IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No D4 of 2018

BETWEEN:

WORK HEALTH AUTHORITY
Appellant

and

OUTBACK BALLOONING PTY LTD
First Respondent

DAVID BAMBER
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

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

PARTS II & III: INTERVENTION

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the appellant.

Filed on behalf of the Attorney-General for the State of Victoria (intervening)

Dated: 22 June 2018

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PART IV: ARGUMENT

A. INTRODUCTION

3. The submissions for the Attorney-General for Victoria (**Victoria**) focus on the issues raised by Grounds 2 and 3 of the appeal, and those raised in the Notice of Contention.

4. Section 109 of the Commonwealth Constitution does not address the relationship between laws of the Commonwealth and those of the Northern Territory.[1] However, the principles that apply when determining whether a law of the Northern Territory is invalid or is to be read down by reason of inconsistency with a law of the Commonwealth bear a close relation to those that apply in relation to State laws by reason of s 109.[2] Victoria's submissions are directed to the issues in this proceeding on the assumption, and to the extent, that the applicable principles coincide.

5. Different "tests" have been developed for the application of s 109:

   (1) The first is to ask whether the State law would "alter, impair or detract from" the operation of the Commonwealth law.[3] If it would, the State law will be inconsistent with the Commonwealth law — this is commonly referred to as "direct inconsistency".

   (2) The second is to ask whether the Commonwealth law evinces an intention[4] that it be a complete statement of the law governing a particular matter, in which case a State law that also regulates the same matter will be inconsistent with the Commonwealth law — this is commonly referred to as "indirect inconsistency".

Significantly, however, both these approaches are "directed to the same end": namely, to determine "whether a 'real conflict' exists" between the laws under consideration.[5] Indeed, the second test was in terms described by Dixon J in *Victoria v The*

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1 *Northern Territory v GPAO* (1999) 196 CLR 553 at 580 [53] (Gleeson CJ and Gummow J, with Hayne J agreeing at 650 [254]).

2 See *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464 (Mason J); *GPAO* (1999) 196 CLR 553 at 581-582 [57], [59] (Gleeson CJ and Gummow J), 630 [202] (Kirby J); *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 466 [52], 467 [56], 468-469 [59]-[60] (the Court), noting that the latter case concerned s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) and that there is no equivalent provision in the *Northern Territory (Self-Government) Act 1978* (Cth).

3 *Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618 at 630 (Dixon J); *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14] (the Court); *Bell Group NV (In liq) v Western Australia* (2016) 90 ALJR 655 at 665-666 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

4 In the sense in which that term is used in *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28] (the Court): see *Dickson* (2010) 241 CLR 491 at 507 [32] (the Court).

5 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42] (the Court) (footnote omitted).

Commonwealth (*The Kakariki*) as an example of a "detraction" from the Commonwealth law.[6] Thus it may be said that in substance there is but one test: does the State law alter, impair or detract from the operation of the Commonwealth law, so as to reveal a real conflict between the two laws?

6. Bearing that fundamental question in mind, the Court below fell into error when it:

(1) discerned an intention in the *Civil Aviation Act 1988* (Cth) (the **CAA**) and the *Civil Aviation Regulations 1988* (Cth) (the **CAR**) to regulate comprehensively the "field" of loading of passengers onto a balloon, relying on little more than the existence of a body of applicable Commonwealth rules, including a number that were found in documents that were not laws of the Commonwealth; and

(2) found that the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (the **NT WHS Act**) intruded into the "field" intended to be regulated exhaustively by the Commonwealth, relying on the fact that the same conduct was regulated by provisions of both Commonwealth and Northern Territory law.

7. If the correct approach is applied to the two legislative regimes at issue in this matter, it is apparent that there is no "real conflict". The two regimes deal with different subject matters and were enacted for different purposes. Adopting the words of Stephen J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*, the interaction between the two legislative regimes involves "no more than an intermeshing of laws, each legislature having confined itself to those aspects of a particular situation appropriate to its own particular role in the federal compact".[7] The Commonwealth law was intended to be supplementary to or cumulative upon Territory law and thus to allow for the operation of concurrent Territory law.

8. Nor, turning to the Notice of Contention, is there any "direct inconsistency" between the Commonwealth law and the NT WHS Act. It is not impossible to obey both laws; and nor does the Commonwealth law relevantly confer rights on the operator of a balloon that are removed or interfered with by the Territory law. There is no relevant "area[] of liberty designedly left" by the Commonwealth law.[8] The Territory law does not alter, impair or detract from the operation of the Commonwealth law.

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6 (1937) 58 CLR 618 at 630; and see *Momcilovic v The Queen* (2011) 245 CLR 1 at 118 [264] (Gummow J).

7 (1980) 142 CLR 237 at 250.

8 *Dickson* (2010) 241 CLR 491 at 505 [25] (the Court), adapting the remarks of Dixon J in *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120. Dixon J appeared to consider that an intention that there

B. RELEVANT PROVISIONS OF THE COMMONWEALTH STATUTORY SCHEME

9. The reasoning of the Court of Appeal was that, because the field of operation of "Commonwealth civil aviation law"[9] extended to the loading of passengers onto hot air balloons, a field extending at least that far was intended to be regulated exclusively by or under the Commonwealth law.[10]

10. In particular, emphasis was placed on the fact that rules set out in, or made under, Commonwealth laws applied to the loading of the passengers onto the balloon.[11] In particular, Southwood J, with whom Blokland J agreed, relied upon "ss 20A, 28BA(1), 28BD(1), 28BE(1), 29(1) and (3), and 98(5) of the [CAA]; regs 215 and 235(7) and (7A) of the [CAR]; and App 2 of *Civil Aviation Order 82.7*".[12]

11. The effect of each of those provisions may be summarised as follows:

(1) Section 20A of the CAA concerns the reckless operation of aircraft, and breach of its provisions is rendered an offence by s 29(3).

(2) Section 28BA(1) of the CAA provides that an Air Operator's Certificate (**AOC**) has effect subject to specified conditions, including compliance with ss 28BD and 28BE.

(3) Section 28BD(1) of the CAA requires the holder of an AOC to comply with the requirements of the CAA, the regulations and the Civil Aviation Orders.

(4) Section 28BE(1) of the CAA provides that "[t]he holder of an AOC must at all times take reasonable steps to ensure that every activity covered by the AOC, and

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be "areas of liberty designedly left [that] should not be closed up" was a consequence of an intention that the Commonwealth legislation be "an exhaustive declaration of the law" on a particular subject. However, in *Dickson* (2010) 241 CLR 491 the Court considered that s 11.5 of the *Criminal Code* (Cth) had deliberately excluded from its operation certain conduct, such that the criminalisation of that conduct by a State law produced a "direct inconsistency", that is a "direct collision": at 504 [22]; see also 506 [30]. The Court concluded that it was thus unnecessary to consider whether the Commonwealth law was intended to be exhaustive: at 506 [31].

9 References to the relevant Commonwealth law in the judgments below are somewhat vague, but the Court of Appeal's substantive discussion focused on the CAA and the CAR: see *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1 at 7 [26] (Southwood J) [**AB 61**], 16 [83] (Riley J) [**AB 79-80**] (**Court of Appeal decision**). See also *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 at 505 [2], 530 [67] (Moore and Stone JJ), 551 [137]-[138] (Flick J).

10 No other reason is given in the judgments, apart from reliance by Southwood J on the decision in *Heli-Aust* (2011) 194 FCR 502. However, *Heli-Aust* could not have justified finding an intention to cover a field that went beyond the field considered in that case.

11 Court of Appeal decision at 7-10 [31]-[52] (Southwood J) [**AB 63-69**].

12 Court of Appeal decision at 10 [49] (Southwood J) [**AB 68**].

everything done in connection with such an activity, is done with a reasonable degree of care and diligence".

(5) Section 29 of the CAA provides for certain offences relating to contraventions of provisions of Pt III, or of directions given or conditions imposed under those provisions.

(6) Regulation 215 of the CAR requires operators to provide "an operations manual for the use and guidance of the operations personnel of the operator". The Civil Aviation Safety Authority (**CASA**) may require an operator to include "particular information, procedures and instructions" in the manual (reg 215(3) and (3A)). Each member of the operations personnel of an operator shall comply with all the instructions contained in the operations manual (reg 215(9)).

(7) Regulation 235(7) of the CAR provides that 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 the aircraft. Regulation 235(7A) provides that a person must not contravene such a direction.

(8) Appendix 2 of Civil Aviation Order 82.7 was made by CASA pursuant to s 98(5) of the CAA.[13] Appendix 2 applies to AOCs that authorise aerial work operations and charter operations in balloons. Clause 6.1 of the Order provides that "each [AOC] is subject to the condition that the requirements set out in Appendix 2 are complied with". Appendix 2 requires, amongst other things, the Chief Pilot to comply with loading procedures specified for each balloon (cl 3.2(e)). In this case, the respondent's operations manual contained procedures relevant to the facts of the present matter, including:[14]

> [Pilots must] point out the dangers of the inflation fan and smoking.
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> If a person is allocated the task of supervising the inflation fan they will not be in clothing that can be entangled in the fan. The importance of standing behind the line of the rotation of the fan blade will also be emphasised.
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> A crew member will supervise and keep clear the area around the fan and basket at all times during inflation.

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13 Section 98(5) of the CAA provides that "[t]he regulations may provide that CASA may issue a Civil Aviation Order containing a direction, instruction, notification, permission, approval or authority".

14 Court of Appeal decision at 5 [14] (Southwood J) [**AB 56-57**].

12. Based on the above provisions Southwood J concluded that, under the Commonwealth scheme, the Chief Pilot was under the following obligations and duties:[15]

(1) with reasonable care and diligence, to take all reasonable steps to point out the dangers of the inflation fan to passengers; and

(2) with reasonable care and diligence, to take all reasonable steps to supervise the area around the inflation fan.

13. On that basis, Southwood J concluded that "the field of operation of Commonwealth civil aviation law extends to the loading of the passengers onto the balloon", and that field was understood to be "covered by" Commonwealth law.[16] Similarly, Riley J reasoned from the observation that embarkation of passengers was covered by or under Commonwealth law to the conclusion that the federal law was intended to "cover the field".[17]

C. INDIRECT INCONSISTENCY: NO INTENTION TO REGULATE COMPLETELY AND EXCLUSIVELY

14. A number of points may be made about the statutory and other provisions, and the conclusion that Southwood J drew from them.

15. ***First***, the mere observation that there are Commonwealth provisions applicable to the case at hand does not answer the question whether those provisions were intended to operate to the exclusion of State or Territory law. The correct approach to the test of indirect inconsistency may be seen in the following passage from the judgment of Dixon J in *Ex parte McLean*:[18]

> When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec 109 applies. That this is so is settled, at least when the sanctions they impose are diverse. But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.

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15 Court of Appeal decision at 10 [48] (Southwood J) [**AB 68**].

16 Court of Appeal decision at 10 [52], 11 [55], [57] (Southwood J) [**AB 69-71**].

17 Court of Appeal decision at 18-19 [92]-[99] [**AB 83-87**].

18 (1930) 43 CLR 472 at 483 (citation omitted).

16. Even a detailed Commonwealth scheme may be intended to be "supplementary to or cumulative upon" State law, particularly where the subject matter of the Commonwealth law is broad. One way for the Commonwealth to cover a field is to enact a less detailed form of regulation than State law provides.[19] But it does not follow from an absence of detail that the field has not been covered. Conversely, the mere existence of a detailed Commonwealth regulatory regime is not sufficient, of itself, to establish that the field is covered.[20]

17. As Gummow J said in *Momcilovic v The Queen*, the essential notion of indirect inconsistency is that "upon its true construction, the federal law contains an implicit negative proposition that nothing other than what the federal law provides upon a particular subject matter is to be the subject of legislation".[21] This was cited with approval by the Court in *The Commonwealth v Australian Capital Territory*, which described the issue in terms of whether the legislation there under consideration necessarily contained the relevant implicit negative proposition.[22] That requires attention to whether, although not expressly articulated, the Commonwealth legislation evinces a "necessary intendment" to exclude State and Territory laws even though they are capable of operating concurrently with it.[23]

18. ***Second***, the source of a duty of "care and diligence", to which Southwood J referred, must be s 28BE(1) of the CAA. There is no other provision of the CAA that uses those terms; and no provision of the CAR imposes a duty of that kind. However, s 28BE(5) expressly provides that s 28BE 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.

19. It is not to the point that the statement in s 28BE(5) applies only in respect of s 28BE or as a condition of an AOC.[24] Rather, the relevant points arising from s 28BE(5) are these:

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19 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 164-169 [364]-[372] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

20 *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, which might be thought to suggest otherwise, is dealt with at paragraph 27 below.

21 (2011) 245 CLR 1 at 111 [244].

22 (2013) 250 CLR 441 at 468 [59].

23 Necessary intendment means that "the force of the language in its surroundings carries such a strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable": *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 at 32 (the Court), cited in *Carr v Western Australia* (2007) 232 CLR 138 at 147 [17] (Gleeson CJ).

24 Cf *Heli-Aust* (2011) 194 FCR 502 at 531 [71] (Moore and Stone JJ), 557 [173] (Flick J).

(1) Section 28BE(5) carves out the very kind of duties with which this matter is concerned. That is, it makes clear that the imposition by s 28BE(1) of a duty to act with "a reasonable degree of care and diligence" does not contain any negative implication that s 28BE is to be the only source of such a duty — a duty of a like kind may arise under State or Territory laws and will not be excluded by s 28BE. Section 28BE(5) does not have the more confined operation given to it by Moore and Stone JJ in *Heli-Aust Pty Ltd v Cahill*, namely to permit the imposition of a duty of care and diligence on a person "when that person is acting in some other capacity".[25]

(2) Section 28BE(5) is an express indication of a legislative intention that the CAA is not a complete and exhaustive statement of the law with respect to the duty to act with a reasonable degree of care and diligence in relation to civil aviation. (Section 28BE(5) would not, of course, affect any conclusion of direct inconsistency — that is, a State law that negated or undermined the duty imposed by s 28BE(1) would be invalid notwithstanding s 28BE(5).)

(3) It makes sense for s 28BE(5) only to apply in respect of s 28BE, because no other provision of the CAA or the regulations imposes that kind of general duty of skill and diligence.

(4) Further, the duty so imposed is wide-ranging, covering every activity covered by an AOC and "everything done in connection with such an activity".

Section 28BE(5) shows that the Commonwealth scheme, while no doubt intended to be comprehensive, was not intended to be exclusive or exhaustive — it was intended to be supplementary to or cumulative upon State and Territory law, at least with respect to duties of reasonable care and diligence.

20. ***Third***, considering the Acts alone, and not the subordinate legislation and instruments, neither the *Air Navigation Act 1920* (Cth) nor the CAA evinced an intention to cover a relevant field, as Flick J correctly held in *Heli-Aust*.[26] Such an implication is inconsistent with positive aspects of the legislation, such as s 28BE(5), discussed above, and s 32, which permits the conferral of functions on CASA by State or Territory law.

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25 (2011) 194 FCR 502 at 531 [72] (Moore and Stone JJ).

26 (2011) 194 FCR 502 at 552 [145], [148], 553 [151]. His Honour differed from Moore and Stone JJ on this point, but Victoria contends that his Honour's reasoning on this point is to be preferred.

21. It is notable that the joint judgment in *Heli-Aust* appeared to consider that s 32 had, in the modern scheme, no work to do[27] — but that is to disregard a fundamental principle of statutory construction, namely that legislation is to be construed so that all of its provisions have work to do.[28] Nor were their Honours correct to disregard the observation of Menzies J in *Airlines of NSW Pty Ltd v New South Wales* that a similar provision in the *Air Navigation Act* left "no room for the contention that the Commonwealth *Air Navigation Regulations* were intended ... to be exclusive and exhaustive so as to leave nothing for the operation of State law".[29] The different historical form of the regulations did not negate the relevance — or correctness — of Menzies J's observation.

22. Nor is it apparent that the subject matter in question "practically permit[s] only one system of law".[30] That is particularly so in circumstances where the CAA expressly contemplates the operation of other systems of law, in relation to duties of care and diligence.

23. ***Fourth,*** the specific hot air balloon embarkation procedures found in the operations manual are not part of any law of the Commonwealth for the purpose of s 109 of the Constitution.[31] Further, those procedures tend to emphasise the **lack** of provision by Commonwealth law of the very detail relied upon by the Court below to establish inconsistency.

24. Here, the regime required operators to provide an operations manual for its personnel (reg 215 of the CAR). It was a condition of the AOC held by the first respondent that it conduct its operations in accordance with the operations manual. Further, cl 6.1 of Civil Aviation Order 82.7 provided that it was a condition of an AOC that the requirements set out in Appendix 2 were complied with. Appendix 2 required, amongst other things, the Chief Pilot to comply with loading procedures (cl 3.2(e)). The operations manual specified the loading procedures. Section 29(1)(b)(ii) of the CAA provides that it is an

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27 (2011) 194 FCR 502 at 532 [76] (Moore and Stone JJ), where their Honours said that "the section was the perpetuation, probably out of an abundance of legislative caution, of a provision which may have had, in 1960, real work to do".

28 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 192 [97] (Gummow, Hayne, Crennan and Bell JJ).

29 (1964) 113 CLR 1 at 48. Cf *Heli-Aust* (2011) 194 FCR 502 at 532-533 [77] (Moore and Stone JJ).

30 *The Kakariki* (1937) 58 CLR 618 at 638 (Evatt J); see also at 626 (Latham CJ), 630-631 (Dixon J).

31 See *Heli-Aust* (2011) 194 FCR 502 at 551 [137]-[138] (Flick J).

offence not to comply with a condition on an AOC. Thus, by that route, a failure to comply with the operations manual may be a criminal offence. However, that does not evince a legislative intention that an operations manual, when in place, is to exhaustively regulate the conduct with which it deals, to the exclusion of State and Territory law.

25. Thus the existence of the operations manual and its provisions dealing with hot air balloon embarkation should not be understood to require the conclusion that any law of the Commonwealth contained a negative implication, namely that no State or Territory law could apply to hot air balloon embarkation or the safety of such embarkation. Indeed, the first respondent does not appear to go so far: it acknowledges in its s 78B notice that State or Territory laws governing manslaughter, or civil liability for loss or damage, for example, would apply.[32]

26. In this case, there was no necessity justifying a negative implication; that is, it cannot be said that the necessary intendment of the legislature was to exclude State and Territory law that operated on the subject of hot air balloon embarkation.

27. In *O'Sullivan v Noarlunga Meat Ltd* Fullagar J, with whom Dixon CJ agreed, relied on the "extremely elaborate and detailed set of requirements" imposed by Commonwealth regulations as establishing an intention to cover the relevant field.[33] However, the field in that case was comparatively narrow (conditions governing the entitlement to use premises for the slaughter of meat for export) and almost every conceivable requirement had been mentioned in the regulations. Further, Fullagar J's own judgment makes it apparent that the case is better understood as one of direct inconsistency, because the State statute had the effect of prohibiting the use of premises registered under the Commonwealth regulations for the very purpose for which they had been registered under those laws.[34] It was a case where there was a direct conflict between the State law and the Commonwealth law.

28. ***Finally***, the fact that the CAA gives effect to Australia's international obligations does not compel any different view as to whether it, or the CAR, evince an intention to cover the field.[35] While that matter may be relevant to the analysis, it is not determinative and,

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32 First Respondent's Notice of a Constitutional Matter dated 9 May 2018 at [20] [**AB 116**].

33 (1954) 92 CLR 565 at 591-592.

34 *O'Sullivan* (1954) 92 CLR 565 at 593.

35 Cf *Viskauskas v Niland* (1983) 153 CLR 280 at 292 (the Court). Relevantly, the CAA gives effect to Australia's obligations under the Convention on International Civil Aviation done at Chicago on 7 December 1944.

in the present case, is negated by the textual aspects of the CAA that demonstrate that the intention of the CAA was not to exhaustively regulate civil aviation safety including embarkation onto a hot air balloon. In any event, it is not apparent why giving effect to the relevant international obligation required exhaustive Commonwealth regulation of the duties of care and diligence in issue in the present proceeding.

29. There is no "real conflict" in this case between Commonwealth and Territory laws. Subject to any direct inconsistencies, the objective of the CAA is compatible with, and is aided by, the co-existence of other laws that seek to ensure safety of civil aviation.[36]

C. TERRITORY LAW DOES NOT REGULATE THE SAME SUBJECT MATTER

10 30. In any event, even if the Court were satisfied that "Commonwealth civil aviation law" intended exhaustively and exclusively to regulate the field of the safety of civil aviation including, relevantly, embarkation processes for hot air balloons, that is not the subject matter of the NT WHS Act.

31. Section 109 jurisprudence establishes that, in order to demonstrate that the law of a State or Territory has intruded into a field intended to be regulated exhaustively by the Commonwealth, it is not sufficient that the same conduct is regulated by both Commonwealth and State provisions.[37] To the contrary, a State law may validly apply to the same facts without thereby dealing with the same subject matter, for the purpose of s 109 of the Constitution.

20 32. A State law may deal with a different subject matter where it is made for a different purpose or where the remedies it provides are of a different character from those provided by the Commonwealth law.[38] The Court gave two examples in *Viskauskas v Niland*:[39]

(1) First, it said that a State law enacted for the protection of consumers might validly penalise conduct that also amounted to racial discrimination (and was covered by the Commonwealth *Racial Discrimination Act*).

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36 See *The Kakariki* (1937) 58 CLR 618 at 630 (Dixon J). See also *Momcilovic* (2011) 245 CLR 1 at 238 [652] (Crennan and Kiefel JJ).

37 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218 (Gibbs CJ); *Ex parte McLean* (1930) 43 CLR 472 at 485 (Dixon J).

38 *Viskauskas* (1983) 153 CLR 280 at 295 (the Court); *Momcilovic* (2011) 245 CLR 1 at 234-235 [637], 236 [644] (Crennan and Kiefel JJ).

39 (1983) 153 CLR 280 at 295 (the Court).

(2) Second, the Court referred to the example given by Dixon J in *Ex parte McLean*: that if a Commonwealth industrial award "expressly forbad shearers to injure sheep when shearing, it would not be a necessary consequence that a shearer who unlawfully and maliciously wounded a sheep he was shearing could not be prosecuted under the State criminal law for unlawfully and maliciously wounding an animal".[40]

33. The nature of the inquiry into purpose and the character of remedies may be illustrated by comparing the cases of *McWaters v Day*[41] and *Viskauskas*.[42]

(1) In *McWaters*, the High Court held that the *Defence Force Discipline Act 1982* (Cth) contemplated "parallel systems of military and ordinary criminal law and [did] not evince any intention that defence force members enjoy an absolute immunity from liability under the ordinary criminal law".[43] The Commonwealth Act was held not "to do other than enact a system of military law in accordance with the traditional and constitutional view of the supplementary function of such law".[44] The Court thus held that the Commonwealth Act was "supplementary to, and not exclusive of, the ordinary criminal law" and that it did "not deal with the same subject-matter or serve the same purpose as laws forming part of the ordinary criminal law".[45]

(2) By contrast, in *Viskauskas*, the *Anti-Discrimination Act 1977* (NSW) was found to found to have the same purpose and provide for remedies of the same character as the *Racial Discrimination Act 1975* (Cth).[46] Accordingly, the State law was found to intrude on a field intended exhaustively to be regulated by the Commonwealth law.

34. In *Viskauskas*, "the Acts both deal[t] with the one subject — racial discrimination".[47] It is not possible to say that of the laws at issue in this matter. While the NT WHS Act may, in some circumstances, apply to conduct that is regulated by or under the CAA, its purpose, subject matter and scope of operation are different, for the reasons that follow.

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40 (1930) 43 CLR 472 at 485-486.

41 (1989) 168 CLR 289.

42 (1983) 153 CLR 280.

43 (1989) 168 CLR 289 at 298 (the Court).

44 (1989) 168 CLR 289 at 298.

45 (1989) 168 CLR 289 at 299.

46 (1983) 153 CLR 280 at 292-293, 295 (the Court).

47 (1983) 153 CLR 280 at 295.

35. ***First***, it is plain from the terms of the legislation in issue that the NT WHS Act was made for a different purpose from the Commonwealth civil aviation law.

(1) The main object of the NT WHS Act is to provide for "a balanced and nationally consistent framework to secure the health and safety of workers and workplaces" by, amongst other things "protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant" (s 3(1)(a)). That object is not connected to aviation; the law touches upon aviation only because the businesses and workplaces covered by the NT WHS Act include businesses and workplaces connected to aviation.

(2) In contrast, the main object of the CAA 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" (s 3A). That framework principally involves:

(a) the requirement in s 27 for an aircraft operator to hold an AOC, which has effect subject to conditions;

(b) the imposition by the CAA of some general conditions, such as the duty in s 28BE(1), referred to above;

(c) the establishment of CASA, which has the function of conducting the safety regulation of civil air operations in Australian territory;

(d) provision for the prescription of safety standards by CASA; and

(e) provision for the making of regulations.

36. ***Second***, in terms of the remedies for which the two regimes provide, some remedies are of a similar character. For example, s 20A of the CAA concerns the reckless operation of aircraft, and breach of its provisions is rendered an offence by s 29(3). Section 31 of the NT WHS Act provides for a "Category 1 offence" for reckless conduct exposing an individual to the risk of death or serious injury or illness. However, assuming that those provisions could apply to the same conduct, "there is no prima facie presumption that a 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".[48]

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[48] *Gallagher* (1982) 152 CLR 211 at 224 (Mason J), quoted in *Momcilovic* (2011) 245 CLR 1 at 236 [643] (Crennan and Kiefel JJ). See also *R v Morris* [2004] QCA 408.

37. In other respects, the remedies contemplated by the two regimes are of a different character. The NT WHS Act is in large part concerned with prevention and improvement, and worker involvement and representative decision-making with respect to prevention and improvement. That may be seen from the ways in which the main object of the NT WHS Act is to be achieved, by:[49]

> (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant; and
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> (b) providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to work health and safety; and
>
> (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
>
> (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
>
> ...
>
> (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; ...

38. Thus, whereas the CAA is primarily concerned to impose and enforce rules of conduct related to aviation safety, and to provide for the imposition and enforcement of such rules through subordinate instruments, the character of the scheme of the NT WHS Act is different. The latter is fundamentally concerned with cooperation (including worker involvement) to avoid and minimise risks to safety. For example:

(1) Part 5 of the NT WHS Act is headed "consultation, representation and participation", and requires, amongst other things, consultation with workers when, for example, identifying hazards and assessing risks to health and safety (ss 47 to 49).

(2) Division 3 of Pt 5 provides for the election of health and safety representatives, whose role is to represent relevant workers in those consultations, but also to monitor and investigate matters (s 68) and to issue provisional improvement notices, subject to review by an inspector appointed by the regulator (ss 90 and 100). Representatives are entitled to training (s 72).

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[49] NT WHS Act, s 3(1).

(3) Division 4 of Pt 5 provides for the establishment of a health and safety committee.

(4) Division 5 of Pt 5 provides a process for resolving health and safety issues. A worker has a right to cease unsafe work (s 84) and a health and safety representative may direct that unsafe work cease (s 85).

(5) Part 6 prohibits discriminatory, coercive and misleading conduct, being conduct (broadly speaking) that would undermine the exercise of rights, functions and powers under the NT WHS Act.

39. Those aspects of the NT WHS Act, which have no counterpart in the CAA, demonstrate the different character of the remedies under the NT WHS Act.

40. ***Third***, the NT WHS Act is concerned with the safety of workers and workplaces and operates by reference to relationships between, on the one hand, persons who conduct businesses or undertakings[50] and, on the other hand, workers or other persons whose health or safety would be at risk from work carried out as part of the conduct of the business or undertaking. By contrast, the scheme established by the CAA is primarily a regulatory licensing or authorisation scheme that is not concerned with workplace relationships or duties between persons at or connected to workplaces. That further distinguishes the subject matter of the scheme created by the NT WHS Act from the subject matter of the CAA.

D. NOTICE OF CONTENTION: NO DIRECT INCONSISTENCY

41. By its Notice of Contention, the first respondent identifies two bases on which it says that ss 19, 27 and 32 of the NT WHS Act are directly inconsistent with provisions of the CAA, the CAR and Civil Aviation Order 82.7.[51] However, the precise way in which the direct inconsistency arguments are to be put is not yet known.

Ground 1 of the Notice of Contention

42. Ground 1 asserts direct inconsistency between, on the one hand, ss 19(2), 27 and 32 of the NT WHS Act[52] and, on the other hand, ss 28BD and 29(1) of the CAA "together with" reg 215 of the CAR and Civil Aviation Order 82.7.[53]

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50 Or other persons in a position to control risks: see ss 20-26.

51 The Notice of Contention is at **AB 111-112**. See also the First Respondent's Notice of a Constitutional Matter at [2] and [22]-[23] [**AB 113, 116-117**].

52 Section 19(2) of the NT WHS Act imposes a duty on a person conducting a business or undertaking (**PCBU**) to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put

43. The argument foreshadowed by Ground 1 does not appear to be that simultaneous obedience to those respective sets of provisions is impossible. Rather, it appears to be that the same conduct is subject to different standards and different maximum penalties. However, that state of affairs would only give rise to direct inconsistency if the Territory law prohibited or penalised conduct permitted by Commonwealth law, as was the case in *Dickson v The Queen*, where Victorian law rendered criminal conduct which was deliberately not criminalised by Commonwealth law.[54]

44. There is no "area of liberty designedly left" in this case. The CAA and the CAR cannot be interpreted to confer, deliberately, a liberty on the holder of an AOC to act in disregard of the NT WHS Act, provided they have complied with such specific rules or procedures as may be contained in their operating manual or in applicable Civil Aviation Orders. Put another way, ss 19(2), 27 and 32 of the NT WHS Act do not purport to alter, vary or detract from the requirement, under the Commonwealth scheme, to comply with operating manuals and Civil Aviation Orders.

Ground 2 of the Notice of Contention

45. Ground 2 asserts a direct inconsistency between, on the one hand, ss 19(2) and 27 of the NT WHS Act and, on the other hand, reg 92(1)(d) of the CAR. In summary, reg 92(1)(d) relevantly provides that a person must not engage in conduct that causes an aircraft to take off from a place other than an authorised aerodrome unless:

(1) the place is suitable for use as an aerodrome for purposes of the taking off of aircraft; and

(2) having regard to all the circumstances (including the prevailing weather conditions), the aircraft can take off from the place in safety.

46. The argument foreshadowed by Ground 2 seems to be that reg 92(1)(d) imposes a duty on a person engaged in the relevant conduct to ensure the safety of the land for take-off, and a duty under Territory law to ensure the safety of persons during embarkation, for

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at risk from work carried out as part of the conduct of the business or undertaking. Section 27 imposes a duty on an officer of a PCBU to exercise due diligence to ensure that the PCBU complies with a duty or obligation of a PCBU. Section 32 provides for the Category 2 offence of failing to comply with a "health and safety duty" and stipulates maximum penalties.

53 The Commonwealth provisions listed, as explained in paragraph 24 above, have the effect that the holder of an AOC may be under a statutory obligation to comply with its operations manual, and a failure to comply with the operations manual may be a criminal offence. In this case, the first respondent's operations manual contained particular rules relating to inflation fans (see paragraph 11(8) above).

54 (2010) 241 CLR 491 at 504 [22], 505 [25], 506 [29] (the Court). Cf *Momcilovic* (2011) 245 CLR 1 at 72-73 [106] (French CJ), 122 [276] (Gummow J), 190-191 [479] (Heydon J), 240-241 [660] (Bell J).

example by erecting a barrier to separate people from an inflation fan,[55] would or could derogate from that requirement.

47. If that is how the argument is to be understood, it should be rejected.

(1) First, the assertion that a duty to ensure safety during embarkation constitutes a "derogation" from a duty to ensure safety of land for take-off is unfounded. Duties to ensure safety of embarkation and safety of a place for take-off, far from contradicting one another, are complementary.

(2) Second, in so far as the argument depends on construing reg 92(1)(d) as positively excluding any other safety considerations, that construction must be rejected. It finds no support in the terms of reg 92(1) or the CAR as a whole.

(3) Regulation 92(1) cannot be read as **requiring** take-off to occur — rather, it **prohibits** take-off where the land is not safe for take off. If it were the case that a place could not be both safe for embarkation and safe for take-off, then neither should be permitted to occur. So, to return to the barrier example, if a barrier were in place to protect people from an inflation fan, but that barrier rendered the land unsafe for take-off, then either the barrier would need to be removed or the take-off could not occur. But simultaneous obedience is possible.

PART V: ESTIMATE OF TIME

48. The Attorney-General for Victoria estimates that he will require approximately 15 minutes for the presentation of his oral submissions.

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[55] As mentioned in the Particulars to Ground 2 **[AB 112]**.