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## Civil Aviation Safety Authority v Marsh [2014] FCA 1253 (21 November 2014)

Last Updated: 21 November 2014

### FEDERAL COURT OF AUSTRALIA

#### Civil Aviation Safety Authority v Marsh [\[2014\] FCA 1253](#)

Citation: Civil Aviation Safety Authority v Marsh [\[2014\] FCA 1253](#)

Parties: **CIVIL AVIATION SAFETY AUTHORITY v KYLE MARSH**

File number: QUD 719 of 2013

Judge: **COLLIER J**

Date of judgment: 21 November 2014

Catchwords: **ADMINISTRATIVE LAW** – appeal from decision of Administrative Appeals Tribunal – s 44 [Administrative Appeals Tribunal Act 1975](#) (Cth) – flight theory examination toward pilot licence conducted by Civil Aviation Safety Authority (“[← CASA →](#)”) – respondent undertook and

passed examination – respondent received and provided to another person coded answers to examination questions designed to look like material permitted in examination – Tribunal found respondent did not personally use coded answers in examination – Tribunal set aside decision of

CASA delegate finding respondent contravened reg 298A(1)(c)(iii) *Civil Aviation Regulations 1998* (Cth) – Tribunal set aside CASA delegate finding that respondent not a fit and proper person to hold licence – reg 269(1)(d) – whether Tribunal erred in failing to find respondent contravened reg 298A(1)(c)(iii) – whether Tribunal erred in failing to find respondent contravened reg 298A(1)(e) – whether Tribunal erred in failing to find respondent not a fit and proper person

**STATUTORY INTERPRETATION** – whether “the examination” in reg 298A(1)(c)(iii) *Civil Aviation Regulations 1998* (Cth) refers only to sitting of examination undertaken by alleged contravener – approach to interpreting legislation – *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 – s 15AA *Acts Interpretation Act 1901* (Cth)

Legislation:

[Administrative Appeals Tribunal Act 1975](#) (Cth) s 44  
[Civil Aviation Act 1988](#) (Cth) s 9A  
[Legislative Instruments Act 2003](#) (Cth) s 13  
[Civil Aviation Regulations 1988](#) (Cth) regs 269(1), 269(1)(c), 269(1)(d), 298A(1), 298A(1)(a), 298A(b), 298A(1)(c), 298A(1)(c)(i), 298A(1)(c)(ii), 298A(1)(c)(iii), 298A(1)(d), 298A(1)(e), 298A(1)(f), 298A(1)(f)(iii), 298A(4), 298A(8)

Cases cited:

*Air Link Pty Ltd v Paterson* [2005] HCA 39; (2005) 223 CLR 283  
*Austin v The Commonwealth of Australia* [2003] HCA 3; (2003) 215 CLR 185  
*Australian Broadcasting Tribunal v Bond* [1990] HCA 33;

[\(1990\) 170 CLR 321](#)

*Boral Besser Masonry Ltd v Australian Competition and Consumer Commissioner* [\[2003\] HCA 10](#); [\(2003\) 215 CLR 374](#)

*Commonwealth v Baume* [\[1905\] HCA 11](#); [\(1905\) 2 CLR 405](#)  
*Confidential v Civil Aviation Safety Authority* [\[2013\] AATA 927](#)

*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [\[1981\] HCA 26](#); [\(1981\) 147 CLR 297](#)

*Craig Williamson Pty Ltd v Barrowcliff* [\[1915\] VicLawRp 66](#); [\[1915\] VLR 450](#)

*Foots v Southern Cross Mine Management Pty Ltd* [\[2007\] HCA 56](#); [\(2007\) 234 CLR 52](#)

*Jagroop v Minister for Immigration and Border Protection* [\[2014\] FCAFC 123](#)

*K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [\[1985\] HCA 48](#); [\(1985\) 157 CLR 309](#)

*Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* [\(2008\) 237 CLR 285](#)

*Monis v R* [\[2013\] HCA 4](#); [\(2013\) 249 CLR 92](#)

*Oshlack v Richmond River Council* [\[1993\] HCA 11](#); [\(1998\) 193 CLR 72](#)

*Plaintiff S4-2014 v Minister for Immigration and Border Protection* [\[2014\] HCA 34](#)

*Project Blue Sky Inc v Australian Broadcasting Authority* [\[1998\] HCA 28](#); [\(1998\) 194 CLR 355](#)

*Re Bolton; Ex parte Beane* [\[1987\] HCA 12](#); [\(1987\) 162 CLR 514](#)

*Repatriation Commission v Richmond* [\[2014\] FCAFC 124](#)

*Taylor v Department of Transport* [\[1978\] AATA 64](#)

*Trust Co of Australia Ltd v Commissioner of State Revenue* [\[2003\] HCA 23](#); [\(2003\) 77 ALJR 1019](#)

Macquarie Dictionary (Macmillan Publishers Group Australia 2014) <https://www.macquariedictionary.com.au> viewed 17 November 2014

Date of hearing: 15 April 2014 and 8 May 2014

Place: Brisbane

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 61

Counsel for the Applicant: Mr RS Ashton

Solicitor for the Applicant: Legal Branch Civil Aviation Safety Authority

Counsel for the Respondent: The Respondent did not appear

**IN THE FEDERAL COURT OF AUSTRALIA  
QUEENSLAND DISTRICT REGISTRY  
GENERAL DIVISION**

**QUD 719 of 2013**

**BETWEEN: CIVIL AVIATION SAFETY AUTHORITY  
Applicant**

**AND: KYLE MARSH  
Respondent**

**JUDGE: COLLIER J**

**DATE OF ORDER: 21 NOVEMBER 2014**

**WHERE MADE: BRISBANE**

**THE COURT ORDERS THAT:**

1. The decision of the Administrative Appeals Tribunal (“Tribunal”) to set aside the reviewable decision made under [regulation 298A\(4\)](#) of the [Civil Aviation Regulations 1988](#) (Cth) be set aside and remitted to the Tribunal for rehearing in accordance with the law.
2. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA  
QUEENSLAND DISTRICT REGISTRY  
GENERAL DIVISION**

**QUD 719 of 2013**

**BETWEEN:**                    **CIVIL AVIATION SAFETY AUTHORITY**  
   **Applicant**

**AND:**                         **KYLE MARSH**  
   **Respondent**

**JUDGE:**                     **COLLIER J**

**DATE:**                      **21 NOVEMBER 2014**

**PLACE:**                     **BRISBANE**

**REASONS FOR JUDGMENT**

1. Before the Court is an appeal from a decision of the Administrative Appeals Tribunal (“Tribunal”) pursuant to [s 44](#) of the [Administrative Appeals Tribunal Act 1975](#) (Cth) (“AAT Act”). The proceeding is in the original jurisdiction of this Court. The applicant, the Civil Aviation Safety Authority (“← CASA →”), appeals from the AAT’s decision to set aside the decisions of ← CASA → that the respondent Mr Marsh had assisted another person to cheat in a flight planning theory examination and that his various licences should be suspended for a period of six months.
2. In relation to this proceeding Mr Marsh informed the Court that he did not intend to enter an appearance. ← CASA → appeared by Counsel, unopposed.
3. The background to this proceeding is set out in detail in the decision of the Tribunal. It is convenient to draw key facts from that decision.

**Background**

4. Mr Marsh is a commercial pilot who sought to obtain an Air Transport Pilot Licence (“ATPL”). This is the highest grade of pilot’s licence available. On 12 October 2011 he undertook and passed a flight planning theory examination conducted by ← CASA →.
5. The flight planning segment of the theory part of the ATPL examination is designed to test a candidate’s understanding of flight planning procedures including fuel requirements, altitude capability, performance limitations, and calculations of point of no return. A candidate is required to answer

- seventeen questions, each question representing an area of the syllabus. The candidate answers the questions online. Questions asked of each candidate are designed to test flight planning skills and knowledge of the individual candidate, and are drawn randomly from a bank of 105 possible questions in the  CASA  examination database. Examination questions have multiple choice answers. The examination is timed, candidates are permitted a certain period of time to finish the examination, and following completion the computer checks the answers. Candidates are permitted to take maps, navigation equipment and the Performance and Operating Handbook for a Boeing 727 (“Boeing 727 Handbook”) aircraft into the examination room.
6. The Tribunal found that by at least 2011 there were numerous documents circulating widely amongst students providing model answers to many of the possible 105 questions. The Tribunal member observed that this was not surprising given that  CASA  had used the same 105 questions for almost 20 years.
  7. One document which was circulating with model answers was four pages of what the Tribunal found to be coded answers to certain examination questions. The Tribunal found that this document was illicitly incorporated into a version of the Boeing 727 Handbook. The Tribunal noted that:

The borders of each of the four pages are exact reproductions of the borders of pages from that Handbook but the text inside the borders reproduces the coded answers. The general format of the inserted part consists of a repetition of key factual data from a question with the answer at the end.

8. The obvious implication was that a cheating candidate could take the version of the Boeing 727 Handbook incorporating the model answers into an examination and clandestinely reference the four pages to assist in answering examination questions if those questions were posed.
9. Mr Gavin Secombe, the Cyber Exams Administrator for  CASA , gave evidence before the Tribunal that answers to 33 of the possible 105 questions in the examination appeared on these four pages.
10.  CASA  became aware of the use of these pages in September 2012 when a whistle-blower forwarded these pages, describing the pages as “cheat sheets”. The Tribunal member noted that use of those four pages in an examination by a candidate was plainly gross and flagrant cheating.
11. On 8 August 2013, following an investigation, a delegate of  CASA  decided that on 7 July 2012 Mr Marsh had contravened reg 298A(1)(c) of the [Civil Aviation Regulations 1988](#) (Cth) (“regulations”) in that he had assisted another person to cheat in a flight planning examination by providing the other person with the four page document.
12. The delegate also decided in accordance with reg 269(1)(c) and (d) of the regulations, to suspend Mr Marsh’s student pilot licence, private pilot (aeroplane) licence, and commercial pilot (aeroplane) licence, for six months from the date of commencement of the suspension. [Regulation 269\(1\)\(d\)](#) in particular provides (*inter alia*) that a licence may be varied, suspended or cancelled where the holder 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.

## Relevant legislation

13. [Regulation 298A\(1\)](#) of the regulations is as follows:

### Cheating by examination candidates

- (1)  CASA  may give written notice to a person who attempted a prescribed examination if it believes on reasonable grounds that the person has committed any of the following acts without  CASA ’s permission

- a. Copied any part of the examination paper;
- b. Removed:
  - i. Any part of the examination paper; or
  - ii. A copy of any part of the examination paper;from the place where the person attempted the examination;
- c. Given to another person:
  - i. Any part of the examination paper; or
  - ii. A copy of any part of the examination paper; or
- iii. Any information about the questions contained in the examination paper, being information that might give anyone an unfair advantage in the examination;
- d. Before the examination – knowingly received from another person, or otherwise knowingly obtained possession of:
  - i. Any part of the examination paper; or
  - ii. A copy of any part of the examination paper; or
- iii. Any information about the questions contained in the examination paper, being information that might give the person an unfair advantage in the examination;
- e. Before or during the examination – knowingly received from another person, or otherwise knowingly obtained possession of:
  - i. Any part of the model answer; or
  - ii. A copy of any part of the model answer; or
  - iii. Any information about the content of the model answer;
- f. During the examination:
  - i. Helped another person to complete any part of the examination; or
  - ii. Received help from another person to complete any part of the examination; or
  - iii. Used any material or aid that  CASA  does not permit to be used; or

iv. Read the examination work of another person attempting the examination;

g. Caused or assisted the commission of, or attempted, any act referred to in paragraph (a), (b), (c), (d), (e) or (f).

14. “Examination paper” is defined in reg 298A(8) of the regulations as:

all of the documents provided by the person conducting a written examination to persons attempting the examination.

15. “Model answer” is defined as meaning, in relation to an examination:

a document which sets out the correct, or suggested, answers to the questions set out in the examination paper.

16. Of further importance is reg 269(1)(d) of the regulations, which empowers  CASA  to vary, suspend or cancel an approval, authority, certificate or licence where satisfied:

(d) that the holder of the authorisation is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such an authorisation.

### Proceeding in the Tribunal

17. In summary,  CASA ’s case in the Tribunal was that a contravention of reg 298A(1)(c) had been established, and that for the purpose of considering whether Mr Marsh was a fit and proper person, it was clear that:

- Mr Marsh, before the examination, knowingly received from another person, part of the examination paper, a copy of part of the examination paper or information about the questions contained in the examination paper being information that might give him an unfair advantage in the examination (in contravention of reg 298A(1)(d));
- Mr Marsh had given the material to another person (reg 298A(1)(c)); and
- Mr Marsh, during the examination, had used material that  CASA  does not permit to be used (in contravention of reg 298A(1)(f)(iii)).

18.  CASA  contended that there was overwhelming evidence that Mr Marsh had in fact cheated during his examination, and that his conduct involved significant dishonesty.  CASA  contended further that Mr Marsh was not a fit and proper person because  CASA  could not rely on his honesty, and because there must be a doubt about his competence.

19. Counsel for Mr Marsh submitted, in summary, that:

- the Tribunal ought accept Mr Marsh’s evidence and denial of cheating;
- although Mr Marsh forwarded the four pages to the other person there was nothing sinister or untoward about this, because it was study material forwarded by Mr Marsh to a fellow student to assist him;
-  CASA  was wrong to focus solely on this indiscretion;
- questions of fitness and propriety involved wider considerations.

20. The Tribunal did not accept that Mr Marsh had cheated in the manner alleged, primarily because the scrutiny of the invigilator was such as to have made it impossible for him to have cheated. The Tribunal accepted that Mr Marsh’s improvement in examination results were attributable to him having studied very hard (at [25]). The Tribunal member noted that he had formed a favourable impression of Mr Marsh and his evidence.

21. In relation to an alleged contravention of reg 298A(1)(c), the Tribunal observed that there was a real difficulty in  establishing that the four pages provided by Mr Marsh to the other person had given that person an unfair advantage in the examination when the evidence before the Tribunal was that the other person had in fact successfully completed the examination the previous year. In response,  submitted that it was not necessary to show that the recipient of the information might receive an unfair advantage – it was enough that *anyone* might receive that unfair advantage, and would encompass the possibility that the first recipient of the information might pass the information on.
22. The Tribunal accepted that the language of reg 298A(1)(c) made it clear that the potential beneficiary class is a wider class than merely the recipient of the information. However the Tribunal member considered that the difficulty in ’s argument was elsewhere in the language of the regulation, namely:
29. ... The examination referred to in reg 298A(1)(c)(iii) must be the same examination as has been attempted by the recipient of the notice. The use of the definite article means that “the examination” in reg 298A(1)(c) can only refer to the phrase “a prescribed examination” as it first appears in the regulation. There can then be no question of anyone getting an unfair advantage in the examination which Mr Marsh undertook in October 2011 by the provision of information in July 2012.
23. The Tribunal member then set aside ’s finding of a contravention of reg 298A(1)(c).
24. In relation to the question whether Mr Marsh was a fit and proper person to have responsibilities, and exercise and perform the functions and duties, of a holder of the licences held by him (and which  sought to have suspended), the Tribunal member noted that each case must depend upon its own facts. The Tribunal member also found that Mr Marsh had a minor role in a widespread system. This did not mean that Mr Marsh was not a fit and proper person, particularly when the Tribunal member otherwise had a favourable impression of him. Accordingly, the Tribunal set aside that part of ’s decision as well.

### Notice of appeal

25.  appealed against the decision of the Tribunal on seven grounds. Grounds 1-4 related to the Tribunal’s interpretation of reg 298A(1)(c) and (e). Grounds 5-7 related to the Tribunal’s finding that Mr Marsh was a fit and proper person to hold a licence.
26. It is useful to set out the grounds of appeal, and then examine them in their respective groups:
1. The Tribunal erred in finding on the construction of sub-regulation 298A(1) of the Regulations that:
    - a. “the examination” referred to in sub-paragraph (c)(iii) must be the same examination [undertaken on the same date] as has been attempted by the recipient of the notice; and
    - b. the examination in which it is necessary that the information might give anyone an unfair advantage must be the same examination undertaken on the same date as has been attempted by the recipient of the notice.
  2. The Tribunal erred in failing to make findings whether the respondent committed acts which were proscribed by sub-regulations 298A(1)(e) in circumstances where the applicant seriously advanced contentions orally and/or in writing to the effect that those findings were open on the evidence before the Tribunal.
  3. The Tribunal erred in failing to make findings that the respondent committed the acts proscribed by sub-regulations 298A(1)(c)(iii) and (e) of the Regulations in circumstances where the Tribunal made the following findings of fact:
    - a. it was “inescapable” that the four pages of coded questions to answers in the flight planning exam (cheat sheets) were designed to be taken into

the examination room and to provide improper advantage to any candidate using them and that “any such use was plainly gross and flagrant cheating”;

- b. that the respondent had received the cheat sheets at some point before attempting the flight planning exam on 12 October 2011;
  - c. that the respondent may have received some benefit from the [sic] receiving the cheat sheets; and
  - d. that the respondent forwarded the cheat sheets to another person via an email dated 7 July 2012.
4. The Tribunal erred in failing to affirm the reviewable decision made under sub-regulation 298A(4) of the Regulations in circumstances where the findings of fact made by the Tribunal (as set out in ground 3 above) demonstrated that the respondent had committed the acts proscribed in sub-regulations 298A(1)(c)(iii) and (e).
  5. The Tribunal erred in considering whether the respondent was a fit and proper person by:
    - a. Failing to properly understand the nature and extent of the duties, functions and obligations which the respondent was required to discharge as the holder of his flight crew licences;
    - b. Failing to make findings which were relevant to its consideration of the extent to which the respondent understood and had discharged these duties, functions and obligations
  6. By failing to make any, or any adequate findings concerning the impact of the applicant’s demonstrated conduct (as set out in ground 3 above) on the safety of air navigation, the Tribunal erred in failing to regard the safety of air navigation as the most important consideration in determining whether the applicant was a fit and proper person to be the holder of his flight crew licences within the meaning of sub-regulation 269(1)(d) of the Regulations.
  7. Having found that the respondent had forwarded to another a document plainly designed to aid cheating in a critical examination for the most significant individual licence, the Tribunal erred in failing to explain, or adequately explain how it was able to be satisfied that the applicant none the less remained a fit and proper person to be the holder of his flight crew licences in breach of his obligation to provide reasons for its decision in accordance with subsection 43(2) of the AAT Act.

#### **Grounds 1-4 – construction of regulation 298A(1)**

27. Before me the applicant submitted that the Tribunal member’s construction of “the examination” in reg 298A(1)(c)(iii) was incorrect because, practically, the result of this interpretation was that the regulation had no effect at all.
28. The evidence is clear that each individual candidate for the flight planning examination will be asked randomly selected questions from a fixed database of 105 questions. Those 105 questions are the “bank” of questions, and it is possible that the same candidate, sitting the flight planning examination more than once, will receive completely different questions or some of the same questions on each occasion. Certainly the evidence indicates that a different candidate sitting the flight planning examination will be in the same position – that is, asked to answer different questions or only some of the same questions as another candidate.
29. A key question however is whether the language of the regulation supports an interpretation consistent with this practical reality. As I noted earlier, the Tribunal considered that it did not.
30. Mr Ashton for  drew my attention to a decision of Mr Egon Fice, Senior Member of the Tribunal, in *Confidential v Civil Aviation Safety Authority* [2013] AATA 927, a decision of the Tribunal which post-dated the Tribunal decision before me. The decision of the Tribunal in *Confidential* is of particular interest because material facts there were very similar to the facts in this case. Interestingly, in relation to the proper construction of reg

298A(1)(c)(iii) the Senior Member did not agree with the view taken by the Tribunal in the matter currently before me. Specifically, Senior Member Fice observed:

37. The expression, *examination paper*, needs to be understood in light of the changed format of the flight planning examination. It is no longer a reference to sheets of paper on which are printed identical exam questions but rather, it is each and every set of 17 questions randomly drawn from the exam database and provided to every candidate at a sitting for the Cyber Exam. It is not limited to the questions put to any particular candidate because the definition of the expression *examination paper* refers to all of the documents provided by the person conducting a written examination to **persons attempting the examination**. In fact, in any one sitting, all 87 questions most likely appeared on the examination paper, although each of the candidates who attempted the exam on that occasion probably had a significant number of different questions put to them. That construction conforms to the object or purpose of Regulation 298A which is to prohibit cheating by examination candidates. It would defeat the purpose if the expression *examination paper* was limited to the questions given to only one candidate. It would also be inconsistent with the definition.
38. The word *examination* is not defined and therefore it should be given its ordinary meaning in the context in which it appears in the CAR. The *Concise Oxford Dictionary* defines *examination* as follows: **3a the testing of the proficiency or knowledge of students or other candidates for a qualification by oral or written questions**. In the context of Regulation 298A, the word *examination* is prefaced by the definite article, *the*. Despite that, it does not mean that where the expression *the examination* is used in Regulation 298A, it is a reference only to the questions put to one candidate in the examination. To limit the proscribed conduct in this way would be to defeat the purpose of the regulation. Furthermore, it is inconsistent with the definition of the expression *examination paper* which refers to persons rather than a single candidate. Therefore, the expression *the examination* when applied to the Cyber Exam must mean the testing of all candidates at any relevant time when examinations are conducted. In fact, it must be a reference to each and every occasion on which candidates are permitted to sit the Cyber Exam. Following the introduction of the Cyber Exam, that testing must include all of the questions held by  CASA  on its exam database.

(Emphasis in original.)

31. He later continued:

46. With respect to Deputy President Hack SC and Mr Lithgow, confining the expression *the examination* in the way in which they have does not give effect to the objects or purpose of Regulation 298A when those provisions are applied to the electronic form of the examination now conducted by  CASA . The prescribed examination must be a reference to the flight planning Cyber Exam. The *examination paper* referred to in the regulation must be a reference to the questions given to all candidates who sit that exam. The questions given to all candidates are taken at random from  CASA ’s exam database. Therefore any one of those questions can properly be described as a part of the examination paper.
47. In my respectful opinion, it follows that the copying or removal of any question which appears on  CASA ’s exam database from the place where a candidate attempts the Cyber Exam; or where a candidate for that exam gives to another person any question or information about the questions on  CASA ’s exam database, being information that might give anyone an unfair advantage in the Cyber Exam, is proscribed conduct under Regulation 298A(1)(a), (b) and (c). Likewise, the references to part of the examination paper; any information about questions contained in the examination paper; and part of the model answer in Regulation 298A(1)(d), (e) and (f) must be references to any questions in the Cyber Exam which are on  CASA ’s exam database.

32. The term “the examination” as it appears in reg 298A(1)(c)(iii) is not defined. It is well-settled from decisions of Australian Courts, and in particular *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]- [70] that the starting point in interpretation of legislation must always be the text, but context and purpose are also vitally important even in cases where the text does not appear on its face to be ambiguous: *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 315; *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 at 518; *Trust Co of Australia Ltd v Commissioner of State Revenue* [2003] HCA 23; (2003) 77 ALJR 1019 at [68]; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commissioner* [2003] HCA 10; (2003) 215 CLR 374 at [383]; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at [2]; *Monis v R* [2013] HCA 4; (2013) 249 CLR 92 at [309]. The meaning of a provision must be determined by reference to the language of the instrument viewed as a whole: *Project Blue Sky* at [69]; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 320; *Plaintiff S4-2014 v Minister for Immigration and Border Protection* [2014] HCA 34 at [42]. Certainly, words, sentences and clauses of a statute should not be construed in a way that renders them superfluous, void or insignificant if by another construction they may be made useful and pertinent: *Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405 at 414; *Project Blue Sky* at [71]; *Repatriation Commission v Richmond* [2014] FCAFC 124; *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123 at [95].
33. The purposive approach adopted by the Courts in respect of federal legislation is consistent with s 15AA of the *Acts Interpretation Act 1901* (Cth): *Boral Besser Masonry Ltd* at [383]; *Austin v The Commonwealth of Australia* [2003] HCA 3; (2003) 215 CLR 185 at [251]; *Air Link Pty Ltd v Paterson* [2005] HCA 39; (2005) 223 CLR 283 at [79]; *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 at [96]. This approach generally applies to legislative instruments under federal law as well as the legislation itself: s 13 *Legislative Instruments Act 2003* (Cth).
34. It is clear that the Tribunal in this case formed the view that “the examination” within the meaning of reg 298A(1)(c)(iii) was time-specific and only referred to the particular examination sat by the particular candidate at a particular date and time. Respectfully however I consider that the analysis of the Tribunal in *Confidential* was correct in its interpretation of reg 298A(1)(c)(iii), and that the Tribunal below in this case erred. I have formed this view for the following reasons.
35. The language of reg 298A(1) does not mandate a finding that the words “the examination” and “the examination paper” are traditional hard-copy form examinations sat by candidates. The term “paper”, particularly in the examination context, can properly be interpreted as meaning something broader than a physical hard copy. For example, the Macquarie Dictionary (Macmillan Publishers Group Australia 2014) <https://www.macquariedictionary.com.au> viewed 17 November 2014 defines “paper” as including the following:
- ... a set of questions for an examination, or an individual set of written answers to them.
36. This definition is sufficiently broad to encompass an electronic questionnaire, as was the case here. Indeed, this definition is consistent with the definition of “examination paper” in reg 298A(8), which refers to “documents provided by” the examiner. “Document” similarly has a broad meaning – the Macquarie Dictionary defines the term as:
1. A written or printed paper furnishing information or evidence, a legal or official paper.
  2. **Computers a file produced by an application, especially a text-based file produced by word processing software.**
  3. *Obsolete* evidence; proof
  4. To furnish with documents, evidence, or the like.
  5. To support by documentary evidence.

6. To record, give an account of: *an attempt to document the period*

(Emphasis added.)

37. Subregulation 298A(1)(c)(iii) is expressed in terms both retrospective and prospective. It applies to a person who has *previously attempted* the examination, and who has given information to another person, where that information, *in future, might give* anyone an unfair advantage in the examination. This reading of the plain language of the subregulation is inconsistent with the interpretation accorded to it by the Tribunal. It is certainly inconsistent with the finding of the Tribunal that the information given by Mr Marsh in July 2012 could not “give an unfair advantage” to a candidate at that time because “the examination” was that sat by Mr Marsh in October 2011. The interpretation of the Tribunal is flawed, because subreg (iii) primarily envisages the relevant information being given after the sitting of the examination by the giver of the information.
38. Reading subregs 298A(1)(c)(i) and (ii) with subreg (iii), I note that subregs (i) and (ii) simply proscribe the provision, to another person, of “any part” of or a copy of the examination paper, whereas subreg (iii) limits the provision of information by reference to questions contained in the examination paper and “being information that might give the person an unfair advantage in the examination”. Practically, the only reason why subregs (i) and (ii) would proscribe provision of parts or copies of the examination paper is because the provision of that material would unfairly assist a person subsequently undertaking the examination. This particular aspect is spelled out in subreg (iii), to prevent the subregulation being absurdly broad in its application. Omitting the qualification after the comma in subreg (iii) could extend the operation of that subregulation to such information as the number of questions on the paper, which in itself would not give an unfair advantage to a candidate for the examination.
39. The point to note here is that the legislature was clearly not concerned to limit the application of subregs (i) and (ii) to material giving an unfair advantage in the *same* examination sitting, undertaken by the person giving the material. It can therefore be reasonably inferred that there was no such intention for the term “the examination” in subreg (iii) to refer only to that examination sitting, as the Tribunal held. Reading subreg (iii) down as the Tribunal did as being referable to information which might give an advantage in the *same* examination sitting as undertaken by the contravenor, would make subreg (iii) far narrower in application than subregs (i) and (ii) without there being any apparent reason for this to be so.
40. A broader interpretation of reg 298A(1)(c)(iii) is supported by the structure of reg 298A(1) as a whole, in that the regulation is directed towards certain means by which cheating can occur, in the sequential order of:

1. **Copying** the examination paper

2. **Removing** the examination paper (presumably after undertaking the examination)

3. **Giving to another person** the examination paper or material conferring an unfair advantage in the examination

4. **Knowingly receiving from another person before the examination** the examination paper or material conferring an unfair advantage in the examination

5. **Before or during the examination** – knowingly receiving information including model answers

6. **During the examination** – helping another person or receiving help.

41. The structure of this regulation clearly contemplates circumstances including where a person sits a relevant examination, and afterwards gives a third party information relevant to “the examination”. The information is relevant because that third party or another person may themselves be undertaking an examination with the same or similar questions. That this is the case in respect of reg 298A(1)(c)(iii) is particularly clear when it is read alongside reg

- 298A(1)(d), which expressly includes the words “before or during the examination”. These limiting words do **not** form part of reg 298A(1)(c)(iii) and it should be inferred from this that they were intentionally excluded. The information contemplated by reg 298A(1)(c)(iii) can be given to a third party irrespective when they propose to sit “the examination”. The time at which the information is given as contemplated by reg 298A(1)(c)(iii) certainly is not confined to a situation where the information is given “before or during” the sitting of the examination undertaken by the contravenor.
42. In any event, and turning to issues of purpose, the purpose of reg 298A(1) is clear. It is designed to prevent cheating in relevant examinations, by (*inter alia*) prohibiting copying, removal, and giving material to another person or receiving from another person material which either constitutes examination questions or provides information which unfairly advantages a candidate for the examination (such as model answers to examination questions). Taking this purpose into account, it follows that limiting the meaning of “the examination” and “the examination paper” in reg 298A(1)(c)(iii) as the Tribunal did would not only be a limitation contrary to the objective of the regulation of preventing cheating, it would deprive reg 298A(1)(c)(iii) of practical meaning. This is because “any information” encompassed by reg 298A(1)(c)(iii) would, on almost all occasions, be derived from examinations **previously undertaken** by candidates. Indeed, this is consistent with the fact that the examinations sat by all candidates include questions from a finite database of questions.
43. All of these factors support the conclusion that “the examination” in reg 298A(1)(c)(iii) is not the examination sitting attempted by the candidate who has given the information, but rather is a generic examination more broadly defined. In this case “the examination” for the purposes of reg 298A(1)(c)(iii) was “the ATPL flight theory examination”, and not only the October 2011 sitting of the ATPL flight theory examination attempted by Mr Marsh. Such an interpretation not only gives effect to reg 298A(1)(c)(iii) with respect to unfair advantages gained in future sittings, it is also consistent with the reality of the generic examinations prescribed by  CASA  which can be attempted online on more than one occasion and use a finite database of questions.
44. I note that the text of regs 298A(1)(d) to (f) appears referable to a specific event (“before the examination”, “during the examination”), and in that respect can only be referring to a specific sitting of “the examination”. As was observed by Hodges J in *Craig Williamson Pty Ltd v Barrowcliff* [1915] VicLawRp 66; [1915] VLR 450 at 452:

*... it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament, and with especial force to words contained in the same section of an Act. There ought to be very strong reasons present before the Court holds that words in one part of a section have a different meaning from the same words appearing in another part of the same section.*

45. As I have explained, however, strong reasons exist for holding that “the examination” in reg 298A(1)(c)(iii) is referable to any attempt of the prescribed category of examination, while regs 298A(1)(d) to (f) refer to one specific sitting. The text alone of the two subregulations makes application of the same meaning to the term *the examination* impossible. Once the purpose of the regulations is considered this problem is highlighted. The resolution of this textual inconsistency which properly fits the purpose of the subregulations is for reg 298A(1)(c)(iii) to be read as being referable to any sitting of the prescribed examination, while regs 298A(1)(d), (e) and (f) are referable to the sitting attempted by the person the subject of those regulations.
46. It follows that ground 1 of the notice of appeal is substantiated.
47. The position is slightly different in relation to grounds of appeal 2, 3 and 4. In ground 2 the applicant claims that the Tribunal erred in not making findings in respect of conduct proscribed by reg 298A(1)(e) in circumstances where the applicant had seriously advanced contentions orally and/or in writing to the effect that those findings were open on the evidence before the Tribunal. Grounds 3 and 4 relate to the failure of the Tribunal to make findings referable to regs 298A(1)(c)(iii) and (e).

48. In light of my findings concerning the Tribunal's interpretation of reg 298A(1)(c)(iii), I am satisfied that grounds 3 and 4 are substantiated so far as concerns that regulation.
49. Regulation 298A(1)(e) requires that the candidate has, before or during the examination, knowingly received from another person, or otherwise knowingly obtained possession of, any part of the model answer, a copy of any part of a model answer, or any information about the content of the model answer. Significantly, the  delegate had indicated that he was not satisfied that Mr Marsh had contravened reg 298A(1)(e): at [17]. It is clear however that the relevant four pages in this case, being the cheat sheets, were "model answers" within the meaning of reg 298A(1)(e). Indeed the Tribunal found that they were at [34]. The Tribunal noted at [23] that Mr Marsh had received those pages at some point prior to 12 October 2011 when he sat the flight planning examination. To that extent it does appear that it was open to the Tribunal to make the findings to which the applicant refers in grounds of appeal 2, 3 and 4.
50. Review of the transcript of the proceedings in the Tribunal demonstrates that  specifically invited the Tribunal to make a finding affirming the delegate's decision on the basis of subreg 298A(1)(e) (Tribunal transcript 3.23 pm 2 October 2013 p 8 ll 15-32). The Tribunal did not do so for reasons which are not identified. In the circumstances I am satisfied that ground of appeal 2 is substantiated, as are grounds of appeal 3 and 4 so far as concerns subreg 298A(1)(e).

### Grounds 5-7 – fit and proper person

51. As submitted by  in this appeal, the meaning of "fit and proper purpose" was considered by the High Court in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, in particular by Mason CJ at 349 where his Honour observed:

For this reason, if for no other, a licensee has a responsibility to exercise the power conferred by the licence with a due regard to proper standards of conduct and a responsibility not to abuse the privilege which it enjoys. ...

52.  submits further that a relevant consideration in respect of whether a person is fit and proper to hold a commercial pilot's licence is the conduct of that person, measured against the responsibilities, functions and duties of the holder of the licence, in particular as those responsibilities, functions and duties exist under the air navigation regulations. Certainly in exercising its powers and performing its functions  must have regard to the safety of air navigation as its most important consideration (s 9A *Civil Aviation Act 1988* (Cth)). It is not in dispute that air navigation is an important aspect of the flight planning examination the subject of this proceeding. A finding to this effect was made by Senior Member Fice in *Confidential* at [210] where the Senior Member observed:

There can be no question therefore that where a person is granted a licence although that person has not demonstrated competence, the safety of air navigation must be compromised.

53. Mr Ashton for  directed me to the transcript of proceedings in the Tribunal, and submitted that the matter of air navigation had been raised in submissions in that forum.
54. In its decision the Tribunal noted the language of reg 269(1)(d), had regard to *Taylor v Department of Transport* [1978] AATA 64 and continued:
33. ... the notion of fitness and propriety involves much more than mere competence. Personal integrity, as well as the need for a regulator to be able to have confidence in a licensee's integrity, forms part of the consideration. Here it has been shown that Mr Marsh forwarded to another a document plainly designed to aid cheating in a critical examination for the most significant individual licence available. It seems to me not to

matter that N was unable to benefit from the four pages, the point is that it was obviously an aid to cheating.

34. I had a favourable impression of Mr Marsh. He struck me as someone with a passion for aviation and someone with a proper understanding of the need for integrity in his dealings with  and more generally in his aviation career. I do not regard his conduct on this occasion as demonstrating an underlying character defect or flaw that might detract from his fitness and propriety. His conduct was explicable, although not excusable, on the footing that it is obvious that there were very many versions of answers to 's examination questions freely available. That was to be expected when the same bank of questions had been used for the examination, virtually unchanged, since 1994. The documents obtained by the whistle-blower and made available to  demonstrate that model answers to the frequently repeated questions were freely circulating amongst candidates. That conclusion is confirmed by the reduction in the pass rate of the examination, from 58.79% in the 12 months to September 2012 to 21.08% in the four months thereafter, once  commenced using “new” questions. I do not accept Mr Ashton's submission that that drop demonstrates widespread cheating by candidates in the past; rather it demonstrates that students of aviation, in common with all students, will seek to memorise answers when an examiner asks the same questions over and over again.
35. Mr Marsh participated in this system. He did not himself cheat (using the word in its popular sense). At worst he may, by his actions, have assisted others to do so and gained some potential benefit from receiving the four pages. That benefit could only have been slight given that the four pages contain far more suggested answers than were contained in the examination that Mr Marsh took. His minor role in a widespread system does not satisfy me that he is not a fit and proper person when I have an otherwise favourable impression of him. I will then set aside that part of 's decision as well.
55. In summary,  criticises the finding of the Tribunal that Mr Marsh was a fit and proper person within the meaning of reg 269(1), largely because it submits that the Tribunal “made the leap” from discussing general concepts of fitness and propriety (including Mr Marsh’s appreciation of the need for integrity in his dealings with  and more generally in his aviation career) to a conclusion that Mr Marsh was fit and proper to hold the relevant licences.
56. I am not satisfied that the Tribunal adopted an incorrect approach in assessing whether Mr Marsh was a fit and proper person within the meaning of reg 269(1)(d). In *Taylor v Department of Transport* the Tribunal there observed (correctly in my view) that determining whether a person is a fit and proper person in the context of civil aviation regulation involves:
- a consideration of the [person’s] conduct measured against the responsibilities, functions and duties of the holder of a commercial pilot licence as they emerge from the provisions of the Air Navigation Regulations. Whilst it would be inappropriate to endeavour to catalogue those responsibilities, functions and duties in any exhaustive fashion, it is clear that they include observing the interests of the safety of air navigation – not only the interests of pilots, passengers and the owners of aircraft, but also the interests of the public at large.
57. While in the case before me the Tribunal’s reasons in finding that Mr Marsh was a fit and proper person were relatively brief, nonetheless the Tribunal made relevant findings including:
- that Mr Marsh was a credible witness, in respect of whom the Tribunal had formed a favourable impression;
  - that Mr Marsh had a proper understanding of the need for integrity in his dealings with  and more generally in his aviation career;
  - that Mr Marsh’s conduct on this occasion did not demonstrate an underlying character defect or flaw which might detract from his fitness and

propriety;

- that Mr Marsh's conduct was explicable in light of the apparent proliferation of material concerning CASA's examination questions;
- that Mr Marsh participated in this system;
- that Mr Marsh did not personally cheat (in the conventional sense);
- that Mr Marsh appeared to have only a minor role in a widespread system.

58. These are relevant considerations to take into account in the circumstances in determining whether Mr Marsh is a fit and proper person. I am satisfied that the Tribunal did direct its attention to the issue of aviation standards and the responsibilities of the holder of a pilot's licence under the legislation while also considering Mr Marsh's conduct the subject of review.

59. Grounds of appeal 5, 6, and 7 are not substantiated.

## Conclusion

60. In my view the learned Tribunal member adopted an incorrect approach in his interpretation of reg 298A(1)(c)(iii). Further, the Tribunal ought to have made the findings identified by the applicant in grounds 2, 3 and 4 of the notice of appeal. Although the Tribunal made a finding on the facts that Mr Marsh was a fit and proper person within the meaning of reg 269(1)(d), I consider it necessary that this decision be revisited in light of this judgment. As the underlying facts were fully explored by the Tribunal it may be that the decision of the Tribunal remains the same concerning Mr Marsh's fitness and propriety, however that is an issue for the Tribunal. The appropriate order is to remit the matter to the Tribunal for determination according to law.

61. CASA seeks costs of the appeal. Although as a general proposition costs follow the event, in this case Mr Marsh has made no appearance and has not opposed the appeal. It was for the applicant to substantiate its case, and while it has done so in part, it was in the face of a Tribunal decision in Mr Marsh's favour and without opposition in this Court from Mr Marsh. The better order in the circumstances is that there be no order as to costs.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 21 November 2014