NORTON WHITE

Contact: **Ben Martin**
Partner

Jayne Heatley

Direct Fax:
Our Ref: 180205

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Email: Jane.Thomson@aph.gov.au; rrat.sen@aph.gov.au

Dr Jane Thomson
Committee Secretary
Rural and Regional Affairs and Transport References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Thomson

Judicial decisions relating to aviation requiring urgent legislative attention

We refer to the statements made by Ben Martin and Jayne Heatley to the Rural and Regional Affairs and Transport References Committee hearing in Brisbane on 15 February 2019.

We **enclose** a copy of our briefing paper and the decisions of *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 and *Civil Aviation Safety Authority v Caper Pty Ltd* (2012) 207 FCR 357.

Please do not hesitate to contact us if we can provide any further assistance.

Yours faithfully

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BRIEFING PAPER

200 YEARS 1818 → 2018 ANNIVERSARY OF JAMES NORTON'S PRACTICE IN AUSTRALIA

Judicial decisions requiring urgent legislative attention

In this paper we outline:

- two judicial decisions that have, in the opinion of the aviation industry, had significant and unintended consequences on air operators and require urgent legislative attention; and
- our recommendation as to how the Commonwealth Government can remedy the issues created by these decisions.

1. Work Health Authority v Outback Ballooning Pty Ltd [2019] HCA 2

This case concerned the prosecution of Outback Ballooning, a hot air balloon operator based in Alice Springs, under sections 19 and 32 of the *Work Health and Safety (National Uniform Legislation) Act* (NT) (the **NT WHS Act**).

A passenger was unfortunately killed when her scarf was caught in an inflation fan as she was boarding the balloon. The NT Work Health Authority alleged that Outback Ballooning breached its duty of care under the *NT WHS Act* through its failure to eliminate or minimise risks to embarking passengers.

The question before the High Court was whether or not the *NT WHS Act* was inconsistent with the Commonwealth *Civil Aviation Act 1988* (which imposes its own very specific regulatory regime conformably with the Chicago Convention for the safety of air navigation) and therefore inapplicable.

The Court, by majority, found that sections 19 and 32 of the NT WHS Act are not inconsistent with the Commonwealth civil aviation regime. The effect of this decision is that aircraft operators and airlines are now subject to **both**:

- Commonwealth laws in relation to aviation safety; and
- State and Territory laws (including occupational health and safety laws).

Aviation safety worldwide depends on uniformity. This is recognised by the Chicago Convention, which sets out international standards and practices for the safety of civil aviation. Australia is a signatory to the Chicago Convention. The importance of international uniformity in safety standards for civil aviation is recognised in the Commonwealth *Civil Aviation Act*, which by section 11 requires that CASA perform its functions in a manner consistent with the Chicago Convention. The High Court majority decision undermines Australia's obligations pursuant to the Chicago Convention and also uniformity of safety standards. State and Territory Workplace Safety Regulators, unlike CASA, are not obliged by legislation to act in a manner consistent with the Chicago Convention.

The risk of subjecting air operators to a multitude of non-uniform laws was addressed by Justice Edelman in dissent:

> *"…it would be surprising, confusing, and potentially dangerous if the Civil Aviation Law were to have the effect that the rules of the air on a flight from Darwin to Melbourne, via Sydney, could be regulated not merely by the comprehensive and uniform rules policed by the Commonwealth Civil Aviation Safety Authority ("CASA"), but also, depending upon the airspace, by separate and different rules policed by the Work Health Authority and its inspectors in the Northern Territory, or regulators in New South Wales and Victoria."*

Justice Edelman argued that an exclusive civil aviation regime is necessary to achieve a uniform national safety regime and rules of the air.

The decision is also likely to add to costs for air operators who will be required to comply with up to 9 sets of safety laws (that may not be consistent) and deal with safety regulators in each State and Territory in addition to CASA. The maximum penalty for a corporation for a breach of workplace health and safety legislation can be up to $1.8 million in Western Australia and $1.5 million in other States and Territories.

Recommendation: As this is a decision of the High Court, it can only be rectified if the Commonwealth Parliament amends the *Civil Aviation Act 1988* (Cth) to include an express statement of legislative intention that the Civil Aviation Act and its Regulations are intended to cover the field in respect of the safety of civil aviation.

2. Civil Aviation Safety Authority v Caper Pty Ltd (2012) 207 FCR 357

In *Civil Aviation Safety Authority v Caper Pty Ltd,* CASA cancelled Caper's AOC on the basis that Caper was providing regular passenger transport (RPT) when its AOC only permitted charter and aerial work operations. Caper appealed to the Federal Court.

The case turned on the classification of air operations as either charter or RPT under regulation 206 of the *Civil Aviation Regulations 1988* (the **Regulations**):

- **Charter operations** are defined in regulation 206(b) as:

  (i) the carriage of passengers or cargo for hire or reward to or from any place, other than carriage in accordance with fixed schedules to and from fixed terminals;

  (ii) the carriage, in accordance with fixed schedules to and from fixed terminals, of passengers or cargo or passengers and cargo in circumstances in which the accommodation in the aircraft is not available for use by persons generally.

- **RPT operations** are defined in regulation 206(c) as: transporting persons generally, or transporting cargo for persons generally, for hire or reward in accordance with fixed schedules to and from fixed terminals over specific routes with or without intermediate stopping places between terminals.

Caper's AOC authorised charter flights between Darwin and Bathurst Island. Caper had an arrangement with a tourist operator (AAT Kings) who chartered Caper's aircraft for AAT's tours from Darwin to Bathurst Island. Only people on the AAT tour were permitted to travel on the aircraft. The flights operated to fixed schedules between fixed terminals and persons seeking transport on the flights were referred by Caper to AAT. CASA cancelled Caper's authorisation to conduct the flights on the ground that the flights were, in reality, RPT flights and not charter flights.

The Federal Court looked at the concept of 'closed charters' in Regulation 206(b)(ii) and found that the words 'persons generally' referred to the general public, so the test for a closed charter was whether or not travel on the flight was offered to the public at large. In other words - if the flight was available to the general public then it was an RPT operation.

The Court found that the Caper air operation was available to the general public because the advertised offer of the flight, albeit bundled with the tour, was made to any member of the public who wished to join the tour.

This decision had significant ramifications for the use of charter flights to access remote locations for tourism flights as well as essential services such as regular medical appointments. It created confusion over the classification of operations which had long been operated safely as charter flights. The fact that these operations now required RPT authorisation meant that many could not meet the stringent regulations governing RPT operations and had to withdraw flight services.

The distinction between charter and RPT operations will be removed from the *Civil Aviation Safety Regulations 1998* when the new Part 119 (which deals with the issuing of Air Operator's Certificates to Australian operators) and the suite of regulations that set the minimum acceptable standards for large aeroplanes (Part 121) and small aeroplanes (Part 135) come into effect into effect in 2021. These regulations include a new classification of operations as A*ir Transport Operations*, dispensing with the distinction between charter and RPT and creating a single standard for carriage of passengers and cargo for hire or reward.

CASA has stated that the new regulations are intended to provide graduated requirements proportionate to the risk.

Recommendation: It is critical that CASA consults and works closely with industry on the development of the Manual of Standards for the new classification to:

- ensure appropriate levels of regulation apply to each type of flight operation; and
- avoid adverse impacts on air access to remote communities.

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

WORK HEALTH AUTHORITY APPELLANT

AND

OUTBACK BALLOONING PTY LTD & ANOR RESPONDENTS

Work Health Authority v Outback Ballooning Pty Ltd
[2019] HCA 2
6 February 2019
D4/2018

ORDER

1. *Appeal allowed.*

2. *Set aside the order made in paragraph 1 of the order of the Court of Appeal of the Supreme Court of the Northern Territory made on 19 October 2017 and the order made in paragraph 1 of the order made on 28 March 2018 and, in their place, order that the appeal to that Court be dismissed with costs.*

3. *The first respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of the Northern Territory

Representation

S L Brownhill SC, Solicitor-General for the Northern Territory, and T Moses for the appellant (instructed by Solicitor for the Northern Territory)

J T Gleeson SC with T J Brennan for the first respondent (instructed by GSG Legal)

Submitting appearance for the second respondent

S P Donaghue QC, Solicitor-General of the Commonwealth, with Z C Heger and T M Wood for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

P J Dunning QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law Queensland)

M E O'Farrell SC, Solicitor-General for the State of Tasmania, with S Elankovan for the Attorney-General for the State of Tasmania, intervening (instructed by Office of the Solicitor-General – Tasmania)

K L Walker QC, Solicitor-General for the State of Victoria, with F I Gordon for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G T W Tannin SC with J A Godfrey for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

CATCHWORDS

Work Health Authority v Outback Ballooning Pty Ltd

Constitutional law (Cth) – Powers of Commonwealth Parliament – Territories – Inconsistency between Commonwealth and Territory laws – Where Commonwealth civil aviation law regulates matters preparatory to and subsequent to aircraft flight including embarkation and disembarkation of passengers – Where Commonwealth law implements and extends international obligations designed to achieve uniformity in regulation of civil aviation – Where Territory law regulates work health and safety – Whether Commonwealth law designed to operate within framework of other State, Territory and Commonwealth laws – Whether Commonwealth law contains implicit negative proposition that it is only law with respect to safety of persons affected by operations of aircraft including embarkation – Whether Territory law inconsistent with Commonwealth law.

Words and phrases – "alter, impair or detract from", "anti-exclusivity clause", "Chicago Convention", "civil aviation", "cover the field", "embarkation", "implicit negative proposition", "indirect inconsistency", "intention to deal completely, exhaustively or exclusively", "legislative intention", "nationally harmonised laws", "operations associated with aircraft", "rule of conduct", "safety standards", "subject matter".

Constitution, ss 109, 122.
Air Navigation Act 1920 (Cth).
Civil Aviation Act 1988 (Cth), ss 3, 3A, 9, 11, 20A, 27, 28BA, 28BD, 28BE, 29, 98.
Civil Aviation Regulations 1988 (Cth), regs 2, 215, 235.
Crimes Act 1914 (Cth), s 4C.
Northern Territory (Self-Government) Act 1978 (Cth), s 6.
Work Health and Safety Act 2011 (Cth).
Work Health and Safety (National Uniform Legislation) Act 2011 (NT), ss 19, 27, 32.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND GORDON JJ. Outback Ballooning Pty Ltd, the first respondent to this appeal, operates a business in Alice Springs which provides rides in hot air balloons to passengers. On 13 July 2013 a group of persons were taken to a location some distance from Alice Springs airport for that purpose. On their arrival the basket which would hold them was laid on its side pointing towards the balloon, which was spread out on the ground preparatory to its inflation. The intended passengers were given a short briefing during which they were told to avoid the inflation fan. The fan was a stand-alone piece of equipment driven by a motor with a metal guard around its blades. The fan was started. Three passengers boarded. The fourth, Ms Stephanie Bernoth, approached the basket and as she did so the scarf she was wearing was sucked into the inflation fan causing her to be dragged towards the metal guard. Ms Bernoth later died from the injuries she sustained.

The NT WHS Act complaint

2 Section 19(2) of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ("the NT WHS Act") requires that a person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of persons "is not put at risk from work carried out as part of the conduct of the business or undertaking". Section 19(3) provides that, without limiting sub-ss (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable, a number of things which are directed to the protection of all persons from risks to their health and safety from work carried out as part of the conduct of the business or undertaking. The NT WHS Act also creates a number of duties which apply to conduct at a "workplace", which is defined as a place where work is carried out for a business or undertaking, and includes an aircraft[1].

3 Section 32 of the NT WHS Act provides that if a person who has a health and safety duty fails to comply with that duty, and that failure exposes an individual to a risk of death or serious injury or illness, that person commits a Category 2 offence for which substantial penalties may be imposed[2].

4 The Work Health Authority ("the WHA"), the appellant in these proceedings, filed a complaint against the first respondent under s 32 of the NT

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1 NT WHS Act, ss 4, 8.

2 $150,000 for an individual, $300,000 for the person conducting the business or undertaking or that person's officer and $1,500,000 in the case of a body corporate.

WHS Act in which it was alleged that the first respondent failed to comply with the duty imposed by s 19(2) of that Act. The breach of duty referred to in the complaint was identified as a failure to eliminate or minimise risks[3] to embarking passengers that arose from the use of a fan to inflate the hot air balloon.

The decisions below

5 The complaint was dismissed by the Northern Territory Court of Summary Jurisdiction as invalid because the subject matter of it was within the field covered by the Commonwealth regulatory scheme with respect to aviation. That scheme, Magistrate Bamber considered, extended to pre-flight operations affecting the safety of passengers on the ground.

6 The WHA sought an order in the nature of certiorari from the Supreme Court of the Northern Territory to quash that decision. Barr J held that the Court of Summary Jurisdiction was wrong to hold that it lacked jurisdiction to hear the complaint, and made the order sought[4]. In his Honour's view, the Commonwealth regime regulates aviation operations which affect the safety of aviation and passengers in flight but does not extend to all operations. His Honour did not consider that the embarkation procedure, the subject of the complaint, was so closely connected with safety in flight as to be regulated by an exclusive Commonwealth regime[5].

7 The Court of Appeal of the Northern Territory allowed the first respondent's appeal from his Honour's decision[6]. Southwood J (with whom Blokland J agreed)[7] and Riley J[8] concluded that the Commonwealth aviation law

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3 NT WHS Act, s 27(1).

4 *Work Health Authority v Outback Ballooning Pty Ltd* (2017) 318 FLR 294 at 306 [38].

5 *Work Health Authority v Outback Ballooning Pty Ltd* (2017) 318 FLR 294 at 301 [21], 305-306 [37].

6 *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1.

7 *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1 at 11-12 [59], [61].

8 *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1 at 19 [99].

was a complete statement of the relevant law and that there was an indirect inconsistency between the Northern Territory law and the Commonwealth aviation law, which extended to the embarkation of passengers. Riley J was of the view that the Commonwealth aviation law was intended to cover the field and was not intended to operate in conjunction with any State or Territory scheme directed to the same end. In reaching these conclusions their Honours followed the decision of a Full Court of the Federal Court in *Heli-Aust Pty Ltd v Cahill*[9].

8 Following a grant of special leave, the WHA appeals to this Court. In this Court, Outback Ballooning contends that the Commonwealth aviation law, as defined below, deals completely, exhaustively or exclusively with the "prescription and enforcement of the standards of safety in the conduct of air navigation or air operations" in Australia. For the reasons that follow, that contention should be rejected. In rejecting that contention, it is important to recognise that there is no dispute that there are aspects of matters preparatory to and subsequent to an aircraft flying, including embarkation and disembarkation of passengers, that are completely, exhaustively or exclusively dealt with by the Commonwealth aviation law.

The Commonwealth aviation law

9 The body of law referred to by the Court of Appeal as the Commonwealth civil aviation law comprises the *Air Navigation Act 1920* (Cth) ("the ANA"), the *Civil Aviation Act 1988* (Cth) ("the CA Act"), the *Civil Aviation Regulations 1988* (Cth) ("the CARs") and some *Civil Aviation Orders* ("CAOs"). These will be referred to as "the Commonwealth aviation law" in the balance of these reasons. Some reference was made in submissions to the *Civil Aviation Safety Regulations 1988* (Cth), but they assume no importance in the reasons below.

10 The ANA initially provided for the making of regulations to give effect to the Paris Convention for the Regulation of Aerial Navigation (1919) for the purpose of providing for the regulation of air navigation in Australia. It later approved the ratification of the Chicago Convention on International Civil Aviation (1944) and subsequent Protocols[10]. It deals with matters such as freedom of the air and the regulation of international airlines, aircraft, airports and flights. It is mentioned only in passing in the reasons of the Court of Appeal.

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9 (2011) 194 FCR 502.

10 ANA, s 3A.

11 The focus of the reasons in the Court of Appeal is the CA Act and the CARs and CAOs made under it. The CA Act has as its main object the establishment of a "regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents"[11]. Subject to certain provisions concerning its extra-territorial application[12] and mutual recognition[13], the CA Act applies to civil aviation in Australian territory.

12 The CA Act establishes the Civil Aviation Safety Authority ("CASA")[14]. Its function is the conduct of safety regulation including that of civil air operations in Australia[15]. The means by which it is to do so include developing and promulgating aviation safety standards, developing strategies to secure compliance with them and issuing certificates, licences, registrations and permits[16]. The definition of "aviation safety standards" includes standards relating to flight crews engaged in operations of aircraft, the design, construction, maintenance, operation and use of aircraft and related equipment, similar activities in relation to aerodromes, and personnel involved in these activities[17].

13 CASA also has what are termed "safety-related functions", such as encouraging acceptance by the aviation industry of obligations to maintain high standards of aviation safety through safety education and training programmes, aviation safety advice and fostering an awareness of the importance of aviation

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11 CA Act, s 3A.

12 CA Act, s 7.

13 CA Act, s 26A.

14 CA Act, s 8.

15 CA Act, s 9.

16 CA Act, s 9(1).

17 CA Act, s 3.

safety, amongst other things[18]. CASA is required to promote the development of Australia's civil aviation safety capabilities, skills and services[19].

14 In the exercise of its powers, CASA is required to regard the safety of air navigation as the most important consideration[20]. Its functions are to be performed in a manner consistent with Australia's obligations under the Chicago Convention and any other international agreements entered into by Australia relating to the safety of air navigation[21].

15 Section 27(2) prohibits the flying of an aircraft into or out of Australia, and the operation of an aircraft in Australia, except as authorised by an Air Operator's Certificate ("an AOC") issued by CASA. "Flight" is defined, in the case of lighter-than-air aircraft[22], to refer to the operation of an aircraft when it is detached from the earth's surface or a fixed object on it. The first respondent's AOC authorised it to operate four classes of balloon for passenger charters in Australia.

16 It is necessary for an applicant for an AOC to lodge manuals, including an operations manual, for which the CARs provide[23], with CASA[24]. CASA may require information and inspections in connection with an application for an AOC[25] and may issue an AOC only if it is satisfied about certain matters[26].

17 An AOC has effect subject to certain general conditions which are set out in s 28BA of the CA Act. Those conditions include compliance with ss 28BD

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18 CA Act, s 9(2).

19 CA Act, s 9(3)(e).

20 CA Act, s 9A(1).

21 CA Act, s 11.

22 See CARs, reg 2(1), which so defines a balloon.

23 CARs, reg 215.

24 CA Act, s 27AB(2).

25 CA Act, s 27AC.

26 CA Act, s 28.

and 28BE. An AOC is also subject to conditions imposed by CASA and conditions specified in the CARs or CAOs[27]. CASA may suspend or cancel an AOC for breach of a condition[28].

18 Section 28BD requires the holder of an AOC to comply with all the requirements of the CA Act and the CARs and CAOs that apply to the holder of the AOC.

19 Section 28BE is in the following terms:

> "(1) The holder of an AOC must at all times take all reasonable steps to ensure that every activity covered by the AOC, and everything done in connection with such an activity, is done with a reasonable degree of care and diligence.
>
> (2) If the holder is a body having legal personality, each of its directors must also take the steps specified in subsection (1).
>
> (3) It is evidence of a failure by a body and its directors to comply with this section if an act covered by this section is done without a reasonable degree of care and diligence mainly because of:
>
> (a) inadequate corporate management, control or supervision of the conduct of any of the body's directors, servants or agents; or
>
> (b) failure to provide adequate systems for communicating relevant information to relevant people in the body.
>
> (4) No action lies, for damages or compensation, in respect of a contravention of this section.
>
> (5) This 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."

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27 CA Act, s 28BA(1).

28 CA Act, s 28BA(3).

20 The effect of s 28BA, which is referred to above, is that in the event of a breach of s 28BE, an AOC may be suspended or cancelled.

21 Section 29(1) provides that an offence is committed if an owner, operator or hirer operates an aircraft or permits an aircraft to be operated in contravention of a provision of Pt III, or of a direction given or condition imposed under such a provision. Each of ss 28BA, 28BD and 28BE appears in Pt III. The offence is punishable by imprisonment for two years.

22 Section 29(3) provides for an offence, punishable by imprisonment for five years, where an owner, operator or hirer operates an aircraft or permits it to be operated in contravention of s 20A(1). Section 20A(1) provides that a person must not be reckless as to whether the manner of operation of an aircraft could endanger the life of another person.

23 Other provisions of Pt III create offences, punishable by imprisonment, of flying without satisfying safety requirements in relation to an aircraft[29], or where provisions respecting the carriage of dangerous goods are not complied with[30].

24 Section 98 contains the regulation-making powers of the CA Act. Section 98(7) provides that a law of a Territory shall not be taken to be inconsistent with a provision of the regulations having effect in the Territory to the extent that it is capable of operating concurrently with those regulations.

25 Regulation 215 of the CARs provides that a commercial aircraft operator is to provide an operations manual for the use and guidance of the operations personnel of the operator[31]. The manual is to contain 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"[32]. CASA may give a direction requiring particular information, procedures and instructions to be included in the manual or for it to be revised or varied[33]. An operator is to revise the operations manual from time

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29 CA Act, s 20AA(4).

30 CA Act, ss 23, 29(5).

31 CARs, reg 215(1).

32 CARs, reg 215(2).

33 CARs, reg 215(3).

to time as a result of changes in operations, aircraft or equipment, or in the light of experience[34]. All personnel are required to comply with instructions in the operations manual[35]. A breach of reg 215 may result in the imposition of a penalty.

26 Regulation 235(7) provides CASA with the power to give "directions with respect to the method of loading of persons and goods (including fuel) on aircraft" for the purpose of ensuring the safety of air navigation. The regulations make it clear that a balloon is a lighter-than-air aircraft[36]. A contravention of a direction under reg 235(7) exposes a person to a penalty[37]. No such directions were given.

27 CAOs are made under s 98(4A) or under the regulations[38] and have the status of legislative instruments[39]. CASA has made CAO 20.16.3, which identifies, in relation to "manned balloons", the number of ground crew members required for "passenger loading and launching operations". CAO 20.9 directs that refuelling not take place while "passengers are on board, or entering or leaving, the aircraft". It gives further directions with respect to the safety of embarking or disembarking of passengers whilst an aircraft's engine is operating.

28 The first respondent's operations manual contained requirements with respect to passengers in connection with the operation of the inflation fan. It is accepted by the first respondent that the content of the manual is not a Commonwealth law although the Court of Appeal appears to have considered that federal law operates upon it "to create a norm"[40].

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34 CARs, reg 215(5).

35 CARs, reg 215(9).

36 CARs, reg 2(1); see also CA Act, s 3.

37 CARs, reg 235(7A).

38 CA Act, s 98(5).

39 CA Act, ss 98(4B), 98(5AAA).

40 *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1 at 17 [90].

Approaches to inconsistency

29 When a law of a State is inconsistent with a law of the Commonwealth, s 109 of the *Constitution* resolves the conflict by giving the Commonwealth law paramountcy and rendering the State law invalid[41] to the extent of the inconsistency.

30 The NT WHS Act is a law of the Northern Territory Legislative Assembly. The Legislative Assembly derives its legislative power from s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth), which is enacted under s 122 of the *Constitution*. The terms of s 109 of the *Constitution* are not addressed to the relationship between laws of the Commonwealth and those enacted by the legislatures of the Territories[42]. The subordinate status of a Territory law has the result that where it is inconsistent with a Commonwealth law the Commonwealth law will prevail. It is not necessary in this case to further consider the effect of the inconsistency on a Territory law. There is no dispute that cases concerning s 109 inconsistency may be applied by analogy to a case involving a Territory law.

31 In *Victoria v The Commonwealth* ("*The Kakariki*")[43], Dixon J referred to two approaches which might be taken to the question whether an inconsistency might be said to arise between State and Commonwealth laws. They were subsequently adopted by the Court in *Telstra Corporation Ltd v Worthing*[44], *Dickson v The Queen*[45] and *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*[46].

32 The first approach has regard to when a State law would "alter, impair or detract from" the operation of the Commonwealth law. This effect is often

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41 Or "inoperative": see *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557; [1942] HCA 30.

42 *Northern Territory v GPAO* (1999) 196 CLR 553 at 580 [53]; [1999] HCA 8.

43 (1937) 58 CLR 618 at 630; [1937] HCA 82.

44 (1999) 197 CLR 61 at 76-77 [28]; [1999] HCA 12.

45 (2010) 241 CLR 491 at 502 [13]-[14]; [2010] HCA 30.

46 (2011) 244 CLR 508 at 524 [39]; [2011] HCA 33.

referred to as a "direct inconsistency"[47]. Notions of "altering", "impairing" or "detracting from" the operation of a Commonwealth law have in common the idea that a State law may be said to conflict with a Commonwealth law if the State law in its operation and effect would undermine the Commonwealth law[48].

33 The second approach is to consider whether a law of the Commonwealth is to be read as expressing an intention to say "completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed"[49]. This is usually referred to as an "indirect inconsistency". A Commonwealth law which expresses an intention of this kind is said to "cover the field" or, perhaps more accurately, to "cover the subject matter" with which it deals[50]. A Commonwealth law of this kind leaves no room for the operation of a State or Territory law dealing with the same subject matter. There can be no question of those laws having a concurrent operation with the Commonwealth law[51].

34 The question whether a State or Territory law is inconsistent with a Commonwealth law is to be determined as a matter of construction. In a case where it is alleged that a State or Territory law is directly inconsistent with a Commonwealth law it will be necessary to have regard to both laws and their operation. Where an indirect inconsistency is said to arise, the primary focus will be on the Commonwealth law in order to determine whether it is intended to be exhaustive or exclusive with respect to an identified subject matter.

35 It is not to be expected that a Commonwealth law will usually declare that it has this effect. In some cases the detailed nature or scheme of the law may

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47 *Dickson v The Queen* (2010) 241 CLR 491 at 504 [22]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524 [39].

48 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [41].

49 *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12.

50 *Ex parte McLean* (1930) 43 CLR 472 at 483; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524 [40]; see also *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55.

51 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 467 [56].

evince an intention to deal completely and therefore exclusively with the law governing a subject matter[52]. It may state a rule of conduct to be observed, from which the relevant intention may be discerned[53]. Any provision which throws light on the intention to make exhaustive or exclusive provision on the subject matter with which it deals is to be considered[54]. A provision which, expressly or impliedly, allows for the operation of other laws may be a strong indication that it is not so intended[55]. The essential notion of indirect inconsistency is that the Commonwealth law contains an implicit negative proposition that nothing other than what it provides with respect to a particular subject matter is to be the subject of legislation[56].

Whether the laws are inconsistent

36 The first respondent submits that, properly construed, the Commonwealth aviation law discloses an intention exhaustively and exclusively to deal with the subject matter which it describes as "the prescription and enforcement of the standards of safety in the conduct of air navigation or air operations" in Australia. These are very broad descriptions. Nonetheless it is common ground that the aircraft operations regulated by the Commonwealth law in question encompass all matters preparatory to and subsequent to an aircraft flying and include the embarkation and disembarkation of passengers.

37 The first respondent had contended before the Court of Appeal that there were direct inconsistencies in the operation of the Commonwealth aviation law and the NT WHS Act. The Court of Appeal did not consider it necessary to address that argument in view of the conclusion it reached that the Commonwealth aviation law covered the field. In this Court the first respondent, by Notice of Contention, sought to contend that the Court of Appeal should also

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52 *Momcilovic v The Queen* (2011) 245 CLR 1 at 116 [261]; [2011] HCA 34.

53 *Ex parte McLean* (1930) 43 CLR 472 at 483-484.

54 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564; [1977] HCA 34.

55 See for example *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545; *New South Wales v The Commonwealth and Carlton* ("the *Hospital Benefits Case*") (1983) 151 CLR 302; [1983] HCA 8.

56 *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [244] per Gummow J.

have found that the NT WHS Act alters, impairs or detracts from the operation of ss 28BD and 29(1) of the CA Act, reg 215 of the CARs and CAO 82.7. During the course of argument on the hearing of this appeal that course was abandoned. The only questions which remain are whether the Commonwealth aviation law can be construed as dealing exclusively with the subject matter identified, or whether it is to be read as permitting other laws including the NT WHS Act to operate, as the WHA contends. It is not contended that the Commonwealth aviation law should be construed as dealing exclusively with some more limited aspect of the embarkation and disembarkation of passengers so as impliedly to exclude the operation of the NT WHS Act in relation to that particular aspect of air navigation.

38 In argument on the appeal the first respondent went to some lengths to chart the historical development of Commonwealth aviation law in its implementation of the Chicago Convention and its later Protocols. No doubt what was sought to be conveyed is that Commonwealth aviation law expanded to become a regulatory scheme with respect to the safety of aviation. But even accepting that there may be aspects of the CA Act which could be so described, it could hardly be said that it purports to lay down an entire legislative framework covering all aspects of the safety of persons who might be affected by operations associated with aircraft, including on-ground operations.

39 In many areas the CA Act must operate within the setting of other laws with which aircraft operators and their staff are obliged to comply[57]. Adapting what Dixon J said in *Ex parte McLean*[58], the CA Act was intended to be "supplementary to or cumulative upon" State or Territory law. The example his Honour gave in that case[59] was of a Commonwealth award which expressly prohibited shearers from injuring sheep whilst shearing. It would not reasonably follow, his Honour said, that a shearer who unlawfully and maliciously wounded a sheep that he was shearing could not be prosecuted under the State criminal law.

40 The fact that a Commonwealth statute makes certain conduct an offence is not conclusive of exclusivity. There is no presumption that a Commonwealth

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57 *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 at 57-58; [1986] HCA 42.

58 (1930) 43 CLR 472 at 483.

59 *Ex parte McLean* (1930) 43 CLR 472 at 485-486.

offence excludes the operation of other laws[60]. The *Crimes Act 1914* (Cth)[61], in providing that a person cannot be punished twice, recognises this. If there were a rule or standard of conduct imposed by the CA Act directed at the safety of persons affected by aircraft operations, gross breach of it could result in a conviction for manslaughter. The first respondent concedes as much and accepts that offences of this kind cannot be said to be within the exclusive preserve of the CA Act.

41 The first respondent suggests that the CA Act might be seen to leave the proscription and punishment of conduct which negligently and intentionally endangers life as a separate matter for the operation of other Commonwealth, State and Territory laws. It points to the *Crimes (Aviation) Act 1991* (Cth), which creates offences relating to aviation terrorism or security, as indicative of this. But the submission simply confirms what is otherwise evident, namely that the CA Act is intended to operate within the setting of other laws.

42 One such law is the *Work Health and Safety Act 2011* (Cth), which was enacted to promote the system of nationally harmonised laws of which the NT WHS Act is a part. It imposes the same duty as the NT WHS Act with respect to the risk to persons from the conduct of businesses or undertakings, albeit those conducted by a public authority, and creates an offence for breach of that duty. The place where a business or undertaking is conducted includes an aircraft[62]. It could hardly be suggested that when this statute was enacted the legislature intended that it would be read down to accommodate the CA Act.

43 The first respondent also accepts that the CA Act is not concerned with civil liability for death, personal injury or damage to cargo arising out of air operations associated with aircraft. These are the subject of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth).

44 The first respondent points to ss 28BD and 29 of the CA Act as the key provisions which would be attracted if there were to be a Commonwealth prosecution arising out of the events in question. Section 28BD, it will be

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60 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 224; [1982] HCA 77; *McWaters v Day* (1989) 168 CLR 289 at 296; [1989] HCA 59.

61 Section 4C.

62 *Work Health and Safety Act 2011* (Cth), s 8.

recalled, requires the holder of an AOC to comply with all the requirements of the CA Act, the CARs and any CAOs which are applicable.

45 In *Ex parte McLean*[63], Dixon J explained that when the Commonwealth and State Parliaments each legislate on the same subject matter "and prescribe what the rule of conduct shall be", they make laws which are inconsistent and s 109 applies. That is so because, by providing a rule to be observed, the Commonwealth statute evinces an intention to cover the subject matter and provide exclusively what the law upon that subject matter should be. When a Commonwealth law discloses such an intention, it is inconsistent with that law for the State law to govern the same subject matter.

46 In *Ex parte McLean* an award made by the Commonwealth Court of Conciliation and Arbitration required the applicant, a shearer, to abide by the terms and conditions of an employment agreement between him and his employer. Non-fulfilment of the terms of the agreement would result in a penalty under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) for breach of the award. A State Act contained somewhat different penal sanctions for the same conduct. An information was brought under it alleging that the applicant neglected to fulfil the contract in the manner of his shearing. The Commonwealth Parliament was held to have given awards made by the arbitrator under the Commonwealth Act exclusive authority. That Act gave the arbitrator power by the award to prescribe completely and exclusively what are the industrial relations between employer and employee. It commanded performance of the contract as an industrial duty according to the sanctions it imposed[64].

47 The difficulty with the first respondent's argument is that neither s 28BD nor any other section of the CA Act referred to above prescribes a rule of conduct to be adhered to in carrying out aircraft operations of the kind here in question. Section 20A(1) imposes only a general duty on a person not to be reckless so as not to endanger the life of another person and that duty arises only in the context of operating an aircraft. Section 28BE(1) also imposes a general duty on a person to carry out activities with a reasonable degree of care and diligence.

48 The scheme of the CA Act permits CASA to set standards or give directions through the CARs and CAOs with respect to matters of safety. But

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63 (1930) 43 CLR 472 at 483.

64 *Ex parte McLean* (1930) 43 CLR 472 at 484, 486-487.

even when it does so, s 98(7) states that the CARs are not to be taken to be inconsistent with a Territory law to the extent that that law is capable of operating concurrently with the regulations. A provision of this kind is effective to avoid inconsistency by making it clear that the law which is the source of the standards or directions is not intended to be exhaustive or exclusive of State or Territory laws. It makes clear that it is not intended to cover subjects dealt with by the regulations and that it leaves room for the operation of other laws[65]. The only qualification is that the other laws do not operate so as to conflict directly with the Commonwealth law.

49 The foregoing may be sufficient for a conclusion that, properly construed, the CA Act does not contain the negative proposition that it alone is intended to state the law relating to the conduct of aircraft operations which may put the health and safety of persons at risk, for which the NT WHS Act also provides. In particular, the CA Act does not convey an intention to state exhaustively the extent of care to be taken by the holder of an AOC, for the health and safety of those who are at risk by reason of the conduct of aviation operations. Section 28BE(5) puts this beyond doubt.

50 It will be recalled that s 28BE(1) requires the holder of an AOC to take all reasonable steps to ensure that "every activity covered by the AOC, and everything done in connection with such an activity, is done with a reasonable degree of care and diligence". Sub-section (2) extends that duty to company directors and sub-s (3) provides for what evidence may amount to non-compliance by directors with that duty. Sub-section (4) says that no action for damages or compensation lies for contravention of the section. Section 28BE(5) provides that the section does not affect any duty imposed by, or under, any other Commonwealth, State or Territory law, or under the common law. It operates in a way similar to s 98(7), which has been discussed above. In its terms s 28BE(5) recognises the continuing operation of other laws concerned with the taking of care in the conduct of activities by the holder of an AOC[66]. The recognition is subject to the necessary qualification that a Commonwealth law might be paramount in cases of direct inconsistency in the operation of the respective laws.

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65 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564.

66 *Hospital Benefits Case* (1983) 151 CLR 302; *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47.

51 The first respondent substantially adopts the approach taken by the Full Court of the Federal Court (Moore, Stone and Flick JJ) in *Heli-Aust*, which was to read s 28BE(5) as having a narrow operation. Section 28BE(1) was seen to apply only to AOC holders and in that capacity. Moore and Stone JJ considered that s 28BE(5) is therefore to be understood to recognise that an AOC holder may have a duty when acting in some other capacity, such as when driving a car[67]. An AOC holder might come under a common law duty of care in that capacity just as she or he might be subject to statutory regulation as a director. Their Honours said that "[t]he subsection clearly has work to do in fields removed, and potentially far removed, from the maintenance of safety in civil aviation"[68].

52 The joint judgment in *Heli-Aust* misapprehended the scope of s 28BE(1)'s operation. An AOC permits aircraft flights with passengers. The duty imposed by the sub-section is expressed to apply to every activity covered by the AOC and anything done in connection with it. It would extend to conduct in carrying out almost every task associated with aircraft operations including what is undertaken pre- and post-flight. It imposes on a holder of an AOC a duty additional to what is otherwise required by the CA Act, the CARs and CAOs. But s 28BE(5) makes plain that that further duty does not exclude other laws concerned to require the taking of care by the holder of an AOC in the conduct of air operations.

53 The Court in *Heli-Aust* regarded it as significant that s 28BE does not purport to confine the operation of any other aspect of the CA Act[69]. The first respondent likewise submits that whilst s 28BE(5) is a statutory indication that s 28BE(1) is not to be construed as exclusive, it says nothing about the scheme of the CA Act. The opening words of sub-s (5) refer only to what "[t]his section" does not affect. On the first respondent's case, it cannot be inferred from sub-s (5) that the balance of the statutory scheme is intended to operate exclusively of other laws.

54 The Court in *Heli-Aust* and the first respondent approach s 28BE(5) on the basis of an assumption – that the CA Act can otherwise be read as exhaustive or exclusive on the topic of the safety of aircraft operations. The joint judgment

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67 *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 at 531 [72].

68 *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 at 531 [72].

69 *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 at 531 [71], 557 [174].

expressed the view that not only is the regulatory regime of the CA Act a comprehensive one, but "the safety of civil aviation is, by its very nature one that would seem to cry out for one comprehensive regulatory regime"[70]. The first respondent points to what s 28BE(5) does not say, namely that "the entirety of what otherwise appears to be the most comprehensive exclusive scheme is simply to operate [supplementarily] upon State or Territory law". But in relevant respects, that is how the CA Act operates. For the reasons given above, the CA Act does not evince an intention to operate exclusively of other laws.

55 True it is that s 28BE(1) provides the occasion for what appears in s 28BE(5). Without the imposition of the additional duty by s 28BE(1), no question would arise about the operation of other laws imposing similar duties. Having added that duty it was necessary to confirm, consistently with the balance of the CA Act, that other State and Territory laws and the common law were to continue to operate. The drafting technique employed in s 28BE(5) has an effect similar to that of s 98(7).

56 The breadth of operation of s 28BE(5) is confirmed by the Explanatory Memorandum to the Bill which introduced s 28BE[71]. Relevantly it explains that whilst the section does not create a new cause of action, it does not affect any common law duty of care or any other statutory duty "under which a person may be able to bring an action in negligence or other legal proceedings against the AOC holder". As the Explanatory Memorandum shows, s 28BE(5) reflects the fact that the CA Act is intended to operate within the framework of other laws, including the common law of negligence.

Conclusion and orders

57 The CA Act in relevant respects is designed to operate within the framework of other State, Territory and Commonwealth laws. The NT WHS Act is one such law. And it has not been suggested that the CA Act contains an implicit negative proposition that it is to be the only law with respect to some particular aspect or aspects of the embarkation of passengers. It cannot be said that the CA Act contains an implicit negative proposition that it is to be the only law with respect to the safety of persons who might be affected by operations associated with aircraft, including the embarkation of passengers. The appeal

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70 *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 at 530-531 [68].

71 Australia, House of Representatives, *Civil Aviation Legislation Amendment Bill 1995*, Explanatory Memorandum at 26-27.

Kiefel CJ
Bell J
Keane J
Nettle J
Gordon J

should be allowed with costs, the orders of the Court of Appeal of the Supreme Court of the Northern Territory set aside and in lieu thereof it be ordered that the appeal to that Court be dismissed with costs.

58 GAGELER J. The legislative power conferred on the Legislative Assembly of the Northern Territory by s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth), which "gives life to and sustains"[72] laws enacted for the peace, order and good government of the Territory, is insufficient to sustain the operation of a Northern Territory law to the extent that the law is inconsistent with or repugnant to a Commonwealth law. The test of inconsistency or repugnancy for the purpose of that implicit limitation is the same as the test of inconsistency between a State law and a Commonwealth law for the purpose of s 109 of the *Constitution*[73].

59 Of little more than historical interest in light of the *Statute of Westminster Adoption Act 1942* (Cth) and the *Australia Act 1986* (Cth), and unnecessary to consider for present purposes, is the unresolved question of whether the same test of inconsistency or repugnancy applied to the determination of repugnancy between a colonial law and an imperial law for the purpose of ss 2 and 3 of the *Colonial Laws Validity Act 1865* (Imp) (28 & 29 Vict c 63)[74]. Of potential contemporary significance, but likewise unnecessary to consider for present purposes, is the unresolved question of whether the consequence of inconsistency or repugnancy between a Northern Territory law and a Commonwealth law is that the Territory law is beyond the legislative power of the Legislative Assembly of the Northern Territory, or, as with the consequence of inconsistency for a State law under s 109 of the *Constitution*[75], that the Territory law is rendered inoperative to the extent of the inconsistency[76].

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72 *Northern Territory v GPAO* (1999) 196 CLR 553 at 580 [54]; [1999] HCA 8.

73 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464; [1984] HCA 74, citing *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588; [1929] HCA 36, *Webster v McIntosh* (1980) 32 ALR 603 at 605-606, and *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 418-419; [1984] HCA 13. See also *P v P* (1994) 181 CLR 583 at 602-603; [1994] HCA 20.

74 cf *Yougarla v Western Australia* (2001) 207 CLR 344 at 354-355 [17]; [2001] HCA 47, referring to *Ffrost v Stevenson* (1937) 58 CLR 528 at 572; [1937] HCA 41; *Union Steamship Co of New Zealand Ltd v The Commonwealth* (1925) 36 CLR 130 at 148; [1925] HCA 23, referring to *Attorney-General (Qld) v Attorney-General (Cth)* (1915) 20 CLR 148 at 166-168; [1915] HCA 39.

75 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 285-286; [1961] HCA 32; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 464-465; [1995] HCA 47.

76 *Webster v McIntosh* (1980) 32 ALR 603 at 605-606. Cf *Attorney-General (NT) v Hand* (1989) 25 FCR 345 at 366-367, 402-403.

60 Together with Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, I conclude that there is no inconsistency or repugnancy between ss 19 and 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ("the NT WHS Act") and the *Civil Aviation Act 1988* (Cth) ("the CA Act") insofar as those sections of the NT WHS Act operate to impose on, and to enforce against, the holder of an air operator's certificate ("AOC") issued under the CA Act an obligation to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk in the course of air operations covered by the AOC. The path of reasoning by which I reach that conclusion is in summary as follows.

61 My reasoning proceeds on an acceptance of the view taken by the Full Court of the Federal Court in *Heli-Aust Pty Ltd v Cahill*[77], which was followed by the Court of Appeal of the Northern Territory in the decision under appeal[78], that there is a large area within which the CA Act operates to the exclusion of State and Territory laws. The area of exclusive operation of the CA Act can be sufficiently described as encompassing the prescription and enforcement of standards for the safe operation of aircraft.

62 My principal disagreement with the Full Court in *Heli-Aust*, and consequently with the conclusion reached in the Court of Appeal, is with the Full Court's view that the subject-matter of the exercise of reasonable care and diligence in the operation of an aircraft falls within the area of exclusive operation of the CA Act. My own view is that s 28BE(5) of the CA Act makes plain that this subject-matter does not fall within that area of exclusive operation.

63 The more detailed reasons set out below need to be read with the description of the CA Act and the *Civil Aviation Regulations 1988* (Cth) ("the CA Regulations") in the reasons for judgment of Kiefel CJ, Bell, Keane, Nettle and Gordon JJ. They also need to be read with the description of the legislative history of the CA Act and the history of the Convention on International Civil Aviation (1944) ("the Chicago Convention") in the reasons for judgment of Edelman J. I am grateful to their Honours for not having to repeat those descriptions or to recite the facts and procedural history of this matter.

The test of inconsistency

64 Matters involving s 109 of the *Constitution* have been described as the "running-down jurisdiction of the High Court"[79]. The suggestion implicit in that

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77 (2011) 194 FCR 502.

78 *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1.

79 See Gummow, "Foreword" (2010) 38 *Federal Law Review* 311 at 315.

description is that issues raised in determining whether a State law, or by analogy a Territory law, is inconsistent with a Commonwealth law are easily resolved in the application of well-understood principles.

65 There is an element of truth in that suggestion. The basic test of inconsistency has been repeated and applied too often to be doubted. The canonical exposition is that "inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience" but "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"[80]. A State or Territory law is inconsistent with a Commonwealth law to the extent that the State or Territory law, if operative, would "alter, impair or detract from the operation" of the Commonwealth law. If the Commonwealth law "was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State [or Territory] law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent"[81].

66 However, as illustrated by the difficulties encountered in decisions on fairly straightforward questions of whether a State law creating one criminal offence is inconsistent with a Commonwealth law creating another criminal offence[82], the suggestion that questions of inconsistency are easily resolved has not been borne out by experience.

67 A recurring source of difficulty has been a conceptually problematic but stubbornly persistent perception of the need to classify some State or Territory law detractions from, or impairments of, a Commonwealth law as "direct" inconsistency, and to classify other State or Territory law detractions from, or impairments of, a Commonwealth law as "indirect" inconsistency. That perception has been accompanied at times by a corresponding perception of the need to classify a Commonwealth law either as operating "cumulatively" upon the corpus of State and Territory laws (so as to admit of only "direct" inconsistency) or as "covering a field" (so as to admit also of "indirect"

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80 *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12.

81 *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 630; [1937] HCA 82, echoing *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136; [1932] HCA 40.

82 *Hume v Palmer* (1926) 38 CLR 441; [1926] HCA 50; *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338; [1974] HCA 36; *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211; [1982] HCA 77; *Dickson v The Queen* (2010) 241 CLR 491; [2010] HCA 30; *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34.

inconsistency). At times, where a particular Commonwealth law could not be fitted neatly into either classification, an obviously conflicting State law has been said to be inconsistent with the Commonwealth law "on both grounds"[83].

68 The reality of Commonwealth legislation is more complex than this conceptual dichotomy admits. Few Commonwealth laws are framed to operate cumulatively upon the entire corpus of State and Territory laws. Most Commonwealth laws will have a definite area of affirmative operation which will admit of the concurrent operation of some, but not all, State and Territory laws. The analysis of Dixon J (albeit in dissent) in *Stock Motor Ploughs Ltd v Forsyth*[84] provides a useful illustration. Having reiterated the basic test of inconsistency, Dixon J there stated a consequence of that basic test to be that "except in so far as the law of the Commonwealth appears otherwise to intend, enjoyment of a right arising under it may not be directly impaired by State law"[85]. Applying that approach to hold the *Moratorium Act 1930* (NSW) inconsistent with the *Bills of Exchange Act 1909* (Cth), Dixon J first identified the intention informing the enactment of the *Bills of Exchange Act*. The identified intention was to undertake:

> "the definition of what shall be bills of exchange, promissory notes and cheques, the statement of what special properties they shall possess, and the description of some of the consequences which ensue from their use, yet [to leave] generally to State law authority to prescribe when and under what conditions, by what persons and subject to what qualifications they may be employed"[86].

Despite the extensive room which it left for the operation of State laws, his Honour's opinion was that the *Bills of Exchange Act* "does not contemplate the legislative extinguishment [or] suspension of a right to enforce payment which has been obtained under [it]"[87]. The *Moratorium Act*, if operative, would have done just that.

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83 eg, *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 at 56; [1986] HCA 42, quoting *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 260; [1980] HCA 8.

84 (1932) 48 CLR 128.

85 (1932) 48 CLR 128 at 137.

86 (1932) 48 CLR 128 at 139.

87 (1932) 48 CLR 128 at 141.

69 *Australian Mutual Provident Society v Goulden*[88] provides another illustration. There the Court held that the *Life Insurance Act 1945* (Cth), although "framed on the basis that it will operate in the context of local laws of the various States and Territories of the Commonwealth"[89], "should be understood as giving expression to a legislative policy that the protection of the interests of policy holders is to be achieved by allowing a registered life insurance company to classify risks and fix rates of premium in its life insurance business in accordance with its own judgment founded upon the advice of actuaries and the practice of prudent insurers"[90]. In its application to regulate the life insurance business of a registered life insurance company, the prohibition in the *Anti-Discrimination Act 1977* (NSW) of "discrimination against a physically handicapped person on the ground of his physical impairment in the terms or conditions appertaining to a superannuation or provident fund or scheme" was held to be inconsistent with the *Life Insurance Act* because the prohibition would "effectively preclude such companies from taking account of physical impairment in classifying risks and rates of premium and other terms and conditions of insurance in the course of their life insurance business in New South Wales" and would thereby "qualify, impair and, in a significant respect, negate the essential legislative scheme of the Commonwealth *Life Insurance Act* for ensuring the financial stability of registered life insurance companies and their statutory funds and the financial viability of the rates of premium and other terms and conditions of the policies of insurance which they write in the course of their life insurance business"[91].

70 References to "direct" and "indirect" inconsistency have been described as "tests for discerning whether a 'real conflict' exists between a Commonwealth law and a State law"[92]. Notably, however, "direct" inconsistency and "indirect" inconsistency do not appear as distinct concepts in the canonical formulation of the basic test. Rather, on the premise that a State or Territory law is inconsistent with a Commonwealth law if it would "alter, impair or detract from the operation" of the Commonwealth law, the case of a State law which would regulate or apply to a matter on which a Commonwealth law was "intended as a

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88 (1986) 160 CLR 330; [1986] HCA 24.

89 (1986) 160 CLR 330 at 335.

90 (1986) 160 CLR 330 at 337.

91 (1986) 160 CLR 330 at 339.

92 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42]; [2011] HCA 33, quoting *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 553; [1955] HCA 44.

complete statement" is an instance of a State or Territory law that is "regarded as a detraction from the full operation of the Commonwealth law".

71 The more complete explanation[93] is that offered by Aickin J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[94]:

> "The two different aspects of inconsistency [ie direct and indirect inconsistency] are no more than a reflection of different ways in which the Parliament may manifest its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct. Whether it be right or not to say that there are two kinds of inconsistency, the central question is the intention of a particular federal law."

72 To adopt the language of Mason J in *New South Wales v The Commonwealth and Carlton*[95], no matter how wide or narrow the operation of the Commonwealth law, "the more general test" of inconsistency is: "Does the State [or Territory] law alter, impair or detract from the operation of the Commonwealth law?" Using "object" or "purpose" in the commonly employed sense explained in subsequent cases to refer to the intended practical operation of the law or to what the law is designed to achieve in fact[96], his Honour went on in that case to explain[97]:

> "That test may be applied so as to produce inconsistency in two ways. It may appear that the legal operation of the two laws is such that the State law alters, impairs or detracts from rights and obligations created by the Commonwealth law. Or it may appear that the State law alters, impairs or detracts from the object or purpose sought to be achieved by the Commonwealth law. In each situation there is a case for saying that the intention underlying the Commonwealth law was that it should operate to the exclusion of any State law having that effect."

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93 See Rumble, "The Nature of Inconsistency under Section 109 of the Constitution" (1980) 11 *Federal Law Review* 40 at 72-77, 81-83.

94 (1980) 142 CLR 237 at 280.

95 (1983) 151 CLR 302 at 330; [1983] HCA 8.

96 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; [2005] HCA 44; *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132]; [2015] HCA 34.

97 (1983) 151 CLR 302 at 330.

73 Associated with the persistent perception of some distinction between "direct" and "indirect" inconsistency, another longstanding source of difficulty in determining whether a State or Territory law is inconsistent with a Commonwealth law has been a tendency to overlook the need to determine at the first stage of analysis the extent, if any, to which the Commonwealth law is intended to operate as a complete or exhaustive statement of the law on a subject-matter. Only once the intended legal and practical operation of the Commonwealth law is determined can the extent, if any, to which the other law, if operative, would alter, impair or detract from that operation be determined. That point was made strongly by Gummow J in *APLA Ltd v Legal Services Commissioner (NSW)*[98] and in *Momcilovic v The Queen*[99].

74 Contributing to the overall difficulty in more recent times has been a tendency to downplay the centrality of legislative intention to the determination of the operation of the Commonwealth law[100]. The tendency can be seen to have been the outworking of emergent scepticism about the very existence of legislative intention[101]. That scepticism cannot be allowed to distort the understanding or application of established constitutional doctrine. "Those who regard the search for 'intention' as fictitious must content themselves with an acceptance that it is the function of the courts, ultimately this Court, to specify what the purpose and effect (and hence the imputed intention) of the competing legislation is."[102]

75 Groups acting deliberatively according to established procedures can meaningfully be seen to have intentions, distinct from the subjective intentions of their constituent individuals, both as to what collectively they seek to achieve and as to how collectively they seek to achieve it[103]. Legislative assemblies in representative democracies are the paradigm of groups acting deliberatively, as

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98 (2005) 224 CLR 322 at 400-401 [204]-[208].

99 (2011) 245 CLR 1 at 115-116 [258]-[261].

100 eg, *Dickson v The Queen* (2010) 241 CLR 491 at 506-507 [32]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 141 [341].

101 eg, *Zheng v Cai* (2009) 239 CLR 446 at 455 [28]; [2009] HCA 52; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389-390 [25]; [2012] HCA 56.

102 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 497; [1997] HCA 36.

103 See generally List and Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (2011).

courts in representative democracies have for the most part done well to recognise when construing legislative output.

76 "[O]ne of the surest indexes of a mature and developed jurisprudence" is "to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"[104]. The responsibility of a court performing its constitutionally mandated function of authoritatively attributing meaning to a legislated text, to the extent necessary to resolve a dispute as to legal rights or legal obligations, is correspondingly "to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have"[105]. That a finding of purpose can involve a "contestable judgment"[106] only heightens that responsibility.

77 "The words 'intention', 'contemplation', 'purpose', and 'design' are used routinely by courts in relation to the meaning of legislation" and "are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked"[107]. Each is appropriate to be used by a court to acknowledge the indisputable and foundational fact that legislated text is the product of deliberative choice on the part of democratically elected representatives to pursue collectively chosen ends by collectively chosen means. To reduce legislative intention to a label for the outcome of a constructional choice made by the court itself, is to miss the point of the traditional terminology. It is to ignore that the responsibility of the court, in making a constructional choice, is to adopt an authoritative construction of legislated text which accords with the imputed intention of the enacting legislature. Worse, it is to use a constructional methodology which fails to give full expression to "the constitutional relationship between courts and the legislature"[108].

78 The extent, if any, to which the Commonwealth Parliament intends a law enacted in an area of concurrent legislative power to operate as a complete or exhaustive statement of the law on a subject-matter is often left by the

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104 *Cabell v Markham* (1945) 148 F 2d 737 at 739, quoted in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [27]; [2000] HCA 33 and in *Thiess v Collector of Customs* (2014) 250 CLR 664 at 672 [23]; [2014] HCA 12.

105 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; [1998] HCA 28.

106 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [91].

107 *Singh v The Commonwealth* (2004) 222 CLR 322 at 336 [19]; [2004] HCA 43.

108 *Singh v The Commonwealth* (2004) 222 CLR 322 at 336 [19].

Commonwealth Parliament to emerge inferentially by reference to the nature of the subject-matter and the express or apparent purpose of the Commonwealth law. However, the Commonwealth Parliament can, and not infrequently does, make the intended operation of the law express, either by stating that the law is to operate on a subject-matter to the exclusion of State or Territory laws or a category of State or Territory laws[109], or by stating that the law is to operate on a subject-matter concurrently with State or Territory laws or a category of State or Territory laws[110]. True it is that any such statement of legislative intention must be construed in context, and that the generality of the language in which such a statement is cast might, on a proper construction, be qualified by some contraindication in the legislative scheme of which it forms part[111]. But once the statement of legislative intention has been properly construed, fidelity to the constitutional relationship between courts and the legislature requires that the statement be given effect in determining the scope of the operation of the Commonwealth law[112].

The test of inconsistency applied

79 Having regard to the expression of the main object of the CA Act as being "to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation"[113], having regard to its evident purpose of facilitating implementation of Australia's obligation under Art 37 of the Chicago Convention to "collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation", and having regard to the obvious impracticality in the modern world of attempting to separate the regulation of domestic aviation from the regulation of international aviation, I see no reason to

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109 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 166-169 [370]-[372]; [2006] HCA 52, applying *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 especially at 109; [1948] HCA 13.

110 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 466, applying *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563; [1977] HCA 34. See also *Palmdale-AGCI Ltd v Workers' Compensation Commission (NSW)* (1977) 140 CLR 236 at 243; [1977] HCA 69.

111 *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 at 527 [20]; [2009] HCA 45; *Dickson v The Queen* (2010) 241 CLR 491 at 508 [36]-[37].

112 *Momcilovic v The Queen* (2011) 245 CLR 1 at 121 [272].

113 Section 3A of the CA Act.

gainsay the view taken in *Heli-Aust* that the CA Act has an operation as an exhaustive statement of the law in Australia on a subject-matter there described as "the safety of civil aviation in Australia"[114] or "the safety of air operations in Australia"[115]. The subject-matter can be described with more precision for present purposes, in language drawn from Annex 6 to the Chicago Convention, as encompassing the prescription and enforcement of standards for the safe operation of aircraft in, to and from Australia, noting that a "standard" for the purpose of the Chicago Convention is a "specification for physical characteristics, configuration, matériel, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention"[116].

80 Confirming the ambition of the CA Act to provide a single regulatory framework for the prescription and enforcement of standards for the safe operation of aircraft in, to and from Australia is the regulation-making power conferred by the CA Act. The power is expressed to allow for the making of regulations "for the purpose of carrying out and giving effect to the provisions of the Chicago Convention relating to safety", the making of regulations in relation to safety of air navigation in, to and from a Territory, and the making of regulations in relation to safety of air navigation, where the regulations are with respect to interstate and international trade and commerce or with respect to any other matter with respect to which the Commonwealth Parliament has power to make laws[117]. The evident intention is that the regulations made under the CA Act are to operate as comprehensively as the legislative power of the Commonwealth Parliament permits.

81 There is no reason to consider the reach of the CA Regulations to be less ambitious than is permitted under the CA Act. To the contrary, the CA Regulations are expressed at the outset to have comprehensive application in relation to air navigation throughout Australia and to and from Australia[118]. The CA Regulations are then structured to make detailed prescription in relation to subject-matters relevantly identified to include qualifications of flight crew (the subject-matter of Annex 1 to the Chicago Convention)[119], rules of the air (the

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114 (2011) 194 FCR 502 at 530 [67], 534 [83].

115 (2011) 194 FCR 502 at 554 [159]-[161], 555-556 [164].

116 Annex 6 to the Chicago Convention, Pt I at (xxi).

117 Section 98(1)(c)-(f) of the CA Act.

118 Regulation 3(1) of the CA Regulations.

119 Part 5 of the CA Regulations.

subject-matter of Annex 2 to the Chicago Convention)[120], airworthiness of aircraft (the subject-matter of Annex 8 to the Chicago Convention)[121] and air operations (the subject-matter of Annex 6 to the Chicago Convention)[122].

82 Whilst there may be exceptions, each regulation should be read as intended to lay down the sole rule to the precise topic with which it deals. Take, for example, the regulation which sets at 500 feet the minimum height at which aircraft can be flown over areas other than cities, towns or populous areas[123]. Accepting that the CA Act and the CA Regulations accommodate the prospect of a State or Territory law penalising the dangerous operation of an aircraft[124], it is impossible to see how the CA Act and the CA Regulations can be interpreted as accommodating the prospect of a State or Territory law setting a different minimum height of say 700 feet. That is so even though it would obviously be possible for the pilot of an aircraft to comply with the minimum height set under the CA Act by flying at or above the height set by the State or Territory law. The point is that, in setting the minimum height at which aircraft can be flown, the CA Regulations are specifying a physical requirement for the operation of aircraft the uniform application of which the CA Act treats as necessary for the safety and regularity of international air navigation.

83 Section 98(7) of the CA Act does not, in my opinion, indicate that regulations made under the CA Act are to have some less pervasive application. In providing that a "law of a Territory (not being a law of the Commonwealth) does not have effect to the extent to which it is inconsistent with a provision of the regulations having effect in that Territory", s 98(7), in my opinion, does no more than to provide for the consequence of inconsistency between a Territory law and a provision of the regulations to be that the Territory law is inoperative to the extent of the inconsistency[125]. And in going on to provide that "such a law shall not be taken to be inconsistent with such a provision to the extent that it is capable of operating concurrently with that provision", s 98(7), in my opinion, does no more than to confirm that the test of inconsistency between a law of a

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120 Parts 11 and 12 of the CA Regulations.

121 Part 4 of the CA Regulations.

122 Part 14 of the CA Regulations.

123 Regulation 157(1)(b) of the CA Regulations.

124 cf *R v Morris* [2004] QCA 408 at [4]-[7], [38]-[40], [51].

125 cf *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 466 [52]; [2013] HCA 55, citing *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 351 [75]; [1999] HCA 44.

Territory (not being a law of the Commonwealth) and a provision of the regulations is whether the Territory law, if operative, would "alter, impair or detract from" the operation of the regulation[126]. Section 98(7) has nothing to say about the extent to which the CA Regulations are intended to operate as a complete or exhaustive statement of the law on any subject-matter. Moreover, the section has nothing to say about the relationship between the CA Regulations and any State law. The section is rather framed to leave no doubt that a Territory law is either to stand with or yield to a regulation in precisely the same way as would a State law by force of s 109 of the *Constitution*.

84 To resolve the question of inconsistency in the present case, I do not think it is necessary to attempt to describe the area of operation of the CA Act with any greater precision than the prescription and enforcement of standards for the safe operation of aircraft. That is because, contrary to the ultimate holding in *Heli-Aust*, I am unable to construe the CA Act as including the subject-matter of s 28BE within the area in which that operation is exhaustive in light of the statement in s 28BE(5) 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". Section 28BE(5) makes plain that, irrespective of precisely how the area of operation of the CA Act might be described, the particular subject-matter of s 28BE is not within its exclusive operation. The subject-matter of s 28BE can be sufficiently described as the general requirement to exercise reasonable care and diligence in the operation of an aircraft.

85 Of course, the CA Act itself prescribes, and permits the prescription of, standards for the safe operation of aircraft which incorporate some requirement for the exercise of some measure of care and diligence. An example is the requirement in reg 215(2) of the CA Regulations that an operator ensure that an 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". The regulation must be taken to be a definitive statement of all that an operator has an obligation to include in an operations manual. The standard which reg 215(2) prescribes nevertheless coexists within the scheme of the CA Act with the obligation imposed on the operator by s 28BE(1) to exercise reasonable care and diligence in the operation of an aircraft, and the standard can also coexist with a similar obligation imposed on the operator by a State or Territory law. Some degree of overlap between a specifically prescribed standard and the general obligation imposed on the operator by s 28BE(1) accordingly does nothing to detract from the operation of s 28BE(5), which enables a State or Territory law to impose an enforceable obligation on the operator of an aircraft to exercise reasonable care

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126 cf *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 468 [59].

and diligence in the operation of an aircraft – an obligation which is cumulative upon all of the obligations that the operator has as the holder of an AOC under the CA Act.

86 To construe s 28BE(5) as an express acknowledgement of the cumulative or concurrent operation of State and Territory laws requiring the exercise of reasonable care and diligence in the operation of an aircraft is not to overlook the point made in *Heli-Aust* that s 28BE(5) is addressed in terms only to the non-exclusive operation of s 28BE itself[127]. What is important to recognise is that s 27(2) prohibits the operation of an aircraft in Australia except, relevantly, by the holder of an AOC and that the obligation imposed on the holder of an AOC by s 28BE(1) to "take all reasonable steps to ensure that every activity covered by the AOC, and everything done in connection with such an activity, is done with a reasonable degree of care and diligence" is necessarily cumulative upon the obligation imposed on the holder of an AOC by s 28BD(1) to "comply with all requirements of [the CA Act], the [CA Regulations] and the Civil Aviation Orders that apply to the holder". By making clear that a State or Territory law can impose a duty which coexists with the obligation imposed on the holder of an AOC by s 28BE(1), s 28BE(5) makes equally clear that a State or Territory law can impose a duty on the holder of an AOC which exists cumulatively upon the obligation imposed on the holder of an AOC by s 28BD(1) to comply with the other requirements of the Act, with the CA Regulations and with applicable Civil Aviation Orders.

87 Nor is to construe s 28BE(5) as an express acknowledgement of the cumulative or concurrent operation of State and Territory laws requiring the exercise of reasonable care and diligence in the operation of an aircraft to overlook another point made in *Heli-Aust*[128], that s 28BE(5) "has work to do in fields removed, and potentially far removed, from the maintenance of safety in civil aviation". That point may be accepted, but it does not mandate a construction of s 28BE(5) which would confine the section's operation to duties other than duties to exercise reasonable care or diligence in the operation of an aircraft. Such a construction does not sit comfortably with either s 28BE(5)'s reference to "[t]his section" or the generality of its references to "any other law" and "any duty". Such a construction, moreover, runs counter to the stated legislative purpose of inserting s 28BE(5) into s 28BE. The purpose recorded in the Explanatory Memorandum accompanying the Bill for the amending Act was to clarify that although s 28BE imposes by s 28BE(1) an obligation on the holder of an AOC to exercise reasonable care or diligence in the operation of an aircraft, a contravention of this obligation will not, by reason of s 28BE(4), give rise to an

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127 (2011) 194 FCR 502 at 531 [71].

128 (2011) 194 FCR 502 at 531 [72].

action for damages or compensation. The Explanatory Memorandum notes that s 28BE does not "affect any common law duty of care or any other statutory duty under which a person may be able to bring an action in negligence or other legal proceedings against the AOC holder"[129].

88 The potential scope of the "other legal proceedings against the AOC holder" to which reference was made in the Explanatory Memorandum is worth noting. The Chicago Convention has taken its place in international law alongside first the Warsaw Convention[130] and then the Montreal Convention[131], each of which has regulated the civil liability of international carriers. In the same way, the CA Act has taken its place within the Commonwealth statute book alongside the *Civil Aviation (Carriers' Liability) Act 1959* (Cth), which regulates the civil liability of international carriers. The CA Act has done so against the background of complementary State statutes[132] and of the common law, which together regulate the civil liability of domestic carriers. And just as the CA Act now sits within the Commonwealth statute book alongside the *Work Health and Safety Act 2011* (Cth), so the latter Act has come to be mirrored in complementary legislation in each State (other than Victoria and Western Australia) and Territory, of which the NT WHS Act is an example, imposing general obligations on persons conducting businesses or undertakings to "ensure, so far as is reasonably practicable", that health and safety is not put at risk[133]. Provided the qualification "so far as is reasonably practicable" takes as given the obligation to comply with the standards imposed by or under the CA Act, the application of those general statutory obligations to air operations conducted by the holder of an AOC creates no legal impediment and no obvious practical

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129 Australia, Senate, *Civil Aviation Legislation Amendment Bill 1995*, Explanatory Memorandum at 26.

130 Convention for the Unification of Certain Rules relating to International Carriage by Air (1929).

131 Convention for the Unification of Certain Rules for International Carriage by Air (1999).

132 See *Civil Aviation (Carriers' Liability) Act 1961* (Vic); *Civil Aviation (Carriers' Liability) Act 1961* (WA); *Civil Aviation (Carriers' Liability) Act 1962* (SA); *Civil Aviation (Carriers' Liability) Act 1963* (Tas); *Civil Aviation (Carriers' Liability) Act 1964* (Qld); *Civil Aviation (Carriers' Liability) Act 1967* (NSW).

133 See *Work Health and Safety Act 2011* (Cth), s 19(2); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT), s 19(2); *Work Health and Safety Act 2011* (ACT), s 19(2); *Work Health and Safety Act 2011* (NSW), s 19(2); *Work Health and Safety Act 2011* (Qld), s 19(2); *Work Health and Safety Act 2012* (SA), s 19(2); *Work Health and Safety Act 2012* (Tas), s 19(2).

impediment to the prescription or enforcement of standards for the safe operation of aircraft within the framework established by the CA Act.

89 To draw a mundane terrestrial analogy, the relevant distinction between the exclusive and non-exclusive areas of operation of the CA Act is akin to the distinction between, on the one hand, the statutory duties of the driver of a motor vehicle to be licensed and to obey the rules of the road, and, on the other hand, the common law and statutory duties of the driver of a motor vehicle to exercise reasonable care for the safety of other persons in the operation of the motor vehicle. Far from being in conflict, the two sets of duties are complementary.

90 There is nothing in the argument that the CA Act does not contemplate the intrusion into aircraft operations of a regulator other than the Civil Aviation Safety Authority ("CASA") and therefore does not accommodate investigative or enforcement action by the Work Health Authority under the NT WHS Act. Section 28BE(5)'s acknowledgement that the holder of an AOC can be subject to a duty imposed by or under another law carries with it an acknowledgement that the holder can become subject to investigative and enforcement action by a regulatory authority having responsibility for the administration of that other law. To the extent that particular administrative action taken by such a regulator might have the potential to impair or detract from the operation of the CA Act or action taken by CASA under the CA Act, the question of whether the action of the regulator might give rise to "operational" inconsistency would appropriately be addressed if and when the question arose. There is no such question in this case. The mere potential for inconsistency to arise in practice as a consequence of the exercise of one or more statutory powers is no reason for holding the statutes conferring those powers to be inconsistent in all of their potential applications[134].

91 For these reasons, I would allow the appeal and make the consequential orders proposed by Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

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134 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 631-632; *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557 at 574-576; [1942] HCA 30; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 417 [62], 441 [145]; [1999] HCA 5.

EDELMAN J.

A. Introduction

92 Every day, aircraft pilots in Australia operate flights consistently with the rules of the air, making decisions that could affect the safety of themselves and their passengers. Those decisions must be made consistently with Commonwealth legislation and legislative instruments, collectively described on this appeal as the Civil Aviation Law. The Civil Aviation Law provides a comprehensive, uniform scheme for regulating safety of air navigation. It gives effect to the Convention on International Civil Aviation (1944) ("the Chicago Convention"), the "highest obligation"[135] of which was to secure uniformity of aviation practices with the object of safety and orderly growth of civil aviation[136]. Does the Civil Aviation Law contemplate that its scheme, including duties concerning aviation safety, could be fragmented by the concurrent application of a different safety regime in the States and Territories?

93 It is plain that the answer to this question in relation to the rules of the air is "no"[137]. The Civil Aviation Law operates exclusively to cover a subject matter that includes at least the rules of the air. The Attorney-General of the Commonwealth gave this answer "without hesitation". The first respondent, Outback Ballooning Pty Ltd, described it as "self-evident". The appellant Work Health Authority and the Attorney-General for the State of Western Australia described that circumstance as one that might "cry out for one comprehensive regulatory regime". As an example, it would be surprising, confusing, and potentially dangerous if the Civil Aviation Law were to have the effect that the rules of the air on a flight from Darwin to Melbourne, via Sydney, could be regulated not merely by the comprehensive and uniform rules policed by the Commonwealth Civil Aviation Safety Authority ("CASA"), but also, depending upon the airspace, by separate and different rules policed by the Work Health Authority and its inspectors in the Northern Territory, or regulators in New South Wales and Victoria. In order to avoid jeopardy to safety, since aircraft cross State and Territory boundaries, there must be "uniform standards for personnel training and licensing, rules of the air, units of measurement, certification of airworthiness, aeronautical communications, characteristics of airports, aircraft operation and many other aspects"[138].

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135 *Airlines of NSW Pty Ltd v New South Wales [No 2]* ("*Airlines No 2*") (1965) 113 CLR 54 at 87; [1965] HCA 3.

136 *Airlines No 2* (1965) 113 CLR 54 at 86, see also at 152.

137 *Airlines No 2* (1965) 113 CLR 54 at 151.

138 Milde, *International Air Law and ICAO*, 2nd ed (2012) at 167.

94 The essential issue on this appeal is whether this zone of exclusivity of the Civil Aviation Law includes standards concerning safety in the process of boarding an aircraft in s 19(2) of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ("the WHS Act"). The Court of Appeal of the Northern Territory held that it does. To determine whether that conclusion is correct requires characterisation of the zone of exclusivity. The Work Health Authority submitted that the Court of Appeal erred because the Civil Aviation Law was exclusive only with respect to "safety in civil aviation or air navigation in flight, including ground operations which affect the safety of aviation and passengers in flight". The Work Health Authority submitted that this did not apply to safety in the course of boarding an aircraft.

95 If the Work Health Authority's submission were correct, the result in this appeal would differ depending upon whether the breach of a safety standard occurred in the moments immediately before take-off or the moments immediately after it. That submission should not be accepted. The Court of Appeal was correct to conclude that the zone of exclusivity extended to the circumstances of this case. The exclusive subject matter of the Civil Aviation Law extends to the prescription and enforcement of standards of safety in the conduct of air navigation in, or from, Australia. That subject matter is not limited to the period commencing when an aircraft leaves the ground. It includes, at least, the period before flight when passengers are boarding, especially if an aeroplane engine or hot air balloon inflation fan is running.

96 There are, of course, some subject matters which are outside the exclusive regime of air safety. These include the general criminal law, air security, and torts to individuals. No party to this appeal submitted that any of these matters was the subject matter of s 19(2) of the WHS Act. No party supported, and the Commonwealth denied, any analogy with the law of torts, which falls outside the exclusive regime, that the subject matter of s 19(2) was the protection of individual rights. That approach was correct. There is a fundamental conceptual gulf between the protection of individual rights by the law of torts and laws concerning the general regulation of safety of the community.

97 The subject matter of the WHS Act concerns the prescription and enforcement of standards of safety of all persons in a business. None of the parties to this appeal submitted that the WHS Act could be construed to exclude from its application the safety of air navigation. Hence, the exclusivity of the Civil Aviation Law over the same subject matter where the business involves air navigation has the effect that s 19(2) of the WHS Act is invalid insofar as its terms purport to establish concurrent regulation over the safety of air navigation, including the process of boarding an aircraft.

98 The appeal should be dismissed.

B. The context of the issue on this appeal

99 Outback Ballooning provides hot air balloon flights to the public. On 13 July 2013, the pilot in command was supervising the boarding of a balloon by passengers. The inflation fan, a standalone piece of equipment used to inflate the balloon, had been started. A passenger, Ms Bernoth, was directed to board the balloon from the side where the inflation fan was operating. Ms Bernoth was wearing a scarf around her neck. As she boarded the balloon, her scarf was sucked into the fan. She was severely injured and later died in hospital.

100 Outback Ballooning was charged by the Work Health Authority under s 32 of the WHS Act for failing to comply with its duty under s 19(2) to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of its business.

101 The complaint issued against Outback Ballooning in essence alleges that Outback Ballooning failed to eliminate or minimise risks to the health and safety of persons as far as was reasonably practicable because it would have been reasonably practicable to take the following steps: (i) warn passengers about the danger of having loose clothing around the inflation fan, and check passengers while giving such a warning; (ii) set up an exclusion zone and physical barrier around the fan; and (iii) direct passengers not to walk past the fan while in operation or supervise passengers to ensure they kept a safe distance if there was a need to walk past the fan.

102 The Court of Appeal, following the decision of the Full Court of the Federal Court of Australia in *Heli-Aust Pty Ltd v Cahill*[139], held that the Civil Aviation Law exclusively regulated the subject matter of the safety of civil aviation in Australia and that this extended to the boarding or loading of passengers onto the balloon in the circumstances of this case[140]. The Court of Appeal therefore concluded that s 19(2) did not operate in relation to the boarding of a balloon by passengers. That conclusion was correct.

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139 (2011) 194 FCR 502.

140 *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1 at 11-12 [59], 12 [61], 19 [99].

C. The structure of these reasons

103 The remainder of these reasons is structured as follows:

D. The concept of inconsistency

104 The concept of inconsistency between a Commonwealth law and a Northern Territory law involves the same test as, although not identical

consequences to[141], the concept, recognised in s 109 of the *Constitution*, of inconsistency between a Commonwealth law and a State law[142]. The different consequences are that inconsistency leads to a State law being inoperative, capable of later revival, but it leads to the Territory law being invalid and beyond power due to either an express limit on Territory law-making power for inconsistencies with earlier Commonwealth laws[143] or a necessarily implied limitation for inconsistencies with later Commonwealth laws[144].

105 The early view of s 109, expounded by Griffith CJ, was that inconsistency was limited to circumstances where obedience to both laws was impossible[145]. But, as Gummow J and Hayne J observed, that view did not prevail[146]. Inconsistency arises whenever there is a "real conflict" between two laws[147]. Real conflict occurs whenever a State or Territory law "would alter, impair or detract from"[148] the Commonwealth law. This verbal formula concerning altering, impairing, or detracting has sometimes been limited to instances

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141 See *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 418-419; [1984] HCA 13; *Attorney-General (NT) v Hand* (1989) 25 FCR 345 at 366-367, and the discussion in Twomey, "Inconsistency Between Commonwealth and Territory Laws" (2014) 42 *Federal Law Review* 421 at 422-423, 426. See also *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464; [1984] HCA 74.

142 *Northern Territory v GPAO* (1999) 196 CLR 553 at 581-582 [57], 630 [202], 636 [219]; [1999] HCA 8.

143 *Northern Territory (Self-Government) Act 1978* (Cth), s 57; *Northern Territory v GPAO* (1999) 196 CLR 553 at 578-579 [46]-[49].

144 Twomey, "Inconsistency Between Commonwealth and Territory Laws" (2014) 42 *Federal Law Review* 421 at 426; Leeming, *Resolving Conflicts of Laws* (2011) at 235.

145 *Federated Saw Mill &c Employes of Australasia v James Moore & Son Pty Ltd* (1909) 8 CLR 465 at 500; [1909] HCA 43; *Australian Boot Trade Employes Federation v Whybrow & Co* (1910) 10 CLR 266 at 286; [1910] HCA 8.

146 *Momcilovic v The Queen* (2011) 245 CLR 1 at 110-111 [241], 135 [322]; [2011] HCA 34.

147 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42]; [2011] HCA 33.

148 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630; [1937] HCA 82. See also *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136-137; [1932] HCA 40.

described as "direct inconsistency", with a different category of conflict said to be one of "indirect inconsistency". This distinction can mislead[149], especially in this context. A better approach, without attempting to abolish concepts that have a long-established usage in both case law and legislation, is to accept that both direct and indirect inconsistency involve the State or Territory law altering, impairing, or detracting from the Commonwealth law but to acknowledge that the descriptions of direct and indirect inconsistency are simply attempts to describe different ways that this can occur.

106 The category sometimes described as indirect inconsistency arises where the State, or Territory[150], law purports to address a subject matter despite an expression or an implication that the Commonwealth law is exhaustive, "covering"[151] a "subject matter" or a "matter"[152]. In other words, indirect inconsistency usually describes an implication where the Commonwealth law "contains an implicit negative proposition that nothing other than what the [Commonwealth] law provides upon a particular subject matter is to be the subject of legislation"[153]. The existence of such an implication, and the characterisation of the subject matter, is determined by interpretation of the Commonwealth law[154]. It will usually be a logically anterior issue to that of "direct" inconsistency.

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149 See *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 280; [1980] HCA 8; *Momcilovic v The Queen* (2011) 245 CLR 1 at 112 [245], 140-141 [339].

150 See *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 466 [52]; [2013] HCA 55; cf *Civil Aviation Act 1988* (Cth), s 98(7).

151 *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12.

152 *Ex parte McLean* (1930) 43 CLR 472 at 483; *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630, 634; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [28]; [1999] HCA 12; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]; [2010] HCA 30; *Momcilovic v The Queen* (2011) 245 CLR 1 at 118 [264].

153 *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [244]. See also *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 468 [59].

154 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 526 [45]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [242], 135 [323]; *Bell Group NV (In liq) v Western Australia* (2016) 260 CLR 500 at 521-522 [52]; [2016] HCA 21.

107 In contrast, the description "direct inconsistency" is usually applied where the State or Territory law alters, impairs, or detracts from the Commonwealth law either despite the two laws operating on different subject matters or despite the Commonwealth law not excluding concurrent operation on the same subject matter. Following a concession by Outback Ballooning in oral submissions, this appeal is not concerned with so-called direct inconsistency. It is concerned only with indirect inconsistency.

E. The subject matter exclusively covered by the Civil Aviation Law

108 The starting point for an assessment of inconsistency is the interpretation of the Commonwealth law[155]. The relevant Commonwealth law on this appeal is comprised in the suite of laws, described on this appeal as the Civil Aviation Law, that give effect to Australia's obligations under the Chicago Convention.

109 The Civil Aviation Law includes the remaining provisions of the *Air Navigation Act 1920* (Cth), s 3A of which approves Australia's ratification of the Chicago Convention. However, the Civil Aviation Law primarily comprises the *Civil Aviation Act 1988* (Cth), which repealed and substantially re-enacted parts of the *Air Navigation Act*. The Civil Aviation Law also includes instruments made under the *Civil Aviation Act*, namely, the *Civil Aviation Regulations 1988* (Cth), the *Civil Aviation Safety Regulations 1998* (Cth), and *Civil Aviation Orders*. In 1960, one reason given by the Minister for Defence for not restricting the Civil Aviation Law to a single instrument, including "many of the regulations [that] relate to detailed safety standards", was the frequency with which, and extent to which, the Annexes to the Chicago Convention were amended[156].

(i) The dispute about the extent of exclusivity

110 There can be little doubt that the Civil Aviation Law contains the implicit negative proposition that nothing other than what the Commonwealth law provides upon a particular subject matter is to be the subject of legislation. The existence of a core of exclusivity in the Civil Aviation Law is clear from the background, context, and text of the Civil Aviation Law. Each of the background, context, and text of the Civil Aviation Law supports an implication, in terms expressed by Outback Ballooning, that the law exclusively covers at least the subject matter of the prescription and enforcement of standards of safety in the conduct of civil air navigation in, to or from Australia. Expressed in short, the exclusive subject matter is standards of safety in air navigation.

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155 *Momcilovic v The Queen* (2011) 245 CLR 1 at 115 [258].

156 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 May 1960 at 1764.

111 Although none of the parties to this appeal disputed that the Commonwealth Parliament intended the Civil Aviation Law to be exclusive as to some subject matter, none of the parties other than Outback Ballooning focused upon the scope or boundaries of the exclusivity. For instance, the Attorney-General of the Commonwealth conceded in oral reply that there was a "subject that the Commonwealth has comprehensively regulated" and a "comprehensive Commonwealth sphere", but did not seek to define that sphere or to explain its boundaries. The Work Health Authority accepted that the Civil Aviation Law had exclusive coverage over some subject matter but only in oral reply did it submit that, if pressed to formulate the subject matter of exclusivity, it would adopt the formulation of Barr J in the Supreme Court of the Northern Territory[157] that the Civil Aviation Law was "exclusive on the subject matter of safety in civil aviation or air navigation in flight, including ground operations which affect the safety of aviation and passengers in flight". The Work Health Authority submitted that "ground operations" affecting "the safety of aviation and passengers in flight" did not include the embarkation of passengers.

112 No party contended that a hot air balloon was exempted from the exclusivity of the Civil Aviation Law. Such a submission could not have succeeded in light of (i) the width of the current definition of aircraft in the Civil Aviation Law, and its background and context, which specifically included hot air balloons[158], and (ii) the detail of regulations and orders in the Civil Aviation Law dealing specifically with hot air balloons[159].

(ii) The consistent international goal of uniform safety rules for air navigation

113 The first multilateral attempt at uniformity of regulation of air safety was the Convention relating to the Regulation of Aerial Navigation (1919) ("the Paris Convention"). The Paris Convention was ratified by over 30 states, including Australia. In Art 2, each contracting state undertook in times of peace to accord freedom of innocent passage above its territory to the aircraft of other contracting states, provided that the conditions under the Paris Convention were

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157 *Work Health Authority v Outback Ballooning Pty Ltd* (2017) 318 FLR 294 at 301 [21].

158 *Civil Aviation Act*, s 3. See also *Laroche v Spirit of Adventure (UK) Ltd* [2009] QB 778 at 789 [45]; *Air Navigation Regulations 1921* (Cth) Statutory Rule No 33 of 1921, reg 3(1).

159 *Civil Aviation Regulations 1988* (Cth), Pt 5, regs 58(1), 59(3), 60, 162(1), 259, Sch 7 Pt 5; *Civil Aviation Safety Regulations 1998* (Cth), regs 21.021, 21.184(4)(a), 21.820(4)(a), 21.825, 21.830, Pt 31; *Civil Aviation Orders* 20.16.3, 40.7, 82.7, 101.54.

observed. Those included conditions in its Annexes which set uniform standards with respect to airworthiness for airlines and certificates of competency for pilots, and established an independent body whose purposes included the harmonisation of standards in technical matters[160].

114 In 1944, the Chicago Convention "supersede[d]"[161] the Paris Convention. The need for uniformity is central to the Chicago Convention. Part II of the Chicago Convention establishes the International Civil Aviation Organization ("the ICAO"), of which Australia is one of the 192 member states. The objectives of the ICAO are stated in Art 44 and include the promotion of "safety of flight in international air navigation". One of the mandatory functions of the Council of the ICAO is to adopt "international standards and recommended practices", which are promulgated as Annexes to the Chicago Convention[162].

115 Article 12 of the Chicago Convention provides that contracting states undertake to keep uniform, "to the greatest possible extent", the Convention rules and regulations relating to the flight and manoeuvre of aircraft. Article 37 provides for contracting states to "collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation". In *Airlines No 2*[163], Barwick CJ described Art 37 as an obligation "to secure in Australia uniformity of standards, practices, procedures and organization to the extent mentioned in art 37, and where annexes have been relevantly adopted to achieve uniformity according to the standards, practices and procedures which they do adopt".

116 Annex 6 to the Chicago Convention, entitled "Operation of Aircraft"[164], has the purpose of contributing to "the safety of international air navigation by providing criteria of safe operating practice", and contains "the minimum Standards applicable to the operation of aeroplanes". It defines a "Standard" in terms that relate to safety and uniformity[165]:

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160 Bartsch, *Aviation Law in Australia*, 4th ed (2013) at 5 [1.10]; Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 31.

161 Chicago Convention, Art 80.

162 Chicago Convention, Art 54(l).

163 (1965) 113 CLR 54 at 87, see also at 138 per Menzies J and at 152 per Windeyer J.

164 Annex 6 to the Chicago Convention, 9th ed (2010), Pt I at (xviii).

165 Annex 6 to the Chicago Convention, 9th ed (2010), Pt I at (xxi).

> "*Standard:* Any specification for physical characteristics, configuration, matériel, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38."

117 Annex 6 provides for state parties to "establish a State safety programme in order to achieve an acceptable level of safety in civil aviation"[166] and to "require, as part of their State safety programme, that an operator implement a safety management system" which fulfils various minimum safety requirements[167].

118 The general provision in Annex 6 for the implementation of minimum safety requirements is not one that invites a number of different standards within a single contracting state. It strives towards a goal of uniformity, by providing for a single international standard imposing a duty upon operators to achieve a required minimum level of safety. For this reason, Art 38 requires a contracting state to notify the ICAO if it deviates from the ICAO's standards. The notification must be given where the domestic regulations or practices differ "in any particular respect" from the international standard[168]. The notification must be given immediately. The Council of the ICAO is then obliged to make immediate notification of that difference to all other contracting states. The rationale for this strict requirement to notify any differences is the need for full transparency so that all contracting states are "aware, in the interest of safety of air navigation, that in a particular place the standard procedures, facilities or services are not available"[169].

(iii) The international goal was a basis for the Civil Aviation Law

119 The legislation comprising the Civil Aviation Law was enacted and amended against the background of these efforts, now over nearly a century, to create uniformity in air navigation laws and consequent safety. As Barwick CJ

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166 Annex 6 to the Chicago Convention, 9th ed (2010), Pt I, Ch 3, cl 3.3.1.

167 Annex 6 to the Chicago Convention, 9th ed (2010), Pt I, Ch 3, cl 3.3.3.

168 Chicago Convention, Art 38.

169 Milde, "Enforcement of Aviation Safety Standards: Problems of Safety Oversight" (1996) 45 *German Journal of Air and Space Law* 3 at 6. See also Milde, *International Air Law and ICAO*, 2nd ed (2012) at 171.

said in *Airlines No 2*[170], the object of uniformity is "the safety and orderly growth of civil aviation throughout the world".

120 The Paris Convention and its Annexes were described by Latham CJ, quoting the Privy Council, as covering "almost every conceivable matter relating to aerial navigation"[171]. In 1937, following an unsuccessful attempt to confer power on the Commonwealth to make laws with respect to air navigation and aircraft, which failed at a referendum[172], the Commonwealth and State governments agreed that each State would enact legislation which, as recited in the preambles to the Acts, applied the Commonwealth Air Navigation Regulations within each State to provide for "uniform rules throughout the Commonwealth" on matters including air navigation and aircraft[173].

121 The Chicago Convention, which Australia ratified in 1947, was likewise described by Owen J as covering "almost every conceivable matter relating to aerial navigation"[174]. The *Air Navigation Act 1947* (Cth) and the *Air Navigation Act (No 2) 1947* (Cth) amended the *Air Navigation Act* to approve of Australia's ratification of the Chicago Convention and to confer power, on the "widest possible basis", to make regulations for the purpose of carrying out and giving effect to the Chicago Convention[175]. In 1960[176], when significant amendments were made to the *Air Navigation Act*, the Chicago Convention was included as a Schedule. And in 1964[177], the Commonwealth, relying in part upon an expanded view of s 51(i) of the *Constitution*, extended the *Air Navigation Regulations*

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170 (1965) 113 CLR 54 at 86, see also at 151-152 per Windeyer J.

171 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 634; [1936] HCA 52, quoting *In re The Regulation and Control of Aeronautics in Canada* [1932] AC 54 at 77.

172 And again in 1944: see *Airlines of NSW Pty Ltd v New South Wales* ("*Airlines No 1*") (1964) 113 CLR 1 at 37; [1964] HCA 2.

173 *Air Navigation Act 1938* (NSW); *Air Navigation Act 1937* (Vic); *Air Navigation Act 1937* (SA); *Air Navigation Act 1937* (Qld); *Air Navigation Act 1937* (WA); *Air Navigation Act 1937* (Tas). See also *Airlines No 1* (1964) 113 CLR 1 at 35; Richardson, "Aviation Law in Australia" (1965) 1 *Federal Law Review* 242 at 252.

174 *Airlines No 2* (1965) 113 CLR 54 at 159.

175 *Airlines No 1* (1964) 113 CLR 1 at 37.

176 *Air Navigation Act 1960* (Cth).

177 *Air Navigation Regulations (Amendment)* (Cth) Statutory Rule No 128 of 1964, reg 3(c). See *Airlines No 2* (1965) 113 CLR 54 at 96, 111, 123, 153.

(Cth), which Taylor J had earlier described as a "studied and careful attempt to devise general and comprehensive rules for securing safety in and in relation to the operation of aircraft"[178], to all civil air navigation in Australia, domestic or international. Similarly, s 98(1) of the *Civil Aviation Act* provides for a purpose of making regulations to be "carrying out and giving effect to the provisions of the Chicago Convention relating to safety"[179] and "in relation to safety of air navigation" within the limits of the powers of the Commonwealth Parliament[180]. Like the *Air Navigation Regulations*, the *Civil Aviation Regulations* are expressed to apply to all civil air navigation within Australian territory[181].

(iv) The textual basis for exclusivity of safety of air navigation in the Civil Aviation Act

122 The long title of the *Civil Aviation Act* is "An Act to establish a Civil Aviation Safety Authority with functions relating to civil aviation, in particular the safety of civil aviation, and for related purposes". Together with the provisions in Pt 14 of the *Civil Aviation Regulations* and certain *Civil Aviation Orders*, the *Civil Aviation Act* implements and extends the safety requirements in Annex 6 in a consistent regime of standards of safety of air navigation in Australia, domestic or international.

123 The careful and detailed text of the Civil Aviation Law prescribes a regime for safety of air navigation that requires an exclusive and unitary, uniform approach because every person involved in an air operation must be able to identify the set of rules governing the safety of that operation, and must be able to identify the person with whose directions he or she is required to comply[182]. That can become impracticable or impossible if there are two or more safety regimes, involving instructions from two or more safety regulators, even if those regimes and instructions impose identical obligations. Indeed, one of the matters about which CASA must be satisfied before issuing an Air Operator's Certificate ("AOC") is that "the organisation's chain of command is appropriate to ensure that the AOC operations can be conducted or carried out safely"[183].

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178 *Airlines No 1* (1964) 113 CLR 1 at 39.

179 *Civil Aviation Act*, s 98(1)(c).

180 *Civil Aviation Act*, s 98(1)(d)-(f).

181 *Civil Aviation Regulations*, reg 3(1)(a)-(e), (g).

182 See Bartsch, *Aviation Law in Australia*, 4th ed (2013) at 471 [12.130].

183 *Civil Aviation Act*, s 28(1)(b)(ii).

124 CASA is established by s 8 of the *Civil Aviation Act*. By s 9, CASA's functions include conducting the safety regulation of civil air operations in Australian territory by means that include developing and promulgating appropriate, clear and concise aviation safety standards. In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration[184] and act consistently with Australia's obligations under the Chicago Convention[185], including Annex 6[186].

125 Section 27(2)(b) provides relevantly that an aircraft shall not operate in Australian territory except as authorised by an AOC. An AOC is issued by CASA on an application made in accordance with Pt III, Div 2, Subdiv B. CASA must issue an AOC if, and only if, the criteria in s 28 are satisfied, most of which are concerned with safety. The first of these is that CASA is satisfied that the applicant has complied with, or is capable of complying with, the "safety rules"[187]. The safety rules are, in effect, all the provisions of the Civil Aviation Law that relate to safety[188]. And, as explained above, most are contained in the *Civil Aviation Regulations* due to the frequency with which, and extent to which, the Chicago Convention is amended.

126 A central manner in which the *Civil Aviation Regulations* have regulated safety is by imposing a duty upon operators to create an operations manual that contains all matters necessary to ensure safe flight operations. This implements cl 4.2.3 of Pt I of Annex 6 to the Chicago Convention. An applicant for an AOC is required to lodge the current or proposed version of the operations manual with CASA[189]. The regulations, as supplemented by directions given by CASA in the form of *Civil Aviation Orders*, are highly prescriptive of the content of the operations manual and the consequences for failing to comply with it.

127 Of particular note is reg 215 of the *Civil Aviation Regulations*. An obligation in this form has existed since its predecessor, reg 212 of the *Air Navigation Regulations*, was amended in 1971[190]. Regulation 215(1) requires

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184 *Civil Aviation Act*, s 9A(1).

185 *Civil Aviation Act*, s 11.

186 *Civil Aviation Act*, s 3 (definition of "Chicago Convention").

187 *Civil Aviation Act*, s 28(1)(a).

188 *Civil Aviation Act*, s 3 (definition of "safety rules").

189 *Civil Aviation Act*, s 27AB(2)(a).

190 *Air Navigation Regulations (Amendment)* (Cth) Statutory Rule No 31 of 1971, reg 31.

an operator to provide an operations manual for the use and guidance of the operations personnel of the operator. 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"[191]. The operator must revise the operations manual from time to time where necessary[192], and CASA may give a direction requiring that the operator include particular content or revise the operations manual[193]. Each member of the operations personnel of an operator must comply with all applicable instructions contained in the operations manual[194]. Offences under reg 215 are strict liability offences[195].

128 Section 29(1) of the *Civil Aviation Act* creates an offence where the owner, operator, hirer, or pilot of an aircraft operates the aircraft or permits the aircraft to be operated in contravention of a provision of Pt III of the *Civil Aviation Act* or a direction given or condition imposed under such a provision. When read with s 28BD(1), which requires the holder of an AOC to comply with all applicable requirements of the Civil Aviation Law, s 29(1) has the effect of criminalising a breach of any of the requirements of the Civil Aviation Law if the holder of the AOC is the owner, operator, hirer, or pilot of the aircraft. An offence is also committed under s 29(3) if the owner, operator, hirer, or pilot of an aircraft operates the aircraft being reckless as to whether the manner of operation could endanger the life of another person.

129 The textual detail of the regime of safety of air navigation is particularly prominent in the provisions of the Civil Aviation Law that concern the authority of the pilot in command. Under reg 224(2) of the *Civil Aviation Regulations*, the pilot in command is responsible for: (a) the start, continuation, diversion and end of a flight by the aircraft; (b) the operation and safety of the aircraft during flight time; (c) the safety of persons and cargo carried on the aircraft; and (d) the conduct and safety of members of the crew on the aircraft. The pilot in command must discharge these responsibilities in accordance with the Civil Aviation Law and, if applicable, the operations manual[196]. The pilot in command's

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191 *Civil Aviation Regulations*, reg 215(2).

192 *Civil Aviation Regulations*, reg 215(5).

193 *Civil Aviation Regulations*, reg 215(3).

194 *Civil Aviation Regulations*, reg 215(9).

195 *Civil Aviation Regulations*, reg 215(11).

196 *Civil Aviation Regulations*, reg 224(2A).

responsibility for maintaining discipline of all persons on board creates a correlative duty on the part of those persons to obey the pilot in command[197].

(v) Territorial self-government provisions do not detract from exclusivity

130 Some Commonwealth laws and regulations contain a provision which evinces "an intention that the statute is not intended to cover the field", for example by providing that the law is "not intended to exclude or limit" the concurrent operation of any State and Territory laws[198], or by referring to the "concurrent operation" of laws of both States and Territories in the absence of "direct inconsistency"[199]. Provisions of this type that militate against an implication of exclusivity might be described as "anti-exclusivity" clauses.

131 Section 98(7) of the *Civil Aviation Act* provides as follows:

> "A law of a Territory (not being a law of the Commonwealth) does not have effect to the extent to which it is inconsistent with a provision of the regulations having effect in that Territory, but such a law shall not be taken to be inconsistent with such a provision to the extent that it is capable of operating concurrently with that provision."

132 This sub-section is not an "anti-exclusivity" clause for four reasons. First, it is directed to the laws of a Territory, not the laws of the Commonwealth. It is concerned with the effect of inconsistent laws of a Territory. It is not concerned with whether regulations made under Commonwealth legislation are intended to exclude or limit Territory laws[200]. In *The Commonwealth v Australian Capital Territory*[201], this Court said of the similar terms of s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth):

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197 Bartsch, *Aviation Law in Australia*, 4th ed (2013) at 465-466 [12.95].

198 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564; [1977] HCA 34; *Palmdale-AGCI Ltd v Workers' Compensation Commission (NSW)* (1977) 140 CLR 236 at 243; [1977] HCA 69; *Momcilovic v The Queen* (2011) 245 CLR 1 at 121 [272]. See also *Momcilovic v The Queen* (2011) 245 CLR 1 at 120-121 [271], referring to s 150 of the *Petroleum (Submerged Lands) Act 1967* (Cth).

199 See, eg, *Corporations Act 2001* (Cth), s 5E(1), (4); *Personal Property Securities Act 2009* (Cth), s 254.

200 Compare *Competition and Consumer Act 2010* (Cth), s 51AAA.

201 (2013) 250 CLR 441 at 466 [53].

> "The text of s 28 thus makes plain that the section is directed to the effect which is to be given to an enactment of the Assembly; it is *not* directed to the effect which is to be given to a federal law. That is, s 28 is a constraint upon the operation of the enactment of the Territory Assembly. It does not say, and it is not to be understood as providing, that laws of the federal Parliament are to be read down or construed in a way which would permit concurrent operation of Territory enactments." (emphasis in original)

133 Secondly, s 98(7) is an example of a provision concerning only the Territories that commonly appears in Commonwealth legislation[202]. The common form of such a provision, in the Northern Territory and the Australian Capital Territory, employs a post-self-government drafting technique intended to reflect the general principle of s 109 of the *Constitution*. The classic example of this technique is in s 28 of the *Australian Capital Territory (Self-Government) Act*, which is entitled "Inconsistency with other laws". That section provides that a provision of an enactment has no effect to the extent that it is inconsistent with a law in force in the Australian Capital Territory, but that "such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law". In other words, the Commonwealth Parliament, recognising that s 109 of the *Constitution* has no direct application to the Australian Capital Territory, provided a rule of inconsistency drawing upon s 109 concepts to be applied to conflicts between a Commonwealth law and a law of the Australian Capital Territory[203].

134 Thirdly, that s 98(7) should have this interpretation, creating a rule of interpretation with similar effect to s 109 of the *Constitution* as a response to Territorial self-government, is also supported by the history and context of the sub-section. As to history, the predecessor to the provision was s 26(5) of the *Air Navigation Act*. That provision was inserted by s 5 of the *Air Navigation Amendment Act 1980* (Cth), after the Northern Territory was granted self-government, in order to "put the Northern Territory in the same position as the States in regard to the control of air services within the Territory's boundaries"[204]. The amendments also included a new s 2A, which provided that

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202 See, eg, *Cocos (Keeling) Islands Act 1955* (Cth), s 8A; *Christmas Island Act 1958* (Cth), s 8A; *Norfolk Island Act 1979* (Cth), s 18A; *Antarctic Marine Living Resources Conservation Act 1981* (Cth), s 6; *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 7(2); *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth), s 11.

203 Twomey, "Inconsistency Between Commonwealth and Territory Laws" (2014) 42 *Federal Law Review* 421 at 438.

204 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 March 1980 at 1034.

the Act also bound the Northern Territory, and s 26(4), which was the predecessor to s 98(6) of the *Civil Aviation Act*. As to context, s 98(6) is further evidence of the focus of s 98(7) upon Territory self-government, as s 98(6) provides that the preceding provisions of s 98 "have effect as if the Northern Territory were a State".

135 Fourthly, if a Commonwealth provision like s 98(7) were an anti-exclusivity clause, then it would have the effect that uniform Commonwealth legislation otherwise exclusively covering a subject matter in the States would not do so in the Territories. That would be a very surprising result which must militate against such an interpretation[205].

(vi) The 1995 amendments to the Civil Aviation Act did not alter its exclusivity

136 The Work Health Authority and the interveners placed considerable emphasis on s 28BE(5) of the *Civil Aviation Act* manifesting a lack of parliamentary intention for the subject matter of safety of air navigation to be exclusive. There are two fundamental points about s 28BE(5) that combine to show that the sub-section did not affect the scope of exclusivity of the regime of standards of safety in air navigation. The first is that s 28BE was not inserted into the *Civil Aviation Act* until 1995 by the *Civil Aviation Legislation Amendment Act 1995* (Cth). The second is that s 28BE(1) is not a tortious duty. There is a vast conceptual gap between a duty that regulates safety and one that protects rights. Section 28BE(5) was therefore a precautionary clause that provided that previous laws both within and outside the exclusive regime were unaffected.

137 The 1995 amendments included s 28BE(1), which requires the holder of an AOC to "take all reasonable steps to ensure that every activity covered by the AOC, and everything done in connection with such an activity, is done with a reasonable degree of care and diligence". The amendments also included s 28BE(4), which provides that no action lies, for damages or compensation, in respect of a contravention of the section. And they included s 28BE(5), which 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". The use of the words "does not affect" is important. Section 28BE(5) does *not* say that other State or Territory, Commonwealth, or common law duties are preserved. It merely says that the section does not affect them. If the duties had been excluded because they fall within the area of exclusivity then s 28BE(5) does not reinstate them. If the duties had not previously been excluded then they are not excluded by s 28BE.

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205 *Northern Territory v GPAO* (1999) 196 CLR 553 at 581-582 [57].

138 Although the Work Health Authority and all the interveners on this appeal relied upon s 28BE(5) of the *Civil Aviation Act*, only the Commonwealth Attorney-General acknowledged the timing of its introduction in 1995, saying in oral reply that s 28BE(5) "reflects an *acknowledgement*" that the Civil Aviation Law did not exclusively cover the subject matter of the safety of air navigation (emphasis added). However, this submission involves the logical fallacy of assuming that which is sought to be proved. Section 28BE(5) could only confirm or acknowledge a lack of exclusivity if such a lack of exclusivity preceded the provision. The operation of s 28BE(5) must be understood in the context of the effect that it had, and was intended to have, upon the pre-existing terms of the *Civil Aviation Act*. Those terms had established a legislative intention to cover exhaustively the subject matter of the safety of air navigation.

139 The *Civil Aviation Legislation Amendment Act* involved amendments to establish CASA as the organisation with responsibility for the safety regulation of civil aviation in Australia. The Explanatory Memorandum explained that many of the provisions in the *Civil Aviation Act* "remain wholly or largely unchanged because they provide appropriately for the aviation safety regulation activities which CASA will take over when it commences operations"[206]. The introduction of CASA could hardly be interpreted as manifesting a parliamentary intention that the regulation of safety of air navigation not be exclusive. On the contrary, as the Explanatory Memorandum said, CASA was intended to be a body with enhanced independence to oversee the implementation of aviation safety standards[207].

140 There is no need to interpret the provision in s 28BE(5) as unwinding the pre-existing exclusivity of the regime of safety of air navigation. Rather, taken as a whole, and in the context of the pre-existing exclusive subject matter of safety of air navigation in the Civil Aviation Law, sub-ss (4) and (5) of s 28BE are provisions designed to ensure that none of the pre-existing law is altered. As the Explanatory Memorandum explained, the section "makes it clear that a breach of this statutory duty does not create a new cause of action; nor does it affect any common law duty of care or any other statutory duty under which a person may be able to bring an action in negligence or other legal proceedings against the AOC holder"[208].

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206 Australia, Senate, *Civil Aviation Legislation Amendment Bill 1995*, Explanatory Memorandum at 4.

207 Australia, Senate, *Civil Aviation Legislation Amendment Bill 1995*, Explanatory Memorandum at 2.

208 Australia, Senate, *Civil Aviation Legislation Amendment Bill 1995*, Explanatory Memorandum at 26.

141 The specific reference to negligence in the Explanatory Memorandum is telling. The pre-existing duties described by the Explanatory Memorandum as giving rise to an action for negligence that, by s 28BE(5), the duty in s 28BE(1) "does not affect" include the common law tortious duty of care and the equitable duty of care. Those duties are outside the exclusive subject matter of the safety of air navigation. By providing in s 28BE(5) that they were not affected, the sub-section confirms the continuing applicability of these existing duties. The reason s 28BE(1) does not affect those duties is that it is not analogous to a general law duty of care. It applies to regulate safety concerns including, but not limited to, those within the exclusive regime of the regulation of safety, and irrespective of whether the rights of any individual are infringed. As I explain below, this is quite different from the general law duty of care, which is concerned with the protection of individual rights.

142 There are other examples of pre-existing duties that might fall within the general duty in s 28BE(1) but which that duty "does not affect" because those pre-existing duties were, and are, outside the exclusive regime of enforcing the standards relating to safety of air navigation either because they are concerned with individual rights or because the duties regulate only the subject matter of matters connected with air navigation. Simply by reference to hot air balloons, a number of examples given by Outback Ballooning can illustrate the breadth of these concurrent, non-excluded duties. One example is where a balloon operator operated the flight safely but carelessly allowed the balloon to land on privately held land, committing the tort of trespass. Another is where a balloon operator made careless misrepresentations or engaged in misleading or deceptive conduct in the course of selling tickets for a balloon flight. Another might be a lack of care causing injury in the course of transporting passengers to the site of departure.

F. Subject matters not exclusively covered by the Civil Aviation Law

143 Even if it were possible, it would not be necessary or appropriate to attempt to delineate and enumerate all subject matters that do *not* fall within the exclusive coverage of standards of safety in air navigation in the Civil Aviation Law. However, in oral argument, some subject matters were raised by the Work Health Authority and the Attorney-General of the Commonwealth in the course of submitting that Outback Ballooning's characterisation of the subject matter of the Civil Aviation Law was too broad. It is necessary to explain why those subject matters are not covered by the Civil Aviation Law, and why they do not militate against recognising the Civil Aviation Law's exclusive coverage of standards of safety of air navigation. The Civil Aviation Law operates concurrently with these other laws because they are laws on a different subject matter. The co-existence of laws on a different subject matter naturally does not detract from the exclusivity of the Civil Aviation Law on the different subject matter of standards of safety of air navigation.

(i) Workplace health and safety unconnected with safety standards for air navigation

144 The Work Health Authority relied upon the *Work Health and Safety Act 2011* (Cth), and particularly the duty in s 19(2) to ensure that the health and safety of other persons is not put at risk from the conduct of the business. The Work Health Authority submitted that the existence of this workplace health and safety duty, read with s 12(9), which accepts the concurrent application to a worker or a workplace of a "corresponding WHS law" (defined in s 4 to include the WHS Act), was evidence that the Civil Aviation Law was not intended to be exclusive at least in relation to that duty. That submission misunderstands the operation of the Commonwealth *Work Health and Safety Act*.

145 The contrast, and area of overlap, between the subject matter of State and Territory workplace health and safety laws, concerned with health and safety in a business, and the subject matter of the Civil Aviation Law, safety of air navigation, is addressed in detail below in Section G. It suffices here to address that issue only in the context of the Commonwealth workplace health and safety legislation.

146 Laws concerning occupational health and safety contrast with the longstanding legislation concerning air navigation that, since 1920, has contained some undisputed core, exclusive, uniform regulation over safety. As late as 2005 there was no single national approach to occupational health and safety legislation[209]. It would be a curious result if the enactment of the Commonwealth *Work Health and Safety Act* in 2011, or the non-uniform legislation that it replaced, the *Occupational Health and Safety Act 1991* (Cth), were interpreted to manifest an intention by Parliament to alter the longstanding approach to exclusivity and uniformity under the Civil Aviation Law. In order to determine whether the *Work Health and Safety Act* did so in 2011, the proper approach to the interpretation of the *Work Health and Safety Act* is to interpret it together with the Civil Aviation Law "in a way which best achieves a harmonious result"[210], including a construction that would treat each as operating "within its respective field"[211].

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209 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 August 2005 at 2-3.

210 *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 28 [78], see also at 33 [98]; [2013] HCA 2.

211 *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 19 [45], quoting *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553.

147 The duty in s 19 of the *Work Health and Safety Act* applies, by s 8, where the workplace is an aircraft, although only to the Commonwealth or to a "public authority" established under a law of the Commonwealth or of a Territory other than the Australian Capital Territory, the Northern Territory or Norfolk Island[212]. Section 19 cannot be construed without regard to its context and the history of regulation of air navigation. To do so would mean that it would apply even to failures by the Commonwealth or by a public authority to take reasonable care for persons on aircraft when making safety decisions concerning flight paths or rules of the air. Every active party to this appeal disclaimed such a result, which would detract from the exclusivity in that area of the Civil Aviation Law.

148 The proper approach to the text of the generalised duty in s 19 of the *Work Health and Safety Act* is for it to be construed in its context including its concern with a different subject matter from the existing exclusive regime of the safety of air navigation. There remain numerous examples where a public authority, if responsible for workplace health and safety on an aircraft, could contravene the general duty under s 19 within the general subject matter of workplace health and safety rather than the safety of air navigation. These could include situations unconnected with safety of air navigation as varied as unsafe meals provided to passengers on a flight, bullying conduct between employees on an aircraft, or the provision of health services or support to cabin crew. In a different legislative context, Canadian provincial labour laws have been held applicable in circumstances including[213]: (i) building airports; (ii) transporting passengers to and from airports; (iii) operating retail services for passengers at airports; (iv) operating an airport parking lot; (v) providing baggage porter services; (vi) providing maintenance services to an air traffic control training school; (vii) repairing certain objects used by airlines; (viii) providing food to airlines; and (ix) providing airline booking and ticketing functions.

149 Although many more examples might be given of work health and safety matters that are unconnected with the specific, and pre-existing, exclusive regime of safety standards in air navigation, it suffices to say that the *Work Health and Safety Act* does not extend to matters directly involving standards of safety in air navigation that have long been covered by the different subject matter of the exclusive regime in the Civil Aviation Law, such as safety of the flight itself.

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212 *Work Health and Safety Act 2011* (Cth), ss 4 (definition of "public authority"), 12(1).

213 See Bur, *Law of the Constitution: The Distribution of Powers* (2016) at 1594 [4.1424]. See also *Construction Montcalm Inc v Minimum Wage Commission* [1979] 1 SCR 754 at 770-771; *Air Canada v Ontario (Liquor Control Board)* [1997] 2 SCR 581 at 609-611 [72]-[74].

(ii) The general law duty of care and torts generally

150 The rules of the law of negligence might have the effect of promoting safety, but that is not their object. A person who digs a pit knowing that another may fall into it creates a grave risk to safety. But the person infringes no-one's rights, and therefore commits no tortious act, unless someone falls in it[214]. A driver who grossly exceeds the speed limit may create serious risks to safety and will contravene laws designed to ensure safety, but no-one's rights are infringed, and no tort is committed, if no-one is injured and no property is damaged. The driver has not violated the rights of all those persons he or she might have injured[215]. Not only is a threat to safety insufficient to establish negligence, it is also unnecessary. A surgeon who fails in his or her assumed responsibility to warn an individual of a remote risk of complications from surgery can commit the tort of negligence even if no risk to safety is created by that failure[216].

151 The law of negligence, and indeed the law of torts generally, is not the judicial regulation of safety. Torts are concerned with the protection of the rights of individuals. That is why it is sometimes said that there is no negligence in the air[217]. A regime that is concerned with safety has a different purpose and regulates a different subject matter from one that is concerned with the violation of individual rights.

152 The subject matter of individual rights was not part of the intended uniform regime of the Chicago Convention. Rather, it was covered by the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air (1929) and the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999), which were enacted, respectively, into domestic law in Australia by the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) complemented by uniform State legislation, and the

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214 *Turner v General Motors (Australia) Pty Ltd* (1929) 42 CLR 352 at 364; [1929] HCA 22.

215 Nolan, "Deconstructing the Duty of Care" (2013) 129 *Law Quarterly Review* 559 at 562.

216 *Chappel v Hart* (1998) 195 CLR 232; [1998] HCA 55; *Rosenberg v Percival* (2001) 205 CLR 434 at 465 [96]-[97]; [2001] HCA 18.

217 See *Martin v Herzog* (1920) 126 NE 814 at 816; *Palsgraf v Long Island Railroad Co* (1928) 162 NE 99 at 101; *Chester v Waverley Corporation* (1939) 62 CLR 1 at 12; [1939] HCA 25; *Bourhill v Young* [1943] AC 92 at 101-102, 108, 116-117; *Seltsam Pty Ltd v McNeill* (2006) 4 DDCR 1 at 4 [4]. See also Landon, *Pollock's Law of Torts*, 15th ed (1951) at 345; Stevens, *Torts and Rights* (2007) at 2, 95.

Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Act 2008 (Cth). In general terms, and without descending into the boundaries of its exclusivity, the *Civil Aviation (Carriers' Liability) Act* has been described as imposing liability on air carriers but exempting them from "what would otherwise have been their ordinary liability for negligence at common law"[218].

(iii) The general criminal law and air security

153 In a commonly repeated example[219] from *Ex parte McLean*[220], Dixon J described an award made under a Commonwealth Act that exclusively covered the subject matter of industrial relations that are in dispute. He hypothesised that the award expressly forbade shearers from injuring sheep while shearing. His Honour then said that this duty under the award would not necessarily be inconsistent with a State criminal law that prohibited unlawfully and maliciously wounding an animal. The reason is that the purpose of the two laws, which informs the characterisation of their subject matters[221], might be different. The purpose of the former might be the narrow purpose of regulating industrial disputes. But the purpose of the latter might be the maintenance of social norms of behaviour in the treatment of animals.

154 Numerous examples can be given of criminal law proscriptions that have a different purpose from the enforcement of safety in air navigation, even though they might operate upon the same facts as those involved in the violations of safety standards in air navigation. Simple examples concern criminal proscriptions that are concerned with conduct that violates individual and social rights. Assault, false imprisonment, manslaughter, or murder on a plane can all compromise safety in the course of air navigation, but the criminal proscriptions, when they apply during the course of air navigation, do not have the purpose of facilitating the safety of air navigation.

155 More closely related, but nevertheless upon a different subject matter from safety of air navigation, is security concerned with air travel. Although overlapping, in that both are designed to avoid injuries, the regulation of safety of

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218 *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 225 [109]; [2005] HCA 33.

219 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218; [1982] HCA 77; *Viskauskas v Niland* (1983) 153 CLR 280 at 295; [1983] HCA 15.

220 (1930) 43 CLR 472 at 485-486.

221 See *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218-219; *McWaters v Day* (1989) 168 CLR 289 at 298-299; [1989] HCA 59.

air navigation has been described as "quite different"[222] and a "separate issue[]"[223] from regulation of security. The former involves regulation to ensure safety of aircraft by requiring strict compliance with a regime of standards of conduct, even where conduct is accidental. The latter, aviation security, proscribes intentional acts that threaten the security of individuals; it is defined separately in the *Civil Aviation Act* as "a combination of measures and human and material resources intended to safeguard civil aviation against acts of unlawful interference"[224].

156 Havel and Sanchez have argued that "[u]nlike in the sphere of technical cooperation on aircraft safety, the international response to the contemporary threat to aviation security has lacked purposiveness"[225]. Aviation security issues were not contemplated at the time of the Chicago Convention in 1944[226]. The subsequent international response has included the Tokyo Convention on Offences and certain other Acts committed on board Aircraft (1963), the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) with its Protocol[227].

157 These security conventions were implemented in Australia by the *Civil Aviation (Offenders on International Aircraft) Act 1970* (Cth), the *Crimes (Hijacking of Aircraft) Act 1972* (Cth) and the *Crimes (Protection of Aircraft) Act 1973* (Cth)[228]. Together with the *Crimes (Aircraft) Act 1963* (Cth), the three security Acts described above were consolidated in the *Crimes (Aviation) Act*

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222 Dempsey, "Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety" (2004) 30 *North Carolina Journal of International Law and Commercial Regulation* 1 at 4.

223 Bartsch, *Aviation Law in Australia*, 4th ed (2013) at 556 [15.95].

224 *Civil Aviation Act*, s 3.

225 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 174.

226 Milde, *International Air Law and ICAO*, 2nd ed (2012) at 219; Bartsch, *Aviation Law in Australia*, 4th ed (2013) at 547 [15.15]. But see, now, Annex 17, adopted by the ICAO Council in 1974.

227 Australia, House of Representatives, *Crimes (Aviation) Bill 1991*, Explanatory Memorandum at 1.

228 Australia, House of Representatives, *Crimes (Aviation) Bill 1991*, Explanatory Memorandum at 1.

1991 (Cth). But unlike the provisions of the Civil Aviation Law, which create the regime of regulation of the safety of air navigation, s 50(1) of the security-related *Crimes (Aviation) Act* provides that the Act, ie in its entirety, "does not exclude or limit the operation of any other law of the Commonwealth, or of a State or Territory".

G. The WHS Act and the subject matter of s 19(2)

158 The WHS Act creates a wide-reaching, general regime for workplace health and safety in the Northern Territory. The focus of this appeal was upon the obligations it creates. But it is pertinent to its wide scope, and its potential to cut across the exclusive Civil Aviation Law regime of safety of air navigation, that the WHS Act also confers broad powers on persons to do things in workplaces (defined in s 8 to include an aircraft). For instance, a person who holds a WHS entry permit may enter a workplace to inquire into a suspected contravention of the WHS Act[229]. Inspectors may enter a workplace at any time with or without consent[230] and without notice[231], examine anything at a workplace[232], seize evidence[233], and seize a workplace or part of the workplace, or plant, a substance or a structure at the workplace, which the inspector reasonably believes is defective or hazardous to a degree likely to cause serious injury or illness or a dangerous incident to occur[234]. A health and safety representative has power in some circumstances to direct a worker to cease work if the representative has a reasonable concern that the worker would be exposed to a serious risk to the worker's health and safety, emanating from an immediate or imminent exposure to a hazard[235].

159 The Work Health Authority alleged various failures by Outback Ballooning to eliminate or minimise risks posed to persons in the vicinity of the balloon's inflation fan. The provision under which Outback Ballooning was charged, s 32 of the WHS Act, creates an offence where a person fails to comply with a health and safety duty and the failure exposes an individual to a risk of

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229 WHS Act, s 117.

230 WHS Act, s 163.

231 WHS Act, s 164.

232 WHS Act, s 165.

233 WHS Act, s 175.

234 WHS Act, s 176.

235 WHS Act, s 85.

death or serious injury or illness. The maximum penalty for a corporation is $1,500,000. The health and safety duty that the Work Health Authority alleged that Outback Ballooning breached is s 19(2) of the WHS Act.

160 Section 19 of the WHS Act relevantly provides:

"(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

(a) workers engaged, or caused to be engaged, by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

(a) the provision and maintenance of a work environment without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling and storage of plant, structures and substances; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking."

161 What is "reasonably practicable" in ensuring health and safety is defined in s 18:

"***reasonably practicable***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

(a) the likelihood of the hazard or the risk concerned occurring; and

(b) the degree of harm that might result from the hazard or the risk; and

(c) what the person concerned knows, or ought reasonably to know, about:

(i) the hazard or the risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."

162 Although the requirement of reasonable practicability in s 19(2) is formulated in similar terms to a standard of care in the tort of negligence[236], it is a

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236 See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48; [1980] HCA 12; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 433 [27], 456 [105], 480-481 [213]; [2005] HCA 62.

higher duty than the common law[237]. An attempt to draw elements from the common law tort is "not ... helpful"[238].

163 Section 19(2) is part of a strict liability[239] duty to "ensure" a result. The offence is based upon risk, not outcome[240]. Hence, no individual rights need be violated before the duty is breached[241]. The duty is a general one concerned with regulating safety in the workplace. That general regulation is consistent with the 1972 recommendations of the committee chaired by Lord Robens[242] to move away from a "haphazard mass of ill-assorted and intricate detail partly as a result of concentration upon one particular type of target". The WHS Act, and s 19 in particular, thus follows the recommended model of imposing general duties, supported by regulations and codes of practice, requiring employers to participate in the making and monitoring of arrangements for health and safety in the workplace[243].

164 As s 19(2) and other general duties in the WHS Act are designed to ensure safety, the s 19(2) duty is designed to be supplemented by regulations made by the Administrator under s 276. Detailed regulations have been proclaimed in the *Work Health and Safety (National Uniform Legislation) Regulations* (NT), which, amongst other things, impose a hierarchy of risk control measures for the elimination or minimisation of risks to health and safety[244]. The general duty in s 19 is also supplemented by codes of practice approved by the Minister under

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237 *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 at 322 [51], 332 [87]; [2001] HCA 6.

238 *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 at 333 [89], citing *Marshall v Gotham Co Ltd* [1954] AC 360 at 373. See also *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 at 122; *Dinko Tuna Farmers Pty Ltd v Markos* (2007) 98 SASR 96 at 109 [42]-[43].

239 WHS Act, s 12B.

240 *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676 at 682 [3].

241 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 553 [13]; [2010] HCA 1.

242 United Kingdom, *Safety and Health at Work: Report of the Committee 1970-72* (1972) Cmnd 5034 at 8 [30].

243 United Kingdom, *Safety and Health at Work: Report of the Committee 1970-72* (1972) Cmnd 5034 at 152 [459], 153 [469]-[471].

244 *Work Health and Safety (National Uniform Legislation) Regulations* (NT), reg 36.

s 274, which are admissible as evidence of whether or not there has been compliance with a duty under the WHS Act[245].

H. Section 19(2) of the WHS Act is inconsistent with the Civil Aviation Law in its application to air navigation

165 The Attorney-General of the State of Queensland broadly, and succinctly, identified the subject matters of the Civil Aviation Law and the WHS Act as, respectively, the safety of air navigation and the safety of the conduct of a business. That characterisation is correct. So stated, there are areas where the subject matter of the safety of the conduct of a business will not intrude into the subject matter of the safety of air navigation. But where the business relevant to the WHS Act involves air navigation, and on the assumption of the parties that the WHS Act should be construed as extending to that subject matter, there will be precise co-existence of the subject matter of the regulation of safety and, therefore, inconsistency because the Civil Aviation Law exclusively covers the subject matter of safety of air navigation. When the business conducted involves air navigation, the subject matter of the WHS Act will purportedly be the safety of air navigation.

166 No party disputed that the purpose of s 19(2) of the WHS Act was the prescription and enforcement of standards of safety. The parties were correct not to characterise the subject matter of s 19(2) of the WHS Act in any other way, such as general criminal law norms or the protection of individual rights. Section 19(2) regulates conduct in order to ensure safety, irrespective of whether any individual is affected and irrespective of the norms that underlie general criminal prohibitions.

167 Where the workplace is an aircraft, then, to the extent that s 19(2) as a general standard of workplace safety applies to air navigation, s 19(2) is inconsistent with the specific, exclusive subject matter of the Civil Aviation Law. An illustration of that inconsistency in the particular circumstances of this appeal is discussed in the next, concluding, section of these reasons, Section I. Another illustration of the inconsistency arising due to the implied exclusivity of the Civil Aviation Law can be seen in the role of the regulator.

168 In comparison with the general powers of the Work Health Authority and its inspectors in the Northern Territory, CASA has many specific powers, including, relevantly in the circumstances of this appeal, "for the purpose of ensuring the safety of air navigation, [to] give directions with respect to the method of loading of persons and goods (including fuel) on aircraft"[246]. The pilot

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245 WHS Act, s 275.

246 *Civil Aviation Regulations*, reg 235(7).

in command commits an offence of strict liability if he or she allows the aircraft to take off or land without complying with a direction given by CASA about the loading of the aircraft[247]. In *Airlines No 1*[248], Windeyer J said that the "proper regulation in the interests of safety ... and the due execution by Australia of the international obligations it has accepted, may well make it desirable that the one authority should exercise sole control of all movement of aircraft in the air and of matters connected with such movement, that is to say of all matters connected with how aircraft may be used".

169 The ultimate issue on this appeal is whether preparation for a balloon take-off, including embarkation of passengers, falls within the specific, exclusive subject matter of the Civil Aviation Law, being the prescription and enforcement of standards of safety in the conduct of air navigation.

170 The Work Health Authority's submission that the exclusive subject matter of the Civil Aviation Law did not extend to embarkation of passengers requires a distinction to be drawn between (i) safety in air navigation while all parts of an aircraft have left the ground, and (ii) safety during boarding, take-off, landing and disembarking.

171 The Work Health Authority was correct to insist that the subject matter of the Civil Aviation Law be limited to safety of air navigation rather than all aspects of safety generally. For instance, as Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ said in *Construction Montcalm Inc v Minimum Wage Commission*[249], "the requirement that workers wear a protective helmet on all construction sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics". However, the subject matter of air navigation is not limited to the events that actually occur in the air. It involves a "broad conception going far beyond what might be called 'aeronautics'"[250] and extends to "all the matters preparatory to flying by air, incidental thereto or consequent thereon"[251]. This is consistent with the definition of "[o]perational control" in Ch 1 of Pt I of Annex 6 to the Chicago Convention as "[t]he exercise of authority over the

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247 *Civil Aviation Regulations*, reg 235(8), (12).

248 (1964) 113 CLR 1 at 51. See also *Airlines No 2* (1965) 113 CLR 54 at 151.

249 [1979] 1 SCR 754 at 771.

250 *Airlines No 2* (1965) 113 CLR 54 at 136.

251 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 670; *Airlines No 2* (1965) 113 CLR 54 at 160.

initiation, continuation, diversion or termination of a flight in the interest of the safety of the aircraft and the regularity and efficiency of the flight".

172 An essential matter that is preparatory to the safety of air navigation is the process of boarding the aircraft. As Taschereau and Estey JJ said in the context of considering the scope of Canadian Parliament's exclusive legislative power in *Johannesson v Rural Municipality of West St Paul*[252], "aeronautics"

> "contemplates the operation of the aeroplane from the moment it leaves the earth until it again returns thereto. This, it seems, in itself makes the aerodrome, as the place of taking off and landing, an essential part of aeronautics and aerial navigation. ... Indeed, in any practical consideration it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other. ... Legislation which in pith and substance is in relation to the aerodrome is legislation in relation to the larger subject of aeronautics and is, therefore, beyond the competence of the Provincial Legislatures."

173 Similarly, as Jackson J said in the United States Supreme Court, from "[t]he moment [an aircraft] taxis onto a runway it is caught up in an elaborate and detailed system of controls"[253]. In the same way, the exclusive regulation of the safety of a balloon operation includes the moment when, with the inflation fan started, passengers begin boarding the balloon.

I. Conclusion

174 Outback Ballooning has not been charged with any offence under the Civil Aviation Law. But that does not mean that no relevant provision creating a safety offence exists under the Civil Aviation Law. To the contrary, the Civil Aviation Law contains a detailed scheme of regulation of the safety of air navigation but does so by a different approach and with different consequences.

175 For instance, the *Civil Aviation Regulations* required Outback Ballooning to keep an operations manual, made available for use by all members of operations personnel[254], containing all information, procedures and instructions

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252 [1952] 1 SCR 292 at 319. See also *Quebec (Attorney General) v Lacombe* [2010] 2 SCR 453 at 472 [27], 513 [135]; *Quebec (Attorney General) v Canadian Owners and Pilots Association* [2010] 2 SCR 536 at 551 [33].

253 *Northwest Airlines Inc v Minnesota* (1944) 322 US 292 at 303. See also *City of Burbank v Lockheed Air Terminal Inc* (1973) 411 US 624 at 633-634.

254 *Civil Aviation Regulations*, reg 215(1), (6), (7).

necessary to ensure the safe conduct of the flight operations[255]. The breach of these regulations is an offence. Failing to comply with these regulations could also put the operator in breach of the duty in s 28BD of the *Civil Aviation Act*, and make it liable for the commission of an offence[256].

176 Further, Outback Ballooning's operations manual required that "[p]assengers, particularly children, will be kept well clear of the inflation fan whilst it is operating". A failure to comply with all instructions in the operations manual is an offence[257]. If that failure involves reckless operation of an aircraft then the pilot may be liable for operating the aircraft, or permitting it to be operated, recklessly[258].

177 Apart from questions of sovereign authority over airspace, safety has been the issue most responsible for the existence and evolution of an international aviation law regime[259]. Since World War I, the international community has been moving towards a consistent, uniform regulation of air safety. Australia has been a central participant in that process. The circumstances of this case are just a snapshot of how, for the reasons explained above, the general provision in s 19(2) of the WHS Act could cut across the specific, exclusive regime of regulation of the safety of air navigation. The subject matter of s 19(2), workplace safety, was assumed in this litigation to include safety of air navigation where the workplace is an aircraft. To that extent, it is inconsistent with the detailed, specific and exclusive approach taken to the safety of air navigation in the Civil Aviation Law.

178 The appeal should be dismissed.

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255 *Civil Aviation Regulations*, reg 215(2).

256 *Civil Aviation Act*, s 29.

257 *Civil Aviation Regulations*, reg 215(9).

258 *Civil Aviation Act*, ss 20A, 29(3).

259 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 175.

FEDERAL COURT OF AUSTRALIA

Civil Aviation Safety Authority v Caper Pty Ltd

[2012] FCA 1213

Murphy J

19 March, 2 November 2012

Aviation — Commercial operations — Licence to conduct by Air Operator's Certificate — Purposes of — Cancellation of — Categories of — Closed charters or regular public transport — Whether for — Civil Aviation Act 1988 (Cth) — Civil Aviation Regulations 1988 (Cth), reg 206(1)(b)(ii), (c).

Aviation — Commercial air operations — Licence to conduct — Purposes of — Closed charter or regular public transport — Whether for — "Available for use by persons generally" — "Transporting persons … or cargo for persons generally" — "Persons generally" — Meaning of — Civil Aviation Regulations 1988 (Cth), reg 206(1)(b)(ii), (c) — Acts Interpretation Act 1901 (Cth), s 15AA.

Licences called Air Operator's Certificates, issued by the applicant for commercial air operations under the *Civil Aviation Act 1988* (Cth), were in different categories depending on the purposes for which the licence was required. The categories included those relevantly described in reg 206 of the *Civil Aviation Regulations 1988* (Cth) as being for the following purposes:

> (b) charter purposes, being purposes of the following kinds:
>
> …
>
> (ii) the carriage … of passengers or cargo or passengers and cargo in circumstances in which the accommodation in the aircraft is not available for use by persons generally;
>
> (c) the purpose of transporting persons generally, or transporting cargo for persons generally …

The applicant cancelled the respondent's licence under subreg (b)(ii) on the ground that, in making available its aircraft for use by Australian Adventure Tours Pty Ltd for daily flights between Darwin and Bathurst Island for the purpose of guided tours of the island by tourists, the respondent was going beyond the purpose of charter described in subreg (b)(ii) and into the purpose of regular public transport described in subreg (c).

In the Administrative Appeals Tribunal (the AAT), on an application for review by the present respondent, the cancellation of the licence was set aside. The subregulations were held to refer to general availability for use by persons and general transport of persons or cargo respectively.

Held, setting aside the AAT's decision: The AAT's interpretation of the subregulations was incorrect. The words "persons generally" in both provisions refer to the general public. [66], [68]-[69], [83]

Appeal from decision of single member of AAT allowed.

Cases Cited

Chegwidden v White (1985) 38 SASR 440.

Customs, Collector of v Agfa-Gevaert Ltd (1996) 186 CLR 389.

Customs, Collector of v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

Southern Cross Airlines Pty Ltd v McNamara (1989) 97 FLR 72.

Appeal

I Harvey, for the applicant.

J Ribbands, for the respondent.

Cur adv vult

2 November 2012

Murphy J.

Introduction

1 This proceeding is an appeal from a decision of the Administrative Appeals Tribunal ("the Tribunal") pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act"). It is brought by the applicant, the Civil Aviation Safety Authority ("CASA") which has the statutory function under the *Civil Aviation Act 1988* (Cth) ("the Act"), of conducting the safety regulation of civil air operations in Australia. The respondent, Caper Pty Ltd ("Caper"), is an aviation company engaged in, amongst other operations, the air transportation of tourists between Darwin and Bathurst Island ("the Caper air operation").

2 Commercial air operations such as Caper's are required under the Act to be authorised pursuant to a license issued by CASA called an Air Operators' Certificate ("AOC"). Caper, trading as Direct Air Charter, is the holder of an AOC which authorises it to conduct charter operations and aerial work operations.

3 Different authorisations are required for different types of commercial air operations. Relevantly, different authorisations are required for:

(a) charter operations that fly to a fixed schedule, to and from fixed terminals, in which the seats in the aircraft are not available for use by persons generally — called closed charters; compared to

(b) operations on a fixed schedule, to and from fixed terminals over specific routes, for the purpose of transporting persons generally — called regular public transport ("RPT").

RPT operations attract more stringent safety requirements under the Act and the *Civil Aviation Regulations 1988* (Cth) ("the Regulations").

4 CASA had concerns that the Caper air operation fell outside the charter purpose permitted by its AOC, and that in its regular flights between Darwin and Bathurst Island Caper was in fact providing RPT. In May 2010 CASA served a show cause notice on Caper advising of its concern and threatening to

suspend or cancel the authorisation in Caper's AOC which permitted charter flights between Darwin and Bathurst Island. In September 2010 CASA issued a notice cancelling the authorisation.

5 Caper applied to the Tribunal for review of CASA's decision and it continued its operation in the interim because s 31A of the Act provided for an automatic stay on the decision. On 21 March 2011 the Tribunal set aside CASA's decision. It found that the Caper air operation was correctly defined as a charter service for the purposes of the Act and Regulations and not RPT.

6 CASA now appeals to this Court from the Tribunal decision. For the reasons set out below, I consider that on a proper construction of the Act and Regulations the Caper air operation constitutes RPT rather than a charter operation. The Tribunal decision must be set aside.

Legislative framework

7 The Act and its associated regulations are the primary instruments by which a comprehensive scheme for the regulation of civil aviation in Australia is created. This is first displayed in the long title of the Act which is "An Act to establish a Civil Aviation Safety Authority with functions relating to civil aviation, in particular the safety of civil aviation, and for related purposes".

8 Section 3A of the Act provides:

> Main object of this Act
>
> 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.

9 The administration of the regulatory scheme is primarily the responsibility of CASA. Section 9 of the Act assigns CASA the role of conducting the safety regulation of civil aviation in the Australian territory. One regulatory method by which CASA performs this role is through the issue of permits, certificates and licences.

10 Consistently with the main object of the Act, s 9 sets out CASA's functions and relates these in particular to the safety of civil aviation, including by the issue of relevant authorisations or certificates under s 9(1)(e). Section 9 relevantly provides:

> CASA's functions
>
> (1) CASA has the function of conducting the safety regulation of the following, in accordance with this Act and the regulations:
>
> (a) civil air operations in Australian territory;
>
> …
>
> by means that include the following:
>
> (c) developing and promulgating appropriate, clear and concise aviation safety standards;
>
> (d) developing effective enforcement strategies to secure compliance with aviation safety standards;
>
> (da) administering Part IV (about drug and alcohol management plans and testing);
>
> (e) issuing certificates, licences, registrations and permits;
>
> (f) conducting comprehensive aviation industry surveillance, including assessment of safety-related decisions taken by industry management at all levels for their impact on aviation safety;
>
> …

(2) CASA also has the following safety-related functions:

(a) encouraging a greater acceptance by the aviation industry of its obligation to maintain high standards of aviation safety …

(3) CASA also has the following functions:

…

(a) cooperating with the Australian Transport Safety Bureau in relation to investigations under the *Transport Safety Investigation Act 2003* that relate to aircraft;

…

(e) promoting the development of Australia's civil aviation safety capabilities, skills and services, for the benefit of the Australian community and for export;

11 Importantly, s 9A(1) indicates that safety considerations are paramount in the Act. It provides:

Performance of functions

In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.

12 Section 27 provides:

AOCs

(1) CASA may issue AOCs for the purposes of its functions.

(2) Except as authorised by an AOC [and apart from exceptions not presently relevant]:

(a) an aircraft shall not fly into or out of Australian territory; and

(b) an aircraft shall not operate in Australian territory; and

(c) an Australian aircraft shall not operate outside Australian territory.

…

(9) Subsection (2) applies only to the flying or operation of an aircraft for such purposes as are prescribed.

The effect of s 27(2) is to prohibit the use of aircraft in Australia unless CASA has authorised that use by the issue of an AOC, but s 27(9) provides that subs (2) applies only to the flying or operation of an aircraft "for such purposes as are prescribed".

13 Regulation 206 prescribes the purposes for which an AOC is required with regard to a commercial air operation and reg 206(1)(b) and (c) are central to the appeal. It provides:

Commercial purposes

(1) For the purposes of subsection 27 (9) of the Act, the following commercial purposes are prescribed:

(a) aerial work purposes, being purposes of the following kinds …

(i) aerial surveying;

(ii) aerial spotting;

(iii) agricultural operations;

(iv) aerial photography;

(v) advertising;

(vi) flying training …

(vii) ambulance functions;

(viii) carriage, for the purposes of trade, of goods being the property of the pilot, the owner or the hirer of the aircraft (not being a carriage of goods in accordance with fixed schedules to and from fixed terminals);

(ix) any other purpose that is substantially similar to any of those specified in sub paragraphs (i) to (vii) (inclusive);

(b) charter purposes, being purposes of the following kinds:

(i) the carriage of passengers or cargo for hire or reward to or from any place, other than carriage in accordance with fixed schedules to and from fixed terminals or carriage for an operation mentioned in subregulation 262AM (7) or under a permission to fly in force under subregulation 317(1);

(ii) the carriage, in accordance with fixed schedules to and from fixed terminals, of passengers or cargo or passengers and cargo in circumstances in which the accommodation in the aircraft is not available for use by persons generally;

(c) the purpose of transporting persons generally, or transporting cargo for persons generally, for hire or reward in accordance with fixed schedules to and from fixed terminals over specific routes with or without intermediate stopping places between terminals.

14 Three different types of commercial air operation are described in reg 206.

15 The first type is described in reg 206(1)(b)(i) which relates to air operations commonly described as "open charters". Relevantly, an open charter is the charter of an aircraft for the carriage of passengers where the flight is not on a fixed schedule to and from fixed terminals, that is, a charter which is on demand. Such carriage may be open to the general public. It is common ground that the Caper air operation is outside the scope of this subregulation because the flights in question were on a fixed schedule to and from fixed terminals.

16 The second type — closed charters — is described in reg 206(1)(b)(ii). Relevantly, a closed charter is the charter of an aircraft for the carriage of passengers where the flight is on a fixed schedule to and from fixed terminals, but where the seats in the aircraft are not available for use by persons generally. It is uncontroversial that closed charters include, for example, a church group which organises regular trips for its congregants to a particular location for the purposes of attending a religious retreat, or a mining company which charters regular flights to and from a capital city for employees and contractors to fly to work at its mine in a remote location. This is uncontroversial because there is no question that such flights are not available for use by members of the general public. They are respectively available only to the congregants or to people engaged to work at the mine.

17 The Tribunal determined that the Caper air operation is a closed charter even though any member of the public could buy a ticket through AAT Kings, and this finding is at the heart of CASA's appeal.

18 The third type of air operation — regular public transport — is described in reg 206(1)(c). Relevantly, RPT is for the purpose of "transporting persons generally" in accordance with a fixed schedule to and from fixed terminals over specific routes.

19 Section 28 imposes the requirement that CASA must issue an AOC only if satisfied in relation to various safety matters. Section 28(1) provides:

CASA must issue AOC if satisfied about certain matters

(1) If a person applies to CASA for an AOC, *CASA must issue the AOC if, and only if:*

(a) *CASA is satisfied that the applicant has complied with, or is capable of complying with, the safety rules*; and

(b) *CASA is satisfied* about the following matters in relation to the applicant's organisation:

(i) *the organisation is suitable to ensure that the AOC operations can be conducted or carried out safely*, having regard to the nature of the AOC operations;

(ii) the organisation's chain of command is appropriate to ensure that the AOC operations can be conducted or carried out safely;

(iii) the organisation has a sufficient number of suitably qualified and competent employees to conduct or carry out the AOC operations safely;

(iv) key personnel in the organisation have appropriate experience in air operations to conduct or to carry out the AOC operations safely;

(v) *the facilities of the organisation are sufficient to enable the AOC operations to be conducted or carried out safely;*

(vi) *the organisation has suitable procedures and practices to* control the organisation and *ensure that the AOC operations can be conducted or carried out safely*;

(vii) if CASA requires particulars of licences held by flight crew members of the organisation — the authorizations conferred by the licences are appropriate, having regard to the nature of the AOC operations;

(Emphasis added.)

This provision, together with many others, illustrates the statutory focus on safety considerations in relation to the issue of AOCs. Other provisions illustrate the same focus in relation to retention of an AOC.

The Tribunal decision

20 The Tribunal heard evidence as to contractual arrangements between Caper and Australian Adventure Tours Pty Ltd, a subsidiary of AAT Kings, with regard to the flights to Bathurst Island. The Tribunal found that Australian Adventure Tours, trading as Tiwi Tours ("AAT Kings"), operated one day tours to Bathurst Island each weekday morning from Monday to Friday, and to do so it chartered aircraft from Caper which flew to and from Darwin to Bathurst Island.

21 At [9] of its decision the Tribunal described the tours as follows:

> Tiwi Tours advertises one day tours of Bathurst Island, which is immediately to the north of Darwin. The one day tour of Bathurst Island includes transport to and from the island by Caper, trading as Direct Air. The brochure advertising the Tiwi Tours states that flights operate between Darwin and Bathurst Island between Monday and Friday from the Direct Air terminal. Check in time is said to be 7.30am for an 8.00am departure and the return to Darwin airport is said to be at approximately 5.15pm. The costs of the tour are broken down into the land content and the return flight from Darwin. The tour, which includes the flight to and from Bathurst Island, involves a guided tour of the Aboriginal community of Nguiu including a museum and displays of traditional art. There are performances by local Aboriginals including a smoking ceremony. The tour also includes a drive

through the Bathurst Island wilderness and lunch at a local waterhole, where tourists are able to swim. These tours on the island are conducted by mini-bus or four-wheel drive vehicle.

22 At [23] of the decision the Tribunal set out various factual findings as follows:

(a) AAT Kings and Caper are not related entities having discrete directors and shareholders;

(b) Caper provides aircraft for AAT Kings to enable it to carry tourists to and from Bathurst Island in the course of [AAT Kings] organised tours of Aboriginal arts and other sites of interest;

(c) although the costs of the tour are advertised indicating the tour and airfare components as discrete items, the combined price is paid by intending tourists to AAT Kings only;

(d) although the travel brochures prepared by AAT Kings state that the flights depart Darwin between March and November, Monday to Friday at 8.00am, that does not mean that the flights will necessarily take place at that time on every day;

(e) whether or not a flight is undertaken by Caper for AAT Kings depends on the number of tourists who have booked a flight on any particular day on which they wish to undertake the tour;

(f) tours are generally booked through travel agents or through AAT Kings in Darwin direct, but Caper does not take any bookings or receive directly any money for the transport of passengers;

(g) the persons to whom the tours are open are members of the public at large;

(h) Caper has a contractual arrangement with AAT Kings, which is regularly reviewed, regarding the price which AAT Kings is to pay Caper for the hire of its aircraft on an aircraft by aircraft basis;

(i) persons who are not booked on an AAT Kings' tour are not permitted to travel on aircraft which have been booked by AAT Kings for their tours;

(j) the size and type of aircraft provided by Caper is determined by the number of passengers on any particular day which is notified to Caper on the day prior to the flight;

(k) if no tourists are booked on a particular day or if there are insufficient tourists booked for a particular day, the flights do not take place and in fact passengers, such as Mr Saffery [a witness for CASA], are offered an alternative day on which they can undertake the tour; and

(l) the terms and conditions of carriage between AAT Kings and Caper, which are set out in AAT Kings information statement following the booking of a flight, have not been discussed with or agreed to by Caper.

23 Additionally, at [11] the Tribunal found that the agreement was not exclusive to Caper, in that if Caper did not provide the aircraft AAT Kings could charter an aircraft from another air operator.

24 Caper also seeks to rely on other factual findings made by the Tribunal as follows:

(a) the advertising for the tour is undertaken by AAT Kings trading as Tiwi Tours and not by Caper;

(b) there is no separate breakdown of costs, that is the participant pays a lump sum fee for the entire tour which includes the provision of services above and beyond the mere flight;

(c) there is a breakdown of the costs as between the air travel component and the land tour component so as to provide a cost for those persons who wish to undertake the aboriginal art tour from the island itself;

(d) there is no suggestion that a person can undertake the air travel component and not undertake the art tour component;

(e) Tiwi Tours undertakes a separate hire of the aircraft from Caper, and the type of aircraft that it hires depends upon the number of tour participants;

(f) Tiwi Tours pays a set fee for the hire of the aircraft regardless of how many participants are undertaking its tour; and

25 The first question the Tribunal dealt with was the different types of charter operation covered by reg 206(b)(i) and (b)(ii). The learned Tribunal member said at [26] and [27]:

> [26] The first matter which I need to address is the distinction between CAR 206 (b)(i) and (b)(ii). The two types [of] charter referred to in those subsections are commonly described as *open charter* (b)(i), and *closed charter* (b)(ii). The distinction is that an *open charter* is one where passengers or cargo are carried where there are no fixed schedules or, in other words, on an *on demand* basis. The *closed charter* situation arises where the carriage of passengers or cargo occurs in accordance with *fixed schedules and between fixed terminals*.
>
> [27] The expression *fixed schedules* is not defined in the regulations and therefore it must be given its ordinary meaning taking into account the context in which the expression appears in the regulation. The adjective *fixed* means:
>
> > 1. fastened; immoveable. 2. unvarying; unchanging; set or established ❑ fixed ideas. (Chambers 21st Century Dictionary)
>
> The noun *schedule* is defined as:
>
> > 1. a list of events or activities planned to take place at certain time. 2. the state of an event or activity occurring on time, according to plan ❑ we are well behind schedule. 3. any list or inventory. 4. a timetable or plan.
>
> The first question then is whether the flights Caper conducts for AAT Kings can be said to be according to a fixed schedule.

26 The Tribunal found that the Tiwi Tours ran to a schedule under which the flights were fixed to depart from Darwin for Bathurst Island each weekday at 8.00 am. It also found that if there were not at least two or more passengers booked for a tour on a particular day the flight did not proceed and the intending passenger was asked to fly on another day. At [29] the Tribunal held that they were on a fixed schedule, noting:

> … the expression *fixed schedules* is a reference to an unvarying or unchanging timetable or plan. It is not a reference to what in fact occurs on any particular day. AAT Kings plans to fly everyday between Monday and Friday between the months of March and November, departing at 8.00am for Bathurst Island. In my opinion, that satisfies the expression *fixed schedules*. The fact that flights take place only when sufficient passengers are available does not alter my opinion. CAR 206(1)(b) is concerned only with the plan or timetable when it refers to *fixed schedules* rather than what in fact occurs on any particular day. **Therefore, I find that Caper's operations when conducting flights for AAT Kings to Bathurst Island**

> **are in accordance with fixed schedules. Those operations are either *closed charters* or RPT.**

(Emphasis added.)

27 In dealing further with the provisions of reg 206(1)(b) the Tribunal also had to determine whether the flights were to and from fixed terminals. The Tribunal considered that they were, noting at [30]:

> The next expression in CAR 206 which needs to be understood is *fixed terminals.* Again, this expression is not defined in the CARs. I confess to having difficulty in understanding this expression and its purpose in the context of CAR 206. That may be because the word *terminal* is commonly used in the aviation industry to describe a building or structure at an airfield. However, I do not believe that is the intended meaning as the expression is used in the CAR. It is more likely to be a reference to a boundary or terminus. In other words, it is the end of a route, not merely an intermediate stopping place.

28 The Tribunal was fortified in this approach by an analysis of the history of the Regulations, and said at [35]:

> Quite plainly there are no proposed or even possible intermediate stopping places between Darwin and Bathurst Island. It follows that the expression *fixed terminals* is a reference to those two terminals. Therefore, I find that Caper conducted operations involving the carriage of passengers or cargo for hire or reward in accordance with *fixed schedules* to and from *fixed terminals.*

29 In relation to the central issue as to whether the seats on the flights were available for use by persons generally, the Tribunal held at [36]:

> The only remaining issue with CAR 206(1)(b) is whether the circumstances in which Caper carries passengers and or cargo to Bathurst Island fall within the description: *in which accommodation in the aircraft is not available for use by persons generally*. The expression is to be distinguished from that used in CAR 206(1)(c) which is: *the purpose of transporting persons generally, or transporting cargo for persons generally*. These two adverbial clauses have been the cause of numerous disputes regarding the distinction which should be drawn between RPT and charter operations. Both clauses are governed by the word *generally*, an adverb. The word *generally* is defined as:
>
> 1. usually. 2. without considering details; broadly. 3. as a whole; collectively. (Chambers 21st Century Dictionary)
> 3. In a general sense or way; as opp. to specially. (The Shorter Oxford English Dictionary)
>
> …

30 The learned Tribunal member embarked upon a detailed grammatical analysis of the words in reg 206(1)(b)(ii) and (c) having regard to the adverb "generally" that appears in each. At [36] he said:

> The adverb *generally*, in the first clause, emphasises the availability for use by persons of accommodation in the aircraft while in the second clause, it emphasises the transport of persons or cargo. The word transporting is of course, strictly speaking, a gerund as it describes the action. However, nothing turns on that. In my opinion, it follows that the two clauses when read according to their grammatical construction, refer to general availability for use by persons and the general transport of persons or cargo. In the context in which it appears in the two clauses, the word *generally* means broadly or in a general sense or way, as opposed to specially. It says nothing about the persons.

31 At [37], [38] and [39] of the decision the learned Tribunal member stated:

> [37] Having explained some elementary rules of grammatical construction, it should be apparent that the first clause (CAR 206(1)(b)(ii)) means that a *closed charter* is one in which accommodation on the aircraft must not be available to those people who are only using the aircraft to travel from destination A to destination B. Such persons do not have a common purpose for travel to destination B. Their reasons for using the aircraft are simply to arrive at a common destination and then to undertake any variety of individual activities depending upon what each passenger had in mind was the purpose of his or her travel.
>
> [38] To fall within the *closed charter* provision under CAR 206(1)(b)(ii), those persons who travel to a destination terminal must all have the same special purpose for travelling to that destination. In my opinion, that is what distinguishes a *closed charter* from RPT. For example, mining companies and off-shore oil companies in the north west of Western Australia operate charter flights to and from Perth for their employees on a regular basis. All of the persons on board those charter aircraft are being transported to their destination terminal so that they can conduct their work for the company which has chartered the aircraft or an associated entity. Their purpose is common even though their occupations may vary. The company may also allow non-employees to utilise the transport, so long as the use bears some relationship to the work being undertaken by the company. Other than the common purpose for undertaking a flight, those persons who travel by *closed charter* may have no other relationship with their fellow travellers.
>
> [39] Unfortunately, I have not come across any material which would indicate that the two clauses I have referred to above in CAR 206 have undergone any proper analysis having regard to their grammatical construction. It therefore comes as no surprise to me that the interpretation of those clauses by CASA, and by Tribunals and Courts, may not be in accordance with the opinions I have expressed above …

32 Taking this grammatical or literal approach to understanding the provisions the Tribunal reached the position that a closed charter under reg 206(1)(b)(ii) is not concerned with whether aircraft are made available for use by members of the public, but is concerned with the purpose for which those persons have acquired seats in the aircraft. The Tribunal considered that the purpose of the passengers purchasing seats on the aircraft in order to attend the Tiwi tour was a specific purpose as opposed to the general purpose of transportation between Darwin and Bathurst Island. It determined that a commercial air operation is a "closed charter" if the seats on the aircraft are not available to those people who are only using the aircraft to travel from one destination to another. This test requires that the purposes of the passengers for using the aircraft be ascertained, because only those who share the specific purpose, in the current case attending the Tiwi tour, could be included in the closed group.

33 In a CASA policy document in evidence, titled "Regulatory Policy — Classification and Regulation of 'Closed-Charter' Operations under CAR 206(1)(b)(ii)" ("the CASA regulatory policy"), CASA set outs its approach to the classification of charter operations under reg 206(1)(b)(ii). The policy records the difficulties faced by CASA with respect to determining the operation of the provision when another entity is interposed between an operator and the passengers who travel on the aircraft, and where that interposed entity sells the seats on the aircraft to the passengers. It notes that the individual passengers who travel on such air services only have a contractual arrangement with the interposed entity and not with the operator.

34 The policy states:

> On this basis, it may also be said that the operator has not made accommodation on the aircraft available to persons generally, since it has made accommodation available only to the entity.

It also provides:

> In such cases, especially where the entity is a travel or booking agency that advertises and sells seats on the aircraft it has chartered to anyone who is prepared to pay the cost for a seat, it is CASA's view that the operator and interposed entity are part of a single enterprise, effectively offering accommodation on the aircraft for use by persons generally.

35 The Tribunal rejected the CASA regulatory policy and this interpretation, in line with its grammatical analysis of the provisions, observing at [41]:

> The problem with this statement should be immediately apparent. It is a paraphrasing of the adverbial clause although the word *use* is omitted. The clause in fact deals with the general availability for *use* of the aircraft by persons, and not making accommodation available to persons generally. With respect to the drafter of the policy document, it is this type of interpretation, ie. reading the adverb *generally* as qualifying the noun *persons,* which has caused difficulty in understanding the *closed charter* provision.

36 The Tribunal determined that the purpose of the Caper air operation was a charter purpose which fell within reg 206(1)(b)(ii). At [62]-[63] the Tribunal stated:

> [62] In my opinion, Caper's operations between Darwin and Bathurst Island fall within the definition of a closed charter set out in CAR 206(1)(b)(ii). When the regulation is read so as to give effect to its grammatical construction, it is clear that it is not concerned with whether aircraft are made available for use by persons who are travelling as members of the public as opposed to a private group which, while nevertheless comprising members of the public, also has some other distinguishing feature. It is concerned with the purpose for which those persons have acquired accommodation in the aircraft.
>
> [63] The evidence clearly indicates that the Caper aircraft, which are the subject of this matter, are only made available for use by persons attending the Tiwi island tour. That is a specific purpose as opposed to the general purpose of transportation between Darwin and Bathurst Island …

37 The Tribunal decided at [78] and [79]:

> [78] CASA contended that Caper, contrary to its AOC, was conducting RPT operations between Darwin and Bathurst Island. CASA claimed that Caper's operation did not fall within the description of charter operations in either CAR 206(1)(b)(i) or (ii). That was because those operations were in accordance with fixed schedules, to and from fixed terminals, for the purpose of transporting persons or cargo generally.
>
> [79] Although I have found that Caper operated between Darwin and Bathurst Island in accordance with fixed schedules, to and from fixed terminals, that operation does not fall under the definition of RPT … That is because the accommodation on Caper's aircraft in that operation is not available for use by persons generally …

In effect, the Tribunal found that the Caper air operation was not outside the

scope of the authorisation in its AOC, and there was no basis for the cancellation of the authorisation. Caper was permitted to continue with its charter operation between Darwin and Bathurst Island.

The appeal

38 The supplementary notice of appeal provides:

> THE QUESTIONS OF LAW raised on appeal are:
>
> 1. Is the interpretation and construction given to regulation 206(1)(b)(ii) of the *Civil Aviation Regulations 1988* (CARs) by the Tribunal correct as a matter of law?
> 2. Are the facts as found by the Tribunal capable of supporting a finding or conclusion that the respondent was engaged in air operations for "charter purposes" that fall within regulation 206(1)(b)(ii) of the CARs?

39 The grounds of the appeal are set out as follows:

> 1. The Tribunal erred in law by failing to construe regulation 206(1)(b)(ii) of the CARs correctly.
> 2. The Tribunal erred in law by construing regulation 206(1)(b)(ii) of the CARs according only to its grammatical meaning and in failing to consider the provision in its statutory context in accordance with applicable principles of statutory interpretation.
> 3. The Tribunal erred in law by failing to construe regulation 206 of the CARs in a manner that would promote the purpose or object of the CARs and the Act in preference to a construction that would *not* promote that purpose or object contrary to section 15AA of the *Acts Interpretation Act 1901* (Cth).
> 4. In seeking to determine whether the air operations of the respondent fell within the meaning of "charter purposes" as that expression appears in the r 206(1)(b)(ii) of the CARs the Tribunal erred in law in asking itself the wrong question by referring to the "purpose" or "reasons" for travel held by the passengers on board an aircraft when the correct test requires that the objective purpose of the air operator in conducting an air operation be identified.

40 Both questions of law set out in the supplementary notice of appeal are proper questions of law within the meaning of s 44 of the AAT Act. The proper construction of words and composite phrases used in a statute, and whether facts found by the Tribunal fall within or without a statute, is a question of law. *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287-288 per Neaves, French and Cooper JJ.

Consideration

41 The effect of s 27 of the Act is that if a commercial air activity is not prescribed in reg 206 then the operator of the aircraft does not require an AOC. It is common ground between the parties that:

(a) in order to operate a commercial air charter service an AOC is required by operation of reg 206(1)(b).

(b) Caper holds an AOC, issued on 10 Feb 2010, authorising it to conduct passenger carrying charter operations, in Australian territory, in specified Australian registered aircraft; and

(c) Caper is not and has never been authorised under its AOC to operate RPT services as defined by reg 206(1)(c).

42 There is no challenge to any of the factual findings made by the Tribunal. It is common ground in the appeal that the flights to Bathurst Island were in

accordance with fixed schedules to and from fixed terminals. The central question is whether, on a proper construction of the Act and reg 206 and on the facts found, the Caper air operation is a closed charter under reg 206(1)(b)(ii). The question as to whether it is RPT under reg 206(1)(c) is a related enquiry. As Caper correctly notes, if its operation is not within that provision it is not in breach of its AOC.

43 For the Caper air operation to be a closed charter within reg 206(1)(b)(ii) it must be a charter which is not open to persons generally. The provision only applies if "the accommodation in the aircraft is not available for use by persons generally". As I indicated earlier, there is no argument that the provision applies to charters for such groups as church congregations and mining company employees as it is unarguable that seats on such chartered aircraft are not available for use by the general public.

44 The more difficult circumstance is the one which arises in this case where a commercial entity is interposed between the AOC holder which is authorised to operate charter services and the passengers who are carried on the aircraft. On the facts found it is AAT Kings which reserves the aircraft from Caper. Caper makes available its aircraft to AAT Kings not to the passengers, and AAT Kings sells the seats on the aircraft to the passengers. The passengers have a contractual relationship only with AAT Kings and not with Caper. Caper argues that as AAT Kings has exclusively secured the seats on the aircraft they are not "available for use by persons generally" and the operation falls within reg 206(1)(b)(ii).

45 It is uncontroversial that the flights are on a fixed schedule to and from fixed terminals and over a specific route. It is of significance that the Tribunal also found that the persons to whom the tours are open are members of the public at large. If, as I have found, a proper construction of reg 206(1)(b)(ii) means that the seats on the relevant aircraft must not be available for use by the general public, then the Caper air operation does not fall within the provision. As I explain, Caper is in fact engaged in RPT and it is therefore engaged in air operations outside the authorisation in its AOC.

Interpreting reg 206 by reference to its purpose or objects

46 The rules of statutory construction are well established. Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

47 In construing a statutory provision a court or tribunal should always begin by examining the context of that provision: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*) per McHugh, Gummow, Kirby and Hayne JJ. As the plurality observed at [69]:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.

48 As a result the Tribunal was required to look behind the immediate textual content of reg 206(1)(b)(ii) and (c) and carefully consider the scheme of the statutory provisions that prescribe the "commercial purposes" for which an AOC is required. The determination of the dispute rested on a choice between two different interpretations, and in construing the two provisions the Tribunal was required to apply an interpretation that would promote the purpose of the Act rather than one that would not. In my view it did not do so.

49 Of course, the task of determining the meaning of individual words within a statutory phrase is bound up in the construction of the phrase in question, and the meaning given to the individual words ultimately provides the construction that one gives to the phrase taken as a whole: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ. In the present case much turns on the meaning given to the phrase "the accommodation in the aircraft is not available for use by persons generally" in reg 206(1)(b)(ii). A related enquiry is the meaning given to the phrase "the purpose of transporting persons generally in" reg 206(1)(c).

50 In *Project Blue Sky* at [78] the plurality explained:

> … the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out:
>
> > The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Considerations of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.

(Footnotes omitted.)

51 In taking the strict grammatical approach that it did the Tribunal fell into error. It made little reference to the construction of the Act as a source of interpretive insight into the meaning of the phrase as I have set out, or to the regulatory scheme and the role played by reg 206. As I set out below, the purpose of the Act and Regulations is plain, yet the Tribunal did not refer to or

call in aid the provisions of s 15AA of the *Acts Interpretation Act* so as to construe the provisions in a way that would promote this purpose. In the result it chose a construction which would not promote the purpose.

The "safety purpose" of the Act

52 There can be no doubt that the Act and the Regulations are focused on the enhancement of civil aviation safety in Australia. This purpose is explicit in s 3A of the Act which describes the main object as "maintaining, enhancing and promoting the safety of civil aviation with particular emphasis on preventing aviation accidents and incidents".

53 This "safety purpose" is also plain from s 9A which requires CASA to treat air safety as the most important consideration when exercising its powers or performing its functions.

54 Caper argues that the obligation imposed upon CASA in s 9A relates to the way that CASA carries out its functions and contends that it does not assist in construing the Act and Regulations. I do not accept this. CASA is the statutory authority that regulates and ensures standards of safety with respect to civil aviation. That the Parliament saw fit to impose an obligation on CASA to treat safety as its paramount concern is a relevant matter in construing the purpose of the Act.

55 Numerous other provisions throughout the Act confirm the "safety purpose", including;

(a) the safety related considerations in s 9(1), (2) and (3);

(b) the requirement in s 28 that CASA must issue an AOC *only* if it is satisfied that the applicant has complied with, or is capable of complying with, the safety rules, and is also satisfied about various other safety related matters set out in s 28(1)(b);

(c) CASA's powers to impose and vary AOC conditions and to suspend or cancel an AOC under s 28BB (noting that in doing so it is required to treat aviation safety as its paramount concern); and

(d) CASA's powers under Div 3A to immediately suspend an AOC if it considers that an AOC holder is engaging in conduct that constitutes, contributes to, or results in, a serious and imminent risk to air safety.

The safety issue

56 It appears that the Tribunal considered that whichever of the two available interpretations applied made little difference to civil aviation safety. For example, at [39] of the decision the learned Tribunal member referred to "distinctions being drawn between certain operations which, not only make no sense, but also have nothing whatsoever to do with aviation safety". At [43] he said "[w]hether the passengers who fly on these aircraft have some pre-existing relationship [such as employer / employee] makes no difference to the safety of that operation".

57 The Tribunal also said at [43], that any safety issues that may arise in respect of a particular commercial charter operation could be addressed by imposing conditions on the air operator's AOC. However, this could be said about any AOC operation, and it is insufficient as an answer to the requirement to construe the relevant provisions having regard to their context and purpose.

58 Caper concedes that different levels of safety regulation are required by the

different types of commercial air operation set out in reg 206. It also accepts that the most stringent safety requirements are imposed on regular public transport operations under reg 206(1)(c).

59 Caper argues, and I accept, that aviation safety risks are not necessarily more pronounced just because a particular air service constitutes RPT rather than a charter. For example, a once per week RPT service by a five seat passenger plane from Moorabbin airport to King Island might involve less risk than a closed charter service from Port Hedland for "fly in-fly out" mining company workers working at a remote location, which had numerous flights per week and carried thousands of workers over the course of a year. There was no evidence before me as to any necessary elevation of aviation risk arising from RPT operations. It depends on the particular RPT and charter operations.

60 However, as I detail at [77]-[80] below, in reg 206 Parliament created a graduated approach to the regulation of air operators based on the purpose of the different types of commercial air operations and having regard to the safety of the fare paying general public. There is a clear parliamentary intention to more stringently regulate RPT operations (open to the carriage of the general public as they are) than charter operations.

61 In my view it is appropriate that I approach the interpretation of the relevant provisions on the basis that the legislature and CASA have imposed more stringent safety requirements on RPT operations than on charter operations for a reason, rather than on a whim. I respectfully agree with the observations of a magistrate, quoted with approval by Bollen J in an appeal, in *Southern Cross Airlines Pty Ltd v McNamara* (1989) 97 FLR 72 at 81 (*Southern Cross Airlines*):

> If the aircraft on that flight was "available" for the transportation of members of the public it falls within the definition [of regular public transport]. This is presumably because Parliament intended high standards and infrastructure be in place where an aircraft is available for the transport of members of the public.

62 The potential aviation safety implications of the alternative available interpretations of reg 206(1)(b)(ii) and (c) are also referred to in CASA's regulatory policy. It provides:

> [13] "Interposed entity" models often involve potentially complex and convoluted interpersonal and inter-corporate arrangements, the details of which can be difficult to ascertain with clarity and accuracy. Aspects of such arrangements pertinent to the judgements CASA needs to make for the purposes of determining whether certain operations are properly classified as charter operations under CAR 206(1)(b)(ii) or are PT operations can be obscure — and sometimes deliberately obscured. Indeed, it is not unusual to find purportedly "closed" groups that have been created solely for the purpose of providing a conduit through which members of the public (i.e. persons generally) might be funnelled onto an aircraft.
>
> …
>
> [16] Neither should CASA be put to the task of undertaking subtle contractual arrangements or the nuances of complex relationships amongst and between persons (natural and corporate) for the purpose of classifying an operation and identifying the appropriate level of safety at which those operations are required by law to be conducted. This is a dauntingly

> difficult task in the best of circumstances, and all the more so where there may be a calculated effort to distort or obscure the true nature of such relationships.
>
> [17] For CASA, the distinction between "closed charter" and RPT operations should reflect relevant safety-related considerations, not pre-eminently political judgements about the social utility of the provision of air services in particular circumstances, or the inevitably contestable results of a forensic "shell game". To that end, CASA will focus on the concrete, practical determination of whether, in fact, accommodation in an aircraft is available to persons generally — regardless of the means by which, or the agency through which, such accommodation is made available.

The policy states that the distinction that CASA seeks to be drawn between closed-charter and RPT operations is a "critical safety-related" one. One can readily see a basis for CASA's concerns.

63 Caper argues that I should treat CASA's regulatory policy as of no assistance in interpreting the Act and Regulations. There can be no doubt that CASA cannot dictate my interpretation of the Act through the policy and it did not seek to do so. I did though find it of some assistance insofar as it set out CASA's view of the safety ramifications of the available interpretations.

The error in the Tribunal's approach to "persons generally" in reg 206

64 The difficulty in construction primarily relates to the phrase in reg 206(1)(b)(ii) which defines the air operation as being a closed charter only if "accommodation in the aircraft is not available for use by persons generally". A related enquiry concerns the phrase in reg 206(1)(c) "the purpose of transporting persons generally" which describes an element of an RPT operation.

65 As *Project Blue Sky* indicates, it was necessary for the Tribunal to identify the meaning of each of these phrases having regard to the purpose of the Act and their context in the Regulations. Instead of taking this approach, the Tribunal largely broke these phrases down into their constituent elements such as "persons generally", even considering the word "generally" in isolation with an emphasis on its role as an adverb. Its grammatical analysis was overly literal and took no account of purpose and context. Both parties accept that the Tribunal's approach in this regard was incorrect.

66 As a result the Tribunal reached a construction which was strained and unrealistic and failed to prefer the interpretation that would best achieve the safety purpose of the Act. This is perhaps best seen in the finding that the words "persons generally" in reg 206(1)(b)(ii) and (c) is not a reference to the general public. The Tribunal said at [36] that these words said nothing about persons at all. In the appeal, both parties accept that the Tribunal was in error in this regard, although Caper says that the Tribunal's decision is in any event correct.

67 CASA also points to the legislative history which shows that the expression in reg 191 of the *Air Navigation Regulations*, the predecessor to reg 206, was "members of the public" which was changed to "persons generally" when reg 206 was introduced. Whilst the words were refined there was no apparent intention to alter their meaning.

68 Having regard to the context and purpose of the legislation, it is clear that the words "persons generally" in both provisions is a reference to the general public. The Tribunal's interpretation must be rejected.

69 Its incorrect grammatical approach also led the Tribunal to conclude that the

words "accommodation in the aircraft is not available for use by persons generally" is not a reference to seats on the flight not being available for the use of the general public. Based on a conclusion that the adverb "generally" does not qualify or add meaning to the noun "public" and instead qualified the adjective "available", the Tribunal reconstructed the provision so that its meaning was to require that the accommodation on the aircraft be not "generally available" for use by persons. This conclusion too is inconsistent with the scheme of the legislation and its safety objectives.

70 It also leads to two potentially absurd results. The first arises from the way that this construction focuses upon the physical availability of "accommodation" on aircraft (which can only mean cargo space or seats), and whether or not the accommodation is "generally available" to persons wishing to be carried on the aircraft. It means that an air operation may qualify as a charter operation merely by an air operator's "cordoning off" some parts of the accommodation so that they are not made available to passengers.

71 Stratagems by air operators to avoid being treated as an RPT operation are apparently not unknown. For example, *Southern Cross Airlines* was an appeal to the Supreme Court of South Australia from the decision of a Magistrate. The airline which was licensed to provide charter services only had been convicted of conducting RPT in breach of the *Air Navigation Regulations* (the predecessor to the present regulations which are relevantly similar). Part of its defence was an attempt to, wrongly, portray the service as partly for freight rather than passenger carriage. In deciding whether the operation was a charter service or regular public transport the Magistrate said, and Bollen J restated, at 80:

> In approaching this task, it seems to me important for a court to have a look at the reality of the situation and not just simply the way a party seeks to dress the operation up. If the reality of the situation is that aircraft is available for the regular transportation of members of the public by fixed routes and at fixed times, in other words, a normal passenger transport service, then the fact that there are some slightly odd aspects to it not normally found within the larger airlines, should not matter. As Mr Justice Cox said in a different context in *Chegwidden v White*: "I cannot believe that it was the intention of the Executive Government of the Commonwealth to allow the regulations to be evaded by such a simple stratagem."
>
> In other words, if the aircraft operator should really be complying with the higher standards thought necessary by the Commonwealth when members of the public are conveyed regularly on aircraft, then the fact that the operation tries to dress up the operation in some small ways, should not deter a court from categorising an operation into its proper category.

72 Bollen J agreed with the Magistrate's approach and I respectfully do as well. I accept that the facts in that case are different to those before me now. In particular, there is no evidence that Caper has tried to "dress up" its operation to appear to be something that it is not. Even so, his Honour's observations are apposite as they illustrate that the critical concern of the Court should be the substance and effect of an arrangement rather than how it appears. In the present case the substance and effect of the arrangement is that the flights to Bathurst Island are available to the general public.

73 The second potentially absurd result arising from the Tribunal's approach is that, taken to its logical extreme, a travel company could charter aircraft from an AOC holder with a charter authorisation and schedule and conduct regular flights on the main business commuting routes like Melbourne to Sydney. The

travel company would sell the tickets and it could effectively construct the "special purpose" required by the Tribunal's decision through package arrangements. These flights, which would ordinarily attract the level of safety regulation reserved for RPT, would be regulated only as a closed charter.

74 Such structuring is also not new, and the Regulations should be construed so that Parliament's intention cannot be so easily evaded. In *Chegwidden v White* (1985) 38 SASR 440 (*Chegwidden*) the prosecution of a pilot for a breach of the *Air Navigation Regulations* was heard in the Supreme Court of South Australia. The pilot had arranged to carry a group of people to and from Kangaroo Island, with a week's holiday accommodation on the island and the use of a car whilst there, for an overall price of $500. Although he held an unrestricted private pilot's licence he did not hold the appropriate commercial licence to carry passengers for "hire or reward". The case turned on the definition and application of the words "for hire or reward". Two competing interpretations were possible. The narrow reading would require proof by the prosecution that some part of the $500 fee charged by the pilot was explicitly and directly referable to the flight. The broad reading would bring the package activity (where there was no breakdown of any component to be spent on the flight as distinct from the overall holiday) within the regulations.

75 Cox J considered that the regulations should be read with regard to the purpose of promoting safety, noting at 552:

> If there is any ambiguity about it, the Court should bare in mind the evident purpose of the Regulations in this respect is to promote air safety … and should give the Regulations a liberal and remedial construction. It would be strange if a pilot commits an offence if he charges $500 to fly a passenger to Sydney, but not if he charges him $600 for a trip that includes a night at the opera as well. I cannot believe that it was the intention of the Executive Government of the Commonwealth to allow the Regulations to be evaded by such a simple stratagem.

I respectfully agree with his Honour.

76 Taking the same approach, in my view it would be strange if Caper's flights between Darwin to Bathurst Island stand to be regulated as RPT if Caper charges a fee to fly members of the public on that route, but regulated as a closed charter if a tour company is interposed and the tour company provides a tour on Bathurst Island for a combined fee which includes a flight component and a tour component. Again, it is the substance and effect of the arrangement that is important.

77 Properly construed the meaning of reg 206 is clear. Its scheme is to provide for the regulation of a range of different aviation "purposes" or air operations arranged with an eye to different levels of risk to the public. It starts with "aerial work" activities in reg 206(1)(a) such as aerial surveying, aerial spotting or photography, and agricultural operations. Such operations will often not involve the carriage of passengers, but if they do the passenger will usually have a specific reason or task to perform whilst they are on board the aircraft. This first level of commercial air operation attracts the lightest regulatory touch available under reg 206.

78 The next level of air operation is charters — both open and closed — as described in reg 206(1)(b)(i) and (ii). These types of operation attract a higher level of regulatory attention. The risk to the public in such charter operations is limited in different ways in each category. In an open charter, carriage of the general public is contemplated but only if it is not to be performed on a fixed

schedule to and from fixed terminals. In a closed charter, carriage may be undertaken on a fixed schedule to and from fixed terminals but the general public may not be carried. Whatever risks the passengers are exposed to in a closed charter, those risks are confined to a closed group.

79 The third and final level, falling under reg 206(1)(c) — as RPT, is an air operation which carries the general public on an aircraft operating on a fixed schedule to and from fixed terminals. The legislature imposes more stringent safety standards on RPT operations than it does on the other types of operation. For example, the *Civil Aviation Orders* require that RPT operators must establish a safety management system and must ensure that pilots are trained in Instrument Flight Rules, whereas no such requirements are imposed on charter operators.

80 I accept CASA's submission that reg 206 sets up a gradation of air activities or purposes which has regard to the safety risks to fare paying members of the general public, with aerial work purposes at the bottom level and RPT at the highest. Seen in this way the scheme of the Regulations is plain. CASA's construction is to be preferred because it is consistent with the scheme of the Regulations and the purpose of the Act.

81 One further issue in the construction of reg 206(1)(b)(i), (b)(ii) and (c) is the fact that the words "for hire or reward" appear in reg 206(1)(b)(i) and (c) but not in (b)(ii). This difference was not significant to the Tribunal's decision, but Caper submits that it indicates that the intervention of a charterer as the contracting party in a closed charter means that the passengers are not being carried for hire or reward. I am not inclined to agree, but it is unnecessary to reach a concluded view because nothing turns on it in the present case. I note too that the Tribunal found that Caper was receiving remuneration for its charter.

82 The Tribunal found that;

(a) Caper's flights between Darwin and Bathurst Island were on a fixed schedule to and from fixed terminals;

(b) the tours were open to members of the public at large; and

(c) any member of the public might obtain a seat on the flight simply by contracting with AAT Kings to purchase a tour to Bathurst Island in response to its advertisements.

83 The ordinary meaning of the phrase "accommodation in the aircraft is not available for use by persons generally" is that seats on the aircraft are not available to the general public. The reality of the Caper air operation is that the accommodation in the aircraft is available for use by the general public. The simple point is that the advertised offer of the flight, albeit bundled with the tour, is made to any member of the public who wishes to avail themselves of the service. The situation is quite unlike that of a church group or mining company that charter regular flights from fixed terminals for congregants or workers respectively. These flights are not available to the general public.

84 Consistently with the rules of construction the expression "persons generally" should be given the same meaning in both reg 206(1)(b)(ii) and (c). On a proper construction of these provisions and on the facts found, the Caper air operation should be seen not as a closed charter under reg 206(1)(b)(ii) as the Tribunal found, but instead as RPT under reg 206(1)(c).

The error in the Tribunal's approach to "purpose"

85 The Tribunal drew a distinction between a closed charter operation and regular public transport by reference to the purpose of those being transported. It decided that the characteristic that distinguishes groups like the church group, the mining employees group, and tour participants from "persons generally" is that they have a shared common purpose. It said that this distinguishing relationship operates so that once it is formed these people are not members of the public or "persons generally". On this interpretation where all the parties share a common purpose, such as the Bathurst Island tour, the relevant air service will be a closed charter.

86 The Tribunal stated at [38]:

> To fall within the *closed charter* provision under CAR 206(1)(b)(ii), those persons who travel to a destination terminal must all have the same special purpose for travelling to that destination. In my opinion, that is what distinguishes a *closed charter* from RPT.

The Tribunal noted that if the reasons for which passengers use an aircraft is simply to get to a common destination and then undertake individual activities those passengers do not have the requisite common purpose.

87 The Tribunal was led to this interpretation by the same incorrect grammatical and literal analysis. As I have already indicated, it failed to properly consider the context of the provisions or the purpose of the Act and Regulations. The Act and Regulations are plainly aimed at the enhancement of aviation safety, and are replete with references to the achievement of this objective by regulation of air operators (or AOC holders). The scheme of the Act and Regulations is directed to and dependent upon the activities of air operators, irrespective of any reason or purpose that may be held by a particular passenger or group of passengers that seek to be carried on a particular flight. It is very difficult to see how the regulation of aviation safety could be achieved by reference to the purposes of the passengers, and there is no compelling basis in the language of the Act or the Regulations in support of such a proposition or construction.

88 Again, the possibility of the absurd result referred to at [73] arises, and the Tribunal's approach cannot be correct. As noted by Cox J in *Chegwidden*, it would be strange if Parliament intended that an air operator could so easily circumvent an important aspect of the regulatory scheme and by doing so expose members of the public to a lower standard of air safety. This is a strong indicator that Caper's construction would not promote the purpose of the Act and that CASA's construction is to be preferred.

Is there a difference between "carriage" and "transport"

89 Caper also contends that there is a distinction to be made between the words "carriage" in reg 206(1)(b)(ii) and "transport" in reg 206(1)(c). It says that this distinction goes to explaining the different functions of the two subregulations, and assists in understanding the need to enquire into the "purpose" of passengers flying on a closed charter. On Caper's argument, "carriage" is transport other than travel for the sole purpose of getting from one place to another, and it requires consideration of the purpose for which the travel is undertaken. Caper notes that its operation only falls within reg 206(1)(c) if it is for "the purpose of transporting persons generally". It argues that the purpose of the flight is to undertake a tour of Bathurst Island and not the purpose of transporting the passengers from point A to point B. Caper says that its

operation therefore falls outside reg 206(1)(c). It correctly notes that if its operation falls outside that provision it is not in breach of its AOC authorisation.

90 I do not accept this contention. The Regulations do not indicate any requirement to consider the subjective purpose for a passenger's journey. Part of CASA's regulatory armoury is its power to issue, modify, suspend or cancel an AOC and I consider that, on a proper construction of the Act and Regulations, the purpose referred to in reg 206 is the purpose of the AOC holder. In the present case, CASA's powers are directed at Caper and it is Caper's purposes which must be of interest to CASA rather than the passengers.

91 It is also difficult to see how any flight available to the public is not for "the purpose of transporting persons generally". Whatever the ultimate purposes of the passengers taking a flight are, the purpose of that flight is to transport those passengers.

92 I also do not accept that the definition ascribed to the word "carriage" by Caper is correct. "Carriage" is a non-technical term and should be given its ordinary meaning. The *Australian Concise Oxford Dictionary* relevantly defines carriage as "the conveying of goods" although in this provision it plainly applies to the conveying of people as well. The dictionary definition of "convey" is "transport or carry". "Transport" too is an ordinary word and should to be given its ordinary meaning. The dictionary definition of "transport" relevantly includes "take or carry (a person, goods, troops, baggage, etc) from one place to another". Transport is used to describe the verb "convey" which in turn is part of the definition of "carriage". The words "transport" and "carriage" are effectively interchangeable and "carriage" does not import a requirement to search for a passenger's objective in travel beyond mere conveyance.

93 In my view the Tribunal made an error of law in embarking upon an enquiry as to the purpose for travel held by the passengers on board the aircraft. The correct test required the identification of Caper's purpose in conducting the particular air operation.

Conclusion

94 The construction given to reg 206(1)(b)(ii) by the Tribunal constitutes an error of law. I do not consider that the facts found by the Tribunal are capable of supporting the conclusion that the Caper air operation is a closed charter within that provision. The decision of the Tribunal must be set aside.

95 In its notice of appeal in its submissions CASA sought that the matter be remitted to the Tribunal to be determined according to law. However, given the decision I have reached, there is a real question as to whether the only result possible is that Caper's operation constitutes regular public transport under reg 206(1)(c).

96 I will allow seven days for the parties to file short submissions as to whether the matter should be remitted to the Tribunal to be determined according to law, or whether the Court should substitute a decision. The parties are requested to file short submissions as to costs within seven days. I am presently unaware of any reason why costs should not follow the event and in the absence of submissions I propose to make an order for the respondent to pay the applicant's costs.

Orders accordingly

Solicitor for the applicant: Civil Aviation Safety Authority.

Solicitors for the respondent: *Maitland Lawyers*.

GRAHAM RAFFELL