

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D7 of 2017

ON APPEAL FROM THE COURT OF APPEAL OF THE NORTHERN TERRITORY

BETWEEN:

WORK HEALTH AUTHORITY
Appellant

10

and

OUTBACK BALLOONING PTY LTD
First Respondent

DAVID BAMBER
Second Respondent

20

FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part 1: Certification

This outline is suitable for publication on the internet.

Part 2: First Respondent's propositions

1. **Introduction:** The appeal involves three related enquiries: (a) does the *Civil Aviation Law* of the Commonwealth (CAL), as in force in 2003, state the exclusive law of Australia on any subject matter; (b) if so, how should that subject matter positively be defined; and (c) does any such subject matter exclude the operation, in whole or part, of modern occupational health and safety (OHS) laws at State or Territory level?
10
2. The submissions of the Territory and the supporting Intervenors are elusive on the first two enquiries. On the third, they argue that the CAL leaves a vacuum which allows for the full operation of State or Territory OHS laws. They resort to legal techniques not sourced to the text of the CAL; nor to its history, objects or the relevant international obligations.
3. The Respondent's answers are: (a) the CAL does state the exclusive law of Australia on a subject matter; (b) properly described as the prescription and enforcement of standards of safety in the conduct of air navigation or air operations in, to or from Australia; (c) leaving room for the operation of State or Territory OHS laws only where they regulate workplace matters in a workplace other than the safety standards for the conduct of air operations.
20
4. **Conceptual matters:** Transportation is carried out by road, rail, air and sea. In each case, a conveyance is employed to transport persons and/or cargo from A to B. Each transport operation gives rise to a range of risks to the safety of the conveyance itself; the persons operating it; the persons or cargo being carried by it; and the surrounding environment, human and physical. Risks are enhanced in that conveyances may come into contact with each other in the same physical space. Air transportation poses special, heightened risks.
5. Every nation has a compelling public interest in establishing a uniform regulatory law to govern the safety of each mode of transportation in the civil sphere. Where the transport crosses international borders, the interest in uniformity of regulation extends wider.
30
6. **History:** Air navigation came into prominence from World War One. In 1919, the Paris Convention recognized the need for uniform standards, including in respect to safety across borders. The Commonwealth commenced addressing that need in the *Air Navigation Act 1920* and *Regulations (ANRs)*. From 1920 there was no scope for a Territory Ordinance regulating the safety of an air operation. That position has never changed.

7. Perceived Constitutional difficulties in regulating purely intra-state air navigation lead to the 1937 uniform co-operative Federal/State scheme.

8. Australia's adoption of the Chicago Convention in 1947 led to an expansion of the *Air Navigation Regulations* to conform to the Chicago Annexes, deepening and broadening the uniform field covered by the scheme, including a focus on air operators: RS [11]-[23].

9. In 1964, the Commonwealth grasped the nettle and used the full breadth of s 51(i) as now understood to extend the ANRs to all navigation within, to or from Australian territory. The State legislation fell away as a result: RS [35]-[41], [45]-[48].

10. In 1971, Reg 212 was amended to take the form now found in Reg 215(2), imposing a duty on operators to ensure the operations manual contained all matters necessary to ensure safe flight operations.

11. **The 1988 Act:** The law was re-enacted in the *Civil Aviation Act (CAA)*, strengthening the model of uniform, national regulation established in 1964. The field is characterized by: (a) a prime object of regulation – consistency with Chicago; (b) depth of regulation – via the CAA, the Regulations (CARs and later CASRs), Civil Aviation Orders (CAOs) and normative instruments; (c) breadth of regulation – a national safety legislative framework defining how Australia conducts the management of safety of air operations; (d) Chicago conceptions of “safety” (being the state in which risks associated with aviation activities related to operation of aircraft are reduced and controlled to an acceptable level) and “air operation” (including the whole process from embarkation, take off, flight, landing and disembarkation); (e) a single specialist technical regulator (now CASA) - given control over who can participate; how they are to be structured; and over normative instruments, such as manuals; (f) industry specific techniques of regulation, such as the operations manual, allocation of separate responsibilities to separate persons and chain of command; (g) specific regulation of balloon operations and loading; (h) comprehensive provisions for surveillance, civil remediation and criminal enforcement, giving CASA control over the selection of the remedy and graduated punishments: RS [50]-[65].

12. **1995 Amendments:** Amendments were made to the CAL: (a) strengthening CASA's ability to exercise control over who could operate and how its organization was to be structured; (b) expanding the scope of s 29 to make any operation of an aircraft in contravention of the CAR/CASRs or the CAOs an offence; (c) with a new general duty of diligence in s 28BE; not limited to safety matters and not rolling back exclusivity.

13. **Balloons:** The CAL contains a detailed regime, general and specific, for regulating the safety of ballon operations, including loading, launching and retrieval.

14. **Matters outside the field:** The *Civil Aviation Law* leaves for separate regulation at Commonwealth, State or Territory level: (a) civil liability for death, personal injury or damage to cargo; (b) aviation terrorism and security (separate from safety risk management); (c) criminal liability for unlawful killing/ injury of persons.

15. **The NT Act:** It views an air operation as the conduct of an undertaking and the carrying on of work at a place (including on or near the aircraft) which may pose risks to the health or safety of workers (ie the pilot and crew) or other persons (ie passengers or intended
10 passengers). It (a) imposes duties on the air operator to ensure, on a reasonable practicability standard, the health and safety of the crew and passengers; (b) duties of diligence on crew and passengers not to adversely affect the health and safety of others; (c) graduated criminal liability for breaches of such duties; (d) rights of entry and control over safety for the HSR, a WHS entry permit holder, the inspector or the Regulator; criminal prosecutions in the hands of the Regulator or inspector; and (e) civil penalties: **RS [95]**.

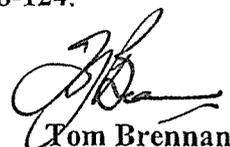
16. The NT Act can operate, consistently with the CAL, to the extent it imposes norms on the operator, crew or passengers in matters of health; it can extend to matters of safety only so far as they do not embrace the safety of the air operation itself. Neither the HSR, a WHS entry permit holder, the inspector or the Regulator can have lawful authority to enter
20 an aircraft/aerodrome to assess the safety for the air operation; nor authority to direct any participant in the air operation on how to act safely; let alone power to sanction or prosecute for breach of any safety norm established by the NT Act: **RS [70]-[95]**.

17. The specific arguments of the Territory and Intervenors should be rejected.

18. **Notice of Contention:** Direct inconsistency: an alleged failure by the operator to establish or implement a safe system for an air operation is regulated in the CAL by the norms, graduated offences and civil remediation provisions following from Regs 215 and 224, s 29 and, CAO 82.7; leaving no room for the separately stated, prosecuted and punished and remediated norms of ss 19 and 30-34 of the NT Act: **RS 118-124**.

30 **Dated: 14 August 2018**


Justin Gleeson SC


Tom Brennan