IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D4 of 2018

BETWEEN:

WORK HEALTH AUTHORITY
Appellant

and

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OUTBACK BALLOONING PTY LTD
First Respondent

DAVID BAMBER
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA, INTERVENING

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Part I:

1. The Attorney-General for the State of Tasmania certifies that these submissions are in a form suitable for publication on the Internet.

Part II:

2. Tasmania intervenes in support of the appellant, to seek to uphold the important purposes for which the National reforms to Australia's Work Health and Safety laws were introduced, to ensure the health and safety of people in workplaces.[1]

Part III:

3. The Attorney General for the State of Tasmania intervenes under the *Judiciary Act 1903* (Cth), s 78A.

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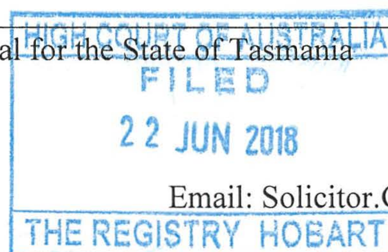
[1] Tasmanian passed the *Work Health and Safety Act 2012* (Tas) as part of the National reforms.

Filed on behalf of Attorney-General for the State of Tasmania

Solicitor-General of Tasmania
Level 8, 15 Murray Street
HOBART TAS 7000

Telephone: 03 6165 3614
Fax: 03 6173 0264
Email: Solicitor.General@justice.tas.gov.au
Ref: Michael O'Farrell



Part IV:

Summary of Argument

4. It is submitted that:

   (a) the Civil Aviation Law is not a complete statement of the rights and duties to the exclusion of all other laws on the subject matter of civil aviation safety; or alternatively,

   (b) if, contrary to the above submission, this Court finds that the Civil Aviation Law[2] is a complete statement of the rights and duties on the subject matter of civil aviation safety then, the correct approach is to define the subject matter 'narrowly' so as not to extend (in this case), to the embarkation of passengers to a balloon basket.

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Appellant's Argument

5. Tasmania respectfully accepts and adopts the submissions of the Appellant as to the applicable principles and concepts.[3]

Indirect inconsistency

6. The approach to indirect inconsistency is (using the common metaphor[4])is whether it can be said that the Commonwealth law 'covers the field'. That test emerged in Clyde Engineering Co Ltd v Cowburn5. It has been applied ever since albeit with some criticism.[6] The High Court's decision in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd ("Jemena")*[7] provides a useful summary of the Court's approach.

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7. The court in *Jemena*[8] drew attention to Evatt J's criticisms of the notion of 'covering the field' in *Stock Motor Ploughs Ltd v Forsyth*[9] which he repeated in *Victoria v The*

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2 As defined in Appellant's submissions footnote 2.
3 Appellant's Submissions [16]-[18].
4 *Burns v Corbett* (2018) 92 ALJR 423, [87] per Gagler J.
5 (1926) 37 CLR 466, at 489.
6 Evatt J in *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 as 147; Evatt J in *Victoria v The Commonwealth* (1937) 58 CLR 618 at 633-634.
7 [2011] HCA 33; (2011) 244 CLR 508, [36]-[46].
8 *Jemena*, [40].
9 (1932) 48 CLR 128, 147.

Commonwealth (the *Kakariki* case)[10]. Despite these difficulties, provided the search for the field of operation and any intended exclusive reach, focus on the terms, subject matter and legal operation of the Act,[11] then the covering the field test remains an established approach for determining inconsistency for the purpose of s 109.

8. The test of whether a State or Territory law is inconsistent by reason of a particular field being covered requires consideration of three questions:

   (a) What is the field covered by the Commonwealth law?

   (b) Is there an intention to cover that field exclusively?

10 (c) Does the state legislation enter that field?

9. In answering questions (a) and (b) the focus is on the subject-matter, scope and purpose. Question (c) requires a characterisation of the state legislation and that character will be determined by reference to its subject-matter, scope and purpose. We submit that question (c) is not reached in this case.

(a) What is the 'field' covered by the Commonwealth law?

10. The importance of clearly identifying the field[12] said to be covered exhaustively by a law of the Commonwealth and correctly characterising a law of a State was crucial in *New South Wales v The Commonwealth* (*Hospital Benefits* Case)[13], which concerned certain State levies in the context of Commonwealth legislation regulating hospital
20 benefits providers and contributors, particularly the benefits payable to the contributors:[14]

> It is argued that the State Acts are invalid by reason of the application of s. 109 of the Constitution...In the first place, it is said that the State legislation intrudes into a field which is exhaustively and exclusively covered by the *National Health Act*...The first of these submissions requires that the field said to be exhaustively covered by the Commonwealth law be clearly identified and that the State laws be shown to enter upon that field.

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[10] (1937) 58 CLR 618, 633-634: "Any analogy between legislation with its infinite complexities and varieties and the picture of a two dimensional field...[is]...of little assistance."

[11] D Meagher, A Simpson, J Stellios, F Wheeler, *Hanks Australian Constitutional Law, Materials and Commentary*, 10th Ed., Lexis Nexis, p 578.

[12] Recently emphasised by Gageler J in *Burns v Corbett* (2018) 92 ALJR 423, [88] –[89].

[13] (1983) 151 CLR 302.

[14] *Hospital Benefits Case,* 316.

Narrow 'field'

11. The expression 'cover the field' means 'cover the subject matter'.[15] In most cases, defining the subject matter demands a specific rather than general conclusion.[16]

12. Dixon J in the *Kakariki* case observed that 'the nature or the subject matter of a Federal enactment' may indicate that the enactment was intended as a complete statement of the law on a particular matter.[17] This was echoed by Evatt J who, mentioned bankruptcy, trade marks and patents as examples of subject matters that practically permit only one system of law and one system of administration.[18] It is submitted that there is little or no analogy between such subjects and the broad realm

10 of safety (even when confined to civil aviation).

13. It is submitted that the consistent approach of this Court in applying the 'cover the field test' has been to identify a specific 'subject matter' or a narrow 'field' rather than a broad universal subject matter such as 'civil aviation safety'.

14. Examples of 'narrow approach':

 (a) *Viskauskas v Niland*[19] – the subject matter was racial discrimination;

 (b) *Commonwealth v Australian Capital Territory* (*the Marriage Equality case*)[20] - the creation and recognition of the legal status of marriage throughout Australia;[21]

 (c) *Australian Broadcasting Commission v Industrial Court of SA and Anor.*[22] –

20 the 'field' was defined as the appointment and termination of the services of temporary employees of the Commission;

 (d) *Airlines of New South Wales Pty Ltd v New South Wales* (*Airlines No 2*)[23] - where Barwick CJ sought to define the field covered by the Commonwealth

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15 Dixon J in *Ex parte McLean* (1930) 43 CLR 472 at 483-486.
16 *Hospital Benefits Case*, 316-317.
17 *Kakariki* case At 630.
18 *Kakariki* case At 638.
19 (1983) 153 CLR 280.
20 (2013) 250 CLR 441.
21 Ibid [57]-[59].
22 (1977) 138 CLR 399.
23 (1965) 113 CLR 54.

laws by reference to the specific subject areas with which the laws dealt: the licensing or authorising of aircraft for use in public air transport operations.[24]

Morris' Approach

15. On that basis it is submitted that the approach of the Queensland Court of Appeal in *R v Morris*[25] was correct. In that case, the Court rejected the submission that s 328A of the *Criminal Code* (Qld) was invalid in consequence of s 109 of the Constitution to the extent that it purported to extend to the operation of an aircraft in air space because it was inconsistent with s 20A of the *Civil Aviation Act 1988* (Cth) ("CA Act") and reg 157 of the *Civil Aviation Regulation 1988* (Cth) ("CA Regs"). In doing so, the Court in *Morris* referred to the reasoning in *The Queen v Winneke; ex parte Gallagher:*[26]

> ...there is no prima facie presumption that 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.

16. The Court examined the specific provisions of the CA Act and the CA Regs and identified the relevant subject matter (in that case) as offences involving the use of aircraft or aircraft navigation and then asked the question of whether the Commonwealth legislation sought to regulate that subject matter exclusively. It was found that the CA Act created some offences, but that its primary purpose was to create an authority (i.e. CASA) to regulate aviation within Australia. Therefore, it could not be said that the CA Act evinced an intention to cover the field in respect of offences relating to the use of aircraft to the exclusion of other legislation. The Court in *Morris* referred to the *Crimes (Aviation) Act 1991* (Cth),[27] which creates a range of offences relating to the use of aircraft but did not cover the field in respect of criminal offences committed involving an aircraft or aircraft navigation. We adopt the Appellant's submissions at [38]-[40].

17. The Court also recognised the broader implication of the constructional question presented, namely, if the Commonwealth legislation was intended exclusively to regulate the operation of an aircraft in air space, it would displace the operation

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24 Ibid 95.
25 [2004] QCA 408.
26 *Morris* [36].
27 *Morris* [37].

within that field of all the other and more general provisions of the Criminal Code and otherwise that affect to regulate human conduct by penalising as criminal acts and omissions.[28] It was noted that it is not difficult to envisage situations in which the crime of murder or manslaughter could be committed involving an aircraft or its navigation.[29]

Heli Aust Pty Ltd v Cahill

18. In *Heli-Aust Pty Ltd v Cahill*[30] (*"Heli"*) the Full Court of the Federal Court recognized the need to precisely identify the field. Moore and Stone JJ correctly set out the relevant principles[31] and noted that the nature of the subject matter can be important in applying the test.[32]

19. However, although Moore and Stone JJ recognized the logical need to 'precisely identify' or define the field[33] they defined it broadly as 'the regulation of the safety of civil aviation in flight in Australia'.[34]

20. In *Heli*, the plurality accepted the written clarification of the description of the field provided by counsel for the appellant, viz[35]

> The applicant says that the area of exclusive regulation by federal law is the "safety of air navigation" or the "safety of air operations in Australia" (*Airlines [No 2]* at (1965) CLR 54 at 90 and 92 ...Barwick CJ regarded both formulations as indistinguishable).
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> That field is not confined to the manner in which aircraft are flown, but extends to the regulation of conduct before (and after) flight whose purpose is to ensure safe flight, including the licensing of pilots, the registration of aircraft. ...

21. After setting out that description of the field Moore and Stone JJ concluded (emphasis added) '[T]his elaboration makes clear the applicant's submission that it is safety *in flight* with which the Commonwealth's regulatory scheme is concerned.' [36]

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28 *Morris* [7] per McPherson JA; [37] per Williams JA.
29 Morris, [37] per Williams JA.
30 [2011] FCAFC 62; (2011) 194 FCR 502.
31 citing at [58] *Dickson v The Queen* (2010) 241 CLR 491, [13].
32 *Heli*, [59] to [62].
33 *Heli*, [63]. Flick J also recognised this at [114].
34 *Heli*, [83]; although at [67] they describe it as simply 'safety of civil aviation in Australia'.
35 Ibid [64].
36 and that confirmed by conclusion at [83]; Flick J at [139 – 143].

22. It was on the basis of the field so identified that the Full Court found that it was "tolerably clear" that the CA Act and the Regulations are intended to regulate the safety of civil aviation in Australia comprehensively and are not intended to operate in conjunction with State legislative scheme directed to the same end.[37]

23. However, before accepting that reasoning, it is necessary to put the formulations of Barwick CJ in *Airlines No 2* into their correct context. In those passages his Honour was considering the issue of the Commonwealth's constitutional head of power to enact the relevant laws, not whether the State law was inconsistent with the Commonwealth law. That involves a different enquiry.[38] After finding that there were sufficient heads of power, Barwick CJ then considered the issue of inconsistency. His Honour took a 'narrow' approach in 'defining' field in which the Commonwealth laws operated, focusing only that aspect of the Commonwealth law that was relevantly in issue. His Honour stated (emphasis added):

> Both from their subject matter and from their terms, the proper conclusion is that the Commonwealth intended these regulations to be *the only law on the matter of licensing or authorizing the use of aircraft in public air transport operations* within Australia, including such operations wholly within any State.

24. Thus, the references to the judgment of Barwick CJ by counsel for the appellant in *Heli*, were apt to mislead the correct inquiry, resulting in the identification of the very broad field of 'aviation safety'.[39] We respectfully submit that this approach was incorrect.

25. The identification of aviation safety as the correct field falls into the very problem about which Evatt J warned, namely an 'analogy between legislation with its infinite complexities and varieties and the picture of a two dimensional field'.[40] While the Commonwealth laws certainly deal with aspects of aviation safety, they do so in a manner that *promotes* it, rather than dealing with it exclusively.[41] Using the approach taken by Barwick CJ in *Airlines No 2*, the field covered by the

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37 Ibid [67]; and see [164].

38 *Re Residential Tenancies Tribunal of New South Wales and Henderson & Anor; ex parte the Defence Housing Authority* ("*Henderson's case*") (1997) 190 CLR 410, 426 per Brennan CJ.

39 A task which will perhaps inevitably lead to difficulties; some of which were pointed out in *Heli-Aust* by counsel for the Attorney General for the State of New South Wales, intervening, see [66] (one of the examples was workplace bullying occurring in flight).

40 *Kakariki case* (1937) 58 CLR 618, 633-634.

41 Part of the object of the *Civil Aviation Act* s 3A.

Commonwealth laws is to be defined, not by amorphous references to safety, but by reference to the specific subject areas with which the laws deal; a subject area that is amenable to precise definition and confinement; for example: licensing, system of navigation, minimum standards; i.e. technical matters and procedures, particularly those which implement the Chicago Convention.[42]

26. Although, in *Heli*, Moore and Stone JJ said that the safety of civil aviation is, by its very nature one that would seem to cry out for one comprehensive regulatory scheme'[43] it does not automatically follow that everything remotely touching, or connected with civil aviation should be exclusive of all other laws which might also promote safety. The broader implication identified in *Morris* is analogous.[44]

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27. By their very nature the types of technical matters dealt with by the civil aviation laws are numerous and detailed, but that was wrongly taken in *Heli* to inform the conclusion that the field of all aviation safety was covered. The details of the civil aviation laws may contribute towards aviation safety, but there is no logical reason that other laws should also not contribute.

28. It is further submitted that Moore and Stone JJ in *Heli* relied on a similar type of reasoning in concluding that *Morris* was wrong. Their Honours placed particular emphasis on the main object of the *Civil Aviation Act* set out in s 3A, and it would seem that this was the primary reason why their Honours considered *Morris* to be wrong.[45] Section 3A provides:

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> The main object of this Act is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.

29. However, it is submitted that far from closing the gates, s 3A is indicative of an acceptance that other laws might apply. The aim is to create a 'framework', for 'maintaining, enhancing and promoting' safety of civil aviation. Those verbs do not

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[42] Other cases taking this approach of defining a narrow field: *Australian Broadcasting Commission v Industrial Court of South Australia and Anor.* (1977) 138 CLR 399, e.g. Mason J at 417: the field is defined as the appointment and termination of the services of temporary employees of the ABC. *Commonwealth v Western Australia* (1999) 196 CLR 392, e.g. per Gummow J at 44-441 (para [146]): only Part X of the *Mining Act 1978* (WA) was examined to determine whether it covered any relevant field.

[43] *Heli*, [68].

[44] *Morris* [7] per McPherson JA; [37] per Williams JA.

[45] *Heli*, [80].

convey a desire to control every aspect of safety or personal harm, or even death connected with aviation. We submit that the purpose of 'promoting' the safety of civil aviation is very compatible with the idea that other laws might also contribute towards safety; that is, in order to promote safety, the CA Act would want to encourage other laws which might improve safety, not invalidate them (as long as the other laws were not directly inconsistent with the Commonwealth laws).

Court of Appeal's Approach

30. In the Court of Appeal, Southwood J (with whom Blokland J agreed) said:

> However, the Federal Court did not determine the full extent of the field covered by Commonwealth civil aviation law.[46]
>
> ...The resolution of that issue primarily depends on the extent of the field covered by Commonwealth civil aviation law.[47]
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> In my opinion, it is unnecessary to make the wide declaration about the extent of the field covered by Commonwealth civil aviation law, sought by the appellant. An incremental approach should be adopted. However, for the reasons set out below, Commonwealth civil aviation law covers the loading of balloon passengers in the circumstances that existed in this case...[48]

31. This approach produces a number of difficulties.

32. First, the Court of Appeal did not find that *Heli* was wrongly decided. To the contrary, it found that it was correctly decided. On that basis the field had been authoritatively identified by an intermediate appellate court.[49] Yet, the Court of Appeal failed to apply it.

33. Secondly, the incremental approach does nothing to identify the field. It merely says that it must be bigger than it was thought to be in *Heli*.

34. Thirdly, the formulation and definition of the field used by the Court of Appeal emanates from the submission of counsel in *Heli-Aust*. It follows, in our submission, that the Court of Appeal was similarly led into error by attempting to fence in too

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46 CA at [7].
47 CA at [10].
48 CA at [11].
49 cf., *Cal No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390.

large a field,[50] namely, 'aviation safety' and then to increase it incrementally. The focus should have been on the relevant aspect of the civil aviation law in question, namely the embarkation of passengers onto a balloon and whether that was comprehended by a Commonwealth law that was intended to be exclusive.

35. Although the plurality turned their attention to the specific question of whether or not that broad field *included* a narrower subject: the embarkation of passengers in the circumstances of this matter;[51] that does not remedy the problem with the definition of the field being in itself too broad. Furthermore, the plurality did not separately examine the detail of the provisions relating to the specific subject of 'embarkation
10 of passengers onto a balloon' to justify the conclusion that it is covered by the broader field.

36. Fourthly, to the extent that their Honours examined specific aspects of the civil aviation law in assessing whether a field was covered, the Court of Appeal incorrectly concluded[52] that if Mr Livingstone failed to carry out certain duties[53] "he would be operating the balloon in contravention of Part III of the *Civil Aviation Act 1988* (Cth) and he would be amenable to prosecution under s 29(1)(a) and (b)(ii) of the CA Act.

37. That conclusion, we submit was unsound. There is no analysis of the elements of the offence to be proved. More particularly, it was based on an assumption that the
20 circumstances in which the accident occurred would constituted the aircraft being 'operated' in the sense required by s 29 of the CA Act. On the contrary, it is submitted that a court considering a charge under s 29 would need at the very least to construe the meaning of 'operated'. The Court below did not do that. Had it done so, it is submitted it is unlikely that it would have come to that conclusion.

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50 A task which will perhaps inevitably lead to difficulties; some of which were pointed out in *Heli-Aust* by counsel for the Attorney General for the State of New South Wales, intervening, see [66] (one of the examples was workplace bullying occurring in flight).

51 Southwood J with whom Blokland J agreed at CA [54] and [59].

52 CA at [50]

53 Set out at [48] as: "1) With reasonable care and diligence, to take all reasonable steps to point out the dangers of the inflation fan to passengers. 2) With reasonable care and diligence, to take all reasonable steps to supervise the area around the inflation fan."

38. First, the balloon was on the ground. It was not being "flown" for the purposes of the CA Act, s 29(b)(ii). Therefore, as it seems to be accepted by the Court, the relevant element in s 29(a), or (b)(ii) was that the balloon was being operated.

39. By the CAA, s 3:

> ***"operate"*** , in relation to an aerodrome, includes manage, maintain and improve the aerodrome.

The definition does not assist the meaning of "operate" in s 29.

40. Secondly, in its ordinary meaning, operate means to work or use a machine, apparatus or the like.[54] The closest dictionary meaning is perhaps 'to perform some process of work...'.[55] The work or operation of a balloon is flight. Filling a balloon with hot air, or the embarkation of passengers is preparatory to flight.[56]

41. Thirdly, not every breach of duty of Part III of the CA Act will result in the commission of an offence. In the present case, the breach of duty (if any) related to a condition of the Air Operators Certificate ("AOC"). It would appear that an AOC applies to circumstances that may not have a connection with the operation of an aircraft. For example, by the AOC the pilot in charge is responsible for the supervision and surveillance on the tarmac area. A person struck by a baggage carrier crossing the tarmac attempting to board an aircraft may be a breach of that condition, but it would not arise from the operation of an aircraft.

42. An identical point can be made about the cause of the tragic accident in the present case. It arose from the use of a free standing machine.

43. In the circumstances of this case it could not be concluded that a failure to observe the duty imposed by the CA Act, s 28BE, would constitute an offence contrary to s 29 because there are strong arguments to suggest that the embarkation onto a balloon is not, relevantly an operation.

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54 Macquarie Dictionary online.

55 Ibid.

56 By analogy, to 'operate' a motor vehicle, considered in *Betts v Bradshaw* [1952] Tas SR 28 "...When the motor is started I think there is no doubt the motor vehicle is being operated. ... But if one merely presses the starter button without getting that result [starting] and if one does no more save insert the key, is there an operation? I think there is not. ..." (at 29-30).

44. However, it was from that reasoning that the plurality in the Court of Appeal directly concluded:[57]

> It also follows that the field of operation of Commonwealth civil aviation law extends to the loading of the passengers onto the balloon in this case.

(b) Is there an intention to cover that field exclusively?

45. We adopt the NT submissions from [32]ff and make the following two points.

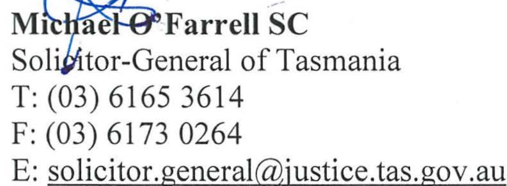
46. First, it does not follow from the CA Act, s 3A (in particular) that the Commonwealth has evinced an intention to cover the field. As we have submitted the language of s 3A is consistent with the promotion of safety by any means.

10 47. Secondly, if, as we submit, the offences available under s 29 are not coextensive with the duties that may arise under Part III of the CA Act, there is no reason to think that the general duties to ensure health and safety under the uniform Work Health and Safety legislation have been excluded.

Part V: Estimate Time for Oral Argument

48. Tasmania will need no longer than 15 minutes to present its oral argument.

Dated: 22 June 2018



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Michael O'Farrell SC
Solicitor-General of Tasmania
T: (03) 6165 3614
F: (03) 6173 0264
E: solicitor.general@justice.tas.gov.au

Jenny Rudolf
T: (03) 6165 3614
F: (03) 6173 0264
E: solicitor.general@justice.tas.gov.au

Dashini Elankovan
T: (03) 6165 3614
F: (03) 6173 0264
E: solicitor.general@justice.tas.gov.au

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57 CA at [52].