IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

ON APPEAL FROM THE COURT OF APPEAL

OF THE NORTHERN TERRITORY

No. D4 of 2018

BETWEEN:

**WORK HEALTH AUTHORITY**

Appellant

and

**OUTBACK BALLOONING PTY LTD**

First Respondent

and

**DAVID BAMBER**

Second Respondent

# APPELLANT'S REPLY

Filed on behalf of the Appellant

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## PART I: CERTIFICATION

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

## PART II: ARGUMENT

**2.** **Summary**: It appears to be accepted by the first respondent that the reasons of the Court below are untenable (First Respondent's Submissions (**RS**) [107]).[1] The first respondent now posits and relies on "four interlocking reasons" to support a conclusion (not arrived at below or by the Full Federal Court in *Heli-Aust*)[2] that the Civil Aviation Law prescribes to the exclusion of every other law the safety standards for air navigation and air operations (including all matters preparatory to flying by air and incidental thereto) and for the enforcement of those standards (RS [7]). Accordingly, we deal in reply, primarily, with the insufficiency of those four interlocking reasons to support the first respondent's interpretive conclusions (at RS [65], [76]). We reply briefly also to the first respondent's subject matter analysis (RS [92]-[95]) and to the grounds of contention.

**3.** **Four interlocking reasons**: It is neither possible nor necessary to deal seriatim with the first respondent's submissions developing the four interlocking reasons underlying its construction of the Civil Aviation Law. The construction unravels at a structural level.

**4.** The structure of the first respondent's argument is that, having regard to the Convention on International Civil Aviation (**Chicago Convention**) (RS [11]-[23]), the terms of the Civil Aviation Law (RS [24]-[34]), and the history of aviation regulation in Australia (RS [35]-[49]) it follows that the Civil Aviation Law is an exhaustive code governing the safety of air navigation, including the safety of inflation and embarkation procedures, such that no other law may prescribe norms or standards of conduct applicable to operators and personnel which impact on those procedures (RS [65]). That construction of the Civil Aviation Law, it is then said, can be maintained in the context of the workplace safety laws and the *Crimes (Aviation) Act 1991* (Cth) (***Crimes Act***) by reading down the latter laws (RS [76]-[79], [105]).

**5.** The structure of the first respondent's argument avoids grappling with the significance of the full legislative context (in particular the Cth WHS Act) until *after* constructional choice in the interpretation of the Civil Aviation Law has been exercised. But

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[1] Referring to the reasons of Southwood J (Blokland J agreeing). Related criticism of the separate reasons of Riley J at Appellant's Submissions in Chief (**AS**) [47] fn 87 similarly goes unanswered.

[2] These submissions adopt the same abbreviations used in the AS.

that is to disregard what this Court said in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 about the need to *begin* the interpretive process with the [full] context of the law. The flaw in the first respondent's approach is that it embarks on the task of reading the Civil Aviation Law and the Cth WHS Act together[3] from a predetermined position about the intention of the Civil Aviation Law to operate as *the* law. From that position, the only interpretive choice is for the Cth WHS Act (and other Commonwealth legislation[4]) to yield to the Civil Aviation Law. The first respondent's constructional analysis (RS [76]-[79]) therefore begs the very question it must answer: *how* are the laws to be read together? Its premise denies the availability of alternatives.

**6.** The mechanism for reading down the Cth WHS Act proposed by the first respondent (RS [79]), while not stated with any precision, is clearly contrary to the language, context[5] and purpose[6] of the Cth WHS Act, and therefore cannot be justified.[7] The first respondent purports to derive support for it by analogy with the *Occupational Health and Safety (Maritime Industry) Act 1994* (Cth) (***Maritime Industry Act***) which operates to the exclusion of the Cth WHS Act as an industry code (RS [77], [102]). The problem is that the interaction between the Cth WHS Act and the *Maritime Industry Act* is governed by s 12A(1) of the Cth WHS Act as an exception to, rather than an explanation of (cf RS [102]), the Cth WHS Act's object of a nationally consistent framework. The Cth WHS Act does not deal with the Civil Aviation Law in the same manner.

**7.** The first respondent appears to contend (RS [79]) that when the Cth WHS Act states that it applies to workplace safety on aircraft this means that it only applies to workplace safety on aircraft where that application does not impose a safety standard on operators or personnel which affects their performance of aviation safety functions under the Civil Aviation Law. A related distinction is advanced in relation to the *Crimes Act* (RS [105]). Both resolve to a submission that the Civil Aviation Law is concerned (to the exclusion of other laws) with safety standards for operators and personnel which affect their performance of aviation safety functions under the Civil Aviation Law, and other Commonwealth (and

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[3] RS [78], [97], citing *Commissioner of Police v Eaton* (2013) 252 CLR 1 at [45].

[4] Such as the *Crimes Act*.

[5] Submissions of the Attorney-General (Cth) (**CS**) [36]-[39].

[6] See AS [35]-[36]. Cf RS [102]-[103] erroneously asserting that the *international* operation of the Civil Aviation Law would advance the *nationally* consistent framework established under the Cth WHS Act.

[7] *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [35]-[40] per French CJ, Crennan and Bell JJ, [65]-[66] per Gageler and Keane JJ.

State/Territory) laws deal with other safety matters on aircraft. The distinction cannot account for the provisions of the *Crimes Act* directly relating to the performance of aviation safety functions (eg, controlling or prejudicing the safe operation of aircraft),[8] the *Civil Aviation (Carriers Liability) Act 1959* (Cth) in its entirety, or the more generally expressed safety standards in the Civil Aviation Law.[9] Reliance on the distinction also highlights that the first respondent needs to establish (on its own case) that, as the workplace duty is drawn in the charge, it affects the performance of aviation safety functions under the Civil Aviation Law – ie they need to make good on one of the grounds of contention.

**8.** Several further brief responses concerning the four interlocking reasons are made. First, the Chicago Convention does not impose any obligation on Australia to enact a single all-inclusive national scheme for the regulation of the safety of civil aviation (cf RS [13]-[23]). Article 12, which contains an obligation on member states to maintain uniform national legislation, is confined to flight and manoeuvring of aircraft. Article 37 is an obligation to collaborate with other member states and is confined to matters in which uniformity between the laws of member states will facilitate and improve international air navigation.[10] None of the other articles referred to advance the issue. Annex 19 came into force on 14 November 2013 *after* the incident the subject of these proceedings (cf RS [22]-[23]). The Chicago Convention does not impose an obligation on member states to carve out or exclude aviation safety from the operation of non-aviation specific safety laws.

**9.** Secondly, the history of Commonwealth implementation of the Chicago Convention shows that implementation can be achieved by co-operative federalism and shared legislative responsibility (cf RS [49]). Neither is incompatible with the Convention.[11]

**10.** Thirdly, the nature of the functions conferred on CASA are not inherently incapable of being shared with State and Territory agencies (cf RS [24], [27]). As it is, those functions are shared between Commonwealth agencies. The Australian Transport Safety Bureau has the functions of investigating aviation safety incidents[12] and recommending improved

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[8] See,eg ss 13, 16, 19, 20, and 32.

[9] See, eg, CAA s 20A which would encompass the conduct of a passenger who opened an aeroplane door mid-flight or any other operation of an aircraft by a person whether having responsibilities or authority or not.

[10] See *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 (***Airlines No 2***) at 101 per McTiernan J, 117 per Kitto J, 126-127, 131 per Taylor J, 138 per Menzies J, 152 per Windeyer J.

[11] *Airlines of New South Wales Pty Ltd v New South Wales (No 1)* (1964) 113 CLR 1.

[12] *Transport Safety Investigation Act 2003* (Cth) (***Investigation Act***) s 12AA(1)(b)-(c). See the definition of Transport safety matters in s 23 referring to the definition of transport vehicle in s 3.

practices[13] in co-operation with CASA,[14] and the Commonwealth Director of Public Prosecutions has the function of enforcing, by way of prosecution, offences under the Civil Aviation Law. There is clearly room for inter-agency federal co-operation.[15]

**11.** Fourthly, on longstanding authority of this Court, State/Territory legislation may validly operate in a manner the practical effect of which is to affect or impede the performance of aviation safety functions without being inconsistent with the Civil Aviation Law.[16]

**12.** Finally, the content of the CARs and CASRs, while voluminous, is hardly exhaustive or comprehensive of the safety standards necessary to maintain human safety in the air and on the ground in the performance of every activity undertaken in connection with air operations; as the inapplicability of any provision to the particular circumstances of the complaint demonstrates (cf RS [33], [51]-[64]).[17]

**13.** **Subject matter analysis**: The first respondent's reliance on *Metal Trades Industry*[18] in support of a conclusion that the NT WHS Act regulates the same subject-matter as the Civil Aviation Law (RS [113]) highlights the error in the first respondent's analysis of the subject matter of the two laws (RS [92]-[95]). In *Metal Trades Industry* this Court identified with precision the subject matter of the laws.[19] That approach accords with authority.[20] By contrast, the first respondent advances an impermissibly broad subject matter – the safety of persons and the management of risks (RS [92]). Framed in that general way, the Civil Aviation Law would share the same subject matter with a substantial body of other

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[13] *Investigation Act* s 12AA(1)(d)-(f).

[14] *Investigation Act* s 12AA(2). As to the interaction of the Act with other laws see s 10.

[15] *Airlines No 2* at 143-144 per Menzies J.

[16] *Airlines No 2* at 109 per McTiernan J, 120 per Kitto J, 133 per Taylor J, 147-148 per Menzies J, 155-156 per Windeyer J, 168 per Owen J. The Court rejected a deadlock argument that the existence of two licensing regimes created inconsistency between them: at 98-99 per Barwick CJ, 121 per Kitto J, 144 per Menzies J, 156 per Windeyer J, 168 per Owen J.

[17] CAA s 20A creates offences of operating an aircraft reckless as to whether the manner of operation could endanger life (s20A(1) or property (s20A(2)). While "operate" as a verb is broader than fly, it remains a significant limitation: Submissions of the Attorney-General (Tas) (**TS**) [37]-[40]. The limitation is evident here where there is no allegation that the balloon (the aircraft) was controlled or manipulated in an unsafe manner.

[18] *Metal Trades Industry Association of Australia v The Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 (***Metal Trades Industry***).

[19] *Metal Trades Industry* at 644 per Gibbs CJ, Wilson and Dawson JJ (relationship of employer and employee with respect to the termination of employment), and see 650 per Mason, Brennan and Deane JJ .

[20] TS [11]-[14]. See also the authorities cited at AS [42]; CS [24]-[26], [50] and in the submissions of the intervening States.

Commonwealth laws regulating disparate fields of human activity[21] and would exclusively regulate even those areas of safety which it otherwise leaves untouched.[22]

**14.** **Notice of contention**: The two grounds in the notice of contention can be answered shortly. In the first ground, the first respondent alleges a direct conflict between the operations manual requirements contained in the Civil Aviation Law and the primary duty under the NT WHS Act: under CAR 224(2)(c) the pilot in command is responsible for safety (subject only to the operator's control through the operations manual) whereas the NT WHS Act imposes a safety obligation on the first respondent (RS [119]-[120]). That submission is answered by the terms of CAR 224(2) which does not confer plenary safety responsibility on the pilot in command during a particular period (cf RS [119]) but confers responsibility in particular subject matters, including persons and crew *on the aircraft* (CAR 224(2)(c) and (d). The pilot in command was not responsible for the safety of the deceased (who was not on the aircraft) by reason of CAR 224(2)(c). In any event, conferral of such responsibility does not exclude by necessary implication an operator's obligations to establish adequate workplace safety procedures for the pilot in command and other employees to follow. Just as CAR 224 does not preclude operator liability under the Civil Aviation Law, it does not preclude it under the general law including the NT WHS Act.

**15.** As to the second ground, the first respondent fails to construe CAR 92(1)(d) in the context of that regulation as a whole, which makes plain that the provision is a constraint on *the place* of landing and take-off. There is no necessary implication in a law of that kind that other laws cannot impose obligations to erect things on the land. In any event, no foundation is found in the evidence for the suggestion (RS [124]) that the erection of a physical barrier around the inflation fan would have made River Track 1 unsuitable for taking-off.[23]

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[21] Including customs controls on firearms importation, product safety legislation and food, alcohol and drug regulation.

[22] *Metal Trades Industry* at 650 per Mason, Brennan and Deane JJ.

[23] That suggestion is contrary to the appellant's understanding that steps have subsequently been taken by the first respondent to place bunting around the fan as a barrier when it is in use.