AVIATION REGULATION AND WORK HEALTH AND SAFETY

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Tom Brennan SC

Kiera Nelson asked me to present on the topic of aviation and work health and safety. I apprehend that was because as one of the counsel who lost in the High Court in *Work Health Authority v Outback Ballooning* (2019) 266 CLR 428 I carry some responsibility for that being a topic of discussion. That responsibility does not extend to Mark Gray-Spencer, our instructing solicitor in the case. Let me explain.

Outback Ballooning

The facts of *Outback Ballooning* were quite difficult for the operator. Outback Ballooning provided rides on hot air balloons in central Australia. A group of passengers were taken by bus to a launch site. In accordance with the provisions of the Operations Manual the passengers were provided with a briefing which included a warning to secure all loose clothing and avoid getting too close to the inflation fan.

The passengers were then loaded onto the basket in accordance with the applicable Civil Aviation Order with equal numbers of passengers directed to each end of the basket.

Ms Stephanie Bernoth who was wearing a scarf which she had not secured was directed to the end which was reached by walking past the fan. The Operations Manual did not require that passengers be kept a safe distance from the fan. As she walked past the fan, Ms Bernoth's scarf was sucked into the fan and she was strangled. She later died from her injuries.

No prosecution action was commenced by CASA or the Commonwealth DPP.

However, the Northern Territory Work Health Authority brought charges under s.32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT). That provision created an offence of failing to comply with the duty imposed by s. 19 of that Act where the failure exposed an individual to a risk of death or serious injury or illness. Section 19 imposed a duty on a person conducting a business or an undertaking to ensure so far as 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 or undertaking.

In the Northern Territory Court of Appeal Outback Ballooning successfully argued that the Territory work health and safety legislation did not apply because it was inconsistent with the Commonwealth's Civil Aviation Law. In so deciding the Court of Appeal followed the decision of the Full Court of the Federal Court of Australia in *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502. *Heli-Aust* had established that State work health and safety laws did not operate to regulate the safety of activities which were regulated by the Civil Aviation Law.

If *Heli-Aust* remained good law we would not be discussing aviation regulation and work health and safety – they were two quite separate areas of law without overlap.

In *Outback Ballooning* the High Court disapproved of the decision in *Heli-Aust* and held that the Work Health Authority's charges against Outback Ballooning under the Northern Territory WHS Act could proceed.

The consequence is that national work health and safety legislation applies, at least to some extent, to regulate the safety of activities which are also regulated under the Civil Aviation Law.

Two key questions arise from that finding. First, to what extent do the national WHS laws operate to regulate air navigation and air operations? Secondly, is the legislative framework as explained by the High Court appropriate?

I deal with each question in turn.

Before doing so it is necessary to consider the reasoning in *Outback Ballooning*.

The reasoning in *Outback Ballooning*

The extent to which State and Territory laws can operate together with Commonwealth laws which affect the same subject matter is determined by reference to "inconsistency".

A State or Territory law cannot *alter, impair or detract from the operation* of a Commonwealth law and to the extent that the State or Territory law does it is said to be "inconsistent" with the Commonwealth law.

One of the ways in which such an "inconsistency" is identified is when a law of the Commonwealth is read as expressing an intention to say "completely exhaustively or exclusively what shall be the law governing the particular conduct or matter to which attention is directed". That is usually referred to as "indirect inconsistency". The Commonwealth law expresses an intention to "cover the subject matter" so that any State or Territory law dealing with the same subject matter is necessarily inconsistent.

It was that form of inconsistency, indirect inconsistency, which was in issue in *Outback Ballooning*.

Outback Ballooning's case was that the subject matter which was exclusively regulated by Commonwealth aviation law was the prescription and enforcement of standards of safety in the conduct of air operations, where "standards of safety" meant the concept, built up through the history of the Chicago Convention, of what it means to regulate safety as a risk management exercise;

and air operations meant the entire process of getting people and cargo safely onto the aircraft, into the air, to the other end and safely disembarked.

There were three judgments in *Outback Ballooning*. Each came to a different conclusion on indirect inconsistency.

The plurality (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) found that there was no indirect inconsistency because the *Civil Aviation Act 1988* properly construed was intended to operate within the setting of other laws, including the work health and safety laws of the States.

There were three key steps in their Honours' reasoning to that conclusion.

First, s.28BE of the *Civil Aviation Act* imposes a duty on the holder of an Air Operators Certificate (AOC) to take all reasonable steps to ensure that every activity covered by the AOC and everything done in connection with such an activity is done with a reasonable degree of care and diligence. Sub-section (5) of that section 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."

Taken together the provisions in s.28BE were a clear textual indication that laws other than the Commonwealth Civil Aviation Law were to continue to operate with respect to AOC holders in so far as they deal with the extent of care to be taken by the holder of an AOC for the health and safety of those affected by air operations.

It is important to note at this point that their Honours did not reason that s. 28BE operated so that State and Territory provisions prescribing safety standards, as distinct from the standard of care to be expected, operate concurrently with the Civil Aviation Law.

Secondly, the regulation making power in the *Civil Aviation Act* included s.98(7) which provided that regulations and orders made under the *Civil Aviation Act* were not to be taken to be inconsistent with a Northern Territory law to the extent that the law was capable of operating concurrently with the regulations. Their Honours reasoned that s. 98(7) provides a clear textual indication that where the source of a legal norm was a Civil Aviation Regulation or Civil Aviation Order it was not intended that any such regulation or order be exhaustive or exclusive of State or Territory laws.

That aspect of the reasoning extends to safety standards prescribed in the Civil Aviation regulations orders and manuals of standards. It may be, but might not be, that it extends to state and territory laws which prescribe safety standards for the same activities as are covered by the Civil Aviation Law.

Thirdly, their Honours reasoned that the Northern Territory *Work Health and Safety Act* along with the *Work Health and Safety Act 2011* (Cth) were each an enactment of the national uniform WHS laws, that the Commonwealth WHS Act was not to be read down to accommodate the *Civil Aviation Act* and consequently each of the State and Territory WHS Acts (which imposed a nationally uniform set of rules) should be read harmoniously with the Commonwealth Act.

Their Honours observed that the only specific standard of conduct prescribed by the Civil Aviation Law which affected the safety of the loading of the balloon was Civil Aviation Regulation 215 (which was then in force) requiring an operator to have an Operations Manual which included all necessary risk management measures approved by the Chief Pilot and submitted to CASA.

The Operations Manual itself was not a law. There was no prospect that ss. 19 and 32 of the NT WHS Act altered impaired or detracted from the requirement to have an adequate Operations Manual. Because the *Civil Aviation Act* did not

convey an intention to operate to the exclusion of any State or Territory laws that deal with the standard of care owed by an AOC holder and because the CARs and CAOs could not operate to the exclusion of State or Territory laws generally there was no prospect of inconsistency between the Commonwealth law and the Territory's WHS Act.

While Justice Gageler reached a similar conclusion to the plurality he did so through a different form of reasoning.

His Honour accepted Outback Ballooning's principal argument that the legislative context of the *Civil Aviation Act* was the implementation by Australia of its obligations under the Chicago Convention including to provide a system of *uniform* aviation safety standards. His Honour reasoned that Australia could not perform its obligations of enacting uniform safety standards unless the standards enacted under Commonwealth law constituted a single regulatory framework for the prescription and enforcement of standards for the safe operation of aircraft in, to and from Australia. Consequently, his Honour reasoned that each norm prescribed by the Civil Aviation Regulations and Orders was to be read as intended to lay down the sole rule on the precise topic with which it dealt. For example, the regulation which sets the low flying minimum altitude of 500 feet operated so that his Honour reasoned a State could not lawfully make a law prescribing a higher minimum height. That was so even though a person could comply with the Commonwealth requirement not to fly below 500 feet and also comply, for example, with a State requirement not to fly below 700 feet. The inconsistency arose, in his Honour's view, because the Commonwealth's safety standards were intended to be exclusive on the topics covered by them.

His Honour however, like the plurality, disapproved of the reasoning in *Heli-Aust.* That was because his Honour reasoned that a law which imposed a general duty to exercise reasonable care and diligence or to take all practicable

measures in the operation of an aircraft fell outside the scope of the Civil Aviation Law's exclusivity: which concerned prescription and enforcement of safety standards rather than prescription or enforcement of a standard of care.

Applying that distinction to the facts of the case, his Honour reasoned that CAR 215 which dealt with Operation Manuals was the sole source of obligation on an AOC holder or Chief Pilot prescribing what was required to be included in an Operations Manual; and that obligation operated alongside the obligation imposed by s.19 of the Territory WHS Act to take all practicable measures to avoid risks of injury.

The third judgment in *Outback Ballooning* was by Justice Edelman who dissented. His Honour framed the question by referring firstly to the Chicago Convention and the "highest obligation" of the Contracting States to secure uniformity of aviation practices with the object of safety and orderly growth of civil aviation. His Honour asked: "Does the civil aviation law contemplate that its scheme, including duties concerning aviation safety, could be fragmented by the concurrent application of a different safety regime in the States and Territories?" His Honour would answer that question "no." In doing so his Honour observed that:

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

As a result, his Honour would have held that *Heli-Aust* remains good law and that State and Territory WHS legislation does not apply to regulate the safety of air operations.

The scope for operation of WHS laws

In identifying the scope for State and Territory laws to operate concurrently with the Civil Aviation Law in regulating the safety of air operations the judgment of the plurality in *Outback Ballooning* is controlling.

In applying that judgment the following comment by their Honours is significant:

> "It is important to recognise that there is no dispute that there are aspects of matters preparatory to and subsequent to an aircraft flying, including embarkation and disembarkation of passengers, that are completely, exhaustively or exclusively dealt with by the Commonwealth aviation law."

Their Honours do not indicate anything about the scope of provisions in the Commonwealth Civil Aviation Law which would operate exhaustively or exclusively of State and Territory WHS laws, other than to indicate in accordance with established principle that no State or Territory law can *alter, impair or detract from the operation* of the Commonwealth law.

Clearly enough the operation of detailed and comprehensive regulation directed to assuring the safety of aviation systems in which multiple parties play a role, may be altered, impaired or detracted from by state or territory laws which alter or add to the safety obligations of some but not all such parties.

An example of such detailed and comprehensive regulation imposed by the Civil Aviation Law is the rules of the air. The rules of the air are directed not simply to the safe conduct of an individual aircraft, but to the safe conduct of flight by all aircraft, and to the safe integration of flight operations, navigational aids, air traffic control and aerodromes. As Justice Edelman observed, it would be potentially dangerous for there to be more than one regulatory regime affecting the rules of the air. It is likely they will be construed as being the sole source of law that governs the conduct of flight of civil aircraft in Australia. A

number of parties, including the Commonwealth Attorney-General submitted to that effect in *Outback Ballooning*.

But even then questions may arise, such as that touched on by Gageler J: could the States prescribe a low flying altitude higher than that prescribed in the Commonwealth law? Would it matter if that were done in order to regulate safety in the WHS domain or whether, for example, it was to achieve an environmental protection objective?

Other areas which seem to be obvious candidates for a conclusion of exhaustive or exclusive Commonwealth law regulating a system are the provisions of the CARs and CASRs regulating the conduct of aircraft maintenance by maintenance organisations, and the provisions of the CASRs and relevant manuals of standards regulating the movement of aircraft at airports.

In each case the argument in support of exclusivity will be that the regulations in question can only work as intended if they are the only regulations on the subject matter with which they deal because they are concerned with governing a system which is larger than any individual regulated entity; and that system can only work safely if there is a single and common regulatory framework. Any other or different regulation would be inconsistent with the regulation of a system and in that way would necessarily alter or impair the practical operation of the Commonwealth law.

Further, it is to be recalled that in the reasoning both of the plurality and Justice Gageler a distinction is drawn between State and Territory provisions which prescribe a standard of care which an operator must meet on the one hand and provisions which prescribe safety standards on the other. It is more likely that State and Territory provisions prescribing general standards of care can operate concurrently and harmoniously with provisions of the Civil Aviation Law, than

that State or Territory provisions either prescribing or requiring the prescription of safety standards could so operate.

However, it is not only in areas of detailed and comprehensive regulation of aviation safety systems where the conclusion of exclusive Commonwealth law may be reached – and the Commonwealth law may operate even to exclude state provisions prescribing standards of care rather than safety standards.

Indeed, as a result of the commencement into force of Parts 119 to 138 of the *Civil Aviation Safety Regulations* there is now available a strong argument that the outcome in *Outback Ballooning* has been reversed and that ss.19 and 32 of the NT WHS Act could not operate to impose a duty on an operator in the position of Outback Ballooning to alter its process for the embarkation of passengers as set out in its approved Exposition.

While the detailed provisions vary depending upon the category of operator the argument is most readily demonstrated by reference to Part 119 which deals with air transport AOCs.

CASR 119.070(1)(a) read together with CASR 119.205(1)(h) and (m) operates so that a condition for the issue of an air transport AOC is the requirement that the operator include in its Exposition :

a) an outline of each of its plans, processes, procedures, programs and systems implemented to safely conduct and manage their Australian air transport operations in compliance with the civil aviation legislation; and
b) a description of the operator's change management process.

Putting aside transitional provisions, an air transport AOC would not be issued unless CASA has approved the Exposition.

CASR 119.100 creates an offence for an operator to make any change, including to any plan, process, procedure, program or system implemented by the operator

to safely conduct and manage its Australian air transport operations otherwise than in accordance with the change management process specified in its Exposition; and CASR 119.090 read with CASR 119.020(b)(i) creates an offence of making a significant change without seeking CASA's approval. A significant change is a change to any plan, process, procedure, program or system for the safe conduct or management of the operator's Australian air transport operations which does not maintain or improve or is not likely to maintain or improve aviation safety. An operator's assessment of whether a change would be a significant change is to be made in accordance with the approved change management process.

Thus, the scheme of Part 119 is to require each operator to document in its approved Exposition each of its plans, processes, procedures, programs and systems implemented to ensure aviation safety and not to change that system otherwise than in accordance with the change management system prescribed in the Exposition. Further where a change is, in accordance with that change management system, assessed to be a significant change the operator must submit the change to CASA for its approval.

On the other hand, even the most generally expressed WHS duty - that contained in s. 19 of the National law which was the provision in issue in *Outback Ballooning* - operates to require an employer to *take those steps* which are reasonably practicable to achieve the identified ends of ensuring the health and safety of workers and that the health and safety of other persons is not put at risk. (*Baiada Poultry Pty Ltd v R* [2012] HCA 14; 246 CLR 92 at [15]; *Keilor Melton Quarries v R* [2020] VSCA 169 at [43])

If s.19 of the WHS uniform laws were to operate to require an AOC holder to take some step which departed from, or added to, its plans, processes, procedures, programs and systems as approved in its Exposition it is arguable it would *alter* the operation of CASR Part 119 by:

(a) requiring that change to be made without regard to the change management process contained in the approved Exposition; and

(b) requiring that change to be made whether or not it is a significant change which Part 119 requires be submitted to CASA for approval.

The same analysis would apply, for example, to the holder of a balloon transport AOC pursuant to Part 131 of the CASR.

If that argument, which in my opinion is strong, is accepted the result would be that sections 19 and 32 of the uniform WHS laws do not now operate to require the holder of an AOC to vary any system of embarkation which is included in the approved Exposition. With that change in the law, the outcome in *Outback Ballooning* might be reversed.

There are other provisions of the WHS law which appear very likely to be irreconcilable with civil aviation regulation.

For example ss.27 to 29 of the national uniform WHS law impose various duties on officers, workers and other persons at workplaces.

The imposition of those duties is in terms which conflict with the detailed allocation of differentiated roles and responsibilities among different office holders of, for example, AOC holders and aircraft maintenance organisations prescribed by the Civil Aviation Law.

Regrettably, beyond these general comments, whether or not any State or Territory WHS law operates in respect of safety in the conduct of air operations is something which must presently be addressed case by case with very close attention to the particular legislative provisions in issue.

Is the legislative framework appropriate?

In my opinion the legislative framework as it applies since the judgment in *Outback Ballooning* is not appropriate and ought be corrected by amendment to the *Civil Aviation Act*.

That is for two distinct reasons, one of principle and one of practice.

The question of principle is clearly seen from the reasoning of Justices Gageler and Edelman in *Outback Ballooning*. I have already referred to Justice Edelman's quotation of the "highest obligation" of the Contracting States to the Chicago Convention being to secure uniformity of aviation practices with the object of safety and orderly growth of civil aviation. That goal of uniformity is central to the Chicago Convention as reflected in Articles 12 and 37 of that Convention. Almost 60 years ago in *Airlines of NSW (No 2)* Chief Justice Barwick described Article 37 as imposing an obligation "to secure in Australia uniformity of standards, practices, procedures and organisation to the extent mentioned in Article 37, and where annexes have been relevantly adopted to achieve uniformity according to the standards, practices and procedures which they do adopt".

Australia's obligations under the Chicago Convention are singular: they apply to Australia as a whole and are not to be derogated from by legislation of the States or Territories.

While State or Territory laws which apply general standards of care as distinct from safety standards, may not derogate from Australia's obligations under the Chicago Convention any State or Territory law which has the effect of altering any safety standard prescribed through the Commonwealth Civil Aviation Law, or requiring its alteration (including by adding to it), derogates from Australia's performance of its obligations under the Chicago Convention.

Presently s. 11 of the *Civil Aviation Act* operates to require CASA to exercise its functions consistently with Australia's obligations under the Chicago Convention. The decision in *Outback Ballooning* raises acutely the question whether the terms of s. 11 are too narrow: Australia's obligations cannot be met fully by CASA; indeed Australia's core obligations are performed by the making of regulations by the Governor-General but there is no reference to the Chicago Convention guiding or controlling the performance of that function.

As a matter of principle, it seems to me the *Civil Aviation Act* ought operate unambiguously so that that Act, and regulations, orders and manuals of standards made under it can and do operate to provide a single and uniform statement of standards, practices, procedures and organisation for civil aviation insofar as those matters are dealt with in the Chicago Convention and its various annexes. That would be in accordance with Chief Justice Barwick's formulation from *Airlines No 2.*

For Australia to continue with a legislative framework which permits states and territories to add to the requirements imposed by Australian law relating to the safe conduct or air operations may have the domestic political advantage of avoiding hard discussions between the aviation and work health and safety regulators – but it has the intolerable disadvantage of Australia failing to deliver on its promises under the Chicago Convention. In principle that situation ought not be permitted to continue.

In my opinion the reasoning in *Outback Ballooning* indicates the need to consider the adequacy of drafting of ss. 11, 28BE and 98(7) of the *Civil Aviation Act.*

The question of practice arises from the discussion concerning the scope for continued exclusive operation of Commonwealth Civil Aviation Law.

It may be accepted that on the facts in *Outback Ballooning* there was an obvious gap in safety regulation: there was nothing in the Operations Manual which required an adequate physical separation of passengers from the inflation fan and there was nothing in CAR 215 (as distinct from the Operations Manual) which controlled the operator's conduct and management of its embarkation procedures.

It is possible that the reasoning in *Outback Ballooning* does not travel much further than those facts so that those provisions of the WHS law which imposed a general standard of care requiring the operator to take all practicable steps to ensure safety could continue to operate consistently with Regulation 215. Whether or not that analysis is correct is presently left for consideration and determination in subsequent cases in circumstances where, as I have indicated, the commencement in force of CASR Parts 119 to 138 may already have resulted in a reversal of the outcome in *Outback Ballooning*.

That situation leaves air operators, air maintenance organisations, airports and other participants in the civil aviation industry, together with work health and safety regulators, in a most unsatisfactory and invidious position.

In every case where there is potential overlap between the Civil Aviation Law and WHS laws there now exists room for dispute whether, and if so how far, the WHS law might apply. That circumstance cannot benefit aviation safety, worker safety or industry efficiency.

The practical case for the Commonwealth to get its house in order by coming to a clear policy position which delineates the scope of operation of WHS laws within the civil aviation system is very strong. If that is done the case for the Commonwealth legislating to give effect to that clear delineation is overwhelming. By doing so it will:

(a) provide clarity to CASA and to WHS regulators as to their respective roles and responsibilities and therefore accurately guide the focus of regulatory efforts;

(b) clearly identify to all participants in the civil aviation industry those matters required to be addressed through the mechanisms of WHS law and in dealings with WHS regulators; and

(c) avoid risks to health and safety falling between unrecognized gaps between CASA's regulatory focus and the WHS system.

On the other hand unless and until that is done participants in the civil aviation industry which are subject to enquiry or other regulatory action by WHS regulators will need to consider case by case whether it may be argued that the WHS law cannot operate because of the particular provisions of the Civil Aviation Law in question.