

**IN THE HIGH COURT OF AUSTRALIA  
DARWIN REGISTRY  
ON APPEAL FROM THE COURT OF APPEAL OF THE NORTHERN TERRITORY**

**No D4 of 2018**

**BETWEEN:**

**WORK HEALTH AUTHORITY**

Appellant

and

**OUTBACK BALLOONING PTY LTD**

First Respondent

**DAVID BAMBER**

Second Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE  
ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)**

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Filed on behalf of the Attorney-General of the  
Commonwealth (intervening)

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## PART I INTERNET PUBLICATION

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1. This outline of oral submissions is in a form suitable for publication on the Internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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2. The resolution of this appeal is not governed by s 109 of the Constitution, but the same principles of inconsistency should be applied (CS [6]-[9]).

3. “Subject matter” has long been recognised as critical to the operation of s 109.

3.1. *Ex parte McLean* (1930) 43 CLR 472 at 483, 485 (JBA 43, CS [26]).

4. The first and most critical step in an inconsistency analysis involves construing the Commonwealth law. That step has two inter-connected stages (CS [12]-[21]):

4.1. *First*, it is necessary to construe the Commonwealth law (or the relevant parts thereof) to identify its subject matter.

4.2. *Second*, having identified that subject matter, it is necessary to identify (again as a matter of construction) whether the Commonwealth law is intended to be a complete, exhaustive or exclusive statement of the law on that subject matter.

5. The Court can conclude that the Commonwealth law operates concurrently with State/Territory law in two different, but interrelated, ways (CS [22]-[27]):

5.1. If the Commonwealth law was not intended to be a complete, exhaustive or exclusive statement of the law on that subject-matter, the Commonwealth law will operate concurrently with State/Territory law even if that law has the same subject matter (except to the extent its operation would alter, impair or detract from the Commonwealth law).

5.2. If the Commonwealth law was intended to be a complete, exhaustive or exclusive statement of the law on a particular subject matter, then the Commonwealth law will operate concurrently with the State/Territory law only if it has a different subject matter.

### Stage 1: What is the subject matter of the Commonwealth Law?

6. If the subject-matter of a law is identified at a level of generality that may distort the analysis.

6.1. *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524 [39]-[40], 525 [42], 526 [47], 527-529 [54]-[60] (**JBA 45**).

7. The metaphor of “cover the field” may likewise distort the analysis, by implying that the subject matter of legislation is two dimensional (**CS [14]**). The subject matter of a law includes not just the persons, things or activities which the law regulate, but also the characteristic that attracts regulation under that law.

7.1. *Stock Motor Ploughs v Forsyth Ltd* (1932) 48 CLR 128 at 146, 147 (**JBA 55**).

7.2. *Victoria v Commonwealth (The Kakariki)* (1937) 58 CLR 618 at 634 (**JBA 58**).

7.3. Goldsworthy at 500 (**JBA 63; CS [14], [26]**).

10 8. The First Respondent identifies the subject matter of the Civil Aviation Law as “the safety of persons and the management of risks to that safety” or the “reduction and control of risks of death or injury to people” (**RS [92]-[93]**). That description is both under and over inclusive. At that level of generality, it plainly is not exhaustive.

9. The subject matter of the Civil Aviation Law is more accurately (albeit still very generally) identified as “the regulation of the safety of air navigation” (**CS [34]-[35]**).

**Stage 2: Was the Civil Aviation Law intended to be a complete statement on its subject?**

20 10. At the time the Civil Aviation Law was enacted, most Australian jurisdictions had enacted workplace health and safety laws based on the Robens model, imposing outcome oriented duties on employers by reference to activities in the workplace. By the time of major amendments in 1995 that created CASA, all jurisdictions except Tasmania had enacted workplace health and safety laws of that kind (**CS [34]-[44]**).

11. The Civil Aviation Law do not adopt the Robens model. That supports the inference that State/Territory work health and safety laws were intended to operate concurrently with the civil aviation regime (**CS [35]-[38]**).

12. The Civil Aviation Law is not a detailed industry specific code.

30 13. Section 28BE is the closest analogue to a workplace health and safety provision, but it is different in nature and scope. Section 28BE(5), by “specifically recognising” the operation of State/Territory law, supports the conclusion that such laws operate concurrently with the civil aviation regime (**CS [39]-[43]**).

13.1. *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 41 at 58 (**JBA 39**).

**Northern Territory law is on a different subject matter**

14. Even if Civil Aviation Law does reveal an intention that it be the complete or exhaustive statement of the law on a particular subject matter, it remains necessary to ask “whether the State [or Territory] law is upon the same subject matter as the federal law”. If not, there is no inconsistency for s 109 purposes (CS [22]-[27]).

14.1. *Momcilovic v The Queen* (2011) 245 CLR 1 at 116 [261] (JBA 49).

15. This explains why Civil Aviation Laws on the safety of air navigation are not inconsistent with ordinary State/Territory criminal laws that may be attracted by acts involving air navigation. (CS [27]).

10 16. The subject matter of the NT WHS Act is workplace health and safety. Their criterion of operation is entirely different to that of the Civil Aviation Laws (CS [45]-[51]).

16.1. The common characteristic of the duties under the NT WHS Act is that they are imposed on employers by virtue of a connection with work.

16.2. They apply regardless of whether a business or undertaking involves the operation of aircraft.

16.3. They are concerned with the safety of persons, not property.

20 17. The result is that the subject matter of the NT WHS Act and the Civil Aviation Law is different, so they are not inconsistent even when they apply to the same facts: (CS [14], [25], [51])

17.1. *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218, 224, 233 (JBA 54)

17.2. *Metal Trades Industry Association v Amalgamated Metal Workers and Shipwrights Union* (1983) 152 CLR 632 at 642, 646, 650, 651 (JBA 48).

Date: 14 August 2018

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