AUSTRALIAN INTERNATIONAL AVIATION COLLEGE PTY LTD v SHENGLONG ZHENG
2025/0090612

FILED
24 JUL 2025
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RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

A. INTRODUCTION

1. This response is made pursuant to r 51.13 of the *Uniform Civil Procedure Rules 2005* (NSW) in opposition to the application for leave to appeal by Australian International Aviation College Pty Ltd (**AIAC**). The applicant seeks leave to appeal the whole of the interlocutory decision of Garling J in *Zheng v Australian International Aviation College Pty Ltd* [2024] NSWSC 1622 (**Decision**).

2. The motions before the Primary Judge, being the subject of this appeal, concerned questions as to the operation of particular provisions of the *Transport Safety Investigation Act 2003* (Cth) (**TSI Act**) in relation to certain evidence proposed to be adduced by the plaintiff/respondent in the substantive proceedings and the admissibility of that evidence in those proceedings. The parties sought advance rulings of the Court in relation to those questions pursuant to s 192A of the *Evidence Act 1995* (NSW) (**EA**).

3. The evidence in question is an 'Accident Report and Operational Recommencement Plan', dated 24 September 2017, prepared by the applicant (**AIAC Report**) and an expert report, dated 30 November 2021 obtained by the respondent that referred to the AIAC Report. The AIAC Report was obtained by the respondent under a subpoena, not objected to by the applicant, from the Civil Aviation Safety Authority (**CASA**).

4. The relevant issue on the interlocutory applications for advance evidentiary rulings was whether the provisions of s 60 of the TSI Act applied to the evidence in question so as to render the evidence inadmissible by reason of s 60(8) of the TSI Act. The respondent contended that, in the circumstances pertaining to the evidence in question, properly construed, the provisions of s 60 of the TSI Act, were not engaged and did not operate so as to preclude admissibility of the evidence (Decision [71], [74]). The applicant contended that the AIAC Report contains "restricted information" within the meaning of the TSI Act with the consequence that it was not to be "published" and that the evidence in question was inadmissible by reason of s 60(8) of the TSI Act (Decision [63], [82]).

5. The Primary Judge found that copies of the AIAC report, as provided by AIAC to CASA and its parent company (HNA General Aviation Group), did not constitute "restricted information" for the purposes of s 60 of the TSI Act and that, upon the proper construction of the TSI Act, the evidence in question was not inadmissible in the proceedings by reason of the provisions of the TSI Act (Decision [82], [83], [86], [92], [94]).

B. WHY LEAVE SHOULD NOT BE GRANTED

6. In determining a leave application, the issue for the Court is whether the application raises an issue of principle, a question of public importance, or a reasonably clear injustice going beyond something which is merely arguable. [1]

7. The applicant's application does not raise any material issue of the kind required.

8. The applicant's draft Notice of Appeal identifies three paragraphs in the reasons for Judgment below (Decision [85], [88], [89]) upon which to base four grounds of appeal alleging factual or legal error. In its summary of argument (**AS**), the applicant asserts three reasons for why leave should be granted (AS [42]).

9. The first reason simply asserts that there is *"sufficient doubt about the Decision"* to warrant consideration by an appeal court. There is no context to the asserted "doubt" which at best depends on implications of alleged misinterpretation of the TSI Act by the Primary Judge. The applicant must identify more than a faintly arguable error by the Primary Judge, and it has not.

10. The second reason submitted is that substantial injustice would *result* if leave were refused in light of the evidence that "the parties" would need to prepare going forward. The only "result" of any practical significance is the forensic decision that the applicant may need to make to deal with the expert evidence served by the respondent in the substantive proceeding. That is unexceptional in personal injury litigation. The Primary Judge duly considered that an advance ruling would assist the "efficient conduct of the final hearing" (Decision [81]). The applicant's suggestion of "substantial injustice" in the preparation of the case for hearing is without foundation.

11. The third suggested reason, of "public importance", is premised on an assertion that the relevant provisions of the TSI Act have not been the subject of any "intermediate appellate

[1] *SY v Public Guardian* [2025] NSWCA 148 at [12]; *Woolf v Brandt (No 3)* [2024] NSWCA 6 at [9].

guidance" with the speculative opinion that the Decision "risks stifling participation in ATSB investigations…". A theoretical concern of this kind is insufficient for the grant of leave.

12. Critically, the applicant does not challenge the following key factual findings made by the Primary Judge.

    (a) The AIAC Report was prepared by the applicant for commercial reasons; being for the purposes of recommencing flying operations (by describing the steps taken to identify the causes of the accident, and to assess risk and safety before recommencing flying): Decision [83]-[84].

    (b) The applicant provided the AIAC Report to CASA, as well as to its parent company, for the purposes of recommencing its flying operations: Decision [83]-[84].

    (c) In providing the AIAC Report to CASA (and its parent company), the applicant considered that it was entitled to do so and did not consider the AIAC Report, or any of its contents, to be in breach of any restriction under s 60 of the TSI Act when doing so: Decision [92].

    (d) The copy of the AIAC Report in the hands of CASA was not restricted information under the TSI Act: Decision [86]. This can be contrasted with information provided to the Australian Transport Safety Bureau (**ATSB**) whether the AIAC Report *subsequently* placed in the hands of the ATSB contained restricted information or not.

    (e) The respondent obtained a copy of the AIAC Report that was in the hands of CASA: Decision [25]. There was no suggestion that the respondent obtained a copy of the AIAC Report from any ATSB person (within the four categories of individuals prohibited from disclosing information under the TSI Act): Decision [87].

    (f) The applicant did not come within any of the classes of persons contained within ss 60(1)-(3) and s 62 of the TSI Act: Decision [92].

13. Those key factual findings made by the Primary Judge were based largely on contemporaneous business records (many being the applicant's own records) which were not meaningfully contested by the applicant (for example, Decision [83]). The applicant's

submissions do not directly identify or address any challenge to those factual findings by the Primary Judge or identify any evidence that would support other, contrary findings.

14. The Primary Judge correctly applied the provisions of ss 60 to 62 of the TSI Act, in accordance with the terms of those provisions and well-established principles of statutory interpretation, to the evidence actually adduced in the proceedings.

15. There is no need for the Court to engage in a close examination of the merits of the case sought to be advanced in the AS, let alone to consider every argument raised by the applicant to come to the view that its leave application fails to raise any material issue of principle, or question of public importance, or demonstrate a basis upon which to assert that the Court below proceeded under some misapprehension of fact or law, in a relevant sense, in making an interlocutory ruling that may result in an inconvenience to, but no practical injustice for, the applicant. The applicant has no real prospect of success if leave is granted.

C. RESPONDENT'S ARGUMENT

16. None of the proposed grounds of appeal raises a reasonable prospect of success on the appeal.

17. The **first proposed ground of appeal** asserts that the Primary Judge mistook the facts in finding without qualification that the information in the AIAC Report did not come from the ATSB. Relatedly, the **second proposed ground of appeal** contends that the Primary Judge misconstrued the TSI Act and/or the facts in failing to find that the applicant was a person who had access to information within s 60(3) of the TSI Act.

18. The Primary Judge made salient findings as to the circumstances surrounding the origins and disclosure of the AIAC Report. The Primary Judge described (at Decision [48]) the contents of the AIAC Report and observed (at Decision [59]) as follows:

> *Some remarks may be made about the Report. First, the Report was not prepared at the direction or request of the ATSB. Secondly, the Report contained the results of broad-ranging enquiries made by Mr McMurtrie and staff at the AIAC of a number of third parties. Thirdly, it is clear that the author of the Report was not suggesting that the Report and the investigations which it undertook, and the conclusions at which it arrived, were in any way a part of the ATSB report. To the contrary, the Report disclaimed any connection with the independent investigation of the ATSB and any reports which it may prepare and release.*

19. That is, the contents of the AIAC Report were prepared, collated and included in the AIAC Report by the applicant, not for the purposes of the ATSB investigation, but rather as part of a parallel process conducted by the applicant for its own commercial purposes.

20. That said, even if the G1000 and ECU data referred to by the applicant were restricted information under the TSI Act and was provided, at some point in time, to the applicant by the ATSB, there was no evidence that the applicant was authorised by the ATSB pursuant to s 62 of the TSI Act as a non-staff member to have access to that restricted information upon the ATSB considering it "necessary or desirable to do so".

21. The applicant now asserts positively for the first time that it was "authorised" by the ATSB to have "restricted information" under s 62 of the TSI Act. The consequence of this is that it was the applicant that was then constrained by the provisions of s 60 of the TSI Act from disclosing it, although there is no positive admission of criminal liability or exposure by the applicant in having disclosed the AIAC Report to other persons in breach of the s 60 non-disclosure obligations (albeit a possible recognition of that outcome: AS [26]). At its highest, the applicant sought, in the proceedings below, to suggest that the ATSB's authorisation under s 62 was a matter of inference to be drawn largely from its own communications with the ATSB at various points in time (White Folder p 617 (at [12]) and p 618 (at [14]), respectively).

22. The applicant points only to s 62, but not to s 61 of the TSI Act. Subsection 61(1) provides:

> *The ATSB may disclose restricted information to any person if the ATSB considers that the disclosure is necessary or desirable for the purposes of transport safety.*

23. The distinction is important because s 62 of the TSI Act, which enables the ATSB to *'authorise'* a non-staff member to have "access" to restricted information, carries with it the express prohibition on disclosure of that information by that person vide s 60(3) of the TSI Act (and a penalty of up to imprisonment for 2 years). By contrast, s 61 of the TSI Act enables the ATSB to *'disclose'* restricted information to any person if the ATSB considers that the disclosure is necessary or desirable for the purposes of transport safety. Such a disclosure of restricted information does not bring the disclosee within one of the 4 categories of persons subject to the limitations on disclosure by the provisions of s 60 of the TSI Act.

24. As the applicant emphasised in its written submissions in the proceedings below (White Folder p 617 at [12]), the applicant's Chief Flying Instructor, Mr McMurtie stated in an email to the ATSB on 12 September 2017 (White Folder p 428) that:

> *[...] We are hoping that we can utilise both the G1000 and ECU data to assist us in making risk-based decision towards starting flying again with the DA40NG, and this will involve a consultative process including Diamond Aircraft, Austro Engine, our casa district office in Tamworth, the ATSB and our parent company Hainan Airlines.*

25. The purpose of the hope expressed by Mr McMurtie (*"to assist us in making risk-based decisions towards starting flying again"*) in respect of any statutory disclosure of information to the applicant by the ATSB, would appear to fall squarely within the circumstances contemplated by s 61 of the TSI Act – being the disclosure of restricted information if *necessary or desirable* for the purposes of *transport safety*. Similarly, the purpose for which the applicant sought information, on the face of it, was presented to the ATSB as a transport safety purpose related to its own processes of risk management and consultation with other parties, including CASA. On that basis, the applicant and its staff would be free to use any data in the AIAC Report sourced from the ATSB (and as part of its "*consultative process*" with a number of third parties) – without risk of committing an offence or being exposed to a penalty of up to 2 years imprisonment upon that information being disclosed. To the extent that the ATSB may have communicated any "restricted information" to the applicant prior to it submitting the AIAC Report to CASA and others, it is consistent with the applicant having received the information pursuant to s 61 of the TSI Act, not s 62.

26. However, it was open to the Primary Judge to conclude that, overall, the information contained in the AIAC Report and the AIAC Report itself was not restricted information. Even if some of the information contained in the AIAC Report might have been describable in terms of the TSI Act definition of "restricted information", the applicant failed to establish that the prohibition under the TSI Act was enlivened by reason of it having received the information pursuant to s 62 of the TSI Act. In any event, the Primary Judge rejected any inferential argument as to the applicability of s 62 by expressly finding that:

> *"Clearly, the AIAC did not fall within the description of the classes or categories of persons contained within s 60(1)—s 60(3), including s 62 of the TSI Act"*. (Decision [92]).

27. By its **third proposed ground of appeal**, the applicant contends that the Primary Judge erred (at Decision [88]) in placing weight on the "untested and untestable" evidence of the

ATSB that the ATSB did not consider the AIAC Report or its contents to be restricted information under the TSI Act.

28. The relevant *"assertion of the ATSB"* is found at White Folder p 360. On 8 June 2023, the ATSB wrote to the respondent and stated inter alia:

    (a) *"The ATSB did not disclose any restricted information to the AIAC under the operative provisions of the Transport Safety Investigation Act 2003 (TSI Act). We note that the copy of the AIAC report in the possession of AIAC is not subject to the non-disclosure requirements of the TSI Act"*; and

    (b) "In our view, there is no purported disclosure of restricted information that would engage the restricted information protections mentioned in s 60 of the TSI Act".

29. Consistent with the position above, and in response to correspondence from the applicant (White Folder p 562, 578), the ATSB indicated that the ATSB had *"no interest"* in the proceedings, referred the applicant to the TSI Act, and noted that the AIAC Report had been provided by the applicant to CASA (White Folder p 580).

30. The source of the evidence as to recent communications by the parties with the ATSB, that was adduced by each of the parties, was not in dispute. Pursuant to s 75 of the EA, the Primary Judge was entitled to receive and consider that evidence in the interlocutory proceeding.

31. To the extent the Primary Judge placed any weight on that material, it is clear from the Decision that any such weight was limited even if it assisted the Primary Judge to make the findings his Honour did as to the circumstances in which the applicant engaged with the ATSB in the aftermath of the accident. It was not essential to his Honour's analysis of the evidence placed before him by the parties and his prime factual findings.

32. In any event, the question of what weight is to be given to admitted evidence is inherently evaluative and discretionary, but not arbitrary, and the Primary Judge's reference to the material at Decision [88] does not disclose any material error of fact or law.

33. It is also not the case that the evidence was untestable (AS [36]). No certificate was issued pursuant to s 65 for the purposes of s 66 of the TSI Act, and it is simply the case that the applicant did not subpoena the author of the ATSB materials, including letters sent by a staff member of the ATSB to the applicant.

34. Further, the applicant's objection to the material (AS [36]) must be viewed in light of the fact that the applicant itself chose to include a copy of the ATSB correspondence (described above at paragraph 28) in the material it adduced in the proceedings below (see White Folder p 486).

35. The **fourth proposed ground of appeal** asserts that the Primary Judge erred in finding that the Court's power under s 60(7) of the TSI Act was not a standalone power, but only enlivened if a certificate was issued under s 60(5) of the TSI Act.

36. The applicant's submissions on this point based on incorrect statutory interpretation are untenable. There was nothing erroneous about the Primary Judge's construction of the TSI Act.

37. As has been judicially observed on frequent occasions, the statutory text of a legislative provision must be considered in its context. It has been emphasised that "context" must be understood *"in a broad sense and not confined to the immediate context supplied by other provisions in a statute of which one or more provisions are the subject of the immediate inquiry by the Court. Context extends to include the existing state of the law, legislative purpose and any mischief which the statute was intended to remedy..."*: *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204 at [29] (also referring to *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]).

38. Applying these well accepted principles of statutory interpretation, the construction given to the meaning and operation of ss 60(5)–60(7) of the TSI Act by his Honour was open to him and clearly correct.

D. OTHER MATTERS

39. The respondent does not consent to leave being granted to the applicant to appeal regardless of whether an extension of time for the filing of the summons as sought by the applicant is granted. The costs on appeal and first instance should follow the event of any appeal.

40. The respondent consents to the application for leave being dealt with 'on the papers', in the absence of the public and without attendance of any person.

41. The leave application ought to be determined at a separate leave only hearing. In light of the lack of prospects of success of the appeal, and the limited matters relied upon by the applicant said to give rise to issues of principle, questions of public importance or a

reasonably clear injustice going beyond something which is merely arguable, a concurrent hearing must naturally take substantially longer to determine. Accordingly, the balance of convenience also favours a separate determination of leave.

42. For the purposes of the appeal, the respondent relies on the following relevant authorities and legislation: ss 60, 61, 62, 65, 66 of the TSI Act; ss 75 and 192A of the EA; *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204 at [29]; *SY v Public Guardian* [2025] NSWCA 148 at [12]; *Woolf v Brandt (No 3)* [2024] NSWCA 6 at [9].

24 July 2025

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