Civil Aviation Safety Authority v Central Aviation Pty Ltd (corrigendum 9 February 2009) [2009] FCA 49 (6 February 2009)

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FEDERAL COURT OF AUSTRALIA

Civil Aviation Safety Authority v Central Aviation Pty Ltd [2009] FCA 49

CORRIGENDUM

CIVIL AVIATION SAFETY AUTHORITY v CENTRAL AVIATION PTY LTD
NSD 1025 of 2008

PERRAM J
6 FEBRUARY 2009 (CORRIGENDUM 9 FEBRUARY 2009)
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1025 of 2008**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY SENIOR MEMBER J KELLY

BETWEEN:	**CIVIL AVIATION SAFETY AUTHORITY** **Applicant**
AND:	**CENTRAL AVIATION PTY LTD** **Respondent**

JUDGE:	**PERRAM J**
DATE OF ORDER:	**6 FEBRUARY 2009**
WHERE MADE:	**SYDNEY**

CORRIGENDUM

1. On page 20 in paragraph 68 delete "under s 43" and insert "under s 44".
2. On page 21 in paragraph 71 delete "Tribuna's" and insert "Tribunal's".

I certify that the preceding two (2) numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment of the Honourable Justice Perram.

Associate:

Dated: 9 February 2009

FEDERAL COURT OF AUSTRALIA

Civil Aviation Safety Authority v Central Aviation Pty Ltd [2009] FCA 49

ADMINISTRATIVE LAW – adequacy of reasons – whether failure of tribunal to provide adequate reasons error of law – whether error of law connotes question of law – appropriate order where failure to provide adequate reasons

Held: application granted – tribunal's reasons were not adequate – reasons set aside

WORDS AND PHRASES – "*question of law*"

Administrative Appeals Tribunal Act 1975 (Cth) ss 43(2), 43(2B), 43AA(3)(b), 44(1)
Federal Court Rules O 53 r 3(2)

Appellant V324 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 259 applied
Australian Telecommunications Corporation v Lambroglou (1990) 12 AAR 515 cited
Birdseye v Australian Securities and Investments Commission (2003) 76 ALD 321 cited
Civil Aviation Safety Authority v Allan [2001] FCA 1064; (2001) 114 FCR 14 referred to
Comcare v Lees [1997] FCA 1415; (1997) 151 ALR 647 discussed
Commissioner for Railways for the State of Queensland v Peters (1991) 24 NSWLR 407 cited
Craig v South Australia [1995] HCA 58; (1995) 184 CLR 163 cited
Dornan v Riordan (1990) 24 FCR 564 questioned
Ergon Energy Corp Ltd v Commissioner of Taxation [2006] FCAFC 125; (2006) 153 FCR 551 cited

Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd [2002] NSWCA 238 cited
Gilkinson v Repatriation Commission [2008] FCA 1441; (2008) 104 ALD 406 referred to
Hughes and Vale Proprietary Limited v State of New South Wales (No 2) [1955] HCA 28; (1955) 93 CLR 127 referred to
Minister for Immigration and Ethnic Affairs v Taveli [1990] FCA 169; (1990) 23 FCR 162 cited
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259 cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 applied
Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1263; (2003) 133 FCR 190 cited
R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Ltd [1949] HCA 33; (1949) 78 CLR 389 cited
Repatriation Commission v Cotton [2006] FCA 1523; (2006) 93 ALD 118 considered
Repatriation Commission v O'Brien [1985] HCA 10; (1985) 155 CLR 422 considered
Stead v State Government Insurance Commission [1986] HCA 54; (1996) 161 CLR 141 applied
Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1069 cited

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NEW SOUTH WALES DISTRICT REGISTRY **NSD 1025 of 2008**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY SENIOR MEMBER J KELLY

BETWEEN:	**CIVIL AVIATION SAFETY AUTHORITY** **Applicant**
AND:	**CENTRAL AVIATION PTY LTD** **Respondent**
JUDGE:	**PERRAM J**
DATE OF ORDER:	**6 FEBRUARY 2009**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The questions be answered as follows:

(a) *The Tribunal complied with its obligations under s 43(2B).*

(b) *Unable to be answered.*

(c) *Unable to be answered.*

(d) *No. The Tribunal did not afford the applicant an opportunity to submit that its proposed conditions did not comply with regulation 30. However, this was not material.*

(e) *Yes. It was open to the Tribunal to impose the conditions in the form that it did. Regulation 30 was not relevant to the exercise of the power under regulation 269(1).*

(f) *No. The reasons of the Tribunal were not adequate.*

(g) *The Tribunal complied with its obligations under s 43(2B).*

2. The Tribunal's statement of reasons dated 19 May 2008 be set aside and that the Tribunal as originally constituted provide reasons in accordance with s 43(2).
3. The parties file and serve submissions as to costs on or before 20 February 2009.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1025 of 2008**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY SENIOR MEMBER J KELLY

BETWEEN:	**CIVIL AVIATION SAFETY AUTHORITY** **Applicant**
AND:	**CENTRAL AVIATION PTY LTD** **Respondent**
JUDGE:	**PERRAM J**
DATE:	**6 FEBRUARY 2009**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1. The Civil Aviation Safety Authority ("the Authority") cancelled the certificate of approval of the respondent, Central Aviation Pty Ltd ("Central"). That certificate permitted it to carry out certain aspects of aircraft maintenance. Central applied to the Administrative Appeals Tribunal ("the Tribunal") for a review of the Authority's decision. The Tribunal found in favour of Central and restored the certificate of approval but imposed various conditions. From that decision of the Tribunal the Authority now appeals to this Court. It contends that the Tribunal made a number of legal errors. In my opinion, the Authority is correct and the appeal must be allowed.

Background

2. The provision of aircraft maintenance in Australia is tightly regulated. Section 20AB of the *Civil Aviation Act 1988* (Cth) ("the Act") makes it an offence for a person to carry out maintenance on an aircraft or any component of any aircraft without being approved so to do under the *Civil*

Aviation Regulations 1988 (Cth) ("the Regulation"). The commission of that offence carries a maximum penalty of two years imprisonment.

3. Regulation 42ZC(4) of the Regulation permits a person to carry out maintenance on a "class B aircraft" if the person holds an "aircraft maintenance engineer licence" and either holds, or works for someone who holds, a "certificate of approval" covering the particular type of maintenance in question. Helpfully, a "class B aircraft" is defined in reg 2(1) to be an aircraft that is not a "class A aircraft". For present purposes, it is useful – although not entirely accurate – to say that a class B aircraft corresponds to the layman's idea of a smaller plane not used for commercial transport purposes.
4. As reg 42ZC(4) contemplates, reg 30 permits the Authority to grant certificates of approval to persons who intend to engage in the maintenance of aircraft. It imposes detailed requirements which must be met by an applicant for such a certificate. Without stating them exhaustively, they include matters such as the adequacy of staff, equipment and systems control and the satisfaction of the Authority as to the ability of the person seeking the certificate to carry out the relevant activities in a proper manner. Whilst the text of reg 30 does not strictly require the holder of a certificate of approval to be an organisation, it is apparent that many of its requirements, particularly those relating to the maintenance of systems and the adequacy of employee training, are more likely to be satisfied by organisations than by individuals. In common with many forms of statutory licence, reg 30(3) permits the endorsement upon a certificate of approval of conditions, non-compliance with which is an offence.
5. Just as reg 30 regulates the grant of a "certificate of approval", so too does reg 31 permit the Authority to grant to a person an "aircraft maintenance engineer licence". Again, the provisions of reg 31 are directed, as might naturally be expected, towards ensuring that the holders of such licences are appropriately qualified. Unlike the holder of a certificate of approval, however, the holder of an aircraft maintenance engineer licence must be a natural person; so much flows from the requirement of reg 31(4) that an applicant for such a licence must have attained the age of 21 years.
6. Central is a corporation and is the holder of a certificate of approval pursuant to reg 30. Its certificate of approval authorises it to carry out certain maintenance activities at Bankstown Airport on class B aircraft and aircraft with a take-off weight below 5,700 kg. At all relevant times, its chief engineer, owner and director was Mr Douglas Fawcett. Mr Fawcett was the holder of an aircraft maintenance engineer licence issued pursuant to reg 31. It permitted him to perform maintenance on airframes and engines.
7. Neither the certificate of approval granted to Central nor the licence granted to Mr Fawcett were necessarily permanent. Both could be cancelled, suspended or varied by the Authority pursuant to reg 269(1) if it became satisfied that the holders suffered from certain deficiencies. The circumstances activating that power were broad but, for present purposes, included relevantly:

Variation, suspension or cancellation of licence, certificate or authority
(1) Subject to this regulation, CASA may, by notice in writing served on the holder of a licence or certificate or an authority, vary, suspend or cancel the licence, certificate or authority where CASA is satisfied that one or more of the following grounds exists, namely:

...

(c) that the holder of the licence, certificate or authority has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft;

(d) that the holder of the licence, certificate or authority is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such a licence or certificate or an authority;

...

8. On 6 July 2007, following much correspondence, the Authority decided to cancel the certificate of approval held by Central on the grounds contained in reg 269(1)(c) and (d). At the same time as it cancelled Central's certificate of approval, the Authority also cancelled Mr Fawcett's licence on what were essentially the same grounds. It was these decisions which elicited applications for review to the Tribunal from Central and Mr Fawcett.

The Tribunal hearing

9. Before the Tribunal the Authority argued that its decision to cancel Central's certificate of approval and Mr Fawcett's licence should be affirmed. It made three claims: first, that Central's operations were inadequate and that audits in 2004 and 2005 disclosed that it lacked a proper system of quality control; secondly, it claimed that Mr Fawcett had failed to detect corrosion in a rudder hinge bracket and bolt on a Partenavia aircraft, VH-IYB, during a 100 hourly inspection carried out in December 2004/January 2005. That corrosion in the plane's rudder hinge bracket and bolt came to the attention of the Authority after the hinge bracket failed on 7 August 2005, an event noticed by its pilot following landing.
10. Thirdly, the Authority pointed to an accident involving a Cirrus aircraft, VH-HYY, which suffered a crash following engine failure in which both the pilot and his passenger were seriously injured. An inquiry by the Australian Transport Safety Bureau found that the accident had occurred because "a steel blanking cap from the engine's fuel supply system was missing". In ordinary parlance this meant as follows. The engine on the plane could be removed for testing. During testing it was necessary to check the engine's internal pressure. The engine had a specially constructed access port by which the pressure could be checked during testing. When restored to the plane this port should have been closed off with a steel "blanking cap". It was not.
11. There was no dispute before the Tribunal that the engine from the Cirrus aircraft had been removed for a "bulk strip" by Hawker Pacific following a propeller strike, and had, upon its return from Hawker Pacific, been put back into the aircraft by Mr Fawcett. Hawker Pacific had placed a red plastic cap on the test port following its bulk strip. Mr Fawcett had not detected the red plastic cap and, consequently, had not replaced it with a steel one.
12. The Tribunal accepted two of the Authority's three arguments. In relation to the serious accident involving the Cirrus aircraft, VH-HYY, it found that Mr Fawcett had failed to detect the absence of the steel blanking cap because he had not conducted the test which he should have conducted. It also found that he had not conducted this test because he assumed that Hawker Pacific would have done so. The Tribunal concluded that this "was a fundamental failure by Mr Fawcett to understand his duties as a LAME [*scil.* licensed aircraft maintenance engineer] which causes me considerable concern." It also found that Mr Fawcett "failed in his duty as a LAME in a fundamental respect and in a manner which had significant and devastating consequences."
13. The Tribunal accepted many of the Authority's criticisms of Central and Mr Fawcett's lack of proper systems of quality control. The Tribunal dealt with that matter in this way:

    > ... It is clear on the evidence that Mr Fawcett is not a good record keeper. He did get his house in order after the 2005 audit and has made an effort to ensure maintenance data is up to date by employer a person. However, he did not employ a person to audit the Company and he has not used Mr George as a consultant since he assisted him with the 2005 audit.
    > As found earlier, Mr Fawcett's experience has been limited, despite the length of time he has been a LAME. Even given the limited amount of maintenance he was undertaking in 2005, his record keeping was not under control. He also seemed to have little understanding of the concept of quality control which is central to holding a Certificate of Approval under CAR 30. This is a matter of concern.

14. These were findings about Mr Fawcett. The Tribunal also found that Mr Fawcett was "in effect" Central. This was consistent with the submission made by the Authority that Central's certificate

of approval should be cancelled because of Mr Fawcett's failures.

15. Having accepted those two aspects of the Authority's case it rejected its other complaint in relation to the alleged failure by Mr Fawcett to detect the corrosion in a rudder hinge bracket and bolt on the Partenavia aircraft VH-IYB. In Mr Fawcett's favour the Tribunal found that the state of the rudder hinge and bolt was not such as to require replacement.
16. In response to the Authority's case against them, Mr Fawcett and Central sought to make good two points which were both accepted by the Tribunal. First, the Tribunal accepted that Mr Fawcett was an honest man. Secondly, it accepted that the cancellation of Central's certificate of approval would cause Mr Fawcett financial hardship because his only earnings came from the business carried out by Central.

The Tribunal's reasoning process

17. The Authority's case with respect to the Cirrus aircraft was that Mr Fawcett and Central had failed in their duties "with respect to a matter affecting" the safe operation of an aircraft. If that were established it would satisfy reg 269(1)(c) and the discretionary power to vary, suspend or cancel Central's certificate of approval and Mr Fawcett's licence would be enlivened.
18. The Tribunal accepted the Authority's contentions in the following terms:
    126. I conclude that Mr Fawcett and the Company failed in the duty imposed upon each of them with respect to a matter affecting the safe operation of an aircraft, that is the Cirrus aircraft (CAR 269(c)).
19. However, the Authority had also contended that neither Mr Fawcett nor Central were fit and proper persons to hold a certificate of approval or licence so that the discretionary power to vary, suspend or cancel them also arose by reason of reg 269(1)(d). The Tribunal dealt with that argument as follows:
    127. I do not consider that Mr Fawcett or the Company is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of a licence and a certificate of approval respectively (CAR 269(d)). In coming to that conclusion I have had regard to the authorities relied on by both parties, including *Re Snook and Civil Aviation Safety Authority* [2003] AATA 285, *Re Brazier and Civil Aviation Safety Authority* [2004] AATA 31 and *Re Richards Aviation Services v Civil Aviation Safety Authority* (AAT, 26 November 1996).
20. The Tribunal had, therefore, found that its power under reg 269(1) was enlivened because it was satisfied of the matter in reg 269(1)(c) as a result of the Cirrus accident. In terms of the powers of the Tribunal, it did not matter that the Tribunal was not satisfied that Mr Fawcett and Central were not fit and proper persons within the meaning of reg 269(1)(d). That being so the Tribunal was permitted to exercise the discretionary power conferred by reg 269(1). Its treatment of how it was to exercise that power was as follows:
    128. In my view, the appropriate decision is to set aside the reviewable decisions and vary both the licence and the Certificate of Approval. I consider that they are appropriate to satisfy the paramount consideration of safety of aviation. The power to vary takes its content from the powers conferred on CASA to grant a Certificate of Approval and a licence (CAR 30 and 31).
    129. I propose to impose three conditions on the Certificate of Approval pursuant to CAR 30(3). The first is that the Company is to employ a suitably qualified LAME, other than Mr Fawcett, and who is acceptable to CASA, to be responsible on a full-time basis for the supervision and certification of all maintenance activities undertaken at Central Aviation. As this is a term of the existing stay, there should be no difficulty in this condition taking immediate effect. The second condition, is that the Company is to employ an appropriately qualified person acceptable to CASA to undertake audits of the Company's system of quality control at six monthly intervals until such time as CASA determines that such audits are not necessary. The third condition is that the Company employ a technical records clerk to maintain the maintenance data necessary for the Company's operations.
    130. Pursuant to CAR 31(3), I propose to impose as a condition of the AME licence N11156 a requirement that Mr Fawcett undergo and satisfy a theoretical and practical examination

to test his competency to hold an AME licence within six months of the date of this decision.

131. I grant the parties a period of 14 days in which to provide agreed terms of the decision I have indicated.

21. Those reasons contemplated further action by the parties. The matter came back before the Tribunal for the making of orders on 10 June 2008. At that time it transpired that Mr Fawcett's licence had already expired on 30 November 2007. Since the licence was no longer extant it was neither coherent nor useful to impose conditions upon it. In that circumstance, the Tribunal set aside both of the original decisions to cancel Central's certificate of approval and Mr Fawcett's licence. However, it imposed a series of conditions on Central's licence. These conditions were agreed by the parties. They were set out by the Tribunal as follows:

1. Central Aviation must employment on a full-time basis a licensed aircraft maintenance engineer (the LAME) acceptable to CASA;
2. The LAME must supervise all maintenance activities and conduct all certifications for maintenance as required by and in accordance with Schedule 6 to the CAR;
3. The LAME may organise another appropriately qualified and licensed engineer (other than the first applicant) who is listed in the Register of Appointed Persons in Central Aviation's Procedures Manual to supervise and certify all maintenance carried out by Central Aviation during any periods when the LAME Is absent due to sickness, leave or personal commitments;
4. Central Aviation must employ an appropriately qualified, independent auditor (the Auditor) acceptable to CASA;
5. The Auditor must conduct comprehensive quality and safety systems audits on a 6 monthly schedule and provide a report to Central Aviation within two weeks of the completion of each audit;
6. Central Aviation must cause a copy of each audit report to be provided to CASA (Sydney Region Office) concurrently with the provision of the report to Central Aviation; and
7. Central Aviation must employ a technical records clerk to maintain the maintenance data necessary for all operation.

The appeal to this Court

22. CASA's right of appeal to this Court is conferred by s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act"). Section 44(1) of that Act provides:

A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

23. A number of decisions of this Court have established the ambit and purpose of the expression "question of law". For present purposes three are pertinent. First, O 53 r 3(2) of the *Federal Court Rules* discloses an intention that a question of law raised on appeal from the Tribunal should be stated with precision as a pure question of law: see *Birdseye v Australian Securities and Investments Commission* (2003) 76 ALD 321 at 325 [18] per Branson and Stone JJ. Secondly, a question which is inelegantly drafted may nonetheless be a question of law if its purport is tolerably clear having regard to the context in which it appears: see *Ergon Energy Corp Ltd v Commissioner of Taxation* [2006] FCAFC 125; (2006) 153 FCR 551 at 565 [51] per Sundberg and Kenny JJ. Thirdly, if a question properly analysed is not a question of law within the meaning of s 44, no amount of formulary such as "erred in law" or "was open as a matter of law" can make it into a question of law: *Australian Telecommunications Corporation v Lambroglou* (1990) 12 AAR 515 at 527 per Ryan J.
24. By way of an amended notice of appeal the applicant posed seven questions of law for consideration by the Court. Those questions were as follows:

(a) whether the Tribunal made all necessary findings of fact to support its conclusion that the grounds for cancellation of the respondent's CoA relied upon by the applicant for the purposes of CAR 269(1)(d) had not been made out;
(b) whether in purporting to consider whether the respondent was not a fit and proper person to be the holder of a CoA for the purposes of CAR 269(1)(d) the Tribunal asked itself the wrong question or applied the wrong test;
(c) whether in considering that the cancellation of the respondent's CoA would cause financial hardship to the Managing Director of the respondent, the Tribunal took into account an irrelevant consideration with determinative effect or otherwise failed to regard the safety of air navigation as the most important consideration contrary to s 9A(1) of the *Civil Aviation Act 1988* ("the CA Act");
(d) whether the Tribunal provided the applicant with an opportunity (or adequate opportunity) to address the Tribunal on the conditions that it intended to impose on the respondent's CoA and whether those conditions would conform to the requirements of the CA Act and CAR 30;
(e) whether, in substituting another decision for the applicant's decision, it was open to the Tribunal to impose the conditions in the form that it did in purporting to vary the respondent's CoA and, by doing so, misconstrued CAR 30 or, alternatively, misidentified (or misunderstood) the regulatory purpose required to be served by CAR 30;
(f) whether the Tribunal failed to give reasons (or sufficient and adequate reasons) for its decision in breach of s.43 (2) of the Administrative Appeals Tribunal Act 1975 ("the AAT Act"); and
(g) further or alternatively, whether the Tribunal failed to include in its reasons findings (or sufficient and adequate findings) on material questions of fact or otherwise failed to refer to the evidence or other material on which such findings were based in breach of s.43(2B) of the AAT Act.

25. It is convenient to deal with those questions in a slightly different order to that in which they have been posed and in groups. The first group relate to the adequacy of the Tribunal's reasoning process.

First issue: adequacy of reasons

26. It is appropriate, I think, to treat together questions of law (a), (f) and (g) which in various ways relate to the adequacy of the Tribunal's reasons.
27. Section 43 of the AAT Act imposes upon the Tribunal in the exercise of its review power an obligation to provide reasons. This is achieved by s 43(2) which provides:

    Subject to this section and to sections 35 and 36D, the Tribunal shall give reasons either orally or in writing for its decision.

28. Section 43(2B) provides:

    Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

29. The Authority's arguments as to the inadequacy of the Tribunal's reasons were based on these provisions. So far as the argument was based on s 43(2B) it must be rejected. The Full Court of this Court has held that that provision requires the Tribunal to do no more that to state the findings which it has actually made. It does not require the Tribunal to make the findings which it ought to have made: *Appellant V324 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 259 at [8] per Hill and Allsop JJ; see also *Repatriation Commission v Cotton* [2006] FCA 1523; (2006) 93 ALD 118 at 128 [42] per Rares J; *Gilkinson v Repatriation Commission* [2008] FCA 1441; (2008) 104 ALD 406 at 410 [14] per Rares J.

That conclusion is inevitable in light of the High Court's decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 331-332 [10] per Gleeson CJ, 349 [77] per McHugh, Gummow and Hayne JJ where it was held that s 430 of the *Migration Act 1958* (Cth) – which is not materially different to s 43(2B) – operated in that manner.

30. The issues which arise from s 43(2) are more subtle. There is no doubt it requires the Tribunal to provide reasons which are adequate. There is also little question but that the question of adequacy, in the present circumstances, directs attention at least to the efficacy of the appeal process contemplated by s 44. The reasons must be at least sufficient in quality to permit that appeal process to be efficacious. However, the appeal process under s 44 is subject to the constraint that there be present a "question of law". Debate exists as to whether a failure to provide reasons is an *error* of law. There is an obiter dictum of Brennan J in *Repatriation Commission v O'Brien* [1985] HCA 10; (1985) 155 CLR 422 at 445-446 which suggests that a failure by the Tribunal to provide adequate reasons does not result in the invalidity of its decision and that the proper remedy is a mandatory order that reasons be provided. That view has not prevailed in this Court where it has instead been held that a failure to provide adequate reasons is an error of law: *Dornan v Riordan* (1990) 24 FCR 564 at 573 per Sweeney, Davies and Burchett JJ. The contrary view is set forth in *Comcare v Lees* [1997] FCA 1415; (1997) 151 ALR 647 at 658-659 by Finkelstein J. The existence of the debate about the correctness of *Dornan* has been noted on a number of occasions by Full Courts of this Court, but none have thought it necessary to resolve it.
31. Without expressing a concluded view on the matter there is much to be said, with respect, for the views of Finkelstein J. To his Honour's observations about the difficulties in accepting that deficient reasons constitute an error of law I would add two further observations. First, the reasons which attend an administrative decision are conceptually distinct from that decision and it is the decision, and not the reasons which accompany it, which is the subject of judicial review or, as here, appeal under s 44. The reasons have no legal consequences in themselves. Rather, they provide material from which arguments about the correctness of a decision may be crafted. Their legal relevance is, therefore, derivative from the decision to which they are appurtenant. That derivative quality is illustrated by the circumstances in which they are admissible.
32. Strictly speaking, a statement by a decision-maker as to its reasons for decision would ordinarily be hearsay and inadmissible. However, it is generally accepted that so long as the reasons are reasonably contemporaneous with an administrative decision they are admissible as part of the res gestae: *Minister for Immigration and Ethnic Affairs v Taveli* [1990] FCA 169; (1990) 23 FCR 162 at 168 per Davies J, 187 per Hill J. *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1069 at [62]- [63] per Hely J; *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1263; (2003) 133 FCR 190 at 205-206 [50]- [52] per French J. The last two mentioned decisions use the language of the res gestae rule, however, it may be that they should be understood as being illustrations of s 72 of the *Evidence Act 1995* (Cth) which appears to be its statutory embodiment.
33. Secondly, once that derivative nature is understood it must follow that the legal requirements attending the production of reasons need have no necessary connexion with the legal requirements attending the decision. A decision accompanied by perfectly adequate reasons may be riddled with legal errors just as a decision which is accompanied by inadequate reasons may be legally impeccable. The fallacy in the view that the provision of inadequate reasons is an error of law in the decision springs from the conflation of rules concerned with the making of the decision itself with rules concerned with the provision of reasons, a conflation which is, in my opinion, wholly without warrant. This is not to say that *questions* of law do not arise from the operation of rules about the provision of reasons. It is only to say that such questions arise dehors the decision and cannot be errors in the decision itself.
34. However, as I have said, the question of whether the Tribunal's reasons are adequate is a "question of law". More formally, the question is whether the Tribunal has complied with its statutory duty under s 43(2) of the AAT Act. That is, without any doubt, a question of law even

if a failure to provide adequate reasons might not involve an error of law in the decision of the Tribunal. Thus the question of the correctness of *Dornan* does not arise for consideration in the context of an appeal under s 44 where what is required is not the identification of an error of law by the Tribunal but rather the existence of a question of law for the consideration of the Court. Of course, any appeal on such a question of law is necessarily delimited by the requirement that there exist a matter in respect of which this Court might exercise its jurisdiction.

35. To the extent that *Lees* assumes that there is no question of law where there is no error of law I respectfully differ. Every error of law corresponds with a question of law but the converse is not true. Questions of law concerning the processes of the Tribunal rather than its actual decision are likely to give rise to questions of law which do not correspond with any error of law in the decision of the Tribunal. The provision of inadequate reasons is one illustration; a departure from a statutorily mandated procedure during the course of a hearing may be another.
36. There is a textual argument available against this view. Section 44 uses the expression "question of law" when conferring jurisdiction on this Court to hear an appeal. The same expression is used in s 45 which permits, in certain circumscribed circumstances, the referral by the Tribunal to this Court of a "question of law". It may be that the expressions should bear the same meaning; if so, there may be difficulties in contemplating the Tribunal referring the adequacy of its own reasons to the Court. However, the answer to that is either that "question of law" in s 45 does not so extend or, alternatively, that it does and that the Tribunal could refer the adequacy of its own reasons to this Court.
37. For those reasons, I would prefer to regard the adequacy of reasons as reviewable under s 44 of the Act not because *Dornan* binds me to such a conclusion but rather because the adequacy of reasons is a question of law within the meaning of s 44.
38. The Authority's challenge to the adequacy of the reasons provided by the Tribunal turns upon the content of paragraph 127 of the Tribunal's reasons which is set out at [19] above. In essence the complaint is that there is no explanation by the Tribunal of how it decided that Mr Fawcett and Central were fit and proper persons – the paragraph merely states a conclusion. This syllogistic infelicity was supported, so the Authority argued, by noting the gulf between the Tribunal's factual findings – unremittingly negative at least where competence was concerned – and its conclusions on whether Central and Mr Fawcett were fit and proper persons within the meaning of reg 269(d).
39. Thus, on the one hand, the Tribunal had concluded that Mr Fawcett had, in his approach to the installation of the engine of the Cirrus plane exhibited "a fundamental failure to understand his role" (at [109]) and that his explanation proffered for that failure did not "excuse what I consider to be a fundamental failure as a LAME" (at [110]) and that he "seemed to have little understanding of the concept of quality control which is central to holding a Certificate of Approval under CAR 30" (at [123]). The Tribunal described this last matter as being "of concern" (at [123]). On the other hand, it found that Mr Fawcett and Central were fit and proper "to have the responsibilities and exercise and perform the functions and duties of a holder of a licence and a certificate of approval respectively" (at [127]).
40. There is considerable force in this criticism. Having concluded that Mr Fawcett suffered from a fundamental failure to appreciate his role and had little understanding of the concept of quality control it is difficult to discern from the Tribunal's reasoning the route which brought it, from those rather adverse findings, to the conclusion that Mr Fawcett (and Central) were fit and proper persons to have the responsibilities and exercise the functions incumbent upon them. I do not say that such a route might not have been able to be charted between these distant points – only that I cannot discern it in the reasons of the Tribunal.
41. There were two other matters raised by the Tribunal which potentially bear upon this issue. I mention these matters because it is necessary to discern, if it is possible, how the Tribunal connected its findings about Mr Fawcett's failings to its conclusions about fitness and propriety. This is particularly so where the High Court has emphasised the need to avoid over-zealous parsing of the reasons of administrative decision-makers: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey,

McHugh and Gummow JJ.

42. The first is the Tribunal's conclusion that Mr Fawcett was an honest man who would suffer financial hardship if Central's certificate of approval were cancelled. One cannot tell from the Tribunal's reasons where, or even if, these findings were taken into account. It is difficult to see that they had anything to do with the Tribunal's conclusions that Mr Fawcett and Central had failed, within the meaning of reg 269(1)(c), in the duty imposed on them with respect to a matter affecting the safe operation of the Cirrus aircraft. Whatever else might be said about the failure by Mr Fawcett to notice that the steel cap was missing from the engine port, it is difficult to incorporate notions of honesty or financial hardship into that particular field of discourse. On the other hand, it is difficult to see how financial hardship to Mr Fawcett had any relevance to the issue of whether he, or Central, were fit and proper persons: cf. *Hughes and Vale Proprietary Limited v State of New South Wales (No 2)* [1955] HCA 28; (1955) 93 CLR 127 at 156-157 per Dixon CJ, McTiernan and Webb JJ. It is possible that his honesty could be seen as going to fitness and propriety but it is difficult to understand, without more, how honesty might be an answer to a lack of fitness said to be constituted by incompetence.
43. Of course, it may be that those factors were taken into account in deciding how to exercise the discretionary power to vary, suspend or cancel which arose consequent upon the Tribunal's conclusions about reg 269(1)(c). There is nothing to indicate, however, that this is what occurred. Indeed, there is no explanation of how the Tribunal came to the conclusion that it was appropriate to vary the conditions other than that those variations were "appropriate to satisfy the paramount consideration of aviation safety" (at [128]).
44. The second matter to which I should refer is the Tribunal's reference at [127] to having "had regard to the authorities relied on by both parties, including *Re Snook and Civil Aviation Safety Authority* [2003] AATA 285, *Re Brazier and Civil Aviation Safety Authority* [2004] AATA 31 and *Re Richards Aviation Services v Civil Aviation Safety Authority* (AAT, 26 November 1996)." It has been held, in the context of the adequacy of judicial reasons, that setting out two sets of competing submissions and indicating a preference for one over the other is not a sufficient discharge of the judicial obligation to give reasons: *Commissioner for Railways for the State of Queensland v Peters* (1991) 24 NSWLR 407 at 415-417 per Kirby P; *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd* [2002] NSWCA 238 at [66] per Heydon JA, [68] per Hodgson JA, [78] per Ipp AJA.
45. It may be fairly deduced from that principle that setting out the names of the cases relied upon by each party and saying that those authorities have been taken into account would also fail to discharge the judicial obligation to give reasons. That does not foreclose the possibility that so doing might be appropriate for some administrative decision-makers. However, I do not think it was adequate for this Tribunal. Its obligation to produce reasons is statutory: s 43(2) of the AAT Act. That statutory obligation to produce reasons has to be read in a context which includes the right of appeal to this Court conferred by s 44. The subject matter of that right of appeal is the question of law identified by the party bringing it. This suggests, at least, that to be adequate for the purposes of s 43 the reasons must sufficiently expose the reasoning process to permit the disappointed party to craft a question of law within the meaning of s 44. Pointing to the authorities relied on by both parties and saying that they have been taken into account does not, at least in the present context, permit that to occur.
46. Having read the reasons with great care and allowing the latitude due to a busy administrative body such as the Tribunal I regret I must conclude that the reasons are inadequate. I do not understand how the Tribunal came to the conclusion that Mr Fawcett and Central were fit and proper persons. Further, I cannot tell whether its process of reasoning did, or did not, involve the use of its finding that Mr Fawcett would suffer financial hardship if Central's certificate of approval were cancelled. Counsel for Central submitted that since that matter was obviously irrelevant to the question of fitness and propriety I should assume that the Tribunal could not possibly have taken it into account. However, I do not think that that can or, in the context of a challenge to the adequacy of reasons, should be presumed.
47. The Authority's notice of appeal also included two grounds which sought to attack the reasons of the Tribunal for failing to make certain findings of fact. In one case it was said that the

Tribunal had failed "to make all necessary findings of fact to support its conclusion" in relation to the grounds for the cancellation of Central's certificate. In another case it was said that the Tribunal failed to include in its reasons findings (or sufficient and adequate findings) on material questions of fact. In the former case, the source of the obligation was unexpressed; in the latter, it was said to flow from s 43(2B).

48. There is no obligation to "make all necessary findings of fact" – the obligation is only to produce reasons which are adequate. In that circumstance, I propose to treat the ground as relating to the duty imposed by s 43(2B). The allegation that s 43(2B) requires the Tribunal to make such findings is, I think, untenable. As I have already noted, that view of s 43(2B) is at odds with the approach held to be required by the High Court to s 430 of the *Migration Act 1958* (Cth) in *Yusuf*.
49. The three questions of law relating to this issue posed by the applicant were as follows:

    (a) whether the Tribunal made all necessary findings of fact to support its conclusion that the grounds for cancellation of the respondent's CoA relied upon by the applicant for the purposes of CAR 269(1)(d) had not been made out;
    (f) whether the Tribunal failed to give reasons (or sufficient and adequate reasons) for its decision in breach of s.43 (2) of the Administrative Appeals Tribunal Act 1975 ("the AAT Act"); and
    (g) further or alternatively, whether the Tribunal failed to include in its reasons findings (or sufficient and adequate findings) on material questions of fact or otherwise failed to refer to the evidence or other material on which such findings were based in breach of s.43 (2B) of the AAT Act.

50. In light of my conclusions, questions (a) and (g) should be answered: "The Tribunal complied with its obligations under s 43(2B)." Question (f) should be answered: "No. The reasons of the Tribunal were not adequate."

Second issue: irrelevant considerations

51. Question (c) raises the question of whether the Tribunal took into account the financial hardship that would be caused to Mr Fawcett if Central's certificate of approval were to be cancelled. It follows from what I have said above that it is not possible to discern whether this matter was taken into account or not. Accordingly, this question must be answered: "Unable to be answered."

Third issue: wrong question?

52. Question (b) raises the issue of whether the Tribunal asked itself the wrong question or applied the wrong tests in its approach to the question of whether Central was a fit and proper person within the meaning of reg 269(1)(d). It follows from what I have said above that the answer to this question must be: "Unable to be answered."

Fourth issue: limitation on regulation 269(1)

53. The Tribunal decided to issue Central's certificate of approval subject to a number of conditions stated only in general terms. One condition was that Central employ a licensed aircraft maintenance engineer who was "acceptable" to the Authority; another was that Central employ a person – again "acceptable" to the Authority – to carry out audits of Central's system of quality control. The parties subsequently agreed conditions giving effect to the Tribunal's decision and it made orders accordingly. The actual conditions repeated the idea of the person being "acceptable" to the Authority.
54. The Authority submits that the power in reg 269(1) does not extend to imposing a condition that the persons so hired be "acceptable" to it. It put forward three reasons for this. First, it was said to be inconsistent with reg 30(2C), which explicitly imposes conditions on the holder of a certificate of approval in relation to the persons employed by it; secondly, it was said that the

regulation did not set forth any criteria by which the acceptability might be measured; thirdly, it was said that the Tribunal had, in truth, remitted its function to the Authority, a course which was said to be forbidden by this Court's decision in *Civil Aviation Safety Authority v Allan* [2001] FCA 1064; (2001) 114 FCR 14.

55. I do not think these submissions have substance. Reg 30(2C) provides:

(2C) A certificate of approval is subject to:

(a) a condition that each activity the certificate covers must only be carried out at a place where the facilities and equipment necessary for the proper carrying out of the activity are available to the holder of the certificate;

(b) a condition that the activities the certificate covers must be carried out in accordance with a system of quality control that satisfies the requirements of subregulation (2D); and

(c) if the certificate covers some or all of the following activities:

(i) the design of aircraft;

(ii) the design of aircraft components;

(iii) the design of aircraft materials;

(vii) the maintenance of aircraft;

(viii) the maintenance of aircraft components;

(ix) the maintenance of aircraft materials;

(x) the training of candidates for the examinations referred to in paragraph 31 (4) (e);

(xi) the conducting of the examinations referred to in paragraph 31 (4) (e);

a condition that each of those activities that is covered by the certificate must be carried out under the control of a person appointed by the applicant to control the activities; and

(d) a condition that the holder of the certificate of approval must ensure that each person employed by, or working under an arrangement with, the holder receives adequate training in:

(i) the work performed by the person for the purposes of the activities covered by the certificate; and

(ii) the use of any equipment used in connection with that work.

56. As I apprehend it, the argument is that because of the specific provisions of reg 30(2C) it should be concluded that there is excluded from the power in reg 269(1) any power to impose conditions regulating the qualities of persons employed by a certificate holder. To accept such an argument it would be necessary to identify some negative implication from reg 30(2C) to the effect that no other power might be used to achieve a similar result. I can discern in it no basis for such an implication.
57. As to the idea that the regulations do not set forth any criteria by which "acceptability" might be judged it may be said, at once, that that observation says nothing about the power under reg 269(1). Even assuming that difficulty could be outflanked, I do not see that the word "acceptable" creates difficulties of uncertain operation. The Authority must ask itself whether the proffered person is "acceptable" to it. What is involved in answering that question is no different in kind – or difficulty – to the Authority's approach to applying the content of any open-textured standard: cf. reg 61(1) which appears to assume that the word "acceptable" has a discernible and stable content.

58. Further, I do not think that to impose such a condition is to leave the Tribunal's review function incomplete and to involve an impermissible remission of that function to the Authority. Once it is accepted that the powers of the Authority run to the imposition of a condition involving the appointment of a person "acceptable" to the Authority then the imposition of that condition by the Tribunal is not a remission to the Authority but, rather, the exercise of a power granted to the Authority itself.
59. In its oral submissions, the Authority faintly argued that the specific power to impose conditions conferred on the Authority by reg 30(3) should be seen as excluding the exercise of such a power under reg 269(1). Regulation 30(3) provides:

CASA may, for the purpose of ensuring the safety of air navigation, include in a certificate of approval granted under this regulation an endorsement that the certificate is granted subject to a condition set out in the endorsement, in a document issued with the certificate of approval or in a specified Part or Section of Civil Aviation Orders.

60. This power was said to be a specific power to impose conditions which was subject to a limitation that the power be used only for the purpose of ensuring the safety of air navigation and then only by CASA and not the Tribunal. Regulation 269(1), on the other hand, was concerned with the general topic of licence discipline, could be exercised on review by the Tribunal and was not subject to the requirement that it be exercised only for the purpose of ensuring the safety of air navigation.
61. The argument should be rejected for a number of reasons. First, reg 30(3) confers a power both to impose an endorsement on a certificate of approval that makes it subject to conditions and also a power to set forth those conditions in various ways. Regulation 269(1) permits variation of a "certificate". The word "certificate" is defined in reg 263 in a way which includes certificates of approval (reg 263(1)) and any conditions endorsed thereon (reg 263(2)). The power of variation in reg 269(1) therefore expressly extends to the variation of conditions imposed under reg 30(3).
62. Secondly, reg 30(3) is not to be seen, as the Authority contends, as a specific power to impose conditions but rather as a general one enlivened whenever the safety of air navigation requires it. It is reg 269(1) which is the specific provision. It is concerned, relevantly, with the imposition of conditions for, broadly speaking, disciplinary reasons. So viewed, it is not a question of a general provision being used to defeat the limitations of a more specific provision but rather the ordinary usage of a specific provision to carry out its clearly intended purpose.
63. Nor is this to accept, as the Authority's submissions appeared to assume from time to time, that the power in reg 269(1) might be used for purposes inimical to the safety of air navigation because words of that kind were missing in reg 269(1) whilst being present in reg 30(3). Such a construction of reg 269(1) could succeed only by ignoring the unambiguous command of s 9A of the Act that the Authority "must regard the safety of air navigation as the most important consideration". So too, the proposition that reg 30(3) contains an implicit limitation that it is only the Authority and not the Tribunal which can impose licence conditions should be rejected. A decision to impose a condition under reg 30(3) could itself be reviewed by the Tribunal – the definition of a "reviewable decision" in s 31(1) of the Act permits no other view.
64. Accordingly, I would answer this question: "Yes. It was open to the Tribunal to impose the conditions in the form that it did. Regulation 30 was not relevant to the exercise of the power under regulation 269(1)."

Fifth issue: natural justice

65. The Authority argued that it did not have an opportunity to dissuade the Tribunal from imposing a condition about the "acceptability" to it of the LAME and the person carrying out the auditing role. The Authority's submissions in this Court proceeded on the basis that it was denied the opportunity to put to the Tribunal "the correct construction of [reg 30]". This I take to be a denial of the opportunity to put the submission I have just rejected. Even if one assumes that the Authority was prevented from arguing against the word "acceptable" and that it was denied

procedural fairness as a result, that denial was not material: cf *Stead v State Government Insurance Commission* [1986] HCA 54; (1996) 161 CLR 141 at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ.

66. Question (d) was as follows:

> (d) whether the Tribunal provided the applicant with an opportunity (or adequate opportunity) to address the Tribunal on the conditions that it intended to impose on the respondent's CoA and whether those conditions would conform to the requirements of the CA Act and CAR 30;

67. I would answer the question: "No. The Tribunal did not afford the applicant an opportunity to submit that its proposed conditions did not comply with reg 30. However, this was not material."

Disposition

68. The reasons of the Tribunal were inadequate in a way which undermines this Court's review function under s 43. The remedial consequences of this are, I think, as follows. The Tribunal was bound by s 43(2) to produce reasons which were adequate. It did not. The statement of reasons produced by it is not the fruit of the statutory duty and consequent power which required their production. Instead, what were produced were purported reasons flowing from a failure to act within the limits of authority marked out by s 43(2). It follows that the reasons are not reasons at all and are liable to be set aside.
69. If that occurs, the Tribunal will again fall under an obligation to produce reasons under s 43(2). If its new reasons are inconsistent with its current decision then s 43AA(3)(b) will permit the decision to be varied. If the new reasons are consistent there will be no need for variation. In either case, there is no occasion for this Court to set aside the decision of the Tribunal. The appropriate orders are therefore ones which set aside the Tribunal's statement of reasons and which compel the Tribunal to produce reasons in accordance with s 43(2). I see no reason why the Tribunal need be reconstituted for that task.
70. Of course, if *Dornan* is correct then, additionally, the Tribunal made an error of law. However, the significance of that for present purposes hinges upon whether that conclusion would lead to a different result. Clearly, such an approach would require the Tribunal to produce its reasons again. The difference would be that, if the error of law were jurisdictional the orders of the Tribunal might be set aside, it might have to re-exercise its powers afresh and it might have to do more than just produce reasons. I think it is unlikely that the error of law constituted by inadequate reasons could be jurisdictional. It is true, no doubt, that generally, an error of law will, in the hands of a non-judicial tribunal, be jurisdictional: *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ. However, it is to be noted that the errors of law there identified as having that effect were said to be those causing an inferior tribunal to identify the wrong issue. It may be doubted whether an error of law constituted by inadequate reasons could ever have that effect for reasons explained in *Yusuf*.
71. However, even if *Dornan* required the conclusion that the decision of the Tribunal were afflicted by jurisdictional error, in the exercise of my discretion I would not set aside the Tribuna's decision. The existence of that discretion is confirmed by s 44(4) which provides that this Court "may" make such order as it thinks appropriate. In the context of a jurisdictional error, it is appropriate that that discretion be exercised in a way which is analogous to the refusal of prerogative relief on discretionary grounds. In that regard, the existence of an adequate alternative remedy is a proper basis for refusing relief: *R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389 at 400 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ. Here adequate alternative relief is available if the decision is left in place because s 43AA(3)(b) allows the Tribunal to correct its decision to ensure consistency with its reasons. That, of course, will still require an order that the Tribunal produce reasons which are adequate. It is not entirely clear to me how *Dornan* can explain that necessity but it is not necessary to determine that issue – any

other result would be surreal.

72. Regardless of the approach taken the proper relief is that the statement of reasons be set aside and that the Tribunal produce reasons which comply with s 43(2).
73. Finally, it is difficult to see how the inadequacy of the Tribunal's reasons is the fault of the respondent. I will entertain any application that the respondent may wish to make under s 6(1) of the *Federal Proceedings (Costs) Act 1981* (Cth), as well as any other submissions on costs.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 6 February 2009

Counsel for the Applicant:	Mr I Harvey
Solicitor for the Applicant:	Mr J Rule of the Civil Aviation Safety Authority
Counsel for the Respondent:	Mr J Anderson
Solicitors for the Respondent:	Goldrick Farrell Mullan
Date of Hearing:	22 October 2008
Date of Judgment:	6 February 2009