

BETWEEN:

**WORK HEALTH AUTHORITY**  
Appellant

AND

**OUTBACK BALLOONING PTY LTD**  
First Respondent

AND

**DAVID BAMBER**  
Second Respondent



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**ANNOTATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY  
GENERAL FOR WESTERN AUSTRALIA (INTERVENING)**

**PART I: SUITABILITY FOR PUBLICATION**

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1. These submissions are in a form suitable for publication on the Internet.

**PART II: BASIS OF INTERVENTION**

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2. The Attorney General for Western Australia (**Western Australia**) intervenes pursuant to s 78A of the *Judiciary Act* 1903 (Cth) in support of the Appellant.

**PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED**

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3. Not applicable.

**PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION**

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- 30 4. Western Australia accepts and adopts the statement of relevant constitutional

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Date of Document: 22 June 2018

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and legislative provisions set out by the Appellant.

**PART V: SUBMISSIONS**

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5. The Appellant submits that the appeal and the First Respondent's Notice of Contention raises three questions<sup>1</sup>.
6. Western Australia makes submissions in relation to two of those questions, namely:
- (a) does the Commonwealth's civil aviation law (**Civil Aviation Law**<sup>2</sup>) manifest, by implication, an intention to regulate, to the exclusion of all other laws, the subject of civil aviation safety?
- 10 (b) do ss 19(2), 27 and 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (**NT WHS Act**), in their application to the First Respondent as particularised in the charge, directly vary, detract from or impair the operation of either ss 28BD and 29(1) of the *Civil Aviation Act 1988* (Cth) (**CAA**) together with *Civil Aviation Regulations 1988* (Cth) (**CAR**) reg 215 and *Civil Aviation Order 82.7* (Cth), or alternatively CAR reg 92(1)(d)?
7. Western Australia submits that each question should be answered "No".
- A. Inconsistency of laws**
8. Section 109 of the Commonwealth *Constitution* requires a comparison between  
20 Commonwealth and State laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in favour of the Commonwealth<sup>3</sup>.

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<sup>1</sup> Appellant's Submissions at [3].

<sup>2</sup> The Civil Aviation Law comprises the following: *Air Navigation Act 1920* (Cth); *Civil Aviation Act 1988* (Cth); the *Civil Aviation Regulations 1988* (Cth); the *Civil Aviation Safety Regulations 1998* (Cth) and various instruments issued under those laws being instruments issued by the Civil Aviation Safety Authority under s 98(5A) and falling within the terms of s 98(5AA) of the CAA.

<sup>3</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ at 523 [37].

9. Different tests of inconsistency, which distinguish between direct and indirect (or "covering the field") inconsistency, are utilised to analyse whether inconsistency exists between Commonwealth and State laws<sup>4</sup>.
10. While the utility of accepted tests of inconsistency is well established<sup>5</sup>, the different tests are interrelated<sup>6</sup>. Fundamentally, all tests of inconsistency applied for the purposes of s 109 are tests for discerning whether a "real conflict" exists between a Commonwealth law and a State law<sup>7</sup>.
11. In the absence of a direct contradiction between two laws (in that it is impossible to comply with both), whether a "real conflict" exists will turn on whether the Commonwealth law is intended to operate to the exclusion of the State law in question, or, alternatively, against the background of the general law including that State law<sup>8</sup>.
12. The question of inconsistency therefore "resolves itself, in the end, into a search for legislative intent"<sup>9</sup> (that legislative intent being objectively determined as a matter of statutory construction<sup>10</sup>).

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<sup>4</sup> *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 per Mason J at 260.

<sup>5</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ at 525 [42] citing *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 per Mason J at 260.

<sup>6</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ at 525 [42]; *Momcilovic v The Queen* (2011) 245 CLR 1 per Crennan and Keifel JJ at 233 [630].

<sup>7</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ at 525 [42]; *Momcilovic v The Queen* (2011) 245 CLR 1 per Crennan and Keifel JJ at 233 [630].

<sup>8</sup> *Ansett Transport Industries (Operations) v Wardley* (1980) 142 CLR 237 at 260 (Mason J); *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 per Wilson, Deane and Dawson JJ at 56-58.

<sup>9</sup> *Ansett Transport Industries (Operations) v Wardley* (1980) 142 CLR 237 per Stephen J at 248, and see also per Aickin J at 280. See also G Lindell, 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8 *Constitutional Law and Policy Review* 25, 30-34.

<sup>10</sup> *Dickson v The Queen* (2010) 241 CLR 491 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at 507-508 [32]-[34].

13. As impossibility of simultaneous obedience is not asserted in the present case, it is submitted that, in relation to both indirect and direct inconsistency, the central issue is a matter of discerning the intention of the Civil Aviation Law.

**B. Indirect inconsistency**

14. Western Australia adopts the Appellant's submissions in relation to the issue of indirect inconsistency and makes the following supplementary submissions.
15. Given that, in a federation, laws are written against the background of a legal system in which legislative power is shared by federal and State lawmakers it may often be inferred, as a matter of legislative intention, that a federal law may operate together with relevant State laws<sup>11</sup>.
16. Indirect, or "covering the field", inconsistency therefore only arises if, contrary to such an inference, it appears from the terms, the nature or the subject matter of a federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties and a State law regulates or applies to the same matter or relation<sup>12</sup>.
17. In any consideration of indirect inconsistency it therefore becomes necessary to clearly identify the field (that is, the subject matter<sup>13</sup>) said to be governed exclusively by a federal law<sup>14</sup>.

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<sup>11</sup> *APLA Limited v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 per Kirby J at 426 [303].

<sup>12</sup> *Victoria v The Commonwealth* (1937) 58 CLR 618 per Dixon J at 630 cited with approval in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ at 76-77 [28] and *Dickson v The Queen* (2010) 241 CLR 491 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at 502 [13].

<sup>13</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ at 524 [40].

<sup>14</sup> *New South Wales v The Commonwealth (Hospital Benefits Case)* (1983) 151 CLR 302 per Gibbs CJ, Murphy and Wilson JJ at 316-319; *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ at 528-529 [58].

18. In this matter, the field has been described in the following ways:
- (a) A majority of the Court of Appeal determined that it was unnecessary to make a wide declaration about the extent of the field covered by the Civil Aviation Law, but stated that those laws do cover "the loading of balloon passengers in the circumstances that existed in this case"<sup>15</sup>.
  - (b) The Notice of Appeal refers to the law "governing the use by the [First Respondent] of the inflation fan, used to inflate its hot air balloon... whilst approaching the balloon's basket for the purpose of embarking as a passenger"<sup>16</sup>.
  - 10 (c) The Appellant's Submissions refer to the subject matter of "civil aviation safety"<sup>17</sup>.
  - (d) The First Respondent's Notice of Constitutional Matter states that the field is "properly described as the regulation of civil aviation by the imposition and enforcement of safety standards for the conduct of air operations and air navigation"<sup>18</sup> and that "air operations" include, amongst other things, "embarkation... and disembarkation of passengers"<sup>19</sup>.
19. The point of convergence in the above formulations of the "field" is that each is focused on, or encompasses, the safe embarkation of passengers onto aircraft.
- 20 For the reasons that follow, it is submitted that, whichever of the above descriptions of the field is adopted, the Civil Aviation Law does not evince an intention to regulate that field to the exclusion of all other laws.

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<sup>15</sup> *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1 per Southwood J (Blokland J agreeing) at 4 [11], and see also 11-12 [59]. Riley J, on the other hand, stated that "the federal law was a complete statement of the law governing the safety of air navigation including the safety of flight of aircraft which, in turn, included safety both on the ground and in-flight" and which "covered the embarkation of passengers in the circumstances of this matter": at 19 [99].

<sup>16</sup> Core Appeal Book (CAB) 104-105.

<sup>17</sup> Appellant's Submissions at [3].

<sup>18</sup> CAB 115 [12].

<sup>19</sup> CAB 115 [13].

*The subject matter does not require uniform regulation*

20. First, a legislative intention to cover the field identified cannot be derived from the subject matter itself.
21. In that regard, absent an express indication to cover the field (of which there is none in the Civil Aviation Law), a legislative intent to cover the field may be implied where the subject matter practically permits only one system of regulation<sup>20</sup>.
22. The safety of civil aviation generally is a broad subject matter. While there may be some aspects of that broader matter of civil aviation safety that "cry out for one comprehensive regulatory regime"<sup>21</sup> (such as the equivalent of road rules for the air), other aspects of civil aviation safety may clearly be intended to operate "within the setting of other laws"<sup>22</sup>. The ordinary application of the general criminal law on a plane is an obvious example.
23. The fact that this is so is supported by the existence of other Commonwealth laws that apply to civil aviation safety and which do not form part of the Civil Aviation Law, namely, the *Work Health and Safety Act 2011* (Cth) (**Cth WHS Act**) and the *Crimes (Aviation) Act 1991* (Cth). Western Australia adopts the Appellant's submissions at [32] to [40] in that regard.
24. The regulation of the safe embarkation of passengers on aircraft does not require uniform regulation. Rather, the Civil Aviation Law, insofar as it regulates the safe embarkation of passengers (discussed below) is compatible with, and aided by, the co-existence of other laws, such as the NT WHS Act.

*The regulation of the safe embarkation of passengers is sparse*

25. Secondly, a legislative intent to cover the field cannot be derived from the level of detail in the Civil Aviation Law. The detailed character of a federal law may

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<sup>20</sup> *Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618 per Evatt J at 638.

<sup>21</sup> *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 per Moore and Stone JJ at 530-531 [68].

<sup>22</sup> *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 per Wilson, Deane and Dawson JJ at 57-58.

evinced a legislative intention to deal completely and thus exclusively with the law governing a particular subject matter<sup>23</sup>. While aspects of civil aviation safety are (understandably) covered in detail by the Civil Aviation Law<sup>24</sup>, those parts dealing with the safe embarkation of passengers is somewhat piecemeal and largely facultative.

26. For example, in identifying the extent to which the embarkation of passengers on a balloon aircraft is covered by the Civil Aviation Law, the Court of Appeal referred to CAR reg 215(1) and (2), which provides:

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- (1) An operator shall provide an operations manual for the use and guidance of the operations personnel of the operator.

Penalty: 25 penalty units.

- (2) The operator must ensure that the operations manual contains such information, procedures and instructions with respect to the flight operations of all types of aircraft operated by the operator as are necessary to ensure the safe conduct of the flight operations (other than information, procedures or instructions that are set out in other documents required to be carried in the aircraft in pursuance of these Regulations).

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Penalty: 25 penalty units.

27. Relatedly, the Civil Aviation Safety Authority (**CASA**) is empowered to give a direction to the operator to include particular information, procedures and instructions in the operations manual<sup>25</sup>.

28. Similarly, the Court of Appeal referred to CAR reg 235(7) and (7A), which state:

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- (7) CASA may, for the purpose of ensuring the safety of air navigation, give directions with respect to the method of loading of persons and goods (including fuel) on aircraft.

(7A) A person must not contravene a direction under subregulation (7).

Penalty: 50 penalty units.

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<sup>23</sup> *Momcilovic v The Queen* (2011) 245 CLR 1 per Gummow J at 116 [261].

<sup>24</sup> See, for example, CAR Pt 12, which addresses 'Rules of the air'.

<sup>25</sup> CAR reg 215(3).

29. Whilst touching upon the loading of persons on aircraft, CAR reg 235(7) is, again, a facultative law that does not give rise to inconsistency in advance of a particular exercise of the power.
30. These laws, permitting directions or operator requirements, raise the important temporal distinction between a law which is self-executing and operates immediately on a subject matter, and one which does so only upon the exercise of a power conferred by that law<sup>26</sup>.
31. As Gummow J explained in *Momcilovic v The Queen*<sup>27</sup> by reference to the notion of "operational inconsistency"<sup>28</sup>:

10            "[V]arious statutes confer authority to create delegated legislation and it will be upon the exercise of that authority that claimed inconsistency may arise...

More generally, what in *Flaherty v Girgis* Brennan J called "[a] facultative law of a State" and "a facultative law of the Commonwealth", which deal with the same subject matter, are "not necessarily inconsistent". Thus a statute may invest a power in a body without any issue of inconsistency arising in advance of a particular exercise of the power." (citations omitted)

20            32. The content of the operations manual, or a power to make a direction, may be relevant to the notion of "operational inconsistency" – a form of direct inconsistency – but it cannot, it is submitted, evince a legislative intent to cover a field.

33. The Court of Appeal also referred to two Civil Aviation Orders. Civil Aviation Order (CAO) 20.16.3 contains directions in relation to the number of ground crew members required for "passenger loading and launching operations" in relation to "manned balloons"<sup>29</sup>. CAO 82.7 provides that an AOC is subject to a condition that the Chief Pilot comply with certain requirements<sup>30</sup>, including a requirement to ensure "compliance with loading procedures specified for each

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<sup>26</sup> *Momcilovic v The Queen* (2011) 245 CLR 1 per Gummow J at 113 [249]. See also *Commonwealth v Western Australia* (1999) 196 CLR 392 per Gleeson CJ and Gaudron J at [62].

<sup>27</sup> *Momcilovic v The Queen* (2011) 245 CLR 1.

<sup>28</sup> *Momcilovic v The Queen* (2011) 245 CLR 1 per Gummow J at 112 [247]-[248].

<sup>29</sup> CAO 20.16.3(6A).

<sup>30</sup> The requirements are set out in CAO 82.7, App 2.

balloon used by the operator"<sup>31</sup>. It is evident that these CAOs too provide only limited regulation of the embarkation of passengers.

34. The only self-executing provision that confers a broad duty to exercise care and diligence with respect to activities conducted under an Air Operator's Certificate (AOC) (of the type that one would expect to see in a comprehensive safety scheme) is s 28BE of the CAA. However, s 28BE cannot support an implication that the Civil Aviation Laws cover the field with respect to the safe embarkation of passengers because:

- 10 (a) the duty is limited in scope, in that it only applies to the holder of an AOC and its directors. In many instances, the holder of an AOC will be a different person to the crew carrying out activities under the AOC, such as the pilot and the ground crew; and
- (b) significantly, s 28BE(5) expressly counters such an implication, providing that "[t]his section does not affect any duty imposed by, or under, any other law of the Commonwealth, or of a State or Territory, or under the common law". Whilst not conclusive, such a statement assists in the resolution, as a matter of statutory construction, of the question of the existence of an intention to exclude other laws<sup>32</sup>.

*The inference to be drawn from the beneficial nature of the laws*

20 35. Thirdly, it should be inferred from the beneficial nature of the Civil Aviation Law that the Commonwealth legislature did not intend to exclude compatible State laws.

36. Safety legislation (such as the Civil Aviation Law and NT WHS Act) is regarded as having a remedial or beneficial nature<sup>33</sup>.

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<sup>31</sup> Civil Aviation Order 82.7, App 2, cl 3.2(e).

<sup>32</sup> *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at 527 [20].

<sup>33</sup> *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 per Isaacs J at 384.

37. In *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*<sup>34</sup>, the Court concluded that a State Act providing a scheme for portable long service leave benefits did not conflict with federal instruments providing for the grant of long service leave. The Court stated<sup>35</sup>:

10 "There is no doubt that provision of long service leave for employees in continuous employment with an employer, and the provision of a long service leave benefit for workers in continuous service in the construction industry, are both just and beneficial legislative aims. As with the concurrent legislation for the removal of shipwrecks considered in the *Kakariki Case*, it is possible to infer from the beneficial nature of the federal instruments that the Commonwealth legislature did not intend to exclude a compatible State law." (citations omitted)

38. A similar inference, it is submitted, can, and should, be drawn in this case.

### C. Direct inconsistency

39. Western Australia adopts the Appellant's submissions (at [53] to [57]) in relation to this issue and makes the following supplementary submissions.
40. The First Respondent does not contend in either ground 1 or 2 of the Notice of Contention<sup>36</sup> that the identified provisions are contradictory such that it is impossible to comply with both laws. A direct inconsistency (i.e. an operational inconsistency) might, of course, arise if, for example, the NT WHS Act required something that the operations manual forbade (or vice versa). That, however, is not this case.
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41. The question, therefore, again is one of identifying the legislative intent. That is, to use the terminology of the Court in *Dickson v The Queen*<sup>37</sup>, the question is whether the NT WHS Act closes up "areas of liberty designedly left"<sup>38</sup> by the provisions of the Civil Aviation Law.

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<sup>34</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508.

<sup>35</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ at 528 [57].

<sup>36</sup> **CAB** 111-112.

<sup>37</sup> *Dickson v The Queen* (2010) 241 CLR 491.

<sup>38</sup> *Dickson v The Queen* (2010) 241 CLR 491 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at 505 [25], adapting the remarks of Dixon J in *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120.

42. In *Dickson v The Queen*<sup>39</sup>, the Court considered whether Commonwealth and State provisions each establishing an offence of conspiracy were inconsistent. The Court concluded that the provisions were directly inconsistent because the State provision criminalised conduct deliberately excluded from the Commonwealth offence. In so finding, the Court referred to extrinsic material which indicated that the narrower scope of the Commonwealth offence reflected a deliberate legislative choice<sup>40</sup>.
43. In the present case, there is no reason to consider that the provisions of the Civil Aviation Law (as specified in ground 1 and 2) reflect a deliberate choice to not impose certain duties, or to exempt certain persons from liability, with respect to the safe embarkation of passengers.
44. Rather, as the Appellant submits<sup>41</sup>, such a construction of the identified provisions would bring them into conflict with other provisions of the Civil Aviation Law (such as s 28BE of the CAA) and with ss 19(2) and 32 of the Cth WHS Act.
45. Moreover, the different penalties provided by the identified provisions and by s 32 of the NT WHS Act are for what are, in truth, independent offences. As stated by Gibbs CJ in *R v Winneke; Ex parte Gallagher*<sup>42</sup>:
- 20           “The different penalties provided by the two Acts [the Royal Commissions Act and the Evidence Act] are in respect of what are in truth independent offences which are created by law to serve different purposes. It is not right to say that the Acts provide different penalties for the one offence. There is no inconsistency between Acts which prescribe different penalties for offences which, albeit constituted by the same conduct, are in substance different from one another.”
46. *McWaters v Day*<sup>43</sup> provides a further example of the concurrent operation of different, but overlapping, offences. In that case, a Queensland law created an

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<sup>39</sup> *Dickson v The Queen* (2010) 241 CLR 491.

<sup>40</sup> *Dickson v The Queen* (2010) 241 CLR 491 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at 505 [24]. The extrinsic material was considered by the Court in *R v LK* (2010) 241 CLR 177.

<sup>41</sup> Appellant's Submissions at [57].

<sup>42</sup> *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 per Gibbs CJ at 219.

<sup>43</sup> *McWaters v Day* (1989) 168 CLR 289.

offence of driving a motor vehicle while under the influence of liquor. Section 40(2) of the *Defence Force Discipline Act* 1982 (Cth) made it an offence for a defence member to drive a vehicle on service land whilst under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of the vehicle. The Court held that the federal Act was “supplementary to, and not exclusive of, the ordinary criminal law”<sup>44</sup>.

47. In so finding, the Court stated that the mere fact that Commonwealth and State laws prescribe different penalties for substantially the same conduct, and that the conduct proscribed by the two is not the same, is insufficient to establish an inconsistency in the relevant sense<sup>45</sup>. It is necessary to inquire whether the Commonwealth law, in prescribing the rule to be observed, evinces an intention to cover the subject matter to the exclusion of any other law<sup>46</sup>.
48. Such an intention, it is submitted, is not evinced by the provisions identified by the First Respondent in grounds 1 and 2.

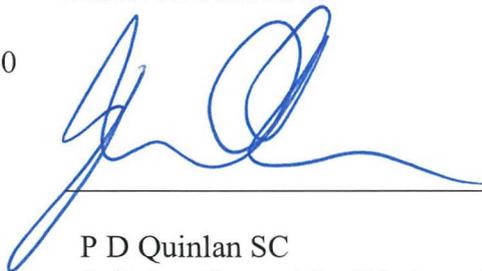
#### **PART VI: LENGTH OF ORAL ARGUMENT**

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49. It is estimated that the oral argument for Western Australia will take 15 minutes.

Dated: 22 June 2018

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<sup>44</sup> *McWaters v Day* (1989) 168 CLR 289 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ at 299.

<sup>45</sup> *McWaters v Day* (1989) 168 CLR 289 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ at 296.

<sup>46</sup> *McWaters v Day* (1989) 168 CLR 289 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ at 296.