

CIVIL AVIATION ADVISORY PUBLICATION

Date: January 1992

No: ADMIN (1)

DELEGATIONS AND AUTHORISATIONS

PURPOSE

1. The purpose of this publication is to explain the legal effect of delegations and authorisations and to provide general information to persons holding delegations and authorisations about their duties and liabilities. It does not purport to be an exhaustive statement of the rights and liabilities of such persons. It is intended only as a summary of the general principles involved. It also provides details about the Civil Aviation Authority's policy in relation to indemnifying delegates and authorised persons against actions brought against them as a result of the exercise of powers under a delegation or authorisation (whether exercised before or after the date of this publication).

CANCELLATION

2. This CAAP is the first issue of CAAP ADMIN (1), and will remain current until withdrawn or superseded.

REFERENCES

3. This publication should be read in conjunction with regulations 6 and 7 of the CARs.

HOW TO OBTAIN COPIES OF THIS PUBLICATION

4. Copies of this publication may be obtained from:

Civil Aviation Authority Publications Centre

P.O. Box 1986

Carlton South

VIC. 3053

Telephone

(008) 331676

(008) 334191

(03) 3422000

Fax (03) 3474407

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SUMMARY

What is a delegation?

A delegation is a legal mechanism whereby an individual or body possessing legal powers transfers the right to exercise any or all of those powers to another person or body.

Under the *Civil Aviation Act 1988* and the Civil Aviation Regulations only the Chief Executive Officer of the Authority can delegate the Authority's powers and functions. Accordingly, a person will only hold a valid delegation if he or she has a written instrument of delegation issued by the Chief Executive Officer.

What is an authorisation?

An authorisation is a legal mechanism whereby an individual or body confers upon a person a right to do something which, apart from the authorisation, the person does not possess.

Authorisations are made under the Civil Aviation Regulations and are issued in the form of written instruments of authorisation. An authorisation can be issued by the Chief Executive Officer or by a person to whom the Chief Executive has delegated the power of issuing authorisations. Accordingly, a person will only hold a valid authorisation if he or she has a written instrument of authorisation issued by the Chief Executive Officer or by a delegate.

Generally, an authorisation is issued by a delegate rather than by the Chief Executive Officer.

Right of Civil Aviation Authority to delegate/authorise

The Civil Aviation Regulations confer various powers upon the Civil Aviation Authority. Those regulations also expressly empower the Authority to delegate those powers or to authorise other persons to exercise those powers.

What are the responsibilities of a delegate/authorised person?

If a person has been made a delegate or appointed as an authorised person then the person has a responsibility to ensure that any actions taken by the person are undertaken strictly in accordance with the terms of the delegation/authorisation and do not exceed the statutory power delegated to, or conferred upon, the person.

What if delegate/authorised person is sued for exercising a power?

At common law, if a delegate/authorised person is an employee of the Authority then the Authority will normally be vicariously liable for the actions of such persons. However, at common law the Authority would normally not be vicariously liable for the actions of delegates/authorised persons who are not employees of the Authority.

However, because the Authority accepts that such persons are to some extent exercising such powers on behalf of the Authority, the Authority has agreed to indemnify *all* delegates/authorised persons against liability or loss arising from the exercise of powers conferred upon them by the delegation/authorisation.

Are delegates/authorised persons indemnified in all circumstances?

No. The Authority will generally only indemnify a delegate/authorised person where the delegate/authorised person exercises a power within the scope of the delegation or authorisation.

The Authority will not normally indemnify delegates/authorised persons against liabilities or losses arising from the exercise of powers or the performance of functions that are outside the range of the Authority's statutory functions and outside the limits of the delegation or authorisation of the person concerned.

Nor will the Authority normally indemnify delegates/authorised persons who exercise their authority with reckless disregard.

What about insurance?

The Authority has comprehensive insurance which covers its delegates/authorised persons against liabilities or losses arising from their performance of functions carried out on behalf of the Authority, when those functions relate to the Authority's statutory functions and are the subject of the delegation/authorisations.

Delegates/authorised persons are encouraged to carry their own insurance in respect of activities that are not part of their delegated/authorised functions and in respect of which they may be subject to legal action.

All delegates and authorised persons must use care when exercising delegated powers

It is important to note, however, that liability for negligence only arises if a person fails to exercise reasonable care in the exercise of a power given to him or her. Accordingly, it is essential that in all cases delegates and authorised persons (whether employees of the Authority or not) exercise their powers using reasonable care and do not exercise those powers in an irresponsible or negligent manner.

What should a delegate/authorised person do if an action is brought against him or her?

If an action is brought against a delegate or authorised person because of actions taken by the delegate/authorised person under a delegation or authorisation then the person should contact the Insurance Manager in the Corporate Services

Division of the Civil Aviation Authority as soon as possible after the person receives advice of a possible action.

The number to ring is Canberra (06) 268 4111 (switchboard) or fax (06) 268 5683.

Further details

Additional technical information about delegations/authorisations is set out in the following pages.

DELEGATIONS (Reg 7)

(a) What is a delegation?

Under the Civil Aviation Regulations the Civil Aviation Authority is given various discretionary powers relating to the safety regulation of civil air operations in Australia. A discretionary power must, in general, be exercised only by the person or body to which it has been committed unless there is an express power to delegate it to another.

Delegation, strictly used, refers to the act by which an individual or body possessing legal authority transfers the right to exercise any or all of those powers to a subordinate individual or body.

(b) Why is delegation necessary?

Arguments for and against delegation cannot be stated in black and white — a balance of advantages and disadvantages is involved. The main arguments supporting delegation are that delegation:

- (a) saves time higher up — in particular, may relieve senior officers of the burden of many relatively routine matters;
- (b) makes possible quicker and cheaper decisions by reducing the need for reference to higher levels. It may also reduce formality, by making it easier to settle matters on a face-to-face basis;
- (c) enables decisions to be made by those most knowledgeable about them, and able to adapt them to the needs of the particular case;
- (d) encourages personal initiative, and an increased sense of

responsibility in the officer to whom wider powers are given. It may also promote the officer's skill as a decision taker.

(c) What is the effect of a delegation?

In general, a delegation of power does not imply parting with authority. The delegating body will retain not only power to revoke the delegation, but also power to act concurrently on matters within the area of delegated authority. This is made clear by section 34AB of the *Acts Interpretation Act 1901* (C'ith) which provides that a delegation 'does not prevent the performance or exercise of a function or power by' the person or body delegating the power or function.

A delegation by the Civil Aviation Authority of its powers under the Civil Aviation Regulations does not automatically create a principal/agent relationship between the Authority and the delegate. Nor does a delegation by the Authority automatically render the Authority legally liable under the general law for the actions of a delegate. A delegate performs functions under the delegation in the delegate's own right, not on behalf of the Authority (see *O'Reilly v. State Bank of Victoria* (1983) 57 ALJR 130 at page 140; *Re Ombudsman Reference* (1979) 2 ALD 86 at page 94). However, there are some duties of care under the general law for which the Authority cannot escape liability by delegating their performance to another body or individual.

(d) Legislative basis for delegations under the Civil Aviation Regulations

Regulation 7 of the Civil Aviation Regulations provides that the Authority may delegate all or any of its powers under the Regulations. Regulation 7 makes it clear that the Authority can, under this power, delegate its powers to *any* person and is not restricted to delegating its power to officers or employees of the Authority.

(e) Is the Civil Aviation Authority vicariously liable for the acts of its delegates?

In looking at delegations by the Authority under the Civil Aviation Regulations different considerations apply whether the delegate is an officer or employee of the Authority or whether the person is someone who has no connection with the Authority at all. However, in both cases the question arises whether there is any significance for the tort liability position of the Authority when it delegates its powers i.e. is the Authority vicariously liable for the actions of all of its delegates.

A person is normally answerable for his own actions and not for those of anybody else, but in some limited circumstances the law will impose liability on one person for the negligence of another e.g. generally an employer is responsible for what his employee does in the course of the employer's business. A plaintiff must therefore establish that he was harmed by the employee doing what he was employed to do. However, the law draws a distinction between an employee acting outside the scope of employment, when the employer will not be liable, and an employee doing improperly something that the employee was supposed to do, thus making the employer liable. The employee does not escape liability himself, and may be sued by the injured person, although in general it is the employer who will be sued because, in most cases, he has the means to pay damages. The employee is also liable to the employer, who is entitled to be indemnified, although in most cases the employee's means will not justify a claim.

The basic test for vicarious liability, therefore, has been whether the person who has breached a duty of care is under the control of the person or entity whose vicarious liability is in issue. Accordingly, where a person has an independent discretion and is not under the direction of another person then the basis for vicarious liability is absent. *Nipper v. Watson* (1882) 3 NSW 168;

Stanbury v. Exeter Corporation [1905] 2 KB 838; *Lambert v. Great Eastern Railway Company* [1909] 2 KB 776 and see generally Halsburys Laws of England Vol. 1(1) para. 199.

(f) Liability at common law for delegates who are officers/employees of the Authority

Applying this principle, it would appear that where the Civil Aviation Authority itself acts *through* its employees and officers, then the first precondition for vicarious liability is present. However, where the Authority itself does not act but appoints one of its employees as a delegate, then the delegate is exercising his or her own power. This suggests that such a delegate is not under the direction of the Authority and that therefore there is no basis for attributing vicarious liability to the Authority for acts and omissions of the delegate. However, in *Minister of Housing and Local Government v. Shart* [1970] 1 All ER 1009 (especially at 1019 and 1026) the Court of Appeal indicated that an authority can be held vicariously liable for the acts and omissions of its employee even when the employee's relevant act or omission occurred while the employee was under someone else's direction and control. This suggests that where a person to whom the Civil Aviation Authority has delegated powers under Regulation 7 is an officer or employee of the Authority, then the Authority may be vicariously liable for acts and omissions of the individual in relation to the delegated powers even though that individual may not be under the direction and control of the Authority in exercising the delegated powers.

(g) CAA practice in relation to its officers/employees

The Civil Aviation Authority practice is that it will indemnify its officers and employees who are holders of delegations against any liability or loss arising from the exercise of powers or the performance of functions carried out on behalf of the Authority, *where those*

powers or functions are within the scope of the delegation.

However, the Civil Aviation Authority will not, generally, indemnify delegates against liabilities or losses arising from the exercise of powers or the performance of functions which are outside the scope of the delegation or which are exercised or performed with reckless disregard.

(h) Position at common law of delegates who are not officers/employees of the Authority

At common law, there is generally no basis for attributing vicarious liability to the Authority for the actions of delegates who have no connection with the Authority at all — such as independent contractors or employees of airline operators. The general rule is stated by Dixon J. in *Colonial Mutual Life Assurance Society Ltd. v. Producers and Citizens Co-operative Assurance Co. of Australia Ltd.* (1931) 46 CLR 41 at page 48:

‘In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorised the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal.’

(i) CAA practice in relation to delegates who are not officers/employees

In spite of the common law position, the Civil Aviation Authority practice is that it will indemnify non-Authority persons who

are holders of delegations against any liability or loss arising from the exercise of powers or the performance of functions carried out on behalf of the Authority, *where those powers or functions are within the scope of the delegation.*

The Civil Aviation Authority will not indemnify non-Authority delegates against liabilities or losses arising from the exercise of powers or the performance of functions which are outside the scope of the delegation or which are exercised or performed with reckless disregard.

AUTHORISED PERSONS (Reg 6)

(a) Legislative basis for appointing authorised persons

Regulation 6 of the Civil Aviation Regulations empowers the Authority to appoint persons as ‘authorised persons’ for the purposes of a provision of the Regulations in which the expression ‘authorised person’ exists.

(b) Legal effect of authorisation

In the case of *Ex p. Johnson re Macmillan* (1947) 47 NSW 16 at 18 Jordan CJ said that ‘The word ‘authorise’, according to its natural meaning, signifies *the conferring upon the person of a right to do something which, apart from the authorisation, he or she does not possess ...*’.

(c) Authority employees and persons outside the Authority may be authorised

In some contexts, the expression may be used to describe the action taken to create an agency relationship. With some of the Civil Aviation Regulations it is clear that ordinarily the only person who would be appointed as an authorised person would be an officer or employee of the Authority. For example, it would be highly unlikely if anyone other than an Authority officer or employee were to have power to determine which officers of the Authority were to be obliged to have copies of the Liens Register (regulation 273). It would

also be surprising if anyone other than an officer or employee were to have power to disallow claims by creditors (regulation 275).

However, with other Regulations it is very clear that it is contemplated that persons appointed will include persons who are not connected with the Authority. For example, Regulations 47, 49, 51 and 53 refer to 'an authorised person (whether as an employee or on his or her own behalf)'. This clearly contemplates that the person authorised may be independent of the Authority. Similarly in regulation 43 the reference to an authorised person being a body corporate also contemplates that the 'authorised person' under that regulation may be unconnected with the Authority.

(d) Authorisation does not automatically make a person an agent of the Authority

It is apparent when all of the regulations which use the term 'authorised person' are read together that the conferring of authority on a person does not of itself make the person an agent of the Authority. *The action of the Authority under regulation 6 in appointing a person confers on the person appointed a statutory status and capacity which the person would not otherwise have but does not bring the 'authorised person' into any employer/employee or master/servant relationship. Accordingly, the Authority is not vicariously liable in tort for the actions of authorised persons simply because of their status under regulation 6.*

(e) Position at common law of authorised persons who are Authority employees

However, the Authority is generally vicariously liable in tort for the acts and omissions of its employees acting within the scope of their employment. It may well be that a person appointed under regulation 6 is also an employee of the Authority and it may be part of their employment with the Authority to carry out the functions associated with the

status of being an 'authorised person'. In such circumstances where the authorised person is an employee or officer of the Authority, the tort duty of care which the individual owes to other persons, and the range of the acts and omissions for which the Authority can be vicariously liable, will be affected by the statutory powers which the person has as an 'authorised person'.

(f) CAA practice in relation to Authority officers who are authorised persons

As in the case of delegates who are Authority employees the Authority has agreed that it will indemnify Authority employees and officers who are holders of authorisations against any liability or loss arising from the exercise of powers or the performance of functions carried out on behalf of the Authority, where the exercise of those powers or functions is within the scope of the authorisation.

The Civil Aviation Authority will not, generally, indemnify Authority officers and employees who are authorised persons against liabilities or losses arising from the exercise of powers or the performance of functions which are outside the scope of the authorisation or which are exercised or performed with reckless disregard.

(g) Position at common law of persons who are not Authority employees

Where the person appointed as an authorised person is not an Authority officer or employee then at common law the Authority will generally not be vicariously liable for the actions of that person. In such cases the authorised person will be personally liable for any acts committed while exercising his or her powers.

(h) CAA practice in relation to authorised persons who are not Authority officers or employees

As in the case of delegations, the Authority has agreed that it will indemnify non-Authority persons who are holders of authorisations against any

liability or loss arising from the exercise of powers or the performance of functions carried out on behalf of the Authority, where those powers or functions are within the scope of the authorisation.

The Authority will not indemnify non-Authority persons who are authorised persons against liabilities or losses arising from the exercise of powers or the performance of functions which are outside the scope of the authorisation or which are exercised or performed with reckless disregard.

GENERAL

(a) All delegates and authorised persons must use care when exercising delegated powers

It is important to note, however, that liability for tort only arises if a person fails to exercise reasonable care in the exercise of a power given to him or her.

Accordingly, it is essential that in all cases delegates and authorised persons (whether employees of the Authority or not) exercise their powers using reasonable care and do not exercise those powers in an irresponsible or negligent manner.

(b) What should a delegate/ authorised person do if an action is brought against him or her?

If an action is brought against a delegate or authorised person because of actions taken by the delegate/authorised person under a delegation or authorisation then the person should contact the Insurance Manager in the Corporate Services Division of the Civil Aviation Authority as soon as possible after the person receives advice of a possible action.

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