

## Appendix 2

### 2.1 Introduction

The enforcement of any law – and the enforcement of the laws dealing with civil air operations is no exception – necessarily involves the exercise of government power. By its very nature, a government tends to have a considerable measure of power at its disposal, and the application of such power can have some telling consequences for those affected by its exercise.

### 2.2 The Exercise of Governmental Power

Historically, governments have enjoyed something of a monopoly on the legitimate exercise of certain kinds of coercive power. That is, the power to compel to do things they would prefer not to do, and to refrain from doing things they might wish to do. It is only the government that can make enforceable rules (laws) which specify the things people must and must not do, and which provide for the imposition of penalties should a person disobey the rules.

In many respects, it is the imbalance in the distribution of the legitimate power to compel or forbid certain actions that has characterised the nature of the relationship between governments and the people they govern. Because it has the monopoly on coercive powers, a government can effectively require people, on the other hand, may only be permitted to do those things which the government decides it will let them do, when it decides they may do so. People act without government “approval” only at their peril, since they may be punished for doing something which the government has not said they may do.

Australia’s constitutional and democratic form of government, however, places some very important restraints on government power and the exercise of such power by government officials.

### 2.3 Constitutional Government and the Constraint of Power

Constitutions establish and organise the political structures and operations of government. Constitutional democracies, like Australia, are organised on the basis of the belief that:

- The unconstrained power of government almost invariably leads to injustice, if not outright oppression
- The exercise of power by government must be subject to a range of controls and checks to guard against abuse.

The Commonwealth Constitution achieves these objectives in three ways.

- Firstly, because the highest levels of government consist of elected officials, it is the people who decide who governs. If the people become dissatisfied with their actions (or failures to act) they can, and often are, voted out at the next election.
- Secondly, all of the powers the Commonwealth government may lawfully exercise are specified in the Constitution and in the laws made under the Constitution. If a power is not provided for in the Constitution, it cannot lawfully be exercised by the government. Any laws made under the Constitution which provide for the exercise of a particular power by government must be able to trace the basis of their lawful authority back to a specific provision of the Constitution. Similarly, the exercise of any power by government officials under such laws must be grounded in an identifiable authorisation provided for in those laws. This is the basis of the requirement that every regulatory action by CASA Safety Regulation must be based on a specific and identifiable “head of power”.
- Thirdly, the powers of government are vested in different, effectively separate institutions:
  - The power to make the rules of law (legislative power) is vested in the Parliament
  - The power to administer, enforce and apply the rules of law (executive power) is vested in the executive branch of government
  - The power to resolve disputes about whether the laws are consistent with terms of the Constitution, whether they have been interpreted in accordance with the meaning intended by the Parliament and whether they have been administered, applied or enforced in a fair and just manner by the relevant executive or administrative authorities (and such other courts as the Parliament may establish).

By separating three kinds of functional powers exercised by government legislative, executive and judicial – into three effectively separate institutions, the risks that can arise from a concentration of all of those powers in a single institution are substantially reduced. Potential abuses of the legislative power are “checked” by the courts, and potential abuses by the courts are “checked” by the law itself, and a person’s right to appeal improper judicial decisions to a higher court.

### 2.4 Delegated Legislation and Decision-Making

As government agents exercising executive authority, officers of CASA should, strictly speaking, do nothing other than administer, apply and enforce the relevant aviation safety laws. And this is, in fact, a large part of CASA's responsibility. In carrying out those executive functions, however officers must also interpret the meaning of the laws they apply, and make factual judgements about people's activities in order to determine whether their conduct complies with, or contravenes, the requirements of the applicable laws.

Moreover, because it is impracticable for the Parliament itself to make all of the detailed and technically sophisticated rules of law which are appropriate for the safety regulation of civil aviation operations, Parliament has delegated this power to CASA as the relevant executive agency, whereby regulation may be made.

As a practical matter, then, while CASA properly carries out the executive function of exercising government power for the purposes of administering, applying and enforcing the law, it is also involved in aspects of the legislative function. Moreover, officers and delegates of CASA regularly engage in what amounts to a kind of judicial function. This situation – which is dictated by the demands of reality, and which is in no way peculiar to CASA – does involve a re-combination of the three kinds of powers which the Constitution seeks to separate. But this potential for abuse is effectively controlled by the imposition of various stringent legal constraints on the ways in which CASA exercises its powers.

#### 2.4.1 Parliamentary Scrutiny of Delegated Legislation

While the Parliament has delegated some of its legislative power to make regulatory rules to the Governor-General and CASA, that delegated legislation is subject to stringent parliamentary scrutiny.

Every regulation and order made by the Governor-General or the Authority must be tabled in both Houses of the Parliament (together with a detailed explanation of the legislation) and each House then has 15 sitting days to decide whether there is anything in those rules of which it disapproves. If either House of Parliament is dissatisfied with anything appearing in such delegated legislation, it has the power to disallow the regulation or order, thereby preventing it from becoming (or remaining) an enforceable rule of law.

### 2.4.2 Administrative and Judicial Review of Decisions and the Decision-Making Process

To the extent that enforcement of the Regulations and Orders involves the application of the written rules to a clear factual situation, the decision-making obligations of officers of the Authority does not involve much in the way of an exercise of judicial-like powers. If a regulation requires that a person be 18 years old to obtain a licence, there is not a great deal of judgement that an officer must exercise in deciding whether or not an applicant has complied with the law.

However, much of our legislation involves the exercise of a considerable measure of judgement and discretion. That is, officers must assess and evaluate sometimes complicated factual situations, interpret the requirements of some rather complex legislation and then decide whether a person has complied, or failed to comply, with the law. Often the Regulations require the Authority to be “satisfied” that a person has demonstrated a sufficient measure of competence, or an aircraft meets certain technical standards. In other cases, the Authority must have “reason to believe” that something is or is not so, in order to determine whether or not the particular provisions of the law will apply.

This kind of decision-making – which involves the exercise of technical judgement based on an officer’s skill, experience and training, and ultimately the making of choices about the nature, import and implications of various facts and circumstances and the rules of law which appear to govern them – is called discretionary decision-making.

Because discretionary decision-making is effectively not guided by the terms of the legislation being interpreted and enforced, and because the exercise of judgement by the decision maker is quasi-judicial in nature (but is not actually the product of a formal judicial decision), such decisions are invariably subject to review by an independent tribunal or the Federal Court.

### 2.4.3 Legal Constraints on the Exercise of Discretionary Decision-Making Powers

The exercise of discretion in the enforcement of the Regulations is one of the most common, most important and, from a legal perspective, one of the most critical functions of an officer of the Authority. The consequences of enforcement-related discretionary decision-making will often have a significant effect on the rights and interests of the people in respect of whom such decisions are made. The law, therefore, places some very severe constraints on the way in which officers go about making such decisions.

In the main, these legal constraints are not concerned with the substance of the decision (that is, with the technical or operational judgements of the officer involved). Rather, they focus on the process by which the officer comes to his or her decision, and they are designed to ensure that those processes provide the highest measure of fairness and justice possible in the circumstances. The law which governs the way in which officers exercise their powers to make decisions, and especially discretionary decisions, is called administrative law.

The rules and principles of administrative law are as binding on officers of the Authority as any provision of the Act, Regulations or Orders are on the people whose aviation-related activities you are responsible for regulating.

### 2.5 Basic Principles of Administrative Law

The rules and principles of administrative law are designed to ensure fairness in government decision-making. Of course, no rule (or set of rules) can specify what will or will not be fair in every conceivable situation. What is “fair” is very much determined by the particular, and often unique, facts and circumstances of the case to hand. What the rules of administrative law strive for, then, is fairness in a procedural sense, on the assumption that a fair procedure is most likely to produce a fair outcome in each individual situation.

Many of the requirements of administrative law appear explicitly in the provisions of the legislation administered by the Authority. Even where they are not expressly mentioned in a provision of the Act, the Regulations or the Orders, officers may assume that they will apply to the exercise of discretionary decision-making power in most, if not all, cases where the results of an officer’s decision are likely to affect someone’s rights, interests or legitimate expectations.

#### 2.5.1 The Rule of Natural Justice

The fundamental principle of administrative law is the principle of natural justice, or as it is more frequently referred to today, the principle of procedural fairness (and, sometimes, due process).

The principle of natural justice consists of two rules: the **hearing rule** and the **rule against bias**.

##### The Hearing Rule

The Hearing Rule requires that a person be given reasonable notice of:

- What it is he or she is alleged to have done (or failed to do)
- The specific provision(s) of law which prohibit(s) or require(s) the conduct in question
- What action the Authority intends to take in response to the person’s conduct
- The reasons upon which the decision to take such action are based.

Once a person has been provided with reasonable notice of the items noted above, he or she must be given a reasonable opportunity to be heard – that is, a meaningful opportunity to challenge any aspect of the Authority’s claims, or the facts upon which those claims are based. Normally this kind of notice must be provided before the decision to act is taken, so that the person is actually given notice of contemplated action and an opportunity to “show cause” why that contemplated action should not be taken.

There are some exceptions to this in the Regulations – for example, regulation 265 of the *Civil Aviation Regulations 1988* (CAR) and section 30DC of the *Civil Aviation Act 1988* (suspension where series and imminent risk to air safety) and such provisions must be used with extreme care and only where there is a serious risk to air safety.

Additionally, where urgency requires that the Authority act immediately in the interests of safety, notification of the decision that has been taken must contain so much of the information specified above as can reasonably be provided in the circumstances, and an opportunity to be heard must be provided as soon afterwards as is reasonably practicable.

### The Rule Against Bias

The Rule Against Bias is in two parts:

- Firstly, the rule requires that an officer exercising discretionary decision-making power must not have a personal interest in the outcome of the decision. This means that the officer should not be related to the person in respect of whom the decision is being made, or otherwise be personally involved with that person to such an extent that the relationship may give rise to a conflict of interest. Where such a relationship exists, and there is no other officer who can practicably make the decision, there are steps that can be taken to counteract the appearance of bias of this kind – for example, through disclosure of the relationship and the person's consent to the officer's continued involvement in the decision-making process.
- Secondly, the officer must not predetermine the matter in relation to which he or she is to make a decision. That is, the decision to take a particular action must not be made until all relevant information and evidence has been considered. This does not mean that preliminary determinations may not be made, or that the officer may not express his or her inclinations or impressions in relation to the person or the matter does mean, however, that the officer cannot effectively have decided the matter before he or she has heard and objectively assessed all of the relevant considerations.

## 2.5.2 Other Important Rules and Principles of Administrative Law

### *A Decision Maker Must Not Act for Improper Purposes*

The reasons for a particular decision must be consistent with the purposes for which the rule being applied was made, as well as being consistent with the explicit requirements of that rule. Even a decision that is in strict accordance with the "letter of the law" may be improper if it can be shown that the motives behind the decision maker's actions are different to the purposes the rule is meant to serve.

### *A Decision Maker Must Take All Relevant Considerations into Account*

All those factors which are relevant to the decision being made must be considered. This includes technical, operational and individual factors. Policy is always a relevant consideration, and the failure of a decision-maker to consider the application of an applicable policy may render the decision invalid.

### ***A Decision Maker Must Not Take Irrelevant Considerations into Account***

Factors which are not germane to the decision being made must not enter into the decision-maker's consideration of the matter. For example, if the decision relates to the operational or technical competence of a person (say, in relation to the holding of a licence or a certificate), considerations of the person's character, background or personality which are not demonstrably relevant to the specific issue of the particular kind of operational or technical competence in question are not relevant.

### ***A Decision Maker Must Not Make a Decision that is Vague or Uncertain in its Implications***

If a person is required to comply with the terms of an officer's decision, or if the person's failure to comply with a requirement of the law is based on certain conduct the specific requirements imposed on the person, or the specific nature of his or her conduct which is said to be inconsistent with the law, must be sent out clearly and unambiguously by the decision maker. This is especially important in respect of the reasons underlying a decision.

Thus, where a person is reasonably unable to understand what it was he or she is said to have done (or failed to do), why he or she must do (or refrain from doing) something or what the particular requirements of the applicable law are in a particular case, the decision may be regarded as unacceptably vague or uncertain, and may be found to be invalid on that basis.

### ***A Decision-Maker Must Not Act without Evidence***

Enforcement related decision-making must be based on clear and plausible facts that are able to be articulated, not mere conjecture or speculation. These facts need not always be clear "beyond a reasonable doubt", nor need they necessarily be facts within the personal knowledge of the decision-maker. However, they must be sufficient to justify, on reasonable grounds the action being taken, and they must be articulated to the person in relation to whom that action is being taken.

The evidence (facts and circumstances) on which a decision rests must be stated, or at least be capable of being stated, with a fair measure of specificity and particularity.

### ***A Decision-Maker Must Not Apply Policy Inflexibly***

As noted above, where the exercise of discretion is involved in decision-making, the decision-maker is required to take any relevant policy of the Authority on the matter into account in the process of making his or her decision. However, where, in the judgement of the delegate, the requirements of the law can be met more effectively and the interests of fairness better served by departing from the terms of an otherwise relevant policy, it is not only within the power of the decision-maker to depart or deviate from the terms of such a policy, he or she may be obligated to do so as a matter of law.

If there is no reason not to apply the terms of a relevant, applicable policy in a particular case, that policy should be followed. If there are sound reasons not to do so, it should not be followed. At all events, the decision-maker should expect that he or she will be required to provide reasons why the terms of a relevant policy was or was not followed in any particular case.

### *A Decision-Maker Must Not Act under Dictation*

Where a delegate is exercising discretionary decision-making powers, the delegate must be free to exercise his or her own judgement. Of course, any decision must be consistent with the requirements of the law. It is not at all improper for colleagues and superiors to express their views about what should or should not be done in a particular case. At the end of the day, however, the decision must be that of the responsible delegate, and no one may direct or require a delegate to make a particular decision. As a matter of law, a decision based on such a direction would not be valid.

### *A Decision-Maker Must Act within a Reasonable Time*

Administrative and logistical realities often prevent decisions from being made within a time frame that is desirable or convenient to the person being affected by that decision. Where delays are unavoidable, the fact that it has taken longer than “usual”, or longer than someone would have liked, for the decision to be made, will not be regarded as an unreasonable delay.

However, where there is no good reason for the delay the failure to make a decision in a timely manner may be regarded as a decision not to decide. A delegate with discretionary decision-making power has a legal obligation to make the decisions which are his or hers to make. In such cases, a court may insist that a decision be made within a time period specified by the court. A tribunal may do likewise, or may provide its own decision in the absence of one having been made by the Authority.

## **2.5.3 Consequences of Defective Decision-Making**

### *Administrative and Judicial Review*

As mentioned previously, the principles of administrative law are, in fact, rules of law and they should be regarded by decision makers as such in relation to any decision-making process. Accordingly, the rules and principles of administrative law described above should operate to structure and guide the way in which an officer goes about the process of making his or her enforcement-related decisions. It is in this sense that the rules and principles of administrative law operate as constraints on the decision-making process.

As a further check on the way in which decision-makers exercise the power of government which have been conferred on them, the law provides those who are affected by such decisions with the right to have those decisions reviewed by an independent tribunal or the Federal Court. In reviewing a decision, the tribunal and the court will examine the processes and procedures followed by the decision-maker, in order to ensure that the rules and principles of administrative law have been complied with.

### 2.5.4 Administrative Appeals Tribunal Review

Most, if not all of the enforcement-related decisions made by officers and delegates of the Authority are subject to review by the Administrative Appeals Tribunal (AAT). The AAT has the power not only to find that a decision was inconsistent with the legislation, but can determine whether the procedures followed in the course of arriving at and making that decision were consistent with the rules of natural justice and any other applicable principles of administrative law. In either case, the AAT has the power to declare the decision to be invalid, and to make an entirely new decision. In imposing its own decision, the AAT may exercise all of their powers of the original decision-maker under the applicable legislation.

Section 31 of the *Civil Aviation Act 1988* provides that any person whose interest is affected by a “reviewable decision” may apply to the AAT for a review of that decision. A “reviewable decision” means:

- A refusal to grant or issue, or the cancellation, suspension or variation of a certificate, permission, permit or licence granted or issued under the Act or the Regulations
- Or
- The imposition or variation of a condition, or the cancellation, suspension or variation of an authorisation, contained in such a certificate, permission, permit or licence.

A number of decisions under the Regulations are also listed in CAR 297A as decisions subject to review in the AAT. The inclusion of these decisions effectively expands the general category of “reviewable decisions” specified in section 31 of the Act.

Both section 31 of the Act and CAR 297A provide that, where the Authority makes a “reviewable decision”, notice of that decision must include advice to the effect that a person whose interests are affected by the decision has a right of appeal to the AAT.

Section 28 of the *Administrative Appeals Tribunal Act 1975* provides that any person who would be entitled to appeal a decision to the AAT has a right to require that a statement of reasons for the decision be provided by the decision-maker. The only situation in which such a statement need not be provided under a section-28 demand is where such a statement has already been provided. AAT proceedings are not as formal as judicial proceedings. They are relatively inexpensive, and the parties appearing before the Tribunal need not be represented by a lawyer. That’s the general rule in court as well.

Because the right of review in the AAT is so readily available, officers should always be prepared to justify every element of their decision, and every step in the decision-making process, before the Tribunal. Properly prepared documentation will make this easier, and possibly eliminate a person’s felt need to appeal in the first instance.

### 2.6 Review in the Federal Court

Officers may safely assume that any decision that is not reviewable in the AAT WILL BE SUBJECT TO REVIEW IN THE Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

Section 5 of the ADJR Act provides judicial review of the Authority's decisions to any person "aggrieved by" such a decision. Here too, officers may assume that this will include any person whose right, interests or legitimate expectations have been demonstrably affected by the decision (and persons so affected will not always be the particular person in respect of whom the decision has been made).

The Federal Court's powers in relation to a decision being reviewed under the ADJR Act are limited to:

- Affirming the original decision

Or

- Declaring the original decision to be invalid, and directing the Authority to make a new decision consistent with the requirements of the legislation

Or

- Requiring the Authority to reconsider the decision in accordance with the applicable rules of administrative law and any other directions given by the court.

It is no accident that the statutory grounds upon which a person may lodge an appeal under the AAT Act or seek judicial review under the ADJR Act essentially mirror the rule of natural justice and the principles of administrative law described above.

### 2.7 Review of Decisions by the Commonwealth Ombudsman

The Ombudsman's powers are confined to investigation, recommending and reporting.

Under the *Ombudsman Act 1976* the Ombudsman has power to enquire into whether action taken by Commonwealth Departments and agencies, such as the Authority, was:

- Contrary to law
- Unreasonable, unjust, oppressive or improperly discriminatory
- Based on mistake of law or of fact
- Otherwise, in all the circumstances wrong.

The Ombudsman has flexible investigatory powers, including the power to have direct access to relevant files. If, on such investigation, the Ombudsman is of the view that there has been maladministration, the Ombudsman can make recommendations to the Head of the Department or agency that a remedial course of action take place.

If the Department or agency refuses or fails to comply with the recommendations of the Ombudsman, the Ombudsman can report the matter to the Prime Minister and, if still dissatisfied, can make a report to the Parliament. The Ombudsman has no power to set aside decisions or to issue orders to persons administering legislation, but can express an opinion about whether or not any decision under consideration has been arrived at lawfully.

### 2.8 Freedom of Information

The *Freedom of Information Act 1982* (FOI Act) applies to the Authority. However, there are grounds on which the delivery up of documents can be refused.

The grounds on which delivery up of documents can be refused include grounds such as:

- Whether disclosure would or could reasonably be expected to disclose the identity of a confidential source of information in relation to the enforcement of the law (which could be relevant where an employee of a participant in the industry has reported to the Authority aspects of the employer's operations which are of concern)
- Whether disclosure would reveal business secrets (which could be relevant to documents provided in support of applications for certification of equipment or systems).

The FOI Act does not provide directly for any remedies or orders to be made to review administrative actions. However, by providing rights of access to information, the FOI Act can provide material which can then be used to base a claim for review under another Act such as the ADJR Act, or at common law.

It should be borne in mind that, just because FOI procedures are available, this does not mean that every request for information must be submitted to these procedures. In many cases where there is no particular sensitivity about information, then it is simpler both for CASA and for the person concerned to provide access to documents on an informal basis. However the requirements of the *Privacy Act 1988* also need to be taken into account.

### 2.9 Privacy Act

The *Privacy Act 1988* (Privacy Act) establishes Australian Privacy Principles (APPs) which apply to the collection, storage, use and security of "personal information" by Commonwealth authorities, including CASA.

The APPs are likely to be of most significance in relation to the processing of applications by individuals for licences, ratings and certificates under the *Civil Aviation Act 1988* or Regulations where the decision maker will need to have information about characteristics of the applicant so as to be able to determine the ability of the applicant to carry out the activities under consideration.

The term “personal information” is not used in any narrow sense. Instead the term is defined broadly by the section 6(1) of the Privacy Act to mean “information.... about” an individual.

The information could be, for example, information about any medical condition affecting the individual or information about the results which an individual obtained in a written test undertaken as part of the process of being assessed for a licence or rating.

The APPs are expressed broadly. The main APPs of relevance to CASA are:

- APP 1: open and transparent management of personal information
- APP 3: collection of solicited personal information
- APP 6: use or disclosure of personal information
- APP 11: security of personal information
- APP 12: access to personal information.

If CASA breaches an APP, a person affected can apply to the Information Commissioner, who can determine what action is appropriate to redress a breach of the APP.

If, on application, the Commissioner determines that there has been a breach of the APPs, the Commissioner can make a determination which sets out the action required to redress the breach. The action required could be a general change to CASA practices, or could be adapted to the circumstances of the individual involved or could deal with both kinds of matters. The determination can even include a determination that compensation be paid to the individual who has suffered loss through breach of the APPs. Such determinations are binding on CASA.

There are also a range of criminal offence provisions in the Act, and a civil penalty scheme administered by the Information Commissioner.

### 2.10 Race and Sex Discrimination

The *Racial Discrimination Act 1975* (RDA) and the *Sex Discrimination Act 1984* (SDA) may be relevant to the exercise of regulatory powers under the *Civil Aviation Act 1988* and Regulations. Both Acts prohibit discrimination of the prescribed kind by public authorities such as CASA.

If a person exercising regulatory powers under the *Civil Aviation Act 1988* or Regulations were to discriminate against a person subject to the power – for example, by refusing to license an applicant as a commercial pilot because the applicant was of Asian descent or because the applicant was a woman – then that would expose the action to judicial review under the *Administrative Decision (Judicial Review) Act 1977*, because such matters are “irrelevant considerations” in administrative law terms and should not be taken into account by decision-makers anyway because it is not relevant to the safety purpose of the legislation.

However, if a decision-maker did take into account such considerations, this could also attract the provisions of the Commonwealth's racial or sex discrimination legislation.

The RDA (section 13) makes it "unlawful" for a person (supplying goods and services to the public or to any section of the public), who by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person:

- a. Refuses or fails on demand to supply those goods or services to another person.
- b. Refuses or fails on demand to supply those goods or services to another person except on less favourable terms or conditions than those upon which he would otherwise supply those goods or services.

While there might be some room for dispute as to whether the carrying out of some of the regulatory functions under the *Civil Aviation Act 1988* or Regulations would amount to the supply of services within the meaning of this provision, there is no doubt about the relevance of the SDA to the exercise of powers under the *Civil Aviation Act 1988* or Regulations.

The SDA in section 26(1) includes the provision:

*It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the others person's sex, marital status or pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.*

Under either Act, a complaint alleging "unlawful" conduct under the Act may be lodged with the Human Rights and Equal Opportunity Commission for determination (including compensation for loss or damage suffered) and any determination of that Commission may be enforced by action in the Federal Court.

### 2.11 Civil Liability for Damages Resulting from Defective Decision-Making

This is not the place to discuss the law relating to negligence or the circumstances under which the Authority (and in some cases, an individual officer or delegate) may be found liable for damages as a result of a failure to observe the rules and principles of administrative law.

It is important to keep in mind, however, that when it can be shown that, in the process of exercising decision-making powers under our legislation, an officer or delegate has acted negligently, the Authority may be held liable to pay the costs associated with any harm or injury a person may have suffered as a direct and proximate result of that action (or, as the case may be, a failure to act).

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