**Drone Danger: Remedies for Damage by Civilian Remotely Piloted Aircraft to Persons or Property on the Ground in Australia**

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Civilian use of drones (Remotely Piloted Aircraft: RPA) in Australian skies is increasing at a dramatic rate. Whilst there is a strict regulatory framework in which RPA operate, they have the capacity to cause significant damage to persons or property on the ground. This article evaluates the availability and scope of statutory and common law remedies for such damage demonstrating a complex matrix of potential accountability. Statutory strict liability under Damage by Aircraft legislation does not apply uniformly to all RPA with the definition of RPA as ‘aircraft’ the crucial determinant. Where the statutory remedy is unavailable, common law causes of action must be relied upon with the statutory safety regulations providing assistance in establishing liability. The article demonstrates that it would be appropriate for legislators to ensure uniform application of the strict liability regime to all RPA and for compulsory identification and insurance of RPA.

**Introduction**

Rapidly increasing marketing and use in Australia of civilian drones, more accurately described as “Remotely Piloted Aircraft” (RPA), makes it timely to analyse the availability and adequacy of legal remedies for injury to person or property on the ground. The Australian Civil Aviation Safety Authority (CASA) has recently turned its attention to the proliferation of RPA in our airspace and the regulations applicable to RPA use for both recreational and commercial purposes have been amended.[[1]](#footnote-1) Whilst the use of RPA is subject to the regulatory framework discussed below, their potential to cause serious harm invites consideration of civil remedies available to persons who suffer injury or damage on the ground.

Of critical significance is the operation of Australian Damage by Aircraft legislation.[[2]](#footnote-2) The statutory strict liability imposed by that legislation applies to pilots and operators only of RPA within the definition of ‘aircraft’, which is not uniform across Australia. Where the Damage by Aircraft legislation does not apply, the torts of negligence, trespass to person and possibly, breach of statutory duty may provide remedies for damage caused by RPA. The statutory safety regulations assist to establish such liability. Remedies in nuisance and trespass for damage to and interference with property are also relevant. Invasion of privacy and surveillance by RPA are not dealt with here as they have already been the subject of thorough research by the Australian Law Reform Commission,[[3]](#footnote-3) by Professor Butler,[[4]](#footnote-4) and the Australian Parliament,[[5]](#footnote-5) and by Australian and international scholars.[[6]](#footnote-6)

**Nomenclature**

The term ‘drone’ is widely understood because of its use in the media, but it is not a term used internationally or in Australia by regulators or industry. The term RPA (Remotely Piloted Aircraft) is used in the Australian Civil Aviation Legislation Amendment (Part 101) Regulation2016 (Cth)which commenced on 26th September 2016,[[7]](#footnote-7) though previously the term Unmanned Aerial Vehicle (UAV) was in use in Australian regulation. The term RPA is used throughout this article.

**The surge in civilian use of RPA in Australia**

While the CSIRO has been using RPA for scientific research since 1999[[8]](#footnote-8), rapidly evolving technology, coupled with significant cost reductions and widespread recognition of RPA capabilities,[[9]](#footnote-9) mean that RPA use for both recreational and commercial purposes is increasing dramatically in Australia. The number of recreational RPA in use in Australia is unknown: estimates put the number in the vicinity of 5,000 in 2014 [[10]](#footnote-10) but the numbers would be considerably greater today and growing at a fast rate.

In the Australian business sector, in 2016, CASA lists on its website, 663 RPA ‘operator certificate holders’ who are commercial operators.[[11]](#footnote-11) In 2009, there were only 10 such operators licensed by CASA.[[12]](#footnote-12) RPA are used in a myriad of situations for surveying, photography, agriculture, advertising, newsgathering[[13]](#footnote-13) and more. In 2016, with the approval of CASA, Australia Post conducted a “closed field” trial, of RPA for domestic delivery services.[[14]](#footnote-14) RPA are already being used by at least two Australian Law Enforcement agencies: the Australian Federal Police and the Queensland Police Service.[[15]](#footnote-15)

**Some salutary lessons**

There are obvious dangers posed by the increasing use of RPA. Their potential for damage to persons and property on the ground[[16]](#footnote-16) is clear whether the cause be illegal or irresponsible use, system failure, equipment malfunction or human error.

There was a widely publicised incident of personal injury on the ground by an RPA at the Geraldton Endure Batavia Triathlon in Western Australia in April 2014. On that occasion Raija Ogden, a triathlete competitor, was struck on the head by an RPA that fell from the air whilst being used to film the race.[[17]](#footnote-17) In October 2013, CASA reportedly investigated a ‘quad-copter’ RPA which crashed onto the rail line on the Sydney Harbour Bridge.[[18]](#footnote-18) In November 2014 an RPA crashed through the roof of a Perth house.[[19]](#footnote-19) In December 2014, an RPA was flown over a police operation crashing to the ground and narrowly avoiding a police officer in Victoria.[[20]](#footnote-20) In October, 2015 there was a police investigation into a drone crashing into one of the sails of the Sydney Opera House.[[21]](#footnote-21) It is extremely unlikely that all illegal, unauthorised or careless flights of RPA are reported or investigated.[[22]](#footnote-22)

Part 1 of this article examines the regulatory framework governing RPA use in Australia. Part 2 considers the applicability and adequacy of statutory strict liability for damage by aircraft in all Australian jurisdictions and concludes that the differential application of the legislation to some RPA and not others is a matter that should be remedied by legislators. In Part 3 the inter-relationship between state and territory Civil Liability legislation and Damage by Aircraft legislation is explored. Part 4 considers common law remedies for RPA damage to persons and property on the ground in the torts of negligence, breach of statutory duty and trespass to person whilst in Part 5, liability of RPA pilots in the torts of trespass to land and nuisance is examined. Lastly, Part 6 considers the need for compulsory identification and insurance of RPA pilots and operators to enable proceedings to be brought against them and damages awards to be met.

**1 Regulatory Framework for RPA and Licensing Requirements for Pilots and Operators**

Aircraft operations and safety in Australia are governed by Commonwealth legislation and the regulations made thereunder.[[23]](#footnote-23) Constitutionally, there are various heads of power[[24]](#footnote-24) which support the legislation. Pursuant to an agreement between the states and the Commonwealth in 1937, all states enacted legislation adopting the Commonwealth Air Navigation Regulations to ensure uniform national aviation regulation.[[25]](#footnote-25)

Australia was the first nation to regulate remotely piloted aircraft, [[26]](#footnote-26) in 2002 by way of Civil Aviation Regulations 1988 (Cth), Part 101. This part has been reviewed over the past two years[[27]](#footnote-27) and significant amendments commenced on 29 September 2016. On 10 October, 2016 the Minister for Infrastructure and Transport announced a further review of aviation safety regulation of RPA.[[28]](#footnote-28)

Part 101 of the Commonwealth regulations governs “unmanned aircraft”[[29]](#footnote-29) a term undefined in the regulations. Part 101 applies to all unmanned aircraft (including ‘model aircraft’ operated remotely outdoors) and to RPA which are defined as “remotely piloted aircraft other than a balloon or a kite.” [[30]](#footnote-30) The regulationsdefine a model aircraft as one “that is used for sport or recreation, and cannot carry a person.”[[31]](#footnote-31) So an unmanned aircraft, an RPA, which is used for sport or recreation, is a ‘model aircraft’, whereas the same RPA used for another purpose is not.

Part 101 restricts the use of unmanned aircraft including model aircraft and RPA. They must not be operated to create a hazard to other aircraft, persons or property[[32]](#footnote-32) and must not be operated over a “populous area.”[[33]](#footnote-33) A “populous area” is defined as one having “sufficient density of population for some aspect of the operation …to pose an unreasonable risk to … life, safety or property.”[[34]](#footnote-34) Other requirements include operation below 400 feet above ground level;[[35]](#footnote-35) in daylight[[36]](#footnote-36) in the visual line of sight of the operator;[[37]](#footnote-37) not within 30 metres of persons;[[38]](#footnote-38) and not over prohibited areas[[39]](#footnote-39) or near airports.[[40]](#footnote-40)

Some restrictions such as the prohibition on operation within 30 metres of persons do not apply to “micro RPA” defined as having a gross weight of 100 grams or less.[[41]](#footnote-41) Large RPA (with a launch mass exceeding 150 kilograms) are subject to extensive regulation including airworthiness certification, maintenance requirements, and registration and marking requirements.[[42]](#footnote-42)

Prior to the 2016 amendments, controller and operator certification by CASA was mandatory for *all* persons using RPA other than for sport or recreation. The CASA regulatory review concluded that *all RPA* weighing less than 2 kilograms (“very small RPA”) whatever their use should be exempt from CASA approval or pilot or operator certification[[43]](#footnote-43) provided they are operating under “standard operating conditions.”[[44]](#footnote-44) Those standard conditions require that the remote pilot maintains direct visual line of sight with the RPA; that it be flown less than 400 feet above ground level; in daytime only; more than 30 metres from persons; outside controlled air space and other restricted areas; not over populous areas; more than 3 nautical miles from an aerodrome; and not over areas where fire, police, public safety or emergency operations are being conducted.[[45]](#footnote-45)

Under the new regulations persons who fly RPA with a gross weight above 2 kilograms or outside the standard RPA operating conditions (described above) will require a remote pilot’s licence.[[46]](#footnote-46) Persons (other than the pilots) conducting operations using those RPA will require an RPA operator’s certificate. There are some limited exclusions for “small” RPA (weighing between 2 and 25 kgs) used by private land owners (for uses such as aerial photography or agricultural operations) on their own land in standard operating conditions where no remuneration is received by any person.[[47]](#footnote-47)

Whilst pilots and operators of very small RPA are not required to be licensed or certified, they must give at least 5 days written notice to CASA prior to operating a very small RPA for hire or reward.[[48]](#footnote-48) CASA is able to maintain a publicly accessible database with details of these notifications.[[49]](#footnote-49)

The most fundamental change wrought by the regulatory review is the removal of the requirement for pilot/operator certification or CASA approval for all RPA weighing less than 2 kilograms operated under standard conditions. This de-regulation recognises the difficulties faced by the regulator dealing with unprecedented rapid increase in small RPA use. CASA has frankly admitted that it cannot regulate them all.[[50]](#footnote-50)

CASA conducted a risk assessment for small RPA and established that because they have very low kinetic energy, they pose little risk to aviation and have a low potential for harm to people and property on the ground if operated in the standard operating conditions[[51]](#footnote-51) Yet, the removal of licensing requirements for under 2 kilogram commercially operated RPA may increase the risk of injury to persons on the ground, given that some relatively unskilled operators may commence business. A two kilogram weight falling from a height of up to 120 metres (400 feet) and hitting a person on the ground would have the capacity to cause substantial damage. In the case of any RPA there is the risk that a remote pilot will flout or be ignorant of safety regulations. There will be accidents, notwithstanding the most rigorous safety regulation.

**2 Statutory Strict Liability for Damage by Aircraft in Australia and its application to RPA**

### There is a strict liability remedy for injury on the ground under Damage by Aircraft legislation in the Commonwealth and all Australian states and territories. [[52]](#footnote-52)

Generally, the effect of Australian Damage by Aircraft legislation is to make operators and owners jointly and severally liable for injury or damage to persons or property on the ground caused by impact with an aircraft or part of an aircraft or by something falling from an aircraft or caused by something that results from such an impact.[[53]](#footnote-53) Damages are recoverable without proof of intention, negligence or other cause of action, as if the injury, loss, damage or destruction had been caused by the wilful act, negligence or default of the defendant.[[54]](#footnote-54) There are some jurisdictional differences discussed below.

Accordingly, if an RPA is within the definition of an ‘aircraft’ and the relevant provisions apply, then personal injury or damage to property caused by an RPA will be compensable without the need for the plaintiff to prove any claim at common law or any fault on the part of the operator or owner of the RPA.

**Damage by Aircraft Act 1999 (Cth)[[55]](#footnote-55)and Constitutional Issues**

The applicable Federal legislation is the Damage by Aircraft Act 1999 (Cth). Owing to constitutional limitations, in some cases the relevant state or territory legislation[[56]](#footnote-56) will be applicable rather than the Commonwealth act.

The Damage by Aircraft Act 1999 (Cth) applies to Commonwealth aircraft (excluding Defence Force aircraft) and to aircraft owned by foreign or trading or financial corporations (within s.51 (xx) of the Australian Constitution). It also applies to air navigation in or to or from Australian territories, and to aircraft engaged in international air navigation or in trade or commerce internationally or amongst the Australian states or to aircraft landing at or taking off from places held by the Commonwealth.[[57]](#footnote-57) The Commonwealth legislation has broad coverage but will not apply to RPA operated for recreation or by individuals, unincorporated associations or partnerships engaged in commercial activities within State borders. It is likely that many RPA will be operated by trading or financial corporations especially as it is common for media and other business organisations to use RPA for photographic purposes. A corporation that is not a foreign or trading or financial corporation such as a State government instrumentality using an RPA within state boarders would not fall within the coverage of the Commonwealth legislation. State legislation would apply to these operators and to any others outside the constitutional reach of the federal legislation.

**State legislation**

All Australian states have legislation imposing strict liability for damage by aircraft, though there are jurisdictional differences. New South Wales, Queensland, Victoria, Western Australia and Tasmania, have provisions similar to, though broader than, the Damage by Aircraft Act1999 (Cth).[[58]](#footnote-58) In South Australia liability is to be determined on the same principles as under the Commonwealth Act, subject to some qualifications.[[59]](#footnote-59)Some differences between state enactments and the Commonwealth Act are significant, especially regarding the effect of contributory negligence of an injured person and the applicability of the legislation to claims of purely psychiatric injury, discussed below.

**Are RPA Aircraft for the purposes of the Damage by Aircraft Legislation?**

An RPA being used for a purpose other than sport or recreation is within the definition of an ‘aircraft’ in Commonwealth legislative instruments regulating safety and strict liability of aircraft pilots and operators. The position is not so clear in the case of some state Damage by Aircraft legislation.

The Damage by Aircraft Act 1999 (Cth), s4 provides that the word “*aircraft”*has the same meaning as in the Civil Aviation Act1988 (Cth), but does not include “*model aircraft*.”

The definition of ‘aircraft’ in the Civil Aviation Act 1988 (Cth), s 3, is as follows:

[A]ny machine or craft that can derive support in the atmosphere from the reactions of the air,other than the reactions of the air against the earth’s surface.[[60]](#footnote-60)

The inclusion of RPA within the definition of ‘aircraft’ in the Damage by Aircraft Act 1999 (Cth) would seem beyond question except where an RPA is a ‘model aircraft’.

The definition of ‘model aircraft’ is problematic as there is no definition included in either the Damage by Aircraft Act 1999 (Cth) nor in the Civil Aviation Act 1988 (Cth). The only available definition is in the Civil Aviation Safety Regulations 1998 (Cth):

[A]n aircraft that is used for sport or recreation, and cannot carry a person.[[61]](#footnote-61)

That definition clearly confines a ‘model aircraft’ to one being used for sport or recreation. Other than for “giant model aircraft” (between 25kgs and 150 kgs) which must have operational approval,[[62]](#footnote-62) there is no other reference to size, weight, power or capability of the aircraft. The possibility that significant damage might be done by such aircraft to persons or property on the ground is ignored for definitional purposes. The definition produces the somewhat surprising result that the same machine is capable of being both an ‘aircraft’ and a ‘model aircraft’ depending on the purpose for which it is being used.

In non-recreational instances, most notably in commercial or law enforcement or information gathering exercises, an RPA would certainly not be a ‘model aircraft’ and would therefore come within the definition of ‘aircraft’ within the Civil Aviation Act 1988 (Cth) and the Damage by Aircraft Act 1999 (Cth) and would be subject to strict liability for damage it caused on the ground, irrespective of the size of the RPA.

Two states, Queensland and South Australia, adopt the Commonwealth definition of ‘aircraft’ but without specific exclusion of ‘model aircraft.’[[63]](#footnote-63) NSW, Tasmania, Victoria and Western Australia do not define ‘aircraft’ at all.[[64]](#footnote-64) Whether the commonwealth definition of ‘aircraft’ might be adopted in those states where the term is undefined is unclear, though the Damage by Aircraft legislation in those states refers specifically to the Commonwealth Air Navigation Regulations*.[[65]](#footnote-65)* A definition of aircraft almost identical to that in the Civil Aviation Act 1988 (Cth) appears in the Air Navigation Act 1920 (Cth), s 3(1), but it does not expressly exclude model aircraft. Most states have legislation that specifically adopts the Commonwealth Air Navigation Regulations*.*[[66]](#footnote-66)So, that definition may be applicable in the states where ‘aircraft’ is undefined. But because it does not exclude model aircraft, where State Damage by Aircraft legislation applies, strict liability for damage on the ground may attach to all RPA pilots and operators including recreational users. This result may lead to some hard fought argument about constitutional and choice of law issues with the high stakes result being the application of strict liability to recreational RPA users.

These definitional challenges could be avoided by amendment of the Damage by Aircraft legislation to include *all* RPA, whatever their use, in the strict liability regime. As the Commonwealth legislation stands, only commercial and non-recreational RPA will be covered, whilst in the states it may be that all RPA are subject to state legislation, depending on the definition of aircraft adopted. Given that all RPA have the same capacity to cause injury whatever their use, liability across Australia should be uniform.

**The scope of Damage by Aircraft Legislation**

Section 10 (1) Damage by Aircraft Act 1999 (Cth) refers to personal injury, loss of life, material loss, damage or destruction *caused* by an *impact* with an aircraft or part of an aircraft in flight or in flight immediately before impact, or by impact with a person or animal or thing dropped or falling from an aircraft in flight or by “something that is the result of an impact of a kind mentioned”.

Not all State provisions contain that form of words. In NSW,[[67]](#footnote-67) Tasmania,[[68]](#footnote-68) Victoria[[69]](#footnote-69) and Western Australia,[[70]](#footnote-70) the strict liability provision does not depend on an ‘impact’ and does not refer to “something that is a result of an impact” with an aircraft. The South Australian provision is narrower than the Commonwealth provision applying only to damage resulting from impact with an aircraft or part of the aircraft in flight or crashing or falling to the ground.[[71]](#footnote-71) The Queensland provision[[72]](#footnote-72) is in generally the same terms as the Commonwealth section and the Commonwealth Act applies in the territories.

The Commonwealth act provides that the operator of an aircraft and the owner (except where the owner had no role and another person had exclusive use of the aircraft) and a person authorising use of the aircraft and a person entitled to control the navigation of the aircraft, will all be jointly and severally liable for the damage.[[73]](#footnote-73) State legislation is not uniform. The South Australian provision relies on the principles under the Commonwealth legislation with some qualification.[[74]](#footnote-74)The Queensland provision[[75]](#footnote-75) is similar though not identical to the Commonwealth provision. In NSW, Tasmania, Western Australia and Victoria the owner is liable but is entitled to be indemnified by a person in whom “a legal liability is created.”[[76]](#footnote-76)

In *ACQ Pty Ltd v Cook; Aircair Moree Pty Ltd v Cook[[77]](#footnote-77)*(the *ACQ* case)the High Court considered the Commonwealth legislation and in particular the nature of the causal link required between the impact of an aircraft and the resulting damage to a person on the ground. The central issue was whether the plaintiff’s damage was caused by “something resulting from an impact” with an aircraft in order to impose strict liability under s 10 (1)(d) of the Damage by Aircraft Act 1999 (Cth). The plaintiff was a linesman sent by his employer to investigate damage to a power line that the defendant’s aircraft had earlier collided with and dislodged from its pole so that it was only 1.5 metres off the ground. The plaintiff fell on wet ground and was injured by an electrical arc from the power line. The line was obscured from the plaintiff’s view by the crop growing in the field and the overcast sky.

The aviation appellants argued that the plaintiff’s injuries were not caused by “something that is a result of an impact” with an aircraft: that the electrical arc emanating from the lowered wire was not causally related to the impact. The appellants argued that the legislation did not provide a compensation scheme for *every* person who sustained injury in some way connected to an aircraft impact. They argued that “something that is a result of an impact” should be construed as something having “an immediate (or reasonably immediate) temporal, geographical and relational connection with an impact.”[[78]](#footnote-78) The argument was that the words of the section did not include persons brought to the scene by reason of the impact,”[[79]](#footnote-79) (as the plaintiff had been) and that “there had to be injury caused by ‘something’- not a series of things or a narrative of intermediate events.”[[80]](#footnote-80)The High Court unanimously rejected this argument and dismissed the appeal. The court held that as a matter of statutory interpretation, there was “no linguistic strain in characterising what happened to the plaintiff as a personal injury caused by “something” that is “a” result of an impact between the aircraft in flight and the conductor.”[[81]](#footnote-81)The High Court was reluctant to examine the relationship between the legislative provision and the common law of causation and held that it was unnecessary to rely on any analogy with the common law to resolve the appeals. The Court did however state that “but for the impact of the aircraft on the conductor the plaintiff would not have been injured; but the causal relationship between the impact and the injury was much closer than that, and did not rest exclusively on a ‘but for’ analysis.”[[82]](#footnote-82) So, the requisite causal connection to establish liability under the Damage by Aircraft legislation may be closer than the common law ‘but-for’ test for causation in negligence, but the court did not consider parallels between the two.

Whilst the *ACQ* case concerned the application of the Damage By Aircraft Act 1999 (Cth) to injury caused by a fixed wing piloted aircraft, the principles enunciated would have the same application to damage caused by an RPA (provided that it came within the definition of an ‘aircraft’). As the High Court pointed out in the *ACQ* case, “most cases on s10 (1) are likely to be intensely fact-specific” as would a case of damage by an RPA. The causation requirement as interpreted by the High Court would encompass most conceivable instances of damage by RPA on the ground. Such collisions would more than likely involve an impact that would come squarely within the section, though there is always the possibility of some physical damage to person or property caused indirectly by an RPA collision with something other than the plaintiff’s person or property.

**3 The Application of State and Territory Civil Liability Legislation to Claims under the Damage by Aircraft Act 1999 (Cth)**

A state or territory court hearing a claim under the Damage by Aircraft Act 1999 (Cth) is exercising federal jurisdiction.[[83]](#footnote-83) By virtue of the Judiciary Act 1903 (Cth), s 79, state and territory laws bind courts exercising federal jurisdiction in all cases to which the State laws are applicable.[[84]](#footnote-84) The NSW Court of Appeal held in the *ACQ Case* that the effect of s.79 Judiciary Act 1903 (Cth) was to make the Civil Liability Act 2002 (NSW) applicable depending upon identification of a provision in that act relating to the case under consideration. The effect of the Judiciary Act 1903 (Cth) provision is not to make the state act applicable in all respects. The result was therefore that some parts of the state Civil Liability legislation applied to the claim under the Damage by Aircraft Act 1999 (Cth), whilst others did not.[[85]](#footnote-85)

**Limitations on Damages**

Significantly, the Court of Appeal held that the limitations on personal injury damages in Part 2 of the Civil Liability Act 2002 (NSW) applied to the claim brought in NSW under the Commonwealth Damage by Aircraft Act 1999. Part 2 of the Civil Liability Act 2002 (NSW) applies to awards of personal injury damages other than those excluded by s 3B of the Act which does not exclude damage by aircraft claims. Part 2 is expressed to apply to all awards of personal injury damages “whether brought in tort, in contract, under statute or otherwise”[[86]](#footnote-86) so the statutory damage by aircraft claim is caught and the limitations on damages apply to those claims in NSW.[[87]](#footnote-87) Provisions in other states,[[88]](#footnote-88) concerning the application of restrictions on personal injury damages are not always expressed in terms similar to the NSW legislation. In Western Australia, Queensland, Victoria, the Northern Territory and the ACT[[89]](#footnote-89) the damages restrictions generally apply to all awards for personal injury damages and would apply to claims under the Commonwealth Damage by Aircraft legislation. In South Australia the restrictions apply only to damages for injury arising from motor accidents or accidents caused by *negligence* or unintentional tort or breach of a contractual duty of care.[[90]](#footnote-90) In Tasmania the restrictions apply only to damages for personal injury or death resulting from a *breach of duty*.[[91]](#footnote-91) So there are significant jurisdictional differences as to restrictions on personal injury damages where a claim is made pursuant to the Damage by Aircraft Act 1999 (Cth).

**Contributory Negligence**

In the *ACQ* case it was held at trial[[92]](#footnote-92) that the defence of contributory negligence was not available in respect of the Damage by Aircraft Act 1999 (Cth) claim. That was challenged on appeal. The Court of Appeal held that the *operation* of the defence is modified by sections 5R and 5S Civil Liability Act 2002 (NSW) but that those sections do not create any defence,[[93]](#footnote-93) so availability of the defence depends on the Law Reform (Miscellaneous Provisions) Act 1965 (NSW).

Under the Law Reform (Miscellaneous Provisions) Act 1965 (NSW) the defence is available only in claims for a ‘wrong’ defined in s 8 as “an act or omission that gives rise to a *liability in tort* (emphasis added) in  respect of which a defence of contributory negligence is available at common law.” The Court of Appeal held that the Damage by Aircraft claim is a statutory right of action and not an action in tort.[[94]](#footnote-94) It is therefore not a ‘wrong’ within s 8(a) of the Law Reform (Miscellaneous Provisions) Act 1965 (NSW).

As to whether the defence of contributory negligence would have been available at common law, Justice Campbell concluded that s 11 Damage by Aircraft Act 1999 (Cth) which refers to damage caused by a *wilful act or default or negligence,* was “quite unspecific about the nature of that cause of action” that is a “default.” His Honour held that “it is impossible to say whether a defence of contributory negligence would apply to it or not.”[[95]](#footnote-95) It was further held that there is uncertainty as to when the defence might be available in respect of damage caused by a wilful act of a defendant.[[96]](#footnote-96) So, the wording of s 11 was held to be inadequate to make contributory negligence a defence to all actions under the Damage by Aircraft Act 1999 (Cth).[[97]](#footnote-97)

Following the *ACQ* decision, the Damage by Aircraft Act 1999 (Cth) was amended in 2012 to provide for a reduction of damages for contributory negligence.[[98]](#footnote-98) The South Australian legislation[[99]](#footnote-99) provides that liability for aircraft damage is to be determined on the same principles as under the Commonwealth Act so the position there is the same with a reduction of damages for contributory negligence. In NSW, s 73(1) Civil Liability Act 2002 (NSW) is the state provision imposing strict liability for damage by aircraft. The section provides that the strict liability regime will not apply where the plaintiff’s loss or damage was caused or contributed to by the negligence of the plaintiff. So in NSW a contributorily negligent plaintiff suffering damage as a result of impact by aircraft, would have to bring a claim at common law and if brought in negligence it would be subject to the Civil Liability Act 2002 (NSW) with the contributory negligence defence available. The position in Victoria,[[100]](#footnote-100) Western Australia[[101]](#footnote-101) and Tasmania[[102]](#footnote-102) is the same as in NSW with claims excluded from the damage by aircraft legislation where the plaintiff was negligent. In Queensland to date there has been no amendment of the damage by aircraft legislation to exclude claims where a plaintiff has been negligent.

**Claims for pure psychiatric injury**

Section 10 (1A) inserted into the Damage by Aircraft Act 1999 (Cth) in 2012,[[103]](#footnote-103) provides that ‘mental injury’ damages are not recoverable unless the plaintiff suffers other damage to person or property. So, only consequential mental injury will be covered by the Commonwealth legislation. The states have not followed the Commonwealth in excluding claims for pure mental harm from the strict liability provision, except in South Australia where the State legislation relies on the Commonwealth principles.

In the Commonwealth and South Australia,[[104]](#footnote-104) claims for pure mental injury as a result of an impact with an aircraft, would have to be brought at common law.

TheDamage by Aircraftlegislation which provides a statutory cause of action is not expressed to be in substitution for other causes of action. It is a matter of statutory interpretation whether a statute which either expands or abrogates rights in particular circumstances or for particular classes of persons, removes common law rights completely for cases in different circumstances or for different classes of plaintiff.[[105]](#footnote-105)

The Damage by Aircraft Act 1999 (Cth) does not *expressly* shut out common law claims where person is unable to bring a claim under the legislation. Nor does the Act evince an intention that it is to be definitive of rights and liabilities in the case of all claims for damages, especially given that it enhances (rather than abrogates) common law rights to recover damages caused by impact with aircraft, by imposing strict liability on defendants. The following statement appears in the Explanatory Memorandum to the Aviation Legislation Amendment (Liability and Insurance) Bill2012 (Cth):[[106]](#footnote-106)

“In relation to third party victims (on the surface) a claimant may also pursue a claim for ‘pure mental injuries’ under the civil law.” (p.15)

So in cases of pure mental harm caused by an RPA collision where the Damage by Aircraft Act 1999 (Cth) would otherwise apply, a claim would have to be brought at common law without the benefit of the strict liability imposed by the act.Such a claim would be subject to the provisions of relevant state or territory civil liability legislation setting out the requirements for a duty of care in cases of pure mental harm.[[107]](#footnote-107)

**Other Aspects of Civil Liability Legislation and Claims under the Damage by Aircraft Legislation**

There are some provisions in state and territory civil liability legislation that would apply to claims under Commonwealth Damage by Aircraft Act 1999 and its state counterparts because they are expressed to apply to “civil liability of any kind.”

In all jurisdictions, provisions protecting Good Samaritans from liability are applicable to ‘civil liability of any kind.’[[108]](#footnote-108) Similarly, various provisions protecting community volunteers from liability apply to ‘civil liability of any kind.’[[109]](#footnote-109) These provisions would protect RPA pilots and operators from liability under Damage by Aircraft legislation (and at common law) if they were engaged in unpaid volunteer or rescue efforts.

There are other aspects of state and territory civil liability legislation that would affect liability under Damage by Aircraft legislation. The Civil Liability Act 2002 (NSW) establishes a statutory defence in claims by persons who are intoxicated at the time of their injury. The provision applies to “civil liability of any kind … for personal injury damages”[[110]](#footnote-110) so that defence would be available in a claim under the Damage by Aircraft Act 1999 (Cth) or its NSW counterpart.

In other jurisdictions there is a presumption of contributory negligence where a plaintiff is intoxicated and those provisions apply to claims for “personal injury”[[111]](#footnote-111) or to proceedings for “recovery of damages.”[[112]](#footnote-112) These provisions may be applied to take a claim outside state Damage by Aircraft legislation all together, given that in some jurisdictions the statutory strict liability regime does not apply where a plaintiff has been contributorily negligent.[[113]](#footnote-113)

There are also some state and territory provisions that allow a type of illegality defence,[[114]](#footnote-114) limiting recovery of damages in civil claims by persons engaged in criminal conduct at the time of injury. These provisions would apparently apply to claims under Damage by Aircraft legislation.

The application of civil liability legislation is a matter that will need to be considered in many instances where a claim is made under Commonwealth or state Damage by Aircraft legislation. The inter-relationship between the statutory provisions present complex questions of statutory construction.

**4 Common Law Remedies**

Whilst Commonwealth or state Damage by Aircraft legislation would apply to many cases of damage by RPA, there will be cases where a plaintiff will be unable to rely on the legislation. Where an RPA is not within the Commonwealth definition of an “aircraft” because it is used for recreational purposes, applicability of state damage by aircraft legislation would depend on interpretation of the definition of aircraft in relevant state legislation as discussed above (in Part 2). There is also a constitutional law question as to whether in circumstances where the Commonwealth legislation would apply but for the specific exclusion of recreational RPA from that scheme, it would be constitutionally permissible for the state legislation to be utilised to fill the breach.[[115]](#footnote-115) There would only be rare circumstances in which a recreational RPA would come within the Commonwealth legislation (but for the exclusion) because of constitutional limitations. It would be most unusual for a recreational RPA to be operated by a trading or financial corporation or to be otherwise within the coverage of the Damage by Aircraft Act 1999 (Cth), s 9.

Cases of purely psychiatric injury clearly fall outside the Commonwealth and South Australian legislation. [[116]](#footnote-116) Where a plaintiff has been contributorily negligent, damage by aircraft legislation in NSW, Tasmania, Western Australia and Victoria does not apply..[[117]](#footnote-117) In all these instances a plaintiff will need to rely on the common law for a remedy with several causes of action available, the most obvious being in the torts of negligence or trespass to person but with possible actions for breach of statutory duty, trespass to land or nuisance.

The South Australian damage by aircraft legislation differs in an important respect from other Australian jurisdictions. It is drafted so that the only cause of action available where neither the Commonwealth nor state strict liability provisions apply, is in the tort of negligence. The relevant section states “liability is to be determined according to principles of negligence unless” the impact occurs whilst the aircraft is in flight or it crashes or falls to the ground.[[118]](#footnote-118) This form of words does not seem to admit the possibility of a common law claim for damages in trespass to person or for breach of statutory duty.

**Negligence**

A cause of action in negligence will lie against an RPA pilot who negligently flies an RPA so as to cause an injury to person or property. A plaintiff must establish that a duty of care was owed to a class of persons of which the plaintiff was one.[[119]](#footnote-119) In the *ACQ* case the NSW Court of Appeal recognised that on ordinary negligence principles, the pilot of an aircraft may well owe duties of care to persons on the ground that might be injured if struck by the aircraft or anything dropped from it.[[120]](#footnote-120) In the *ACQ* case however, because of the unusual circumstances of the plaintiff’s employment as an inexperienced power worker, the Court of Appeal held that it was not reasonably foreseeable that a hypothetical electrical power worker might suffer injury if the pilot were negligent.[[121]](#footnote-121)

At common law, the pilot of an RPA would owe a duty of care to persons in the vicinity of the flight of the RPA. It would be reasonably foreseeable that a member of the class of persons in the area over which an RPA is being flown might be “not unlikely” to suffer injury as a result of a consequence “of the same general character” as that which eventuated,[[122]](#footnote-122) if the RPA were negligently flown of if there was a technical mal-function of any kind. In addition, the salient features of such a case would certainly favour the imposition of a duty of care[[123]](#footnote-123) given the vulnerability of a plaintiff and the significant level of control exercised by a defendant pilot.[[124]](#footnote-124)

The question of breach of duty is governed by Civil Liability legislation in all Australian jurisdictions where the relevant provisions are similar though not identical.[[125]](#footnote-125) A plaintiff would have to establish that the defendant pilot could reasonably have foreseen the risk of injury by the RPA colliding with a person or property and that the risk of such a collision was “not insignificant.” If that threshold requirement is satisfied then the plaintiff must establish that a reasonable pilot in the position of the defendant would have taken precautions to avoid the risk of injury having regard to the ‘*Shirt* Calculus”[[126]](#footnote-126) as it is enacted in the relevant State Civil Liability legislation.[[127]](#footnote-127)

Because RPA operation is subject to extensive safety regulation under the Civil Aviation Safety Regulations 1988 (Cth), the effect of a breach of a statutory safety provision on negligence liability is a crucial consideration. There is clear Australian authority that a breach of a statutory obligation can be relied upon as evidence of negligence,[[128]](#footnote-128) although it is a question of fact whether a failure to act in accordance with a statutory obligation constitutes a breach of a duty of care.[[129]](#footnote-129) In the case of an RPA pilot who, for example, breaches the prohibitions on flying over populous areas[[130]](#footnote-130) or within 30 metres of persons,[[131]](#footnote-131) the failure to comply with the regulations would be persuasive evidence of a failure to take reasonable care. Compliance with the regulations would be a precaution that a reasonable person would take to avoid the plainly foreseeable and ‘not insignificant’ risk of injury. And this would be so whatever the cause of the RPA crash: whether it was because of some negligent manoeuvre by the pilot or by some technical failure or even outside interference with the computer functions of the RPA. A denial of fault by a defendant based on an RPA collision that is the result of a technical equipment failure or even hacking of the RPA computer system rather than any action of the pilot should fail on this basis.

The issues of causation and scope of liability would be determined pursuant to the two-stage process[[132]](#footnote-132) set out in state civil liability legislation.[[133]](#footnote-133) An impact with an RPA or something falling from it would satisfy the “necessary condition”[[134]](#footnote-134) requirement for causation and it is difficult to imagine a scenario in which a court would not find it appropriate for the scope of liability[[135]](#footnote-135) of an RPA pilot to extend to damage caused by such an impact.

A technical fault or outside interference with the operation of the RPA might be argued by a defendant pilot to amount to a *novus actus interveniens* breaking the chain of causation between the defendant’s negligent act (flying the RPA over a populous area for example) and the impact with the plaintiff or his property. But because the “scope of liability” provisions in civil liability legislation have been held to be normative with considerations of policy for the imposition of liability being relevant,[[136]](#footnote-136) it is likely that the courts would refuse to find that such an event should absolve a negligent pilot from liability, particularly where there has been a breach of a safety law. Common law principles concerning intervening causation have focused on the risk created by the defendant’s negligence and questions of “the very kind of thing likely to happen”[[137]](#footnote-137) as well as the purpose and scope of the cause of action.[[138]](#footnote-138) These kinds of considerations indicate that liability should be imposed on a negligent pilot notwithstanding technical failure.

The Damage by Aircraft legislation imposes joint and several liability on both the operator & owner of an aircraft.[[139]](#footnote-139) Clearly this would not be the case in a common law negligence action where a Plaintiff would have to rely on vicarious liability[[140]](#footnote-140) or agency[[141]](#footnote-141) to establish liability of the operator/owner who was not also the negligent pilot.

**Breach of Statutory Duty**

The tort of Breach of Statutory Duty[[142]](#footnote-142) may provide a remedy to persons injured by the failure of an RPA pilot to comply with statutory safety obligations. The tort has been the subject of academic criticism for lacking a rational basis in legal doctrine.[[143]](#footnote-143) The significant advantage to a plaintiff of the action for Breach of Statutory Duty is that the liability is strict: proof of the defendant’s failure to comply with the relevant statutory obligation is sufficient to establish liability.[[144]](#footnote-144)

As discussed in Part 1 above, the Civil Aviation Safety Regulations 1988 (Cth) impose detailed restrictions on the operation of RPA. Prescriptive regulations concern matters such as flight outside populous areas, daytime flying and line of sight operation, and make provision for strict liability offences[[145]](#footnote-145) in the event of non-compliance. There is also a general prohibition on unsafe operation.[[146]](#footnote-146)

The elements of the action for breach of statutory duty were succinctly stated by the High Court of Australia in *Byrne v Australian Airlines[[147]](#footnote-147)* (a case dealing with employment matters not damage by aircraft):

A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection.

The High Court has held that where a statute prescribes a safety precaution in circumstances where the person having the burden of that safety requirement would, under the general law of negligence, owe a duty to exercise due care, then “the statutory duty will give rise to a correlative private right unless a contrary intention appears in the statute.”[[148]](#footnote-148) In the context of the Civil Aviation Safety Regulations 1988 (Cth), it is arguable that the availability of a private right to sue for breach of the statutory duty is within the intent of the legislature. An RPA pilot would owe a duty of care at general law so the statutory obligation should create a correlative private right. A person suffering injury as a result of an RPA pilot’s failure to comply with the safety regulations would certainly fall within the class of persons protected by the regulations.

The specificity of the safety standard enacted is relevant on the question of whether parliament intended a private right of action. In *O’Connor v Bray,* Dixon J considered it influential that a statutory regulation defined “specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on.”[[149]](#footnote-149) The highly specific nature of most of the regulations in Part 101 of the Civil Aviation Safety Regulations 1988 (Cth) would meet the requirement of specific prescription of what “must be done in furtherance of the duty to protect,” though a general prohibition of hazardous operation[[150]](#footnote-150) may be problematic.

There is some authority that where a statutory protection is for the benefit of the public at large rather than a discrete class of persons, a private right of action for breach would not be supported.[[151]](#footnote-151) This has been referred to as the “limited class” rule[[152]](#footnote-152) though it has been doubted in the High Court:

“[C]ases of actions for breach of statutory duty cannot be confined to instances where the plaintiff belongs to some so-called ‘special class of the community’ … [T]he dominant consideration is prevention of danger to all persons brought into proximity to a specific peril which can easily be avoided if the regulation is observed.”[[153]](#footnote-153)

Significantly, Australian courts have refused to allow a private right of action in respect of breach of road safety regulations.[[154]](#footnote-154) In the traffic cases the Courts have inferred that the legislative intent was not to create a private right of action because traffic regulations were made primarily for the *control of traffic* rather than to create new private rights unknown to the common law.[[155]](#footnote-155)

Similarly, in *Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority*,[[156]](#footnote-156) the Federal Court held (in an application for leave to appeal from an interlocutory judgment) that the provisions of the Civil Aviation Act 1988(Cth) were for the benefit of the public at large with the safety of air navigation as the most important objective and they were not designed to protect the commercial interests of aviation companies. That case was not concerned with injury as a result of impact by aircraft but rather with a claim concerning commercial losses incurred as a result of the cancellation of a licence and it is not authoritative. But it may be instructive. It might be difficult to argue the converse given that the civil aviation regulations are in the same class as road safety regulations in the sense that they are part of a very broad scheme governing air safety.

There is one important point of distinction between motor traffic regulation and air safety regulation. Whereas the scheme of motor traffic legislation is one of “mutual and reciprocal obligations imposed on all who engage in traffic” as identified in *Abela v Giew,* the scheme of civil aviation safety legislation does not always involve “mutual and reciprocal obligations.” Persons on the ground are not mutually or reciprocally obligated by the legislation to those controlling or operating aircraft. This distinction may enable a court to determine a parliamentary intention that breach of the civil aviation safety regulations should provide a private right of action for breach of statutory duty to an injured person on the ground.

Given the High Court statement in *O’Connor v S & P Bray Ltd[[157]](#footnote-157)* concerning correlative rights where a general duty of care would arise, an action for breach of statutory duty could be available to a plaintiff in respect of injury caused by an RPA in breach of the Civil Aviation Safety Regulations 1998 (Cth). Clearly the air safety regulations applicable to RPA operation are designed to afford protection to persons and property on the ground as well as other aircraft. Moreover the regulations are highly specific as to what is required to be done to ensure safety and it is likely that a breach will cause injury. It was recognised by the High Court in *O’Connor v S & P Bray Ltd* that whether the right of action arises will depend on “the scope and object of the duty imposed and the probability or certainty that a breach of the duty will be likely to cause death or injury.” [[158]](#footnote-158)

There is one persuasive argument against a parliamentary intention to create a private right of action for breach of the air safety regulations. That is the very existence of the strict liability remedy available under the Damage by Aircraft Act 1999 (Cth) and its state counterparts. The argument is simply that if parliament has created a statutory strict liability regime to provide a remedy in the event of injury by aircraft to person or property on the ground, then it is unlikely that parliament intended to provide a further private cause of action for breach of statutory duty in respect of the air safety regulations. A plaintiff would be likely to press a claim for Breach of Statutory duty only in circumstances where the Damage by Aircraft statutory action was unavailable (as discussed above). The argument would be that Parliament no doubt intended the Damage by Aircraft strict liability action to be available only in the circumstances limited by the statute and would not have intended an alternative common law strict liability to supplement the statutory regime.

If a plaintiff were able to establish a private right of action in the tort of breach of statutory duty then satisfaction of the remaining elements of the claim should be relatively straight forward. Proof that the defendant breached the statutory obligation will result in liability provided the plaintiff can establish the casual connection between the breach and the damage. It should be noted that some aspects of state Civil Liability legislation would apply to claims for Breach of Statutory Duty, in particular the provisions relating to quantum of personal injury damages which apply to all claims whether brought in tort or contract or under statute or otherwise.[[159]](#footnote-159)

**Trespass to Person – Battery**

A plaintiff who has been hit by an RPA or something falling from it would have a cause of action in Battery. The plaintiff must prove that the defendant committed an intentional positive voluntary act which directly caused a contact with the plaintiff’s body.[[160]](#footnote-160) A battery is actionable *per se* without proof of damage.[[161]](#footnote-161)

It is unlikely that a collision between an RPA, or something falling from it, and a person would be a deliberate act by a defendant, though it may be reckless in nature and on current authority that would suffice as to intention.[[162]](#footnote-162) Further, Australian common law to date, allows for a negligently committed battery,[[163]](#footnote-163) contrary to the position in England.[[164]](#footnote-164) Doubt has been expressed judicially[[165]](#footnote-165) and by some academic commentators[[166]](#footnote-166) about the continued availability of an action in trespass to person where the act of the defendant is negligent rather than deliberate: it is suggested that the only cause of action in that event should be in the tort of negligence. But the current state of authority in Australia enables a claim in battery based on a negligent act by a defendant.

A plaintiff will have to establish the requisite directness[[167]](#footnote-167) between the act of the pilot and the interference with the plaintiff. In the case of an RPA collision with a person, the act of the pilot (who may be a considerable distance away) in remotely controlling the machine is not physically connected to the impact with the plaintiff’s body. But, just as a person who fires a gun or throws a missile at another commits a battery, [[168]](#footnote-168) so the RPA pilot who is remotely controlling a machine that hits another should satisfy the directness element of battery.

The advantage of a claim in trespass to person in Australia is that the plaintiff does not have to prove the defendant was at fault. Once the trespassory contact is established, then the defendant must prove lack of fault to escape liability.[[169]](#footnote-169) A person injured by an RPA falling from the sky will possibly have scant evidence as to the cause of the event, though negligence of the operator would be a likely cause.

Generally, state civil liability legislation would apply to a claim in trespass to person where the act of the defendant was negligent as opposed to deliberate.[[170]](#footnote-170)

**5 Liability of RPA Pilots for Trespass to Land and Nuisance**

In addition to the remedies discussed above, there would in limited circumstances, be remedies for damage or interference by RPA in trespass to land or private nuisance.

Recent New Zealand regulation of RPA recognises the need to address safety of persons and property as well as privacy, when RPA are flown over private property. Amendments to CivilAviation Rules 1997 (NZ) that commenced on 24 September 2015, provide that an RPA may not be operated in airspace above property unless prior consent has been obtained from the occupier or owner of the property.[[171]](#footnote-171)

By contrast in Australia, there is statutory protection from liability for flight over real property in several jurisdictions for RPA which fall within the definition of aircraft.

**Statutory protection**

Legislation in NSW, South Australia, Tasmania, Victoria and Western Australia [[172]](#footnote-172) provides that there is no action in trespass or nuisance by reason only of the flight of an aircraft over any property at a reasonable height so long as Air Navigation Regulations are complied with. As previously discussed (in Part 2), except in South Australia, ‘aircraft’ is not defined in state legislation and there is no exclusion for ‘model aircraft’. So the legislation in NSW, Tasmania, Victoria and WA, would probably protect all RPA. In Queensland, the Northern territory and the ACT there is no statutory protection from liability for trespass or nuisance by reason of over-flight.

In the event that a flight by an ‘aircraft’ is at an unreasonable height (having regard to wind, weather and all the circumstances of the case) or is in breach of the Air navigation Regulationsthen the statutory immunity is lost. The statutory protection is from liability “by reason only” of flight over property. So where the claim is for something other than the flight alone, there may be an action: where there is undue disturbance or noise, or where something falls from the RPA or the machine itself falls to the ground.

**Trespass to Land**

The common law as to trespass to land by over-fight of aircraft is as stated in the English decision in *Bernstein of Leigh (Baron) v Skyviews & General Ltd (Skyviews).[[173]](#footnote-173)* In *Skyviews* Griffiths J held, relying on various authorities,[[174]](#footnote-174) that the right of a person in possession of land to the air space above is limited to “such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it.”[[175]](#footnote-175) Interestingly, the Australian High Court has not adopted and applied the *Skyviews* decision, though it has referred to it in obiter dictum.[[176]](#footnote-176) The NSW Court of Appeal has stated obiter, citing *Skyviews* that it is “not a trespass for an aircraft to pass over someone’s land at a height greater than the owner needs for the ordinary use and enjoyment of his or her land and the structures upon it.”[[177]](#footnote-177)

In *Skyviews* Griffiths J took a pragmatic view of the competing interests between land owners and the flying public and held that a balance e required restriction of owners’ rights. [[178]](#footnote-178) In 1978 when *Skyviews* was decided, Griffiths J was concerned solely with over flight by a plane.[[179]](#footnote-179) But of course, an RPA is not a plane and it flies at a much lower altitude than a plane. It might be argued therefore that the rights to be balanced are not as clearly delineated as Griffiths J supposed and that in the case of an RPA, some very different considerations apply. The flight height of an RPA (which must not be higher than 400 feet above ground but may be substantially lower) is such that it may interfere with the ordinary use and enjoyment of land and thereby constitute a trespass. The remaining elements of the tort of trespass to land would be likely satisfied: that the RPA pilot engaged in a positive voluntary act[[180]](#footnote-180) (the physical controlling of the RPA) that directly[[181]](#footnote-181) caused a physical interference with the airspace above the plaintiff’s land. The requisite intention to enter the plaintiff’s air space on the part of the defendant RPA pilot should be established: either a deliberate or reckless act[[182]](#footnote-182) although in Australia the onus of proving absence of intention should rest on the defendant as it does in cases of trespass to person.[[183]](#footnote-183) This is a distinct advantage to a plaintiff.

**Nuisance**

Whether an interference with the use or enjoyment of private property[[184]](#footnote-184) by over-flight of an RPA amounts to the tort of private nuisance is problematic, there being no authority of assistance. Whether interference is so unreasonable as to constitute a nuisance is dependent on various factors including locality,[[185]](#footnote-185) duration,[[186]](#footnote-186) time of day,[[187]](#footnote-187) frequency,[[188]](#footnote-188) the extent of the interference and “give and take” between neighbours.[[189]](#footnote-189)There is the obiter statement in the *Bernstein* case that a defendant might be liable in nuisance for aircraft activity amounting to harassment from the air.[[190]](#footnote-190)

It is doubtful that a single RPA flight would amount to an unreasonable interference, unless it was somehow additionally irksome. Though, if it caused material damage then that would be sufficient to prove an unreasonable interference unless the defendant could establish by way of defence that it acted reasonably.[[191]](#footnote-191)

Whilst material damage to property can be recovered, whether a plaintiff can recover personal injury damages in a private nuisance action is a vexed question in Australian law.[[192]](#footnote-192) There is High Court obiter dicta in *Benning v Wong[[193]](#footnote-193)* to the effect that a plaintiff may recover personal injury damages in private nuisance though there is sparse other Australian authority.[[194]](#footnote-194)

The advantage to a plaintiff of a claim in nuisance over negligence is that in a case of material damage caused by a nuisance, it is incumbent on the defendant to prove reasonableness.[[195]](#footnote-195)

**6 Compulsory Third Party Insurance and Identification of Drone Pilots and Operators**

The availability of a cause of action to a person injured by an RPA is of little value unless the pilot and the operator of the RPA can be identified and sued by the injured party and have the means to satisfy a damages award.

At present in Australia there is no requirement for identification on RPA except for a large RPA, defined as an “unmanned aeroplane with a launch mass greater than 150 kilograms.”[[196]](#footnote-196) These are required to be registered and to carry a manufacturer's data plate and an aircraft registration identification plate.[[197]](#footnote-197) The 2016 amendments to Part 101 of the Australian Civil Aviation Safety Regulations1998 (Cth) did not include any alteration to previous requirements.[[198]](#footnote-198) So any RPA under the 150 kilogram threshold does not require any ‘on board’ identification with the result that a person injured by such an RPA may have no way of tracing the responsible pilot or operator.

In the USA, Unmanned Aircraft Systems (UAS) weighing more than 0.55 pounds (250 grams) and less than 55 pounds (25 kilograms) are required to be registered online with the Federal Aviation Administration’s UAS registry.[[199]](#footnote-199) The registration number must be marked on the aircraft to enable identification, with civil and criminal penalties for failure to comply.[[200]](#footnote-200) For UAS weighing more than 55 pounds there are more stringent registration, licensing and certification requirements.[[201]](#footnote-201) There are no registration requirements for small RPA in the EU or the UK, though in 2015, the House of Lords European Union Committee recommended the development of a computerised system that would monitor flight plans and coordinate airspace, and enable identification of every RPA and its pilot.[[202]](#footnote-202)

The current Australian Civil Aviation Safety Regulations[[203]](#footnote-203) do not require pilots or operators of RPA to have any third party insurance cover. The EU requires all commercial RPA operations to carry third party liability insurance. For RPA weighing less than 500kg the minimum cover required is approximately €660,000, though model aircraft, including RPA for leisure use, weighing less than 20kg are exempted from the requirement for insurance.[[204]](#footnote-204)

It is unfortunate that, having recently reviewed Part 101of the Civil Aviation Safety Regulations 1998 (Cth), Australian regulators have missed an opportunity to consider a requirement for ‘on board’ identification of RPA operators and compulsory insurance in respect of injury to third parties on the ground. Such a requirement might have been imposed for RPA other than micro RPA (weighing less than 100 grams) or at least in respect of those in weight categories above 2 kilograms.

For a person seeking to claim damages for injury by an RPA there is little certainty that the CASA records of licensed remote pilots or certified operators or RPA commercial use will enable identification of the pilot or operator of a specific RPA in the absence of some identifier on the RPA itself.

**Conclusion**

The regulatory framework applicable to RPA use in Australia imposes stringent safety measures and licensing and certification requirements, yet the propensity for RPA to cause damage to persons and property on the ground is significant. Australian law provides both statutory and common law remedies for injury by RPA to persons or property on the ground.

The legislative landscape is anything but simple. Jurisdictional differences result in disparities in available remedies. The availability of statutory strict liability under Commonwealth and State Damage by Aircraft legislation depends on the status of RPA as ‘aircraft’ which turns on interpretation of several statutory definitions. The Damage by Aircraft Act 1999 (Cth) excludes recreational RPA from strict liability. Damage by Aircraft legislation in some jurisdictions does not apply to claims where a plaintiff has been contributorily negligent or to claims for purely psychiatric injury. There is a complex inter-relationship between Damage by Aircraft legislation and state and territory civil liability legislation with respect to assessment of damages and other aspects of tort law that have been the subject of reform.

A plaintiff who does not have the benefit of a statutory strict liability claim will have to rely on the common law of negligence or trespass to person or possibly, breach of statutory duty to recover damages for injury on the ground by RPA. In some cases, causes of action in trespass to land or private nuisance may be available against RPA pilots.

But, if a plaintiff is to have a real opportunity to pursue a damages claim against an RPA pilot or operator, the person at fault must be able to be identified. Recent amendments to Australian Civil Aviation Safety Regulations applicable to RPA have failed to make any provision for ‘on board’ identification of RPA owners, pilots, or operators or for compulsory third party insurance which would ensure that damages awards are satisfied.

One thing is certain: the proliferating use of RPA in Australian skies, recreationally, commercially and by government, will provide ample opportunity for statutory and common law remedies to be tested and refined by Australian courts and will challenge legislators to meet the demands of fair access to compensation for injured persons.

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   Civil Aviation legislation Amendment (Part 101) Regulation 2016, amending Civil Aviation Safety Regulations 1988 (Cth). See also, *Civil Aviation Legislation Amendment (Part 101) Regulation 2016 Explanatory Statement*, available at <https://www.legislation.gov.au/Details/F2016L00400/Explanatory%20Statement/Text> [↑](#footnote-ref-1)
2. Damage by Aircraft Act 1999 (Cth) (also applies in the Australian Capital Territory and the Northern Territory); Air Navigation Act 1937 (Qld); Civil Liability Act 1936 (SA), s 61; Civil Liability Act 2002 (NSW), s 73; Damage by Aircraft Act 1963 (Tas); Wrongs Act 1958 (Vic), s 31(1); Damage by Aircraft Act 1964 (WA), s 5(1). [↑](#footnote-ref-2)
3. Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era,* (ALRC Report 123) 2014, Commonwealth of Australia, Canberra; B. McDonald et al, Serious *Invasions of Privacy in the Digital Era: Australian Law Reform Commission Discussion Paper 80,* 2014, Commonwealth of Australia, Canberra. [↑](#footnote-ref-3)
4. Des Butler, “The Dawn of the Age of the Drones: An Australian Privacy Law Perspective” (2015) 37 *UNSW Law Journal* 434. [↑](#footnote-ref-4)
5. Australian Parliament, House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA) *Eyes in the Sky*: *Inquiry into drones and the regulation of air safety and privacy,* July 2014, The Parliament of the Commonwealth of Australia, Canberra. (*Report: Eyes in the Sky*)

   <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Drones/Report> [↑](#footnote-ref-5)
6. B. McDonald, *Surveillance, Tort and Privacy*, Association of Aviation Law of Australia and New Zealand (ALAANZ) Annual Conference 2015, Cairns, Qld; B. Gogarty and I. Robinson, "Unmanned Vehicles, Surveillance Saturation and Prisons of the Mind" (2012) 21(2) *Journal of Law, Information and Science* 180; G. Cho,” Unmanned Aerial Vehicles: Emerging Policy and Regulatory Issues" (2013) 22(2) *Journal of Law, Information and Science* 201; H.B. Farber “Eyes in the Sky: Constitutional and Regulatory Approaches to Domestic Drone Deployment” (2014) 64 *Syracuse law Review* 1; U. Volovelsky, "Civilian Uses of Unmanned Aerial Vehicles and the Threat to the Right of Privacy: An Israeli Case Study” (2014) 30 *Computer Law and Security Journal* 506; [↑](#footnote-ref-6)
7. Civil Aviation legislation Amendment (Part 101) Regulation 2016, amendment to Part 1 of the Dictionary, Civil Aviation Safety Regulations 1988 (Cth).

   See also, *Civil Aviation Legislation Amendment (Part 101) Regulation 2016 Explanatory Statement,* available at <https://www.legislation.gov.au/Details/F2016L00400/Explanatory%20Statement/Text>

   and CASA, *Notice of Proposed Rule-Making (*1309OS), Remotely Piloted Aircraft Systems Terminology and Weight Categorisation of Remotely Piloted Aircraft, CASA Standards Division, Australian Government, May 2014, pp 8-9, available at:

   <http://www.casa.gov.au/wcmswr/_assets/main/newrules/ops/nprm/nprm1309os.pdf> [↑](#footnote-ref-7)
8. *Report: Eyes in the Sky,* p 10 [2.22]. [↑](#footnote-ref-8)
9. B. Gogarty & M. Hagger, "The Laws of Man Over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air" (2008) 19 *Journal of Law, Information and Science* 73; B. Gogarty and I. Robinson, "Unmanned Vehicles: A (Rebooted) History, Background and Current State of the Art" (2012) 21(2) *Journal of Law, Information and Science* 1. [↑](#footnote-ref-9)
10. Australian Parliament, House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA) *Eyes in the Sky*: *Inquiry into drones and the regulation of air safety and privacy,* The Parliament of the Commonwealth of Australia, Canberra *,* July 2014, Chapter 2, p.6 [2.4].

    <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Drones/Report> [↑](#footnote-ref-10)
11. Civil Aviation Safety Authority, Operations, Remotely Piloted Aircraft, *List of UAS operator Certificate Holders,* <https://www.casa.gov.au/uas-operator-certificate-holders> , Accessed 28th July 2016; *Eyes in the Sky*, Chapter 2, p.5, [2.4]. [↑](#footnote-ref-11)
12. Department of Infrastructure and Regional Development, *National Aviation Policy White Paper:* *Flight Path to the Future,* Australian Government, Canberra, 2009. <https://infrastructure.gov.au/aviation/publications/pdf/Aviation_White_Paper_final.pdf> [↑](#footnote-ref-12)
13. M. Corcoran, D. Goldberg and R. G. Picard, *Remotely Piloted Aircraft Systems & Journalism: Opportunities and Challenges of Drones in News Gathering,* June 2013, Reuters Institute for the Study of Journalism, Oxford University.

    <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Remotely%20Piloted%20Aircraft%20and%20Journalism.pdf> ;

    M. Corcoran. *Drone Journalism: Newsgathering applications of Unmanned Aerial Vehicles (UAVs) in covering conflict, civil unrest and disaster*. Introductory Paper, January 2014, Flinders University, Adelaide.

    <http://www.flinders.edu.au/ehl/fms/law_files/Drone%20Journalism%20During%20Conflict,%20Civil%20Unrest%20and%20Disasters%20March%201%202014.pdf> ; N. Syed & M. Berry, “Journo-drones: A flight over the landscape” (2014) 30 *Communications Lawyer* 1. [↑](#footnote-ref-13)
14. Australia Post Newsroom, “Australia Post Delivery Trial Takes Flight”15 April 2016, News Releases, Australia Post. <https://auspost.newsroom.com.au/Content/Home/02-Home/Article/Australia-Post-Delivery-Trial-Takes-Flight-/-2/-2/6092> [↑](#footnote-ref-14)
15. *Report: Eyes in the Sky*, p.7 [2.8]. [↑](#footnote-ref-15)
16. The issue of liability for collision in the air by RPA with other aircraft is beyond the scope of this article and is governed by the Civil Aviation Act 1988 (Cth). Compensation for death or injury to persons on board aircraft and in aircraft accidents pursuant to Civil Aviation (Carriers Liability) Act 1959 (Cth) (or state equivalents) does not arise because this article considers damage caused by RPA which by definition, do not carry passengers or crew. [↑](#footnote-ref-16)
17. ### BBC News, “[Australian triathlete injured after drone crash”, BBC News](https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&uact=8&ved=0CEsQFjAJ&url=http%3A%2F%2Fwww.bbc.com%2Fnews%2Ftechnology-26921504&ei=nqqcVdO-FIXs8AXr3ajoCA&usg=AFQjCNF8vPgJXEJ-9x0hMFtSYX6xs91oBw) *Services*, 7 April, 2014: <http://www.bbc.com/news/technology-26921504> and The Guardian, “Air Safety Investigation into Drone Incident with Triathlete.” Guardian News & Media Limited, 8 April, 2014, ,[http://www.theguardian.com/world/2014/apr/08/air-safety-triathlete-struck-drone](http://www.theguardian.com/world/2014/apr/08/air-safety-triathlete-struck-drone%20) . It was subsequently reported that the UAV operator had been fined by CASA: S. Taillier, “Drone operator fined after UAV crashed into Geraldton triathlete” *ABC News,* 13 Nov 2014: <http://www.abc.net.au/news/2014-11-13/drone-operator-at-geraldton-marathon-fined/5887196>

    [↑](#footnote-ref-17)
18. B. Jabour, “Drone Crash on Sydney Harbour Bridge Investigated”, *The Guardian,* 5 October, 2013, Guardian News and Media Limited.

    <http://www.theguardian.com/world/2013/oct/05/drone-crash-on-sydney-harbour-bridge-investigated> [↑](#footnote-ref-18)
19. C. Tyrrell and AAP, “Drone Crashes into Perth House” *The West Australian*, 20 November 2014.

    <https://au.news.yahoo.com/thewest/wa/a/25569788/drone-crashes-into-perth-house/> [↑](#footnote-ref-19)
20. P. Gibson, CASA Media Release (MR13214), “CASA to issue fine after Vic drone crash” Civil Aviation Safety Authority, Australian Government. <https://www.casa.gov.au/standard-page/media-release-archive>; ABC News, “Man who flew drone over Victorian Siege Fined $850” 19 December, 2014. ABC. <http://www.abc.net.au/news/2014-12-18/drone-fine-man-hit-with-24850-penalty-for-interfering-with/5977594> [↑](#footnote-ref-20)
21. M. O’Sullivan, “Straying Drones put pilots, firefighters at risk” *The Sun Herald*, Sydney, 11 October 2015 Fairfax [↑](#footnote-ref-21)
22. The Association of Australian Certified UAV Operators Inc. (ACUO) *Reply to the Aviation Safety Regulation Review Panel Report,* 30 June, 2014; Brad Mason, Secretary ACUO, *ACUO Submission to CASA’s Notice of Proposed Rule Making 1309OS Process,* 30 June 2014. <https://infrastructure.gov.au/aviation/asrr/public_comments/files/Australian_Certified_UAV_Operators_Inc.pdf> [↑](#footnote-ref-22)
23. Civil Aviation Act 1988 (Cth); Civil Aviation Safety Regulations 1998 (Cth); Civil Aviation Regulations 1988 (Cth); Air Navigation Act 1920 (Cth). For discussion of various jurisdictions see, R. Clarke and L. B. Moses, “The regulation of civilian drones’ impact on public safety” (2014) 30 *Computer Law and Security Review* 263. [↑](#footnote-ref-23)
24. The external affairs power, the trade and commerce power, the corporations power and the incidental power: Commonwealth of Australia Constitution Act, s 51(xxix); (i); (xx) and (xxxix) respectively. [↑](#footnote-ref-24)
25. Air Navigation Act 1938 (NSW); Air Navigation Act 1937 (Qld); Air Navigation Act 1937 (SA); Air Navigation Act 1937 (Tas); Air Navigation Act 1958 (Vic) (now repealed); Air Navigation Act 1937 (WA); Commonwealth Powers (Air Transport) Act 1950 (QLD); Commonwealth Powers (Air Transport) Act 1952 (TAS).  [↑](#footnote-ref-25)
26. Civil Aviation Safety Authority, “CASA and Remotely Piloted Aircraft.” Australian Government Canberra. <http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_100376> [↑](#footnote-ref-26)
27. CASA, *Notice of Proposed Rule-Making (*1309OS), Remotely Piloted Aircraft Systems Terminology and Weight Categorisation of Remotely Piloted Aircraft, CASA Standards Division, Australian Government, May 2014. <http://www.casa.gov.au/wcmswr/_assets/main/newrules/ops/nprm/nprm1309os.pdf> [↑](#footnote-ref-27)
28. Hon D. Chester, “Drone safety review announced.” Press release DC138/2016, 10 October 2016, Canberra. http://minister.infrastructure.gov.au/chester/releases/2016/October/dc138\_2016.aspx [↑](#footnote-ref-28)
29. Civil Aviation Safety Regulations 1998 (Cth), Reg. 101.005. [↑](#footnote-ref-29)
30. Civil Aviation Safety Regulations 1998 (Cth), Part 1 of the Dictionary. [↑](#footnote-ref-30)
31. Civil Aviation Safety Regulations 1998 (Cth), Dictionary. [↑](#footnote-ref-31)
32. Civil Aviation Safety Regulations 1998 (Cth), Reg. 101.055; Reg 101.280 (uncertificated RPA). [↑](#footnote-ref-32)
33. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.250 (for very small, small and medium RPA); Reg. 101.395 (for model aircraft); Reg 101.280 (uncertificated RPA). [↑](#footnote-ref-33)
34. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.025. [↑](#footnote-ref-34)
35. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.085 and Reg 101.070 (unmanned Aircraft); Reg 101.250 (very small, small, and medium RPA). [↑](#footnote-ref-35)
36. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.095 [↑](#footnote-ref-36)
37. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.073(3). [↑](#footnote-ref-37)
38. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.245 and 101.395 (for model aircraft). [↑](#footnote-ref-38)
39. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.065. Prohibited and restricted areas are designated by CASA pursuant to Airspace Regulations 2007(Cth), Reg.6 and may include military areas or areas that pose a danger to aircraft. [↑](#footnote-ref-39)
40. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.075 [↑](#footnote-ref-40)
41. Civil Aviation Safety Regulations 1998 (Cth), Regs Dictionary, Part 1. [↑](#footnote-ref-41)
42. Civil Aviation Safety Regulations 1998 (Cth), Regs 101.235; 101.240; 101.255 21.820; Subpart 45D. [↑](#footnote-ref-42)
43. Reg. 101.237 defines “excluded RPA” to which regs 101.252 “Requirement for remote pilot licence” and 101.270 “Requirement for RPA Operators certificate” do not apply. [↑](#footnote-ref-43)
44. Defined in Civil Aviation Safety Regulations 1998 (Cth), reg. 101.238 as amended by Civil Aviation legislation Amendment (Part 101) Regulation 2016. [↑](#footnote-ref-44)
45. Civil Aviation Safety Regulations 1998 (Cth), Regs 101.237 and 101.238. CASA, *Notice of Proposed Rule-Making (*1309OS), Remotely Piloted Aircraft Systems Terminology and Weight Categorisation of Remotely Piloted Aircraft, CASA Standards Division, Australian Government, May 2014, pp 8-9.

    <http://www.casa.gov.au/wcmswr/_assets/main/newrules/ops/nprm/nprm1309os.pdf> [↑](#footnote-ref-45)
46. Civil Aviation Safety Regulations 1998 (Cth), reg. 101.252. [↑](#footnote-ref-46)
47. Civil Aviation Safety Regulations 1998 (Cth), reg. 101.237. [↑](#footnote-ref-47)
48. Civil Aviation Safety Regulations 1998 (Cth), reg. 101.371. [↑](#footnote-ref-48)
49. Civil Aviation Safety Regulations 1998 (Cth), reg. 101.374. [↑](#footnote-ref-49)
50. CASA, *Notice of Proposed Rule-Making (*1309OS), Remotely Piloted Aircraft Systems Terminology and Weight Categorisation of Remotely Piloted Aircraft, CASA Standards Division, Australian Government, May 2014, pp 8-9; Terry Farquharson, CASA Deputy Director of Aviation Safety, *UAVs (Drones) in Civil Airspace and Challenges for CASA*. Speech delivered at a public seminar organised by the Sir Richard Williams Foundation, Canberra 3 July 2013. [↑](#footnote-ref-50)
51. Ibid. [↑](#footnote-ref-51)
52. Damage by Aircraft Act 1999 (Cth), s11; Air Navigation Act 1937 (Qld) Pt 3; Civil Liability Act 1936 (SA), s 61; Civil Liability Act 2002 (NSW), s73; Damage by Aircraft Act 1963 (TAS), s 4; Wrongs Act 1958 (VIC), s 31; Damage by Aircraft Act 1964 (WA), s 5. [↑](#footnote-ref-52)
53. Section 10 (1) Damage by Aircraft Act 1999 (Cth). [↑](#footnote-ref-53)
54. Damage by Aircraft Act 1999 (Cth), s11; Air Navigation Act 1937 (Qld), s 17(2); Civil Liability Act 1936 (SA), s 61(3); Civil Liability Act 2002 (NSW), s73 (1); Damage by Aircraft Act 1963 (TAS), s 4(1); Wrongs Act 1958 (VIC), s 31(1); Damage by Aircraft Act 1964 (WA), s 5(1). [↑](#footnote-ref-54)
55. The Damage by Aircraft Act 1999 (Cth) repealed the Civil Aviation (Damage by Aircraft) Act 1958 (Cth), which by s 8(1), incorporated into domestic law in Australia, The Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention 1952) (1952) 310 UNTS 181. That Act imposed strict liability for damage by aircraft but imposed a limit on compensation which became manifestly inadequate. The Act was repealed by Damage by Aircraft Act 1999 (Cth), Schedule 1. Australia no longer adheres to the Rome Convention. [↑](#footnote-ref-55)
56. See Civil Liability Act 2002 (NSW), s.73; Air Navigation Act 1937 (Qld), s 16; Civil Liability Act 1936 (SA), s 61; Damage by Aircraft Act 1963 (Tas), s 4; Wrongs Act 1958 (Vic), s 31; Damage by Aircraft Act 1964 (WA), s 5. [↑](#footnote-ref-56)
57. Civil Aviation Act 1999 (Cth), s.9 [↑](#footnote-ref-57)
58. Civil Liability Act 2002 (NSW) s 73; Air Navigation Act 1937 (Qld), Pt 3, s 16; Wrongs Act 1958 (Vic), Part VI, s.31 (1); Damage by Aircraft Act 1964 (WA), s.5; Damage by Aircraft Act 1963 (Tas), s. 4. [↑](#footnote-ref-58)
59. Civil Liability Act 1936 (SA), s 61. [↑](#footnote-ref-59)
60. A similar definition appears in the Air Navigation Act 1920 (Cth), s 3(1). [↑](#footnote-ref-60)
61. Civil Aviation Safety Regulations 1998 (Cth), Dictionary. [↑](#footnote-ref-61)
62. Civil Aviation Safety Regulations 1998 (Cth), Regs 101.380, 101.405. [↑](#footnote-ref-62)
63. Air Navigation Act 1937 (Qld), s 4; Civil Liability Act 1936 (SA) s 61(1) which defines ‘aircraft damage’ by reference to the Commonwealth Damage by Aircraft Act. [↑](#footnote-ref-63)
64. Civil Liability Act 2002 (NSW); Damage by Aircraft Act, 1963 (Tas); Wrongs Act 1958 (Vic) Pt VI; Damage By Aircraft Act 1964 (WA). [↑](#footnote-ref-64)
65. Civil liability Act 2002 (NSW), s 72; Damage by Aircraft Act 2002 (Tas), s2; Damage by Aircraft Act 1964 (WA), s 3; Wrongs Act 1958 (Vic), s 29. The commonwealth Air Navigation Regulations are: Air Navigation (Aerodrome Flight Corridors) Regulations 1994; Air Navigation (Aircraft Engine Emissions) Regulations; Air Navigation (Aircraft Noise) Regulations 1984 ; Air Navigation (Coolangatta Airport Curfew) Regulations 1999; Air Navigation (Essendon Airport) Regulations 2001; Air Navigation (Fuel Spillage) Regulations 1999. [↑](#footnote-ref-65)
66. Air Navigation Act 1938 (NSW); Air Navigation Act 1937 (Qld); Air Navigation Act 1937 (SA); Air Navigation Act 1937 (Tas); Air Navigation Act 1937 (WA); Commonwealth Powers (Air Transport) Act 1950 (QLD); Commonwealth Powers (Air Transport) Act 1952 (Tas). In Victoria the Air Navigation Act 1958 (Vic) adopting Commonwealth legislation was repealed by Australian Airlines (Intrastate Services) Act 1990 (Vic) s 4. The Government had advice that the Air Navigation Act 1958 (Vic) had no practical application in Victoria, due to case law on Commonwealth powers and legislation passed by the Commonwealth: *Hansard*, Victorian Legislative Assembly, 29th March 1990 at 517. [↑](#footnote-ref-66)
67. Civil Liability Act 2002 (NSW), s 73. [↑](#footnote-ref-67)
68. Damage by Aircraft Act 1963 (Tas), s 4. [↑](#footnote-ref-68)
69. Wrongs Act 1958 (Vic) s 31. [↑](#footnote-ref-69)
70. Damage by Aircraft Act 1964 (WA), s 5. [↑](#footnote-ref-70)
71. Civil Liability Act 1936 (SA), s 61 (c). [↑](#footnote-ref-71)
72. Air Navigation Act 1937 (Qld), s 16. [↑](#footnote-ref-72)
73. Damage by Aircraft Act 1999 (Cth), s 10(2), (2A) and (3). [↑](#footnote-ref-73)
74. Civil Liability Act 1936 (SA), s 61(3), (4) . The qualifications concern liability of persons who rely on the skill of another (not an employee) to operate aircraft; provide for an indemnity where there is unauthorised use of an aircraft; restrict the operation of the Commonwealth legislation to damage caused by impact between an aircraft or part of an aircraft and a person or object whilst the aircraft is in flight or when it crashes or falls to the ground. [↑](#footnote-ref-74)
75. Air Navigation Act 1937 (Qld), s 16 (2), (3). [↑](#footnote-ref-75)
76. Civil Liability Act 2002 (NSW) s 73 (1), (2); Damage by Aircraft Act 1962 (Tas), s 4 (1), (2); Damage by Aircraft Act 1964 (WA), s 5(1), (2); Wrongs Act 1958 (Vic), s 31(1), (2). [↑](#footnote-ref-76)
77. *ACQ Pty Ltd v Cook; Aircair Moree Pty Ltd v Cook* (*ACQ* case) (2009) 237 CLR 656. [↑](#footnote-ref-77)
78. *ACQ* case, [10], French CJ, Gummow, Heydon, Crennan and Bell JJ. [↑](#footnote-ref-78)
79. Ibid [11]. [↑](#footnote-ref-79)
80. Ibid [13]. [↑](#footnote-ref-80)
81. Ibid [18]. [↑](#footnote-ref-81)
82. *ACQ case,* [27], French CJ, Gummow, Heydon, Crennan AND Bell JJ. The High Court referred to *March v Stramare* (1999) 71 CLR 506. [↑](#footnote-ref-82)
83. Judiciary Act 1903 (Cth), s 39(2). [↑](#footnote-ref-83)
84. Judiciary Act 1903 (Cth), s 79. [↑](#footnote-ref-84)
85. *ACQ v Cook; Aircair Moree v Cook; Cook v Country Energy; Country Energy v Cook* (2008) 72 NSWLR 318, (*ACQ case*, Court of Appeal), [150]-[157] per Campbell JA. [↑](#footnote-ref-85)
86. Civil Liability Act 2002 (NSW), s11A*.*  [↑](#footnote-ref-86)
87. *ACQ case*, Court of Appeal, [156] per Campbell JA. [↑](#footnote-ref-87)
88. Civil Liability Act 20023 (Qld) Chapter 3; Civil Liability Act 1936 (SA) Part 8; Civil Liability Act 2002 (Tas), Part 7; Wrongs Act 1958 (Vic) Parts VB and VBA; Civil Liability Act 2002 (WA) Part 2; Civil Law (Wrongs) Act (ACT) Part 7; Personal Injuries (Liabilities and Damages) Act 2003 (NT), Part 4. [↑](#footnote-ref-88)
89. Civil Liability Act 2002 (WA), s.6; Civil Liability Act 20023 (Qld), s.50; Wrongs Act 1958 (Vic), s. 28C; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s.4; Civil Law (Wrongs) Act (ACT), s.93. [↑](#footnote-ref-89)
90. Civil Liability Act 1936 (SA), s.51. [↑](#footnote-ref-90)
91. Civil Liability Act 2002 (Tas), s.24. [↑](#footnote-ref-91)
92. *Cook v Aircair Moree Pty Ltd* (2007) 5 DCLR (NSW) 142 per Johnstone DCJ. [↑](#footnote-ref-92)
93. *ACQ case*, Court of Appeal, [158] per Campbell JA (Beazley and Giles JJ agreeing). [↑](#footnote-ref-93)
94. Ibid [174]. [↑](#footnote-ref-94)
95. Ibid, [165]. [↑](#footnote-ref-95)
96. Ibid, [164]. [↑](#footnote-ref-96)
97. Ibid, [167]. [↑](#footnote-ref-97)
98. Aviation Legislation Amendment (Liability and Insurance) Act 2012 (Cth) which inserted s11A into Damage by Aircraft Act 1999(Cth). [↑](#footnote-ref-98)
99. Civil Liability Act 1936 (SA), s 61. [↑](#footnote-ref-99)
100. Wrongs Act 1958 (Vic), s 31(1); Competition and Efficiency Commission, Inquiry into Aspects of the Wrongs Act1958, Final Report, *Adjusting the Balance: Inquiry into Aspects of the Wrongs Act 1958,* 26 February 2014. <http://www.vcec.vic.gov.au/Inquiries/Completed-inquiries/Wrongs-Act/Final-report> [↑](#footnote-ref-100)
101. Damage by Aircraft Act 1964 (WA), s 5(1) [↑](#footnote-ref-101)
102. Damage by Aircraft Act 1963(Tas), s 4(1) [↑](#footnote-ref-102)
103. Amended by Aviation Legislation Amendment (Liability and Insurance) Act 2012 (Cth), schedule 1 [↑](#footnote-ref-103)
104. Civil Liability Act 1936 (SA) s 61; In Victoria, it has been recommended that the damage by aircraft legislation (*Wrongs Act* 1958, s 31) in that State be amended to exclude claims for pure mental harm but no amendment has yet been enacted: Competition and Efficiency Commission of Victoria, *Final Report - Adjusting the Balance: Inquiry into Aspects of the Wrongs Act 1958*, 26 Feb 2014. [↑](#footnote-ref-104)
105. *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269. [↑](#footnote-ref-105)
106. Parliament of the Commonwealth of Australia, House of Representatives: <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4856_ems_b4b5f024-2bd9-4a62-912f-d6e256297979/upload_pdf/371907.pdf;fileType=application%2Fpdf> [↑](#footnote-ref-106)
107. Civil Liability Act 2002 (NSW), Pt 3; Civil Liability Act 2002 (Tas) Pt 8; Civil Liability Act 1936 (SA), s 33; Wrongs Act 1958 (Vic), Pt XI; Civil Liability Act 2002 (WA), s 5S; Civil Law (Wrongs) Act 2002 (ACT), Pt 3.2. [↑](#footnote-ref-107)
108. Civil Law (Wrongs) Act 2002 (ACT), s.5; Civil Liability Act 2002 (NSW), s.55-58; Personal Injuries (Liability and Damages) Act 2003 (NT), s.8; Civil Liability Act 2003 (Qld), s.25-27; Civil Liability Act 1936 (SA), s 74; Civil Liability Act 2002 (Tas) s.35A-35C; Wrongs Act 1958 (Vic), s.31A-31D; Civil Liability Act 2002 (WA), s 5AB-5AE. [↑](#footnote-ref-108)
109. Civil Law (Wrongs) Act 2002 (ACT), s.6-11; Civil Liability Act 2002 (NSW), s.59-66; Personal Injuries (Liability and Damages) Act 2003 (NT), s.7; Civil Liability Act 2003 (Qld), s.38-44;Volunteers Protection Act 2001 (SA), s 74; Civil Liability Act 2002 (Tas) s.44-49; Wrongs Act 1958 (Vic), s.34-42; Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA). [↑](#footnote-ref-109)
110. Civil Liability Act 2002 (NSW), s 47. [↑](#footnote-ref-110)
111. Civil Law (Wrongs) Act 2002 (ACT), s.93, s.95. [↑](#footnote-ref-111)
112. Civil Liability Act 2002 (WA), s 5L; Personal Injuries (Liability and Damages) Act 2003 (NT), s.14-17; Civil Liability Act 1936 (SA), s46-48; Civil Liability Act 2002 (Tas) s.5; Civil Liability Act 2002 (WA), s 5L. In Queensland and Victoria the provision applies only in the case of a breach of duty: Civil Liability Act 2003 (Qld), s.47-49; Wrongs Act 1956 (Vic), s.14G. [↑](#footnote-ref-112)
113. Civil Liability Act 2002 (NSW), s.73; Damage by Aircraft Act 1963(Tas), s 4(1); Wrongs Act 1958 (Vic), s 31(1); Damage by Aircraft Act 1964 (WA), s 5(1); Damage by Aircraft Act 1963(Tas), s 4(1). [↑](#footnote-ref-113)
114. Civil Law (Wrongs) Act 2002 (ACT), s .93, s.94; Civil Liability Act 2002 (NSW), s .51, s.54; Personal Injuries (Liabilities and Damages) Act 2003 (NT),s. 10; Civil Liability Act 1936 (SA), s 43; Civil Liability Act 2002 (Tas), s.5A, s. 6. [↑](#footnote-ref-114)
115. Commonwealth of Australia Constitution Act, s.109; *Halsbury's Laws of Australia,* LexisNexis, [90-1980]-[90-2040]. The Damage by Aircraft Act, 1999 (Cth), s 9 clearly indicates that the Act it is not intended to ‘cover the field’ completely with respect to liability for damage by aircraft so that state legislation would apply where the constitutional reach of the Commonwealth Act is exhausted. But where the Commonwealth Act applies because the particular instance is within the constitutional power (for example where an RPA is being used by a trading corporation) but is excluded by operation of the Act (because of recreational use), then state legislation may not be applicable on constitutional grounds. [↑](#footnote-ref-115)
116. Damage by Aircraft Act 1999 (Cth), s 10(1)(A); Civil Liability Act 1936 (SA) s 61. [↑](#footnote-ref-116)
117. Damage by Aircraft Act 1999 (Cth), s 11(A);Civil Liability Act 2002 (NSW), s73; Damage by Aircraft Act 1963 (Tas), s4 (1); Damage by Aircraft Act 1964 (WA), s5 (1); Wrongs Act 1956 (Vic), s31 (1). [↑](#footnote-ref-117)
118. Civil Liability Act 1936 (SA), s 61 (c). [↑](#footnote-ref-118)
119. *Chapman v Hearse* (1961) 106 CLR 112. [↑](#footnote-ref-119)
120. *ACQ Case,* Court of AppealCampbell JA, Beazley & Giles JJA agreeing, [99]. The duty of care issue was not relevant in the High Court appeal. [↑](#footnote-ref-120)
121. Ibid, [101]. [↑](#footnote-ref-121)
122. *Chapman v Hearse* (1961) 106 CLR 112, 125, Dixon CJ, Kitto, Taylor and Windeyer JJ. [↑](#footnote-ref-122)
123. *Sullivan v Moody (*2001) 207 CLR 562. [↑](#footnote-ref-123)
124. *Perre v Apand* (1999) 198 CLR 180; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540. [↑](#footnote-ref-124)
125. Civil Liability Act 2002 (NSW), s 5B; Civil Liability Act 2003 (Qld), s 9; Civil Liability Act 1936 (SA), s 32; Civil Liability Act 2002 (Tas), s 11; Wrongs Act 1958 (Vic), s 48; Civil Liability Act 2002 (WA), s 5B; Civil Law (Wrongs) Act 2002 (ACT), s 43. [↑](#footnote-ref-125)
126. *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48, Mason J. [↑](#footnote-ref-126)
127. Civil Liability Act 2002 (NSW), s 5B; Civil Liability Act 2003 (Qld), s 9; Civil Liability Act 1936 (SA), s 32; Civil Liability Act 2002 (Tas), s 11; Wrongs Act 1958 (Vic), s 48; Civil Liability Act 2002 (WA), s 5B; Civil Law (Wrongs) Act 2002 (ACT), s 43. [↑](#footnote-ref-127)
128. *O’Connor v SP Bray Ltd* (1937) 56 CLR 464 at 477 per Dixon J. [↑](#footnote-ref-128)
129. *Sibley v Kais* (1967) 118 CLR 424 at 427*; Abela v Giew* (1965) 65 SR (NSW) 485 at 489; *Tucker v McCann* [1948] VLR 222 at 225 per Herring CJ; *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449, [90], McColl JA. [↑](#footnote-ref-129)
130. Civil Aviation Safety Regulations 1998 (Cth), Reg 101.250 (for very small, small and medium RPA); Reg. 101.395 (for model aircraft). [↑](#footnote-ref-130)
131. Civil Aviation Safety Regulations 1998 (Cth), Regs 101.245 and 101.395 (for model aircraft). [↑](#footnote-ref-131)
132. *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, [41]-[45], French CJ, Gummow, Hayne, Heydon and Crennan JJ, referring to Civil Liability Act 2002 (NSW), s 5D. The two-stage process is relevant at common law also: *Pledge v RTA* (2004) 205 ALR 56, [10], Hayne J. [↑](#footnote-ref-132)
133. Civil Liability Act 2002 (NSW), s 5D; Civil Liability Act 2003 (Qld), s 11; Civil Liability Act 1936 (SA), s 34; Civil Liability Act 2002 (Tas), s 13; Wrongs Act 1958 (Vic), s 51; Civil Liability Act 2002 (WA), s 5C; Civil Law (Wrongs) Act 2002 (ACT), s 45. The Northern Territory has not enacted any statutory provision concerning causation. [↑](#footnote-ref-133)
134. The High Court held in *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 that s 5D(1) Civil Liability Act 2002(NSW) is a statutory equivalent of the common law ‘but for’ test: at [45] French CJ, Gummow, Hayne, Heydon and Crennan JJ. [↑](#footnote-ref-134)
135. The scope of liability provision in s 5D(1)(b) and s 5D(4) Civil Liability Act 2002 (NSW) was held to be “entirely normative” by the High Court in *Wallace v Kam* [2013] HCA 19, [14], French CJ, Crennan, Kiefel, Gageler And Keane JJ. [↑](#footnote-ref-135)
136. *Wallace v Kam* (2013) 250 CLR 375. [↑](#footnote-ref-136)
137. *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 518 Mason CJ; *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522, 529, per Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ. [↑](#footnote-ref-137)
138. *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627. [↑](#footnote-ref-138)
139. Damage by Aircraft Act 1999 (Cth), s11(2); Air Navigation Act 1937 (Qld) Pt 3; Civil Liability Act 1936 (SA), s 61; Civil Liability Act 2002 (NSW), s73; Damage by Aircraft Act 1963 (Tas), s 4; Wrongs Act 1958 (VIC), s 31; Damage by Aircraft Act 1964 (WA), s 5. [↑](#footnote-ref-139)
140. *Hollis v Vabu* (2001) 207 CLR 21; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *NSW v Lepore* (2003) 212 CLR 511; *Deatons v Flew* (1949) 79 CLR 370*.* [↑](#footnote-ref-140)
141. *Scott v Davis* (2000) 204 CLR 333; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161. [↑](#footnote-ref-141)
142. For discussion generally see R A Buckley, ‘Liability in Tort for Breach of Statutory Duty’ (1984) 100 *Law Quarterly Review* 204. [↑](#footnote-ref-142)
143. P. D. Finn, ‘A Road Not Taken: The Boyce Plaintiff and Lord Cairns’ Act’ (1983) 57 *Australian Law Journal* 493; J L R Davis, ‘Farewell to the Action for Breach of Statutory Duty?’ in Nicholas J Mullany and Allen M Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* LBC Information Services, 1998. The tort has been abolished in Canada: *R v Saskatchewan Wheat Pool* [1983] 1 SCR 205. The UK Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 5 recommended its abolition. For argument in favour of the tort see Neil Foster, “The Merits of the Civil Action for Breach of Statutory Duty” (2011) 33 *Sydney Law Review* 67. [↑](#footnote-ref-143)
144. *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [130] per Crennan and Kiefel JJ [↑](#footnote-ref-144)
145. See Civil Aviation Safety Regulations 1988 (Cth), Part 101 Unmanned Aircraft and Rockets, Regulations 101.055; 101.065; 101.070; 101.075; 101.085; 101.090; 101.095; 101.245; 101.250; 101.255; 101.270; 101.275; 101.280; 101.285; 101.385; 101.390; 101.395; 101.400; 101.405; [↑](#footnote-ref-145)
146. Civil Aviation Safety Regulations 1988 (Cth), Part 101, Reg. 101.055 [↑](#footnote-ref-146)
147. (1995) 185 CLR 410 at [16] per Brennan CJ, Dawson & Toohey JJ, citing *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 404-405. [↑](#footnote-ref-147)
148. *O’Connor v Bray* (1937) 56 CLR 464 at 478 per Dixon J; *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218, 231, Mason J. [↑](#footnote-ref-148)
149. *O’Connor v S & P Bray Ltd* (1937) 56 CLR 464, 478, Dixon J. [↑](#footnote-ref-149)
150. Civil Aviation Safety Regulations 1988 (Cth), 101.055 [↑](#footnote-ref-150)
151. *Read v Croydon Corp* [1938] 4 All ER 631, 652; *Morrison Sports Ltd v Scottish Power* [2010] UKSC 37 [39]-[40]. [↑](#footnote-ref-151)
152. Foster N. J. “The Tort of Breach of Statutory Duty” Chapter 18 in Sappideen & Vines (Eds), *Fleming’s The Law of Torts,* 10th Edn, 2011, Thomson Reuters, Sydney. [↑](#footnote-ref-152)
153. *O’Connor v S & P Bray Ltd* (1937) 56 CLR 464, 486–487, Evatt and McTiernan JJ. [↑](#footnote-ref-153)
154. *Abela v Giew* (1965) 65 SR (NSW) 485; *Tucker v McCann* [1948] VLR 222. [↑](#footnote-ref-154)
155. *Tucker v McCann* [1948] VLR 222, 225, Herring CJ. [↑](#footnote-ref-155)
156. [2010] FCA 994 (10 September 2010) Gilmour J, [20]–[31]. [↑](#footnote-ref-156)
157. (1937) 56 CLR 464. [↑](#footnote-ref-157)
158. *O’Connor v S & P Bray Ltd* (1937) 56 CLR 464, 486–487, Evatt and McTiernan JJ. [↑](#footnote-ref-158)
159. Civil Liability Act 2002 (NSW), Part 2 Personal Injury Damages. In other states and territories: Civil Liability Act 20023 (Qld) Chapter 3; Civil Liability Act 1936 (SA) Part 8; Civil Liability Act 2002 (Tas), Part 7; Wrongs Act 1958 (Vic) Parts VB and VBA; Civil Liability Act 2002 (WA) Part 2; Civil Law (Wrongs) Act (ACT) Part 7; Personal Injuries (Liabilities and Damages) Act 2003 (NT), Part 4.

     Other parts of the NSW Act that would apply are: Part 5, Liability of Public and other authorities; Part 6, Intoxication; Part 7, Self Defence and recovery by Criminals; Part 8, Good Samaritans; Part 9, Volunteers; Part 10 Apologies. [↑](#footnote-ref-159)
160. *Secretary, Department of Health and community Services v JWB (Marion’s case)* (1992) 175 CLR 218. [↑](#footnote-ref-160)
161. *Cole v Turner*  (1704) 6 Mod 149; 87 ER 907. [↑](#footnote-ref-161)
162. *James v Campbell* [1832] Eng R 527; (1832) 172 ER 1015; *Ball v Axtens* [1866] Eng R 2; [1866] 176 ER 890. See discussion in Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* 4th ed, 2007, Oxford University Press, 41-431. [↑](#footnote-ref-162)
163. *Williams v Milotin* (1957) 97 CLR 465; *McHale v Watson* (1964) 111 CLR 384*; New South Wales v Knight* [2002] NSWCA 392. [↑](#footnote-ref-163)
164. *Letang v Cooper* [1965] 1 QB 232, 238-40, Denning LJ. [↑](#footnote-ref-164)
165. Dicta suggests some judicial disapproval of a negligent trespass action: *Hackshaw v Shaw* (1984) 56 ALR 417, 420, Gibbs, CJ; *Platt v Nutt* (1988) 12 NSWLR 231, 244-6, Kirby J. [↑](#footnote-ref-165)
166. P. Handford, “Intentional Negligence: A contradiction in Terms” (2010) 32 *Sydney Law Review* 29; 9.Heffey, P G and Glasbeek, H J, "Trespass: High Court versus Court of Appeal” (1966) 5(2) *Melbourne University Law Review* 158. [↑](#footnote-ref-166)
167. *Scott v Shepherd* (1773) 2 Wm Bl 892; 96 ER 525; *Leame v Bray; Reynolds v Clarke;* Ounapuu, Albert "Abolition or Reform: The Future for Directness as a Requirement of Trespass in Australia " (2008) 34(1) *Monash University Law Review* 103.For the difficult distinctions between direct and consequential contact see, *Hutchins v Maughan* [1947] VLR 131; *Reynolds v Clarke* (1726) 1 Str 634; *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182, 195-6 Denning LJ. [↑](#footnote-ref-167)
168. *McHale v Watson* (1964) 111 CLR 384,[9], Windeyer J [↑](#footnote-ref-168)
169. *McHale v Watson* (1964) 111 CLR 384,[9], Windeyer J. In England the plaintiff bears the burden of proof as to the defendant’s fault: *Fowler v Lanning* [1959] 1 QB 426; *Letang v Cooper* [1965] 1 QB 232 [↑](#footnote-ref-169)
170. Civil Liability Act 2002 (NSW), s.3B ; Civil Liability Act 2002 (Tas),s.3B; Wrongs Act 1958 (Vic), s.28C; Civil Liability Act 2002 (WA), s 3A; Civil Liability Act 2003 (Qld) does not exclude deliberate acts; Civil Liability Act 1936 (SA) does not exclude deliberate acts; Civil Law (Wrongs) Act (ACT) does not exclude deliberate acts; Personal Injuries (Liabilities and Damages) Act 2003 (NT) does not exclude deliberate acts. [↑](#footnote-ref-170)
171. Civil Aviation Rules (NZ), Rule 101.207 (a) (1) (ii). [↑](#footnote-ref-171)
172. Civil Liability Act 2002 (NSW), s 72; Civil Liability Act 1936 (SA) s 62; Damage by Aircraft Act 1963 (Tas), s3; Wrongs Act 1958 (Vic), s 30; Damage by Aircraft Act 1964 (WA), s.4. [↑](#footnote-ref-172)
173. [1978] QB 479, 488-9. There is Australian authority in *Davies v Bennison* (1927) 22 Tas LR 52. A bullet was fired over the plaintiff’s land. Nicholls CJ held “So far as the ability to use land and the air above it, exists mechanically speaking,… any intrusion above land … is in principle a trespass” at p. 57. His Honour recognised that there would be difficulty in deciding “how far the rights of a landowner “ad coelom” will have to be reduced to permit the free use of beneficial inventions such as flying machines etc.” p.56. [↑](#footnote-ref-173)
174. Griffiths J held that there was no direct authority but relied upon dicta in the following cases: *Pickering v. Rudd (1815) 4 Camp.219; Saunders v. Smith* (1838) 2 Jur. 491; *Commissioner for Railways v. Valuer-General* [1974] A.C. 328; *Sovmots Investments Ltd. v. Secretary of State for the Environment* [1977] Q.B. 411; *Wandsworth Board of Works v. United Telephone Co. Ltd*. (1884) 13 Q.B.D. 904 [↑](#footnote-ref-174)
175. [1978] QB 479, 488. [↑](#footnote-ref-175)
176. *Western Australia v Ward* (2002) 213 CLR 1 [638], Callinan J. [↑](#footnote-ref-176)
177. *ACQ Case, Court of Appeal,* [131]. See cases applying *Skyviews* though not in the context of trespass by aircraft*:* *LJP Investments Pty Ltd v Howard Chia Investments (No 2)* (1989) 24 NSWLR 490; *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464. [↑](#footnote-ref-177)
178. [1978] QB 479, 488. [↑](#footnote-ref-178)
179. The US Supreme Court decided its own *Bernstein* case, in *United States v Causby* 328 U.S. 256, 264 (1946), 260-6. Douglas J held the ‘ad coelum’ doctrine did not apply “in the modern world” but a landowner’s rights extended to “at least as much of the space above the ground as he can occupy or use in connection with the land.”; Troy A. Rule, “Airspace in an Age of Drones” (2015) 95 *Boston University Law Review* 155. [↑](#footnote-ref-179)
180. *Smith v Stone* (1647) Style 65; 82 ER 533 [↑](#footnote-ref-180)
181. *Esso Petroleum Co Limited v Southport Corporation* [1956] AC 218. [↑](#footnote-ref-181)
182. *League Against cruel Sports v Scott* [1986] 1 QB 240. [↑](#footnote-ref-182)
183. *McHale v Watson* (1964) 111 CLR 384; *Williams v Milotin* (1957) 97 CLR 465. [↑](#footnote-ref-183)
184. A plaintiff must have a legal right to occupy the land in order to have title to sue: *Malone v Laskey* [1907] 2 KB 141; *Oldham v Lawson (No 1)* [1976] VR 654; *Hunter v Canary Wharf Ltd* [1997] AC 655; *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWSC 1312. [↑](#footnote-ref-184)
185. *Sturges v Bridgman* (1879) 11 Ch D 582. [↑](#footnote-ref-185)
186. *Andreas v Selfridge & Co Ltd* [1938] Ch 1. [↑](#footnote-ref-186)
187. *Seidler v Luna Park Reserve Trust* (unreported NSWSC, Hodgson J, 21 September 1995, BC9505507); *Haddon v Lynch* [1911] VLR 230; *McKenzie v Powley* [1916] SALR 1. [↑](#footnote-ref-187)
188. *Seidler v Luna Park Reserve Trust* (unreported NSWSC, Hodgson J, 21 September 1995, [↑](#footnote-ref-188)
189. *Clarey v The Principal and Council of the Womens College* (1953) 90 CLR 170. [↑](#footnote-ref-189)
190. *Bernstein of Leigh (Baron) v Skyviews & General Ltd (Skyviews)* [1978] QB 479, 489, Griffiths J. It has been held that ‘watching and besetting’ premises will amount to a nuisance: *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51*; Raciti v Hughes* (1995) 7 BPR 14, 83. [↑](#footnote-ref-190)
191. *Kraemers v Attorney-General (Tas)* [1966] Tas S R 113, 122-3 per Bunbury CJ; *Corbett v Pallas* (1995) Aust Torts Reps 81-329 at 62,241; *Harris v Carnegie’s Pty Ltd* [1917] VLR 95; M. Davies & I. Malkin, *Torts* 7th Edn, LexisNexis Butterworths, Australia, 2015, pp717-718. [↑](#footnote-ref-191)
192. M. Davies, “Private Nuisance, Fault and Personal Injuries” (1990) 20 *UWA Law Rev* 129; F. Newark, “The Boundaries of Nuisance” (1949) 65 *LQR* 480; Spencer, “Public Nuisance – A Critical Examination” [1989] *Cam LJ* 55; M. Davies & I. Malkin, *Torts* 7th Edn. LexisNexis Butterworths, Australia, 2015, pp721-723. [↑](#footnote-ref-192)
193. (1969) 122 CLR 249, 318 per Windeyer J. [↑](#footnote-ref-193)
194. *Pelmothe v Phillips* (1899) 20 LR (NSW) 58; *Cohen v City of Perth* [2000] WASC 306; *Wilson v NSW Land and Housing Corp* [1998] ANZ Conv R 623; cf *Clifford v Dove* [2006] NSWSC 314. [↑](#footnote-ref-194)
195. *Kraemers v Attorney-General (Tas)* [1966] Tas S R 113, 122-3 per Bunbury CJ. [↑](#footnote-ref-195)
196. Civil Aviation Safety Regulations 1998 (Cth), reg 101.240 [↑](#footnote-ref-196)
197. Civil Aviation Safety Regulations 1998 (Cth), regs. 47.015; 21.820 and Subpart 45.D of Part 45. [↑](#footnote-ref-197)
198. Civil Aviation legislation Amendment (Part 101) Regulation 2016, amending Civil Aviation Safety Regulations 1988 (Cth) available at: <http://www.austlii.edu.au/au/legis/cth/num_reg/cala101r2016r1n544/> See also Civil Aviation Safety Authority, *Notice of Proposed Rule Making* 1309OS, Annexure B, *Exposure Draft Civil Aviation Legislation Amendment (Part 101) Regulation* 2014 and Annexure C, *Draft Advisory Circular AC 101-1*, May 2014. [↑](#footnote-ref-198)
199. Registration and Marking Requirements for Small Unmanned Aircraft Interim Final Rule 12/16/2015*.* <https://www.federalregister.gov/articles/2015/12/16/2015-31750/registration-and-marking-requirements-for-small-unmanned-aircraft>

     For commentary see, H. Perritt &A. Plawinski, “Making Civilian Drones safe: Performance standards, self-certification and post-sale data collection” (2016) 14(1) *Northwestern Journal of Technology and Intellectual Property* 1. [↑](#footnote-ref-199)
200. Exemptions from requirements can be obtained pursuant to s.333 FAA Modernization and Reform Act 2012. [↑](#footnote-ref-200)
201. Traditional Aircraft Registration under Title 14 Code of Federal Regulations, Part 47. [↑](#footnote-ref-201)
202. House of Lords European Union Committee, 7th Report of Session 2014-15, *Civilian Use of Drones in the EU* (HL Paper 122), The Stationery Office Limited, London, 2015.

     <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/122/122.pdf> [↑](#footnote-ref-202)
203. Civil Aviation Safety Regulations 1998, Part 101. [↑](#footnote-ref-203)
204. Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators. It sets minimum third party liability insurance required based on the mass of the aircraft on take-off. The adequacy of insurance requirements has been considered in the UK: Lloyds, *Drones Take Flight: Key Issues for Insurance, Emerging Risk Report, Innovation Series*, 2015, London. [↑](#footnote-ref-204)