Ekinci v Civil Aviation Safety Authority [2014] FCAFC 180 (23 December 2014)

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FEDERAL COURT OF AUSTRALIA

Ekinci v Civil Aviation Safety Authority [2014] FCAFC 180

Citation:	Ekinci v Civil Aviation Safety Authority [2014] FCAFC 180
Appeal from:	Re Reha Ekinci and Civil Aviation Safety Authority [2014] AATA 424
Parties:	**REHA EKINCI v CIVIL AVIATION SAFETY AUTHORITY; CIVIL AVIATION SAFETY AUTHORITY; REHA EKINCI**
File number:	NSD 722 of 2014
Judges:	**BENNETT, NICHOLAS AND GRIFFITHS JJ**
Date of judgment:	23 December 2014

Catchwords:

ADMINISTRATIVE LAW – appeal from decision of Administrative Appeals Tribunal – *Administrative Appeals Tribunal Act 1975* (Cth) s 44 – suspension and cancellation of licences and certificates of approval – application and construction of *Civil Aviation Regulations 1988* (Cth) – whether appellant a fit and proper person to hold licences and certificates of approval – denial of procedural fairness.

Legislation:

Administrative Appeals Tribunal Act 1975 (Cth)
Civil Aviation Act 1988 (Cth)
Civil Aviation Regulations 1988 (Cth)
Civil Aviation Safety Regulations 1998 (Cth)
Income Tax Assessment Act 1936 (Cth)

Cases cited:

AB v Commissioner of Taxation (Unreported, Federal Court of Australia, 9 September 1998)
B & L Linings Pty Ltd v Chief Commissioner of State Revenue [2008] NSWCA 187; (2008) 74 NSWLR 481
Brazier and Civil Aviation Safety Authority [2004] AATA 313
Clements v Independent Indigenous Advisory Committee [2003] FCAFC 143; (2003) 131 FCR 28
Comcare v Broadhurst [2011] FCAFC 39; (2011) 192 FCR 497
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd [1994] FCA 1074; (1994) 49 FCR 576
Commissioner of Taxation v Zoffanies [2003] FCAFC 236; (2003) 132 FCR 523
Director-General, Department of Ageing, Disability and Home Care v Lambert [2009] NSWCA 102; (2009) 74 NSWLR 523
Dornan v Riordan (1990) 24 FCR 564
Ekinci v Civil Aviation Safety Authority [2014] FCA 905
Fletcher v Commissioner of Taxation (1988) 19 FCR 442
House v The King [1936] HCA 40; (1936) 55 CLR 499
Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32; (2010) 241 CLR 390

McAuliffe v Secretary, Department of Social Security (1992) 28 ALD 609
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611
Repatriation Commission v Boyle (1997) 47 ALD 637
Repatriation Commission v O'Brien [1985] HCA 10; (1995) 155 CLR 422
Rich v Australian Securities and Investment Commission [2004] HCA 42; (2004) 220 CLR 129
Statham v Federal Commissioner of Taxation (1998) 16 ALD 723
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247
TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation [1988] FCA 119; (1998) 82 ALR 175

Date of hearing:	17 November 2014
Date of last submissions:	14 November 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	123
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Solicitor for the Respondent: Civil Aviation Safety Authority

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 722 of 2014**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN:	**REHA EKINCI** **Appellant**
	CIVIL AVIATION SAFETY AUTHORITY **Cross-Appellant**
AND:	**CIVIL AVIATION SAFETY AUTHORITY** **Respondent**
	REHA EKINCI **Cross-Respondent**
JUDGES:	**BENNETT, NICHOLAS AND GRIFFITHS JJ**
DATE OF ORDER:	**23 DECEMBER 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed in respect of ground 7(b) and ground 10 in the amended notice of appeal.
2. The decision and orders of the Administrative Appeals Tribunal made on 27 June 2014 be set aside.
3. The applications for review of the following decisions be remitted to the Administrative Appeals Tribunal for reconsideration according to law:

    (a) the application for review dated 31 January 2014 of the decision to cancel aircraft maintenance engineer's licence No. L 187910;
    (b) the application for review dated 31 January 2014 of the decision to suspend the aircrew pilot licence ARN 187910;

(c) the application for review dated 31 January 2014 of the decision to cancel chief pilot approvals 1-5G8V1 and SBAO/151/2004;
(d) the application for review dated 31 January 2014 of the decision to cancel chief flying instructor appointments SBAO/150/2004 and 1-SDJTO;
(e) the application for review dated 31 January 2014 of the decision to cancel the endorsement training approval SYDR/177/2004;
(f) the application for review dated 31 January 2014 of the decision to cancel air operator's certificate No. S594248-05;
(g) the application for review dated 31 January 2014 of the decision to cancel air operator's certificate No. S576371-14; and
(h) the application for review dated 31 January 2014 of the decision to cancel certificate of approval No. 1-HCC69 issue 02.

4. The appeal otherwise be dismissed.
5. The appellant is to pay two-thirds of the respondent's costs of the appeal as agreed or assessed.
6. Grounds 2 and 3 of the cross-appeal be allowed.
7. The cross-appeal otherwise be dismissed.
8. The cross-respondent is to pay the cross-appellant's costs of the cross-appeal as agreed or assessed.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 722 of 2014**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: **REHA EKINCI**
Appellant

CIVIL AVIATION SAFETY AUTHORITY
Cross-Appellant

AND: **CIVIL AVIATION SAFETY AUTHORITY**
Respondent

REHA EKINCI
Cross-Respondent

JUDGES: **BENNETT, NICHOLAS AND GRIFFITHS JJ**
DATE: **23 DECEMBER 2014**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1. The appellant appeals from a decision of the Administrative Appeals Tribunal (**the AAT**) delivered on 27 June 2014. The AAT suspended and/or cancelled various licences, certificates, approvals or permits which were held either by the appellant or entities with which he was associated. Those other entities have not sought to appeal any aspect of the AAT's decision.
2. The respondent, the Civil Aviation Safety Authority (**CASA**), cross-appeals against some aspects of the decision. **CASA** essentially argues that the AAT failed to give sufficient reasons as to why, in the light of new evidence before the AAT, certain licences held by the appellant should be cancelled and not just suspended. **CASA** also complains that the AAT failed to consider, determine and give reasons in respect of the appellant's challenge to **CASA**'s decision to revoke an instrument which permitted him to give conversion training.
3. Under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**), an appeal (or cross-appeal) lies with this Court on a question of law from any decision made by the AAT in a proceeding. The jurisdiction of the Court to hear and determine such an appeal is provided for in s 44(3) of that Act. The appeal, which is in the Court's original jurisdiction, was heard by a Full Court in accordance with a direction made by the Chief Justice under s 44(3)(b) of the AAT Act.
4. The following abbreviations will be used to refer to the legislation regulating **CASA**:

   (a) *Civil Aviation Act 1988* (Cth) (**CA Act**);
   (b) *Civil Aviation Safety Regulations 1998* (Cth) (**CASR**); and
   (c) Regulations made under *Civil Aviation Regulations 1988* (Cth) will be referred to as "**CAR #**", as they were in the AAT's reasons for decision and in the submissions of the parties.

Background

5. The appellant, Mr Reha Ekinci, has been involved for many years in the civil aviation industry. He is the sole shareholder in two companies which hold air operator certificates (**AOCs**). Those two companies are Air Combat Australia Pty Limited (**Air Combat**) and Cloud Nine Helicopters Pty Limited (**Cloud Nine**). Until recently, Mr Ekinci was also the sole director of both those companies, which conduct their business from Camden Airport in New South Wales.
6. By letter dated 24 January 2014, Mr Ekinci was informed that **CASA**'s delegate (Mr Gerard Campbell, who held the position of Executive Manager, Operations) had decided to:

   (a) cancel his aircraft maintenance engineer licence No. L187910 (**LAME**);
   (b) cancel the certificate of approval for aircraft maintenance No. 1-HCC69 issue 02 held by Air Combat;
   (c) suspend Mr Ekinci's commercial pilot (helicopter), commercial pilot (aeroplane), private pilot (aeroplane and helicopter), student pilot and air transport pilot (aeroplane) licences, ARN 187910 for a period of 12 months;
   (d) cancel the AOC No. S594248-05 held by Air Combat;

(e) cancel the AOC No. S576371-14 held by Cloud Nine;
(f) cancel Mr Ekinci's chief pilot approvals Nos. 1-5G8V1 and SBAO/151/2004;
(g) cancel Mr Ekinci's chief flying instructor appointments SBAO/150/2004 and 1-SDJT0;
(h) recommend to the Director of **CASA** that Mr Ekinci's approved testing officer (**ATO**) delegation (**CASA** 64/06 as extended by **CASA** 205/11) be cancelled; and
(i) cancel Mr Ekinci's endorsement training approval No. SYDR/177/2007.

7. On 31 January 2014, Mr Ekinci, together with Air Combat and Cloud Nine, appealed to the AAT by lodging multiple applications for review of the decisions made by **CASA**'s delegate (it should be noted that the application for review in respect of the delegate's decision to suspend Mr Ekinci's various licences as described in [6(c)] above made express reference only to the suspension of his "aircrew pilot licence ARN 187910", but it appears that the parties and the AAT proceeded on the basis that this application for review extended to all the licences which were suspended by the delegate as described in [6(c)] above). On 27 June 2014, the AAT gave reasons for its decision (noting also that on 29 July 2014, the AAT published a list of 33 corrections to those reasons). Curiously, the AAT's description of the orders made by the delegate on 24 January 2014 differs from the orders which were in fact made (see [1] of the AAT's reasons for decision). In particular, the AAT stated that the delegate had decided to cancel Mr Ekinci's airline transport (ATPL), commercial (CPL), private (PPL) and student pilot licences (aeroplane and helicopter) ARN 187910 whereas, in fact, the delegate had determined merely to suspend those licences. Furthermore, contrary to the AAT's reference to the delegate having suspended Air Combat's certificate of approval for aircraft maintenance No. 1-HCC69 issue 02, the delegate had in fact determined to cancel that certificate of approval. Finally, the AAT's description of the delegate's orders omits any reference to his decision to recommend to the Director that Mr Ekinci's delegation as an ATO be cancelled, notwithstanding that Mr Ekinci purported to seek a review of that decision by the AAT and the AAT purported to cancel his delegation (as will emerge below, this particular decision was in fact not able to be reviewed by the AAT).
8. The AAT set aside all the orders made by **CASA** and, in substitution thereof, made the following orders, that:

(a) Mr Ekinci's LAME be suspended for a period of one year;
(b) it is a condition of the certificate of approval pursuant to CAR 30(3) that Air Combat is to employ a suitably qualified person holding a LAME other than Mr Ekinci, and who is acceptable to **CASA**, to be responsible for the supervision and certification of all maintenance activities undertaken at Air Combat;
(c) it shall be a condition of the AOCs of both Air Combat and Cloud Nine that the respective companies employ a person or persons to hold the positions of chief executive officer, other than Mr Ekinci, and who is acceptable to **CASA**, for the purposes of satisfying the requirements of s 28(1)(a) of the CA Act;
(d) Mr Ekinci's chief pilot approvals 1-5G8V1 and SBAO/151/2004 are cancelled;
(e) Mr Ekinci's chief flying instructor appointments SBAO/150/2004 and 1-SDJTO are cancelled; and
(f) Mr Ekinci's ATO Delegation **CASA** 64/06 is cancelled.

9. The following differences may be noted between the orders made by the AAT as opposed to those made by the delegate:

(a) after setting aside all of the delegate's orders, the AAT made substituted orders which affected some, but not all, of the licences or approvals which were the subject of the delegate's orders. For example, no substitute orders were made by the AAT in respect of the delegate's decision to suspend various of Mr Ekinci's flying licences as set out in [6(c)] above or in respect of the delegate's

decision to cancel Mr Ekinci's endorsement training approval;
(b) instead of cancelling Mr Ekinci's LAME, the AAT suspended it for 12 months;
(c) instead of cancelling the AOCs of both Air Combat and Cloud Nine, the AAT inserted conditions (without time limits) on those AOCs which had the effect of requiring:

(i) Air Combat to employ a person with a LAME, other than Mr Ekinci, and who was acceptable to **CASA**; and
(ii) both Air Combat and Cloud Nine to employ a person, other than Mr Ekinci, as chief executive officer and who was acceptable to **CASA**; and

(d) the delegate's decision to recommend that Mr Ekinci's ATO delegation be cancelled was replaced by an order of the AAT which cancelled that delegation.

10. The significance of some of these differences will be developed below.

The AAT's reasons for decision summarised

11. As noted above, **CASA**'s decisions were challenged in the AAT not only by Mr Ekinci, but also by his two companies. In [4] of its reasons for decision, the AAT described the issues posed by the appeal as raising questions "as to whether there are serious safety concerns or whether, as the Applicants submit, there are minor administrative or clerical errors or oversights perhaps worthy, at most, of counselling".
12. Before considering the substantive issues raised by the parties, the AAT summarised some relevant legal principles. It noted that s 3A of the CA Act provides that the main object of the legislation was to establish a framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents. It then noted that, under s 9 of the CA Act, **CASA**'s function is the conduct of the safety regime in accordance with the CA Act and regulations by developing effective enforcement standards to secure compliance with aviation safety standards and by issuing certification licences, registrations and permits. After referring to s 9A of the CA Act, the AAT also observed that it was clear that effective compliance with standards is essential to the proper performance of **CASA**'s functions and that **CASA** was obliged to regard the safety of air navigation as the most important consideration.
13. The AAT then identified the following principles or guidance established by earlier AAT or court decisions:

(a) it is necessary to consider a licence holder's past record of compliance as indicative of the likelihood of their complying or not complying with aviation regulations in the future, and the respect or lack of respect for such civil aviation regulations generally (citing *Repacholi and Civil Aviation Safety Authority* [2003] AATA 573);
(b) the system of certification of completion of maintenance records is "a central plank" in the regulations dealing with maintenance and repair of aircraft because it is the only means by which it is possible to determine whether all required maintenance has been performed in accordance with regulatory requirements (citing *Brazier and Civil Aviation Authority* [2004] AATA 313 (**Brazier**));
(c) the frequency and extent of airworthiness deficiencies may indicate a culture of non-compliance and indicate that a person is not fit and proper to exercise the privileges of an aircraft maintenance engineer licence (citing *Brazier* at [19]). The AAT regarded this principle as relevant here having regard to Mr Ekinci's attitude that many of the breaches were mere administrative or clerical

oversights;
(d) the expression "fit and proper person" has no precise meaning, but takes its meaning from its context and from the activities in which the person is or will be engaged and the purposes to be served by those activities (citing *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321) and that, in an aviation context, it is necessary to take into account the responsibilities, functions and duties of the holder of a licence, privilege or permit (citing *Re Griffiths and Civil Aviation Authority* (1994) 34 ALD 554); and
(e) in determining whether a person is fit and proper the relevant issue is not whether the person is competent, but rather, whether the person has an appreciation of his or her statutory responsibilities and discharges them, which makes relevant the person's attitude to compliance with the civil aviation regulatory regime (citing *Quadrio and Civil Aviation Safety Authority* [2011] AATA 709).

14. Against the background of those principles and guidance, and the evidence, the AAT made the following findings.
15. First, Mr Ekinci was not entitled at any relevant time to certify or coordinate maintenance on a non-piston engine aircraft, including an L-39 airframe turbine engine and Enstrom helicopters. The AAT rejected the appellant's argument that he was entitled to rely upon certain transitional regulatory provisions as permitting him to supervise or certify the L-39 aircraft or the helicopters. Those transitional provisions are to be found in Pt 66 of **CASA**'s Manual of Standards (**MOS**), which was made under reg 66.015 of the CASR. The AAT expressly approved and adopted the outline of the relevant legislative regime, including the transitional provisions, as described by Mr Paul Simpson of **CASA** in an email dated 4 May 2012 which he sent to Mr Ekinci. The email was in the following terms (emphasis and errors in original):

> Hi Ray,
> Thanks for the consideration of the licensing matters. To help clarify I provide the following info.
> As a group 1 engine licence holder under the 1988 regulations you are permitted to carry out maintenance under the CAR 30 utilising the part 66 transition arrangements. Basically whatever you could do before you can do now with some minor additional privileges under part 66.
> You were issued a group 1 licence with a rating described in CAO 100.92. Please note CAO 100.91, CAO 100.93, CAO 100.94 and CAO 100.95 do not apply to engine ratings. CAO 100.92 1.1 states:
>
> > 1.1 Except where otherwise approved or directed by the Authority, this section of CAO's applies to the requirements for the grant of an aircraft maintenance engineer licence in category engines and for the grant of additional ratings to a licence in the category.
>
> The CAO then lists the ratings group 1 through to group 22. **The L-39 engine does not fit in to any rating and therefore as you have stated is not a licence and must be administered through Maintenance Authorities.** CAO 100.90.3 describes the engine rating and privileges you have associated with the category's electrical, instrument, radio and airframe. At the beginning of each category privilege there is statements similar to:
>
> > Certification of maintenance within the... category may be made by persons holding the appropriate engine rating(s).
>
> **You do not hold a rating on the L-39 engine.** Additionally **CASA** records indicate you are aware of this as you applied for a

Maintenance Authority for both the L-39 engine and airframe in September 2009. **That application was rejected** by AME licencing. **The fac**t that you held a Group 1 engine licence at the time of application for the Maintenance Authority **indicates to CASA that you were aware that your group 1 engine licence did not cover the L-39. This matter is of great concern to CASA.**

Turning to the part 66 transitional regulations it is clear that you can utilise your part 66 licence for any privileges that your old group 1 engine licence permitted. It clearly states in the transitional regulations that its application relates to maintenance certifications and issue of certificates of release to service to which the licence and rating applied. Clearly you cannot apply **you group 1 engine licence to the L-39** and therefore the transitional does not apply in relation to the L-39.

Under Part 66 you hold a category B1 licence with a subcategory B1.2 - aeroplane piston engines with a number of exclusions. **As you do not have a subcategory B1.1-Aeroplanes turbine licence you are excluded from the privileges listed in Part 66.A.20.4 and Part 66.A.20.4. You are therefore unable to certify for any maintenance, coordination or make any certification for either the L-39 aircraft and the Enstrom helicopters.**

As just discussed with you, as a result of the preliminary findings **CASA** will be issuing class 'A' ASR's on the L-39's and the Enstrom helicopters. Acquittal of the ASR's will require completion of fresh Maintenance Release inspections on the L-39's. Once completed and certified appropriately **CASA** will accept they can be returned to service. A copy of the maintenance work packages and maintenance release issued for the Maintenance Release inspection are to be submitted to **CASA** on completion.

As we are still reviewing the log books for the Enstrom helicopters it appears at this stage acquittal of the ASR's will require either final certifications completed for the last maintenance release inspection by a person that was authorised to do so, or alternatively fresh Maintenance Release inspections will be required.

Regards

Paul Simpson

Airworthiness Team Leader Sydney Region

16. The AAT did not accept Mr Ekinci's claim that he had been advised around 18 April 2011 by a **CASA** maintenance inspector, Mr Ho, that Mr Ekinci was entitled to carry out, supervise and certify maintenance work in respect of the L-39 aircraft and aircraft generally. The AAT added that, in any event, the alleged statements attributed to Mr Ho could not provide any ground to justify Mr Ekinci performing certification work prior to April 2011, nor thereafter, in the absence of evidence that Mr Ho had any authority to waive or vary the regulatory requirements. Moreover, the AAT attached weight to the fact that Mr Ekinci understood that there was a need for him to hold a B1.1 licence because, when his licence in respect of MIG 15 aircraft expired in 2007, he made an application for it to be renewed and amended so as to add a L-39 licence, but then he did not pursue that application.
17. The AAT explained at [35] and [36] of its reasons for decision why it considered that Mr Ekinci was not entitled to rely on his subjective interpretation of the transitional provisions.
18. Secondly, the AAT found that Mr Ekinci made several "extremely serious and unfounded allegations of misconduct against **CASA** officials", that his own evidence could not be described as objective and was not to be preferred to the evidence of **CASA** witnesses regarding Mr Ekinci's claims concerning Mr Ho's advice, but also in respect of his claims that other **CASA** officers had attempted bribery. The AAT found at [45] that the bribery allegations were made without any reasonable basis, "and reinforce the manifest hostility of Mr Ekinci towards certain **CASA** officers".

19. Thirdly, the AAT made the following findings in respect of several discrete maintenance issues:

    (a) *Enstrom helicopter mast: VH-CLI*: The parties were in dispute as to whether the mast on this aircraft was of a type that required retirement at 300 hours and the AAT resolved the issue in Mr Ekinci's favour;
    (b) *Failure to perform maintenance: VH-CLI*: The AAT was not satisfied that **CASA** made good its allegation that the applicants below had failed to performed scheduled engine maintenance on helicopter VH-CLI; and
    (c) *Dual inspections of controls pursuant to CAR 42G*: The AAT found that Mr Ekinci had failed to obtain counter signatures in respect of certain aircraft which required dual inspection and certification. It added that it was Mr Ekinci's responsibility, as the certificate of approval holder, to ensure that counter signatures were obtained. The AAT described the significance of the incident as demonstrating that "Mr Ekinci considered omissions to obtain signatures as an 'inadvertent technical or clerical omission'". This, the AAT found, was further reinforced by Mr Ekinci's submission to the effect that, because there was no evidence of any safety-related incidents arising from the relevant maintenance, **CASA**'s response was concerned with "administrative and clerical discrepancies" in the maintenance records. The AAT noted that a substantial number of the safety reports issued by **CASA** in respect of this matter were of sufficient seriousness to warrant grounding of the aircraft. Moreover, the AAT observed that Mr Ekinci's attitude to compliance was inconsistent with the importance of air safety considerations and the need for strict compliance with regulatory requirements (particularly with respect to the verification of the completion of maintenance), because "these matters go directly to the question of confidence and reliance upon the airworthiness regime".

20. Fourthly, the AAT made the following findings in respect of several discrete flying operations issues:

    (a) *Flight times for helicopters VH-CLI and VH-KZY*: The AAT found that **CASA** failed to establish its claim that there were deficiencies in the recording of flight times and time in service in respect of these helicopters;
    (b) *Flight in VH-JEN without valid maintenance release*: **CASA**'s claim that Mr Ekinci had operated this aircraft without having a valid maintenance release was not made out in circumstances where it accepted Mr Ekinci's explanation that the relevant flight had been conducted not in VH-JEN, but in another aircraft; and
    (c) *BE-90 Beechcraft King Air Endorsement*: **CASA**'s claim that Mr Ekinci had failed to sign the maintenance release in respect of a Beechcraft King Air (BE-90) aircraft on the day he was obtaining an endorsement from the aircraft owner was not established because there was no evidence to contradict Mr Ekinci's account, which was to the effect that he was unable to sign the maintenance release before he obtained an endorsement from the aircraft owner and that the issue was therefore one between the owner and **CASA**.

21. Fifthly, notwithstanding that **CASA** had not issued a show cause notice to the applicants below in respect of certain new matters upon which it relied in support of its decision, the AAT proceeded to hear and determine those matters. It said that this was not procedurally unfair because the applicants had had "ample opportunity to and have in fact produced evidence and made submissions in relation to these matters". The AAT added, however, that it recognised that this was not "the ideal way in which to deal with new issues", and that this had been taken into account in weighing the evidence.
22. The AAT proceeded to make the following findings on these new issues:

(a) *Training flights*: **CASA** alleged that Mr Ekinci conducted training flights when his Grade 1 flight instructor rating had expired. Mr Ekinci acknowledged that his Grade 1 flight instructor rating had lapsed, but he relied on his helicopter "check pilot" approval as permitting him to conduct "check flights", which is what he said occurred here. The AAT found that **CASA** had correctly classified the flights as "training flights" and that they should not have taken place in circumstances where Mr Ekinci's rating had lapsed. Moreover, the AAT was critical of Mr Ekinci's attitude as to whether or not there was strict adherence to the regulations and his attitude to **CASA**, all the more so, it observed, given that Mr Ekinci held supernumerary positions (i.e. as chief pilot and chief flying instructor);
(b) *Private flight to Germany in US registered Citation C-650 aircraft*: This issue related to what Mr Ekinci alleged to be a "private flight" from Australia to Germany in a US registered aircraft which was flown by him with a Mr Singh as co-pilot. The flight was conducted for the purpose of transporting a terminally ill person to a hospital in Germany for treatment that was not available in Australia. Mr Ekinci gave evidence that the flight was classified as a private flight, that the use of the aircraft had been donated, and that the services of the aircrew and on-board nurse had all been volunteered, with the costs of fuel, landing fees and over-flight clearances being borne by the patient's family. After analysing relevant provisions and definitions in the CARs, the AAT concluded that, as an experienced chief pilot, Mr Ekinci's should have urgently sought **CASA**'s determination as to the regularity of the flight if he really had any doubt about its characterisation;
(c) *Private operation Co-Pilot*: **CASA** queried whether Mr Singh held an appropriate co-pilot endorsement for the aircraft used for the flight to Germany. The AAT found that if the flight was not properly classified as a private operation, it followed that Mr Singh was not appropriately licensed;
(d) *Maintenance on the C-650*: The AAT said that, on the evidence, it made no determination on whether or not the aircraft was properly maintained at the time of the flight to Germany;
(e) *Logging of private flight time in US registered aircraft*: **CASA** queried the requirements for logging of flight times for private flights in a US registered aircraft. The AAT concluded that, on the state of the evidence before it, it was unable to make a final determination on the issue. It also observed that it did "not give great weight to the flight to Germany", an observation which apparently was intended to apply generally to other aspects of the topic, including aspects upon which the AAT upheld **CASA** 's position;
(f) *Low level aerobatic flight*: **CASA** raised for the first time during Mr Ekinci's cross-examination that he had conducted a low level aerobatic flight at a time when his relevant approval had expired. After reviewing the competing evidence, which it described as "contradictory", the AAT stated that it did not find that **CASA**'s claim had been made out; and
(g) *Flights over built-up areas in L-39 aircraft*: The AAT found that there was no significant, relevant or intentional breach committed by Mr Ekinci or any of the other applicants in respect of flights over built-up areas in this aircraft.

23. Sixthly, **CASA** contended that the applicants, including Mr Ekinci, were not fit and proper to have the responsibilities and exercise and perform the functions and duties of licensee authorisation holders. The AAT stated that it considered that the applicants' past conduct was an indication as to likely future conduct, insofar as it reflected an unwillingness and inability to accept and comply with statutory obligations and **CASA**'s rulings. The AAT noted that, under CAR 269, **CASA** was empowered to vary, suspend or cancel an authorisation (after issuing a notice in writing) if satisfied:

(a) ...;
(b) ...;

(c) that the holder of the authorisation has failed in his or her duty with respect to any matter affecting the safe navigation and operation of an aircraft;
(d) that the holder of the authorisation **is not a fit and proper person** to have a responsibility to exercise and perform the functions and duties of the holder of such an authorisation;
(e) that the holder of the authorisation has **contravened a direction** or **instruction** with respect to a matter affecting the safe navigation and operation of an aircraft.

(emphasis in original)

24. The AAT concluded that Mr Ekinci had failed in his duty with respect to ensuring the safe operation of certain aircraft, particularly in relation to the carrying out of maintenance and verification in relation to the L-39 and helicopter aircraft, and that he failed to act in accordance with permissions and licences conferred on him. The AAT made the following observations at [117] of its reasons for decision:

> ... In our view these important failures by Mr Ekinci in these respects could materially affect the security and safe operation of the aircraft leading to an increased risk that those maintenance activities may not be performed in a safe and satisfactory manner. Clearly the keeping of accurate records in accordance with the prescribed regulations goes to the heart of ensuring reliable and safe operation of an aircraft so far as maintenance is concerned. It is unacceptable for an individual operator such as Mr Ekinci to depart from the requirements of the aviation safety standards on the basis that in his or her opinion the safety of the aircraft will not be affected. To permit any significant departures from the regulatory regime established for ensuring and regulating air safety is capable of adversely impacting in a serious way on the integrity of the regime by undermining the reliability and confidence that can be placed on records and compliance procedures which form an integral part of such standards.

25. The AAT further noted that, since at least 2007, Mr Ekinci and his two companies had demonstrated on numerous occasions that they elected to judge for themselves the particular requirements of the regulatory scheme with which they would comply. It added at [119]:

> ... For example as to dual certification requirements, Mr Ekinci has treated this as an administrative, formal or clerical matter which can be ignored, provided that in his assessment there is no impediment to safety. However, the provisions as to certification and compliance with formal and substantive requirements of the regime are essential to air safety. The attitude of Mr Ekinci is reflected in his submission that there is no evidence of accidents or safety related incidents, and therefore this failure to comply with requirements can be placed in the category of administrative or clerical discrepancies. The absence of past incidents or accidents does not necessarily show that the person or organisation has the appropriate appreciation of the need for a culture of compliance.

26. The AAT then made the following observations and findings at [120] to [124]:

> The Tribunal notes in relation to the Medivac flight to Germany in March 2014, that the Applicants contended throughout the hearing that its actions were completely regular and compliant with all requirements. However, at the conclusion of the hearing the

> Applicants fell back to rely on the provision of the regulations concerning urgent mercy flights which is only available on the basis that it was not reasonably practical for them to comply with all the relevant requirements (Exhibit AR).
> The evidence in this case is that over a period of about 14 years, dating back to 1999, there have been significant hostilities and difficulties in the relationships between **CASA** officers and Mr Ekinci and the Applicants. The Tribunal has taken into account that it can be reasonably anticipated, and considered not uncommon, that in a long-standing relationship between a regulatory body and those subject to regulation, differences will arise from time to time and relationships may at times be difficult. However, for a regulatory regime to function effectively there must remain between the parties mutual respect as the underlying basis of a professional relationship.
> It is clear that the hostilities on the part of the Applicants are so deeply entrenched over a period of 14 years as to make it extremely difficult for the Applicants to liaise and cooperate with officers of the Authority. There is no justification for attributing to Mr Ho, for example, the statements that had been made by him. Nor has any basis for allegations of bribery and misconduct on the part of a number of senior **CASA** officials been made out. The Applicants submit that the personal difficulties in relationships between the Applicants and the regulator are capable of resolution and that they will be able to co-operate in the interest of safety in the future. However, the past history of the relationship indicates there will be very serious difficulties in the way of that degree of effective communication and co-operation which is at the heart of effective regulation. The failure to co-operate could pose a danger to the safety of aircraft operations as such problems impede communication and co-operation. As emphasised by the *Rapacholi* (sic) principles there has in the present case been a lack of respect for objective compliance with the regulations and civil aviation regulatory legislation generally. In dealings with **CASA** officers in their professional capacities, the Applicants have demonstrated a lack of respect for the civil aviation laws and those whose professional responsibility it is to enforce them.
> Whilst entertaining doubts as to his entitlement to certify and perform maintenance work on non-piston engine aircraft, Mr Ekinci has taken it upon himself to act for several years upon his own understanding as to what is required to satisfy the regulatory scheme rather than seeking to clarify any differences or interpretation in an appropriate and timely manner.
> With respect to Mr Ekinci's abilities and performance as a commercial charter pilot and flight instructor there has been no question raised as to his competence. However those charged with the higher responsibility of supervision and oversight of other pilots and instructors must ensure they satisfactorily undertake their duties, responsibilities and obligations that arise under relevant legislation to provide for the safety of air navigation. The role and responsibilities of such supernumerary positions as Chief Pilot and Chief Flying Instructor are necessarily of a much higher order than other persons in the aviation industry.

27. After observing that the standard of fitness and propriety must be measured against the duties, responsibilities and obligations entrusted to operators like **CASA**, the AAT stated that it was incumbent upon licensees to behave in a manner which enhances and does not jeopardise the safety of the air navigation system. The AAT then concluded at [127] that, having regard to the above considerations, Mr Ekinci had not satisfied it that he was presently a fit and proper person to perform these duties and responsibilities as a LAME, chief engineer, chief pilot or chief flying instructor in relation to the applicants' operations.
28. In determining what orders it should make, the AAT recorded at [128]-[132] that it took into account the following matters:

> (a) the positions of a licensed aircraft maintenance engineer, chief engineer, chief pilot and chief flying instructor are "positions of great importance" and are of "great significance to air safety". Where there has been a series of significant important failures to perform the functions associated with those positions and comply with relevant regulations, orders should take into account the need

to have the functions carried out in a proper, reliable and consistent manner;
(b) the principal difficulties in this case arose from the actions and conduct of Mr Ekinci over a substantial period of time; and
(c) the disruption, hardship and difficulties which will flow to the applicants if adverse orders are made have to be taken into account, however, primary emphasis had to be given to compliance in the interests of safety.

29. Paragraph 132 of the AAT's reasons for decision squarely addressed the orders which the AAT considered should be made in substitution for those of the delegate. Because of the significance of this paragraph in the appeal, it is desirable to set it out in full:

> The Tribunal does not consider that cancellation is necessary, although, if that course were to be taken it would be open to Mr Ekinci to apply for new licences and approvals and it would be necessary for him to establish, to the satisfaction of **CASA**, that it was appropriate for such authorities to be granted. In the circumstances of this case the Tribunal considers that suspension is the correct course. The Tribunal considers that a term of one year of suspension is appropriate.

30. As will emerge below, this paragraph of the AAT's reasons is not without difficulty. Mr Ekinci contends that it is illogical in circumstances where, having stated that it did not consider that cancellation was necessary, the AAT proceeded to cancel several of his licences and other authorisations without seeking to explain how those particular sanctions were justified.

The appeal and cross-appeal

31. The grounds of the amended notice of appeal are as follows (emphasis in original and without correction):
    1. The Tribunal erred in law in that it suspended the applicant's engineer licence L187910 for a period of one year and in so doing imposed a punishment which was beyond the power conferred upon it under the provisions of section 269 of the *Civil Aviation Regulations 1988*.
    2. The Tribunal misconstrued the entitlements of the applicant to sign for maintenance carried out on VFR aircraft equipped with a single generator in respect of work carried out on the categories of electricals, instruments and radio.
    3. The Tribunal misconstrued the extent of the privileges afforded by Part 66 of the MOS transitional provisions relating to the limited maintenance that can be carried out on VFR aircraft equipped with a single generator.
    4. The Tribunal erred in preventing the applicant from being responsible for the supervision and certification of all maintenance activities undertaken at Air Combat Australia Pty Ltd in circumstances where:

        (a) It purported to suspend his aircraft engineer licence for a period of one year and made no corresponding order which would otherwise entitle him to be responsible for the supervision and certification of all maintenance activities undertaken at Air Combat Australia Pty Ltd at the expiration of that suspension;
        (b) Alternatively the conclusion reached by the Tribunal at [60] was based upon its findings of two discreet errors in relation to the failure of the applicant to obtain the second signatory to maintenance records notwithstanding that the maintenance had in fact been carried out;
        (c) The exercise of the Tribunal's discretion to make such an order was one that no reasonable decision maker could have come to on the evidence before it.

    5. The Tribunal erred in ordering that both Air Combat Australia Pty Ltd and Cloud Nine Helicopters Pty Ltd not employ the applicant in the position of

Chief Executive Officer (however described) for the purposes of satisfying the requirements of Section 28(1)(a) of the *Civil Aviation Act 1988*;

(a) when there was no evidence before the Tribunal which would permit a finding that were the applicant otherwise employed in that position, he would interfere with or otherwise override the chain of command of those corporate entities; and/or

(b) The exercise of the Tribunal's discretion to make such an order was one that no reasonable decision maker could have come to on the evidence before it.

6. The Tribunal erred in cancelling the applicant's chief pilot approvals and chief flying instructor appointments in that:

(a) It conflated in its reasons for decision a series of allegations raised against the applicant which were nonetheless dismissed or otherwise stated as not being of any weight to the Tribunal in its determination with those issues which were relevant to the exercise of their discretion;
(b) No reasonable Tribunal could exercise its discretion in such a way when based upon the relevant findings that it made.

7. The Tribunal denied the applicant procedural fairness in that it used the evidence before it as to issues of alleged breaches of rules and procedures in an entirely unexpected way, namely:

(a) to support the conclusion described in [122] and [130] of the Tribunal's decision that the applicant was or would be unable to liaise and cooperate with officers of the respondent; **and**
(b) **to make the order contained in paragraph 2(c) of the Tribunal's decision.**

8. The Tribunal applied the wrong test in determining to:

(a) Suspend the applicant's aircraft maintenance engineer's licence;

(b) Cancel the applicant's chief pilot approvals;

(c) Cancel the applicant's chief flying instructor appointments as described in [129] of the Tribunal's decision.

9. Alternatively, insofar as the decision to cancel those was based upon "a series of significant and important failures to perform those functions and comply with the regulations designed to ensure safety of air operations", as described in [129], the findings of the Tribunal which were relied upon by it to support that conclusion were such that no reasonable decision maker could conclude that suspension and/or cancellation of the relevant authorisations was the correct or preferable decision and/or within the scope of their discretion.
10. The Tribunal erred in that it had no power to cancel ATO Delegation **CASA** 64/06 as it was not a reviewable decision that was before the Tribunal for determination.
32. Mr Ekinci identified the following questions of law as arising in the appeal (without correction):

(a) Did the Tribunal misconstrue the provisions of Civil Action (sic) 269 of the CAR in purporting to suspend and/or cancel the authorisations of Mr Ekinci?
(b) Did the Tribunal misconstrue the privileges and obligations imposed upon the Applicant with regard to the certification of maintenance
(c) Did the Tribunal misconstrue the provisions of s 30 of the CAR.
(d) Did the Tribunal misconstrue the provisions of s 28(1) of the CA Act.
(e) Was the exercise of the discretion of the Tribunal one that no reasonable decision maker could make on the basis of the findings made by it.
(f) Was the applicant denied procedural fairness.

33. Mr Ekinci sought unsuccessfully to have the AAT's orders stayed pending the hearing of his appeal (see *Ekinci v Civil Aviation Safety Authority* [2014] FCA 905); however, his appeal was expedited.
34. As noted above, **CASA** cross-appealed from certain aspects of the AAT's decision. In particular it cross-appealed from:

(a) the AAT's alleged failure to exercise its discretion to review **CASA**'s decision to suspend Mr Ekinci's student pilot licence, private pilot (aeroplane and helicopter) licences, commercial pilot (aeroplane and helicopter) licences and air transport pilot (aeroplane) licence for a period of 12 months;
(b) the AAT's decision to suspend, rather than cancel, Mr Ekinci's LAME; and
(c) the Tribunal's failure to exercise its jurisdiction to review **CASA**'s decision to revoke Mr Ekinci's approval to give conversion training under instrument SYDR/177/2007.

35. The grounds of cross-appeal raised by **CASA** were as follows (emphasis in original):
    1. The AAT, having found that the Applicant was not a fit and proper person to:
        a. Hold an Aircraft Maintenance Engineer Licence or a Certificate of Approval, at [63];
        b. Perform his duties and responsibilities as an Aircraft Maintenance Engineer, Chief Engineer, Chief Pilot and Chief Flying Instructor, at [127];

    erred in failing to also find that the Applicant was not a fit and proper person to perform the duties and responsibilities as the holder of the Licences and consequently to affirm the Respondent's decision to suspend the Licences or alternatively to cancel the Licences on the basis of the material before the Tribunal.

    2. The AAT erred in failing to:
        a. Exercise its jurisdiction to review the Respondent's decision to suspend the Licences; or
        b. Alternatively, give any, or any sufficient, reasons for its decision to set aside the Respondent's decision to suspend the Licences and to decline to set aside the Respondent's decision to suspend the Licences and in its place cancel the Licences.
    3. The AAT erred in failing to:
        a. Exercise its jurisdiction to review the Respondent's decision to revoke the Applicant's approval to give conversion training under instrument SYDR177/2007; or

b. **Alternatively,** give any reasons for its decision to set aside the Respondent's decision to revoke the Approval.

36. **CASA** identified the following questions of law as arising in respect of its cross-appeal:

Questions of law

1. The proper construction of CAR 269(1)(c) and (d) and particularly whether it requires the cancellation, suspension or variation of all of the authorisations within the meaning of that provision held by a person where there is a finding that the person:
   a. As the holder of an authorisation has failed in their duty with respect to matters affecting safe operation of an aircraft; and/or
   b. Is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of an authorisation.
2. Whether the AAT erred in law in failing to:
   a. Exercise its jurisdiction to review the Respondent's decision to suspend the Applicant's Student Pilot Licence, Private Pilot (Aeroplane and Helicopter) Licences, Commercial Pilot (Aeroplane and Helicopter) Licences and Air Transport Pilot (Aeroplane) Licence ('the Licences') for a period of 12 months; or
   b. **Alternatively,** to give any, or any sufficient, reasons for its decision to:
      i. Set aside the Respondent's decision to suspend the Licences for a period of 12 months; or
      ii. Decline to set aside the Respondent's decision to suspend the Licences and in its place cancel the Licences, for which the Respondent contended.
3. Whether the AAT erred in law in failing to:
   a. Exercise the jurisdiction to review the Respondent's decision to revoke the Applicant's approval to give conversion training under instrument SYDR/177/2007 ('the Approval'), or
   b. **Alternatively,** give any reasons for its decision to set aside the Respondent's decision to revoke the Approval.

Resolution of the appeal

37. *Ground 1:* Ground 1 involves a claim that the AAT erred in exercising its power to suspend under CAR 269 on the basis that it imposed a punishment. Mr Ekinci submitted that the AAT sought to penalise or punish him, which involved an improper exercise of its discretion. Mr Ekinci acknowledged that, as recognised in *Rich v Australian Securities and Investment Commission* [2004] HCA 42; (2004) 220 CLR 129 at [30]- [38] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, a legislative scheme might be protective of the public in its intent but nevertheless be penal in its consequences insofar as the impact upon a licensee is concerned. But he submitted that this did not permit a protective scheme to be employed for the purposes of penalisation.
38. In our view, there is nothing in the AAT's reasons for decision or in any of the other material before us which would support a finding that the AAT employed its power to impose sanctions for the purpose of punishing or penalising Mr Ekinci. In [128] to [132] of its reasons for decision, the AAT set out the matters which it took into account in determining what orders should be substituted for those made by **CASA**'s delegate (see [28] and [29] above). While some of the matters there identified could be regarded as involving considerations of both general and specific deterrence, we do not consider those considerations to be impermissible, nor do we consider that any of the matters which were taken into account by the AAT manifested a desire or endeavour on its part to punish or penalise Mr Ekinci. In our view, there is no foundation to support Mr Ekinci's claim that the AAT was motivated by a desire to punish or penalise him.

39. It might also be noted that the decision to suspend Mr Ekinci's LAME was a less harsh sanction than that for which it was substituted, namely the delegate's decision to cancel that licence. In other words, that the AAT reduced the severity of some aspects of the sanctions imposed by **CASA**, which sits uncomfortably with Mr Ekinci's claim that the AAT was motivated by a desire to punish him.
40. For these reasons, ground 1 must be rejected.
41. *Grounds 2 and 3*: Grounds 2 and 3 relate to the AAT's findings that Mr Ekinci had performed maintenance on non-piston aircraft or helicopters and also had certified for the coordination of maintenance for both those types of aircraft when he did not have proper authorisation to do so. Mr Ekinci submitted that there was no suggestion that he was not an able and competent engineer or that the maintenance work performed by him was sub-standard. He acknowledged that his relevant licences had expired when the relevant conduct occurred and that the AAT correctly found that his licences and approvals did not on their face permit the maintenance to be performed but he contended that "the combined effect of the regulatory regime was to provide for an overarching entitlement to license (sic) holders which... permitted him to carry out the work in question".
42. These grounds raise the question whether the AAT erroneously concluded that Mr Ekinci was unable to perform maintenance on non-piston aircraft or helicopters or certify for the coordination of maintenance for the L-39 jet or helicopters. Mr Ekinci contended that, on a proper construction of the relevant provisions of the CARs and the transitional provisions, together with the evidence given below by Mr Ho and Mr Marriott from **CASA** concerning the scope and effect of those provisions, he was properly authorised to certify for the categories of electrical, instruments and radios for all VFR aircraft fitted with a single generator system, regardless of the airframe. He further contended that he was both entitled and obliged under s 6.14.2 of the Air Combat Procedures Manual (**ACPM**) to certify for the co-ordination of maintenance. That provision stated:

> Final inspection for all maintenance/schedule maintenance/unscheduled maintenance and mitcom will be conducted by the LAME who holds the relevant **CASA** qualifications who has supervised the work.
> The chief engineer and/or the co-ordinating engineer will co-ordinate all final inspections prior to certification of the work...
> When the final inspection has been made by all required personnel and they have signed for the inspection of the relevant paper work the co-ordinator will then place the co-ordinated certification and the aircraft maintenance work package and certify for the work in the aircraft's relevant log book.

43. Alternatively, Mr Ekinci contended that, if his construction of the relevant provisions was incorrect, the degree of uncertainty surrounding the various entitlements indicated that "a more appropriate safety related outcome would be for him to undergo counselling and/or training" and not impose a harsher sanction.
44. For the following reasons, we do not accept these contentions.
45. First, we do not accept Mr Ekinci's contention that he held an expired licence to carry out maintenance on the L-39 jet and helicopters. As the AAT found at [22] of its reasons for decision, Mr Ekinci or his companies previously held a maintenance authority for the MIG 15 aircraft (which is a non-piston engine aircraft), but that authority expired in 2007 and was not renewed. Mr Ekinci then applied for a maintenance authority for the L-39 aircraft, but it was not granted by **CASA**. The expired maintenance authority for the MIG 15 was limited to that particular aircraft and had no application to the L-39 aircraft or Enstrom helicopters.
46. Secondly, we do not accept that Mr Ekinci's LAME authorised him to certify for maintenance on the relevant aircraft. The effect of CAR 42ZC(1) is to prohibit maintenance on an aircraft unless the person who carries out the maintenance is permitted to do so by the CAR. CAR 42ZC(4), which deals with class B aircraft (i.e. non-regular public transport), provides that the person can carry out maintenance if they:

> (a) hold a LAME which permits them to certify for the maintenance and they either hold, or work under an arrangement, with a

person who holds, a certificate of approval for the maintenance;
(b) hold a LAME that permits them to certify for the maintenance and they are either not an employee, or are an employee of a person who holds such a licence;
(c) carry out the maintenance under the supervision of a person who holds a LAME that permits them to certify for the maintenance and is permitted to carry out the maintenance;
(d) are a pilot performing Schedule 8 maintenance; or
(e) are authorised to carry out the maintenance by an authorisation issued by **CASA**.

47. CAR 42G contains requirements for dual inspection/certification where any part of a flight control system of an aircraft is worked on during the carrying out of maintenance.
48. Schedule 6 of the CAR sets out the system of certification of the completion and coordination of the maintenance. The relevant provisions of that Schedule may be summarised as follows.
49. Part 1 of Sch 6 contains definitions and provisions which are relevant to interpretation. Paragraph 1.2 defines the term 'the person who performs maintenance' to mean the person who physically does the maintenance. The effect of [1.3] is that maintenance performed under supervision pursuant to, inter alia, CARs 42ZC(3)(b) or 42ZC(4)(c) is taken to have been performed by the supervisor (i.e. not the supervisee), so that a person who physically does the work under supervision cannot certify for or co-ordinate the maintenance in compliance with Pts 2 and 3 of Sch 6.
50. Part 2 of Sch 6 deals with certification of stages of maintenance and completion of inspections. Paragraph 2.1 requires a certification for the completion of each stage of maintenance. Paragraph 2.2 provides that such certification is only to be made by the person who performed the stage of maintenance.
51. Coordination of maintenance is required when:

(a) more than one person performs stages of maintenance within a category of maintenance (see [3.1]); or
(b) maintenance in more than one category of maintenance is performed on an aircraft and more than one person performs that maintenance (see [3.2]).

52. If the carrying out of maintenance within a category of maintenance is required to be coordinated under [3.1], it must be coordinated by one of the people who performed a stage of maintenance within that category (see [3.5]) which, applying [1.2], means a person who physically does the maintenance.
53. If the maintenance is within more than one category of maintenance (see [3.2]), the person carrying out the maintenance must ensure that one of the people specified in [3.6] coordinates the maintenance. Paragraph 3.6 specifies the following persons as being permitted to co-ordinate maintenance across categories:

(a) if maintenance within a category of maintenance is performed by more than one person – the person coordinating the carrying out of maintenance within that category; or
(b) if maintenance within a category of maintenance is performed by one person – that person; or
(c) a person approved by **CASA** to coordinate the carrying out of different categories of maintenance.

54. The relevant effect of these provisions may be summarised as follows:

> (a) to perform and certify for maintenance, a person must be authorized under one of the subgroupings in CAR 42ZC; and
> (b) to coordinate maintenance, the person must have performed the whole or part of the maintenance within a category, or is otherwise authorized by **CASA**, and that cannot be a person who has performed work under the supervision of another licensed person.

55. Mr Ekinci's LAME was a category B1.2 licence which entitled him to work on non-supercharged piston engine aeroplanes only. Mr Marriott explained in his evidence below that the following items were excluded from Mr Ekinci's LAME: airframe, electrical systems and sub-systems, instruments and super-charging. There was an inclusion, which was a continuation of a privilege under Mr Ekinci's previous CAR 31 licence, for minor work, like the adjustment of a compass.
56. Mr Ekinci's previous CAR 31 licence permitted him to work only on Group 1 aeroplane piston engine and systems. CAO 100.3 provided additional maintenance privileges in the electrical, instrument, airframe, and radio categories if the licensee held the appropriate engine rating for the aircraft. Accordingly, the only additional privileges available to Mr Ekinci under CAO 100.3 were in those specified additional categories when fitted to a non-supercharged piston engine aeroplane.
57. We accept **CASA**'s submission that Mr Ekinci's contention, that the transitional provisions for moving to the new Part 66 CASR regime expanded the privileges available to Mr Ekinci beyond those available to him under his previous CAR 31 licence, is incorrect. In our view, the transitional provisions, properly construed, do not expand Mr Ekinci's privileges beyond those which he held under his previous CAR 31 licence (which, as noted above, were confined to work on the piston engine and systems of a Group 1 aeroplane and not a jet or helicopter).
58. Part 66 of the MOS includes the following provisions relating to transitional privileges:

> **Transitional privileges**
> Despite Table No 1 and the exclusions annotated on a licence issued under Part 66 of CASR 1998, and to be without doubt:
>
> 1. a person who held an aircraft maintenance engineer licence under regulation 31 of CAR 1988 to which regulation 202.341 applies; or
> 2. a person who, in accordance with subregulation 202.343(2) or 202.344(2), is taken to be entitled to the issue of an aircraft maintenance engineer licence:
>
> (1) by previously holding, or becoming qualified for, an engine category Group 1 or 2 rating, or an airframe category Group 1, 2 or 19 rating, may perform maintenance certifications and issue certificates of release to service in relation to any of the following kinds of maintenance **to which that licence or rating applied or would have applied**:
> (a) for a Category B1 licence, on aircraft:
> (i) fitted with a single generator; and
> (ii) approved only for V.F.R. operations;
> all electrical maintenance;

(b) for a Category B1 licence, on aircraft approved only for V.F.R. operations:
(i) for aircraft general instruments (excluding RMI, inertial navigation and multi-axis autopilots), all instrument system maintenance and
(ii) for aircraft radio systems, periodic inspections;
(2) by previously holding, or becoming qualified for, an engine or airframe category rated licence, may perform maintenance certifications and issue certificates of release to service in relation to any of the following kinds of maintenance to which that licence and rating applied:
(a) for a category B1 licence, for structural, powerplant, mechanical, electrical and avionic systems on aircraft covered by the licence:
(i) daily or manufacturers' equivalent inspection; and

Aircraft system (and ATA chapter reference)	**Designation of system**	**Conditions or limitations**

(ii) check of the condition of security of attachment of wiring, plumbing, parts and appliances; and
(iii) maintenance of instrument, or electrical, parts and appliances forming part of the powerplant, mechanical or structural systems, where the maintenance:

A. is limited to external mechanical adjustments to facilitate correct operation of power plant or mechanical or structural systems; or
B. is limited to replacement of instrument, or electrical parts and appliances, connected by simple twist or terminal connectors; and

C. excludes instrument or electrical parts and appliances, where maintenance involves functional tests and adjustments requiring the use of external specialised test equipment.

(Emphasis added).

59. The parties agreed that the text of this instrument was defective in two respects. First, they agreed that the headings to the three columns which appear two-thirds of the way down in that extract were inadvertently included in the text and should be ignored. Secondly, they agreed that the text in

sub-paragraphs (1) and (2) of paragraph 2 in that text applies not only to the paragraph numbered 2, but also to the paragraph numbered 1 immediately above it.

60. Taking these matters into account, we consider that the effect of the transitional provisions was as Mr Marriott described below, i.e. a licensee in Mr Ekinci's position can perform electrical, instrument and radio maintenance and inspections which was permitted by their previous CAR 31 licence. In the case of a Category B1 licence, such as that held by Mr Ekinci, privileges can be exercised only in relation to piston engine aeroplanes. The transitional provisions do not authorise Mr Ekinci to perform and certify for electrical, instrument and radio maintenance and inspections on aircraft other than piston engine aeroplanes.
61. The L-39 is a former military jet. Under the previous CAR 31 licensing regime, to perform maintenance on that aircraft's airframe, a licensee required privileges in Groups 1 (airframe), 5 (hydraulics), 6 (air conditioning) and 10 (pressurisation), as the L-39 was not listed in Airworthiness Advisory Circular (**AAC**) 9-91 (airframes) and therefore was not a Group 20 airframe. To perform maintenance on that aircraft's engine, a maintenance authority issued by the **CASA** was required, as the L-39 engine was not listed in AAC 9-92 (engines) and could not be classified as within any of the relevant engine groups.
62. Under the CAR 31 licensing provisions, Mr Ekinci did not hold a licence within the groups required for the L-39 airframe, and neither Mr Ekinci nor his two companies ever held a maintenance authority in relation to the L-39 engine, or in relation to that aircraft generally, so as to permit Mr Ekinci to perform maintenance upon it or certify it for that maintenance. Mr Ekinci previously held a maintenance authority in relation to an MIG 15 aircraft, which was not renewed, and he applied for a maintenance authority in relation to the L-39 aircraft, which was not granted. As the AAT found at [22] of its decision, Mr Ekinci plainly understood that it was necessary for him to have a maintenance authority in relation to the L-39 aircraft as is reflected in the fact that he applied for such an authorisation. Moreover, under Part 66 of CASR, it was necessary that Mr Ekinci held a Category B1 licence, which he did not hold.
63. Mr Ekinci also contended that [66.A.20] of the MOS transitional arrangements authorised him to undertake maintenance in the electrical, instrument and radio categories on the L-39 aircraft and that the AAT erred in taking a different view of the proper construction of that provision. We disagree. The transitional arrangement under that provision includes a reference to Appendix II, which includes a condition set out in the table relating to a Category A licence and is expressed in the following terms:

> Provided that the old licence and its ratings applied to the maintenance, or would have applied to the maintenance but for Part 66 of CASR 1998.

64. Mr Ekinci also drew attention to [66A.45] of the MOS in support of his contention that he was entitled to undertake maintenance upon the L-39 because it was not listed in Appendix IX to CAO 104 as a type rated aircraft. CAO 104 deals with certificates of approval, including applications, grant and conditions. CAO 104.0 contains specific requirements for the authorisation of persons to perform maintenance on Warbird, Historic or Replica (**WHR**) aircraft. CAO 104 (2) defines a "WHR employee" as a person who is an employee of a certificate of approval holder and who is either the holder of a B1 licence in a subcategory that is applicable to the WHR or a Category B2 licence holder. The L-39 is a turbine-powered aeroplane. CASR 66.010 defines a "B1.1 licence" as applicable to a turbine-engined fixed-wing aeroplane. Mr Ekinci holds a Part 66 licence endorsed with the sub-category B1.2. CASR 66.010 defines a "B1.2 licence" as applicable to a piston-engined fixed wing aeroplane. Accordingly, Mr Ekinci's B1.2 licence did not afford any privileges for him to perform or certify for maintenance on turbine powered aeroplanes, including L-39 aircraft, and the AAT did not misconstrue the relevant provisions.
65. As noted above, Mr Ekinci also relied upon various provisions in the ACPM. **CASA** accepted that the designated chief engineer can co-ordinate maintenance, but only if that person is appropriately qualified and licensed to perform maintenance in one of the categories of maintenance. **CASA**

emphasised that this was an express requirement of the ACPM (under ss 6.8(2) and (3)).

66. We accept **CASA**'s submission that the ACPM does not state that the chief engineer is required to sign co-ordination and that s 6.7 of the ACPM required certification in accordance with Sch 6 of the CARs. It should also be noted that s 3.4 of the ACPM obliged the chief engineer to appoint a maintenance co-ordinator for the purposes of coordinating scheduled maintenance of aircraft in accordance with the approved system of certification.
67. In our view, Mr Ekinci has failed to establish any appealable error in respect of the AAT's construction of the relevant provisions of these instruments.
68. As noted above, ground 2 of the notice of appeal claimed that the AAT misconstrued Mr Ekinci's entitlements to sign for maintenance carried out in certain categories on VFR aircraft equipped with a single generator. Mr Ekinci also contended that, even if there was no such misconstruction, his conduct was not of a level of egregiousness with which it was viewed by the AAT and that it "ought fairly be excused". We have some difficulty seeing how this alternative contention falls within the ambit of ground 2; however, we would reject it in any event. Mr Ekinci submitted that his conduct in undertaking maintenance on the L-39 aircraft and Elstrom helicopters was not of a kind which demonstrated a flagrant disregard for authority, but rather constituted "an understandable error arising from the complexities of the regulatory regime". A similar argument was raised by him before the AAT (see [25] of the AAT's reasons for decision), but was rejected by it for reasons which are set out at some length in [117] to [127] of its reasons for decision. Those reasons include the AAT's finding that Mr Ekinci and his companies had elected to judge for themselves the particular regulatory requirements with which they would comply and that, in the case of Mr Ekinci, notwithstanding that he entertained doubts as to his entitlement to certify and perform maintenance work on non-piston engine aircraft, he took upon himself to act for several years upon his own subjective views regarding the regulatory requirements, rather than seek clarification. In our view, those findings were plainly open on the evidence and we do not consider that they are illogical or unreasonable in the relevant legal sense (see the discussion below of the grounds of illogicality and unreasonableness). Accordingly, we reject Mr Ekinci's alternative case under ground 2.
69. *Ground 4*: Ground 4 is directed to the AAT's decision to impose a condition on Air Combat's certificate of approval that it is to employ a suitably qualified LAME, other than Mr Ekinci, and who is acceptable to **CASA**. Mr Ekinci complained that the combined effect of suspending his LAME for one year, with an absolute prohibition against Air Combat employing him, constituted an "illogical outcome that demonstrates a want of reasoning". In particular, Mr Ekinci contended that it is illogical and unreasonable of **CASA** to suspend his LAME for one year based on the AAT's finding that he was not fit or proper, yet take no other action to address the question whether that lack of fitness or propriety would cease after his one year's suspension. In effect, he contended that it was arbitrary simply to impose such a finite suspension on the basis of a want of fitness or propriety without taking some accompanying step which is designed to assure his fitness and propriety at the end of the suspension period (unless there was some specific disability which impacted upon his fitness and propriety and which would itself terminate at the end of the suspension period).
70. In support of that contention, Mr Ekinci relied upon the High Court's decisions in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (**Li**) and *House v The King* [1936] HCA 40; (1936) 55 CLR 499 (**House**). *Li* deals with the legal sense of "unreasonableness" as a ground of review for jurisdictional error. It may be accepted, however, that the High Court's discussion of that concept also broadly applies to the concept of unreasonableness in the context of a s 44 AAT Act appeal.
71. The following propositions are established in that case by the joint judgment of Hayne, Kiefel and Bell JJ:

> (a) the standard of legal unreasonableness does not involve the court substituting its view as to how a discretion should be exercised for that of the primary decision-maker (at [66]);
> (b) the legal standard of reasonableness is the standard indicated by the proper construction of the statute ([67]);
> (c) by reference to the scope and purpose of the statute, legal unreasonableness may be established where a decision-maker is shown to have committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally (notwithstanding that, ordinarily, the weight to be accorded to relevant matters is for the decision-maker to determine) (at [72]); and

> (d) where the decision-maker provides reasons, the review court may not be able to comprehend how the decision was arrived at. In those circumstances, legal unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification (at [76]).

72. There is nothing in *Li* which contradicts the view previously expressed by Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [135] that it is not the Court's function to substitute its own decision for that of the primary decision-maker:

> ... Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn...

73. Applying those principles here, we do not consider that this aspect of the AAT's decision is illogical or unreasonable in the appropriate legal sense. First, insofar as the decision to suspend Mr Ekinci's LAME for one year is concerned, the AAT (stepping into the shoes of **CASA**), was empowered by CAR 269(1)(d) (subject to the terms of that regulation) to vary, suspend or cancel such an authorisation if it was satisfied, inter alia, "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". In our view, having attained the relevant satisfaction that a holder of an authorisation is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties associated with such an authorisation, **CASA** (and the AAT on review) is entitled to suspend the authorisation for such a period it considers to be appropriate and without necessarily having to take some additional step which is designed to ensure that the person will be fit and proper in the relevant sense at the expiration of a suspension period. If it transpires that, at the end of the suspension period, the person's authorisation is revived but the relevant person is still not fit and proper to **CASA**'s satisfaction, it will be a matter for **CASA** at that time to determine what regulatory action should be taken in those circumstances.
74. Secondly, we do not consider that it is illogical or unreasonable in the relevant legal sense to impose a finite period of suspension on Mr Ekinci's LAME, while effectively imposing an absolute prohibition on Air Combat from employing him at any stage as a person holding a LAME, even when his LAME revives at the end of his suspension. The source of the power to impose such a condition on Air Combat's certificate of approval is to be found in CAR 30(3), which provides:

> 30(3) **CASA** may, for the purpose of ensuring the safety of air navigation, including 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.

75. The power to impose a condition under this provision is expressly limited by the requirement that it must be for the purpose of ensuring the safety of air navigation. Having regard to the serious findings made by the AAT concerning Mr Ekinci's fitness and propriety and his actions and conduct over a substantial period of time which created such serious difficulties in his relationship with **CASA**, coupled with the particular and important responsibilities of a chief engineer, we do not consider that the relevant condition is illogical or unreasonable in the relevant sense. We accept **CASA**'s submission that, having regard to the evidence which was before the AAT concerning Mr Ekinci's fitness and propriety to perform relevant duties and discharge relevant responsibilities and the relationship between those matters and the primacy of the safety of air navigation, a logical and

rational person could reach the same conclusions and impose the same condition as did the AAT, including the requirement that the person holding the LAME be acceptable to **CASA**.

76. *Grounds 5 and 6*: Ground 5 relates to the AAT's order that neither Air Combat or Cloud Nine employ Mr Ekinci in the position of chief executive officer for the purposes of satisfying s 28(1)(a) of the CA Act. Mr Ekinci contended that the issues presented by this ground involve "a consideration of the hierarchical requirements with regard to the chief executive officer and the chief pilot" and raise similar considerations to ground 6. It is convenient, therefore, to deal with this ground together with ground 6.
77. Ground 6 relates to the AAT's decision to cancel Mr Ekinci's chief pilot approvals and chief flying instructor appointments, which he contended was evidence of *Wednesbury* unreasonableness, citing *Li* and *House*. Mr Ekinci contended that there is an irreconcilable difference between the AAT's decision to suspend his LAME, yet cancel his chief flying instructor approvals and chief pilot appointments. He contended that there was no evidence or intelligible justification for that difference. We have rejected a similar submission made by Mr Ekinci in relation to the AAT's decision to suspend his LAME and amend Air Combat's certificate of approval.
78. For the following reasons, we consider that grounds 5 and 6 should also be rejected. First, we do not consider that the AAT misconstrued s 28(1) of the CA Act. It is desirable to set out the relevant parts of s 28:

> **28. CASA must issue AOC if satisfied about certain matters**
> (1) If a person applies to **CASA** for an AOC, **CASA** must issue the AOC if, and only if:
> (a) **CASA** is satisfied that the applicant has complied with, or is capable of complying with, the safety rules; and
> (b) **CASA** is satisfied about the following matters in relation to the applicant's organisation;
> (i) the organisation is suitable to ensure that the AOC operations can be conducted or carried out safely, having regard to the nature of the AOC operation;
> (ii) the organisation's chain of command is appropriate to ensure that the AOC operations can be conducted or carried out safely;
> (iii) the organisation has a sufficient number of suitably qualified and competent employees to conduct or carry out the AOC operations safely;
> (iv) key personnel in the organisation have appropriate experience in air operations to conduct or to carry out the AOC operations safely;
> ...

79. It is also relevant to take into account the effects of ss 28BA and 28BB in relation to **CASA**'s powers to impose conditions on an AOC. Section 28BA(1)(c) provides that an AOC has effect subject to any conditions imposed by **CASA** under s 28BB.
80. Sub-section 28BB(1) confers a power on **CASA** to impose conditions on an AOC either at the time of issuing the AOC or, at any time thereafter, to impose further conditions by giving the AOC holder a written notice.
81. For completeness, it might be noted that there are some express limits imposed by s 28BC on **CASA**'s powers in relation to the suspension or cancellation of an AOC or the imposition of conditions, none of which is relevant here.
82. In our view, the combined effect of ss 28(1)(a) and (b)(ii), (iii) and (iv) required **CASA** (and the AAT) to be satisfied that the chain of command of both Air Combat and Cloud Nine was appropriate to ensure that their operations would be carried out safely and that the employees and "key personnel" (which is defined in s 28(3) to include a person who carries out the duties of a chief executive office) have the appropriate experience safely to conduct those operations under the AOC before **CASA** can lawfully issue an AOC. That construction is reinforced by the terms of s 28BF of

the CA Act, which requires the holder of an AOC to maintain an appropriate organisation and management structure, a requirement which applies as a general condition of the AOC by operation of s 28BA(1)(a).

83. It is evident that the AAT concluded that, for purposes of ss 28(1)(a) and (b) of the CA Act, Air Combat and Cloud Nine could only hold AOCs if those responsible for compliance with aviation legislation would not be under Mr Ekinci's influence. Accordingly, it imposed conditions on the relevant AOCs which had the effect of excluding Mr Ekinci from occupying what the AAT described as a "supernumerary position" with the companies. We are not persuaded that the AAT acted illogically or unreasonably in the relevant legal sense in imposing those conditions. Having regard to the evidence and the AAT's findings regarding Mr Ekinci's conduct and lack of fitness and propriety, it was plainly open to the AAT to conclude that Mr Ekinci was not an appropriate person to be involved in the senior management of the two companies in order to satisfy the requirements of ss 28(1)(a) and (b) of the CA Act.
84. *Ground 7*: Ground 7(a) concerned the allegation that the AAT denied Mr Ekinci procedural fairness by using the evidence adduced before it as to the alleged breaches of rules and procedures in an entirely unexpected way and without giving him an opportunity to address the AAT's concerns. Mr Ekinci submitted that he was denied procedural fairness as he was not given an opportunity to address the AAT's findings concerning his poor historical relationship with **CASA** and the related finding that his dealings with **CASA** demonstrated a lack of respect for civil aviation regulations and those who have a professional responsibility for enforcing those regulations.
85. Ground 7(b) concerned the claim that Mr Ekinci was given no prior notice of the AAT's intention to make an order which had the effect of permanently precluding him from acting as chief executive officer in his own companies. He contended that, had the issue been raised, he could have called evidence and made submissions to address any concerns which the AAT had that he might meddle in or interfere with the performance of the duties of the chief pilot or chief flying instructor, assuming that someone else was performing those roles.
86. The relevant requirements of procedural fairness are reflected in [28] to [30] of the Full Court's decision in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; (1994) 49 FCR 576 which, despite their length, should be set out in full:

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material - *Dixon v. Commonwealth* (1981) 61 ALR 173 at 179. However, as Lord Diplock said in *F Hoffman-La Roche and Co. A.G. v. Secretary of State for Trade and Industry* (1975) AC 295 at 369:
>
> > "...the rules of natural justice do not require the decision-maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished."
>
> A person likely to be affected by an administrative decision to which requirements of procedural fairness apply can support his or her case by appropriate information but cannot complain if it is not accepted. On the other hand, if information on some factor personal to that person is obtained from some other source and is likely to have an effect upon the outcome, he or she should be given the opportunity of dealing with it: *Kioa v West* at 587 (Mason J), 628 (Brennan J). Within the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case: *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502 at 506 (Fox J), 513 (Neaves J). In *Ansett Transport Industries Ltd v Minister for Aviation* (1987) 72 ALR 469 at 499, Lockhart J expressly agreed with the observations of Fox J in *Sinnathamby* on this point.

> See also *Geroudis v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 19 ALD 755 at 756-7 (French J) and *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (supra) at 103 (Keely J), 119 (Gummow J).
> The general propositions set out above may be subject to qualifications in particular cases. Two such qualifications were enunciated by Jenkinson J in *Somaghi* (supra) at 108-109:

1. The subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it: *Kioa v West* at 587 (Mason J); *Sinnathamby* at 348 (Burchett J); *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 (Burchett J).
2. The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material: *Minister for Immigration and Ethnic Affairs v Kumar* (unreported, Full Court Federal Court, 31 May 1990); *Kioa v West* at 573, 588 and 634.

> His Honour observed that those qualifications may be no more than an application of the general requirement of procedural fairness in particular cases. As Gummow J there said (at 359):
>
> > "... in a particular case, fairness may require the applicant to have the opportunity to deal with matters adverse to the applicant's interests which the decision-maker proposes to take into account, even if the source of concern by the decision-maker is not information or material provided by the third party, but what is seen to be the conduct of the applicant in question."
>
> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question. For a statutory exception to the latter proposition see the pre-decision conference process provided for in the *Trade Practices Act 1974* (Cth).

87. We do not consider that Mr Ekinci was denied procedural fairness in respect of the AAT's findings and related orders concerning his poor relationship with **CASA**. That topic was canvassed at the AAT hearing in evidence, in exchanges with the Tribunal's members during the hearing and in closing submissions. Mr Ekinci was cross-examined on the matter and it was taken up by his counsel in re-examination. It was also addressed in his written submissions, as well as in those of **CASA**. It is evident that Mr Ekinci was content to conduct his case below on the basis that the personal difficulties between himself, his associated companies and **CASA** were capable of resolution and that they would be able to co-operate in the interests of aviation safety in the future, but the AAT concluded otherwise. There was no procedural unfairness in relation to this topic or issue.
88. In our view, however, the position is different in respect of ground 7(b) of the amended notice of appeal. it raised a claim of procedural unfairness in respect of the AAT's decision to set aside the delegate's decision to cancel Air Combat's certificate of authority and the AOCs of both Air Combat and

Cloud Nine and, instead, to substitute a decision to impose a condition on both those companies' AOCs which had the effect of allowing them to continue to operate, but only on condition that Mr Ekinci not be the chief executive officer and that an alternative person occupying that position had to be acceptable to **CASA. CASA** acknowledged before us that the possibility of such a condition being imposed was not raised by it during the course of the AAT hearing and that the AAT itself never indicated that it was contemplating imposing such a condition. It is plain that all the parties to the AAT proceeding were caught by surprise when the AAT imposed such a condition.

89. In our view, procedural fairness required the AAT to put Mr Ekinci on notice that it was contemplating making such an order and to provide him with an opportunity to respond, by calling evidence as to the effect of such a condition and by making submissions. The same could be said in respect of Air Combat and Cloud Nine, whose interests were also plainly affected by the condition, but that matter need not be taken any further because neither company appealed the AAT's decision. It is unnecessary for us to determine whether **CASA** was also denied procedural fairness on this issue.
90. The circumstances here are broadly similar to those in *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 (**Fletcher**). In that case, the AAT affirmed the Commissioner's disallowance of the taxpayer's objection to the Commissioner's decision rejecting certain deductions. In affirming the Commissioner's disallowance of the taxpayer's objections the AAT purported to exercise the discretion conferred upon the Commissioner by s 177F(1) of the *Income Tax Assessment Act 1936* (Cth) (i.e. the discretion to cancel a tax benefit obtained by a taxpayer in connection with a scheme to which Pt IVA of that Act applied). The Commissioner conceded that at no time had he made a determination against the taxpayer under s 177F(1) and that no submission was made to the AAT in connection with Pt IVA.
91. The Full Court held that, in making a determination under s 177F(1), the AAT denied the taxpayer procedural fairness. The Full Court said at 456-457:

> As we have already mentioned, in the present case it is conceded that at no time prior to, or during, the hearing before the Tribunal was any reference made to Pt IVA of the Act. Although the objections to the various assessments submitted by Mr McGrath on behalf of the applicants had included, as one of 18 grounds of objection, an assertion that Pt IVA of the Act did not apply to the transaction, the Commissioner at no time indicated any intention to rely upon this path. Nor did the members of the Tribunal give any indication to the applicants that the Tribunal might determine the appeal by reference to that Part; as they were entitled to do notwithstanding that the Commissioner himself had not raised Pt IVA.
>
> It is not clear to us that the applicants would have adduced additional evidence in order to resist a case made under Pt IVA. Indeed it is not easy to see what additional evidence could usefully have been led. But, because the matter was not raised, the applicants and their advisers had no opportunity to consider this question. We are not in a position to conclude that there was no possibility that material evidence could have been led. Moreover as both *Stead* (supra) and *Lewis* (supra) demonstrate, the question whether procedural fairness has been denied does not depend upon the question whether material evidence has been lost. The opportunity of making relevant submissions is an important ingredient of a fair trial. This statement is true in all cases, notwithstanding that there may be cases in which the grant of a new trial is unnecessary or futile.
>
> ...
>
> In our opinion the course taken in the present case involved the denial to the applicants of procedural fairness. Prima facie the matter ought to be remitted to the Tribunal for further consideration at a hearing at which all parties will have a proper opportunity to address the possible application to the case of the provisions of Pt IVA of the Act.

92. The position here is perhaps even stronger than was the case in *Fletcher*. Mr Ekinci contended that, had he known that the AAT was contemplating imposing such a condition, he would have adduced evidence and made submissions in relation to that possibility. It can be assumed that such evidence might include material which was directed to the implications for him as the sole shareholder of the two companies being precluded from continuing to

act as their chief executive officer. Mr Ekinci might also have wished to adduce evidence relating to the personal hardship to him of any such condition (although the AAT stated at [131] that it took into account hardship and difficulty for Mr Ekinci and his companies, it is evident that this was at a high level of generality and did not relate specifically to the implications of the condition on the AOCs regarding the chief executive officer in circumstances where the AAT never indicated that it was contemplating imposing such a condition any evidence before it on hardship would not have been directed to that possibility). He may also have wished to make submissions on the question whether the power to impose a condition included the power to require that the chief executive officer be acceptable to **CASA**.

93. Although different views have been expressed by some members of the Court on the issue whether denial of procedural fairness by the AAT raises a question of law for the purposes of s 44 of the AAT Act (the relevant authorities were discussed by the Full Court in *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143; (2003) 131 FCR 28 at [6]- [7] per Gray ACJ, North and Gyles JJ (**Clements**)), it is now established that "this Court should accept the principle that a denial of procedural fairness is an error of law and that, therefore, an appeal from a decision of Tribunal on the ground of such a denial raises a question of law" (*Clements* at [8]).
94. We will consider below the appropriate relief in respect of this successful ground of appeal.
95. *Ground 8*: Ground 8 was not pressed.
96. *Ground 9*: Ground 9 raised a claim of *Wednesbury* unreasonableness in respect of the AAT's findings that there had been a series of significant and important failures to perform relevant functions and comply with relevant aviation safety regulations. It appears that Mr Ekinci may not have pressed this ground of appeal but, for completeness, we would have rejected it in any event for the following reasons.
97. First, the relevant principles relating to unreasonableness are those that are described in *Li*, which we have discussed above at [70].
98. Secondly, with respect to the AAT's findings at [129] regarding the important role and functions of an aircraft maintenance engineer, chief engineer, chief pilot and chief flying instructor, there can be no doubt that the AAT was correct to view each of those positions as positions of significance and that the proper performance of the functions of persons who occupy those positions is of great significance to air safety. Moreover, we also consider that there was ample evidence to support the AAT's finding that there "had been a series of significant and important failures to perform those functions" and comply with relevant air safety regulations. Having regard to the evidence before the AAT, a logical and rational person could plainly come to the same conclusion as did the AAT and the AAT's reasoning and relevant findings cannot be described as unreasonable in the appropriate legal sense of that concept.
99. *Ground 10*: Ground 10 is directed to the AAT's decision to cancel Mr Ekinci's ATO delegation **CASA** 64/06. Mr Ekinci contended that this decision was not before the AAT on review and that, in any event, it was not a reviewable decision.
100. **CASA** accepted that ground 10 should be upheld. It acknowledged that it was common ground before the AAT that there was no reviewable decision to cancel Mr Ekinci's ATO delegation and the matter was not properly before the AAT. It submitted, however, that this formed a minor and severable part of the AAT's decision, which is capable of being set aside under ss 44(4) and (5) of the AAT Act. **CASA** further submitted that there is no utility in the Court making an order in relation to this aspect of the AAT's decision because the ATO delegation would have expired at the end of June 2014.
101. In our view, it is appropriate that this aspect of the AAT's decision be set aside even though the relevant delegation has now expired. The AAT did not have jurisdiction in relation to the matter and its decision should be formally set aside. In our view, there is utility in granting such relief because it removes what otherwise would be an adverse regulatory determination which might have prejudicial consequences for Mr Ekinci in terms of his future dealings with aviation regulators, both here and, potentially, overseas.

Conclusions on the appeal

102. For these reasons, orders 2 (c) and (f) made by the AAT on 27 June 2014 should be set aside. The question then arises as to whether any relief should be granted in respect of the other orders made by the AAT even though Mr Ekinci has not succeeded in any of the grounds of appeal which relate directly to those orders. Although it is established that the Court's powers under ss 44(4) and (5) of the AAT Act enable it to set aside only part of the AAT's decision and remit that part for redetermination (see *Commissioner of Taxation v Zoffanies* [2003] FCAFC 236; (2003) 132 FCR 523 at [68]-[81] per Hill J, at [86] per Hely J and [95] per Gyles J), we consider that it is appropriate in this case to set aside the AAT's decision and orders in their entirety and to remit to the AAT for redetermination according to law the relevant applications for review of the delegate's decisions (apart from that relating to the recommendation to cancel Mr Ekinci's ATO delegation, which is not a reviewable decision).
103. Although we have rejected Mr Ekinci's appeal in relation to some of the AAT's orders and upheld his appeal in respect of others, it appears that the AAT approached the task of making orders on the basis that they were intertwined. Having regard to the difficulties presented by the AAT's reasoning in [132] of its reasons for decision (as discussed above), the AAT may need to revisit the terms of those other orders depending on the decision it comes to in respect of the issue of Mr Ekinci being precluded from holding a position of chief executive officer with either of the AOC companies.
104. It will be a matter for the AAT to determine whether fresh evidence may be adduced in the conduct of the remitted proceeding. If the AAT proposes to impose a condition on the AOCs similar to that which it imposed under order 2(c), procedural fairness requirements will oblige the Tribunal to provide the parties with an opportunity to adduce relevant evidence and make submissions on that matter. Different considerations are likely to arise in respect of whether fresh evidence should be allowed in respect of the matters which gave rise to other orders made by the AAT which have to be set aside because of their interconnection with order 2(c). We make no direction in this regard but acknowledge that the AAT may well consider that, in light of the extensive canvassing of factual matters at the first hearing and the findings already made by the AAT in respect of those matters, it would be oppressive and inappropriate to allow further evidence to be called in relation to them. That, however, is a matter for the AAT (see the pertinent observations of Foster J in *AB v Commissioner of Taxation*, Unreported, Federal Court of Australia, 9 September 1998).
105. As to costs of the appeal, both parties were agreed that costs should follow the result unless the Court considered that it was appropriate to apportion costs by reference to the relative degrees of success or failure of the respective parties. Taking into account Mr Ekinci's success in respect of only two of his ten grounds of appeal, we consider that it is appropriate to order him to pay two-thirds of **CASA**'s costs of the appeal, as agreed or assessed.

Resolution of the cross-appeal

106. *Ground 1*: This ground was not pressed.
107. *Ground 2*: This ground related to whether the AAT erred on a question of law in relation to the consideration of that aspect of **CASA**'s reviewable decision which concerned the suspension of Mr Ekinci's student pilot licence, private pilot (aeroplane and helicopter) licences, commercial pilot (aeroplane and helicopter) licences and air transport pilot (aeroplane) licence (collectively **the Licences**) for a period of twelve months. **CASA** contended that, notwithstanding that its decision to suspend the Licences formed part of the application for review lodged by the applicants below with the AAT (noting, however, the anomaly described in [7] above), and that those decisions were effectively set aside by [2] of the AAT's decision, namely that the "Decisions under review made on 24 January 2014 by **CASA** are set aside", the AAT failed to give any reasons for so ordering in respect of the Licences. **CASA** emphasised that the AAT had a statutory obligation under s 43(2) of the AAT Act to give reasons for its decision and it contended that a failure to give sufficient reasons is an error of law and provides a basis for setting aside the AAT's decision (citing *Dornan v Riordan* (1990) 24 FCR 564 at 564 (**Dornan**); *McAuliffe v Secretary, Department of Social Security* (1992) 28 ALD 609 at 614-615 and *Repatriation Commission v Boyle* (1997) 47 ALD 637 at 644 (**Boyle**)).
108. The relevant provisions relating to the giving of reasons by the AAT are as follows. Sub-section 43(2) of the AAT Act provides:

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

109. Under s 43(2A), where the AAT does not give reasons in writing for its decision, a party to the proceeding may, within 28 days after being given a copy of the AAT's decision, request the AAT to give that party a statement in writing of the reasons for the decision and the AAT is obliged to comply with that request within 28 days of receiving such a request. Sub-section 43(2B) provides that:

> 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.

110. There are some exceptions to s 43(2), including ss 35, 36, 36A or 36C. None of those exceptions is relevant here.
111. The issue here is whether a failure by the AAT to give reasons for a decision, where it is required to do so under ss 43(2) and (2B), raises a question of law for the purposes of an appeal to this court under s 44(1) of the AAT Act.
112. Different views have been expressed on the relevant issue when it arises in an appeal under s 44 of the AAT Act. Thus, in *Repatriation Commission v O'Brien* [1985] HCA 10; (1995) 155 CLR 422 (**O'Brien**) at 445-46, Brennan J (as his Honour then was and in dissent) considered that if a tribunal fails to give adequate reasons for making an administrative decision which gives rise to an inference that it failed to exercise its powers according to law (such as by taking into account an irrelevant consideration or failing to consider material issues or facts), an inference might be drawn that the tribunal committed an error of law and its decision should be set aside. His Honour emphasised, however, that in those circumstances the tribunal's decision is set aside not because the tribunal failed to state the reason for making its decision, but because of a failure to make the decision according to law. His Honour observed (at 446) that while an obligation to give oral or written reasons for a decision under s 43(2) of the AAT Act might entitle a party to a mandatory judicial order that such reasons be provided, it was not necessarily an error of law merely to fail to expose the reasons for making a decision.
113. Justice Brennan's observations in *O'Brien* were not adopted by the Full Court in *Dornan*. As noted above, the Court there was not dealing with an appeal under s 44 of the AAT Act, but rather, with an appeal from the primary judge's decision on a judicial review. Justices Sweeney, Davies and Burchett said at 573 that the law appeared to be "that a substantial failure to state reasons for a decision, in the circumstances that a statement of reasons is a requirement of the exercise under the statute of the decision-making power, constitutes an error of law".
114. It is important to pay close attention to the express terms of a statutory right of appeal. As Basten JA observed in *Director-General, Department of Ageing, Disability and Home Care v Lambert* [2009] NSWCA 102; (2009) 74 NSWLR 523 at [59], an appeal "on a question of law, from a decision of the Tribunal" (i.e. the language of s 44 of the AAT Act) is narrower than an appeal involving a question of law" (see also *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* [2008] NSWCA 187; (2008) 74 NSWLR 481 at [41]- [46] per Allsop P (as his Honour then was); *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* [1988] FCA 119; (1998) 82 ALR 175 at 178 per Gummow J and *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 at [89] per Hayne, Heydon, Crennan and Kiefel JJ).
115. A similar point was made by McHugh JA (as his Honour then was) in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 281:

> In a case where a right of appeal is given only in respect of a question of law, different considerations apply from a case where there is a full appeal. An ultimate finding of fact, which is not subject to appeal and which is not subject to appeal and which is in no way dependent upon the application of a legal standard, can be treated less elaborately than an issue involving a question of law or mixed fact and law. If not right of appeal is given against findings of fact, a failure to state the basis or even a crucial finding of fact, if it involves no legal standard, will only constitute an error of law if the failure can be characterised as a breach of the principle that justice must be seen to be done. If, for example, the only issue before a court is whether the plaintiff sustained injury by falling over,

> a simple finding that he fell or sustained injury would be enough, if the decision turned simply on the plaintiff's credibility. But, if, in addition to the issue of credibility, other matters were relied on as going to the probability or improbability of the plaintiff's case, such a simple finding would not be enough.

116. In *Boyle*, Tamberlin J held that a failure to provide reasons as required by the relevant provisions of the AAT Act involves a question of law for the purposes of s 44 of the AAT Act. We respectfully agree with that view.
117. Accordingly, the central question is whether the AAT complied with its obligation to provide the reasons for its decision in respect of the Licences. Mr Ekinci contended that it should be inferred from the AAT's reasons for decision that:

> (a) the AAT heard and determined a multiplicity of allegations against Mr Ekinci and dismissed most of them;
> (b) the issues which **CASA** raised before the AAT as bearing on Mr Ekinci's fitness and propriety to hold flight crew licences were dismissed by the AAT;
> (c) other matters originally relied on by **CASA** in its original decision are relevant to its decision to suspend Mr Ekinci's flight crew licences were not pursued before the AAT;
> (d) the AAT was not satisfied that Mr Ekinci was not a fit and proper person to hold the flight crew licences;
> (e) the AAT determined that the correct or preferable decision was to cancel Mr Ekinci's "supernumerary" appointments and approvals; and
> (f) in arriving at that conclusion, the AAT took into account all of the adverse findings against Mr Ekinci and was nonetheless "impressed" with his abilities and performance as a commercial charter pilot but not with his capacity to discharge the obligations of those who held a supernumerary appointment or approval.

118. We do not accept Mr Ekinci's contentions. They are based on speculation as to the AAT's unarticulated reasons for setting aside **CASA**'s decision relating to the Licences. Part of the accepted rationale for requiring a tribunal such as the AAT to give reasons for its decision is to avoid such speculation. In *Statham v Federal Commissioner of Taxation* (1998) 16 ALD 723, which involved an appeal under s 44 of the AAT Act, the Full Court (Woodward, Lockhart and Hartigan JJ) said:

> It is timely for this court to state that it is the duty of the Tribunal, when reviewing the Commissioner's disallowance of objections under the Act, to make clear and full findings on material questions of fact, referring to the evidence or other material on which those findings were based: see Administrative Appeals Tribunal Act 1975 s 43(2B). That duty must be performed by the Tribunal, although the court does not hold the Tribunal's reasons for decision to a standard of perfection: *Bisley Investment Corp v Australian Broadcasting Tribunal* (1982) 40 ALR 233 at 251... ; *FCT v Cainero* (1988) 88 ATC 4427 at 4430-1. **Not least of the reasons for requiring the Tribunal to reach adequate findings of fact is the difficulty of the court determining an appeal on a question of law under s 44 of the Administrative Appeals Tribunal Act where such finding have not been or not adequately been made**. (Emphasis added).

119. We accept **CASA**'s submissions that the issues concerning its decision to suspend the Licences were significant and that the appeal to the AAT raised the issue whether the Licences should be suspended or, indeed, cancelled (as was contended by **CASA** at the AAT hearing after taking into account the new matters described at [22] above). In our view, as a consequence of the AAT's failure to provide reasons in respect of its decision to set

aside **CASA**'s decision suspending the Licences, the reader is unable to determine whether the issue was simply overlooked, or was considered and a conscious decision then taken to set aside **CASA**'s decision and, if that be the case, what were the reasons for the AAT coming to that view. That involves an error on a question of law.

120. *Ground 3*: This issue relates to the AAT's failure to explain why it set aside **CASA**'s decision to revoke Mr Ekinci's approval to give conversion training. In our view, for similar reasons to those given immediately above in respect of the other aspect of the cross-appeal, we consider that the AAT erred on a question of law in not providing reasons on this matter. The AAT's reasons for decision are entirely silent on this matter.

Conclusions on the cross-appeal

121. Grounds 2 and 3 of the cross-appeal should be upheld and the cross-appeal otherwise dismissed. Since the matter is being remitted to the AAT there is no need to make any additional orders in this regard. The AAT will need to address the matters which have given rise to these successful grounds in the cross-appeal. If, on reconsideration, the AAT determines to set aside the delegate's decision to suspend the Licences and to revoke the approval to give conversion training, it will need to provide reasons, as required by s 43(2) of the AAT Act.
122. On the issue of costs, although **CASA** did not press ground 1 of its cross-appeal, it has succeeded in the balance of its cross-appeal. In the circumstances, we consider that it is entitled to an order that Mr Ekinci pay its costs of the cross-appeal.
123. We have also given consideration to the question whether, as Mr Ekinci requested, we should make a direction concerning the constitution of the AAT to conduct the remitted hearing. Although the Court has the power to give such a direction (see, for example, *Comcare v Broadhurst* [2011] FCAFC 39; (2011) 192 FCR 497 at [88]- [99]), we consider that the appropriate course here is to set aside the AAT's decision and remit the matters to the AAT, but leave it to the President to give such directions as he considers appropriate on the issue of the Tribunal's composition, having regard to the AAT's Guidelines for Constituting the Tribunal, dated 14 November 2011.

I certify that the preceding one hundred and twenty-three (123) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Bennett, Nicholas and Griffiths.

Associate:

Dated: 23 December 2014
