

BETWEEN:

WORK HEALTH AUTHORITY
Appellant

and

OUTBACK BALLOONING PTY LTD
First Respondent

and

DAVID BAMBER
Second Respondent

**ANNOTATED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR
THE STATE OF QUEENSLAND (INTERVENING)**

PART I: Internet publication

1. This submission is in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('**Queensland**') intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the appellant.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

Intervener's submissions
Filed on behalf of the Attorney-General for the
State of Queensland
Form 27c

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PART IV: Submissions

Summary of argument

4. Queensland submits that there is no inconsistency in the relevant sense between the Commonwealth's civil aviation law¹ ('**civil aviation law**') and s 19(2) of the *Work Health and Safety (National Uniform Legislation) Act* (NT) ('**NT WHS Act**'). The Court of Appeal of the Northern Territory ('**NTCA**') was, with respect, wrong to find otherwise.
5. In essence, Southwood J (with whom Blokland J agreed) reasoned as follows:²
- a. within its field of operation, the civil aviation law is a complete statement of the law;³
 - b. the 'field' of the civil aviation law extends to the loading of balloon passengers;⁴
 - c. s 19(2) of the NT WHS Act enters that field;⁵ and
 - d. to that extent, s 19(2) of the NT WHS Act is inconsistent with the Commonwealth law.⁶
6. With respect, that reasoning was in error at least because:
- a. the first step (that the civil aviation law's field of exclusive operation is coextensive with its field of operation) was unsustainable in light of ss 28BE(5) and 32 of the CA Act;

¹ As contained within the *Air Navigation Act 1920* (Cth) ('**Air Navigation Act**'), *Civil Aviation Act 1988* (Cth) ('**CA Act**'), *Civil Aviation Regulations 1988* (Cth) ('**CA Regulations**') and the *Civil Aviation Safety Regulations 1998* (Cth) ('**CAS Regulations**') and instruments issued by the Civil Aviation Safety Authority ('**CASA**') under s 98(5A) consistently with s 98(5AA) of the CA Act.

² *Outback Ballooning Pty Ltd v Work Health Authority* [2017] NTCA 7 (19 October 2017); (2017) 326 FLR 1 ('**NTCA decision**'), 6-7 [24]-[25] (Southwood J), 12 [61] (Blokland J, agreeing).

³ NTCA decision, 4 [7] (Southwood J).

⁴ NTCA decision, 4 [11] (Southwood J).

⁵ NTCA decision, 10-11 [54]-[55] (Southwood J).

⁶ NTCA decision, 11-12 [59] (Southwood J).

- b. acceptance of the first step meant Southwood J never analysed whether the civil aviation law, or part of it, was intended to be a complete statement of the law governing the loading of balloon passengers; and
- c. the second and third steps (that the ‘field’ of the civil aviation law extended to the loading of balloon passengers and that the NT WHS Act entered that field) failed to recognise that:
- 10
- i. ‘cover the field’ means ‘cover the subject matter’;⁷
- ii. laws may apply to the same facts and yet deal with different subject matters;⁸ and
- iii. the two laws here in issue have different subject matters.
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7. Respectfully, Riley J, as his Honour is now, reasoned in a similar way and made similar errors, although his Honour described the field exhaustively covered by the civil aviation law as ‘the field of the safety of air navigation’, which, he held, relevantly ‘included safety both on the ground and in flight’.⁹
8. The focus in each judgment on the metaphor of a ‘field’ distracted attention from the real issue, which (by analogy with s 109) was whether there was a ‘real conflict’
- 30
- between the laws. The NTCA should have identified the Commonwealth law applying to the particular ‘relation or thing’ in issue, and then construed it so as to determine (amongst other things) whether it was intended to be an exhaustive statement of the law governing its subject matter. That process would then have enabled the NTCA to consider the ultimate issue, which was whether s 19(2) of the NT WHS Act law altered, impaired or detracted from any Commonwealth law in a manner that was significant and not trivial.
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⁷ *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508, 524 [40] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

⁸ *Ex parte McLean* (1930) 43 CLR 472, 483-484, 485-486 (Dixon J); *R v Winnneke; Ex parte Gallagher* (1982) 152 CLR 211, 218 (Gibbs CJ), 220-221 (Mason J), 232-233 (Wilson J); *Momcilovic v The Queen* (2011) 245 CLR 1, 138-140 [336]-[338] (Hayne J).

⁹ NTCA decision, 18 [92], 19 [99].

9. Undertaking the correct analysis reveals that there is no inconsistency in this case.

Statement of argument

Errors in the NTCA's reasoning

10. In the leading judgment, Southwood J (with whom Blokland J agreed) held that *Heli-Aust Pty Ltd v Cahill*¹⁰ ('**Heli-Aust**') was correct, and bound him to the view that
10 'within its field of operation Commonwealth civil aviation law was intended to be a complete statement of the law'.¹¹ That left for determination by the NTCA, whether the field of operation of the civil aviation law extended to the embarkation of balloon passengers under the supervision of a pilot.¹² Justice Southwood examined the law and found it made provision in that respect.¹³ According to his Honour, it followed that, to the extent the NT WHS Act applied to the loading of balloon passengers, it did not
20 operate.¹⁴ As noted above, Riley J reasoned similarly, although his Honour described the field 'covered' by the civil aviation law as 'the safety of air navigation'.¹⁵

11. That reasoning was, with respect, flawed for several reasons.

12. **First**, the conclusion that the civil aviation law is a complete statement of the law within its field of operation, or with respect to 'the safety of air navigation', relied on the
30 analysis of s 28BE(5) of the CA Act adopted by Moore and Stone JJ in *Heli-Aust*.¹⁶ That analysis was, with respect, plainly wrong.

13. Section 28BE(1) imposes a duty on the holder of an Air Operator's Certificate ('**AOC**') to ensure that every activity covered by the AOC, or done in connection with such an activity, is done with a reasonable degree of care and diligence. Section 28BE(5) provides that the section 'does not affect any duty imposed by, or under, any other law
40 of the Commonwealth, or of a State or Territory, or under the common law'.

¹⁰ (2011) 194 FCR 502 ('*Heli-Aust*').

¹¹ NTCA decision, 4 [7], [9].

¹² NTCA decision, 4 [10].

¹³ NTCA decision, 10 [48].

¹⁴ NTCA decision, 10-12, [52], [57], [59].

¹⁵ NTCA decision, 16-18, 19 [85]-[92], [99].

¹⁶ NTCA decision, 11 [58] (Southwood), 19 [97] (Riley J).

14. Section 28BE(5) is an express statement of intention against which the section must be construed, of the kind described by Mason J in *R v Credit Tribunal*.¹⁷ As its terms make plain, s 28BE(5) is intended to ensure that the duty imposed by s 28BE(1) is not construed as a complete statement of the law as to the duties that the holder of an AOC may have, in respect of the activities which are covered by an AOC or done in connection with such activities.

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15. In *Heli-Aust*, however, Moore and Stone JJ held that s 28BE(5) said ‘little about whether the CA Act is intended to cover the field’.¹⁸ Instead, their Honours reasoned that s 28BE(5) had work to-do ‘in fields removed, and potentially far removed, from the maintenance of safety in civil aviation’.¹⁹ The subsection was said to negative an implication which might otherwise arise, that the section precluded the imposition of duties of care and diligence on the holder of an AOC when acting in some other capacity, ‘for instance when operating a motor vehicle’, or as a company director.²⁰

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16. That interpretation is inconsistent with the terms of the provision and should be rejected for that reason alone.²¹ Moreover, the implication which Moore and Stone JJ considered s 28BE(5) negated – that the holder of an AOC might be free from duties in other fields – could only arise where the other field was within a head of Commonwealth legislative power.²² Duties in relation to the operation of a motor vehicle, for example, are generally outside Commonwealth legislative power.²³

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17. It may be accepted, as Flick J pointed out in *Heli-Aust*, that s 28BE(5) is a statement of intention addressed only to the operation of s 28BE.²⁴ Even so, it belies the conception of the civil aviation law as a monolith which completely states the law wherever it

¹⁷ *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 562-564.

¹⁸ *Heli-Aust* (2011) 194 FCR 502, 531 [72].

¹⁹ *Heli-Aust* (2011) 194 FCR 502, 531 [72].

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²⁰ *Heli-Aust* (2011) 194 FCR 502, 531 [72].

²¹ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

²² *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 454 [9] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Burns v Corbett* (2018) 92 ALJR 423, 461 [173], 465 [191] (Gordon J).

²³ At least that is so outside a Territory. It is not to be supposed that s 28BE would have a differential operation in the Northern Territory: see *Northern Territory v GPAO* (1999) 196 CLR 553, 581-582 [57] (Gleeson CJ and Gummow J).

²⁴ *Heli-Aust* (2011) 194 FCR 502, 557 [173] (Flick J). See also at 531 [71] (Moore and Stone JJ).

applies. Moreover, because s 28BE(1) is concerned with ‘the safety of air navigation’, s 28BE(5) also undermines the narrower proposition that the Commonwealth law is intended to be a complete statement of the law on that subject matter.

18. **Second**, the reasons of Moore and Stone JJ in *Heli-Aust* also failed to account for s 32 of the CA Act. Section 32 provides that persons having functions under the CA Act or the CA Regulations, ‘may also have similar powers and functions conferred by the law of a State or Territory relating to air navigation’. Justices Moore and Stone held that the section did not contradict their conclusion that the CA Act covered the field of air safety, because it was merely a ‘perpetuation, probably out of an abundance of legislative caution, of a provision which may have had, in 1960, real work to do’.²⁵ The difficulty with treating s 32 as irrelevant on that basis is, however, that it remains part of the CA Act. It must be construed in accordance with its text,²⁶ and that text must be given work to do.²⁷ Moreover, the text of s 32, like all legislation, speaks to the eternal present, not the circumstances that existed as at some point in the past. Section 32 must be given effect while the law remains in force: it was ‘switched on’ at commencement and can only be ‘switched off’ by repeal,²⁸ not extraneous events or judicial interpretation.

19. **Third**, acceptance of the conclusions in *Heli-Aust* led both Southwood and Riley JJ to focus in their reasons upon whether the civil aviation law made any provision in respect of the loading of passengers onto a balloon.²⁹ As their Honours found, the civil aviation law does make provision in that regard. But to conclude that a Commonwealth law applies to a particular set of facts says nothing about whether it is intended to be a complete and exhaustive statement of the law.

20. **Fourth**, and relatedly, to conclude that a Commonwealth law applies to a particular set of facts also does not identify the ‘field’, or the subject matter, of that law. As discussed

²⁵ *Heli-Aust* (2011) 194 FCR 502, 532 [76].

²⁶ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

²⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ); *Wilkie v Commonwealth* (2017) 91 ALJR 1035, 1060 [146] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

²⁸ Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 6th ed, 2013) 165 (s 30).

²⁹ NTCA decision, 7-10 [31]-[52] (Southwood J), 16-17 [86]-[91] (Riley J).

further below, the subject matter of a law is related to, but conceptually distinct from, the facts to which the law applies. That is why laws on different subject matters can apply to the same facts.³⁰ Both Southwood and Riley JJ, however, failed to make that distinction.

The correct approach – is there a ‘real conflict’?

- 10 21. Queensland adopts the appellant’s submission³¹ that the correct approach to determining whether a law of the Northern Territory is in irreconcilable conflict with a Commonwealth law is analogous to the approach to inconsistency under s 109 of the *Constitution*. This is so although the inquiry stands on a different constitutional footing. These submissions proceed on the basis that the two approaches are relevantly indistinguishable.
- 20 22. In the context of s 109 of the *Constitution*, the ultimate question is always: Is there a ‘real conflict’ between the two laws?³² In all cases, that question is answered by an analysis of whether the State law undermines the Commonwealth law by altering, impairing or detracting from it in a way that is significant and not trivial.³³ The interrelated and overlapping³⁴ tests of ‘direct’ and ‘indirect’ inconsistency provide different ways of undertaking that analysis. Thus they are recognised by this Court as useful in determining the answer to the ultimate question of whether there is real
- 30 conflict between the two laws.³⁵ The necessary corollary of this that the tests of ‘direct’ and ‘indirect’ must not be applied in a way that distracts or diverts from the ultimate

³⁰ *R v Winnneke; Ex parte Gallagher* (1982) 152 CLR 211, 218 (Gibbs CJ), 220-221 (Mason J), 232-233 (Wilson J); *McWaters v Day* (1989) 168 CLR 289, 299 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

40 ³¹ Appellant’s submissions, [16]-[17].

³² *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 553 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ); *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

³³ In particular, the test of covering the field ‘on reflection is but an instance of alteration, impairment and detraction’: *Momcilovic v The Queen* (2011) 245 CLR 1, 111 [242] (Gummow J); see also 140 [339] (Hayne J).

³⁴ *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 137, 260 (Mason J).

³⁵ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

question.³⁶ With respect, that potential is demonstrated by the reasons of Southwood and Riley JJ.

23. The test of ‘covering the field’ or ‘indirect’ inconsistency is useful because it points out that the answer to the constitutional inquiry may turn, in part, on whether the Commonwealth has expressed by its enactment, ‘completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.’³⁷ If a Commonwealth law has expressed such an intention, then a State law upon the same conduct or matter will alter, impair or detract from that Commonwealth law.³⁸ In that way, the concept of ‘contradiction’ is as central to cases of indirect inconsistency as to any s 109 case,³⁹ although it may be ‘more subtle’.⁴⁰
24. ‘Law’ for s 109 does not mean a statute ‘taken as a unit’, but means a rule or norm of conduct which creates a right, obligation, privilege, power or immunity.⁴¹ For that reason, the relevant ‘law of the Commonwealth’ will rarely be an entire Commonwealth Act.⁴² More rarely, if ever, will the ‘law of the Commonwealth’ consist of numerous broad-ranging but related Commonwealth Acts, regulations and other instruments made pursuant to a number of different heads of legislative power. Examination of the broader statutory context will usually be relevant only to ascertaining the true construction of the particular provisions which create the particular rule or norm.⁴³

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³⁶ *Momcilovic v The Queen* (2011) 245 CLR 1, 134 [318] (Hayne J).

³⁷ *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J).

³⁸ *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); *Momcilovic v The Queen* (2011) 245 CLR 1, 111 [244] (Gummow J), 141 [339] (Hayne J).

40 ³⁹ Compare Geoff Lindell, ‘Grappling with inconsistency between Commonwealth and State legislation and the link with statutory interpretation’ (2005) 8 *Constitutional Law and Policy Review* 25, 28. See also Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 155-156.

⁴⁰ *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399, 406 (Stephen J), quoted in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 524 [40] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

⁴¹ *Momcilovic v The Queen* (2011) 245 CLR 1, 106 [226]-[228] (Gummow J). See also *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 523 [37] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

⁴² Although it may be: see for example, *Viskauskas v Niland* (1983) 153 CLR 280.

⁴³ *Cf Heli-Aust* (2011) 194 FCR 502, 513-515 [19]-[24] (Moore and Stone JJ).

25. As in every s 109 inquiry, the critical first step in cases of ‘indirect’ inconsistency is to identify and construe the Commonwealth law.⁴⁴ Justice Flick was, with respect, plainly wrong when he said, in *Heli-Aust*:⁴⁵

10 For the purposes of concluding that the Commonwealth legislative regime evinces an intention to exhaustively and completely ‘cover the field’ ... it is unnecessary to identify particular ‘laws of the Commonwealth’ which are inconsistent with any relevant State law. That is a task more relevant to resolving a submission as to ‘direct’ inconsistency.

26. Statements of that kind justify the criticism that the metaphor of a ‘field’ is inapt, distracting and leads to error.⁴⁶ It is inapt because ‘subject matters of legislation bear little resemblance to geographic areas’.⁴⁷ A field is a single plain with a defined boundary: legislation is infinitely complex and varied.⁴⁸ The metaphor is inapt also because it tends to obscure the distinction between the subject matter of a law and the facts to which that law applies. The metaphor is distracting because, as demonstrated by 20 the judgments below, it tends to lead to an analysis of the ‘field’, rather than of the ‘crucial notions’⁴⁹ of alteration, impairment and detraction. And because it directs attention to the wrong question, the metaphor tends to lead to error. Finally, the metaphor of a ‘field’ is superfluous. It is respectfully submitted that its use should be eschewed in favour of the more accurate phrase ‘cover the subject matter’.

27. It is necessary to say something further about the concept of ‘subject matter’.

30 The significance of ‘subject matter’

28. As Gummow J noted in *Momcilovic*,⁵⁰ none of Dixon J’s classic explanations of the operation of s 109 used the phrase ‘cover the field’. Instead, Dixon J referred to the

44 *Momcilovic v The Queen* (2011) 245 CLR 1, 115 [258] (Gummow J). See also Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 2nd ed, 1910) 410.

45 *Heli-Aust* (2011) 194 FCR 502, 554 [161]. The reasoning of Riley J in the decision below was similar: NTCA decision, 18 [94]-[95].

46 Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 153-155; *Momcilovic v The Queen* (2011) 245 CLR 1, 116-119 [262]-[265] (Gummow J).

47 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 147 (Evatt J); see also *R v Morris* [2004] QCA 408, [4] (McPherson JA).

48 *Victoria v Commonwealth* (1937) 58 CLR 618, 634 (Evatt J).

49 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [41] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

50 *Momcilovic v The Queen* (2011) 245 CLR 1, 116-117 [262].

intention of the Commonwealth legislature to cover ‘the subject matter’,⁵¹ ‘the particular relation or thing’,⁵² or ‘a particular matter or set of rights and duties’.⁵³ This Court recognised in *Jemena* that ‘cover the field’ means ‘cover the subject matter’.⁵⁴

29. The cases demonstrate that the concept of ‘subject matter’ does not merely describe the facts to which the law applies. As Gibbs CJ explained in *R v Winneke; Ex parte Gallagher*:⁵⁵

two laws may deal with different subject matters, so that each may validly apply in relation to the same set of facts. Dixon J gave an example of this in *Ex parte McLean*, when he referred to the case of a shearer who unlawfully and maliciously wounded a sheep he was shearing and who might thereby commit an offence both against a Commonwealth award and against the State criminal law.

30. The reasons of Gibbs CJ’s in *Winneke* were relevantly adopted and applied by the Court in *Viskauskas v Niland*.⁵⁶ Moreover, the distinction between the subject matter of a law and the facts to which it applies is demonstrated by numerous decisions of this Court. For example:

a. In *Collins v Charles Marshall Pty Ltd*, it was held that although the federal industrial award comprehensively set out the relationship between employer and employee as to annual leave and rates of pay, the long service leave provided for by the State Act was ‘an entirely distinct subject matter’. There was therefore no ‘real conflict’ between the State Act and the award.⁵⁷

b. In *Airlines of New South Wales Pty Ltd v New South Wales*, this Court held that there was no inconsistency between the licensing regimes of airlines under State and Commonwealth laws. The Commonwealth law was ‘designed exclusively in the interests of safety in relation to aerial navigation and ha[d] nothing to say on the topic with which the [State law was] concerned, that is to say, the co-

⁵¹ *Ex parte McLean* (1930) 43 CLR 472, 483.

⁵² *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 136-137.

⁵³ *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (‘*The Kakariki*’).

⁵⁴ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 524 [40].

⁵⁵ (1982) 152 CLR 211, 218.

⁵⁶ (1983) 153 CLR 280, 295 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ). See also *Momcilovic* (2011) 245 CLR 1, 235 [637] (Crennan and Kiefel JJ).

⁵⁷ (1955) 92 CLR 529, 553 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

ordination of transport services within the State.’⁵⁸ The two laws ‘operate[d] in their respective fields’.⁵⁹

10 c. *Commercial Radio Coffs Harbour Ltd v Fuller* concerned the interaction between conditions on a broadcasting licence under a Commonwealth Act and State planning laws, in circumstances where both applied to the construction of a radio transmitter tower. This Court held that the Commonwealth law ‘le[ft] room for the operation of laws ... dealing with other matters relevant to the operation of [broadcasting] services.’⁶⁰ Although a licensee under the Commonwealth Act may be thwarted by State planning laws, because the two laws ‘deal[t] with a different topic’, that was a matter of ‘inconvenience rather than inconsistency’.⁶¹

20 d. In *McWaters v Day*, this Court held that a law providing for the discipline of members of the defence force did ‘not deal with the same subject-matter or serve the same purpose’ as the ordinary criminal law of a State, notwithstanding that both laws applied to a person driving while intoxicated.⁶²

30 e. Similarly, but much more recently, in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*, the federal instruments obliged employers to grant, and pay for, long service leave. The State Act dealt with a subject matter ‘not covered in’ those federal instruments, being ‘portable long service leave benefits in the construction industry’.⁶³

31. A number of propositions may be made in light of those authorities.

32. **First**, for an ‘indirect inconsistency’ to arise, the laws must make provision, or operate with respect to, the same subject matter. As Gageler J recently explained:⁶⁴

58 (1964) 113 CLR 1, 32 (Taylor J, Kitto J agreeing).

59 (1964) 113 CLR 1, 42 (Taylor J, Kitto J agreeing).

60 (1986) 161 CLR 47, 57 (Wilson, Deane and Dawson JJ).

61 (1986) 161 CLR 47, 58, 59 (Wilson, Deane and Dawson JJ).

62 (1989) 168 CLR 289, 299 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

63 (2011) 244 CLR 508, 528 [56] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

64 *Burns v Corbett* (2018) 92 ALJR 423, 445 [89].

Only to the extent that a State law has a legal operation or practical effect within the universe covered by the Commonwealth law could it be said that that State law impaired or detracted from the ... operation of the Commonwealth law.

33. It is for that reason that, as Gummow J noted in *Momcilovic*,⁶⁵ where a Commonwealth law evinces an intention to deal completely with a particular subject matter, and thus gives rise to a ‘negative implication’ that there shall be no other law on that matter:

10 [t]he question then is whether the State law is upon the same subject matter as the federal law and, if so, whether the State law is inconsistent with it because it detracts from or impairs that negative implication.

34. In the same case, Crennan and Kiefel JJ said:⁶⁶

What is required in every case is that the two laws being compared be construed so as to determine their operation, as a matter of construction, and, in particular, so as to determine whether the Commonwealth’s coverage of the subject matter is complete, exhaustive or exclusive.

- 20 35. **Second**, the subject matter of a law is to be ascertained by a process of statutory construction. In relation to Commonwealth laws, that process must account for that fact that the Commonwealth may only make laws with respect to the matters in respect of which it is given legislative power.⁶⁷ The ‘negative penumbra’ of a Commonwealth law cannot extend beyond the boundaries of Commonwealth legislative power.⁶⁸

- 30 36. **Third**, because it is a process of statutory construction, the process of identifying the subject matter of a law will necessarily entail reference to the purpose of the law.⁶⁹ Moreover, the cases demonstrate that identification of the purpose of the law is crucial to the characterisation of its subject matter. So, for example, in *Airlines of New South Wales*, ‘[t]he Court unanimously held that there was no inconsistency between the two statutes since each employed a licensing system to serve a different end’.⁷⁰

40 ⁶⁵ *Momcilovic v The Queen* (2011) 245 CLR 1, 116 [261]; see also 137-140 [330]-[338] (Hayne J). See further *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J); *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 119-120 (Dixon J).

⁶⁶ *Momcilovic v The Queen* (2011) 245 CLR 1, 235 [637].

⁶⁷ *Burns v Corbett* (2018) 92 ALJR 423, 446 [92] (Gageler J).

⁶⁸ *Burns v Corbett* (2018) 92 ALJR 423, 446 [92] (Gageler J). See also *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 454 [9] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁶⁹ *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 218 (Gibbs CJ).

⁷⁰ *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47, 57 (Wilson, Deane and Dawson JJ).

37. **Fourth**, it is a ‘commonplace’⁷¹ that laws may create the same or similar rules of conduct and provide different penalties for contravention, without any inconsistency arising. Inconsistency arises in such circumstances only where the laws deal with the same subject matter *and* the Commonwealth law is intended to be a complete statement of the law on that subject matter.⁷² While Commonwealth criminal laws sometimes evince such an intention,⁷³ they do not always: ‘there is no prima facie presumption that a Commonwealth statute, by making it an offence to do a particular act, evinces an intention to deal with that act to the exclusion of any other law.’⁷⁴ So much is recognised by s 4C(2) of the *Crimes Act 1914* (Cth). Hence in *R v Morris*, the Queensland Court of Appeal was correct to address itself to whether the laws in question dealt with the same subject-matter, and whether the Commonwealth law was intended to be exhaustive.⁷⁵
38. **Fifth**, none of the above is to suggest that the application of s 109 ‘depends upon assignment of legislation to specific categories which are assumed on a *a priori* basis to be mutually exclusive’.⁷⁶ Inconsistency may arise between laws dealing with different subject matters,⁷⁷ although it is ‘less likely’.⁷⁸ The determinative question is always whether the State law alters, impairs or detracts from the Commonwealth law in a manner that is significant and not trivial. Identification of the laws’ subject matter aids but does not determine that inquiry.

⁷¹ *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 224 (Mason J).

⁷² *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J); *Momcilovic v The Queen* (2011) 245 CLR 1, 234-235 [637] (Crennan and Kiefel JJ).

⁷³ See, for eg, *R v Lowenthal; Ex parte Blacklock* (1974) 131 CLR 338, *Dickson v The Queen* (2010) 241 CLR 491.

⁷⁴ *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 224 (Mason J).

⁷⁵ *R v Morris* [2004] QCA 408 (5 November 2004) [5] (McPherson JA), [37] (Williams JA), [51] (White J).

⁷⁶ *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151, 157-168 (Latham J).

⁷⁷ *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 78 [32] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Burns v Corbett* (2018) 92 ALJR 423, 445 [86] (Gageler J).

⁷⁸ *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 220, 221-222 (Mason J).

Application of the correct approach in this case – no ‘real conflict’

The CA Act, CA Regulations and CA Orders

39. ‘The first task in any application of s 109 is to construe the federal law in question’.⁷⁹
Only when the effect of a valid Commonwealth law has been determined is it possible
to consider whether a State or Territory law is inconsistent with it.⁸⁰ In this case, that
task requires the traversing of the various provisions within the CA Act, the CA
Regulations and CA orders, on which the NTCA relied to identify an inconsistency.
40. The main object of the CA Act is stated in s 3A as:
... to establish a regulatory framework for maintaining, enhancing and promoting
the safety of civil aviation, with particular emphasis on preventing aviation
accidents and incidents.
41. The Act establishes CASA in s 8 and sets out its functions in s 9.
42. Section 20A(1) provides that a person must not operate an aircraft being reckless as to
whether the manner of operation could endanger the life of another person.
43. Section 27(1) authorises CASA to issue AOCs for the purposes of its functions. Except
as authorised by an AOC or certain other instruments, an aircraft shall not operate in
Australian territory (sub-s (2)(b)).
44. Where an applicant for an AOC is or will be required by the regulations or Civil
Aviation Orders (‘**CA Orders**’) to have certain manuals, including an operations
manual, the applicant must lodge the current or proposed version of the manual with
CASA if CASA requires (s 27AB(2)).

⁷⁹ *Momcilovic v The Queen* (2011) 245 CLR 1, 115 [258] (Gummow J).

⁸⁰ *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 217 (Gibbs CJ), citing *Cater v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 574-576 (Latham CJ).

45. Pursuant to s 28, CASA must issue an AOC to an applicant if it is satisfied that the applicant has, or is capable of, complying with the safety rules,⁸¹ and if it is satisfied of various matters (generally relating to safety) in respect of the applicant's organisation.
46. Section 28BA provides that an AOC has effect subject to conditions including, most relevantly:
- 10 a. the condition that ss 28BD, 28BE, 28BF, 28BG and 28BH are complied with (s 28BA(1)(a)); and
- b. any conditions specified in the regulations or the CA Orders (s 28BA(1)(b)).
47. If a condition of an AOC is breached, CASA may, by written notice, suspend or cancel the AOC or any specified authorisation contained within it (s 28BA(3)).
- 20 48. Section 28BD(1) provides that the holder of an AOC must comply with all requirements of the CA Act, the CA regulations and the CA Orders that apply to the holder.
49. As noted above, s 28BE(1) provides that the holder of an AOC must at all times take all reasonable steps to ensure that every activity covered by the AOC, and everything done in connection with such an activity, is done with a reasonable degree of care and diligence. If the holder of the AOC is a body having legal personality, its directors must
- 30 take the action specified in sub-s (1) (s 28BE(2)). Inadequate corporate management, control or supervision of the body's directors, employees or agents, or a failure to provide adequate systems for communicating relevant information to relevant people, is evidence of a failure by the body and its directors to comply with the section (s 28BE(3)). No action lies for damages or compensation, in respect of a contravention of that section (s 28BE(4)). The section does not affect any duty imposed by or under
- 40 any other Commonwealth law, or law of a State or Territory, or under the common law (s 28BE(5)).

⁸¹ Section 3 of the CA Act defines 'safety rules', in relation to a permission or AOC, to mean 'the provisions of this Act, the regulations and the Civil Aviation Orders that relate to safety (including rules about the competence of persons to do anything that would be covered by the permission or AOC).'

50. Section 29(1) makes it an offence for the owner, operator, hirer or pilot of an aircraft to operate the aircraft, or permit it to be operated, in a way that results in the aircraft being flown or operated in contravention of a provision of Part III of the CA Act (other than ss 20A(1) or 23(1)). The penalty for that offence is imprisonment for two years. Section 29(3) creates a similar offence relating to contravention of ss 20A(1) and 23(1)). The penalty for that offence is imprisonment for seven years.

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51. Section 98 of the CA Act provides that the Governor-General may make regulations not inconsistent with the Act in relation to various matters. The regulations may (and do) provide for CASA to issue a CA Order containing a direction, instruction, notification, permission, approval or authority (s 98(5)).

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52. Regulation 215 is contained in Part 14, division 2 of the CA Regulations. It requires that 'An operator shall provide an operations manual for the use and guidance of the operations personnel of the operator' (r 215(1)). The penalty for a failure to do so is 25 penalty units. CASA may give directions to the operator requiring the operator to include particular information, procedures and instructions in the operations manual, or require the operator to revise or vary the existing information, procedures and instructions (s 215(3)). An operator must not contravene such a direction (s 215(4)). An operator must furnish copies of the operations manual to such personnel as the operator considers necessary, to CASA and to other persons associated with the operator's operations (s 215(7)). The operator must also ensure that a copy of the manual is kept in a convenient and accessible place for use by all members of the operations personnel who have not been furnished with a copy (s 215(8)). Each member of the operations personnel of an operator shall comply with all instructions contained in the operations manual in so far as they relate to his or her duties or activities (s 215(9)). The penalty for a failure to do so is 25 penalty units.

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53. Regulation 235(7) provides that CASA may, for the purposes of ensuring the safety of air navigation, give directions with respect to the method of loading persons and goods (including fuel) on an aircraft. A person must not contravene such a direction (r 235(7A)). Contravention is punishable by 50 penalty units. The judgments below do not suggest that this power has been relevantly exercised.

54. Finally, CA Order 82.7 applies to AOCs which authorise aerial work operation and charter operations in balloons, and sets out conditions to which those AOCs are subject. The conditions include that the responsibilities of the Chief Pilot must include, amongst other things, ensuring compliance with loading procedures specified for each balloon used by the operator and proper compilation of loading documents, including passenger manifests (s 6.1 and App 2 of CA Order 82.7).

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55. That overview of the relevant Commonwealth law reveals that:

a. The CA Act allows aircraft to be operated pursuant to an AOC. It imposes various duties on the holder of an AOC, and makes those duties conditions of the AOC. In particular the holder of an AOC (here, the first respondent⁸²) must comply with the CA Act, the CA Regulations and CA Orders (s 28BD(1)), and take all reasonable steps to ensure activities covered by the AOC are done with a reasonable degree of care and diligence (s 28BE(1)). Those sections imposed duties on the first respondent and its directors (s 28BE(2)). Similarly, CA Order 82.7 in terms imposed a condition on the AOC held by the first respondent, not an obligation upon the Chief Pilot.

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b. On the other hand, because he was ‘a member of the operations personnel’ of the first respondent, the Chief Pilot was required to comply with all relevant instructions contained in the operations manual (s 215(9)), which was provided by the first respondent ‘for the use and guidance of the operations personnel of the operator’ (r 215(1)). As a person operating the aircraft, the Chief Pilot was also under an obligation not to operate an aircraft being reckless as to whether the manner of operation could endanger the life of another person (s 20A(1)). A failure to comply with that obligation may result in the commission of an offence against s 29(3).

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c. Justice Southwood, with respect, conflated the above aspects of the legislative scheme when he concluded that the effect of the provisions was to impose a duty on the Chief Pilot, ‘with all reasonable care and diligence, to take all reasonable

⁸² NTCA decision, 4 [13] (Southwood J).

steps', to 'point out the dangers of the inflation fan to passengers', and 'to take all reasonable steps to supervise the area around the inflation fan'.⁸³ For the purposes of construing the law, it was irrelevant that the Chief Pilot happened also to be a director of the first respondent.⁸⁴ Moreover, and in any event, it is difficult to see how the imposition of such duties on the Chief Pilot could be said to exhaustively state the law in respect of the duties and obligations of the first respondent.

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The Territory law

56. Section 19(2) of the NT WHS Act provides:

A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other person is not put at risk from work carried out as part of the conduct of the business or undertaking.

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There is no inconsistency in this case

57. For the following reasons, there is no inconsistency between the civil aviation law and s 19(2) of the NT WHS Act.

58. **First**, there is no suggestion that it is impossible to comply with both laws.⁸⁵

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59. **Second**, the laws have different subject matters. Once that is understood, it becomes clear that the Northern Territory law does not alter, impair or detract from the civil aviation law. There is no 'indirect' inconsistency.

60. It is true, as the NTCA identified, that both laws provided rules or norms of conduct applicable to the facts in this case. But that says nothing about whether the laws concerned the same subject matter (nor about whether the civil aviation law was intended to be exhaustive).

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61. The subject matter of the civil aviation law may be described, at a general and abstract level, as 'the safety of air navigation'. For the purpose of furthering that end, the particular 'laws' in question deal with the safe operation of aircraft, the licensing and

⁸³ NTCA decision, 10 [48]-[49].

⁸⁴ NTCA decision, 5 [15] (Southwood J).

⁸⁵ NTCA decision, 11 [57] (Southwood J).

regulation of persons operating aircraft, the conditions of licences and the obligations of licence holders, as well as the obligations of individuals undertaking activities for a licence holder. On the other hand, the relevant Northern Territory law deals with the obligation of a person to conduct a business or undertaking safely. The laws are directed to different ends.

- 10 62. The identification of the laws' subject matter is useful to the constitutional inquiry. It assists the analysis by making clear that the Northern Territory law does not undermine the civil aviation law by altering, impairing or detracting from it. A different way of making the same point is to observe that it is not possible to construe laws which:
- a. impose duties on the holder of an AOC, and condition the AOC, in relation to the safe operation of aircraft,
 - 20 b. oblige the personnel of an operator to comply with an operations manual,
 - c. make it an offence to operate an aircraft (or permit it to be operated) in a way which contravenes certain provisions of CA Act, and
 - d. make it an offence to operate an aircraft being reckless as to whether the manner of operation could endanger the life of another person;
- 30 as giving rise (either together or separately) to a 'negative implication' that the holder of an AOC, when conducting a business or undertaking, is not subject to a duty to ensure a safe workplace.
63. That no such negative implication arises is underscored by the fact that the Commonwealth Parliament has itself enacted legislation which deals with the obligation to conduct a business safely, and which expressly applies to aircraft.⁸⁶
- 40 64. **Third**, it may be that the Commonwealth could have legislated to provide that the relevant activities of the holder of an AOC were not to be subject to any regulation by State and Territory laws. But it has evidently not done so: s 28BE(5).

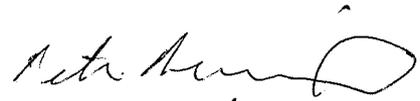
⁸⁶ See s 19(2) of the *Work Health and Safety Act 2011* (Cth).

65. *Fourth*, there is no other way that s 19(2) could sensibly be said to alter, impair or detract from the civil aviation law. The grounds in the notice of contention should also be rejected on the basis that the laws in question deal with different subject matters.

PART V: Estimate of time

10 66. It is estimated that 15 minutes will be required for the presentation of oral argument.

Dated 22 June 2018.



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