Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93 (25 July 2014)

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FEDERAL COURT OF AUSTRALIA

Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93

Citation:	Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93
Appeal from:	Sullivan v Civil Aviation Safety Authority [2013] FCA 1362
Parties:	**MARK SULLIVAN v CIVIL AVIATION SAFETY AUTHORITY**
File number:	NSD 56 of 2014
Judges:	**LOGAN, FLICK & PERRY JJ**
Date of judgment:	25 July 2014
Catchwords:	**ADMINISTRATIVE LAW** – Civil Aviation Safety Authority – whether the Administrative Appeals Tribunal was bound to

apply the principle in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 – whether the Tribunal erred in not requiring compliance with the rule in *Browne v Dunn* (1894) 6 R 67 – whether notice was given in any event satisfying the rule in *Brown v Dunn* and affording the appellant procedural fairness

EVIDENCE – rules of evidence may provide guidance to administrative tribunal – Administrative Appeals Tribunal not bound by the rules of evidence

Held: Appeal dismissed with costs

Legislation:

Administrative Appeals Tribunal Act 1975 (Cth) ss 2A, 33, 39, 43, 44
Australian Federal Police (Disciplinary) Regulations 1979 (Cth)
Australian Securities and Investments Commission Act 2001 (Cth) ss 59, 218
Civil Aviation Act 1988 (Cth) ss 3A, 9A, 29, 30A, 30DC, 30DE
Civil Aviation Regulations 1988 (Cth) reg 215, 269(1)(c), 269(1)(d)
Criminal Code 1995 (Cth) s 137.1
Defence Force Discipline Act 1982 (Cth) s 146A
Evidence Act 1995 (Cth) s 140
Marriage Act 1928 (Vic)
Migration Act 1958 (Cth) ss 311E, 420
National Health Act 1953 (Cth) s 122
Quarantine Act 1908 (Cth) s 66AZA
Transport Safety Investigation Act 2003 (Cth) s 19

Cases cited:

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1
Aporo v Minister for Immigration and Citizenship [2009] FCAFC 123; (2009) 113 ALD 46

Ashby v Slipper [2014] FCAFC 15
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Browne v Dunn (1894) 6 R. 67
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Bromley London Borough City Council v Greater London Council [1983] 1 AC 768
Calvista Australia Pty Ltd v Administrative Appeals Tribunal [2013] FCA 860, (2013) 216 FCR 32
Civil Aviation Safety Authority v Boatman [2006] FCA 460
Clyne v New South Wales Bar Association [1960] HCA 40; (1960) 104 CLR 186
Collins v Administrative Appeals Tribunal [2007] FCAFC 111, (2007) 163 FCR 35
Comcare v Etheridge [2006] FCAFC 27; (2006) 149 FCR 522
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission [2007] FCAFC 132
Ellis v Wallsend District Hospital (1989) 17 NSWLR 553
Hardcastle v Commissioner of Police [1984] FCA 105; (1984) 53 ALR 593
Harvey v Law Society of New South Wales (1975) 49 ALJR 362
Hood v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2010] FCA 555
Hoskins v Repatriation Commission [1991] FCA 559; (1991) 32 FCR 443
Husband v Repatriation Commission [2000] FCA 356, (2000) 171 ALR 69
Hughes and Vale Pty Ltd v New South Wales (No 2) [1955] HCA 28; (1955) 93 CLR 127
Kioa v West [1985] HCA 81; (1985) 159 CLR 550
Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32, (2010) 241 CLR 390

Lamers v Repatriation Commission [2001] FCA 24
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594
Minister for Immigration and Citizenship v SZIAI [2009] HCA 39; (2009) 83 ALJR 1123
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611
Minister for Immigration and Ethnic Affairs v Pochi [1981] HCA 58; (1981) 149 CLR 139
Minister for Immigration and Ethnic Affairs v Pochi [1980] FCA 85; (1980) 44 FLR 41
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Epeabaka [1999] FCA 1, (1999) 84 FCR 411
Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21, (1999) 197 CLR 611
Puryer v Legal Services Commissioner [2012] QCA 300
O'Reilly v Law Society of New South Wales (1988) 24 NSWLR 204
O'Rourke v Miller [1985] HCA 24; (1985) 156 CLR 342
R v Deputy Industrial Injuries Commissioner; *Ex parte Moore* [1965] 1 QB 456
R v The War Pensions Entitlement Appeal Tribunal; *Ex parte Bott* [1933] HCA 30; (1933) 50 CLR 228
Rawson Finances Pty Ltd v Commissioner of Taxation [2013] FCAFC 26, (2013) 296 ALR 307
Re Ekinci and Civil Aviation Safety Authority [2014] AATA 114
Re Flynn and Secretary, Department of Transport (1980) 2 ALN No 116
Re Kevin and Minister for Capital Territory (1979) 2 ALD 238

Re McKenzie and Civil Aviation Safety Authority [2008] AATA 651
Re Pochi v Minister for Immigration and Ethnic Affairs [1979] AATA 64; (1979) 36 FLR 482, (1979) 2 ALD 33
Re Ruddock; Ex parte Applicant S154/2002 [2003] HCA 60, (2003) 201 ALR 437
Re Sullivan and Civil Aviation Safety Authority [2013] AATA 425
Re Tarrant and Australian Securities and Investments Commission [2013] AATA 926, (2013) 62 AAR 192
Rejfek v McElroy [1965] HCA 46; (1965) 112 CLR 517
Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129
Saunders v Federal Commissioner of Taxation (1988) 15 ALD 353
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1976] UKHL 6; [1977] AC 1014
Smith v New South Wales Bar Association [1992] HCA 36; (1992) 176 CLR 256
Soliman v University of Technology, Sydney [2012] FCAFC 146, (2012) 207 FCR 277
Sullivan v Civil Aviation Safety Authority [2013] FCA 1362, (2013) 62 AAR 77
SZRTN v Minister for Immigration and Border Protection [2014] FCA 303
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83
VN Railway Pty Ltd v Federal Commissioner of Taxation [2013] FCA 265, (2013) 211 FCR 188
Unsted v Unsted [1947] NSWStRp 44; (1947) 47 SR (NSW) 495
Yum! Restaurants Australia Pty Ltd v Full Bench of Fair Work Australia [2012] FCAFC 114, (2012) 205 FCR 306
Ziems v The Prothonotary of the Supreme Court of New South Wales [1957] HCA 46; (1957) 97 CLR 279

Commonwealth, *Committee on Administrative Discretions*, Parl Paper No 316 (1973)
Commonwealth, *Commonwealth Administrative Review Committee*, Parl Paper No 144 (1971)

Date of hearing:	6 May 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	168
Counsel for the Appellant:	Mr A W Street SC with Mr J S Emmett
Solicitor for the Appellant:	MBG Lawyers
Counsel for the Respondent:	Mr I L Harvey
Solicitor for the Respondent:	Legal Branch, Civil Aviation Safety Authority

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 56 of 2014**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **MARK SULLIVAN**

Appellant

AND: **CIVIL AVIATION SAFETY AUTHORITY**
Respondent

JUDGES: **LOGAN, FLICK & PERRY JJ**
DATE OF ORDER: **25 JULY 2014**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The Appellant is to pay the costs of the Respondent.

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

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PLACE: **SYDNEY**

REASONS FOR JUDGMENT

LOGAN J:

1. I have had the advantage of reading in draft the reasons for judgement of Flick and Perry JJ. I gratefully adopt the account given by their Honours of the background facts, pertinent extracts from the reasons of the Administrative Appeals Tribunal and those of the learned primary judge, the submissions of the parties and the issues in the appeal. I agree that the appeal must be dismissed with costs.
2. It is a mistake critically to read the reasons of an administrator or administrative tribunal with an eye for error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 282 (*Wu Shan Liang*).
3. It is also a mistake uncritically to assimilate decision making by officers of the Executive with judicial decision making: *Wu Shan Liang* at 271-272. Decision making by the former serves such a diversity of purposes and the occasion for its exercise may arise in such an almost infinite variety of circumstances, in peace or war, within Australia or abroad, that no general assimilation is possible. That said, there can be circumstances where, in its application and operation in the circumstances of a particular case, the content of an obligation on the part of an administrative decision-maker such as the Tribunal to afford procedural fairness can be informed by analogy with a similar obligation attending the exercise of judicial power.
4. *Re Pochi v Minister for Immigration and Ethnic Affairs* [1979] AATA 64; (1979) 2 ALD 33 was a case which entailed the review of a deportation decision in respect of a non-Australian citizen resident who had been convicted of criminal offences. For the purpose of reviewing the Minister's deportation decision, the Tribunal was constituted by its then President, Brennan J, then a judge of this Court. In giving the Tribunal's reasons, Brennan J observed (at 40), "at the end of the day the decision-maker must be persuaded that deportation is in the best interests of Australia, and where the consequences of deportation are grave, he will not be lightly persuaded: see *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 362 (*Briginshaw*)". In the circumstances of the particular case, Brennan J chose not to act upon material which, his Honour acknowledged, raised a suspicion but did not prove that Mr Pochi had been engaged in the commercial trafficking of marijuana. In the result, he recommended (for that was the limit of the review jurisdiction consigned to the Tribunal under the governing legislation) to the Minister that the deportation order be set aside.
5. The Minister appealed against the Tribunal's decision under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act): *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 44 FLR 41 (*Pochi*). In that appeal, Deane J (with whom Evatt J agreed) stated (at 62):

> In my view, the Tribunal was bound, as a matter of law, to act on the basis that any conduct alleged against Mr Pochi which was relied upon as a basis for sustaining the deportation order should be established, on the balance of probability, to its satisfaction by some rationally probative evidence and **not merely raised before it as a matter of suspicion or speculation or left, on the material before it, in the situation where the Tribunal considered that, while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had**. It seems to me that this conclusion follows, as a matter of law, from the authorities referred to and the reasoning advanced by the Tribunal to establish the proposition as a general principle to be observed by it as a matter of administrative practice.
> [Emphasis added]

One of the authorities referred to by Brennan J and hence treated by Deane J as relevant to the conclusion he (Deane J) reached was *Briginshaw*. The words which I have emphasised in the passage quoted from the judgement of Deane J underscore this. As the quote from the reasons of Brennan J reveals, his Honour's use of that case was by analogy and so as to emphasise why suspicion was an insufficient foundation for a conclusion that "the banishing of the husband and father" was in the interests of Australia: (1979) 2 ALD at 58. Brennan J linked this proposition to "notions of fairness" (ibid).

6. The Minister sought and was initially granted special leave to appeal to the High Court against the Full Court's dismissal of his s 44 appeal in *Pochi*. The High Court later revoked special leave for a number of reasons, one of which related to the ramifications of the Tribunal's decision as but a recommendation, another of which touched on a constitutional issue which had emerged late and without earlier consideration by the Full Court: *Minister for Immigration and Ethnic Affairs v Pochi* [1981] HCA 58; (1981) 149 CLR 139.
7. In light of the manner in which the High Court came to dispose of the case, it cannot be said that the views expressed in *Pochi* by Deane J (Evatt J agreeing) in the passage quoted have the approval of that court. Nonetheless, those views have never been disapproved. To the contrary, in *Aporo v Minister for Immigration and Citizenship* [2009] FCAFC 123; (2009) 113 ALD 46 at [48] the Full Court proceeded on the basis that they remained correct.
8. *Pochi* then is not just a case which illustrates the proposition that the Tribunal's conclusions must be based on logically probative material. It is also one in which it was held that, where that conclusion may have grave consequences for a party to the review or even third parties, it ought not lightly to be reached and this factor intrudes on what the Tribunal should regard as probative in the making of a reasonable decision.
9. In dismissing the appeal, the learned primary judge observed, *Sullivan v Civil Aviation Safety Authority* (2013) 67 AAR 77 at [38]:

> The problem with the submissions for Mr Sullivan is that they seek to elevate what is a mere tool for administrative decision-making into a principle which must not only be applied but also must be identified on the face of the Tribunal's reasons as having been applied. I do not accept either proposition.
> ...
> It is Mr Sullivan's case that the Tribunal's decision may be impugned not because the conclusion was not reasonably open and not because material factual findings were not based on some logically probative material but as a result of the Tribunal not having reasoned by reference to *Briginshaw*. Given the statutory context in which the Tribunal operates there is no justification for confining the possible reasoning processes of the Tribunal in this way.

10. Having regard to the passage which I have quoted from the judgement of Deane J in *Pochi*, I respectfully disagree with her Honour's view that there is no possible justification for the nature and consequences of an administrative decision and no concomitant need not lightly to reach particular conclusions intruding into the Tribunal's reasoning process. "Bound as a matter of law", as Deane J put it in *Pochi* puts the subject rather higher, with respect, than a "mere tool".
11. That there is *some* material to warrant a particular conclusion may not always be a complete answer. Where the consequences of that conclusion are so grave and either the quality of that material so slender or the body of contradictory material so compelling that, unless it appears expressly or by necessary inference that the Tribunal has adverted to a need not lightly to reach the conclusion, that conclusion may be unreasonable in the sense explained by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] UKHL 6; [1977] AC 1014 at 1064 (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council*), "*To fall within this expression it must be conduct which no sensible authority* ***acting with due appreciation of its responsibilities*** *would have decided to adopt*" (emphasis added). Overt recognition by an administrative tribunal of a need not lightly to make findings of grave consequence evidences "acting with due appreciation of its responsibilities". To similar effect but without the express reference to an appreciation of responsibilities is his Lordship's later reference in *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768 at 821 to "decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them".
12. That the Tribunal is, by s 33(1)(b) of the AAT Act, exhorted to proceed "with as little formality and technicality, and with as much expedition, as

the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit" and, by s 33(1)(c) of that Act, "not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate" may not be a panacea for inadvertence to the nature of the decision under review or the consequences of making a particular finding.

13. The Migration Review Tribunal operates under a materially similar statutory charter to the Administrative Appeals Tribunal in conducting merits review. That did not prevent French CJ from observing, in respect of the Migration Review Tribunal, in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [28] (*Li*) that, while there was generally an area of decisional freedom consigned to the exercise of a discretion, within which area reasonable minds might reasonably differ as to that exercise, "the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense". In that same case, Hayne, Kiefel and Bell JJ (at [71]) cited with approval the explanation, quoted above, of unreasonableness given by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* and stated that this reflected, "the requirement of the law that a decision-maker understand his or her statutory powers and obligations". Later, at [72], their Honours observed:

> Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

14. The remaining judge in *Li*, Gageler J put matters this way but not, with respect, to different effect when he stated (at [90]):

> Implication of reasonableness as a condition of the exercise of a discretionary power conferred by statute is no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power or performance of a statutory duty. Each is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to reason within limits set by the subject matter, scope and purposes of the statute.
> [Footnote references omitted]

15. Having regard to Li, a requirement in a case where particular conclusions may be attended with grave consequences to advert to a need not lightly to reach such conclusions is but a corollary of the need for the decision-maker to act reasonably. Just such an association is evident in the passage from the judgement of Deane J in *Pochi* quoted above. It is in the implication of reasonableness in administrative decision-making, not in an uncritical assimilation of judicial and administrative decision-making, that the source of the requirement is to be found.
16. In resolving justiciable controversies by a final judgement, a court is constrained to act on admissible evidence. An administrative decision-maker is not so constrained, as s 33(1)(c) of the AAT Act makes plain in respect of the Tribunal. However, an administrative decision-maker must act reasonably. As *Pochi* illustrates, there are particular kinds of administrative decisions which are attended with such grave consequences that to act on "inexact proofs, indefinite testimony or indirect references" (to borrow from *Briginshaw* at 362) may not be reasonable. What was said in *Briginshaw* is applicable only by analogy for the reminder it offers about what may be necessary in particular kinds of case to induce reasonable satisfaction in the mind of a decision-maker. It is not necessary for a decision-maker overtly to refer to *Briginshaw*, only that it be apparent from the reasons given that the decision-maker is aware of that conclusions carrying grave consequences ought not lightly to be made.
17. That such an awareness was apparent in a decision-maker's reasons, would not, in itself, be sufficient to make the decision a reasonable one. It

would also have to be apparent from the reasons that this understanding had permeated the reaching of any such conclusion. To borrow from the language employed by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, it must be apparent from those reasons not only that the decision-maker has appreciated his responsibilities but also that the conclusion reached is sensible, i.e. neither illogical nor irrational. The expectation is that the former will be conducive of the latter.

18. Further and in any event, what was said in *Pochi* is the considered view of a majority of the Full Court and ought not to be departed from by a later Full Court unless persuaded that it was clearly in error. I am not, for the reasons given above, so persuaded.
19. It follows that, insofar as Mr Sullivan's challenge to the dismissal of his s 44 appeal depends upon acceptance of a principle that there are types of decision where it is incumbent upon the Tribunal in its reasons to make apparent an appreciation of the need not lightly to reach conclusions carrying grave consequences, I accept that there is such a principle.
20. The next premise of Mr Sullivan's submission was that the nature of the decision under review or at least the findings which the Tribunal made with respect to Mr Sullivan's evidence were such that the Tribunal was required to observe this principle and that the reasons of the learned Deputy President constituting the Tribunal did not disclose such an appreciation.
21. The decision to cancel Mr Sullivan's aviation licence was made under reg 269 of the *Civil Aviation Regulations 1988* (Cth) (CAR) made pursuant to the *Civil Aviation Act 1988* (Cth) (CAA). That regulation materially provides that the respondent Civil Aviation Safety Authority (**CASA**) may cancel a licence, certificate or authority if satisfied that the holder:

> (a) has contravened, a provision of the Act or these regulations, including these Regulations as in force by virtue of a law of a State;
> ...
> (c) has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft;
> (d) 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.

22. The nature of the administrative review jurisdiction exercised by the Tribunal was such that it fell to the Tribunal, sitting in place of **CASA**, to decide whether, on the basis of the material before it, it was satisfied that Mr Sullivan's Commercial Pilot (Helicopter) Licence should be cancelled.
23. The learned primary judge found (at [38]) that, "Given the statutory context in which the Tribunal operates there is no justification for confining the possible reasoning processes of the Tribunal [by requiring reference to *Briginshaw*]". Her Honour considered (at [39]) that this was consistent with the conclusions in *Civil Aviation Safety Authority v Boatman* [2006] FCA 460 at [62]" (*Boatman*). In *Boatman*, Madgwick J had stated (at [62]):

> 62. As to the ease with which the Court should be satisfied of matters adverse to them, the respondents submitted that, given the seriousness of the consequences for their reputation and livelihood of adverse findings, the evidentiary principles in *Briginshaw* at 361-3 are applicable. I disagree. The proceedings are primarily protective of the public, notwithstanding that fairness to impugned authorisation holders is an important part of the process. Further, any adverse finding that the Court might make is provisional only: it would merely assert that there are reasonable grounds for believing that some conduct had been in contravention of the statutory requirement. It would be inconsistent with the statutory commands to the Court to consider 'reasonable grounds to believe' and to give safety the primary emphasis to require that the Court only act on proofs which are not 'inexact', testimony which is not 'indefinite' and inferences which are not 'indirect' (see *Briginshaw* at 362).

24. *Boatman* did not arise against the background of a decision to cancel a licence pursuant to reg 269 of the CAR. Rather, the Court was dealing with an application by **CASA**, pursuant to s 30DE of the CAA, for orders prohibiting the respondent pilots from doing anything that would otherwise be authorised under their respective pilot licences for a period of 25 days.
25. Mr Sullivan submitted that the jurisdiction exercised by the Tribunal was not protective, as her Honour evidently thought by her reference to *Boatman*, but rather disciplinary. *Boatman*, he submitted, was distinguishable because the jurisdiction was protective and entailed only the making of preliminary findings. His submission was that the nature of the jurisdiction exercised by the Tribunal was such that the Tribunal in its reasons was obliged to make apparent an appreciation of the need not lightly to reach conclusions carrying grave consequences.
26. Apart from submitting that there was no such obligation at all in administrative decision-making, **CASA** submitted that, even if there were, neither the nature of the review jurisdiction being exercised nor the findings which the Tribunal made entailed any such obligation. **CASA** further submitted that the effect of s 9A of the CAA was such that it excluded any such obligation. That section provides:

> Performance of functions
> (1) In exercising its powers and performing its functions, **CASA** must regard the safety of air navigation as the most important consideration.
> (2) Subject to subsection (1), **CASA** must exercise its powers and perform its functions in a manner that ensures that, as far as is practicable, the environment is protected from:
>
> (a) the effects of the operation and use of aircraft; and
> (b) the effects associated with the operation and use of aircraft.

CASA also submitted, further or alternatively, that, in any event, the Tribunal's reasons, read as a whole, disclosed that the learned Deputy President was well aware of any such obligation.

27. It is true that there are many statements to be found in cases which characterise the purpose of the cancellation or suspension of an authority to practise a learned profession or undertake a particular occupation providing a service to the public as protective rather than punitive. *Ziems v The Prothonotary of the Supreme Court of New South Wales* [1957] HCA 46; (1957) 97 CLR 279 at 286, 289, 300 is a notable example of such a characterisation, often cited in later such cases. More recently, a distinction between protective and punitive proceedings has been described as "elusive": *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [32] (*Rich v ASIC*). In *Rich v ASIC*, which was a disqualification proceeding, the supposed distinction was not regarded as determinative of whether Mr Rich was entitled to rely upon the privilege against exposure to penalties and forfeitures so as to resist discovery. It was held that he was entitled to rely on this privilege.
28. In this case, too, to seek to draw such a distinction may be apt to distract from the question as to whether the issues at large in the proceeding before the Tribunal were such that, in deciding whether it was satisfied as to the occurrence of particular events or whether Mr Sullivan was a fit and proper person, the Tribunal ought to have approached fact finding by reference to the gravity and consequences of particular conclusions. That position is not altered by the presence of s 9A in the CAA. A requirement to regard the safety of air navigation as the most important consideration is, for example, not a licence lightly to find that someone such as Mr Sullivan is dishonest.
29. *Boatman* is distinguishable from the present type of case. The jurisdiction of the Court under s 30DE of the CAA which **CASA** invoked in *Boatman* was reactive to a process triggered a suspension decision by **CASA** under s 30DC on the basis that it had reason to believe that the

holder of a civil aviation authorisation had engaged in, was engaging in, or was likely to engage in, conduct that constituted, contributed to or resulted in a serious and imminent risk to air safety. In order to make a prohibition order under s 30DE, the Court had to be satisfied that there was "reason to believe" that the holder of the authorisation had engaged in such conduct: s 30DE(2) of the CAA. Neither an initial suspension decision under s 30DC nor any order under s 30DE entails reaching any concluded view about the holder of the authorisation. The very nature of the condition precedent to the making of either a suspension decision under s 30DC or a prohibition order under s 30DE is inconsistent with a need to advert to *Briginshaw*. In contrast, the exercise or the review of the exercise of the power under reg 269 of the CAR to suspend or cancel does entail the reaching of concluded views in respect of one or more of the criteria mentioned in that regulation. Thus, while I agree with the view expressed by Madgwick J in *Boatman* at [62] as to the inapplicability of *Briginshaw*, unlike the primary judge, I do not regard that view as of any assistance in relation to whether the Tribunal was required to advert to a like principle in reviewing the reg 269 decision of **CASA**.

30. The expression "fit and proper person" found in reg 269 of the CAR has a long history of use as a touchstone in the making of decisions with respect to the cancellation or suspension of an ability to practise a learned profession or pursue a particular occupation. As the learned Deputy President correctly recognised (at [72], fn 38) in the present case, the root Australian authority meaning of that expression is *Hughes and Vale Pty Ltd v New South Wales (No 2)* [1955] HCA 28; (1955) 93 CLR 127 where, at, 156-157, Dixon CJ, McTiernan and Webb JJ said of it:

> The expression "fit and proper person" is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, honesty knowledge and ability: "honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it" — Coke. When the question was whether a man was a fit and proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances: *R v Hyde Justices* [1912] 1 KB 645, 664.

31. The expression "fit and proper" thus can and in this case did entail the reaching of a conclusion about a person's honesty. That being so, the case was one entailing a potentially grave consequence for Mr Sullivan. It was therefore of the kind where the Tribunal ought not to make such a finding lightly and where the reasons should reflect an understanding of this.
32. Mr Sullivan's submissions drew particular attention to two paragraphs of the Tribunal's reasons, paragraph 40 in which the Tribunal observed of Exhibit 3, "I find myself well short of being satisfied that it is what Mr Sullivan claims it to be." and paragraph 75 in which the Tribunal made an affirmative finding of dishonesty in respect of a post-accident report which Mr Sullivan furnished to the Australian Transport Safety Bureau (ATSB).
33. There is a difference between not being satisfied that a person's version of events is accurate and a finding that the version of events given by that person is deliberately false. In *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 at 268, Brennan, Dawson, Toohey and Gaudron JJ observed:

> It is necessary to say something as to the finding that the appellant lied in the Court of Appeal. There is a difference between the rejection of a person's evidence and a finding that he or she deliberately lied. In some cases, a rejection of evidence may lead to a finding that that person lied on another occasion. Thus, in the present case, a rejection of the appellant's evidence in the Court

> of Appeal led to a finding that he lied in the Penrith Local Court on the morning of 11 November 1986. On other occasions, other evidence may be of such a nature or of such weight that, in combination with the rejection of some particular evidence, it will justify a finding that that evidence was fabricated. But, as a matter of logic and common sense, something more than mere rejection of a person's evidence is necessary before there can be a positive finding that he or she deliberately lied in the giving of that evidence. It is particularly important in disciplinary cases, where the honesty and candour of legal practitioners assume special significance, that the distinction between the rejection of a person's evidence and a positive finding that he or she deliberately lied be observed. The mere rejection of evidence can neither justify a consequence over and above that which properly attaches to the matter charged, nor deprive the person of the benefit of personal considerations which might otherwise be taken into account.

34. In *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 230, Clarke JA (Mahoney JA agreeing) referred to this same difference in this way:

> In particular there is a need to distinguish carefully between cases in which the evidence of a solicitor is not accepted and those in which there is an affirmative finding that he has deliberately lied or sought to mislead the tribunal. It goes without saying that a tribunal needs to be satisfied to that degree of persuasion which is necessary to satisfy the *Briginshaw* test before it can properly make a finding that a solicitor has lied or deliberately deceived the tribunal.

His Honour's observations are especially apt for present purposes for their reference to *Briginshaw*.

35. Each of the paragraphs in the Tribunal's reasons to which Mr Sullivan drew attention must not only just be read in context but also keeping firmly in mind what was said in *Wu Shan Liang* about the scrutiny of an administrator's reasons.
36. When this is done, the result in my view is that, in recording in paragraph 40 an absence of satisfaction as to Mr Sullivan's account with respect to Exhibit 3, the learned Deputy President was deliberately refraining from making any positive finding of dishonesty with respect to this account. When he thought that a finding of dishonesty was warranted, the Deputy President has, in paragraph 75 and on a different subject, expressly made such a finding.
37. Mr Sullivan was closely cross-examined about Exhibit 3 and the steps which he took in relation to the calculation of take-off weight for the helicopter. It was never part of that cross-examination that Exhibit 3 was a fabrication. To make such a finding in the absence of any confronting of Mr Sullivan with an allegation of fabrication and the affording to him of an opportunity to respond would not just have entailed confronting a need not lightly to make such a finding but, more fundamentally, a need to observe procedural fairness. There has never been a complaint as to an absence of the latter in relation to the Tribunal's expressed lack of satisfaction with Mr Sullivan's account as to Exhibit 3.
38. There was then no need for the Tribunal to confront a need not lightly to be persuaded before making a finding of dishonesty in relation to Mr Sullivan's account concerning Exhibit 3 because the Tribunal did not, at paragraph 40, make any such finding. Further and, in any event, even if paragraph 40 is to be characterised as Mr Sullivan would have it, the Tribunal, as will be seen, was well aware of a need not lightly to make a finding of that character.
39. As to the finding with respect to the false report to the ATSB, it is to be remembered that Mr Sullivan had already pleaded guilty to a charge that, contrary to s 137.1 of the *Criminal Code 1995* (Cth), he had given a report to the ATSB knowing that the information in the report was false and

misleading. Mr Sullivan's case before the Tribunal did not entail an invitation to the Tribunal to revisit his confession of guilt. Rather, that confession was a given but the Tribunal was invited to look at other events on the day of the accident and to Mr Sullivan's overall history as an aviator and the opinions of others concerning his general character and character and skill as an aviator so as not to be satisfied that his licence should be cancelled. There was no need for the Tribunal to confront a need not lightly to make a finding of dishonesty with respect to the report to the ATSB. Mr Sullivan's dishonesty in this report was an uncontested given in the proceedings.

40. Two further pejorative findings were made in paragraph 75. One was that Mr Sullivan had given the false report so as to avoid an investigation by **CASA** and related examination of his conduct on the day of the accident. The other was that he had made a related dishonest report to an insurer concerning the helicopter's take-off weight. Mr Sullivan submitted that in making these, the Deputy President had not, as he should have, directed himself to the need not lightly to make such findings and, by analogy, to what was said in this regard in *Briginshaw*.
41. This submission either ignores or fails to read fairly and in context paragraph 47 of the Tribunal's reasons:

> 47. Mr Sullivan's submissions referred to a passage in the decision of Deputy President Jarvis in *Re Johanson & Civil Aviation Safety Authority* and to the familiar passage from the judgment of Dixon J in *Briginshaw v Briginshaw* that in matters such as the present, 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Conscious of that warning, I see no reason to doubt the general accuracy of Mr Smale's evidence of matters of observable fact and his recollection of the general thrust of conversations. I was impressed by his recollection of events and I propose to generally accept his evidence. I expressly reject the suggestion that his evidence was the product of prompting by Mr Saffery.
>
> [footnote references omitted]

42. Present in this paragraph is express reference not just to *Briginshaw* and but also to an earlier aviation licencing case in the Tribunal where what was said in that case had been regarded as applicable to the engendering of reasonable satisfaction under reg 269 of the CAR. The learned Deputy President does more than here record his acceptance ("conscious of that warning") of a submission made to him on behalf of Mr Sullivan that reasonable satisfaction is not to be found in "inexact proofs, indefinite testimony, or indirect inferences". He also records his familiarity with the passage concerned in *Briginshaw*.
43. It is true that paragraph 39 appears in part of the Tribunal's reasons directed to whether the evidence of another witness, Mr Smale, ought generally to be accepted but, again, as *Wu Shan Liang* requires, read fairly and in context, what is entailed in the particular reason for generally accepting Mr Smale's evidence is a general recognition as to what is entailed in reaching reasonable satisfaction in a matter of this kind. It would be a quite artificial reading of the Tribunal's reasons to read paragraph 39 otherwise.
44. Thus, though there was a requirement in the circumstances of the case before the Tribunal to advert to a need not lightly to be reasonably satisfied that a condition for cancellation specified in reg 269 of the CAR was met, the Tribunal adverted to this requirement. The findings which the Tribunal came to make in paragraph 75 were each reasonably open on the material before the Tribunal.
45. As originally formulated, ground 7 of the notice of appeal was in these terms:

> That the court below erred in law by failing to hold that the rule in Browne v Dunn had not been complied with in relation to Ms Parsissons' evidence.

In the course of the appeal and after the attention of Mr Sullivan's counsel was drawn to the High Court's decision in *Re Ruddock; Ex parte Applicant*

S154/2002 [2003] HCA 60; (2003) 201 ALR 437 (*S154*), this ground was amended so as to read:

> That the court below erred in law by failing to a relevant matter in relation to the acceptance of the evidence of Ms Anna Parsissons, namely that it was not put to Ms Parsissons that her recollection was faulty in relation to material matters.

46. The so-called "rule in *Browne v Dunn*", derived from observations (quoted by Flick and Perry JJ) made by the then Lord Chancellor, Lord Herschell, in *Browne v Dunn* (1894) 6 R 67 at 70-71, was held in *S154* to be inapplicable to proceedings in the Refugee Review Tribunal. There is no relevant distinction to be drawn between that tribunal and the Administrative Appeals Tribunal so far as the rejection of the direct applicability of that rule is concerned.
47. The reference in the amended ground of appeal to "relevant matter" cannot be to a "relevant consideration" in the sense authoritatively described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40. There was nothing in the CAR or in the CAA which expressly or by necessary implication made what is described in the amended ground a relevant consideration. What did follow from the nature of the review which the Tribunal conducted was that it was bound to afford Mr Sullivan procedural fairness. Even in its amended form, the ground does not expressly assert such a denial but, even reading it benignly and as if it did, there is no substance in this basis of challenge.
48. Since *S154*, the High Court has returned to the nature of administrative review proceedings in *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123 and *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594. In light of these cases, it must now be held that, while, in form, a tribunal such as the Administrative Appeals Tribunal is strictly inquisitorial, the "core function" of such a tribunal is one of review. In undertaking such a review and where there are interested parties to the review with conflicting positions, there can be circumstances where it would be procedurally unfair for the Administrative Appeals Tribunal to base its decision on the acceptance of a particular witness called by one party without affording another party due notice of a differing version. To recognise this is not to subvert *S154* by assimilating the differing nature of judicial and administrative review proceedings. It is just that the inherently flexible content of a procedural fairness obligation can, where that obligation attends the exercise of administrative power, entail a requirement which resembles that which would flow in a judicial proceeding from observance of the rule in *Browne v Dunn*.
49. In some cases, and the present was not one, procedural fairness may dictate that the nature of a differing version be put in the course of the oral testimony of a witness called by one party. So far as the evidence of Ms Anna Parsissons was concerned and insofar as there were any differences between her evidence and that of those on whom **CASA** relied, there was no denial of procedural fairness by the Tribunal to Mr Sullivan. That is because Ms Parsissons' statement, which became part of the evidence before the Tribunal, was prepared after Mr Sullivan had the benefit of being provided with the statements of the witnesses upon whose evidence **CASA** proposed to rely. All of this occurred well before the hearing undertaken by the Tribunal and in accordance with the Tribunal's pre-hearing requirements. He thereby had notice of the nature and content of the factual bases upon which **CASA** would submit that the Tribunal ought on review to be satisfied that his licence ought to be cancelled. Ms Parsissons' statement was prepared with the benefit of this notice.
50. The present, therefore, is a case like *VN Railway Pty Ltd v Federal Commissioner of Taxation* [2013] FCA 265; (2013) 211 FCR 188 (*VN Railway*). In that case, too, there was a complaint that the Tribunal had failed to afford procedural fairness by non-compliance with the "rule in *Browne v Dunn*". That complaint was rejected by Tracey J. His Honour explained, by reference to a leading modern exposition of that rule by Hunt J in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 16, 26, that at its heart lay the affording of fairness by due notice. His Honour observed, at [50]:

> The requirements of the rule may be satisfied prior to a hearing if one party provides to the other notice of the case which it proposes to make in reliance on documents to which the other party has access and of the inferences proposed to be drawn from them: see *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* [1998] FCA 806; (1998) 156 ALR 169 at 220 (Goldberg J).

51. It is plain from his Honour's later reference (at [51]) to an obligation flowing from a statement made by Brennan J in *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 629 with respect to a need to furnish to a person likely to be affected by an administrative decision information which was "credible, relevant and significant to the decision" that discussion by Tracey J of the "rule in Browne v Dunn" issue was premised upon the need to give due notice flowing from a procedural fairness obligation which can attend the making of an administrative decision, not an uncritical assimilation of administrative and judicial and administrative proceedings. It is just that considerations of fairness can lead to like requirements in relation to the giving of due notice. So understood, I respectfully agree with the analysis in *VN Railway* of this like issue.
52. Even as recast, there is no substance in the circumstances in ground 7.
53. For these reasons, I agree that the appeal must be dismissed, with costs.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 25 July 2014

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 56 of 2014**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**MARK SULLIVAN** **Appellant**
AND:	**CIVIL AVIATION SAFETY AUTHORITY** **Respondent**
JUDGES:	**LOGAN, FLICK & PERRY JJ**
DATE:	**25 JULY 2014**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

FLICK AND PERRY JJ:

54. On 30 March 2010 the Appellant, Mr Mark Sullivan, was piloting a helicopter which crashed in the Northern Territory.
55. On 3 January 2012 a delegate of the Civil Aviation Safety Authority ("the Authority") decided to cancel Mr Sullivan's pilot ("helicopter") licence. He sought review of that decision by the Administrative Appeals Tribunal ("the Tribunal"). The Tribunal affirmed the decision of the Authority: *Re Sullivan and Civil Aviation Safety Authority* [2013] AATA 425.
56. Mr Sullivan appealed the Tribunal's decision to this Court under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) ("*Administrative Appeals Tribunal Act*") which creates a right of "*appeal*" on a question of law. A Judge of this Court in December 2013 dismissed the appeal: *Sullivan v Civil Aviation Safety Authority* [2013] FCA 1362, (2013) 62 AAR 77.
57. Mr Sullivan now appeals from the decision of the primary Judge.
58. The appeal is to be dismissed.

The issues to be resolved

59. The amended *Notice of Appeal* filed at the outset of the hearing initially sets forth seven *Grounds of Appeal* (without alteration), being:
    1. That the court below erred in law by failing to hold that the Tribunal was bound to take into account the *Briginshaw* principle in applying the standard of proof in findings on material questions of fact adverse to the appellant.
    2. That the court below erred in law by failing to hold that the Tribunal was required to identify application of the *Briginshaw* principle in applying the stand [sic] of proof in the referring to evidence on which the findings on material question of fact and adverse to the appellant are based.
    3. That the court below erred in law by taking into account an irrelevant consideration being an absence of a burden of proof.
    4. That the court below erred in law by failing to take into account a relevant consideration being the presumption of innocence.
    5. That the court below erred in law by taking into account an irrelevant consideration that reasons showing the taking into account and application of the *Briginshaw* principle in applying the standard of proof are a mere tool for administrative decision making.
    6. That the court below erred in law by treating the alleged errors of law as a question of whether findings were reasonable open.
    7. That the court below erred in law by failing to take into consideration a relevant matter in relation to the acceptance of the evidence of Ms Anna Parsissons, namely that it was not put to Ms Parsissons that her recollection was faulty in relation to material matters.

60. The *Appellant's Outline of Submissions* as filed in support of the appeal more helpfully identify what is there described as the "*two broad issues*" to be resolved on appeal as being:

    (a) Whether the Tribunal was bound to apply the standard of proof set out in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-362 (the *Briginshaw* standard) in making its factual findings and whether the Tribunal in fact so applied this standard – Appeal Grounds 1 to 6; and

> (b) Whether her Honour erred in holding that the Tribunal had complied with the rule in *Browne v Dunn* (1893) 6 R 67 in relation to Ms Parsissons' evidence – Appeal Ground 7.

Notwithstanding the simplicity with which these "*broad issues*" are formulated, they raise questions of fundamental importance to administrative decision-making and decision-making by administrative tribunals. And resolution of these "*broad issues*" must necessarily start from the proposition that the procedures whereby superior courts of record resolve civil litigation (and the rules of evidence applicable in such litigation) cannot automatically be transposed to the sphere of administrative decision-making where the tasks entrusted to the making of such decisions and the procedures to be followed may be very different.

61. Any unquestioning analogy between administrative and judicial processes is to be shunned: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 282. Brennan CJ, Toohey, McHugh and Gummow JJ there relevantly observed:

> ... Submissions were made at the hearing of the appeal as to the correct decision-making process which it would have been permissible for the delegates to adopt. These submissions were misguided. They draw too closely upon analogies in the conduct and determination of civil litigation.
> Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law. The term "balance of probabilities" played a major part in those submissions, presumably as a result of the Full Court's decision. As with the term "evidence" as used to describe the material before the delegates, it seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance.

See also: *Saunders v Federal Commissioner of Taxation* (1988) 15 ALD 353 at 358 per Northrop J.

62. The resolution of the *Grounds of Appeal*, aided by the "*two broad issues*" as formulated in the *Appellant's Outline of Submissions*, are to be resolved by reference to:
    - the facts which gave rise to the decision of the delegate and the decision of the Tribunal;
    - the role and decision-making functions of the Tribunal;
    - the proper application of the "*rule*" in *Briginshaw v Briginshaw* or principles derived from that decision to administrative decision-making; and
    - the proper application of the "*rule*" in *Browne v Dunn* or principles derived from that decision to administrative decision-making.

The Crash – Criminal Charges and the Subsequent Cancellation Decision

63. The facts giving rise to the present dispute were within a relatively narrow compass and largely uncontroversial – although the factual area in which

there was dispute provided the catalyst to Mr Sullivan's attempt to impugn the decision-making processes of the Tribunal.

64. In very summary form, Mr Sullivan had agreed with the Roper Gulf Shire Council to fly Mr Smale (the Council's Regional Manager for Community Safety), another Council officer (Mr Mole) and some equipment to a township called Numbulwar. Numbulwar is located in a remote area of the Northern Territory, located on the western shores of the Gulf of Carpentaria. Repairs had to be carried out there in respect to some damage that had been caused by a cyclone. Numbulwar was some distance away and access by road was impeded by flooding.
65. The helicopter was to take off from Flying Fox Station. That Station is located on the Roper Highway and is approximately half-way between Katherine and Numbulwar. The helicopter crashed on take-off.
66. The crash was reported by Mr Sullivan to the Australian Transportation and Safety Bureau on the following day, as required by s 19 of the *Transport Safety Investigation Act 2003* (Cth). The crash was the subject of an investigation by the Authority.
67. As events unfolded, Mr Sullivan was charged with three criminal offences. He pleaded guilty to each.
68. The first offence was that he had failed to comply with instructions contained in an "*operations manual*" as required by reg 215(9) of the *Civil Aviation Regulations 1988* (Cth) ("*Civil Aviation Regulations*"). That Regulation relevantly provides as follows:

> **Operations manual**
> (1) An operator shall provide an operations manual for the use and guidance of the operations personnel of the operator.
> Penalty: 25 penalty units.
> ...
> (9) Each member of the operations personnel of an operator shall comply with all instructions contained in the operations manual in so far as they relate to his or her duties or activities.
> Penalty: 25 penalty units.

69. The second charge was that he gave false and misleading information to the Australian Transportation and Safety Bureau contrary to s 137.1 of the *Criminal Code 1995* (Cth).
70. The third charge was that he breached s 29 of the *Civil Aviation Act 1988* (Cth) ("*Civil Aviation Act*").
71. The Magistrate who sentenced Mr Sullivan imposed fines and a suspended gaol sentence. In addition, the Magistrate imposed an "*exclusion period*" pursuant to s 30A of the *Civil Aviation Act*, namely a period during which Mr Sullivan was excluded from specified activities.
72. Thereafter, the Authority formed the view that Mr Sullivan had failed in his duty pursuant to reg 269(1)(c) or was not a fit and proper person as required by reg 269(1)(d) of the *Civil Aviation Regulations*. It proceeded to cancel his licence pursuant to reg 269. Regulation 269 relevantly provides as follows:

> **Variation, suspension or cancellation of approval, authority, certificate or licence**
> (1) Subject to this regulation, **CASA** may, by notice in writing served on the holder of an approval, authority, certificate or licence (***an authorisation***), vary, suspend or cancel the authorisation if **CASA** is satisfied that one or more of the following grounds exists, namely:
> (a) that the holder of the authorisation has contravened, a provision of the Act or these Regulations, including these regulations as in force by virtue of a law of a State;
> ...

(c) that the holder of the authorisation has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft;
(d) that the holder of the 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;
...
(1A) **CASA** must not cancel an authorisation under subregulation (1) because of a contravention mentioned in paragraph (1)(a) unless:
(a) the holder of the authorisation has been convicted by a court of an offence against a provision of the Act or these Regulations (including these Regulations as in force by virtue of a law of a State) in respect of the contravention; or
(b) the person was charged before a court with an offence against a provision of the Act or these Regulations (including these Regulations as in force by virtue of a law of a State) in respect of the contravention and was found by the court to have committed the offence, but the court did not proceed to convict the person of the offence.
...

73. In the performance of its powers and functions, the Authority is required to regard the safety of air navigation as the most important consideration: *Civil Aviation Act* s 9A. This is one of the means by which the main object of the Act in s 3A is implemented. Section 3A relevantly provides as follows:

Main object of this Act
The main object of this Act is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.

74. The requirement in s 9A of the *Civil Aviation Act* applies to the exercise by the Authority, and the Tribunal standing in its shoes (*Administrative Appeals Tribunal Act* s 43), of its statutory power to vary, suspend or cancel an authorisation under reg 269(1)(d) of the *Civil Aviation Regulations*: see e.g., by analogy *Re Ekinci and Civil Aviation Safety Authority* [2014] AATA 114 at [5] and [21] per Dep Pres Tamberlin QC: *Re McKenzie and Civil Aviation Safety Authority* [2008] AATA 651 at [30] per Dep Pres Hack SC; *Re Flynn and Secretary, Department of Transport* (1980) 2 ALN No 116 at 1025 to 1026 per Davies J. While other considerations are also relevant, such as the impact of suspension or cancellation of a licence on the individual concerned, this purpose suggests that it is no part of the exercise of the power to punish the individual concerned. That is reinforced by the fact that the power in reg 269(1)(d) is attracted only where a court has determined that the person committed an offence against the Act. Similar statutory powers exist in many other contexts to suspend or cancel the entitlement of persons to engage in a profession or hold a permission or office which are exercisable not for the purpose of punishment, but to protect a public interest. For example, it is no part of the function of disciplinary proceedings against a legal practitioner to punish; their object is to protect the interests of the public and of the practitioner's clients in the past and for the future: *Harvey v Law Society of New South Wales* (1975) 49 ALJR 362 at 364 per Barwick CJ: *Clyne v New South Wales Bar Association* [1960] HCA 40; (1960) 104 CLR 186 at 201 to 202. Equally the object of disciplinary proceedings under the *Australian Federal Police (Disciplinary) Regulations 1979* (Cth) is not to publish or exact retribution, but "*to protect the public, to maintain proper standards of conduct...and to protect the reputation of that body*": *Hardcastle v Commissioner of Police* [1984] FCA 105; (1984) 53 ALR 593 at 597 per Bowen CJ, Gallop and Lockhart JJ.

75. The delegate when exercising the power to cancel Mr Sullivan's helicopter licence, and the Tribunal when conducting its review of the delegate's decision for the purpose of reaching the "*correct or preferable decision*", had to take into account both the interests of Mr Sullivan and the broader public interest.
76. When conducting its review, the Tribunal addressed what it characterised as "*The Contested Conduct*" and reasoned that although there were "*several discrete areas of dispute they all revolve around a single issue – what was the weight of HCQ on take-off*": [2013] AATA 425 at [30]. The Tribunal thereafter went on to address the evidence of the witnesses.
77. Although much of the events surrounding the crash were the subject of agreement, some disagreement remained. Thus, for example, Mr Sullivan maintained that he planned to fly first to a township called Roper Bar and there refuel and thereafter to fly on to Numbulwar. Mr Sullivan maintained that he had asked a person simply named as "*Brad*" to drive extra fuel to Roper Bar. He further maintained that "*jerry cans*" which were strapped to the helicopter when it took off were empty. A different account was given by other witnesses who maintained that Brad was present at the field from which the helicopter took off and not in Roper Bar and that the "*jerry cans*" were full of fuel and not empty.
78. In need of resolution was the question as to which account was to be preferred.
79. In doing so, the Tribunal made a series of adverse findings about Mr Sullivan. Its reasons for decision thus state in part as follows:

> **Mr Sullivan**
> [33] I was not left with a favourable impression of Mr Sullivan's reliability. I reach that view for a number of reasons.
> [34] First, it seems to me to be notable that there are a number of ways in which Mr Sullivan's evidence varied from the agreed facts put forward in the Magistrates Court. Three matters, in particular, stand out.
> [35] Mr Sullivan earlier agreed, in two separate passages in the Agreed Facts, that the generator carried on HCQ was restrained (or secured) only by a passenger seat belt. Yet in his statement in these proceedings he now says,
> *We then secured the generator with the right hand rear seat belt and another strap that was attached to the seat.*
> He expanded on that during his oral evidence with reference to a "ratchet tie down strap".
> [36] Next, in his oral evidence he said that he had turned his mind to the distinction between a charter flight and aerial work and had consciously decided that the flight was aerial work not a charter flight. When completing the ATSB report he described the flight as aerial work. He said that he did not consider that any injuries had been sustained in the crash. Yet he pleaded guilty to an offence that had as an element the giving of information knowing the information to be false or misleading, particularised as,
> (1) falsely stating the flight to be aerial work and not charter,
> (2) omitting all reference to the carriage of dangerous goods in a passenger compartment or at all, and;
> (3) failing to state that at least one passenger was doused with fuel, that circumstance constituting a minor injury.
> [37] Additionally, Mr Sullivan said in his statement:
> *I recall that before I loaded the generator into the helicopter I did look into it to see if there was any fuel. I noticed there was a tiny bit of fuel in the tank and I tipped it onto the ground.*
> But he had earlier pleaded guilty to an offence of carrying dangerous goods on HCQ particularised in part, as "a generator containing fuel in a passenger cabin". The agreed facts also recited that the generator contained fuel and that fuel leaked onto Mr Mole and soaked his clothes.
> [38] Mr Sullivan was represented by solicitor and counsel at the hearing before the Magistrate. The charges were, no doubt, read to him prior to his pleas of guilty and the agreed facts read into the record. He did not suggest, and I would certainly not infer,

> that the plea of guilty and the agreement about the facts were other than in accordance with his instructions. He did not suggest that he had had occasion to reflect more on the events and had come to realise that the facts were otherwise than he had earlier agreed to. I am then driven to conclude that Mr Sullivan was attempting, and I infer deliberately so, to minimise the extent of his failures of duty and to downplay the seriousness of them.
> [39] Next, it reflects poorly on Mr Sullivan's credit that he knowingly provided false or misleading information to the ATSB following the crash. He has acknowledged that the effect of him doing so was to minimise the seriousness of the crash and the possibility of a referral to **CASA**. The inference that I draw is that he consciously sought to avoid an investigation by **CASA**.
> ...
> [41] Mr Sullivan's evidence in these proceedings was inconsistent with his evidence given in the Magistrates Court. Additionally, it is illogical. If, as Mr Sullivan said, exhibit 3 was written at a time after all the equipment had been laid out on the hangar floor but before any attempt had been made to load it he laid out, it may be wondered why only one chainsaw was recorded. In that circumstance it might have been expected that the list would have referred, at least initially, to two chainsaws. Moreover there is further illogicality in the notion of leaving a 5 kilogram chainsaw behind because of weight considerations. If exhibit 3 was what Mr Sullivan claimed it to be his calculated take-off weight was 1060 kilograms, 19 kilograms below the maximum take-off weight. That displays a concern about weight not otherwise demonstrated by Mr Sullivan whose estimates of the weight of Mr Smale and Mr Mole were out by 12 kilograms.
> [42] Finally, it seems absurd that Mr Sullivan would make a conscious decision to leave out one of the chainsaws yet not tell either of the passengers that part of the equipment was not to be carried as had been agreed. It is, I consider, more likely that both chainsaws were loaded aboard HCQ.
> [43] The evidence leaves me not satisfied that Mr Sullivan made any meaningful calculation of the take-off weight.
> [44] There is a further reason for scepticism about exhibit 3. On 31 March 2010 Mr Sullivan completed an insurance claim. In answer to a question about the take-off weight he wrote "1020 kg". It seems highly improbable that he would have written that figure had he, the previous day, carefully calculated and recorded the take-off weight at 1060 kilograms.
> [45] I was left with the distinct impression that Mr Sullivan's professed recollections were unreliable. As Mr Ashton, counsel for **CASA** submitted, there was a significant number of occasions when, in cross-examination, he was unable to recall details of matters of some significance in circumstances when one might have expected a recollection. The extracts from the transcript in paragraph 40 above illustrate a recurring theme in Mr Sullivan's evidence, an inability to recall details of events of the day.

The Tribunal proceeded to find that the helicopter was "*considerably in excess of the maximum take-off weight*": [2013] AATA 425 at [63]. In so concluding, the Tribunal preferred the evidence of those witnesses who gave an account different from that of Mr Sullivan. In further concluding that Mr Sullivan was not a fit and proper person for the purposes of reg 269(1)(d) of the *Civil Aviation Regulations*, the Tribunal reasoned in part as follows:

> [74] Mr Sullivan's competence is not open to question but his judgement on 30 March 2010 and thereafter was seriously flawed. The danger of stowing an 80 kilogram generator on a passenger seat was obvious. That it contained fuel merely compounded the danger. Mr Sullivan either did not comprehend the danger or, if he did, he was indifferent to it. He must have known that HCQ was significantly overweight or, if he did not, he was indifferent to it. To attempt a take-off was a further, and dangerous, lapse of

> judgement. The danger inherent in the attempt was heightened by the prevailing weather conditions that ought to have made Mr Sullivan even more cautious about taking off. Mr Sullivan did not desist from his attempts at take-off when prudence required him to do so. And he was either unaware of the requirements of the operating manual of HCQ or chose to ignore them. Either is concerning.
> [75] Mr Sullivan then acted dishonestly by lodging a report with the ATSB which he knew to be false in material particulars. I infer that he did so to avoid an investigation and subsequent consideration of his conduct by **CASA**. I reject his evidence to the contrary. Additionally it cannot have been other than dishonest on his part to tell his insurer, on the day following the incident, that the take-off weight of HCQ was 1020 kilograms.
> [76] In the hearing he sought to downplay the seriousness of matters and, in my view, did so deliberately. That may be a common enough human reaction but it does display a concerning lack of insight.
> [77] These matters satisfy me that Mr Sullivan is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of the holder of a commercial pilot's licence.

80. Mr Sullivan submitted that the failure on the part of the Tribunal to apply the rule in *Briginshaw* and the rule in *Browne v Dunn* – or, at least principles derived from those decisions – led it into error. In making its findings of fact – and, in particular, those at paras [44] to [45] and [75] – it was said that the Tribunal failed to apply generally applicable "*principles of law*". The failure on the part of the Tribunal to pay heed to these "*principles of law*", it was submitted, took the present appeal out of the impermissible area of appeals which sought to cavil with findings of fact.
81. Whether Mr Sullivan was correct in his submissions as to these generally applicable "*principles of law*" was necessarily to be resolved, at least initially, by reference to the statutory context in which the Tribunal conducted its review functions.

The role of the Tribunal and its procedure

82. Although the relevant statutory provisions in the *Administrative Appeals Tribunal Act* have been well-travelled, they bear some repetition.
83. The provisions of central relevance in the present proceeding focus attention primarily upon ss 2A, 33, 39, 43 and 44 of the *Administrative Appeals Tribunal Act*.
84. Section 2A provides as follows:

> **Tribunal's objective**
> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

85. Section 33(1) provides as follows:

> In a proceeding before the Tribunal:
> (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;
> (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

86. Section 39(1) provides as follows:

> **Opportunity to make submissions concerning evidence**
> (1) Subject to sections 35, 36 and 36B, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.
> ...

87. Section 43 provides in part as follows:

> ...
> (1) For the purpose of reviewing a decision, the Tribunal may exercise all the power and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:
> (a) affirming the decision under review;
> (b) varying the decision under review; or
> (c) setting aside the decision under review and:
> (i) making a decision in substitution for the decision so set aside; or
> (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.
> *Tribunal must give reasons for its decision.*
> (2) Subject to this section and to sections 35 and 36D, the Tribunal shall give reasons either orally or in writing for its decision.
> ...
> (2B) 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.

88. And s 44(1) provides as follows:

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

Of these provisions, special reference should be made to s 33(1). The charter given by this provision to the Tribunal to be the master of its own procedure, together with the emphasis placed upon informality and the freedom not to be bound by the common law rules of evidence, were hallmarks of the Tribunal being espoused even before the *Administrative Appeals Tribunal Act* was enacted in 1975.

89. When there were but recommendations being made which ultimately led to the establishment of the Administrative Appeals Tribunal, the *Kerr Committee* thus made recommendations as to the "*Powers and Procedures of an Administrative Review Tribunal*": *Commonwealth Administrative Review Committee* at paras [294] to [299] (Parl Paper No 144, 1971). Included in those recommendations was the following:

> 295. ... The Tribunal would be empowered to dismiss summarily an application for review at any stage after commencement of the hearing. The following matters would also be provided for as to procedure at the hearing:
> ...
> (*d*) the Tribunal may require, but shall not be obliged to require, evidence to be given on oath;
> (*e*) where disputed facts are in issue witnesses may be examined, cross-examined and re-examined but only to the extent necessary in the opinion of the Tribunal to ensure full disclosure and investigation of the facts;
> ...
> (*g*) the rules of evidence applying in courts of law shall not apply but the Tribunal shall exclude irrelevant, immaterial or unduly repetitious evidence; and
> (*h*) the Tribunal shall inform itself as to the issues involved in such manner as it thinks fit, but procedures should be adopted to ensure that all material facts and matters of expert opinion are brought to the attention of the parties before a final decision is reached and parties should have the right to make submissions to the Tribunal thereon.
> 296. Except as provided for in the enabling Act, and in statutory rules made thereunder, the Tribunal should be permitted to regulate its own procedure.

Subsequently, the *Bland Committee* substantially endorsed the recommendations previously made by the *Kerr Committee*: *Committee on Administrative Discretions* at paras [172] and [229(xxxiv)] (Parl Paper No 316, 1973).

90. Many amendments have been made to the *Administrative Appeals Tribunal Act* since it was first enacted. But the original task of the Tribunal as set out in s 33(1) has remained relatively unchanged. Such amendments as have been made – for example, the introduction in 2005 of s 2A – have only served to emphasise, rather than to detract, from the emphasis constantly placed by the Commonwealth Legislature upon the need for the Tribunal to proceed with a lack of technicality and formality.
91. Sections 2A, 33 and 39 are to be read and applied in context. Sub-sections 33(1)(a), (b) and (c), in particular, are to be read together and subject to the requirement to ensure that a party has a "*reasonable opportunity*" to present his or her case: s 39. "*Understood in that context*", it has been said, "*s 33(1)(c) is not a grant of power occasionally to depart from the strict application of the rules of evidence; rather it presupposes and establishes a scheme for the Tribunal to inform itself of relevant matters in which, notwithstanding that the procedure of the Tribunal always remains within the Tribunal's independent control, ... the Tribunal, subject to the rules of natural justice, properly may rely on any probative materials relevant to its function*": *Re Tarrant and Australian Securities and Investments Commission* [2013] AATA 926 at [75], [2013] AATA 926; (2013) 62 AAR 192 at 209 per Kerr J and Sen Mem Redfern. The Tribunal members there went on to observe that the power conferred by s 33(1)(a) would be sufficient to give a direction that even probative material may be excluded from the Tribunal's consideration: [2013] AATA 926 at [77], [2013] AATA 926; (2013) 62 AAR 192 at 209 to 210.
92. Provisions such as s 33(1)(c) or provisions comparable to that provision are repeatedly found elsewhere in Commonwealth legislation: e.g., *Migration Act 1958* (Cth) ss 311E(a) and 420(2)(a); *National Health Act 1953* (Cth) s 122; *Quarantine Act 1908* (Cth) s 66AZA; *Defence Force Discipline Act 1982* (Cth) s 146A(2)(b)(ii); *Australian Securities and Investments Commission Act 2001* (Cth) ss 59(2) and 218(1). When addressing s 420 of the *Migration Act 1958* (Cth), Gleeson CJ and McHugh J have said that such provisions "*are intended to be facultative, not restrictive*" and that their "*purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals*": *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21 at [49], (1999) 197 CLR

611 at 628.

93. But questions have been repeatedly raised to as whether the reasons standing behind the common law rules of evidence may guide an administrative tribunal in the procedure which best facilitates the discharge of its statutory functions. In many instances, the common law rules of evidence are founded upon principles of common sense, reliability and fairness.
94. So much has long been recognised. Thus, for example, in an oft-quoted passage in *R v The War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* [1933] HCA 30; (1933) 50 CLR 228 at 256 Evatt J observed:

> ... Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, "bound by any rules of evidence." Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice." The position of an appellant has been specially protected by the Legislature, and he should not be placed in a position where he is effectually prevented from conducting his appeal.

After referring to these observations in *Ex parte Bott*, supra, the first President of the Administrative Appeals Tribunal – Brennan J (as his Honour then was) – observed in *Re Pochi v Minister for Immigration and Ethnic Affairs* [1979] AATA 64; (1979) 36 FLR 482 at 492 to 493:

> ... That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence...
> .....
> The majority judgments in *Bott's* case show that the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not...

These observations of both Evatt J in *Ex parte Bott*, supra, and of Brennan J in *Pochi*, supra, have been recently approved by French CJ in *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32 at [17], [2010] HCA 32; (2010) 241 CLR 390 at 396.

95. Instances can thus be found where, for example, the Tribunal has excluded "*opinion*" evidence proffered by a party: *Re Kevin and Minister for Capital Territory* (1979) 2 ALD 238 at 242 to 243. In doing so, it was there said that it was "*not appropriate ... for an applicant to offer his non-expert opinion as a fact upon which the Tribunal ought to base its conclusion*". The opinion was thus not given "*any weight*". Similarly, it has been said that there "*should...be a reluctance to dispense with the rules of evidence where there is a real dispute over a matter which goes to the heart of a case*": *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [25], [2012] FCAFC 146; (2012) 207 FCR 277 at 285 per Marshall, North and Flick JJ.
96. Even in the absence of a statutory provision such as s 33(1)(c), the common law rules of evidence, it has long been recognised, may for historical reasons exclude material which could assist in an administrative fact-finding task. Thus, for example, in *R v Deputy Industrial Injuries Commissioner*; *Ex parte Moore* [1965] 1 QB 456 at 487 to 488 Diplock LJ relevantly observed:

> ...The question of law raised before us is whether the deputy commissioner acted contrary to the rules of natural justice in attaching some weight to opinions as to the general aetiology of the prolapse of intervertebral discs reported to have been given by unnamed medical practitioners in two earlier appeals determined by other commissioners, and upon which the medical experts who gave evidence orally for the claimant and the insurance officer at the actual hearing before the deputy commissioner were invited to comment.
> Where, as in the present case, a personal bias or mala fides on the part of the deputy commissioner is not in question, the rules of natural justice which he must observe can, in my view, be reduced to two. First, he must base his decision on evidence, whether a hearing is requested or not. Secondly, if a hearing is requested, he must fairly listen to the contentions of all persons who are entitled to be represented at the hearing. In the context of the first rule, "evidence" is not restricted to evidence which would be admissible in a court of law. For historical reasons, based perhaps on the fear that juries who might be illiterate were incapable of differentiating between the probative values of different methods of proof, the practice of the common law courts has been to admit only what the judges then regarded as the best evidence of any disputed fact, and thereby to exclude much material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion...These technical rules of evidence, however, form no part of the rules of natural justice...

Diplock LJ thereafter went on to make his oft-repeated remarks that a decision-maker could "*not spin a coin or consult an astrologer*...". The application in Australia of the "*no-evidence*" rule as a part of natural justice has received recent attention by Allsop CJ, Middleton and Foster JJ in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [89] to [90]. For present purposes, however, it is sufficient to note the recognition in *Ex parte Moore*, supra, that an administrative decision-maker may have recourse to "*material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion*".

97. The procedural flexibility afforded to an administrative tribunal freed from the rules of evidence does not absolve it from the obligation to make findings of fact based upon material which is logically probative in which the rules of evidence provide a guide.

Briginshaw v Briginshaw

98. It is within this historical and statutory context that the Appellant's submissions in respect to *Briginshaw v Briginshaw* are to be considered.
99. The "*rule*" in *Briginshaw* is ultimately founded upon principles of fairness and common sense, but is more immediately derived from the decision of the High Court in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. That was a case concerning the standard of proof to be applied in a petition for divorce on the ground of adultery under the *Marriage Act 1928* (Vic). Times and attitudes may have changed in respect to grounds upon which a divorce may be now allowed. Nonetheless, the underlying "*rule of prudence*" there identified and the need for caution to be exercised in applying the standard of proof when asked to make findings of a serious nature remain valid. Latham CJ expressed the position as follows:

> .... The words ["*satisfy itself*" in s 80 of the *Marriage Act*] are apt and suitable for applying in the new jurisdiction the civil standard of proof, but they are not apt words of description for the criminal standard of proof. In sec. 86 the words are simply: "The court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi." These words, like those in sec. 80, are applicable to all the grounds upon which a petition can be presented. If they require the criminal standard of proof in

> the case of adultery, they also require that standard of proof in the case of desertion—a proposition which has no authority to support it. The result is that the ordinary standard of proof in civil matters must be applied to the proof of adultery in divorce proceedings, subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation such as that of adultery is established...: (1938) 60 CLR at 347.

The more oft-repeated observations of Dixon J (on which the Appellant here relies) are as follows:

> ... But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences...: (1938) 60 CLR at 361 to 362.

Expressed differently, Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ have said that the "*degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved*": *Rejfek v McElroy* [1965] HCA 46; (1965) 112 CLR 517 at 521.

100. Whatever may be the origin, the so-called "*rule*" and these principles were originally sourced from principles of common law rules of evidence as applied to civil litigation. They have been given more recent legislative recognition in s 140 of the *Evidence Act 1995* (Cth). Section 140(2) encapsulates (albeit not exhaustively) the rule in *Briginshaw*: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* [2007] FCAFC 132 at [31] per Weinberg, Bennett and Rares JJ. But that section does not apply to proceedings before the Tribunal: e.g., *Hood v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] FCA 555 at [18] to [20] Ryan J.
101. In the circumstances of the present case, Senior Counsel for Mr Sullivan sought:
    - to avoid the freedom given to the Administrative Appeals Tribunal to be not bound by the rules of evidence conferred by s 33(1)(c);

but:

- nevertheless to invoke the basic concept of fairness and common sense recognised in *Briginshaw;*

by seizing upon:

- the power of cancellation conferred by reg 269; and
- the requirement imposed upon the Tribunal to provide reasons including "*its findings on material questions of fact...*".

The requirement to apply the "*rule*" set forth in *Briginshaw* was, on this approach, not a rule of evidence at all – but, rather, was a "*principle of law*" that (in the Appellant's submission) the Tribunal was bound to apply.

102. Thus, when the Authority was exercising the power conferred by reg 269(1)(d) of the *Civil Aviation Regulations*, and when considering whether it was "*satisfied*" for the purposes of that regulation, the submission was that the Authority could only be "*satisfied*" – and the Administrative Appeals Tribunal upon review could only reach the "*correct or preferable*" decision – if the "*standard of proof*" (as it was misdescribed) required by *Briginshaw* was applied.
103. A proper application of the term "*satisfied*" in reg 269(1)(d), it was submitted, was not exhausted by considerations drawn from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR.
104. The "*principle of law*" which was advanced for resolution on behalf of Mr Sullivan was the proposition that the Tribunal was "*bound*" to apply the decision in *Briginshaw* when making findings of fact which were "*critical*" or "*material*" to its reasoning process where those findings were "*grave or serious*". By confining the submission to those findings which were "*grave or serious*", Senior Counsel sought to avoid the prospect of the Tribunal having to apply *Briginshaw* to all findings of fact which were simply "*adverse*" to a party. Subject to that constraint, the "*principle of law*" was one which it was said that the Tribunal was bound to apply in all of its decision-making. When engaged in such fact-finding, the Tribunal had to give due weight to the "*presumption of innocence*" of the person against whom the findings were being made. An invitation to restrict or narrow the proposition to decision-making pursuant to the *Civil Aviation Regulations* by reason of some implication drawn from those *Regulations* was rejected.
105. In the circumstances of the present appeal, it was said by the Appellant that the Tribunal had itself identified that which was "*critical*" or "*material*" to its reasoning process when in its reasons it stated:

> The Contested Conduct
> [30] Whilst there are several discrete areas of dispute they all revolve around a single issue — what was the weight of HCQ on take-off...

Building upon this reasoning, Senior Counsel for Mr Sullivan focussed attention upon the manner in which the Tribunal had made findings of fact in respect to:

- Exhibit 3, being a note upon which Mr Sullivan had recorded the weight of that which was being carried by the helicopter and in support of his contention that he had in fact performed such a calculation; and
- its finding that Mr Sullivan, when lodging a report with the ATSB which he knew to be false, "*did so to avoid an investigation and subsequent consideration of his conduct by* ***CASA***": [2013] AATA 425 at [75].

On a proper reading of the reasons for decision of the Tribunal, it was submitted on behalf of Mr Sullivan either that:

- the Tribunal had not properly applied the *Briginshaw* "*standard of proof*";

or, alternatively:

- the Tribunal had failed to provide reasons for its findings as required by s 43(2B) of the *Administrative Appeals Tribunal Act*.

106. In respect to these submissions advanced by Senior Counsel, it is concluded that:

- the general "*principle of law*" espoused on behalf of Mr Sullivan is rejected;

but that:

- the Tribunal when engaged in its process of fact-finding may inform itself – and in some circumstances should inform itself – by reference to evidence or other materials which properly supports the seriousness of the findings being made and the seriousness of those findings upon a party.

107. Albeit expressed as a general "*principle of law*" – as opposed to a rule of evidence – the submissions, with respect, seek impermissibly to achieve the result whereby "*the rules of evidence which have been excluded expressly by statute creep back through a domestic procedural rule*": *Re Pochi v Minister for Immigration and Ethnic Affairs* [1979] AATA 64; (1979) 36 FLR 482 at 492. It is also further concluded that:
    - the reasons of the Tribunal expose a proper and adequate factual basis upon which it made its findings in respect to Exhibit 3 and its finding that Mr Sullivan acted in order "*to avoid an investigation and subsequent consideration of his conduct by* ***CASA***";

and that:

- the reasons of the Tribunal sufficiently expose a consciousness of the seriousness of the findings being made and sufficiently expose the basis upon which it proceeded such that there has been no failure to comply with s 43(2B).

Given the latter conclusions, it is strictly unnecessary to express any concluded view as to the correctness of the general "*principle of law*" espouses on behalf of Mr Sullivan. But the submission was made and should be resolved.

Grave or serious fact-finding by the Tribunal – Briginshaw?

108. The general proposition advanced on behalf of Mr Sullivan as to the circumstances in which the Tribunal is "*bound*" to apply *Briginshaw* suffers from at least two fundamental difficulties, namely:
    - the difficulty of identifying those "*facts*" which can properly be characterised as "*serious*" or "*grave*" so as to attract the application of the general proposition;

but, and more importantly:

- the difficulty that the proposition is inconsistent with the very charter entrusted to the Tribunal and the deliberate and detailed legislative scheme enacted by the Parliament for the discharge by the Tribunal of its statutory functions of review.

109. As to the first difficulty, it may be tempting when the Tribunal is reviewing a decision affecting the manner in which an applicant carries on business activities or engaged in commercial decision-making to characterise adverse findings as "*serious*" or "*grave*". The loss of an ability to carry on a commercial activity, such as a helicopter charter service, truly has serious consequences to an individual. But other findings made by the Tribunal in other statutory contexts may have equally "*serious*" impacts upon a party. A finding of fact that an applicant's evidence as to limitations upon physical movements or physical capacities is not to be accepted may have an equally "*serious*" impact upon an applicant seeking the payment of

disability benefits.

110. Decision-making in commercial contexts, it is respectfully considered, does not necessarily attract any greater degree of caution in fact finding than decision-making in (for example) social security or welfare contexts.
111. Some findings of fact, however, have been long-recognised as calling for considerable caution before being made and for care being exercised in respect to the evidence upon which the finding is made. Findings as to a party or a witness having engaged in fraud or having lied are but examples. These requirements have been variously expressed. Thus, and by way of example, in *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 a Solicitor's Statutory Committee had made findings of misconduct. In the course of delivering his reasons, Kirby P (as his Honour then was) observed:

> ... There is no doubt that a conclusion of deliberate lying to the Committee, at least in a matter material to its inquiry into the solicitor, would warrant a conclusion that the solicitor was guilty of professional misconduct. In a proper case, it could sustain an order removing his name from the Roll. The Committee, and this Court, must approach such a conclusion, having regard to the seriousness of its consequence. It must do so with great care. A high degree of satisfaction is required before the conclusion may finally be accepted. It is important to observe the distinction between preferring the evidence of another witness or doubting the evidence of the solicitor (on the one hand) and reaching the affirmative opinion that the solicitor has deliberately lied to the Committee (on the other): (1988) 24 NSWLR at 208.

Clarke JA expressed his approach as follows:

> ... What was said was that the appellant had lied to, and deceived, the Law Society and the Statutory Committee. It should be said at once that a finding that a solicitor has deceived a court or tribunal provides compelling evidence of his unfitness to practise. The profession is a honourable one and nothing less than complete honesty and candour in all instances is acceptable. The client should be entitled to rely on the truthfulness of all that he is told. The courts should likewise be entitled to accept without question assertions made by a solicitor. If a solicitor is found to have deliberately lied to a client or to the court then he has failed, in a fundamental respect, to adhere to the required standards: ...But care must be taken in reaching a conclusion that the solicitor has lied or deceived the tribunal. In particular there is a need to distinguish carefully between cases in which the evidence of a solicitor is not accepted and those in which there is an affirmative finding that he has deliberately lied or sought to mislead the tribunal. It goes without saying that a tribunal needs to be satisfied to that degree of persuasion which is necessary to satisfy the *Briginshaw* test before it can properly make a finding that a solicitor has lied or deliberately deceived the tribunal: (1988) 24 NSWLR at 230.

Mahoney JA agreed with Clarke JA. Another example of a finding which may attract the need for "*actual persuasion*" is a finding in disciplinary proceedings that a solicitor has misled the court: cf. *Puryer v Legal Services Commissioner* [2012] QCA 300 at [23] to [29] per Holmes JA (Gotterson JA and North J agreeing).

112. In seeking to confine the application of the general "*principle of law*" to those findings which are "*serious*" or "*grave*", Senior Counsel for Mr Sullivan did not seek to further confine the application of that principle to those findings involving "*moral turpitude*".
113. The lack of precision in identifying those findings of fact which would then invoke the need to apply the general "*principle of law*" formulated on

behalf of Mr Sullivan tends strongly against its acceptance.

114. More importantly, however, is the conclusion that the general "*principle of law*" being advanced on behalf of Mr Sullivan would:
    - be inconsistent with the well-entrenched acceptance of the proposition that curial proceedings are inherently different from the tasks entrusted to decision-making by administrative tribunals and the Administrative Appeals Tribunal in particular;

and would be:

- inconsistent with the flexibility of procedure deliberately entrusted by the Legislature to the Tribunal; and
- a potentially serious encroachment upon the statutory limitation on an appeal from decisions of the Tribunal to a "*question of law*".

It would create insurmountable difficulties in its application to the decision-making functions entrusted to the Administrative Appeals Tribunal, that Tribunal having been entrusted with jurisdiction to review decisions by over 400 Commonwealth Acts and legislative instruments.

115. The attempt on the part of Mr Sullivan to side-line the fundamental importance of provisions such as ss 2A, 33 and 39 of the *Administrative Appeals Tribunal Act* – and to shift the focus of attention to the ultimate task of the Tribunal in making the "*correct or preferable*" decision as to whether it is "*satisfied*" for the purposes of reg 269(1)(d) of the *Civil Aviation Regulations* – should be soundly rejected. Such a submission, with respect, fails to recognise that:
    - the rule in *Briginshaw* is a rule of evidence derived from curial proceedings;
    - the Tribunal is not "*bound by the rules of evidence*"; and
    - a party to proceedings before the Tribunal has no "*onus of proof*", let alone an "*onus*" to establish facts to any particular or pre-determined standard.

Moreover, the submission fails to also recognise the fact that the procedure of the Tribunal is within its own discretion.

116. What procedure the Tribunal decides to follow in any particular case, and whether the Tribunal decides to either apply or inform itself by reference to the common law rules of evidence, is a matter which has been left by the legislature to the Tribunal itself to determine. The manner in which the Tribunal proceeds cannot, with respect, be pre-determined by any generally expressed "*principle of law*" which is to be applied to some indeterminate fact findings which may be characterised as "*grave*" or "*serious*".
117. To endorse the general "*principle of law*", it is respectfully concluded, would only serve to confuse the fundamental division of functions between the Tribunal as a body vested with administrative power and the function of this Court when entertaining an "*appeal*" from a decision of the Tribunal. This division is respected in the statutory limitation upon the subject matter of an "*appeal*" from a Tribunal decision to a "*question of law*": *Administrative Appeals Tribunal Act* s 44(1). An appeal purportedly on a "*mixed question of fact and law*" is not sufficient: *Comcare v Etheridge* [2006] FCAFC 27; (2006) 149 FCR 522 at 527 per Branson J (with whose reasons Spender J agreed). Assertions that a decision is against the weight of the evidence will, therefore, be given "*short shrift*": *Husband v Repatriation Commission* [2000] FCA 356 at [41], [2000] FCA 356; (2000) 171 ALR 69 at 83 per French J (as his Honour was then). See also: *Lamers v Repartriation Commission* [2001] FCA 24 at [20] per Goldberg J. But this does not permit the Tribunal to make a finding of fact for which there is "*no evidence*", being a case which falls on the other side of the line between these different functions: *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32 at [90] to [91], [2010] HCA 32; (2010) 241 CLR 390 at 418 per Hayne, Heydon, Crennan and Kiefel JJ. Nor does it mean that the reach of s 44 of the *Administrative Appeals*

Tribunal Act is limited to questions of law divorced from the need to look at facts: *Collins v Administrative Appeals Tribunal* [2007] FCAFC 111 at [55], [2007] FCAFC 111; (2007) 163 FCR 35 at 49 per Allsop J (Lindgren and Emmett JJ agreeing).

118. It was presumably in recognition of the limitations upon the ability of this Court to set aside findings of fact made by the Tribunal which were open to it on the evidence that Senior Counsel for Mr Sullivan invoked the principles of procedural fairness and the requirement imposed upon the Tribunal to provide reasons for its decisions. Although the Tribunal is given a considerable degree of freedom in respect to the procedures whereby it reaches its findings of fact, the potential for an excess of power on the part of the Tribunal in making findings of fact upon evidence untested in cross-examination and unexplained findings is already addressed in means whereby this Court can meaningfully scrutinise such findings. There is no need for this Court to endorse any further constraint such as the general "*principle of law*" now sought to be espoused.
119. Although the Tribunal is not obliged to accept evidence which is not contradicted by means of cross-examination or otherwise, it has long been recognised that the rejection of such evidence may amount to a denial of procedural fairness: cf. *Hoskins v Repatriation Commission* [1991] FCA 559; (1991) 32 FCR 443 at 449 to 450 per Pincus J. Equally a failure to provide adequate or any reasons for rejecting unchallenged evidence may constitute an error of law: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 587 to 588 per Samuels JA. See also: *SZRTN v Minister for Immigration and Border Protection* [2014] FCA 303 at [79] per Katzmann J; *Ashby v Slipper* [2014] FCAFC 15 at [78] per Mansfield and Gilmour JJ. These are but two of the already accepted means whereby this Court can ensure that the Tribunal is not given an untrammelled power to make findings of fact free of all judicial scrutiny. Without being exhaustive, another constraint is the need for findings to be neither "*irrational*" nor "*illogical*": *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at 649 to 650 per Crennan and Bell JJ. A "*failure rationally to consider probative evidence*", it has been said, "*is not the same kind of error as a simple mistake of fact*": *Minister for Immigration and Multicultural Affairs v Epeabaka* [1999] FCA 1 at [26], [1999] FCA 1; (1999) 84 FCR 411 at 422 per Black CJ, Von Doussa and Carr JJ.
120. Within these already accepted principles, the Tribunal is otherwise free to make findings of fact which cannot be set aside by this Court. When making findings of fact which have "*serious*" consequences to a party, or "*grave*" consequences, the Tribunal is free to consider the evidence and other materials before it. The more centrally relevant a particular fact may be to the decision reached, the Tribunal it may be accepted would express greater caution in evaluating the factual foundation for the decision to be reached. The absence of any cross-examination on the evidence and the absence of any indication being given to a party that such evidence is under challenge, may well be factors taken into account initially by the Tribunal and thereafter this Court on "*appeal*".
121. Cases may be found where the Tribunal has applied the decision in *Briginshaw.* But these cases are nothing more than the Tribunal proceeding, perhaps, in a manner which applies the common law rules of evidence. The provisions of s 33(1)(c), it will be recalled, simply provided that the Tribunal is not "*bound*" to apply those rules; it is not a prohibition upon the Tribunal applying those rules if it sees fit.
122. The imposition of the requirement now sought to be imposed by the Appellant's general "*principle of law*", it is concluded, would be an unnecessary constraint upon the freedom of the Tribunal to employ such procedures as it sees fit in undertaking its fact-finding role. It is a "*principle of law*" unsupported by authority and, indeed, contrary to authority.

Exhibit 3

123. Even if Mr Sullivan's primary submission were accepted – the Tribunal nevertheless adhered in making findings in respect to Exhibit 3 to the principles espoused in *Briginshaw*. In making those findings, the Tribunal was fully conscious of the need to ensure that those findings were soundly based upon evidence having probative weight. Even if the general "*principle of law*" as formulated by Senior Counsel be correct, the

Tribunal applied the caution required by *Briginshaw* to the facts of the present case.

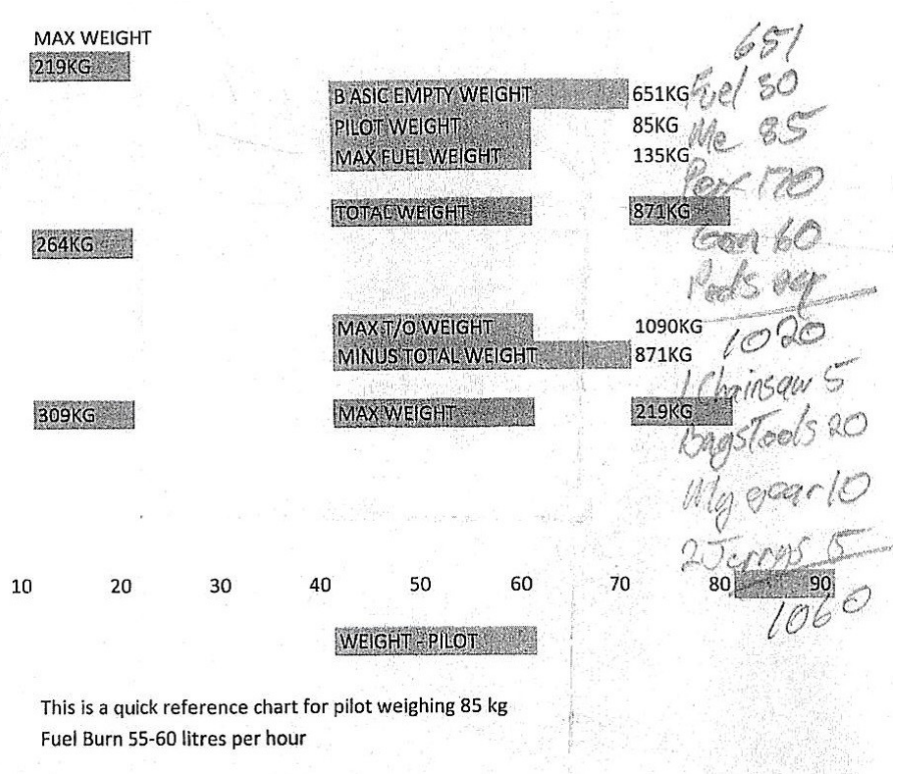
124. The Tribunal, it was accepted on behalf of Mr Sullivan, did in fact expressly refer to the decision in *Briginshaw*. The Tribunal's reasons thus state in part as follows:

> [47] [Counsel for Mr Sullivan] referred to a passage in the decision of Deputy President Jarvis in *Re Johanson & Civil Aviation Safety Authority* ([2012] AATA 239 at [29] – [31]) and to the familiar passage from the judgment of Dixon J in *Briginshaw v Briginshaw* that in matters such as the present,
>
> > *'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*
>
> Conscious of that warning, I see no reason to doubt the general accuracy of Mr Smale's evidence of matters of observable fact and his recollection of the general thrust of conversations. I was impressed by his recollection of events and I propose to generally accept his evidence. I expressly reject the suggestion that his evidence was the product of prompting by Mr Saffery.

But that reference, so it was submitted for Mr Sullivan, was confined to the Tribunal's consideration of the evidence of Mr Smale. The Appellant contended that it disclosed the Tribunal confining its application of *Briginshaw* to a limited fact-finding task and did not disclose an awareness and an application by the Tribunal of the principles in *Briginshaw* to the fact-finding in respect to those facts the subject of challenge in this Court. That submission is rejected. As a general proposition it is correct to observe that the reasons of an administrator or an administrative tribunal should not be read with "*an eye keenly attuned to the perception of error*": cf. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ. It is equally relevant to observe that reasons may be read conscious of the fact that the administrator was (for example) legally qualified (*Yum! Restaurants Australia Pty Ltd v Full Bench of Fair Work Australia* [2012] FCAFC 114 at [37], [2012] FCAFC 114; (2012) 205 FCR 306 at 315 to 316 per Lander, Flick and Jagot JJ). The Tribunal in the present proceeding was constituted by an experienced Senior Counsel. In the absence of a reason to reach a contrary conclusion, it would be wrong to approach the construction of the reasons of the Tribunal in the present proceeding with any perception that the Tribunal applied *Briginshaw* in one context and then totally ignored the principles in that case when making other findings of fact.

125. But the conclusions in respect to Exhibit 3 do not depend upon any such nicety as to the manner in which the Tribunal's reasons are to be construed.

126. Exhibit 3 was a document upon which there were handwritten calculations going to the take-off weight of the helicopter. It provided in relevant part as follows:



In submissions before this Court it was accepted that there were errors in this calculation, those errors being that the weight for other persons of 170 kgs should have been 182 kgs and that the weight for the generator should have been 80 kgs and not 60 kgs. But such errors, importantly it was said, did not detract from the evidence that a process of calculation was in fact undertaken. If these errors in calculation be accepted, the helicopter would still have been overweight; but the Tribunal would have found – if the note was accepted at face value – that a genuine process of calculation was undertaken.

127. It was Mr Sullivan's contention that he had undertaken this process of calculation recorded on this Exhibit prior to take-off. His statement of evidence filed in the Administrative Appeals Tribunal was that he had completed that task prior to take-off but that the sheet recording those calculations was temporarily lost. That statement of evidence provided in part as follows:
    35. I always carry a red Elders diary in which I make notes about arrangements such as meetings etc. I had made some notes in that diary about the arrangement with Roper Gulf Shire Council on this day and I placed the notebook in my shirt pocket. The diary was lost following the crash on 30 March 2010 and it was not until a couple of months prior the hearing in Darwin that I located it in a box with other items from the helicopter.
    36. I concluded that [sic] must have fallen out of my pocket following the accident because when I found it was covered in red mud.

    ...

41. I completed the calculations sheet and estimating the weights of myself, the 2 passengers, their bags, my gear, the generator, the chainsaw, the helipod and the empty jerry cans.
42. I dipped the fuel tanks of the helicopter and determined that it had 40 litres which equated to 30 kgs in weight. I was aware that it had flown to Katherine and back and that, if it had full tanks at the time it took off, I expected it would have around 40 litres remaining after that flight.
43. After completing the calculation sheet I folded it and placed it inside the front cover of my red diary. When I recovered the diary I found the sheet still folder and inside the cover.

There was cross-examination of Mr Sullivan querying each of the weights recorded.

128. But this evidence of Mr Sullivan did not prevail. The findings made by the Tribunal in respect to this Exhibit were that:
    - the Tribunal found itself "*well short of being satisfied that it is what Mr Sullivan claims it to be...*" (at para [40]);
    - it was "*illogical*" if the calculations recorded on Exhibit 3 were made at the time when all the equipment had been laid out on the hanger floor that only one chain saw had been recorded (at para [41]); and
    - there was a "*further reason for scepticism about Exhibit 3*" (at para [44])

The Tribunal was "*not satisfied that Mr Sullivan made any meaningful calculation of the take-off weight*" (at para [43]) and "*was left with the distinct impression that Mr Sullivan's professed recollections were unreliable*" (at para [45]). These specific findings and observations in respect to Exhibit 3 must be read in the context where the Tribunal was also recording its findings as to the credibility of Mr Sullivan. Those findings were introduced by the Tribunal's overall conclusion that it was "*not left with a favourable impression of Mr Sullivan's reliability*" (at para [33]).

129. The submission advanced on behalf of Mr Sullivan was that these findings by the Tribunal were findings equivalent to findings that Mr Sullivan had "*lied*" and that he had "*fabricated*" Exhibit 3. Particular emphasis was placed upon the "*scepticism*" expressed by the Tribunal in respect to this Exhibit.
130. That submission is rejected.
131. In respect to Exhibit 3, the findings of the Tribunal rose no higher than that it did not accept the evidence of Mr Sullivan. The Tribunal set forth its reasons as to why it was "*not left with a favourable impression of [his] reliability*" and why it was "*not satisfied that Mr Sullivan made any meaningful calculation of the take-off weight*". The attempt to characterise these conclusions of the Tribunal as findings equivalent to the "*fabrication*" of evidence – in order to attract the characterisation of "*serious*" or "*grave*" findings – missed its mark by a long way. The findings of the Tribunal were carefully made and record nothing more than the Tribunal having real reservation in accepting Mr Sullivan's evidence.
132. However, the premise of Mr Sullivan's submission that the findings made by the Tribunal in respect to Exhibit 3 would attract the application of the general "*principle of law*" for which he contended is not made good. It fails to appreciate the distinction between the rejection of a person's evidence, and a finding that a person has lied: *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 at 268 per Brennan, Dawson, Toohey and Gaudron JJ. A finding that Mr Sullivan's evidence is "*unreliable*" is not a finding of dishonesty but a rejection of his evidence. The Tribunal's findings did not attract the application of the "*general principle of law*". Further, and in any event, even if the finding otherwise would attract the "*general principle of law*" for which Mr Sullivan contended, the Tribunal set forth its reasons for preferring other evidence in preference to that of Mr Sullivan and demonstrating in fact that it approached the finding with the required degree of caution.
133. The challenge to the reasoning processes of the Tribunal, by reference to Exhibit 3, is rejected. The challenge is nothing more than a carefully

crafted but impermissible challenge to the fact finding processes of the Tribunal.

Avoiding an investigation

134. The second of the two instances relied upon by Senior Counsel for Mr Sullivan as exposing the failure on the part of the Tribunal to apply *Briginshaw* is the Tribunal's finding that Mr Sullivan, when lodging a report with the ATSB which he knew to be false, "*did so to avoid an investigation and subsequent consideration of his conduct by* ***CASA***": at [75].
135. The "*target*" of Senior Counsel's submission was necessarily constrained by admissions which had previously been made by Mr Sullivan and therefore confined to the "*inference*" which the Tribunal drew from the fact that Mr Sullivan had "*acted dishonestly*" by providing the report which "*he knew to be false in material particulars*".
136. The facts upon which the Tribunal proceeded, it should be noted, inevitably followed from the following passages extracted from a *Statement of Agreed Facts* prepared for the purposes of the criminal proceedings in which Mr Sullivan pleaded guilty:

> 14. The matter came to the attention of the Civil Aviation Safety Authority (**CASA**), when passenger Mr Smale six months after the accident contacted the Australian Transport Safety Bureau (ATSB) seeking a copy of any accident investigation. When ATSB determined that there were divergences between the reported accident and Mr Smale's version of events, the matter was referred to **CASA**.
> 15. The purpose of the ATSB is to investigate matters and make recommendations to improve safety in civil aviation in Australia and around the world.
> 16. The false and misleading information given to the ATSB had the effect of minimising the seriousness of the crash. It also minimised the possibility of a prompt action by the ATSB including the possibility of a referral to **CASA** and timely investigation by that body.
> 17. The 6 month delay impeded the investigation by **CASA** of this matter in particular the gathering of evidence in documentary form some of which is only required to be kept for 3 months pursuant to operation manual requirements.

137. Given these admissions and the necessary findings, the inference drawn by the Tribunal as to the reasons or motive of Mr Sullivan was, with respect, equally inevitable.
138. Even applying the degree of persuasion required by *Briginshaw*, the inference drawn or the further finding was equally inevitable that Mr Sullivan had provided the false and misleading information "*to avoid an investigation and subsequent consideration of his conduct by* ***CASA***". No other inference or finding was suggested by Senior Counsel for Mr Sullivan during the hearing of the appeal. The inference or finding certainly cannot be said to be founded upon "*inexact proofs, indefinite testimony, or indirect inferences*": *Briginshaw* at 362 per Dixon J.

Browne v Dunn -v- a submission not put to a witness

139. At the outset of the appeal, and in the Appellant's written submissions, reliance was also placed upon the "*rule*" in *Browne v Dunn* (1894) 6 R. 67.
140. Like *Briginshaw,* the "*rule*" in *Browne v Dunn* also has its origins in the common law and in the judicial resolution of disputes. It is a rule also founded in basic common sense and fairness. "*The rule is essentially one of fairness*": *VN Railway Pty Ltd v Federal Commissioner of Taxation*

[2013] FCA 265 at [49], [2013] FCA 265; (2013) 211 FCR 188 at 198 per Tracey J. If a submission is to be advanced that a person's account of events is not to be accepted, it is not "*fair*" for an opponent to allow that account to go unchallenged in cross-examination and to deny to the person concerned an opportunity to give an explanation of his account.

141. In *Browne v Dunn* (1894) 6 R. 67 at 70 to 71 Lord Herschell LC first expressed the principle to be applied as follows:

> Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be delivered, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

The Lord Chancellor continued:

> My Lords, with regard to the manner in which the evidence was given in this case, 1 cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

See also *Unsted v Unsted* [1947] NSWStRp 44; (1947) 47 SR (NSW) 495 at 500 per Street J.

142. The submission advanced in respect to *Browne v Dunn* in the present proceeding focussed on the evidence of Ms Parsissons.
143. The reliance placed on behalf of Mr Sullivan upon the rule in *Browne v Dunn*, however, shifted during the course of the hearing of the appeal.
144. The ground relied upon when the "*appeal*" was first brought from the decision of the primary Judge was relevantly expressed as follows:
    1. ...
    2. ...
    3. ...
    4. ....
    5. ...
    6. ....
    7. That the court below erred in law by failing to hold that the rule in *Browne v Dunn* had not been complied with in relation to Ms Parsissons' evidence take into account.

Ground 7 of the *Grounds of Appeal* as first formulated was reformulated during the course of the hearing of the appeal as follows:

> That the court below erred in law by failing to ~~hold that the rule in Browne v Dunn had not been complied with in relation to Ms Parsisson's evidence~~ take into consideration a relevant matter in relation to the acceptance of the evidence of Ms Anna Parsissons, namely that it was not put to Ms Parsissons that her recollection was faulty in relation to material matters.

145. The reformulated *Ground* is necessarily to be resolved by reference to the evidence in fact given by Ms Parsissons and the manner in which it was resolved by the Tribunal. Within that factual context, it is concluded that:
    - any generally expressed "*principle of law*" applicable to the decision-making functions of the Tribunal relying upon the "*rule*" in *Browne v Dunn* was rightly abandoned during the hearing of the appeal and that the reformulated *Ground* is to be rejected as but an impermissible attempt to impose curial principles analogous to that rule upon administrative decision-making processes;
    - any generally expressed "*principle of law*" founded upon procedural fairness which requires the Tribunal to take into account in all cases a failure to put matters to a witness applicable is also to be rejected; and
    - the finding of the Tribunal that her recollection was "*faulty*" was a finding open to it upon the evidence and the Tribunal did not need to take into account any matters other than those set forth in its reasons.

The evidence of Ms Parsissons and the Tribunal's findings

146. The evidence of Ms Parsissons, if accepted, supported the account given by Mr Sullivan – namely that fuel had been transported to Roper Bar and that there had been a change in plans by reason of the weather. If accepted, that evidence supported the finding that the weight of the helicopter on take-off was a lesser rather than a greater weight. Ms Parsissons' statement of evidence tendered before the Tribunal thus stated in relevant part as follows:

> 11. Just prior to 12:00pm, I received another phone call from Mark. He said to me "*I'm at Tindall and I'm on my way back. Can you get Brad to load two 44 gallon drums on the ute, fill them with AvGas and take them down to Roper Bar. I want this done as soon as possible because the way the weather is, the road may be cut and we will be unable to get the fuel there*."
> 12. I then went and found Brad, who was another employee of Flying Fox. I said to him "*Get the Toyota, load it with two 44 gallon drums of AvGas and take it down to Roper Bar as soon as possible. Mark will be over in the chopper later this afternoon.*"
> 13. I was aware that this fuel would be for the helicopter, because we have done this on prior occasions. I did not see Brad after I had given him these instructions until much later that night.
> 14. I went back inside the homestead and into the office, which is a room in the homestead. A little while later, I saw Brad's wife Chrissy, she said "*Brad has just left*".
>
> ...
>
> 26. The next thing I recall was Mark coming around the corner and saying to the men words to the effect "*There has been a change of plans, we are going to go to Roper Bar and refuel and assess what the weather is doing.*" I then saw Mark walk in to the office. I did not observe what he did there, but he came out a short time later and said "*I have had a look at the weather, its as I thought, we will go to Roper Bar and then we will have to reassess where were are going to go.*" Neither of the two gentlemen made any specific comment.

27. He then turned to me and gave me the SAR details of the flight to Roper Bar. I recall that it was only a short flight of about 20 minutes. I noted this information on the white board. The usual arrangement was that Mark would carry a satellite phone and also, would call up on the radio when he arrived at the destination.

147. With respect to this evidence, the Tribunal found as follows:

> [55] Much of Ms Parsissons' evidence is uncontroversial and much of it is not in issue. She gives two pieces of evidence that Mr Sullivan relies on in particular. First, she gives evidence that, if accepted, would confirm that Brad was not at Flying Fox and thus could not have refuelled HCQ before the departure with Mr Sullivan in command. And her evidence, if accepted, confirms Mr Sullivan's evidence of a change in plan with the new plan to fly to Roper Bar and reassess the position at that point. I am unable to accept that evidence principally because it conflicts with the evidence of Mr Smale and Mr Mole that I do accept. In my judgment, on these aspects, Ms Parsissons' recollection is faulty.

The primary Judge resolved the *Ground of Appeal* as argued before her as follows:

> [50] The notion that the Tribunal was bound to accept Ms Parsissons' evidence because it was cogent and not challenged is wrong in law and fact. The evidence was challenged through the evidence of Mr Smale and Mr Mole. *State Rail Authority (NSW) v Brown* [2006] NSWCA 220 at [9], [18]–[24] and [53]–[59] involves a different context in which the rules of evidence applied and the plaintiff was subject to the civil onus of proof. Even in that context the alleged breach of the rule in *Browne v Dunn* (1893) 6 R 67 was said not to arise because the matter was patently in issue and thus issue joined and, as a result, the fairness of the trial as a whole was not impugned.

148. The challenge to this part of the fact-finding processes of the Tribunal focusses upon the Tribunal's conclusion that her recollection was "*faulty*".

Browne v Dunn and administrative decision-making

149. The amendment to the *Ground of Appeal* made during the course of the hearing of the appeal followed upon Senior Counsel for Mr Sullivan being referred to the following conclusions of Gummow and Heydon JJ in *Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60, (2003) 201 ALR 437 at 450:

> [57] Accordingly, the rule in *Browne v Dunn* has no application to proceedings in the Tribunal. Those proceedings are not adversarial, but inquisitorial; the Tribunal is not in the position of a contradictor of the case being advanced by the applicant. The Tribunal Member conducting the inquiry is not an adversarial cross-examiner, but an inquisitor obliged to be fair. The Tribunal Member has no "client", and has no "case" to put against the applicant. Cross-examiners must not only comply with *Browne v Dunn* by putting their client's cases to the witnesses; if they want to be as sure as possible of success, they have to damage the testimony of the witnesses by means which are sometimes confrontational and aggressive, namely means of a kind which an inquisitorial Tribunal Member could not employ without running a risk of bias being inferred. Here, on the other hand, it was for the prosecutrix to advance whatever evidence or argument she wished to advance, and for the Tribunal to decide whether her

> claim had been made out; it was not part of the function of the Tribunal to seek to damage the credibility of the prosecutrix's story in the manner a cross-examiner might seek to damage the credibility of a witness being cross-examined in adversarial litigation.

These were observations made in respect to the Refugee Review Tribunal. But, importantly, no attempt was made to seek to distinguish the case where the administrative decision-maker was the Administrative Appeals Tribunal. Indeed, with specific reference to the Administrative Appeals Tribunal, Robertson J has said that "*in light of the origins of the rule ... it is apt to mislead and to give proceedings in the tribunal an unwarranted curial gloss to refer to principles of procedural fairness as they operate in the tribunal by reference to Browne v Dunn*": *Calvista Australia Pty Ltd v Administrative Appeals Tribunal* [2013] FCA 860 at [118], [2013] FCA 860; (2013) 216 FCR 32 at 56.

150. The amendment to the *Ground* in the present appeal was not opposed and leave was granted to amend. The manner in which it was said that the Tribunal had "*erred in law*" was expressed in the *Ground* itself as a failure to "*take into a consideration a relevant matter*" [sic]; in oral submissions reliance was also placed upon s 39 of the *Administrative Appeals Tribunal Act* and requirements separately and independently imposed upon the Tribunal by the rules of procedural fairness.
151. Whatever the rubric of judicial review or error of law sought to be relied upon, the *Ground* as reformulated is – with respect – but a thinly disguised attempt to subvert the observations of Gummow and Heydon JJ in *Applicant S154/2002*, supra. Although the reformulation may "*side step*" the observations of their Honours going to the Tribunal not being "*a contradictor of the case being advanced by the applicant*", the reformulated *Ground* suffers all of the defects of seeking to impose a curial manner of decision-making upon an administrative process. The reformulated *Ground*, with respect, seeks to "*rebadge*" the rule of evidence encapsulated in *Browne v Dunn* as either a failure to take into account a relevant consideration or as a denial of procedural fairness. However expressed, the curial origins and reasons for the rule in *Browne v Dunn* remain.
152. For that reason alone, this challenge to the decision of the Administrative Appeals Tribunal should be rejected.

Procedural fairness – cross-examination and the need to put matters to a witness

153. Any reliance on behalf of Mr Sullivan upon the principles of natural justice or procedural fairness is also, with respect, equally misplaced.
154. Notwithstanding the manner in which the amended *Ground of Appeal* was expressed, the submission in the present proceeding was that the Tribunal was bound by either the requirement to provide a "*reasonable opportunity*" to be heard imposed by s 39 of the *Administrative Appeals Tribunal Act* or by the rules of "*procedural fairness*" to apply the rule in *Browne v Dunn*. If the findings that were made in paragraph [55] of its reasons were to be made, the submission was that the rules of procedural fairness which were owed to both:
    - Mr Sullivan, as the applicant; and
    - Ms Parsissons, as a witness

required it to be put to Ms Parsissons when giving her evidence that:

- her evidence conflicted with the evidence of Messrs Smale and Mole – namely that they had both seen Brad immediately before take-off such that he had not "*just left*"; and
- her recollection was "*faulty*".

Inherent in these submissions, and as properly accepted by Senior Counsel for Mr Sullivan, was the submission that:

- even if Mr Sullivan had been given a "*reasonable opportunity*" to present his case, the rules of "*procedural fairness*" went further and encapsulated the requirement imposed by *Browne v Dunn* in respect to both Mr Sullivan and Ms Parsissons.

Those submissions are rejected.

155. There are a number of reasons for reaching that conclusion.
156. At a level of generality, the submission has to confront at least two initial difficulties.
157. First, administrative decision-makers bound by the common law rules of natural justice or procedural fairness are not required in all circumstances to permit cross-examination: *O'Rourke v Miller* [1985] HCA 24; (1985) 156 CLR 342. It was there alleged that a probationary police constable had engaged in disorderly and drunken conduct and had misused his police badge. He denied allegations made against him but was denied the opportunity to confront the complainants and to cross-examine. In concluding that there had been no denial of natural justice, Gibbs J concluded:

> It was submitted that the appellant should have been given an opportunity to cross-examine, or at the very least, to confront, the two girls who made the complaints. In support of these submissions we were referred to *Barrier Reef Broadcasting Corporation Pty. Ltd. v. Staley* [(1978) 52 ALJR 493] and *Reg. v. Board of Visitors of Hull Prisoners; Ex parte St. Germain* ([1979] 1 WLR 1401). Those were cases in which there was a hearing before a tribunal which refused to allow the cross-examination of persons who in the one case had given evidence and in the other had made hearsay statements and the decisions depended, as all cases of this kind do, on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal was acting and the subject-matter being dealt with: see *Russell v. Duke of Norfolk* ([1949] 1 All ER 109 at 118). Even when there is a hearing before a tribunal it does not follow that a person affected necessarily has a right to cross-examine witnesses: see *National Companies and Securities Commission v. News Corporation Ltd,* [1984] HCA 29; [(1984) 156 CLR 296]. Natural justice does not require the application of fixed or technical rules; it requires fairness in all the circumstances: [1985] HCA 24; (1985) 156 CLR 342 at 353.

These observations have been applied in the context of hearings before the Administrative Appeals Tribunal: e.g., *Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26 at [73], [2013] FCAFC 26; (2013) 296 ALR 307 per Jessup J.

158. Second, if the rules of procedural fairness do not require that cross-examination be permitted in all circumstances, it necessarily follows that there is no general requirement that a witness be cross-examined in such a manner as to permit an opportunity to answer particular submissions or findings which may later be advanced or made.
159. Again, any submission that the Tribunal is universally – or even generally – required to apply the rule in *Browne v Dunn* in the conduct of its hearings is a submission doomed to failure. And for the same reasons as the submission was rejected in respect to *Briginshaw v Briginshaw*.

The evidence given and the findings made

160. If general principle be left to one side, there are further reasons for rejecting the submission in the present appeal.

161. The question as to who was present when the helicopter took off was a factual question canvassed in the evidence of Messrs Sullivan, Smale and Moles. The conflict in that evidence, to the extent it assumed relevance, was exposed in the witness statements. There was no denial of a "*reasonable opportunity*" to Mr Sullivan to advance his case and no denial of "*procedural fairness*".
162. And the question as to what Ms Parsissons wrote upon the "*white board*" involved her in recording information that had been communicated to her by others. The relevance or weight to be given to any cross-examination of Ms Parsissons of what she had been told, as opposed to the cross-examination of those who were communicating to her the information recorded, remained elusive.
163. The primary Judge was correct in rejecting the argument as then advanced. Nor is any error exposed in the Tribunal's decision by reference to the *Ground of Appeal* as reformulated on appeal to this Court.

Conclusions

164. The Tribunal was not "*bound by the rules of evidence*". But it was bound in carrying out its review function to proceed in a manner which was "*fair just, economical, informal and quick*" and was further bound to ensure that Mr Sullivan was given "*a reasonable opportunity to present his ... case"* (*Administrative Appeals Tribunal Act* s 39). Subject to those requirements, the procedure of the Tribunal was within its own discretion.
165. In the present proceeding the Tribunal proceeded in a procedurally fair manner and Mr Sullivan was given a "*reasonable opportunity to present his...case*". No question arises as to Mr Sullivan not being aware of the factual issues he needed to address. Nor does any question arise as to Mr Sullivan not being given a "*reasonable opportunity*" to present his own evidence or being denied a "*reasonable opportunity*" to test the evidence being led against him. Thereafter, the task of the Tribunal was to evaluate the evidence and other materials available to it and to then reach the "*correct or preferable*" decision on the merits. It did so. And it did so fully conscious of the need to carefully consider the evidence presented. The commercial impact of its decision upon Mr Sullivan, and the adverse impact of its decision upon his reputation, could not have escaped the attention of the Tribunal.
166. Subject to the arguments presented founded upon procedural unfairness, no argument was advanced on behalf of Mr Sullivan that the findings of fact as made were otherwise open to scrutiny. Nor could they be in circumstances where an appeal from the Tribunal was only open on a "*question of law*".
167. Notwithstanding the considerable ingenuity with which the *Notice of Appeal* was drafted, and the written and oral submissions advanced on behalf of Mr Sullivan, the appeal at the end of the day was but an attempt to cavil with the findings of fact made by the Administrative Appeals Tribunal. Although the *Notice of Appeal* identified "*questions of law*" in need of resolution, as required by s 44(1) of the *Administrative Appeals Tribunal Act*, those questions were ultimately answered by an examination of the reasoning process employed by the Tribunal and the findings of fact it made. Each of those findings of fact was open to the Tribunal. And its reasoning from those findings exposed no error of law.
168. The appeal should be dismissed with costs.

I certify that the preceding one hundred and fifteen (115) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Flick and Perry.

Associate:

Dated: 25 July 2014
