SUPREME COURT OF QUEENSLAND

CITATION:	*Hoch v The Director of Public Prosecutions (Qld)* [2019] QSC 266
PARTIES:	**Hoch** (applicant) **v** **The Director of Public Prosecutions (Qld)** (respondent)
FILE NO:	SC No 288 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	30 September 2019
DELIVERED AT:	Townsville
HEARING DATE:	8 August 2019
JUDGE:	North J

ORDER:

1. The application is dismissed.

2. Subject to orders 3 and 4 there is to be a cost order as follows:

"The applicant is to pay the respondent's costs of and incidental to the application to be assessed on the standard basis."

3. If any party seeks a cost order different from order 2 above (and in the event the parties cannot agree with respect to costs) then the following is to occur:

a) A written submission seeking a different order is to be filed and served on the other party within 21 days of the publication of these reasons;

b) The opposed party is to file and serve their written submission in response within 14 days of service of the submission seeking a different order;

c) The written submissions are to be no longer

than two (2) pages;

d) The issue of costs is to be determined "on the papers" without further appearance nor oral argument.

4. If the parties agree upon a cost order different from order 2 above they are to file a written consent order within 21 days.

CATCHWORDS: CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS – whether s 319 of the *Criminal Code* (QLD) is inconsistent with s 24 of the *Civil Aviation Act* 1988 (Cth)

CASES: *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212
R v Licencing Court of Brisbane; Ex parte Daniell (1920) 28 CLR 23
Colvin v Bradley Brothers Pty Ltd (1943) 68 CLR 15
Dickson v The Queen (2010) 241 CLR 491
Momcilovic v The Queen (2011) 245 CLR 1
*Ex Parte McLea*n (1930) 43 CLR 472
R v Morris [2004] QCA 408
Heli-Aust Pty Ltd v Cahill (2011) 194 FCR 502

LEGISLATION: *Civil Aviation Act* 1988 (Cth) (the "*CAA*")
Criminal Code 1899 (Qld) (the "Code")
Crimes (Aviation) Act 1991 (Cth)

COUNSEL: Mr J. Ribbands for the applicant

Mr G. Del Villar and Ms K.A. McGree for the respondent

SOLICITORS: Resolute Legal for the applicant

Queensland Office of Director of Public Prosecutions for the respondent

Introduction

[1] **NORTH J**: The applicant is the owner and operator of an aircraft charter company "Hoch Air" based at the airport at Mt Isa in Queensland. He is charged with a number of offences currently pending before the Magistrate's Court at Mt Isa. The five charges the subject of the application allege conduct in contravention of s 319 of the *Criminal Code* 1899 (Qld) (the "Code"). For the purposes of this application

the facts upon which the charges are based are not disputed.[1] The allegations are that between April and October 2016 at Mt Isa the applicant on one occasion removed oil from a plane's engine and on four occasions introduced foreign objects into a plane's engine. The planes were owned by other companies.

[2] The applicant seeks an order that the five charges be stayed on the grounds that s 319 of the Code is inconsistent with s 24 of the *Civil Aviation Act* 1988 (Cth) (the "*CAA*") and hence by reason of s 109 of the Constitution invalid and in these instances of no operative effect.

[3] For the purposes of the application the parties proceeded upon the agreed summary of facts as alleged and comprehensive written outlines which were supplemented by oral submissions. As stipulated by s 78(B) of the *Judiciary Act* 1903 (Cth) notices[2] were given to the attorneys-general for the Commonwealth and each of the States and Territories but none sought to intervene or to remove the matter. The application was argued upon the common position that the respondent was a proper respondent to the application.

[4] In *Work Health Authority v Outback Ballooning Pty Ltd*[3] the majority[4] said;[5]

> "[34] The question whether a State or Territory law is inconsistent with a Commonwealth law is to be determined as a matter of construction. In a case where it is alleged a State or Territory law is directly inconsistent with a Commonwealth law it will be necessary to have regard to both laws and their operation. 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 an intended subject matter."

[5] In preceding paragraphs in *Work Health Authority v Outback Ballooning Pty*[6] their Honours had referred to the two approaches that might be taken to the question of whether there was an inconsistency. Relevantly their Honours said:[7]

> "[31] In *Victoria v Commonwealth ("The Kakariki")*, Dixon J referred to two approaches which might be taken to the question whether an inconsistency might be said to arise between State and Commonwealth laws. They were subsequently adopted by the Court

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1 See the agreed summary of facts filed 21 June 2019.
2 See the notice filed 12 April 2019.
3 (2019) 93 ALJR 212.
4 Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.
5 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [34].
6 Supra.
7 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [31]-[33].

> in *Telstra Corporation Ltd v Worthing, Dickson v The Queen* and *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*.
> [32] The first approach has regard to when a State law would "alter, impair or detract from" the operation of the Commonwealth law. This effect is often referred to as a "direct inconsistency". Notions of "altering", "impairing" or "detracting from" the operation of a Commonwealth law have in common the idea that a State law may be said to conflict with a Commonwealth laws if the State law in its operation and effect would undermine the Commonwealth law.
> [33] The second approach is to consider whether a law of the Commonwealth is to be read as expressing an intention to say "completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed". This is usually referred to as an "indirect inconsistency". A Commonwealth law which expresses an intention of this kind is said to "cover the field" or, perhaps more accurately, to "cover the subject matter" with which it deals. A Commonwealth law of this kind leaves no room for the operation of a State or Territory law dealing with the same subject matter. There can be no question of those laws having a concurrent operation with the Commonwealth law."
> (footnotes omitted)

[6] For the applicant it was submitted that a direct inconsistency arose from s 319 of the Code "seeking to proscribe exactly the same conduct which is addressed by the Commonwealth in s 24(2) *CAA* in relation to the safety of aircraft operability." It was submitted that the conduct that s 24 concerned, vis an act that "threatens the safety of an aircraft or of persons on board an aircraft" (s 24(1)(b)(ii)) or tampering with an aircraft if the tampering "may endanger the safety of the aircraft" (s 24(2)(b)) is essentially the same conduct that s 319 of the Code concerns, vis "anything that endangers or is likely to endanger the safe use of [an aircraft]". Hence, it was submitted, a direct inconsistency arose. In support of the submission there was an indirect inconsistency it was submitted that the obligations imposed upon the Commonwealth as a consequence of the ratification of the *Chicago Convention* left no room for State legislatures to intrude into the field.[8] In relation to matters of aircraft operability and safety arising therefrom, it was submitted that the Commonwealth law "is intended to be exhaustive or exclusive".[9] In submissions the applicant pointed to s 3(A) of the *CAA* and to the main object of the Act being the safety of civil aviation with an emphasis upon preventing accidents and incidents.

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8 See *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [9]-[14].

9 See Outline of the applicant at [16].

[7] In response the respondent submitted that there was no direct inconsistency. The respondent's argument proceeded:[10]

> "52. The Applicant was capable of observing both the State and Commonwealth offence provisions. There was no impediment to obedience to both provisions. It was open to the Applicant to abstain from doing an act that endangered, was likely to endanger, threatened, or may have endangered: the safety of any person in (or on board) the aircraft; the safety of an aircraft; or any person or property.
> 53. Therefore, no direct inconsistency can arise on the basis that a person could not comply with the State and Commonwealth conduct requirements.
> 54. Further, no direct inconsistency arises on the basis that the CA Act confers a right, privilege or entitlement that s 319 purports to take away or diminish. It is wrong to characterise s 24 of the CA Act as conferring a right where its words, by their ordinary and natural meaning, merely impose an obligation.
> 55. In addition, the relevant offences contained in s 24 of the CA Act extend to a wider range of conduct that s 319 of the Queensland Code. *Firstly*, for each of the relevant s 24 CA Act offences, the fault element (or mental state) threshold for the offending is lower. Mere recklessness as to the risk to safety will suffice for s 24(1)(b)(ii) and s 24(2)(a) of the CA Act. Section 319 of the Queensland Code, however, requires the endangering act to be accompanied by an intent to harm (injure or endanger the safety of) a person in the vehicle. *Secondly*, the physical elements for each of the relevant s 24 CA Act offences are broader than the physical element of s 319 of the Queensland Code. Section 24(1)(b)(ii) extends to acts which threaten the safety of persons on board an aircraft, irrespective of whether those acts also affect the aircraft's use. Moreover, s 24(2)(a) extends to acts which may endanger the safety of any person or property (as well as the safety of an aircraft). Section 319 on the other hand applies only to acts which affect the safe use of an aircraft."
> (footnotes omitted)

[8] Concerning the submission there was an indirect inconsistency the respondent submitted that s 24(1)(b)(ii) and s 24(2)(a) proscribe interference with aircraft to protect the safety of civil aviation whereas s 319 of the Code proscribed conduct that was a crime that was directed against a person.[11] And, it was submitted, the Acts have different subject matters and that the *CAA* has no express nor "implied negative proposition" that there shall be no other law.[12]

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10 See Outline of the respondent at [52]-[55].
11 See Outline of the respondent at [58]-[61].
12 See Outline of the respondent at [52]-[69].

[9] In this application the applicant contends that there is both a direct and an indirect inconsistency.[13] I will first consider whether there is a direct inconsistency. It is therefore necessary to consider the construction and operation of the respective provisions.

[10] Section 319 of the Code provides:

> "**Endangering the safety of a person in a vehicle with intent**
>
> (1) A person who does anything that endangers, or is likely to endanger, the safe use of a vehicle, with intent to injure or endanger the safety of any person in the vehicle, whether a particular person or not, commits a crime.
>
> Maximum penalty – life imprisonment.
>
> (2) In this section –
>
> ***do*** anything, for a person who has a duty to do the thing, includes omit to do the thing.
>
> ***in*** includes on."

[11] Section 24 of the *CAA* provides:

> **"Interference with crew or aircraft**
>
> (1) A person commits an offence if:
>
> (a) the person does an act; and
> (b) the act:
>
> (i) interferes with a crew member of an aircraft in the course of the performance of his or her duties as such a crew member; or
>
> (ii) threatens the safety of an aircraft or of persons on board an aircraft.
>
> Penalty: Imprisonment for 2 years.
>
> (2) A person must not tamper with:
>
> (a) An aircraft; or
>
> (b) An aeronautical product that is of such a type that tampering with it may endanger the safety of an aircraft or any person or property;
>
> if tampering with it may endanger the safety of the aircraft or any person or property.
>
> Penalty: Imprisonment for 2 years."

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13 In both written and oral submissions the applicant placed greater emphasis upon a direct inconsistency and at the hearing the contention for an indirect inconsistency was only "faintly" argued.

[12] A direct inconsistency, that is one where the State law alters or impairs or detracts from the operation of the Commonwealth law[14] can arise in three ways. The first is that it is impossible for a person to comply with both the Commonwealth law and the State law.[15] The second is where one law confers a right or a privilege or an entitlement that the other takes away or diminishes[16] and the third is where there is what is sometimes called an operational inconsistency between the Commonwealth law and the State law.[17]

[13] Before considering whether any one of the three ways I have mentioned arise in the circumstances it is necessary to pay some attention to the relevant provisions and consider their construction.

[14] Section 319 is one of the sections contained within Chapter 29 of the Code which concerns "offences endangering life or health" and contains a number of provisions dealing with serious offending. They include for example s 317 (Acts intended to cause grievous bodily harm and other malicious acts), s 320 (grievous bodily harm) and a variety of other provisions including s 328A (dangerous operation of a vehicle). By contrast s 24 is found within Part III, Division 1 of the *CAA*. Part III concerns "Regulation of civil aviation" and Division 1 concerns "General regulatory provisions".

[15] Relevantly s 319 contains an element of intention as one of the elements of the crime being "intent to injure or endanger the safety of any person in the vehicle".[18] With such an element of intent within the crime s 319 concerns it is unsurprising that the maximum penalty is life imprisonment. That can be contrasted with the "elements" of the offences that s 24(1) and s 24(2) of the *CAA* create. The fault element of s 24(1)(b)(ii) concerns the doing of an act and meaning to do the act which has a result of threatening the safety of an aircraft or a person on board. With respect to the latter the fault element involves an element of recklessness. A similar analysis applied to the offence s 24(2)(a) concerns.[19] The "intent to injure or endanger the safety of a person" that s 319 contains as an element absent from s 24

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14 See *Workplace Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [32].
15 See for example *R v Licencing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23.
16 See for example *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 15 and *Dickson v The Queen* (2010) 241 CLR 491.
17 See for example *Momcilovic v The Queen* (2011) 245 CLR 1.
18 The term "vehicle" includes an aircraft, see s 1 of the Code.
19 See the schedule attached to the Outline of the respondent.

of the *CAA*. The offences s 24 concerns involve "willed acts" done meaning to bring about a result or being aware that a result will or may occur.[20] So while it may be, as was submitted on behalf of the applicant, that there is a certain coincidence or similarity between the act or deeds s 319 of the Code and s 24 of the *CAA* concern the inclusion into s 319 of the element of an intent "to injure or endanger the safety of any person" involves or creates an offence different in both substance and criminality from those which s 24 of the *CAA* concerns.

[16] Returning to the consideration of the three ways in which a direct inconsistency can arise the first is the impossibility of compliance with both laws simultaneously. Plainly it is possible for any person to comply with s 319 of the Code and s 24 of the *CAA*. To put it another way all that is required is to refrain from certain conduct. In *Momcilovic v The Queen*[21] Crennan and Kiefel JJ said:

> "630 The utility of recognising different approaches to inconsistency for the purposes of s 109 emerges from cases resolved by reference to the expressions "direct inconsistency" or direct collision" on the one hand, or by reference to the expressions "indirect inconsistency" or "covering the field" on the other. However, as was recognised by Mason J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*, different approaches to inconsistency all directed to the same end are inevitably interrelated. **That end is to determine whether there is a "real conflict" between the laws under consideration.**"
> (footnotes omitted, emphasis added)

There is no "fork in the road" forcing a decision to be made between inconsistent legislative demands, there is no inconsistency of this kind.

[17] The second of the grounds for consideration of "direct inconsistency", is whether one law takes away or diminishes from a right or a privilege or an entitlement conferred by the other law. One example of this arose in *Dickson v The Queen*[22] which concerns competing Commonwealth and State provisions dealing with conspiracy to commit offences. In holding that, in this instance, there was a "direct inconsistency" the Court said:[23]

> "22 The direct inconsistency in the present case is presented by the circumstance that s 321 of the *Crimes Act* (Vic) renders criminal conduct not caught by, and indeed deliberately excluded from, the

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20 A result that, in the case of s 24(1)(b)(ii) "threatens safety" and, in the case of s 24(2)(a) "may endanger safety".

21 *Momcilovic v The Queen* (2011) 245 CLR 1 at [631].

22 *Dickson v The Queen* (2010) 241 CLR 491.

23 *Dickson v The Queen* (2010) 241 CLR 491 at [22].

> conduct rendered criminal by s 11.5 of the *Criminal Code* (Cth). In the absence of the operation of s 109 of the *Constitution*, the *Crimes Act* (Vic) will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. **The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law.** No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*, the case is one of "direct collision" because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law."
> (footnotes omitted, emphasis added)

[18] The decision in *Dickson* was considered explained and distinguished in *Momcilovic* where Gummow J said:[24]

> "274 The appellant submitted that her case and *Dickson v The Queen* were in pari materia. **But it should be noted that the law of Victoria creating the crime of conspiracy which was at stake in *Dickson* rendered criminal conduct deliberately excluded from the federal offence;** in particular, the federal offence required the commission of an overt act pursuant to the agreement by at least one party to it before the offence was complete, and permitted withdrawal from the agreement before commission of an overt act.
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> 275 With the conclusion reached in Section [H] of these reasons (at [190]) that s 5 of the Drugs Act has no linkage to s 71AC, there is removed the ground for the submissions by the appellant based upon *Dickson*. However, it should be added that the premise upon which the appellant's argument was based gave insufficient attention to the significance of the presumption against her which would have been presented by s 302.5 of the Code. This would have operated for the purpose of proving an offence against s 302.4 (Trafficking controlled drugs) so that, if the appellant had possessed a traffickable quantity of a substance, she would be taken to have had the necessary intention of selling it to have been trafficking in the substance; this would be so unless she proved she did not have that intention.
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> 276 By reason of the inapplicability of s 5 to s 71 AC of the Drugs Act, there is no comparable provision in the State law to the presumption created by s 302.5 of the Code. **The result is that the situation disclosed by the present case is the reverse of that considered in *Dickson*;** there the federal law, s 11.5 of the Code, excluded from the rule of conduct it prescribed significant elements to which the State law attached criminal liability. Section 11.5 of the Code, like the federal law considered in *R v Loewenthal; Ex parte*

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24 *Momcilovic v The Queen* (2011) 245 CLR 1 at [274]-[276].

> *Blacklock*, upon its true construction may be seen to have contained an implicit negative; this denied the concurrent operation of the State law in respect of the acts the subject of the federal offence. Here, absent the attachment of s 5 of the Drugs Act, s 71 AC is less stringent than the provisions of the Code; the federal law cannot be said upon its proper construction designedly to have left a liberty which the operation of s 109 does not permit by the State law to be "closed up". Further, it is significant that to s 11.5 of the Code there was applicable no provision with respect to "intention", such as there is in s 300.4 of the Code."
> (footnotes omitted, emphasis added)

[19] To similar effect Heydon J said:[25]

> "479 … **In *Dickson v The Queen* there was direct inconsistency between the laws because the Victorian law as a substantive matter rendered criminal that which the Commonwealth law did not, and the Commonwealth law was thus seen as preserving "areas of liberty designedly left" which should not be closed up by Victorian law.** That is not the case here. The appellant relied on the following passage from *Dickson v The Queen*:
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> > "In the absence of the operation of s 109 … the [State legislation] will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury."
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> But the Court went on to "explain why this is so". It was so because of difference, not in procedural respects like burdens of proof and jury trial, but in three points of substantive law, *Dickson v The Queen* is thus against the appellant's argument. It is the substantive criminal law which determines what areas of liberty are left, not procedural law."
> (footnotes omitted, emphasis added)

[20] No right, privilege or entitlement appears to be conferred by s 24 of the *CAA*, it creates offences. Even if I am in error in this conclusion s 319 of the Code in the crime it concerns does not threaten to take away or diminish any right or privilege or entitlement. It cannot be contended that because s 24 does not expressly deal with conduct with the intention s 319 concerns it was intended that such conduct was not to be subject to a sanction by the criminal law of a State. Section 24 of the *CAA* and

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25 *Momcilovic v The Queen* (2011) 245 CLR 1 at [479].

s 319 of the Code concern, because of the important differences in the mental element, materially different offences. Thus it cannot be said that the "criteria for the existence and adjudication of criminal liability" imposed by s 24 of the *CAA* is "negated" in any way by s 319 of the Code. There is no inconsistency of the second kind.

[21] The third ground, operational inconsistency, does not arise here. As Gummow J observed in *Momcilovic*[26] as there has been no prosecution for the federal offence no occasion of operational inconsistency arises.

[22] For these reasons I am of the view that there is no direct inconsistency.

[23] I now turn to the submission that there is an indirect inconsistency. Thus the "focus is on the Commonwealth law" and "whether it is intended to be exhaustive or exclusive with respect to an intended subject matter".[27] In such an inquiry the provision or the law in question will have to be considered in the legislative context with an eye to discerning the intention or implication of any because;[28]

> "[35] 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."
> (footnotes omitted)

[24] The *CAA* was one of the Acts comprising the "Commonwealth aviation law" considered in this context in *Work Health Authority v Outback Ballooning Pty Ltd*.[29] That matter concerned a prosecution under Northern Territory Workplace Health and Safety legislation following the death of a passenger in a hot air balloon operated by the respondent. The Supreme Court of the Northern Territory held that

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26 *Momcilovic v The Queen* (2011) 245 CLR 1 at [255].

27 See *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [34], quoted at [4] above.

28 See *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [35].

29 See *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [9].

the Commonwealth aviation law was a complete statement of the relevant law and that there was an indirect inconsistency between the Northern Territory Workplace Health and Safety law and the Commonwealth aviation law, thus the issue in the appeal to the High Court was the "indirect inconsistency" issue, namely whether the Commonwealth aviation law dealt exclusively with the subject matter or whether it should be read as permitting other laws to operate.

[25] In holding that there was no indirect inconsistency between the Commonwealth aviation law and the Northern Territory Workplace Health and Safety law the plurality,[30] after a consideration of some observations by Dixon J in *ex parte McLean,*[31] said:[32]

> "[40] **The fact that a Commonwealth statute makes certain conduct an offence is not conclusive of exclusivity.** There is no presumption that a Commonwealth offence excludes the operation of other laws. *The Crimes Act 1914* (Cth), in providing that a person cannot be punished twice, recognises this. If there were a rule of standard of conduct imposed by the CA Act directed at the safety of persons affected by aircraft operations, gross breach of it could result in a conviction for manslaughter. The first respondent concedes as much and accepts that offences of this kind cannot be said to be within the exclusive preserve of the CA Act.
> [41] The first respondent suggests that the CA Act might be seen to leave the proscription and punishment of conduct which negligently and intentionally endangers life as a separate matter for the operation of other Commonwealth, State and Territory laws. It points to the *Crimes (Aviation) Act 1991* (Cth), which creates offences relating to aviation terrorism or security, as indicative of this. **But the submission simply confirms what is otherwise evident, namely that the CA Act is intended to operate within the setting of other laws.**"
> (footnotes omitted, emphasis added)

[26] After further considering the legislation and authorities their Honours said:[33]

> "[49] The foregoing may be sufficient for a conclusion that, **properly construed, the CA Act does not contain the negative proposition that it alone is intended to state the law relating to the conduct of aircraft operations which may put the health and safety of persons at risk,** for which the NT WHS Act also provides. In particular, the CA Act does not convey an intention to state exhaustively the extent of care to be taken by the holder of an AOC, for the health and safety of those who are at risk by reason of the

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30 Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.
31 *Ex parte McLean* (1930) 43 CLR 472 at [483].
32 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [40]-[41].
33 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [49].

> conduct of aviation operations. Section 28BE(5) puts this beyond doubt."
> (emphasis added)

[27] The plurality[34] concluded their joint reasons with the following:[35]

> "[57] **The CA Act in relevant respects is designed to operate within the framework of other State, Territory and Commonwealth laws.** The NT WHS Act is one such law. And it has not been suggested that the CA Act contains an implicit negative proposition that it is to be the only law with respect to some particular aspect or aspects of the embarkation of passengers. **It cannot be said that the CA Act contains an implicit negative proposition that it is to be the only law with respect to the safety of persons who might be affected by operations associated with aircraft,** including the embarkation of passengers. …"
> (emphasis added)

[28] Section 319 of the Code is materially different from the sections in the Northern Territory legislation considered by the High Court in *Work Health Authority v Outback Ballooning Pty Ltd* so that decision may not be direct authority expressly rebutting the contentions of the applicant in the matter before me. Nevertheless the reasoning of their Honours in the plurality persuades me that the *CAA*, and in this matter s 24, is not exhaustive or exclusive with respect to criminal conduct that may threaten or endanger the safety of persons on board an aircraft. This conclusion is reinforced in my view by reason that there is no suggestion to this effect that I can detect from any words of the section nor from other provisions of the *CAA*.[36] My conclusion is, I consider, further reinforced by a wider statutory context. In the respondent's outline and in submissions my attention was drawn to the *Crimes (Aviation) Act* 1991 (Cth) and particularly ss 19, 20 and 50. The express provisions of s 50(1) strongly suggest that it is not the intention of the Commonwealth Parliament that the provisions such as s 24 of *CAA* should be exhaustive or exclusive with respect to criminal conduct I have just described.

[29] My conclusion is also reinforced by the decision of the Court of Appeal in *R v Morris*[37] and in particular to the judgment of Williams JA[38] where his Honour said:[39]

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34 Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.
35 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [57].
36 The main object of the CAA is the safety of civil aviation with an emphasis on preventing accidents and incidents. See further [6] above.
37 *R v Morris* [2004] QCA 408.
38 With whom McPherson JA and White J agreed.
39 *R v Morris* [2004] QCA 408 at [37].

> "[37] The *Civil Aviation Act* creates few offences. Its primary purpose, as evidenced by the Explanatory Memorandum and the second reading speech, was to create an Authority to regulate aviation within Australia. It cannot be said that the *Civil Aviation Act* evinced an intention to cover the field of offences relating to the use of aircraft to the exclusion of other legislation. That that is so is clearly demonstrated by the provisions of the *Crimes (Aviation) Act* 1991 (Cth). Even that statute does not cover the field of all criminal offences committed involving a relationship with aircraft or aircraft navigation. It is not difficult to envisage situations in which the crime of murder or manslaughter could be committed involving an aircraft or its navigation which would not be covered by the provisions of the 1991 Act.

[30] I have not overlooked that the full court of the Federal Court[40] was critical of the reasoning in *R v Morris* but, in turn, the reasoning in *Heli-Aust Pty Ltd v Cahill* was considered and criticised by the High Court in *Work Health Authority v Outback Ballooning Pty Ltd.*[41] In those circumstances I consider that *R v Morris* remains a persuasive authority in support of the contentions made by the respondent. There is no indirect inconsistency.

[31] For these reasons the application should be dismissed.

[32] Prima facie I consider that costs should follow the event but I will make orders giving the parties to make submissions with respect to costs in the event that one or both contend that a different order should be made.

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40 See *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 at [79]-[80].

41 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [51]-[54].