REVIEW OF RECENT AVIATION DECISIONS

A PAPER PRESENTED TO THE 38TH ANNUAL CONFERENCE OF THE AVIATION LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND

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In the last year, three cases concerning the liability of air operators have reached varying stages of consideration by the High Court.

The first, *Outback Ballooning*, shows that an operator's criminal liability for failure to conform with operational requirements under the Civil Aviation Regulations and Orders, and an operator's criminal liability for failure to meet prescribed standards of care under the Civil Aviation Act, Regulations and Orders are not exclusive - state and territory laws imposing criminal liability on the same subject matters - including work health and safety laws - operate to also make the operator criminally liable.

The second, *Helicopter Resources,* highlights one of the issues that arises from that concurrent operation: a Civil Aviation Order confers on a Chief Pilot control of all matters affecting the safety of flying operations. Work Health and Safety laws expose an air operator to criminal liability for failures to ensure that safety. How does the law respond when an operator has been charged under a WHS law with a failure to take steps to ensure safety of those operations, and it is proposed to compel the Chief Pilot to give evidence, outside the criminal process, about those alleged failures of which he had control?

The third, *South West Helicopters,* shows that an operator's civil liability under the *Civil Aviation (Carrier's Liability)* is exclusive of civil liability under other laws; and assists to identify the limits of that exclusivity.

Work Health Authority v Outback Ballooning Pty Ltd[2]

The Facts

Outback Ballooning operated hot air balloons under an Air Operators Certificate (**AOC**) authorising charter operations. It provided early morning flights for tourists over Alice Springs. On 13 July 2013 the pilot and a crew member collected a group

[1] Barrister, NSW. Tom Brennan was counsel for each of the air operators in each of the decisions addressed in this paper.
[2] [2019] HCA 2.

of tourists from motels in Alice Springs and drove their bus to a launch site. Upon arrival the balloon was laid out with the basket lying on its side pointing towards the balloon.

The first stage of inflation of the balloon was undertaken with two passengers holding the balloon mouth. An inflation fan was placed to one side of the basket to pump air into the balloon. After the balloon was sufficiently inflated to support its weight at the mouth passengers commenced boarding.

A Civil Aviation Order[3] required that if a cabin attendant was not to be carried an approximately equal weight of passengers needed to be located in each passenger compartment in the basket.

As a consequence, an equal number of passengers needed to embark from each side of the basket, including from the side on which the inflation fan was operating.

Ms Stephanie Bernoth approached the basket from the inflation fan side. As she passed the fan her scarf was sucked into the housing. Ms Bernoth suffered injuries from which she later died.

Civil Aviation Regulation 215 required every AOC holder, including Outback Ballooning, to provide an Operations Manual and required that that Manual contain such "information, procedures and instructions with respect to the flight operations of all types of aircraft operated by the operator as are necessary to ensure the safe conduct of the flight operations".

The Operations Manual contained instructions for the briefing of passengers about the risks of the inflation fan and the control of passengers in the vicinity of the inflation fan.

Other provisions touched on the embarkation operation including CASR Part 31 which concerned flight manuals for hot air balloons and required (by reference to EASA standards) that flight manuals include information necessary for safe loading of a balloon; and CAR 92(1)(d) which concerned standards for informal aerodromes such as was used by Outback Ballooning for the launch.

[3] CAO 20.16.3.

The Territory Charge

Outback Ballooning was charged with an offence pursuant to Section 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (**NTWHS Act**). The elements of that offence were that:

(a) Outback Ballooning had a health and safety duty;

(b) Outback Ballooning failed to comply with that duty; and

(c) that failure exposed an individual to a risk of death.

The health and safety duty upon which the prosecution relied was that prescribed by s.19(2) of the NTWHS Act. Outback Ballooning was a person conducting a business. It therefore had a duty to ensure, so far as is reasonably practicable, that the health and safety of persons was not put at risk from work carried out as part of the conduct of the business. The conduct of the embarkation operation was work carried out as part of the conduct of the business.

Outback Ballooning was charged with failing to comply with that duty by failing to implement measures which would have prevented any passenger with loose clothing passing near to the inflation fan while it was operating.

The Constitutional issue

Outback Ballooning contended that the Northern Territory law did not apply to its conduct of the embarkation operation because the Commonwealth's Civil Aviation Law[4] governed the conduct of the embarkation operation and the Civil Aviation Law was to be read as expressing the intention to say "completely, exhaustively or exclusively what shall be the law governing the" prescription and enforcement of civil aviation safety standards.

That is, Outback Ballooning contended that there was an *indirect inconsistency* between the Civil Aviation Law and the NTWHS Act. If that was so, the effect of s.109 of the *Constitution* was that the NTWHS Act did not operate to the extent of that inconsistency.

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[4] Comprised of the *Air Navigation Act, Civil Aviation Act* and Orders and Regulations made under the *Civil Aviation Act*.

Outback Ballooning was successful in that contention in the Court of Summary Jurisdiction in Alice Springs but failed on review before a single Judge of the Northern Territory Supreme Court. Outback Ballooning was again successful on appeal to the Northern Territory Court of Appeal. The Work Health and Safety Authority appealed to the High Court.

The majority of the Court[5] found there was no inconsistency between the NTWHS Act and the Commonwealth Civil Aviation Law and consequently allowed the appeal.

The Reasons for Decision, particularly of the plurality[6] may have broad consequences for the conduct of civil aviation in Australia, if not addressed by legislative amendment.

Outback Ballooning's Case

Outback Ballooning placed principal reliance on four matters to support the contention that the Commonwealth Civil Aviation Law was to be construed as the exclusive Australian law prescribing safety standards for air navigation and air operations and providing for enforcement of those standards:

(a) ***first***, that the Civil Aviation Law was enacted to give effect to Australia's obligations under the Chicago Convention which required Australian law on the prescription and enforcement of aviation safety standards to be national and uniform;

(b) ***secondly***, that the terms of the Civil Aviation Act showed an intention to give effect to the obligations under the Chicago Convention including the obligation of uniform regulation of the safety of air navigation in Australia;

(c) ***thirdly***, the comprehensive and detailed terms of the Civil Aviation Law, taken as a whole, particularly by reference to the Civil Aviation Regulations (**CARs**), Civil Aviation Safety Regulations (**CASRs**) and Civil Aviation Orders (**CAOs**) evinced an intention to regulate comprehensively and uniformly the safety of air navigation in Australia; and

[5] Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.
[6] Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

(d) ***fourthly***, the legislative and constitutional history of the Civil Aviation Law confirmed that it had developed as the sole and uniform law of Australia including with respect to the safety of air navigation in Australia.

The Plurality's Approach

The plurality identified the question that arose in the following terms[7]:

> "Where an indirect inconsistency is said to arise, the primary focus will be on the Commonwealth law in order to determine whether it is intended to be exhaustive or exclusive with respect to an identified subject matter.
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> It is not to be expected that a Commonwealth law will usually declare that it has this effect. In some cases the detailed nature or scheme of the law may evince an intention to deal completely and therefore exclusively with the law governing a subject matter. It may state a rule of conduct to be observed, from which the relevant intention may be discerned. Any provision which throws light on the intention to make exhaustive or exclusive provision on the subject matter with which it deals is to be considered. A provision which, expressly or impliedly, allows for the operation of other laws may be a strong indication that it is not so intended. The essential notion of indirect inconsistency is that the Commonwealth law contains an implicit negative proposition that nothing other than what it provides with respect to a particular subject matter is to be the subject of legislation."

In so identifying the issue the plurality placed no weight on the Chicago Convention and Australia's obligations under it, or on the legislative and constitutional history of the Civil Aviation Law. To the contrary the plurality dismissed the significance of those matters in the following terms:[8]

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

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[7] At [34] and [35]
[8] At [38].

The plurality accepted, and indeed it was common ground, that the scheme of the Civil Aviation Law was detailed and extensive. The plurality noted[9]:

> "It is common ground that the aircraft operations regulated by the Commonwealth law in question encompass all matters preparatory to and subsequent to an aircraft flying and include the embarkation and disembarkation of passengers."

That acceptance conformed with long accepted reasoning in the High Court. In *Airlines No 2*[10] in 1965 the Court had upheld the validity of the application of the *Air Navigation Act* and Regulations to all aspects of air operations in Australia, including intra-state air operations. The majority of the Court had reasoned that the Civil Aviation Law, including in its application to intra-state operations, was a law with respect to international and interstate trade and commerce because it provided for uniformity in operational regulation of all air operations.[11]

However it was not necessary for the plurality to further address the significance of international obligations, legislative and constitutional history or the comprehensiveness of the Civil Aviation Law because they found in the express terms of the *Civil Aviation Act* wording, inserted after 1965, which provides for the operation of State and Territory laws concurrently with certain provisions of the Civil Aviation Law.

That wording provides two independent reasons for the plurality's conclusion that there was no relevant inconsistency between the Civil Aviation Law and the NTWHS Act:

(a) ***first***, because a provision of the *Civil Aviation Act* operated to prevent any CAR, CASR or CAO from being construed to exclude the operation of a State or Territory law; and

(b) ***secondly***, because another provision of the *Civil Aviation Act,* properly construed, expressly provides for the continued operation of any State or

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[9] At [36].
[10] *Airlines of New South Wales v New South Wales (No 2)* (1965) 113 CLR 54
[11] Per Barwick CJ at 78, Kitto J at 116- 117, 125 and 128, Menzies J at 141- 142, Taylor J at 127.3, Windeyer J at 151 and Owen J at 166.5 -166.8, 167.2.

> Territory law concerned to require the taking of care by the holder of an AOC in the conduct of air operations.

CARs and CAOs not exclusive

The plurality accepted that when the Commonwealth and State Parliaments each legislate on the same subject matter and prescribe what the rule of conduct shall be they make laws which are inconsistent.

However that principle was of no assistance to Outback Ballooning because the *Civil Aviation Act* itself did not prescribe a rule of conduct to be adhered to in carrying out the embarkation operation. The particular rules of conduct were prescribed by CARs and CAOs.

Prior to enactment of the *Civil Aviation Act* in 1988 the Commonwealth's regulation of air navigation, including on safety matters, was conducted pursuant to the *Air Navigation Act 1920* (**ANA**) and the *Air Navigation Regulations* (**ANRs**). Following *Airlines No. 2* the *Air Navigation Act* and ANRs operated as a comprehensive code of operational regulation with respect to intra-State air navigation throughout Australia extending, but not limited to, safety regulation. They also operated as a plenary law with respect to air navigation (including the economic regulation of airlines) in the internal Territories.

Upon Northern Territory self-government the ANA was amended so that it bound the Crown in right of the Northern Territory, the Northern Territory was authorised to engage in economic regulation of intra-territory airlines and a new s.26(5) was inserted providing that a law of the Northern Territory did not have effect to the extent that it was inconsistent with the ANRs.

The successor provision to s.26(5) of the *Air Navigation Act* is now found at s.98(7) of the *Civil Aviation Act*. Section 98(7) provides:

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

The plurality reasoned that:[12]

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

Edelman J, in dissent, identified four reasons why his Honour would not accept that conclusion.[13] The first of those reasons concerned the Court's construction of a similarly worded provision in s.28 of the *Australian Capital Territory (Self Government) Act 1988* in the *Marriage Act Case*:[14]

> "It does not say, and it is not to be understood as providing, that laws of the Federal Parliament are to be read down or construed in a way which would permit concurrent operation of Territory enactments." [emphasis added]

In any event, the consequence of the plurality's reasoning is significant: the only inconsistency that can arise between the CARs, CASRs and CAOs on the one hand and a law of a State or Territory on the other is a direct inconsistency.

Gageler J, who did not accept this aspect of the plurality's reasons, gave an example of the difficulties that arise from that construction.[15] CAR 157(1)(b) prescribes 500 feet as the minimum height at which aircraft can be flown over areas other than cities, towns or populous areas. It is clear a State or Territory law could not authorise flying at a lower height because that would be directly inconsistent with the Commonwealth law. However, a State law which prescribes a greater minimum height would not be directly inconsistent: a pilot could comply with both laws by not descending below the higher State threshold. The plurality's reasoning means that s.98(7) provides for that State law to operate concurrently with CAR 157(1)(b). A

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[12] At [48].
[13] At [132] – [135]. See also Gageler J at [83].
[14] *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 466 [53].
[15] At [82].

state could make such a law for purposes far removed from safety: for example it could prescribe minimum heights for the purpose of noise amelioration.

Duty of Care and Diligence

The *Civil Aviation Legislation Amendment Act 1995* provided for the splitting of the Civil Aviation Authority with the transfer of its commercial functions to Air Services Australia and the establishment of the Civil Aviation Safety Authority as the independent safety regulator for civil aviation safety in Australia. Included in the Act was a new s.28BE which imposed upon air operators, and the directors of air operators, a duty of care and diligence in respect of all activities authorised by an AOC and which provided:

> "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."[16]

The plurality[17] and Gageler J[18] held that s.28BE expressly authorises the concurrent operation of State or Territory laws concerned to require the taking of care by the holder of an AOC in the conduct of air operations. That is, one effect of s.28BE is that State and Territory laws which prescribe a standard of care to be applied in air operations can operate in addition to the Civil Aviation Law.

Outback Ballooning's case concerned alleged inconsistency of a WHS law imposing a standard of care to be applied by an operator and depended upon provisions of the CARs and CAOs to demonstrate that inconsistency. For both reasons given by the plurality that case failed.

Broader implications

The potential for State and Territory laws to operate concurrently with the CARs, CASRs and CAOs across the many aspects of operational regulation, including but not limited to safety, covered by those Federal laws presents manifest practical risks to the operation of not merely air operators but also aircraft maintenance organisations, aircraft manufacturers and airport operators to name just a few.

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[16] s.28BE(5).
[17] At [52] – [54].
[18] At [85].

An immediate and obvious consequence is that Australia's Aeronautical Information Publication (**AIP**) cannot provide accurate information on the requirements of Australian regulation of air operations without it incorporating the relevant effect of any laws of the States and Territories.

A further more fundamental difficulty concerns Australia's compliance with its obligations under the Chicago Convention. Article 37 of that Convention provides:

> "Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.
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> To this end the International Civil Aviation Organisation (ICAO) shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures (**SARPs**)…"

The obligation to collaborate to secure uniformity extends well beyond safety to the operational regulation of air navigation.

The international SARPs, which indicate the scope of Australia's obligation to collaborate to secure international uniformity, include:

(a) the rules of the air;[19]

(b) regulation of air operators;[20]

(c) airworthiness of aircraft;[21]

(d) operation of aerodromes;[22]

(e) aeronautical information publications;[23]

(e) safety management including the attributes of the National Safety Regulator.[24]

The Commonwealth's approach to conforming with Australia's obligation to secure the highest practical degree of uniformity in regulations, standards, procedures and organisation to date has been principally through the creation of a single national safety regulator, CASA; a single national air services provider, Air Services Australia

[19] Chicago Annex 2.
[20] Chicago Annex 6.
[21] Chicago Annex 8.
[22] Chicago Annex 14.
[23] Chicago Annex 15.
[24] Chicago Annex 19.

and a single national safety investigator, ATSB together with making of CARs, CASRs and CAOs in conformance with the requirements of ICAOs SARPs. The AIP is then prepared and published on the basis that those national bodies applying the single Civil Aviation Law regulate air operations.

However for international purposes Australia is not merely the Commonwealth. For international purposes, Australia's law is that made by both the Commonwealth and the States and Northern Territory. To the extent that State and Northern Territory laws operate concurrently with the CARs, CASRs and CAOs to regulate the operation of aviation sector participants they necessarily detract from Australia's achievement of international uniformity in conformance with ICAO SARPs.

The reasoning of the plurality demonstrates that by enactment of s.26(5) of the *Air Navigation Act* in 1980 the Commonwealth caused Australia to depart from the obligation imposed by Article 37 of the Chicago Convention.

As a result Australia's obligations under Article 38 loom large:

> "Any State which finds it impractical to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organisation of the differences between its own practice and that established by the international standards."

Since 1980 Australia has had an obligation to identify each of the State or Territory laws operating concurrently with the CARs, CASRs and CAOs to prescribe operational standards extending to air operations, or to provide for their enforcement, and to notify those laws to ICAO.

The provision in s.28BE for concurrent operation of State and Territory laws that prescribe the standard of care to be applied in the conduct of air operations might not raise the same degree of practical concern that arises from the prospect of concurrent operation of all State and Territory laws which are not directly inconsistent with all CARs, CASRs and CAOs.

Gageler J gave a useful, albeit imperfect, analogy of the detailed statutory duties of the driver of a motor vehicle operating concurrently with the common law and

statutory duties of that driver to exercise reasonable care for the safety of other persons and the operation of the motor vehicle. In assessment of what is reasonable, regard must be had to the detailed rules of the road. If that is done, as Gageler J noted[25]:

> "Far from being in conflict, the two sets of duties are complimentary".

Even if that is correct, it is not sufficient to address the difficulties of non-conformance by Australia with its obligations under the Chicago Convention. Apart from the manifest difficulties of State and Territory laws prescribing standards which differ from those which have been developed to be uniform with ICAOs SARPs, the intrusion of State and Territory regulators and investigatory bodies into the standards of safety of aviation operations and their enforcement would conflict with ICAOs SARPs for aircraft accident and incident investigation and safety management which include standards for the establishment, governance and operation of a single national safety regulator and for an accident and incident investigator.[26]

Helicopter Resources Pty Ltd v Commonwealth of Australia[27]

The facts

Helicopter Resources is an operator of helicopters in the Antarctic pursuant to an AOC authorising the conduct of charter operations.

Under contract from the Australian Antarctic Division, which is part of the Commonwealth, Helicopter Resources provides helicopters with pilots to support Australia's scientific mission in the Antarctic.

The Commonwealth sought to provide logistic support to a scientific mission investigating part of the Antarctic far removed from Australia's bases. As a consequence it was necessary to establish a fuel dump to enable helicopters to refuel flying to and from the investigation site.

On 11 January 2016 Captain David Wood, a pilot employed by Helicopter Resources, flew his helicopter with fuel drums to a place where he landed to deposit the drums. He climbed out of his helicopter to collect the drum line and place it back

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[25] At [89].
[26] Chicago Annexes 13 and 19.
[27] [2019] FCAFC 25.

in the helicopter. While climbing back into the cabin he slipped and fell. Unknown to him, he had landed across a deep crevasse into which he fell. While he was recovered from the crevasse he died the following day from hypothermia.

The Commonwealth and Helicopter Resources were each charged by the Commonwealth Work Health and Safety Regulator, Comcare with offences under the Commonwealth *Work Health and Safety Act* which mirror the Northern Territory offence considered in *Outback Ballooning*.

After those charges were laid the Commonwealth sought and obtained a subpoena addressed to Helicopter Resources' chief pilot to give evidence at the inquest into Captain Wood's death so that the Commonwealth could cross-examine the chief pilot on a list of issues. Those issues were the issues likely to arise on the prosecution.

Helicopter Resources commenced proceedings in the Federal Court to prevent the Coroner from compelling the chief pilot to give evidence before the completion of the prosecution.

Helicopter Resources failed at first instance[28] but was successful in the Full Court.[29]

The Commonwealth has applied for special leave to appeal to the High Court and that application has not yet been determined.

Helicopter Resources' Case

In summary Helicopter Resources' case was as follows:

(a) ***first,*** Australia's system of criminal justice is accusatory and except where the law governing conduct of a criminal trial otherwise provides, neither the prosecutor of a summary offence nor the co-accused on a summary charge, is permitted a process of compulsory pre-trial examination of persons who may then be summonsed to give evidence either as part of the prosecution's case or the co-accused's case;

(b) ***secondly***, Helicopter Resources and the Commonwealth are co-accused on summary charges;

[28] Bromwich J – see [2018] FCA 991.
[29] Rares, McKerracher and Robertson JJ.

(c) ***thirdly,*** Helicopter Resources' chief pilot was to be called as a witness at the inquest at the Commonwealth's request because he would be able to ventilate the contribution, if any, of acts or omissions of Helicopter Resources to the death of Captain Wood and they were key issues in the criminal proceedings;

(d) ***fourthly,*** Helicopter Resources' chief pilot was, by reason of CAO 82.0, responsible for the safety standards of the relevant operations of Helicopter Resources and of any acts or omissions alleged. That responsibility extended to "control" indicating a level of authority to the exclusion of directors and other officers of the air operator;

(e) ***fifthly***, if the chief pilot was required to give evidence at the inquest the Commonwealth would cross-examine him on topics that overlapped with key aspects of the subject matter of the criminal proceedings; and

(f) ***sixthly***, there was thereby a real and substantial risk that the Commonwealth would obtain forensic advantages and Helicopter Resources would incur disadvantages in the conduct of the criminal trial.

Helicopter Resources contended that in those circumstances to require the chief pilot to give evidence at the inquest would be a contempt of the Court hearing the criminal proceedings[30] and that the *Coroners Act*, or any legislation, would not be construed as authorising such a contempt without clear words.

The decision at trial

The trial judge rejected that case for the reason that he did not accept that the Commonwealth obtaining forensic advantages and imposing upon Helicopter Resources forensic disadvantages for which the law of criminal procedure did not provide was sufficient to amount to a contempt. Rather, he reasoned that a contempt would only occur if there was something improper in the conduct of the Commonwealth or the Coroner in circumstances where there was no suggestion of impropriety.

[30] *Hammond v Commonwealth* (1982) 152 CLR 188 at 198.

The Full Court's decision

The Full Court did not accept that there was a requirement for impropriety. Rather the question was one of objective assessment of the risk of interference with the criminal process as governed by the law of criminal procedure.

While *Environment Protection Authority v Caltex Refining Co Pty Ltd*[31] shows that a corporation has no privilege against self-incrimination, the Full Court reasoned that the accusatorial nature of a criminal trial involved questions far richer than that privilege. The Full Court referred to a series of recent High Court cases dealing with the accusatorial nature of a criminal trial of natural persons, which show that legislation will not be construed as authorising by general words executive inquiries that interfere with the accusatory nature of a criminal trial.[32]

The Full Court, reasoned:[33]

> 187. The consequence of the Coroner requiring [the Chief Pilot] to give evidence will be to reveal matters about whether he will, or may, give evidence for the appellant at the trial and, possibly, what that evidence is. All of those matters are not now known to the CDPP or the Commonwealth (AAD), as the co-accused, and neither can compel the appellant to reveal them. That is because of the appellant's common law right to decide how to meet the case that the prosecution must prove beyond reasonable doubt, without the prosecution or co-accused having any entitlement to know, beyond the appellant's plea of not guilty, how it will defend the charge. That is so, even if it knows (but the prosecution or co-accused do not) that, for example, [the Chief Pilot] will not give evidence for it because of a concern about his own potential exposure or for some other reason.
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> 188. Thus, the Coroner's use of her compulsory powers has the real potential of forcing the appellant's hand prematurely, before the time in the criminal trial when the prosecution has closed its case. A second, but separate, aspect of the potential forcing of the appellant's hand is the role of the Commonwealth (AAD), as its co-accused in the criminal trial, urging the Coroner to overrule the appellant's objection to her requiring [the Chief Pilot] to give evidence at the inquest before the trial, when knowledge of his evidence would be likely to assist it, as co-accused, in its own defence of the charges.
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> 189. In our opinion, the crucial and dispositive consideration in relation to the issue of interference is that if [the Chief Pilot] were compelled to

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[31] (1993) 178 CLR 477.
[32] *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission (Lee No 1)* (2013) 251 CLR 196; *Lee v R (Lee No 2)* (2014) 253 CLR 455; *Strickland v Commonwealth Director of Public Prosecutions* [2018] HCA 53.
[33] At [187] – [189].

> give evidence in the inquest, as a matter of practical reality, the appellant's position as an accused corporation in the criminal proceedings would be altered fundamentally: *Strickland* at [77]-[81].

Application for special leave

The Commonwealth has applied for special leave to appeal against that decision. As I am briefed on the application for special leave I will say no more about that decision.

South West Helicopters Pty Ltd v Stephenson[34]

The Facts

South West Helicopters is the operator of helicopters under an AOC authorising charter operations. South West Helicopters provided a helicopter with pilot to councils in the western district of New South Wales for the conduct of weed surveys.

One of South West Helicopters' customers was Parkes Shire Council.

In May 2005 Parkes Shire Council had engaged a different helicopter operator to conduct a weed survey which had been conducted by two Parkes Shire Council employees, Mr Stephenson and Mr Buerckner. To assist in the conduct of that survey Parkes had purchased a video camera with a zoom lens which could be used to spot weeds without the need for the helicopter to descend close to the weeds.

In February 2006 South West Helicopters was engaged by Parkes to conduct a second weed survey. Mr Stephenson and Mr Buerckner were the Council officers who undertook the survey with South West Helicopters' pilot, Shane Thrupp.

The contract between South West and Parkes provided for Mr Thrupp to have full control of the operation of the helicopter but for Messrs Stephenson and Buerckner, subject to Mr Thrupp's control of the helicopter, to give directions as to where to fly, including at what height.

About an hour after take-off the helicopter was observed to track immediately above the main road between Parkes and Sydney. At a height of about 120 feet its skid

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[34] [2017] NSWCA 312.

caught on a single strand power line flipping the helicopter into the ground and leading to the immediate loss of life of Messrs Thrupp, Stephenson and Buerckner.

The wire that was struck was unusual. The point of impact was close to the mid-point of a single span 1.1 kms long. The topography of the valley across which the wire was slung meant that its height at that point, 120 feet, was close to its highest point above land at any point across the valley. That meant that the Australian standard requiring the marking of the line did not apply.[35]

The families of both Messrs Stephenson and Buerckner received workers compensation payments from Parkes Shire Council.

Mr Stephenson's family sued South West Helicopters and Parkes Shire Council on a *Compensation to Relatives Act* claim and for nervous shock.

Those actions were commenced more than 2 years after the date of the accident.

South West Helicopters joined Essential Energy, the wire operator, and there were various cross claims and claims for contribution between the 3 defendants.

Parkes Shire Council was found liable on the claims by the Stephensons.

The main questions on appeal to the New South Wales Court of Appeal were between the 3 defendants:

(a) were the claims by the Stephensons within the scope of the *Civil Aviation (Carriers Liability) Acts* so that they were extinguished, they having been commenced more than 2 years after the date of the accident;[36]

(b) was Parkes entitled to an indemnity from South West for the payments of workers compensation made to the Stephensons;

(c) in assessing South West's liability to make contribution to Parkes, was Parkes' liability to the Stephensons in nervous shock a liability within the *Civil Aviation (Carriers Liability) Act* or outside it? If it was a liability to which the Carriers Liability Acts applied South West's liability cap of $500,000 operated,

[35] The standard requiring marking only if a section of the line was more than 360 feet above ground level.
[36] Section 34 *Civil Aviation (Carriers Liability) Act 1959* (Cth).

but if it was a liability to which the Carriers Liability Acts did not apply, Parkes could recover more than the $500,000 from South West;

(d) was Essential Energy liable in negligence and therefore liable to contribute to the damages payable to the Stephensons?

Exclusivity of the Carriers Liability Act Regime

The liability of civil air carriers for injury or death caused to a passenger in the course of carriage is governed by the Carriers Liability Act regime constituted by:

(a) the Warsaw Convention[37] and its successors[38] (collectively, **Conventions**) which provide for carrier liability in the course of international travel;

(b) the *Civil Aviation (Carriers Liability) Act 1959* (Cth) (**Carriers Liability Act**) which gives the Conventions the force of law in Australia and in Part IV applies analogous principles to the liability of air carriers arising in the course of interstate carriage and carriage with or within the Territories;

(c) counterpart legislation of each of the States which applies the provisions of Part IV of the Carriers Liability Act to intrastate carriage.

The Conventions

Two features of the Conventions were important to the decision in *South West*.

First, the Conventions are concerned with the liability of carriers and only indirectly and consequentially with the rights of passengers or of those who may claim through or because of the harm to passengers. The Conventions leave to domestic law questions of who may sue, for what forms of harm they may sue, under what legal theory they may sue and the manner of division between them for damages available up to the prescribed cap.

Secondly, Article 24 of each of the Conventions provides that the liability under the Convention is exclusive in the sense that actions for damages can only be brought subject to the conditions and limits set out in the Convention.

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[37] Convention of the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929.

[38] The Warsaw Convention as amended at The Hague, 1955; Warsaw Convention as amended at The Hague, 1955, and by Protocol no. 4 of Montreal, 1975; Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999.

In recent years the Supreme Courts of the United States, United Kingdom and Canada have each considered the operation and effect of Article 24 and concluded that it precludes actions for damages identified by reference to an event: whether the damages claimed arise in the carriage of passengers, baggage or cargo.[39]

Construing the Australian Acts

Reasoning in the High Court in 2005 had shown that Part IV of the Carriers Liability Act is to be construed to operate harmoniously with the Conventions.[40] In *South West* the Court reasoned that when the Commonwealth provisions are applied by the counterpart State Acts those applied provisions should also be construed in light of the purpose of applying within Australia the legal principles governing international air travel.[41]

Stephenson's claims extinguished

Article 29 of the Conventions and s.34 found in Part IV of the Carriers Liability Act provide for extinguishment of any claim not brought within 2 years after the date of the flight upon which damage is alleged to have occurred.

The result was that the claims by the Stephensons against South West were doomed to fail if the New South Wales Act applied the provisions of Part IV of the Carriers Liability Act to the carriage of Mr Stephenson. It did not matter that they were claims under other laws: the Carriers Liability Regime is exclusive where it applies.

The Stephensons contended that the State Act did not apply the provisions of Part IV to that carriage for two reasons.

First, it was contended that the carriage was not in the course of "commercial transport operations".

The Court rejected that argument[42]:

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[39] *Sidhu v British Airways PLC* [1997] AC 430; *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1998) 525 US 155; *Stott v Thomas Cook Tour Operators Ltd* [2014] AC 1347; *Thibodeau v Air Canada* [2014] 3 SCR 340.
[40] *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 270 [54]; *Airlink Pty Ltd v Paterson* (2005) 223 CLR 283 at 303 [49].
[41] At [23].
[42] At [71] to [76].

(a) ***first***, on the basis of the ordinary meaning of the words "commercial transport operations". The operations involved were carried out pursuant to a contract between Parkes Shire Council and South West for reward and were "commercial transport operations" as ordinarily understood;

(b) ***secondly***, because the words "commercial transport operations" in the State Act were to be given their defined meaning in the Commonwealth Carriers Liability Act being "operations in which an aircraft is used, for hire or reward, for the carriage of passengers or cargo". If Mr Stephenson was a passenger that definition was clearly satisfied; and

(c) ***thirdly***, the limitation in the State Act that the carriage be "in an aircraft being operated by the holder of an airline licence or a charter licence" was to be read in light of the definitions in Part IV of the Commonwealth Carriers Liability Act, so that the references to licences included an AOC. South West held an AOC and consequently that limitation was also satisfied.

Passenger?

Secondly, the Stephenson's alleged that Mr Stephenson was not a passenger within the defined meaning of "commercial transport operations."

The Court reviewed English, United States, Canadian and French cases which consider the distinction in the Conventions between passengers on the one hand and crew on the other.[43]

The Court reasoned that crew include all persons on board who are involved in the control or operation of the aircraft. In cases where a third party is on board who may give instructions to a pilot as to where to fly a line is to be drawn. The line was correctly drawn by the House of Lords in *Herd v Clyde Helicopters Ltd*.[44] Merely providing instructions of where to fly does not involve the control or operation of the aircraft. Mr Thrupp maintained complete control over the operation of the aircraft. As a result Mr Stephenson was not crew. He was therefore a passenger.[45]

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[43] At [44] to [59].
[44] [1997] AC 534.
[45] At [61] to [63] and [78].

Indemnity and contribution

Section 37 of the Carriers Liability Act provides for a carrier to be liable to third parties by way of indemnity under workers compensation legislation or in contribution.

Parkes sought indemnity for the workers compensation payments it had made to the Stephensons. That claim failed for reasons that are important to the operation of NSW workers compensation law, but which do not need to be addressed for the purposes of this paper.

Parkes also sought contribution from South West as a concurrent tortfeasor. That claim was successful, and the Court's reasons show that s. 37 of the Carriers Liability Act operates as a partial exception to the exclusivity principle: a carrier can be liable to contribute as a tortfeasor but only up to the liability cap of $500,000. A claim for indemnity or contribution can be brought after the 2 year period that results in extinguishment of the plaintiff's rights against the air carrier.[46]

Nervous shock claims

The third issue of exclusivity which arose in *South West Helicopters* was whether the claims to damages for nervous shock caused upon the learning of Mr Stephenson's death were claims which were precluded by the Carriers Liability regime. That is a question upon which the High Court is reserved and I say nothing further about it.

A wire operator's duty of care

Essential Energy appealed against the finding that it was liable in negligence, and succeeded. The Court held that it did not owe a duty of care to helicopter operators or users.

Essential Energy knew of the likely presence of low flying helicopters in the vicinity of the wire for two reasons: ***first*** because it was in a fire prone area and Essential Energy knew of the use of helicopters in the fighting of fires; and ***secondly***, because Essential Energy itself used helicopters for the conduct of wire surveys, including surveys of the wire in question.

[46] At [165], [166], [186] to [190].

In *Endeavour Energy v Precision Helicopters Pty Ltd*[47] the Court of Appeal had found Telstra owed a duty of care to users of low flying helicopters in respect of a short span at a very low level of a disused wire.

Telstra was found to owe that duty of care because, although it was not proven that Telstra knew that helicopters were likely to fly in the vicinity of the wire, it was reasonable to expect that Telstra should have had knowledge that electricity companies used low flying helicopters to conduct wire inspections and as a result it was reasonable to require Telstra to have in contemplation the risk of injury that eventuated.[48] As a result Telstra was liable for loss of a helicopter and injuries to Mr Edwards, who was being carried on board, incurred when a helicopter being used to survey Endeavour Energy's wires clipped Telstra's wire and crashed.

If Telstra, in operating a short span of low level wire owed a duty of care because it should have known that electricity companies would use helicopters to survey electricity lines in the vicinity of that wire, how could Essential Energy not owe a duty in operating a wire with a span of 1.1 km hanging about 120 feet above ground level for the length of that span; when it had actual knowledge that it used helicopters to survey wires including the wire in question; and knew that the wire was in a fire prone area in which helicopters may be used to fight fires?

The only basis, on the facts, identified by the reasoning in *South West Helicopters* for distinguishing the decision in *Endeavour Energy* was that there was no evidence of a complaint to Essential Energy or of any prior indication of any accident or near miss with the wire in question.[49]

There is nothing in the reasoning in *Endeavour Energy* suggesting there had been a complaint or of any prior indication of any accident or near miss with the wire in question; and that distinction cannot stand with the dispositive reason in that case: that Telstra had constructive knowledge even if it had no actual notice of the risk. The end result is that it is not presently possible, in NSW, to articulate the principles that govern when a wire operator is to be found to owe a duty of care to helicopter

[47] [2015] NSWCA 169.
[48] At [30], [31],[47] and [182].
[49] At [235].

operators and users. On 19 April 2018, the High Court refused special leave to appeal on that question.[50]

[50] [2018] HCASL 98.