

CITATION: *Outback Ballooning Pty Ltd v Work Health Authority and Bamber*
[2017] NTCA 7

PARTIES: OUTBACK BALLOONING PTY LTD
v
WORK HEALTH AUTHORITY
and
DAVID BAMBER SM

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL from the SUPREME
COURT exercising Northern Territory
Jurisdiction

FILE NO: 7 of 2017 (21562815)

DELIVERED: 19 October 2017

HEARING DATES: 30 and 31 August 2017

JUDGMENT OF: Southwood, Blokland and Riley JJ

APPEALED FROM: Barr J

CATCHWORDS:

CONSTITUTIONAL LAW – Whether complaint charging an offence against *Work Health Safety (National Uniform Legislation) Act* (NT) inconsistent with Commonwealth legislative and regulatory scheme for air safety – indirect inconsistency - Commonwealth legislative intent to exhaustively and completely cover the field – extent of field covered by Commonwealth law – includes loading of passengers onto hot air balloon – passenger’s scarf caught in inflation fan – death of passenger – normative duty imposed by both Commonwealth legislative and regulatory scheme and Territory law – Territory law inoperative – appeal allowed.

Air Navigation Act 1920 (Cth)

Civil Aviation Act 1988 (Cth) s 3A, s 8, s 9, s 9(1)(a), (c), (d) and (e), s 20A(1), s 23(1), s 27, s 27A, s 27(2)(b), s 28(1)(a) and (b)(i), (iv) and (vi), s 28BA(1)(a), (b), and (c), s 28BB(1)(a), s 28 BD(1), s 28BE(1), (2), and (5), s 29(1)(a) and (b)(ii), s 29(3), s 98(4), (4A), (5), (5A), and (5AA).

Civil Aviation Regulations 1988 (Cth) r 6A, r 4.2.1, r 5.3, r 215(1), r 215(2), r 215(9), r 235(7), r 235(7A).

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; *Commonwealth v Australian Capital Territory (the Marriage Equality Case)* (2013) 250 CLR 441; *Ex Parte McLean* (1930) 43 CLR 472; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508; *Momcilovic v The Queen* (2011) 245 CLR 1; *Northern Territory of Australia v GPAO* (1999) 196 CLR 553; *Telstra v Worthing* (1999) 197 CLR 61, applied.

Heli-Aust v Cahill and Another (2011) 194 FCR 502, followed.

Carter v Egg and Egg Pulp Marketing Board (Vic) (1942) 66 CLR 557; *Lamb v Cockatoo Docks & Engineering Co Pty Ltd* [1961] SR NSW 459, referred to.

Work Health Authority v Outback Ballooning Pty Ltd [2017] NTSC 32; 318 FLR 294, overruled.

REPRESENTATION:

Counsel:

Appellant:	J Gleeson SC, T Brennan
Respondent:	T Moses

Solicitors:

Appellant:	Povey Stirk Lawyers & Notaries
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Number of pages:	37

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Outback Ballooning Pty Ltd v Work Health Authority and Bamber
[2017] NTCA 7
No. 7 of 2017 (21562815)

BETWEEN:

OUTBACK BALLOONING PTY LTD
Appellant

AND:

WORK HEALTH AUTHORITY
First Respondent

AND:

DAVID BAMBER
Second Respondent

CORAM: SOUTHWOOD, BLOKLAND and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 19 October 2017)

Southwood J:

Introduction

- [1] This is an appeal from a decision of the Supreme Court quashing a decision of the Court of Summary Jurisdiction dismissing a complaint filed by the first respondent in that court.
- [2] The complaint charged that contrary to s 32 of the *Work Health and Safety (National Uniform Legislation) Act* on 13 July 2013 the appellant failed to

comply with the duty imposed upon it under s 19(2) of the Act to, so far as is reasonably practicable, ensure the health and safety of the deceased, who was to be a passenger on a hot air balloon. The failure was identified as a failure to eliminate or minimise risks to embarking passengers that arose from the use of a fan to inflate the hot air balloon.

- [3] On 6 November 2015, under s 182 of the *Justices Act*, the presiding magistrate dismissed the complaint. His Honour ruled that the complaint did not disclose an offence because Commonwealth law covered the field of safety of air navigation. As a consequence, Territory law could not operate to impose duties that affect safety of air navigation. The magistrate held that “the Commonwealth legislative regime evinces an intention to exhaustively and completely ‘cover the field’ for all aspects of the safety of air operations”.
- [4] On 24 April 2017 the Supreme Court quashed the decision of the Court of Summary Jurisdiction. The primary Judge held that the presiding magistrate fell into jurisdictional error in that his Honour mistakenly denied existence of jurisdiction for the Court of Summary Jurisdiction to hear and determine the complaint. It was his Honour’s judgment there was no inconsistency between Commonwealth law and Territory law in this case. Commonwealth civil aviation law did not evince an intention to completely state the law governing all pre-flight operations of balloon aircraft and the embarkation

procedure was not so closely connected with inflight safety that it was regulated by the comprehensive and exclusive Commonwealth regime.¹

[5] The grounds of appeal are:

1. The learned Judge erred in finding that the Second Respondent fell into jurisdictional error when the Second Respondent dismissed the complaint.
2. The learned Judge erred in failing to find that the Second Respondent was correct in determining the exclusive jurisdiction of the Commonwealth law on civil aviation denied jurisdiction to the Court of Summary Jurisdiction in respect of the complaint.

[6] A third ground of appeal – the appellant had allowed time to appeal from the order of the Court of Summary Jurisdiction to lapse, thereby relief in the nature of certiorari should be refused on discretionary grounds; was abandoned.

The main issue

[7] In *Heli-Aust v Cahill and Another*² the Full Court of the Federal Court determined that within its field of operation Commonwealth civil aviation law was intended to be a complete statement of the law. However, the Federal Court did not determine the full extent of the field covered by Commonwealth civil aviation law. The reason for not doing so was, for the purposes of that case which involved a helicopter striking an electrical

¹ *Work Health Authority v Outback Ballooning Pty Ltd* [2017] NTSC 32 at [36] and [37]; 318 FLR 294.

² (2011) 194 FCR 502.

power line while inflight and crashing, the parties agreed that the extent of the field was “safety of civil aviation in flight”.

- [8] In that context the plurality of the court in *Heli-Aust v Cahill and Another*, Moore and Stone JJ, concluded that it was “tolerably clear” that the Commonwealth Act and the Regulations were “intended to regulate the safety of civil aviation in Australia comprehensively and are not intended to operate in conjunction with State legislative schemes directed to the same end, namely the safety of air navigation”. Their Honours observed that “the safety of civil aviation is, by its very nature one that would seem to cry out for one comprehensive regulatory regime”.³
- [9] This Court is bound to follow *Heli-Aust v Cahill and Another* unless it is convinced the decision is wrong.⁴ In my opinion the decision of the Full Court of the Federal Court is correct and should be followed.
- [10] Therefore the main issue in the appeal, which concerns the embarkation of balloon passengers under the supervision of the pilot, is whether Territory law under the *Work Health and Safety (National Uniform Legislation) Act* (NT) is inoperative in this instance because it is inconsistent with Commonwealth civil aviation law. The resolution of that issue primarily depends on the extent of the field covered by Commonwealth civil aviation law.

³ (2011) 194 FCR 502 at [67] to [69].

⁴ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

[11] In my opinion, it is unnecessary to make the wide declaration about the extent of the field covered by Commonwealth civil aviation law, sought by the appellant. An incremental approach should be adopted. However, for the reasons set out below, Commonwealth civil aviation law covers the loading of balloon passengers in the circumstances that existed in this case on 13 July 2013; and the Territory law cannot and does not operate.

The facts

[12] The appellant operates a ballooning business which is based in Alice Springs.

[13] In order to operate the business the appellant held an Air Operator's Certificate. The certificate was issued under s 27 of the *Civil Aviation Act 1988* (Cth) and it authorised the appellant to operate four classes, or types, and models of hot air balloon in Charter operations not only in the Northern Territory but in Australia, in accordance with the appellant's operations manual.

[14] The appellant's operations manual contained the following requirements which are relevant to this appeal.

The P.I.C. (pilot in charge) is responsible for the supervision and surveillance on the tarmac area. Particular care shall be exercised when in the vicinity of the inflated balloon.⁵

All pilots must comply with the Check Lists detailed in Part B of this manual. Flight critical Check Lists may at the pilot's discretion be committed to memory. If not memorised the current Flight Critical

⁵ Paragraph A4.07, Operations Manual.

Checklists from this manual are reproduced in Appendix 10, which will be carried in the balloon.⁶

[Pilots must] give a flight briefing to passengers.⁷

[Pilots must] point out the dangers of the inflation fan and smoking.⁸

If a person is allocated the task of supervising the inflation fan they will not be in clothing that can be entangled in the fan. The importance of standing behind the line of the rotation of the fan blade will also be emphasised.⁹

A crew member will supervise and keep clear the area around the fan and basket at all times during inflation.¹⁰

[15] On 13 July 2013 the balloon pilot, Mr Jason Livingston who is a director and Chief Pilot of the appellant, and another staff member intended to take a number of passengers on a 30 minute balloon ride near Alice Springs Airport. Mr Livingston held a Commercial Balloon Pilot's Licence from the Civil Aviation Safety Authority (CASA).

[16] The intended passengers, including Ms Stephanie Bernoth (now deceased) and her husband, were picked up from their hotels by bus at 5.15 am and taken to a site known as River Track 1. The site is 6.5 km from the airport. Ms Bernoth was wearing warm clothing and a scarf.

[17] On arrival they got off the bus, and the balloon and its basket were unloaded. A short briefing was provided to the passengers at the basket.

⁶ Part A Operations Manual paragraph A6.18.

⁷ Part B All Pilots Responsibilities and Checklists, Operations Manual paragraph 2).

⁸ Part B All Pilots Responsibilities and Checklists, Operations Manual paragraph 2) vii.

⁹ Part B All Pilots Responsibilities and Checklists, Operations Manual paragraph 3) iii.

¹⁰ D1.02 Tethers, Operations Manual paragraph [a].

They were told to stay away from the inflation fan which was to be used to inflate the balloon. To maintain a balanced load in the basket, the passengers were separated into two groups and told to get into the basket from opposite sides.

- [18] The basket was on its side and its opening was pointing towards the balloon which was spread out on the ground for inflation. Two passengers were asked to hold the bottom of the balloon open and the inflation fan was started. The fan was a stand-alone piece of equipment which was not attached to either the balloon or the basket. It was driven by a 13 horse power Honda motor, and there was a metal guard with openings of 4.65 centimetres around the blades.
- [19] Once the opening of the balloon was able to support itself on the air that was inflating the balloon, the pilot instructed the passengers to get into the basket which was still on its side. The pilot was standing next to the burners at the front of the basket. The other staff member was at the other end of the balloon. Two passengers from the side of the basket away from the fan boarded the basket first without any difficulty. The first passenger from the inflation fan side of the basket then walked safely between the fan and the basket. As she was getting into the basket, Ms Bernoth was directed to board the basket from the fan side. She followed the same path as the previous passenger. As she did, her scarf was sucked into the fan and she was dragged headfirst toward the metal guard.

- [20] The fan was turned off by the pilot and the other staff member was asked to cut Ms Bernoth's scarf from around her neck. An ambulance was called and Ms Bernoth was taken to Alice Springs hospital where she died from the injuries she suffered.
- [21] The following may be inferred from the facts to which I have referred. The boarding of the balloon by the passengers was supervised by the appellant's Chief Pilot. The passengers acted in accordance with his directions. It was necessary for the passengers to board the balloon from opposite sides, one of the sides being where the inflation fan was located, so there was a balanced load in the basket. The inflight safety of the passengers required the load in the basket to be evenly balanced. The death of Ms Bernoth was not caused by the manner in which the inflation fan was used, but by the direction she received from the Chief Pilot to board the basket from the side where the inflation fan was located and by the fact she was wearing a scarf which was not tucked into her clothing.

Inconsistency

- [22] The primary test for inconsistency between Commonwealth and Territory laws in this case is:¹¹

whether the Commonwealth law was intended as a complete statement of the law governing a particular matter or set of rights and duties, such that a Territory law regulating or applying to the same matter would detract from *the full operation* of the Commonwealth

¹¹ *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at [57] and [59]; *Telstra v Worthing* (1999) 197 CLR 61.

law (sometimes called ‘cover the field’ inconsistency or ‘indirect’ inconsistency).

[23] That is, was it the intention of the Commonwealth Parliament “to express by its enactment/s, completely, exhaustively, or exclusively what shall be the law governing a particular conduct or matter to which its attention is directed?”¹² If a Commonwealth law is a complete statement of the law on a particular subject, a Territory law which seeks to govern some aspect of that subject matter cannot operate concurrently with Commonwealth law.¹³

[24] The ‘complete statement’ or ‘indirect’ test of inconsistency requires consideration of the following issues.

- (a) Whether the Commonwealth law is intended to be an exhaustive statement of the law on that subject matter.
- (b) The extent of the field occupied by the Commonwealth law.¹⁴
- (c) Whether the Territory law attempts to regulate the same subject matter.
- (d) Whether there is a ‘real conflict’ between the two laws.¹⁵

[25] As I have stated at [7] and [8], the current state of the law is that the Commonwealth law on civil aviation is intended to be an exhaustive

¹² *Ex Parte McLean* (1930) 43 CLR 472 at [483]; *Momcilovic v The Queen* (2011) 245 CLR 1 at [103].

¹³ *Commonwealth v Australian Capital Territory (the Marriage Equality Case)* (2013) 250 CLR 441 at [52].

¹⁴ *Heli-Aust v Cahill and Another* (2011) FCR 502 at [63].

¹⁵ *Momcilovic v The Queen* (2011) 245 CLR 1 at [630]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [41].

statement of the law within its field of operation. So it is issues (b), (c) and (d) above that fall for consideration in this appeal.

[26] It is also necessary to determine what amounts to the Commonwealth ‘law’.

It is common ground between the parties that civil aviation is regulated by the following Commonwealth Acts and Legislative Instruments: *Air Navigation Act (Cth)*; *Civil Aviation Act 1988 (Cth)*; *Civil Aviation Regulations (Cth)*; *Civil Aviation Safety Regulations (Cth)*; Civil Aviation Orders; and Normative Instruments referred to in the regulations.¹⁶

[27] Finally, it is to be noted that ‘invalid’ in this area of law means that the Territory law is inoperative. The Territory law remains valid but is rendered inoperative to the extent of any inconsistency for so long as the inconsistency persists.¹⁷

The appellant’s case on appeal

[28] The appellant’s primary submission is that Commonwealth civil aviation law was a complete statement of the law governing the regulation of safety of air navigation. Further, the “safety of air navigation” is not limited to the safety of flight of aircraft and includes the safety of:

- (a) air navigation, air operations and the operation of aircraft – both on ground and in flight;
- (b) the systems of risk assessment and safety management used by an operator in respect of all aspects of its flight operations,

¹⁶ *Civil Aviation Act 1988 (Cth)* s 98(5A) and (5AA).

¹⁷ *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at [573] and [599]; *Lamb v Cockatoo Docks & Engineering Co Pty Ltd* [1961] SR NSW 459 at [468].

including preparing aircraft for flight and embarking passengers;

(c) land as it might affect take off when the land is used for conduct that will cause an aircraft to take off; and

(d) the embarkation of passengers onto aircraft.

[29] In support of the extent of the field of operation of the Commonwealth law, the appellant presented the Court with a detailed analysis of the Chicago Convention, the *Civil Aviation Act* (Cth) in particular the scope of the regulation making power in s 98 of that Act, the *Civil Aviation Regulations*, the *Civil Aviation Safety Regulations* and various Civil Aviation Orders. It was submitted that the intention of the Commonwealth Parliament to ‘cover the field’ and the extent of the field was established by the extensive regulatory regime that is created by the regulations and Civil Aviation Orders.

[30] The evolution of the regulatory regime is addressed in detail by Flick J in *Heli-Aust Pty Ltd v Cahill and Another*.¹⁸ The appellant’s description of the breadth of the regulatory regime is set out in his Honour Riley J’s reasons for decision. The appellant correctly pointed out that, included within the regime, is a safety management framework which is not restricted to aircraft that are actually in-flight.

¹⁸ (2011) 194 FCR 502 at [120] to [135].

[31] As to the extent to which passengers embarking on a balloon aircraft in the Territory were covered by Commonwealth civil aviation law, the Court was taken to the following.

[32] First, sub-regulations 215(1) and (2) of the *Civil Aviation Regulations 1988* (Cth) state:

- (1) An operator shall provide an operations manual for the use and guidance of the operations personnel of the operator. [Penalty: 25 penalty units]
- (2) 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 flight operations (...). [Penalty: 25 penalty units.]

[33] CASA is empowered to give direction to the operator to include particular information and procedures or instructions in the manual. Subregulation 215(9) obliges all operations personnel to comply with all instructions contained in the operations manual. A failure to comply with the obligations can lead to the imposition of a fine.

[34] Second, sub-regulations 235(7) and (7A) of the *Civil Aviation Regulations 1988* (Cth) state:

- (7) CASA may, *for the purpose* of ensuring the safety of air navigation, give directions *with respect to* the method of loading persons and goods (including fuel) on aircraft.
- (7A) A person must not contravene a direction under subregulation (7). [Penalty: 50 penalty units.]

[35] Third, 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 standards, developing effective enforcement strategies to ensure compliance with aviation safety standards; and issuing certificates, licences, registration and permits.¹⁹

[36] Significantly, CASA has the power to issue Air Operator's Certificates (AOC).²⁰ Except as authorised by an AOC,²¹ an aircraft shall not operate in Australian territory.²²

[37] CASA must issue an AOC if, and only if, CASA is satisfied that:²³

The applicant is capable of complying with the safety rules.

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.

Key personnel in the organisation have appropriate experience in air operations to conduct or to carry out the AOC operations safely.

The organisation has suitable procedures and practices to control the organisation and ensure that the AOC operations can be conducted or carried out safely.

[38] Section 28BA of the *Civil Aviation Act 1988* (Cth) deals with the general conditions to which all AOCs are subject. Subsection 28BA (1) provides an AOC has effect subject to the following conditions:

¹⁹ *Civil Aviation Act 1988* (Cth) s 9(1)(a), (c), (d) and (e).

²⁰ *Civil Aviation Act 1988* (Cth) s 27.

²¹ Or by permission under s 27A of the *Civil Aviation Act* (Cth) which is not relevant to this appeal.

²² *Civil Aviation Act 1988* (Cth) s 27(2)(b).

²³ *Civil Aviation Act 1988* (Cth) s 28(1)(a), b(i), b(iv) and b(vi).

The holder of an AOC must comply with all requirements of the Act, the regulations and the Civil Aviation Orders that apply to the holder.²⁴

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.²⁵ If the holder of the AOC is a body having a legal personality, each of its directors must also take the steps specified.²⁶

The holder must comply with any conditions CASA imposed by specifying them in the AOC at the time of issuing the AOC.²⁷

The holder must comply with any conditions specified in the regulations or Civil Aviation Orders.²⁸

[39] As is stated at [13], it was a specified condition of the appellant's AOC that the appellant was authorised to operate its balloons in accordance with its operations manual. While the manual itself is not a Commonwealth law, it is a document containing provisions upon which Commonwealth law operates to create a norm. The manual in this case imposed a normative obligation upon the Chief Pilot to point out the dangers of the inflation fan and supervise and keep clear the area around the fan.

[40] Fourth, under s 98(4A) of the *Civil Aviation Act 1988* (Cth), CASA may issue Civil Aviation Orders, not inconsistent with the Act or regulations, and not prescribing any pecuniary penalty, with respect to any matter in relation to which regulations may be made for the purposes of sections 23, 23B or

²⁴ *Civil Aviation Act 1988* (Cth) s 28BA(1)(a) and s 28BD(1).

²⁵ *Civil Aviation Act 1988* (Cth) s 28BA(1)(a) and s 28BE(1).

²⁶ *Civil Aviation Act 1988* (Cth) s 28BA(1)(a) and s 28BE(2).

²⁷ *Civil Aviation Act 1988* (Cth) s 28BA(1)(c) and s 28BB(1)(a).

²⁸ *Civil Aviation Act 1988* (Cth) s 28BA(1)(b).

28BA of the Act. Further, under s 98(5) of the Act, the regulations may provide that CASA may issue a Civil Aviation Order containing a direction, instruction, notification, permission, approval or authority. Such an order is a legislative instrument.

[41] By Civil Aviation Order²⁹ CASA provided directions for “manned balloons” in which it identified the number of ground crew members required for “passenger loading and launching operations”. Under s 28BA(1)(b) and s 98(5) of the *Civil Aviation Act 1988* (Cth) CASA has made Civil Aviation Order 82.7. The contents of the order are headed, “Air Operator’s Certificates authorising aerial work operations and charter operations in balloons”. The order applies to Air Operator’s Certificates authorising charter operations in balloons and sets out the conditions to which such certificates are subject for the purpose of s 28BA(1)(b) of the Act. Paragraph 6.1 of the order states, “each certificate is subject to the condition that the requirements set out in Appendix 2 are complied with.”

[42] Subparagraph 3.2(e) of Appendix 2 to Civil Aviation Order 82.7 states:

The responsibilities of the Chief Pilot must, unless CASA otherwise specifies in writing, include the following responsibilities:

- (e) ensuring compliance with loading procedures specified for each balloon used by the operator and proper compilation of loading documents, including passenger manifests;

²⁹ *Civil Aviation Order* 20.16.3(6A).

- [43] The loading procedures for the balloon were specified in the appellant's operations manual.
- [44] Under s 28BD(1) of the *Civil Aviation Act 1988* (Cth) the holder of an AOC must comply with all requirements of the Act, the regulations and the Civil Aviation Orders that apply to the holder.
- [45] Under s 28BE(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 activity*, is done with a reasonable degree of care and diligence.
- [46] Subsection 29(1)(a) and (b)(ii) of the *Civil Aviation Act 1988* (Cth) provides that the owner, operator, hirer (not being the Crown) or pilot of an aircraft commits an offence if he or she operates the aircraft or permits the aircraft to be operated; and the operation of the aircraft results in the aircraft being flown or operated in contravention of a provision of Part III of the Act (other than subsection 20A(1) or 23(1)), or of a direction given or condition imposed, under such a provision. The offence is a strict liability offence and carries a maximum penalty of two years imprisonment.
- [47] Subsection 20A(1) of the *Civil Aviation Act 1988* (Cth) provides that a person must not operate an aircraft being reckless as to whether the manner of operation could endanger the life of another person. Subsection 29(3) of the Act provides the owner, operator, hirer (not being the Crown) or pilot of an aircraft commits an offence if he or she operates the aircraft or permits

the aircraft to be operated; and the operation of the aircraft results in a contravention of s 20A(1). The offence is a strict liability offence and carries a maximum penalty of imprisonment for five years.

Obligations of the Chief Balloon Pilot under Commonwealth law

[48] It follows from the above that under Commonwealth civil aviation law the Chief Pilot, Mr Livingston, was under the following obligations and duties.

- 1) With reasonable care and diligence, to take all reasonable steps to point out the dangers of the inflation fan to passengers.
- 2) With reasonable care and diligence, to take all reasonable steps to supervise the area around the inflation fan.

[49] Those duties are imposed by the operation of sections 20A, 28BA(1), 28BD(1), 28BE(1), 29(1) and (3), and 98(5) of the *Civil Aviation Act 1988* (Cth); regulations 215 and 235(7) and (7A) of the *Civil Aviation Regulations*; and Appendix 2 of Civil Aviation Order 82.7.

[50] If Mr Livingstone failed to carry out the duties at [48] he would be operating the balloon in contravention of Part III of the *Civil Aviation Act 1988* (Cth) and he would be amenable to prosecution under s 29(1)(a) and (b)(ii) of the Act.

[51] If Mr Livingston was reckless in the performance of the duties at [48], which involve the operation of the balloon, he may also be amenable to prosecution under s 29(3) of the *Civil Aviation Act 1988* (Cth).

[52] It also follows that the field of operation of Commonwealth civil aviation law extends to the loading of the passengers onto the balloon in this case.

Does the operation of the Territory law enter the Commonwealth field?

[53] In the circumstances of this case, the complaint, which is the subject of the appeal, and the intended operation of s 32 and s 19(2) of the *Work Health and Safety (National Uniform Legislation) Act* (NT), does enter the field of Commonwealth civil aviation law.

[54] In paragraphs 1 and 5 of the complaint it is pleaded that:

1. The [appellant] 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.

5. The [appellant] did not comply with the health and safety duty in that it did not eliminate or minimise those risks as far as was reasonably practical (sic). The [appellant]:
 - 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.

[55] The duty imposed by s 19(2) of the *Work Health and Safety (National Uniform Legislation) Act* (NT) and pleaded in the complaint is a similar duty to that imposed on the appellant's Chief Pilot in this case by Commonwealth civil aviation law. The particulars of breach pleaded in subparagraph 5a of the complaint may constitute a breach of the duty referred to in subparagraph 1) at [53]. The particulars of breach pleaded in subparagraphs 5b, d, e and f of the complaint may constitute a breach of the duty referred to in subparagraph 2) at [53]. Each of those matters are matters of Commonwealth civil aviation law which contain rules specifically directed to them.

The respondent's case

[56] I have had the benefit of reading a draft of his Honour Riley J's reasons for decision and I agree with his Honour's analysis of the respondent's case. However, I would add the following.

[57] For the reasons set out above, the Commonwealth law is not silent on the matters which constitute the subject matter of the complaint against the appellant. While both the Commonwealth and Territory laws may be capable

of simultaneous obedience that is not to the point when the intention of the Commonwealth Parliament is to cover the field, and the field includes the relation or thing that the Territory law seeks to regulate.

[58] I also see no error in the Full Court of the Federal Court's interpretation of s 28BE(5) of the *Civil Aviation Act 1988* (Cth) in *Heli-Aust Pty Ltd v Cahill and Another*.³⁰

Conclusion

[59] In my opinion, the Commonwealth law not only extends to, but is a complete statement of the law governing the loading of passengers onto a balloon in the circumstances of this case. The *Work Health and Safety (National Uniform Legislation) Act* (NT) does not operate through s 19(2) to impose a duty on the appellant in the circumstances alleged in the complaint. As there is an indirect inconsistency between the Northern Territory law and the Commonwealth law,³¹ it is unnecessary to consider if there is a direct conflict between the two laws.

[60] I find that the primary Judge fell into error. I would allow the appeal.

Blokland J:

[61] I agree with the reasons given by Southwood J and with both Southwood and Riley JJ that the appeal should be allowed.

³⁰ (2011) 194 FCR 502 at [72] to [74].

³¹ *Commonwealth v Australian Capital Territory (the Marriage Equality Case)* (2013) 250 CLR 441 at [52].

Riley J:

- [62] As its name suggests the appellant operates a ballooning business in the outback. The business is based in Alice Springs.
- [63] On 13 July 2013 the appellant intended to take a number of passengers on a 30 minute balloon ride near to Alice Springs. The balloon pilot, Jason Livingston, was a director of the appellant and he held a Commercial Balloon Pilot's Licence from the Civil Aviation Safety Authority (CASA). The intended passengers, including Stephanie Bernoth, were taken to a location about 6.5 km from the airport, a site known as River Track 1. On arrival the passengers were given a briefing during which they were told to stay away from the inflation fan.
- [64] The balloon was laid out on the ground for inflation and the basket in which the passengers were to be carried was on its side with the opening pointing towards the balloon. The inflation fan, which was driven by a 13 horse power motor and had a metal guard around the blades, was started. Three passengers had been directed to board the basket and then Ms Bernoth was directed to do so. She boarded from the fan side and, as she was boarding, her scarf was sucked into the fan causing her to be dragged headfirst toward the guard of the fan. She later died in hospital as a consequence of the injuries she suffered due to her scarf being sucked into the fan.
- [65] The appellant was charged on complaint with contravening s 32 of the *Work Health and Safety (National Uniform Legislation) Act* (NT) (WHS Act). It

was alleged that the appellant failed to comply with the duty imposed upon it under s 19 of the Act to, so far as is reasonably practicable, ensure the health and safety of the deceased. The failure was identified as conduct during, and forming part of, the inflation of the hot air balloon and the embarkation of passengers.

[66] The matter came before the Court of Summary Jurisdiction and, on 6 November 2015, a magistrate ruled that the complaint did not disclose an offence because federal law covered the field of safety of air navigation and, as a consequence, Territory law could not operate to impose duties that affect safety of air navigation. In so ruling, his Honour held that “the Commonwealth legislative regime evinces an intention to exhaustively and completely ‘cover the field’ for all aspects of the safety of air operations”. His Honour relied upon the decision in *Heli-Aust Pty Ltd v Cahill and Another* to find that the regime “extends to pre-flight operations that affect the safety³² of aviation and passengers whilst on the ground prior to flight” and the activities relied upon in the present case were “best characterised as issues of aviation safety rather than workplace health and safety”.

[67] The Work Health Authority referred the decision to the Supreme Court, seeking an order in the nature of certiorari to quash the order of the magistrate and, on 24 April 2017, such an order was made. The learned

³² (2011) 194 FCR 502.

Judge held that the magistrate fell into jurisdictional error by mistakenly denying the existence of jurisdiction. His Honour said:³³

[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.

[68] The appellant has now appealed to this Court on the grounds that:

- the learned Judge fell into jurisdictional error;
- the Magistrate was correct in determining the exclusive jurisdiction of the Commonwealth law on civil aviation denied jurisdiction to the Court of Summary Jurisdiction in respect of the complaint; and in any event
- relief in the nature of certiorari ought to have been refused on discretionary grounds (this ground was later abandoned).

Inconsistency

[69] The appellant submitted that the federal law was a complete statement of the law governing the safety of air navigation and this included, but was not limited to, the safety of flight of aircraft which, in turn, included safety both

³³ *Work Health Authority v Outback Ballooning Pty Ltd* [2017] NTSC 32 at [36] and [37]; 318 FLR 294.

on the ground and in-flight. As such it covered the embarkation of passengers. The appellant submitted that the law of the Northern Territory could not operate concurrently with the federal law to any extent and, consequently, the WHS Act did not operate through s 19(2) to impose a duty on the appellant in the circumstances alleged in the complaint. There was an indirect inconsistency between the Northern Territory law and the federal law.³⁴

[70] Further, or in the alternative, the appellant argued that the imposition of the duty in s 19 of the WHS Act upon an air operator undertaking embarkation of passengers to an aircraft “varied, detracted from or impaired” the operation of provisions of federal law and was therefore directly inconsistent with the federal law.

[71] In *Commonwealth v Australian Capital Territory (the Marriage Equality Case)*³⁵ the High Court dealt with a matter related to the Australian Capital Territory, describing what has been called an indirect inconsistency, in the following terms:

... if a Commonwealth law is a complete statement of the law governing a particular relation or thing, a Territory law which seeks to govern some aspect of that relation or thing cannot operate concurrently with the federal law to any extent.

³⁴ *Commonwealth v Australian Capital Territory (the Marriage Equality Case)* (2013) 250 CLR 441 at [52].

³⁵ (2013) 250 CLR 441 at [52].

[72] The existence of an indirect inconsistency is not established by “the mere coexistence of two laws which are susceptible of simultaneous obedience” but, rather:³⁶

... 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.

[73] A direct inconsistency is different and occurs where the paramount Legislature has not expressed such an intention. It occurs where, for example, the Commonwealth Parliament and the Northern Territory Legislative Assembly pass inconsistent laws. The subordinate status of the Legislative Assembly results in the Territory law being inoperative to the extent of the inconsistency.

[74] The nature of inconsistency was discussed in *Northern Territory of Australia v GPAO and Others*³⁷ where it was said that:

[57] There may be discerned in a law which is of general application throughout the nation and is made by the Parliament in exercise of a power conferred by s 51 of the Constitution the legislative intention to make exhaustive or exclusive provision on the subject with which it deals. Section 109 of the Constitution then will apply on the footing that, “when the Parliament appears to intend that the Federal law shall be a complete statement of the law governing a particular relation or thing ... the operation of the Federal law would be impaired if the State law were allowed to affect the matter at all”. In such a case, it is to be expected also that this field will be covered with respect to the territories. For example, one would be slow to attribute to the Parliament the intention that a law with respect to defence would occupy two fields and, in that sense, operate

³⁶ *Ex Parte McLean* (1930) 43 CLR 472 at [483]; *Momcilovic v The Queen* (2011) 245 CLR 1 at [103] and [261].

³⁷ (1999) 196 CLR 553 per Gleeson CJ and Gummow J at [57] and [59].

differentially across Australia, or that a law with respect to marriage would segregate the population by a criterion of residence in a territory rather than elsewhere in Australia.

[59] Different considerations may apply where the law made by the Parliament, whatever the constitutional source of authority, does not evince an intention to cover the relevant field. In such cases, one would expect a greater scope for the concurrent operation of territorial laws. This would correspond with the situation respecting State laws, if narrower notions of textual collision or direct inconsistency and repugnancy be applied. Those notions apply in cases such as those where two laws may make ‘contradictory provision upon the same topic, making it impossible for both laws to be obeyed’ as Mason J put it in *R v Credit Tribunal; ex parte General Motors Acceptance Corporation*, or one law as Dixon J said in *Stock Motor Ploughs Ltd v Forsyth*, varies, detracts from or impairs the other.”

[75] In *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*³⁸ the High Court noted that the “crucial notions” of “altering”, “impairing” or “detracting from” the operation of a law of the Commonwealth involves undermining such a law and “must be significant and not trivial”. It is necessary to determine whether there is a “real conflict” between the two laws.³⁹

[76] In *Heli-Aust Pty Ltd v Cahill and Another*⁴⁰ the Full Court of the Federal Court considered issues regarding the relationship between the Commonwealth civil aviation legislative framework and the New South Wales equivalent of s 19(2) of the WHS Act. The case involved the prosecution of the operator of a helicopter which struck an electrical powerline and crashed while engaged in aerial locust detection. The pilot and a passenger died and another passenger was injured. The issue

³⁸ (2011) 244 CLR 508 at [41].

³⁹ *Momcilovic v The Queen* (2011) 245 CLR 1 at [630].

⁴⁰ (2001) 194 FCR 502.

considered by the Court related only to the reach of the Commonwealth law to operations that took place in-flight.

[77] Moore and Stone JJ concluded that it was “tolerably clear” that the Commonwealth Act and the Regulations were “intended to regulate the safety of civil aviation in Australia comprehensively and are not intended to operate in conjunction with State legislative schemes directed to the same end, namely the safety of air navigation”. Their Honours observed that “the safety of civil aviation is, by its very nature one that would seem to cry out for one comprehensive regulatory regime”.⁴¹

[78] Flick J considered the *Civil Aviation Act* and the *Civil Aviation Regulations* and concluded that it is “within the detail of the regulatory provisions that the Commonwealth manifested its intention to ‘cover the field’ of all aspects of the safety of air operations in Australia”.⁴² His Honour concluded that it was “the intention of the Commonwealth Parliament to exclusively occupy the field of safety of air navigation and operations”.

[79] The conclusions reached in *Heli-Aust Pty Ltd v Cahill and Another* are aptly summarised in the head-note to the case which reads:⁴³

The history of Commonwealth regulation of civil aviation and its connection with international obligations, the main object of the *Civil Aviation Act* with its emphasis on safety and on preventing air accidents, and the detailed provisions in the *Civil Aviation Act* and Regulations concerning the regulation of air safety all suggest that the *Civil Aviation Act* and Regulations are intended to regulate safety

⁴¹ *Heli-Aust Pty Ltd v Cahill and Another* (2001) 194 FCR 502 at [67] to [69].

⁴² (2001) 194 FCR 502 at [145] to [166].

⁴³ (2011) 194 FCR 502 at [503].

of civil aviation in Australia comprehensively, and is not intended to operate in conjunction with State legislative schemes directed to the same end.

An indirect inconsistency?

- [80] Accepting those authorities, the first issue for consideration in the present proceedings becomes whether the conduct the subject of the complaint falls within the field the Commonwealth Parliament sought to exclusively occupy. Was there an indirect inconsistency?
- [81] The appellant referred to and relied upon the findings in *Heli-Aust Pty Ltd v Cahill and Another* submitting it was there held that the Commonwealth legislative regime was a complete statement of the law, to the exclusion of State and Territory laws, in the field to which it applied. It is of obvious importance then to clearly identify the field said to be covered exhaustively.
- [82] It was the submission of the appellant that provisions relating to matters of concern in this case identified as being: air navigation; air operations; the systems for risk assessment and safety management used by operators; safety of land used for aircraft take-off; and providing for the safe embarkation of passengers were specifically within the field regulated by the federal law and were included within a complete statement of the law governing the regulation of safety of air navigation.

The Commonwealth legislative regime

- [83] The appellant made detailed reference to a range of requirements contained in the Commonwealth legislative regime which, for the purposes of the

argument, was said to include the *Air Navigation Act*, the *Civil Aviation Act*, the Regulations and the Safety Regulations, along with Civil Aviation Orders issued under the Act.

[84] The regime gave domestic effect to aspects of the Convention on Civil Aviation generally known as the Chicago Convention. That Convention has been ratified under the *Air Navigation Act*. The evolution of the regime is addressed in detail by Flick J in *Heli-Aust Pty Ltd v Cahill and Another* and need not be repeated here.

[85] The main object of the *Civil Aviation Act* is expressed to be “to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents”.⁴⁴

[86] The Civil Aviation Safety Authority (CASA) is established under the Act with functions that include promulgating clear and concise aviation safety standards and developing effective enforcement strategies to secure compliance with those aviation safety standards.⁴⁵ The regime established under the *Civil Aviation Act* then embraces three forms of delegated legislation. First, s 98 of the Act provides for the making of regulations, not inconsistent with the terms of the Act, in relation to a range of matters including (relevant to present purposes): (a) giving effect to the provisions of the Chicago Convention relating to safety; (b) safety of air navigation

⁴⁴ *Civil Aviation Act 1988* (Cth) s 3A.

⁴⁵ *Civil Aviation Act 1988* (Cth) s 8 and s 9.

within a Territory or to or from a Territory; and (d) in relation to safety of air navigation generally. Second, is the ability under the regulations for CASA to issue Civil Aviation Orders with respect to any matter in relation to which regulations may be made. Such an order is a legislative instrument.⁴⁶ Third, provision is made in the regulations for CASA to issue normative instruments in relation to various matters including those affecting the safe navigation and operation of aircraft.⁴⁷

[87] Further, as part of the regulatory regime, regulation 215 of the *Civil Aviation Regulations* requires an operator to provide an operations manual for the use and guidance of its operations. The operations manual must contain such information, procedures and instructions with respect to flight operations as “are necessary to ensure the safe conduct of the flight operations”. CASA is empowered to give a direction to the operator to include particular information, procedures or instructions in the manual. Regulation 215(9) obliges all operations personnel to comply with all instructions contained in the operations manual. A failure to comply with the obligations can lead to the imposition of a fine. Other sanctions are also available. Section 28BD of the *Civil Aviation Act* requires the holder of an Air Operator’s Certificate (in this case the appellant) to comply with all requirements under the Act and under the regulations. Section 29 of the Act provides that, in the event of an aircraft being “flown or operated” in

⁴⁶ *Civil Aviation Act 1988* (Cth) s 98(4) and (4A).

⁴⁷ *Civil Aviation Act 1988* (Cth) s 98(5A) and (5AA).

contravention of, inter alia, s 28BD, an offence is committed. The applicable penalties for failure include imprisonment.

[88] The appellant pointed out that included within the regime is a safety management framework which is plainly not restricted to aircraft in-flight. A series of examples was identified of provisions not directly related to in-flight operations including such things as design and manufacture of aircraft, aerodromes, registration marking and airworthiness of aircraft, and numerous others.

[89] Of interest for present purposes, CASA is empowered, for the purposes of ensuring safety of air navigation, to give “directions with respect to the method of loading of persons and goods (including fuel) on aircraft”.⁴⁸ By Civil Aviation Order⁴⁹ CASA provided directions in relation to “manned balloons” in which it identified the number of ground crew members required for “passenger loading and launching operations”. In a further Civil Aviation Order,⁵⁰ direction was given in relation to refuelling not taking place while “passengers are on board, or entering or leaving, the aircraft”. Other precautions, including identifying where embarking or disembarking passengers could be situated during fuelling operations were identified. Further, a direction relating to the safety of embarking or disembarking of

⁴⁸ *Civil Aviation Regulations 1988* (Cth) r 235(7).

⁴⁹ *Civil Aviation Order 20.16.3* (6A).

⁵⁰ *Civil Aviation Order 20.9* (4.2.1).

passengers “whilst an engine of the aircraft is operating” was also provided.⁵¹

[90] In the present case the appellant, consistent with its obligations under the regime, issued an operations manual which included requirements enforceable under that regime. As noted above, regulation 215 provided that the manual must contain all information, procedures and instructions as are necessary to ensure the safe conduct of flight operations. The content of the manual is subject to the direction of CASA. It is a prerequisite to obtaining an Air Operator’s Certificate and criminal sanctions apply to a failure to comply with the requirements. The manual is, itself, not a federal law but it is a document containing provisions upon which federal law operates to create a norm.

[91] The manual in this case imposed an obligation upon the Pilot in Charge to supervise passengers on the tarmac area and in the vicinity of the inflated balloon. It required that “passengers, particularly children, will be kept well clear of the inflation fan whilst it is operating”. Additional responsibilities were imposed on the crew to point out the dangers of the inflation fan and for a crew member to “keep clear the area around the fan and basket at all times during inflation”.

[92] In those circumstances in my opinion, considering the regime as a whole, the federal law covered the field of the safety of air navigation, including

⁵¹ *Civil Aviation Order 20.9 (5.3)*.

safety of air operations, which extended to the safe operation of aircraft.

The system for safety management, including the safety of the embarkation of passengers and the suitability of land for take-off when an aircraft is being prepared for take-off were each specifically covered within the field regulated by federal law.

[93] The respondent acknowledged that there is federal law on the subjects identified by the appellant but submitted that this did not indicate an intention to cover the field in those areas. It was submitted that the situation is different from that addressed in *Heli-Aust Pty Ltd v Cahill and Another* where federal law regulated each of the specific subject matters of the complaint then before the Federal Court. The allegations against the operator in that case were that he had (a) failed to maintain sufficient crew for the operation; (b) failed to conduct sufficient pre-flight planning or risk assessment; (c) provided insufficient training to the crew; (d) failed to fly at safe altitudes; and (e) failed to properly equip the helicopter for low-flying operations. Each of those matters was the subject of Commonwealth law which contained rules specifically directed to minimum crew requirements, training requirements, minimum flight altitudes, and minimum safety equipment. In that case there was no question that both the Commonwealth and the State had enacted laws on the same “relation or thing”. The focus was whether or not those federal laws were capable of coexisting with the duty framed in the State charge.

[94] The respondent submitted that in the present case there is no Commonwealth aviation law on the precise “relation or thing” with which the complaint is concerned. Whilst there may be general federal law of the kind identified by the appellant the federal law is silent on the matters which constitute the subject matter of the complaint against the appellant. It was argued that there is no collision or conflict between the Commonwealth aviation laws in this area and the duty imposed under the WHS Act because they are capable of simultaneous obedience.

[95] However, this is not an appropriate approach to be taken in relation to statutory interpretation in these circumstances. The suggested approach looks first to the terms of the Territory legislation and then to the federal law to determine whether the Territory legislation can coexist with the federal law. Rather, the first question to be asked is whether the Commonwealth law is a complete statement of the law governing a particular relation or thing. This will be answered by considering whether there is a legislative intention on the part of the Commonwealth Parliament to make exhaustive or exclusive provision on the subject under consideration.⁵² It is only where the Commonwealth Parliament has not evinced an intention to cover the relevant field that “narrower notions of textual collision or direct inconsistency and repugnancy” will be applied.

[96] The respondent went on to submit that, in the present case, the intention of the Commonwealth Parliament to not cover the field could be gleaned from

⁵² *Ex Parte McLean* (1930) 43 CLR 472 at [483]; *Momcilovic v The Queen* (2011) 245 CLR 1.

the provisions of s 28BE of the *Civil Aviation Act*. That section imposes an obligation on the holder of an Air Operator's Certificate 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." Importantly, subsection (5) provides:

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.

[97] The same argument was presented in *Heli-Aust Pty Ltd v Cahill and Another* and rejected as being unhelpful for present purposes. Moore and Stone JJ observed that s 28BE was of restricted ambit. Their Honours went on to note that s 28BE(5) applies only to "this section", namely s 28BE, and not to any other aspect of the *Civil Aviation Act*. It does not impact on any other duty to exercise care and diligence imposed upon the holder of an Air Operator's Certificate when that person is acting in some other capacity than as the holder of an AOC. Their Honours observed:⁵³

The subsection clearly has work to do in fields removed, and potentially far removed, from the maintenance of safety in civil aviation.

⁵³ *Heli-Aust Pty Ltd v Cahill and Another* (2011) 194 CLR 502 at [72].

[98] Flick J expressed the view that the section “provides no foundation for any more broadly expressed Commonwealth intention to preserve the continued operation of State laws”.⁵⁴

[99] In my opinion, the federal law was a complete statement of the law governing the safety of air navigation including the safety of flight of aircraft which, in turn, included safety both on the ground and in-flight. It covered the embarkation of passengers in the circumstances of this matter. The federal 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 those circumstances the law of the Northern Territory could not operate concurrently with the federal law to any extent and, consequently, the WHS Act did not operate through s 19(2) to impose a duty on the appellant in the circumstances alleged in the complaint. There was an indirect inconsistency between the Northern Territory law and the federal law.⁵⁵

A direct inconsistency

[100] It would only be if there was no indirect inconsistency that it would be necessary to consider whether there existed a direct inconsistency.

Conclusion

[101] It follows that the learned Judge fell into error. I would allow the appeal.

⁵⁴ *Heli-Aust Pty Ltd v Cahill and Another* (2011) 194 CLR 502 at [175].

⁵⁵ *Commonwealth v Australian Capital Territory (the Marriage Equality Case)* (2013) 250 CLR 441 at [52].
