

BETWEEN:

WORK HEALTH AUTHORITY  
Appellant

and

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OUTBACK BALLOONING PTY LTD  
First Respondent

and

DAVID BAMBER  
Second Respondent

ORAL OUTLINE OF THE ATTORNEY-GENERAL FOR QUEENSLAND

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**Part I: Internet publication**

1. This outline is in a form suitable for publication on the internet.

**Part II: Propositions to be advanced in oral argument**

2. The integer of constitutional invalidity of a Territory or State law is that it creates a real conflict with a Commonwealth law, in that upon the proper construction of each law, the Territory or State law alters, impairs or detracts from the Commonwealth law.

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3. There are several potentially overlapping inquiries that may be embarked upon to come to the answer as to whether the integer of invalidity exists. Relevantly, two of those inquiries are as follows.

4. First, is the Commonwealth law, subject obviously to the sufficiency of the head of Commonwealth power, a statement of the exclusive law governing a particular act or omission in question? *Ex parte McLean*, 485.4 (Dixon J). A State or Territory law also operating on that act or omission will be invalid. An affirmative answer to that question may coincide with an affirmative answer to the question set out next, but that is not essential: *Ex parte McLean*, 485.5 (Dixon J); 480 (Rich J); see also J.D.

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Outline of oral submissions  
Filed on behalf of the Attorney-General for the  
State of Queensland (intervening)  
Form 27F; Rule 44.08.2

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Dated: 14 August 2018  
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Goldsworthy 'Legal Rights Subject Matters and Inconsistency' (1981) 7 Adelaide Law Review 487, 504.

5. Second, whether the Commonwealth and Territory or State laws concern the same subject matter and that the Commonwealth law was intended to cover the subject matter to the exclusion of Territory or State laws on that subject matter? On this question, if the same set facts engage different subject matters, there will not be any invalidity: *Ex parte McLean*, 485.6 - 486.1 (Dixon J).

10 *Indirect inconsistency*

6. 'Cover the field' means 'cover the subject matter'. The second, more accurate phrase should be preferred.

- *Jemena Asset Management Pty Ltd v Coinvest Limited* (2011) 244 CLR 508, at 524 [40] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).

7. A Commonwealth law will cover the subject matter where it contains an implicit (or explicit) negative proposition that there shall be no other law on the subject matter. It is therefore necessary to demonstrate both that there is a 'negative proposition' and that the State/Territory law deals with the same subject matter.

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- *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J)
- *Momcilovic*, at 111 [244] (Gummow J), 234-235 [637] (Crennan and Kiefel JJ), 241 [660] (Bell J).

8. It follows, as is well-settled, that laws on different subject matters may validly apply to the same facts.

- *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 218 (Gibbs CJ), 220-221 (Mason J), 232-233 (Wilson J).
- *Viskauskas v Niland* (1983) 152 CLR 280, 295 (the Court).

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9. Moreover, it also follows that laws on the *same* subject matter may validly apply to the same facts, where the Commonwealth law does not intend to state the law exhaustively.

10. Here, neither requirement is made out. There is no 'negative proposition' (implicit or otherwise) that there shall be no other law on the subject matter, instead there are express positive propositions to the contrary embodied in:

- Section 28BE(5) of the CAA, that State and Territory laws may impose duties on the holder of an AOC, in respect of activities which are covered by an AOC or done in connection with such activities. The loading of balloon passengers was an activity 'done in connection' with the operation of the balloon, the activity covered by the AOC.

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- Section 32 of the CAA, that a State or Territory may enact laws which ‘have similar powers and functions ... relating to air navigation’, which powers it may choose to confer on CASA or its officers: see *Airlines of New South Wales Pty Ltd v New South Wales* (No 1) (1964) 113 CLR 1, 48 (Menzies J); QS at [6(a)], [18]; cf First Respondent’s submissions at [116].

11. In any event, the relevant laws deal with different subject matters.

*Direct inconsistency*

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12. The tests of ‘direct’ and ‘indirect’ are interrelated and directed to the same end, namely, the identification of a ‘real conflict’ between the Commonwealth law and the State/Territory law.

- *Jemena Asset Management Pty Ltd v Coinvest Limited* (2011) 244 CLR 508, 525 [41]-[42] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).

13. That interrelationship is especially evident in cases of ‘direct collision’: that is, where a Commonwealth law ‘designedly’ leaves open an ‘area of liberty’ (as in *Dickson v The Queen* (2010) 241 CLR 491).

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- Such cases involve an ‘implicit negative’: *Momcilovic*, 122 [276], 116 [261] (Gummow J); 234 [633], 235 [637] (Crennan and Kiefel JJ).
- There is no ‘direct collision’ where the Commonwealth law is ‘supplementary to or cumulative upon the State law’: *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 [27] (the Court).

14. Thus the concept of ‘subject matter’ remains useful in such cases, because identifying the subject matter of the Commonwealth law aids in determining the scope of the rights, liabilities, obligations, privileges and immunities it creates, and hence the scope of any ‘negative implication’ said to arise.

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- See, for example, *Jemena Asset Management*, 526-527 [47]-[53] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ); *McWaters v Day* (1989) 168 CLR 289, 299 (the Court); *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47, 56-57 (Wilson, Deane and Dawson JJ); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 246, 248-249 (Stephen J), 260-261 (Mason J); *Airlines of New South Wales Pty Limited v State of New South Wales* (1965) 113 CLR 54, 109 (McTiernan J), 121-122 (Kitto J).

Dated: 14 August 2018.

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**Felicity Nagorcka**