Work Health Authority v Outback Ballooning Pty Ltd & Anor
[2017] NTSC 32

PARTIES:	WORK HEALTH AUTHORITY v OUTBACK BALLOONING PTY LTD AND DAVID BAMBER SM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21562815
DELIVERED:	24 April 2017
HEARING DATES:	26 and 27 May 2016
JUDGMENT OF:	BARR J

CATCHWORDS:

CONSTITUTIONAL LAW – Whether complaint charging an offence against *Work Health and Safety (National Uniform Legislation) Act* (NT) inconsistent with Commonwealth legislative and regulatory scheme for air safety – indirect inconsistency – no Commonwealth legislative intent to 'cover the field' to include pre-flight operations which do not affect safety of aviation 'in flight'– order granted in the nature of certiorari.

PRACTICE AND PROCEDURE – Judicial review – order in the nature of certiorari sought to quash magistrate's dismissal of complaint – jurisdictional error – magistrate mistakenly denied existence of jurisdiction to hear and determine complaint.

Local Court (Criminal Procedure) Act (NT), formerly *Justices Act* (NT) s 182
Work Health and Safety (National Uniform Legislation) Act (NT) s 32
Northern Territory Supreme Court Rules, Order 56.01

Air Navigation Act 1920 (Cth)
Civil Aviation Act 1988 (Cth) s 28BE
Civil Aviation Regulations 1988 (Cth) reg 98
Civil Aviation Safety Regulations 1998 (Cth)

Victoria v The Commonwealth (1937) 58 CLR 618 at 630.
Australian Coastal Shipping Commission v O'Reilly (1962) 107 CLR 46
Airlines of New South Wales Pty Limited v New South Wales (No 2) (1965) 113 CLR 5
R v Winneke; ex parte Gallagher (1982) 152 CLR 211
Craig v South Australia (1995) 184 CLR 163
Samad v District Court of New South Wales (2002) 209 CLR 140 at [26] – [27].
Dickson v The Queen [2010] HCA 30; (2010) 270 ALR 1
Momcilovic v The Queen (2011) 245 CLR 1
Heli-Aust Pty Ltd v Cahill [2011] FCAFC 62; (2011) 194 FCR 502

REPRESENTATION:

Counsel:

Plaintiff:	T Moses
Defendant:	B O'Loughlin

Solicitors:

Plaintiff:	Solicitor for the Northern Territory
Defendant:	Povey Stirk

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Work Health Authority v Outback Ballooning Pty Ltd & Anor
[2017] NTSC 32
No. 21562815

BETWEEN:

WORK HEALTH AUTHORITY
Plaintiff

AND:

OUTBACK BALLOONING PTY LTD
First Defendant

AND:

DAVID BAMBER SM
Second Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 24 April 2017)

Introduction

[1] The plaintiff seeks an order in the nature of certiorari, pursuant to r 56.01 of the Supreme Court Rules, to quash the order of the second defendant ("the magistrate") made on 6 November 2015 dismissing the plaintiff's complaint against the first defendant, pursuant to s 182 *Justices Act*.[1]

[1] The *Justices Act* is now called the *Local Court (Criminal Procedure) Act*.

Background

[2] On 7 October 2014, the plaintiff commenced criminal proceedings on complaint against the first defendant, alleging an offence contrary to s 32 of the *Work Health and Safety (National Uniform Legislation) Act* (NT). The complaint and particulars read as follows:

> On the 13th day of July, 2013, at River Track 1, Alice Springs in the Northern Territory of Australia, did fail to comply with its duty pursuant to the *Work Health and Safety (National Uniform Legislation) Act* ("the Act"), contrary to section 32 of the Act.
>
> Particulars
>
> 1. The Defendant is a person conducting a business or undertaking that had a health and safety duty pursuant to section 19(2) of the Act 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 the business or undertaking.
>
> 2. The Defendant conducts a business providing balloon rides in or about Alice Springs.
>
> 3. On 13 July 2013 the Defendant was to provide a balloon ride to 10 persons including Stephanie Bernoth.
>
> 4. To inflate the balloon, the Defendant used a fan powered by a Honda motor. The fan was a hazard that posed risks to persons in its vicinity due to the speed of the fan and the suction of air being drawn into the fan.
>
> 5. The Defendant did not comply with the health and safety duty in that it did not eliminate or minimize those risks as far as was reasonably practical. The Defendant:
>
> a. Failed to warn or adequately warn the passengers of the severity and nature of the risks including the risk of the fan drawing into it loose clothing, scarves and long hair of

those in the vicinity and the potential consequences should that occur;

b. Failed to ensure that the passengers boarding the balloon were not wearing loose clothing, scarves and long hair likely to be drawn into the hazard;

c. Failed to isolate the hazard by any form of barrier or passenger exclusion zone to prevent persons approaching the hazard;

d. Requested passengers to board the basket of the balloon from the side of the balloon where the fan was in operation;

e. Failed to supervise or adequately supervise the passengers boarding the basket of the balloon;

f. Failed to place a staff member close to the hazard to ensure adequate distance was maintained from the hazard.

6. It would have been reasonably practicable for the Defendant:

a. When warning the passengers, to describe the danger, and in conjunction with that warning check the passengers to ensure that if there was any loose clothing, hair or accessories those passengers either removed the loose clothing and accessories and restrained their hair or they were kept well away from the fan;

b. To set up an exclusion zone and a physical barrier around the hazard;

c. To ensure the passengers were not directed to walk pass the fan while in operation or if there was a need should have ensured they were supervised such that they were kept a safe distance from the fan.

7. The Defendant did not undertake any of those measures.

8. The failure to comply with the duty exposed an individual to a risk of death or serious injury, namely, Stephanie Bernoth who died due to the scarf around her neck being drawn into the hazard.

[3] The *Justices Act*, in force at all material times, provided that no objection should be taken or allowed to any complaint in respect of any alleged defect in substance or form, or any variance between the complaint and the evidence adduced at hearing. However, the proviso in s 182 *Justices Act* read as follows:

> Provided that the Court shall dismiss the ... complaint … if it appears…
>
> a. (not relevant)
>
> b. that the … complaint fails to disclose any offence or matter of complaint.

Proceedings in the court below

[4] Before any hearing took place on the merits, the first defendant made an application to the Court of Summary Jurisdiction for the complaint to be dismissed pursuant to s 182 *Justices Act*, submitting that the complaint was "not competent" and "invalid". The plaintiff (complainant) agreed that the magistrate should not proceed to a full hearing before determining the preliminary application.[2]

[5] The first defendant's argument, in brief, was that because balloons are classed as 'aircraft', the operation of ballooning is subject to a

[2] Complainant's Further Submissions (undated), exh 'SW6' to affidavit of Simone Wiese sworn 3 March 2016, par 23.

comprehensive Commonwealth statutory and regulatory regime for the regulation of civil aviation. The first defendant contended that the Commonwealth had "covered the field" by the enactment of an extensive body of Commonwealth acts and regulations, including the *Air Navigation Act*, the *Civil Aviation Act*, the *Civil Aviation (Carriers Liability) Act*, the *Civil Aviation Regulations* and the *Civil Aviation Safety Regulations*.[3] In support, the first defendant relied on the decision of the Federal Court in *Heli-Aust Pty Ltd v Cahill*.[4] The first defendant further contended that the Commonwealth statutory and regulatory regime in relation to civil aviation applied to events that occur on the ground, including the act of inflating a balloon for flight.

[6] Although the first defendant's written submissions argued that the *Work Health and Safety (National Uniform Legislation) Act* (NT) was "inconsistent or repugnant [with the Commonwealth statutory and regulatory regime] to the extent that it also purports to regulate or prosecute this activity" (the activity of embarkation of passengers into the basket of a balloon),[5] the inconsistency contended for by the first defendant is properly described as 'indirect inconsistency'.

[7] In *Victoria v The Commonwealth*, Dixon J explained the principle as follows:[6]

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[3] Defendant's submissions 31 August 2015 par 5.
[4] *Heli-Aust Pty Ltd v Cahill* [2011] FCAFC 62; (2011) 194 FCR 502.
[5] Defendant's submissions 31 August 2015 par 35.
[6] *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630.

> … if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State 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.

[8] The High Court has interpreted s 109 of the Constitution as operating to exclude State law "not only when there is a more direct collision between federal and State law but also when there is found in federal law the manifestation of an intention on the part of the federal Parliament to 'occupy the field'".[7] More recently, in *Dickson v The Queen*, the High Court stated that the proposition extracted in [7] is often associated with the expressions "covering the field" and "indirect inconsistency".[8] In *Momcevelic v The Queen*, Gummow J. explained "indirect consistency" as follows:[9]

> … the essential notion is that, upon its true construction, the federal law contains an implicit negative proposition that nothing other than what the federal law provides upon a particular subject-matter is to be the subject of legislation; a State law which impairs or detracts from that negative proposition will enliven s 109.

[9] The first defendant's application was heard by the Court of Summary Jurisdiction on 22 September 2015. On 6 November 2015, the magistrate dismissed the complaint as invalid and provided written reasons to the parties.

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[7] *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 56, per Dixon CJ.
[8] *Dickson v The Queen* [2010] HCA 30; (2010) 270 ALR 1 at [14].
[9] *Momcilovic v The Queen* (2011) 245 CLR 1, at [244].

The magistrate's decision

[10] In his reasons, the magistrate correctly identified the crucial issue as being the extent of the field of exclusive Commonwealth legislative and regulatory operation.[10] His Honour's analysis of the relevant facts included the following:[11]

> The defendant in this case operates an aviation business. The complained of behaviour occurred whilst operating that business. The allegations are of failure to keep passengers safe from a fan used in the inflation of the balloon whilst boarding just prior to take off. The defendant has an AOC [Air Operator's Certificate], keeps an operations manual which outlines procedures pre-flight, procedures including the safe operation of the inflation fan. Although there is not specific Commonwealth legislation as to the safe operation of inflation fans, their use inflating balloons and embarking passengers is within the scope of Commonwealth regulation and CASA oversight.
>
> Although the danger posed by the fan was not inextricably linked to aviation and the safe operation of the fan is not strictly an aviation matter, on the facts presented for the purpose of this application, the surrounding circumstances were:- the balloon pilot and director of the defendant company had a commercial balloon pilot licence from CASA. Wind tests and pre-flight briefing were done. Passengers separated into two groups for loading into the basket. Two passengers were asked to hold open the balloon while the inflation fan was started. Once the opening of the balloon was able to support itself, the pilot instructed the passengers to preload while the basket was still on its side. Two passengers, from the side of the basket away from the fan, boarded and then passengers from the fan side were asked to board. The first person from the fan side boarded after walking between the fan and the basket. He was getting into the basket when the victim was directed to board also from the fan side. She followed the first person from that side. In doing so her scarf was sucked into the fan.

[11] The magistrate accepted the first defendant's contention, based on *Heli-Aust Pty Ltd v Cahill*, that Commonwealth legislation and regulation extended

[10] Reasons for Decision par 17.
[11] Reasons for Decision par 27 - 28.

beyond ‘in-flight’ to ‘pre-flight’operations which affect the safety of aviation and passengers whilst on the ground prior to flight. Consequently, the magistrate found that the activities complained of by the plaintiff were “best characterised as issues of aviation safety rather than of workplace health and safety”.[12] His Honour ultimately concluded that the subject matter of the complaint was within the field covered by the Commonwealth legislative/regulatory scheme, and dismissed the complaint as invalid.[13] The decision was based on indirect inconsistency between Commonwealth and Territory law.

[12] The plaintiff challenges the magistrate’s dismissal of the complaint on the interrelated grounds that his Honour (1) fell into jurisdictional error in holding that the complaint failed to disclose an offence known to law, and (2) denied the existence of jurisdiction in holding that the Court did not have jurisdiction to hear and determine the complaint. These grounds may be properly considered together.

[13] Since the plaintiff contends that the magistrate erred in adopting the principle in *Heli-Aust* as the basis for the indirect inconsistency finding,[14] it is appropriate to now consider that decision.

Heli-Aust Pty Ltd v Cahill

[14] The applicant in *Heli-Aust Pty Ltd v Cahill*[15] was the operator and holder of an Air Operator’s Certificate which, relevantly, authorised an aerial locust

[12] Reasons for Decision par 29.
[13] Reasons for Decision par 31.
[14] Plaintiff’s submissions 4 May 2016 par 17.

detection operation for the New South Wales Department of Primary Industries at a rural property near Dunedoo. During the operation, a helicopter struck an electrical power line and crashed. The pilot and a rear seat passenger were both killed, and a front seat passenger was seriously injured. The applicant was prosecuted under state legislation, the *Occupational Health and Safety Act 2000* (NSW) ('the OHS Act'). One charge alleged that the applicant controlled 'premises' (the helicopter) used by people as a place of work, which premises were unsafe in a number of aspects including: inadequate risk assessment for low level flying; insufficient pre-flight planning; the helicopter was not fitted with a wire strike prevention system; the helicopter was not fitted with four point harnesses to each seat, and passengers were not provided with personal protective equipment in the form of a suitable flight helmet and flight suit. A second charge alleged that the applicant, in its capacity as employer, failed to ensure that the two passengers were not exposed to health or safety risks arising from the employer's undertaking while at the employer's 'place of work'.

[15] The applicant brought proceedings in the Federal Court in its original jurisdiction seeking prerogative relief and a declaration that the OHS Act was invalid in so far as it purported to extend to civil aviation. In brief, the applicant argued that the OHS Act did not apply to the events surrounding the helicopter accident because, if it did, the Act would operate in a field in

[15] *Heli-Aust Pty Ltd v Cahill* [2011] FCAFC 62; (2011) 194 FCR 502 ("*Heli-Aust*").

which the *Civil Aviation Act 1988* (Cth), the *Civil Aviation Regulations 1988* (Cth) and the *Civil Aviation Safety Regulations 1998* (Cth) were intended to regulate to the exclusion of State law. That field, as finally formulated by the applicant's counsel, was the "safety of air navigation" or the "safety of air operations in Australia".[16] The applicant's submission was that the Commonwealth regulatory scheme was concerned with safety in flight.[17]

[16] The majority in *Heli-Aust* decided that the *Civil Aviation Act* and 'the Regulations',[18] which together created a regulatory framework to ensure the safety of civil aviation,[19] were "intended to regulate the safety of civil aviation in Australia comprehensively and … not intended to operate in conjunction with State legislative schemes directed to the same end, namely the safety of air navigation".[20] In a joint judgment, Moore and Stone JJ concluded as follows:[21]

> The Commonwealth regime for the regulation of the safety of civil aviation in flight in Australia is comprehensive and exclusive. It is not supplementary or cumulative on State law. There is a direct conflict between the State and Commonwealth legislative schemes. The State law, to the extent of the inconsistency is invalid.

[16] *Heli-Aust* at [7], [64]. Both formulations were taken from *Airlines of New South Wales v New South Wales (No 2)* (1965) 113 CLR 54 per Barwick CJ at 90, 92.
[17] *Heli-Aust* at [7], [63] – [64] per Moore and Stone JJ. The applicant also argued that there was direct inconsistency between certain provisions of the *Civil Aviation Act 1988* (Cth) and Regulations and the provisions of the OHS Act in relation to the charges as particularized.
[18] The reference to "the Regulations" in *Heli-Aust* at [8], and subsequently, was a short form reference to both the *Civil Aviation Regulations 1988* (Cth) and the *Civil Aviation Safety Regulations 1998* (Cth) – see *Heli-Aust* at [2].
[19] *Heli-Aust* at [8] per Moore and Stone JJ.
[20] *Heli-Aust* at [67] per Moore and Stone JJ.
[21] *Heli-Aust* at [83] per Moore and Stone JJ.

[17] In a separate judgement, Flick J referred to the *Air Navigation Act*[22] and held that no Commonwealth legislative intent could be discerned from that Act alone "to exhaustively or completely cover the field of safety of air navigation or the safety of air operations in Australia".[23] His Honour explained that the Act was enacted to ratify the Chicago Convention,[24] and that, even with subsequent amendments dealing with aviation security, there was no legislative intention evinced to deal "exhaustively and completely with all aspects of safety of air navigation or safety of air operations in Australia" to the exclusion the OHS Act. Nor could any such legislative intent on the part of the Commonwealth be discerned from the *Civil Aviation Act* alone,[25] notwithstanding the establishment under that Act of the Civil Aviation Safety Authority (CASA), which had the statutory function of safety regulation of civil air operations in Australia.[26] However, Flick J then considered those Acts in combination with the *Civil Aviation Regulations* and the *Civil Aviation Safety Regulations*, and reached the conclusion that it was "within the detail of these regulatory provisions that the Commonwealth [had] manifested its intention to 'cover the field' of all aspects of the safety of air operations in Australia".[27] His Honour concluded that (1) the width of the functions entrusted to CASA and (2) the subsequent promulgation of

[22] *Air Navigation Act 1920* (Cth).
[23] *Heli-Aust* at [145] per Flick J.
[24] The *Convention on International Civil Aviation*, concluded in Chicago on 7 December 1944.
[25] *Heli-Aust* at [148], [152] per Flick J.
[26] *Civil Aviation Act 1988* (Cth) s 9.
[27] *Heli-Aust* at [154] - [159], [164] per Flick J. Because his Honour found indirect inconsistency, he found it unnecessary to identify "particular laws of the Commonwealth" which were inconsistent with relevant State law, an exercise which, he said, might be relevant to resolving a submission as to direct inconsistency – see [161].

detailed regulations made apparent the "Commonwealth intent to set forth a comprehensive and exclusive regime".[28]

Plaintiff's arguments in the present case

[18] The plaintiff argues that the magistrate erred in adopting what his Honour described as 'the ratio of the *Heli-Aust* decision', seen in the passage extracted below:[29]

> If one accepts [that] the ratio of the *Heli-Aust* decision extends beyond "in flight" and extends to pre-flight operations that affect the safety of aviation and passengers whilst on the ground prior to flight, then it seems to me that the activities complained of are best characterised as issues of aviation safety rather than workplace health and safety.

[19] Counsel for the plaintiff submits that the magistrate erred in impermissibly extending the ratio in *Heli-Aust*. He argues that it was "incorrect in fact and principle to assert that *Heli-Aust* stands for some broader proposition that that which was put to the Court and which was necessary to decide the controversy",[30] and that the magistrate's "unexplained acceptance of a broader ratio cannot be sustained".[31]

[20] As can be seen from the extract from the joint judgment of Moore and Stone JJ in [16] above, their Honours described the Commonwealth regime for the regulation of the safety of civil aviation *in flight* as "comprehensive and exclusive".[32] Those observations were in the context of the helicopter

[28] *Heli-Aust* at [164] per Flick J.
[29] Reasons for Decision par 29.
[30] Citing *Blair v Curran* (1939) 62 CLR 464 at 532 per Dixon J.
[31] Plaintiff's Submissions 4 May 2016 par 23.
[32] *Heli-Aust* at [83] per Moore and Stone JJ.

accident, described in [14] above, which raised the very obvious factual issue of safety in flight. Consequently the legal issue for determination was as to whether the Commonwealth regime was intended to comprehensively and exclusively cover the regulation of the safety of civil aviation in flight. Their Honours did not decide whether the Commonwealth regime extended to (that is, was "comprehensive and exclusive" in relation to) the regulation of the safety of civil aviation ground operations, or civil aviation otherwise than 'in flight'. Moore and Stone JJ did not state the law beyond that applicable to the facts in *Heli-Aust* and should not be seen as necessarily setting the limits of the exclusive Commonwealth regime. It may be noted that Flick J described the 'field' in arguably wider terms: "all aspects of the safety of air operations in Australia.[33]

[21] In my view, the majority reasoning in *Heli-Aust* would support the proposition that the Commonwealth regime extends to the regulation of civil aviation ground operations, to the exclusion of State and Territory laws, where such operations affect the safety of aviation and passengers in flight. However, the magistrate impermissibly relied on the decision in *Heli-Aust* to extend the limits of the exclusive Commonwealth regime to all operations or procedures affecting the safety of aviation and passengers whilst on the ground prior to flight.

[22] The decision in *Heli-Aust* is not determinative of the issues raised before the magistrate and in this proceeding.

[33] *Heli-Aust* at [159], [161].

The plaintiff's arguments

[23] The plaintiff refers to the limits on Federal legislative power, identified and referred to by Barwick CJ in *Airlines of New South Wales v New South Wales (No 2)*,[34] to support the contention that the Commonwealth Parliament does not have an unqualified fiat to regulate all aspects of safety intersecting with an aviation business, or the safety of aviation and passengers whilst on the ground prior to flight.[35] The plaintiff refers in the same context to the statement of Lockhart J in *Ansett Transport Industries Ltd v Morris* that the power of the Commonwealth Parliament is "… circumscribed in that it must fall within the concept of air navigation and not, for example, the air transport industry generally in all its aspects and with its many ramifications."[36] The plaintiff contends that the Commonwealth does not have legislative competence "to regulate generally the establishment and maintenance of safe environments (including safe use of plant and machinery) around balloon take-off and landing sites".[37]

[24] The plaintiff then contends that that the Commonwealth aviation scheme (that is, the Commonwealth regulatory framework referred to in [15] and [16] above) does not purport to regulate generally the safe use of plant and equipment by aviation operators. This absence of regulation is said to be determinative: the plaintiff contends that Commonwealth laws do not regulate, much less evince an intention by necessary implication (based on

[34] *Airlines of New South Wales v New South Wales (No 2)* (1965) 113 CLR 54 at 90 – 93. See plaintiff's submissions 4 May 2016 par 25.
[35] Plaintiff's submissions 4 May 2016 par 27.
[36] *Ansett Transport Industries Ltd v Morris* (1987) 18 FCR 498 at 562.
[37] Plaintiff's submissions 4 May 2016 par 27.

the detailed content of the regulatory framework) to regulate, the safe use of inflation fans to the exclusion of other laws.[38]

[25] The plaintiff's submissions summarised in [23] and [24] are focused on the inflation fan as an item of plant and machinery used in the first defendant's business or undertaking. If the particulars of the charge on complaint[39] are accepted for present purposes, then the first defendant's careless operation of the inflation fan was clearly a cause of the deceased's fatal injuries.[40] However, the activity in which the fatal accident occurred was the embarkation of the deceased and other passengers onto an aircraft. The charge alleged (directly or indirectly) the first defendant's endangerment of a passenger in the embarkation procedure prior to the aircraft taking off in flight. The relevant question is therefore whether the embarkation procedure was so closely connected with the flight that it is regulated by the comprehensive and exclusive Commonwealth regime "for the regulation of the safety of civil aviation in flight". I will return to a consideration of this question below.

[26] The plaintiff next refers to the magistrate's conclusion that the ratio of the *Heli-Aust* decision could be extended to apply to the activities the subject of the complaint. The plaintiff submits that, in reaching that conclusion, the magistrate wrongly assumed the co-existence of Commonwealth offences

[38] Plaintiff's submissions 4 May 2016 par 46.
[39] See [2] above.
[40] In combination, inter alia, with a failure to warn of the hazards, to instruct on safe boarding, and to adequately supervise.

with which the first defendant might have been charged.[41] Specifically, the plaintiff referred to the magistrate's statement that he accepted that there were charges under the *Civil Aviation Act 1988* (Cth) with which the first defendant "could possibly be charged".[42] The plaintiff submits that there were no offences or prohibitions under the *Civil Aviation Act* or any other relevant Commonwealth laws comprising the Commonwealth aviation scheme applicable to the allegations the subject of the complaint.[43]

[27] The plaintiff's submission in the previous paragraph was contested by counsel for the first defendant, who maintained that there were "relevant Commonwealth offences", by implication offences contrary to the Commonwealth regulatory scheme, with which his client could have been charged.[44] Mr O'Loughlin referred to a breach of s 30DB *Civil Aviation Act 1988*, which provides that the holder of a civil aviation authorisation must not engage in conduct that constitutes, contributes to or results in a serious and imminent risk to air safety. That provision does not expressly relate to on-ground safety, even in relation to embarkation of passengers. Moreover, the consequence for breach is a discretionary administrative consequence: CASA has the right to suspend the holder's authorisation.[45] Mr O'Loughlin also referred to the administrative consequence of suspension by CASA of a holder's Air Operators Certificate ('AOC'), pursuant to s 28BA(3) *Civil*

[41] Plaintiff's submissions, 4 May 2016, par 28.
[42] Reasons for Decision, par 25.
[43] Plaintiff's submissions, 4 May 2016, par 46.
[44] First defendant's submissions, 17 May 2016, pars 25-31, under the heading, "There are relevant Commonwealth Offences".
[45] Another example given by counsel for the first defendant was a possible prosecution for the offence of failing to comply with the instructions in the Operations Manual, contrary to regulation 215(9) *Civil Aviation Regulations 1988*. Reference was also made to s 29(1) *Civil Aviation Act 1988*.

Aviation Act 1988, if a condition of the AOC were breached. In the present case, the breach of the AOC was a failure to comply with the first defendant's own Operations Manual. In my opinion, however, whether the Commonwealth regulatory framework comprehensively and exclusively covers the relevant field cannot be determined by the content of an individual operator's Operations Manual, nor by the consequences of breach by an operator of an effectively self-imposed obligation. I accept the plaintiff's submission to this effect.[46]

[28] In any event, the co-existence of Commonwealth and State/Territory offences does not of itself result in inconsistency between the laws. There is no prima facie presumption that a Commonwealth statute, by making it an offence to do a particular act, evinces an intention to deal with that act to the exclusion of any other law.[47] The C*rimes Act 1914* (Cth) provides rules in relation to the interaction between co-existing Commonwealth and Territory offences which apply to the co-existence of any offences contrary to the Commonwealth statutory regime and the *Work Health and Safety (National Uniform Legislation) Act* (NT). In this context, s 4C(2)(b) *Crimes Act* provides that a person is not liable to punishment for a Commonwealth offence if he or she has already been punished for a Territory offence arising from the same act or omission. S 4C(3) *Crimes Act* provides that where an act or omission constitutes an offence against a law of the Territory, the

[46] Plaintiff's reply submissions, 20 May 2016, pars 22-23.
[47] *R v Winneke; ex parte Gallagher* (1982) 152 CLR 211 at 224, per Mason J: "It is ... commonplace that the doing of a single act may involve the actor in the commission of more than one criminal offence. Moreover, it may amount to an offence against a law of the Commonwealth and a law of a State. So much at least is recognised by … s 11 *Crimes Act* (Cth) which [is] designed to ensure that in such a case the offender will not be punished twice where he has first been punished under State law".

validity of that law is not affected merely because the act or omission also constitutes an offence against a law of the Commonwealth. The plaintiff submits that these provisions assume the co-existence of offences and are intended to "address any unfairness which may result from this federal reality".[48] I accept that submission.

[29] The observations of the magistrate (1) that it could be unfair to the first defendant to be "subject to charges under the Civil Aviation Act and under the Work Health and Safety Act",[49] and (2) that the Commonwealth offences should be "investigated by CASA and charges brought by the appropriate federal authority"[50] were made without reference to the effect of s 4C(3) *Crimes Act*. The magistrate wrongly attributed significance to the availability of offences which his Honour thought "could possibly be charged" under Commonwealth law. To the extent that his Honour treated corresponding Commonwealth legislation as adversely affecting the validity of the Territory law, that approach did not take into account and was inconsistent with s 4C(3) *Crimes Act* (Cth).

[30] The plaintiff contends that the co-existence of Commonwealth offences, if there were such offences, would do no more than establish that the Commonwealth law regulates the subject matter to some extent. However, that could not logically enable a finding that the Commonwealth intends to regulate the subject matter to the exclusion of Territory law.

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[48] Citing *Momcilivic v the Queen* (2011) 245 CLR 1 at [252]-[255], per Gummow J.
[49] Reasons for Decision, par 26.
[50] Reasons for Decision, par 30.

The first defendant's arguments

[31] The first defendant contends that the 'field' exclusively covered by the Commonwealth regime for the regulation of the safety of civil aviation is not confined to safety in flight. Counsel for the first defendant relies on the arguably wider description of the 'field' stated by Flick J in *Heli-Aust* at [159] as "all aspects of the safety of air operations in Australia". He contends that analysis of the reasons of Moore and Stone JJ in *Heli-Aust* does not show why "in-flight" was adopted in their Honours' conclusion, extracted in [16] above. The simple answer to the latter contention is that the applicant's submission in *Heli-Aust*, elaborated as explained in [64] of *Heli-Aust*, was that the Commonwealth regulatory scheme was concerned with safety in-flight. I refer to my observations in [20] above. The majority's decision was in response to the case put by the applicant.

[32] Counsel for the first defendant also contends that restricting the 'field' to safety in-flight would be inconsistent with the High Court's decision in *Airlines of New South Wales (No 2),*[51] because Barwick CJ there mentioned that the "great deal of evidence" in that case included evidence "descriptive of the use and control of aerodromes, flight paths, controlled air space, navigational aids, systems of communication and a number of other matters from which the clear conclusion must be drawn that the safety of air operations in Australia does not admit of any distinction being drawn between aircraft engaged in intra-State and those in inter-State or international air operations in connection with all those matters which go to

[51] *Airlines of New South Wales Pty Limited v New South Wales (No 2)* (1965) 113 CLR.

make up … safety precautions and procedures." Counsel contends that, if 'control of aerodromes' came within the description of "safety precautions and procedures", then 'control of aerodromes' was part of the "safety of air operations in Australia." This is said to have some significance because, it was submitted, aircraft are not "in-flight" when using an aerodrome.[52] That submission indicates an apparent misunderstanding of what is denoted by the term "control of aerodromes". At the risk of stating the obvious, I note that aircraft approach aerodromes from the air, and may circle an aerodrome, in controlled air space, subject to air traffic control directions. It is most unlikely that the expression 'control of aerodromes', as used by Barwick CJ, was limited to control of activities or operations on the ground. Moreover, the first defendant's submission does not resolve the difficulty referred to by me in [25] above. Some operations of an aircraft at an aerodrome, such as taxi-ing, taking off and landing, may be so closely connected with flight that they would necessarily be regulated by the comprehensive and exclusive Commonwealth regime "for the regulation of the safety of civil aviation in flight". Others are not.

[33] Counsel for the first defendant also refers to some examples of the Commonwealth regulatory regime extending beyond 'in-flight'. Regulation 137.125(2) of the *Civil Aviation Safety Regulations 1998* provides that, if an aeroplane engaged in an 'application operation'[53] is on the ground with the engine running, the pilot in command must be at the controls unless the pilot

[52] First defendant's submissions, 17 May 2016, par 15.
[53] A reference to crop-dusting

is refuelling the aeroplane. Regulation 163 of the *Civil Aviation Safety Regulations 1988* provides that the pilot in command of an aircraft must not operate the aircraft on the ground in such a manner as to create a hazard to itself or to another aircraft. In my opinion, however, these limited examples of 'on-ground regulation' are still related to air safety in that the danger of an unpiloted aircraft or of an aircraft operated dangerously on the ground could well impact on other aircraft in flight, or in the process of taking off or landing. That is not the case with the balloon referred to in [2] above.

[34] Counsel for the first defendant finally contends that the *Civil Aviation (Carriers Liability) Act 1959* (Cth) is part of the Commonwealth regulatory scheme. The fact that s 28 of that Act imposes liability on a carrier for the death of or injury suffered by a passenger, resulting not only from an accident which takes place on board an aircraft but also in the course of the operations of embarking and disembarking, is said to demonstrate that the Commonwealth regime extends beyond 'in flight'. I reject that submission. The particular provision of the *Civil Aviation (Carriers Liability) Act 1959* (Cth) was enacted to give effect to the Warsaw Convention, as modified by the Hague Protocol, known as the '*Warsaw Convention as amended at The Hague, 1955*', and specifically Article 17 of the Operative Provisions of the *Convention*, which provides:

> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[35] In my opinion, the *Civil Aviation (Carriers Liability) Act 1959* (Cth) is not part of the regulatory framework created by the Commonwealth legislation and regulations, referred to in [15] and [16] above, which comprise the legislative air safety scheme in Australia. I note that the *Civil Aviation (Carriers Liability) Act 1959* (Cth) was not referred to as having any relevance to the issue decided in *Heli-Aust.*[54] The fact that a carrier's liability under the Act extends to injuries sustained while embarking or disembarking is not relevant to the issue I have to determine.

Conclusion

[36] In my judgment, the terms, nature and subject matter of the Commonwealth legislative and regulatory scheme for air safety in Australia do not evince an intention to completely state the law governing the pre-flight operations of balloon aircraft, even where those operations affect the safety of passengers on the ground prior to flight.

[37] In relation to the fatal accident the subject of the charge on complaint in [2] above, neither the operation of the freestanding fan to inflate the balloon nor the embarkation procedure in which the deceased was endangered was regulated exclusively by the Commonwealth legislative and regulatory scheme to the exclusion of Territory laws. I do not consider that the embarkation procedure was so closely connected with safety in flight that it is regulated by the comprehensive and exclusive Commonwealth regime.

[54] See the majority decision in *Heli-Aust* at [52] as to the legislative and regulatory components of the air safety scheme in Australia .

[38] The magistrate fell into jurisdictional error in that his Honour mistakenly denied existence of jurisdiction for him to hear and determine the complaint referred to in [2] above.[55]

[39] There will be an order in the nature of certiorari, pursuant to r 56.01 of the Supreme Court Rules, to quash the order of the second defendant made on 6 November 2015 dismissing the plaintiff's complaint against the first defendant.

[40] I will hear the parties on the question of costs.

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[55] *Craig v South Australia* (1995) 184 CLR 163 at 177-178; *Samad v District Court of New South Wales* (2002) 209 CLR 140 at [26] – [27].