

4.1 Introduction

CASA delegates are frequently required to consider whether an applicant for an authorisation is a 'fit and proper person' for the purpose of that application or whether the holder of an authorisation is a fit and proper person to continue to hold it.

4.2 Fit and Proper person

References to the 'fitness' of a person to hold an authorization is used in a number of regulations¹ as a factor which the regulator should take into consideration in assessing whether an applicant should be issued, or should retain, an authorisation.

4.2.2 Guidance from the Legislation

There is no definition of the term 'fit and proper person' in the *Civil Aviation Act 1988* (the Act), the *Civil Aviation Regulations 1988* (CAR) or the *Civil Aviation Safety Regulations 1998* (CASR).

Subsection 9A(1) of the Act provides that, in exercising its powers and performing its functions CASA must regard *the safety of air navigation as the most important consideration*.

Subsection 98(1) of the Act gives a very wide power to make Regulations relating to the safety of air navigation: see s 98(1)(c), (d), (e) and (f). Without limiting the generality of s98(1), s 98(2) sets out more specific Regulation making powers. An examination of those particular powers and the specific Regulations and Orders made under them indicates that they cover a very broad range of matters relevant to air safety. They touch not only upon, for example, a person's ability to fly an aircraft but to the maintenance of those aircraft, the use of airspace, and the safety of those on the ground and in the air. The specific functions, duties and responsibilities of an authorisation holder apply, in at least some degree, to all of those areas. All are based on considerations of aviation safety.

¹ For examples see regulation 269(1)(d) of the *Civil Aviation Regulations 1988* and regulation 11.055(4)(i) of the *Civil Aviation Safety Regulations 1998*.

4.2.2.1 Context

While there is no express definition in the legislation it gives us the starting point; the *context* for our consideration of this phrase in the aviation environment.

As a summary of what might be expected to be taken into consideration in relation to context (although this is not exhaustive):

- the safety of air navigation;
- the safety of those on the ground and those in the air;
- the specific functions, duties and responsibilities associated with the particular authorisation.

4.2.3 High Court decisions and other case law

The term ‘fit and proper person’ is employed in a number of Commonwealth regulatory frameworks governing the issue of licences, permits and the like. As such, there is a significant body of case law considering the meaning that should be accorded to the phrase.

4.2.3.1 Confidence

The High Court refers to the ‘context’ as a starting point for understanding the term ‘fit and proper person’. While it is a separate consideration from the actual activities undertaken under the authorisation it encompasses the need for CASA to have confidence that the conduct of those activities will be carried out properly and lawfully.

The leading authority on what is encompassed by the phrase ‘fit and proper person’ is the decision of the High Court in ***Australian Broadcasting Tribunal v Bond***.² In relation to that phrase as used in ss.88(2) of the *Broadcasting Act 1992*, the Court said that:³

The expression ‘fit and proper person’ standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concepts of ‘fit and proper person’ cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur.

². (1990) 94 ALR 11

³. Ibid per Toohey and Gaudron JJ at ALR 56

As well as the confidence that an authorisation holder will carry out the functions and responsibilities of that licence, the regulator must also have confidence in the holder’s ability and temperament so as to be regarded as a person who can be relied upon to do these things properly and lawfully.

In ***Sullivan v Civil Aviation Safety Authority***,⁴ the Administrative Appeals Tribunal considered the issue of fit and proper person in relation to the holder of a private pilot licence and said:

*“In assessing whether the Applicant is a fit and proper person to hold a pilot’s licence the Tribunal is not concerned with moral turpitude nor to impose a penalty **but regard has to be had to the safety of the public**...it would seem a fit and proper person to hold a pilot’s licence is one in whom [CASA] has confidence as to his ability and temperament so as to be regarded as a person who can be relied upon to safely operate an aircraft”. [emphasis added]*

In ***Re Griffiths and Civil Aviation Authority***⁵ the Administrative Appeals Tribunal determined that, in considering the meaning of the term ‘fit and proper person’ in sr.269(1)(d) of the CAR, it should, conformably with the principles established in *Bond*, consider the fitness and propriety of an authorisation holding taking into account the responsibilities, functions and duties of the holder of such an authorisation. In taking that approach, the Tribunal in *Griffiths* was also influenced by the following passage from a previous decision of the Tribunal in *Re Taylor and Department of Transport*⁶ in which it was said in the substantially similar context of the then r.258 of the *Air Navigation Regulations* that:⁷

*... the enquiry whether the applicant is a ‘fit and proper person’ is directly focused upon the fitness and the propriety of the applicant **exercising the ‘responsibilities’ and performing the ‘functions’ and ‘duties’ of the holder of an authorisation** – in this case a commercial pilot licence. It is not simply a question of competence to fly an aircraft which the Secretary must consider for this purpose.*

*In our view, what **the regulation requires is a consideration of the applicant’s conduct measured against the responsibilities, functions and duties of the holder of a commercial pilot licence** as they emerge from the provisions of the Air Navigation Regulations. **Whilst it would be inappropriate to endeavor to catalogue those responsibilities, functions and duties in any exhaustive fashion, it is clear that they include observing the interests of the safety of air navigation – not only the interests of pilots, passengers and the owners of aircraft, but also the interests of the public at large.** [emphasis added]*

⁴. [2003] AATA 237 (14 March 2003)

⁵. (1994) 34 ALD 554 (part reported) at [6] – [14]

⁶. (1978) 1 ALD 312

⁷. Ibid at ALD 321

In *Re Broadbent and Civil Aviation Safety Authority*⁸ the Administrative Appeals Tribunal found Mr Broadbent not to be a fit and proper person to hold a Commercial Pilot Licence. It said:

15. In my view the applicant is not a fit and proper person to hold a flight crew licence because, as has been demonstrated in the proceedings before the Tribunal, he could not be relied upon to operate an aircraft in accordance with the Civil Aviation Regulations, Notices to Airmen and Air Traffic Control instructions so as to navigate the aircraft in a safe manner. He has a well-established record of breaking and bending rules and then asserting that the problem lies with someone else - often Air Services Australia or the respondent. Those are not the actions of a person who could be accepted as coming within Coke's definition of "fit". [emphasis added]

The following is a summary of what might be expected to be taken into consideration in relation to confidence (although this is not exhaustive):

- demonstrated evidence that a person has the ability and appreciates the responsibilities of the duties and functions of the authorisation; and
- demonstrated temperament that gives CASA the confidence that the authorisation holder can be relied upon to carry out the duties and functions of the authorisation.

4.2.3.2 Honesty, Knowledge and Diligence

The expression 'fit and proper person' in its traditional application brings in those personal qualities of an upright citizen; honesty, knowledge to know what ought to be done and diligence. Their express inclusion in the aviation legislation as a consideration and a ground for action is, as the High Court said in *Hughes and Vale Pty Ltd v NSW (No 2)* cited below, to give the widest scope for judgment and rejection.

In *Re Broadbent and Civil Aviation Safety Authority*⁹ the Tribunal referred to *Hughes and Vale Pty Ltd v NSW (No 2)*¹⁰ where the High Court said:

"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 affecting 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. [emphasis added]

⁸. [1999] AATA 972

⁹. [1999] AATA 972

¹⁰. (1955) 93 CLR 127 at 156-7

As a summary of what might be expected to be taken into consideration in relation to honesty, knowledge to know what ought to be done and diligence to carry it out (although this is not exhaustive):

- demonstrated frankness in dealings with the regulator;
- demonstrated attitude to the responsibilities and duties of the authorisation; and
- demonstrated openness and contrition in relation to inadvertent breaches made by the authorisation holder;

are all relevant considerations.

4.2.3.3 Attitude, responsibility and respect for regulatory compliance

The issue of attitude and behaviour towards CASA officers is often raised by officers of CASA in the carrying out of their roles; auditing the aviation industry and investigating complaints or incidents.

Court and Tribunal decisions have given some guidance to when attitude may be taken into consideration, as follows.

In *Repacholi and Civil Aviation Safety Authority*,¹¹ the Administrative Appeals Tribunal said:

*89. ... In the Tribunal's opinion it is appropriate, in determining whether a person is a "fit and proper person" for the purpose of deciding whether to cancel that person's licence under reg 269(1) of the Regulations, to have regard to a wider range of considerations than is permissible when determining whether a person is a "fit and proper person" for the purpose of deciding whether to issue an authorisation to that person under reg 5.09(1) of the regulations. In the latter case it appears, from reg 5.09(3) of the Regulations, that the category of matters that may be taken into account is limited to matters that relate to the safety of air navigation. In the former case, however, it is appropriate that consideration be given not only to matters relating to the safety of air navigation but also, inter alia, to the licence holder's past record of compliance, or non-compliance, with the Regulations during the currency of their licence as indicative of the likelihood of their complying, or not complying, with the Regulations in the future, **and of their respect, or lack of respect, for the Regulations and civil aviation regulatory legislation generally.** The Tribunal accepts Mr Shields' submission that, in the present case, **it is appropriate for it to have regard to the applicant's conduct in his dealings with CASA officers in their professional capacities, and at least insofar as such conduct is indicative of the degree of the applicant's respect, or lack thereof, for the civil aviation laws and for those persons whose professional responsibility it is to uphold and enforce them.***

[emphasis added]

In *McBain v Civil Aviation Safety Authority*,¹² the Federal Magistrate's Court considered the expression "fit and proper person" in CAR 5.09 and said the assessment of whether the applicant in that case was a fit and proper person **was directly related to his past breaches and attitude towards those breaches** which in turn relate to the issue of the safety of air navigation. [emphasis added]

¹¹ AATA 573 (18 June 2003)

¹² [2003] FMCA 83 (14 March 2003)

In **Brazier and Civil Aviation Safety Authority**,¹³ the Administrative Appeals Tribunal said:

*212. In my opinion, the evidence disclosed that Mr Brazier, by his conduct, demonstrated that he is prepared to compromise air safety for the sake of business expediency. **He has also demonstrated a lack of respect for the regulations and the aviation regulatory legislation generally. He has not accepted responsibility** for breaches of the regulatory regime and has attempted to deflect responsibility to other persons. Clearly he was the person responsible for signing off on the completion of stages of maintenance, for certifying completion of maintenance on aircraft on most occasions and for the issue of maintenance releases. His denial of any knowledge of the handwritten defect list, followed by a subsequent, reluctant admission that he had made an entry on that list does put his integrity into question. Mr Brazier's handling of the right-hand fuel tank problem on aircraft VH-XLB also demonstrates his lack of respect for the Regulations. His inability to supervise his staff in conducting maintenance, particularly critical maintenance such as the adjustment of a turbocharger density controller, does not instil confidence that Mr Brazier, under pressure to complete maintenance by an aircraft operator, will not again succumb to the temptation to simply sign off on maintenance which had not been properly completed. Accordingly, it is my view that Mr Brazier is not a fit and proper person to have the responsibilities, and exercise and perform the functions and duties of a holder of an aircraft maintenance engineer licence or a Certificate of Approval. [emphasis added]*

In **Mulligan and Civil Aviation Safety Authority**¹⁴ in relation to CAR 269(1)(d), the Administrative Appeal's Tribunal said:

*90. On the view that I take of the evidence Mr Mulligan's flying whilst suspended on 17 March 2005 was wrong, but was explicable on the basis that he reasonably believed that being re-licensed was imminent. But the same cannot be said, in my view, for the flights on 28 March and 1 April 2005. I am of the view that in relation to these flights he took a chance that he would not be detected. In so doing he demonstrated a flagrant disregard for compliance with the regulatory scheme. It is said that Mr Mulligan was placed in a "no win situation" with his employer and that he would lose his job were he to advise the employer of the suspension. That may be accepted, but in this case when confronted with a conflict of private interest and public duty, Mr Mulligan chose his private interest over his public duty. **It is not to the point that these flights of themselves were short and were not a threat to safety. Pilots are not free to choose which regulations they will obey.** Mr Mulligan chose, on two occasions, to deliberately ignore a suspension and that leads me to conclude that he does not fully appreciate the need for compliance with the regulatory scheme. I cannot be confident that Mr Mulligan would not choose to disregard a regulation more closely attuned to safety issues or that he would not again prefer his private interest to his public duty when again placed in a similar situation. [emphasis added]*

¹³ [2004] AATA 313 (26 March 2004)

¹⁴ [2006] AATA 652 (26 July 2006)

As a summary of what might be expected to be taken into consideration in relation to honesty, knowledge to know what ought to be done and diligence to carry it out (although this is not exhaustive):

- Attitude to dealing with CASA and its officers in the context of that attitude reflecting on a broader lack of respect for the aviation legislation and those who uphold and enforce it;
- Attitude to demonstrated breaches and failure to take responsibility for those breaches;
- See also the *Sullivan* decision cited under the heading 'confidence', where reference is made to temperament in the context of giving CASA confidence that the licence holder would comply with the legislation; and
- Demonstration by an authorisation holder that they consider that they are 'above the law' such as where:
 - They have put commercial concerns above compliance;
 - They have chosen their interpretation of the legislation over expressed advice of CASA or that contained in CASA publications or other advisory publications; and
 - Demonstrated instances of compliance with some legislative requirements and not others.

4.2.3.4 Patterns of behaviour, recency and a systematic approach to regulatory compliance

A further consideration raised in the matter of *Re Griffiths and Civil Aviation Authority*¹⁵ referred to above was the recency of actions/behaviour to be taken into consideration when looking at fitness and propriety. The court considered that it should not limit itself to recent breaches where older breaches showed a pattern of behaviour:

15. There arose at an early stage of the proceedings the question whether we should consider only Mr Griffiths' actions as a pilot in relation to the events leading up to the variation of his licence on 9 August, 1993 or whether we may look at his actions as a pilot in the past and as the holder of a Chief Pilot approval, which the CAA cancelled on 31 August, 1993. Furthermore, should we take account of the actions of Grif-Air Pty Ltd ("Grif-Air") of which Mr Griffiths was a director? The CAA cancelled the Air Operator's Certificate ("the AOC") of Grif-Air. Applications for the review of the cancellation of Mr Griffiths' Chief Pilot approval and of Grif-Air's AOC were both withdrawn at the commencement of the substantive part of these proceedings.

¹⁵ (1994) 34 ALD 554 (part reported) at [6] – [14]

16. We do not consider that we should limit the matters, to which we may have regard, to those events occurring immediately prior to the variation of the pilot licences and related only to his actions as the holder of those licences. In assessing whether he is a fit and proper person to carry out the functions, duties and responsibilities of an authorisation holder, one of the aspects we need to assess is how he has carried out those, or similar or related, functions, duties and responsibilities in the past. Past actions in respect of those matters are one guide to how he may be expected to behave in the future. **It is not, however, simply the events immediately prior to the variation of the licences which are relevant but the pattern of his past behaviour in areas related to that under consideration.** Individual events and actions taken out of that broader context are not necessarily an accurate reflection of a person's fitness or otherwise. [emphasis added]

In **Mulligan and Civil Aviation Safety Authority**¹⁶ in relation to CAR 269(1)(d), the Administrative Appeal's Tribunal said:

69. It is not in dispute that one at least of those matters is made out. That is that Mr Mulligan has contravened a provision of the Act or the Regulations. Indeed he has contravened a provision of the Act on 3 occasions and on his own account contravened various provisions of the Regulations on numerous occasions in relation to the 2004 conduct. But, in my view, the matter is best considered by asking whether Mr Mulligan is a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of the licence, having regard to the conduct of Mr Mulligan as I have found it to be.

...

78. Mr Mulligan flew on three occasions when the tail rotor was over time before noticing that. He flew on those occasions and another three occasions without noticing that the maintenance release had expired.

...

79. The breaches do not, of themselves, represent any great risk to safety but **they point to the absence of any systematic approach** by Mr Mulligan to the task of maintenance. Here Mr Mulligan had no such system. Indeed, even when he became aware that the tail rotor had gone overtime, he did not then notice that the maintenance release was also overtime. I infer that he did not pay any attention to the maintenance release.

...

83. So far as this incident is concerned **I would consider that a pilot who was conscious of the needs of safety and the need to comply with the statutory requirements ought to have planned this trip** in such a way that the work could be undertaken and the helicopter returned to Coffs Harbour without running the risk of impermissible night flying. It may be correct to say that the safer course was to press on to Coffs Harbour, even after dark. But Mr Mulligan ought not to have put himself in the position where he had to make that choice. He ought to have planned his trip better and he ought to have given more thought to the possibility of encountering headwinds.

84. In my view a pilot ought give consideration to these matters in advance in order to avoid the potential for unsafe practices and breaches of the legislation. Once again, it may be said that this breach was, of itself, of no great moment, however **it highlights an issue of a much greater moment to me, the absence of any planning or forethought.** ...

¹⁶ [2006] AATA 652 (26 July 2006)

91. *These incidents collectively satisfy me that Mr Mulligan is not a fit and proper person to hold the flying licences, that is, the commercial pilot (helicopter) licence and the private pilot (aeroplane) licence. **There is a consistent pattern to his conduct characterised by a lack of foresight and planning and by a lack of appreciation of the need to comply with the scheme of regulation.** [emphasis added]*

As a summary of what might be expected to be taken into consideration in relation to patterns of behaviour, recency and a systematic approach (or lack of same) to regulatory compliance (although this is not exhaustive), the following are relevant considerations:

- A pattern of behaviour even over a long period;
- A lack of a systematic approach to planning that demonstrates lack of foresight, planning and a lack of appreciation of the need to comply with the regulatory framework.

This appendix seek to provide as much assistance and guidance to CASA officers as possible. All factors mentioned should be considered as to their relevance to any assessment whether in the context of considering enforcement action or in the context of considering an application for an authorisation. ‘

This appendix is not to be viewed as definitive in a consideration of this topic and officers should seek legal advice from Legal Services Division if further guidance is sought as to whether an authorisation holder is a fit and proper person. Delegates, as long as they are not in clear conflict with legal authority or the legislation¹⁷, have a discretion to make decisions based on their view of whether any particular authorisation holder or applicant is a ‘fit and proper person’ (where this term is raised for consideration¹⁸) as long as they provide clear reasons for their decision and where they can demonstrate they have had regard to the key issues set out in this appendix.

¹⁷ See for example CAR 5.09(3) which expressly states that ‘...CASA must only take into account those things set out in paras (a) which is prescriptive and (b) ‘any other matter that relates to the safety of air navigation’ which would allow CASA delegates to take into consideration the matters which are encompassed in this Appendix.

¹⁸ See also specific reference in CASR 11.055 (4)(i) to ‘any other matter relating to the fitness of the applicant to hold the authorisation.’