Australian Government
Civil Aviation Safety Authority

**CHIEF EXECUTIVE OFFICER and
DIRECTOR OF AVIATION SAFETY**

CASA Ref: M20/8

Senator Susan McDonald
Chair
Senate Rural and Regional Affairs and Transport Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator McDonald

**Second Supplementary Submission to the
Inquiry into the current state of Australia's general aviation industry,
with particular reference to aviation in rural, regional and remote Australia**

Thank you for the opportunity to provide evidence at the hearing on 7 December 2021 to the Senate Rural and Regional Affairs and Transport Legislation Committee's Inquiry into the current state of Australia's general aviation industry, with particular reference to aviation in rural, regional and remote Australia (the **Inquiry**).

At that hearing I undertook to provide the Committee with additional information on several issues. On 10 December 2021 I wrote to you providing the information requested on the costs awarded by the Federal Court to the Civil Aviation Safety Authority (**CASA**) in connection with the proceedings instigated by Angel Flight Australia (**AFA**).

The attached **second supplementary submission** provides the other information I agreed to provide to the Committee and addresses some of the claims made by AFA during the hearing and in its submission to the Inquiry. As I said at the hearing, we disagree with a number of the statements made by AFA and the attached supplementary submission includes our responses to some of the most concerning of those assertions. Once the Committee has reviewed the submission we would be happy to answer any further questions.

Notwithstanding these concerns, we continue to engage with AFA constructively and in a spirit of collaboration. Senior CASA officials met with AFA in Brisbane on 15 December 2021 to progress discussions about the means by which it might be shown that Community Service Flights organised by Angel Flight can be conducted in accordance with appropriate safety standards, without the need to comply with the requirements set out in the Civil Aviation (Community Service Flights – Conditions on Flight Crew Licences) Instrument 2019 (as amended), CASA 09/19.

Finally, I underscore the sentiments I conveyed at the hearing that I am fully committed to fostering genuine improvements in and for the general aviation (GA) sectors. I share your view that GA is important to the success of the aviation system more broadly and I assure you that CASA will

continue to explore reforms to ensure that the regulatory environment for GA is fair, reasonable, proportionate and in line with community expectations.

I look forward to continuing to support and advance the Government's objectives in this area, among others, and I will be happy to provide the Committee with CASA's perspectives on other issues raised at the hearing.

Yours sincerely

Ms Pip Spence PSM
Chief Executive Officer and
Director of Aviation Safety

6 January 2022

Australian Government
Civil Aviation Safety Authority

Senate Rural and Regional Affairs and Transport Legislation Committee

Inquiry into the current state of Australia's general aviation industry, with particular reference to aviation in rural, regional and remote Australia

Second supplementary submission of the Civil Aviation Safety Authority

January 2022

GPO Box 2005 Canberra ACT 2601 Telephone: (02) 6217 1001 Facsimile: (02) 6217 1555

CASA's initiatives to assist general aviation

The opening statement made to the Inquiry by the Director of Aviation Safety (DAS) and Chief Executive Officer (CEO), Ms Pip Spence PSM, included a list of initiatives that CASA already has underway to assist general aviation (GA). On 9 December 2021 CASA provided this statement to the Committee Secretariat for inclusion in Hansard and a copy is included for your reference at **Annexure A**.

This last year has seen major regulatory changes, with the introduction of the new flight operations suite commencing on 2 December 2021 and the new fatigue requirements amongst others. These changes have modernised, consolidated and improved key safety obligations for just about everyone in the industry. We know regulatory change places additional workload on many people and organisations and CASA has been mindful to keep these demands to a minimum.

With the focus now on implementation of these new regulations, CASA is in a better position to focus on developing strategic policies for GA that address long-standing items industry has raised as well as investigating other initiatives to streamline requirements and reduce regulatory burden without jeopardising appropriate and necessary safety standards. CASA is confident that a number of reforms in train will provide tangible benefits to many in the GA community.

Work is underway to make regulatory changes that will assist private pilots, general aviation maintenance, maintenance training, flight training, aerial work, aerial application and sport and recreational flying. This work will need to get the balance right between the regulations that are required to deliver the safety outcomes expected by the Australian public, without imposing unfair burdens on day-to-day operations.

Key initiatives include:

- *Reducing maintenance costs for industry*: to support private and aerial work operators we are considering the mandatory applicability of the Cessna SIDs program, introducing new general aviation maintenance regulations and considering new rules for aircraft maintenance.

- *Supporting flight training*: we are looking at how we expand privileges for some flight instructors to improve flight testing, revisiting how we administer the Flight Examiner Rating, and looking at how we can work with industry to prioritise other initiatives.

- *Supporting regional and remote areas*: we are looking at ways to improve access to training and reviewing the fatigue rules for aerial application operators.

- *Encouraging growth of the sector*: we are considering a new small aircraft maintenance licence to address training limitations impacting the GA sector, putting in place a weight increase for aircraft administered by Recreation Aviation Australia, reviewing the associated stall speed and reviewing aviation medical standards for private operations (including a potential 'self-declared' medical).

CASA will progress a general aviation work plan for 2022 in the context of the Australian Government's Aviation Recovery Framework announced on 20 December 2021[1]. This body of work will build a consolidated picture of all the activity already underway and identify other initiatives that

[1] www.infrastructure.gov.au/infrastructure-transport-vehicles/aviation

could support the sector. CASA expects to have more to say about this at the next meeting of the Committee and it looks forward to working collaboratively with industry to achieve these outcomes.

Angel Flight Australia

Safety basis for CASA 09/19 — Civil Aviation (Community Service Flights — Conditions on Flight Crew Licences) Instrument 2019

Some references were made at the hearing by Angel Flight Australia (AFA) and the Chair that CASA has failed to provide AFA and/or the Committee with information sought in relation to the safety basis for the making of CASA 09/19 — Civil Aviation (Community Service Flights — Conditions on Flight Crew Licences) Instrument 2019 (the ***Instrument***).

CASA believes it has provided all the information the Committee has requested over the past several years in relation to this topic and therefore disagrees with claims to the contrary.

On 4 September 2019, at the public hearing held as part of the Senate Rural and Regional Affairs and Transport Legislation Committee's Inquiry into the Performance of the Australian Transport Safety Bureau, and in particular its report on the June 2017 crash of a flight conducted on behalf of Angel Flight Australia (the ***2019 Inquiry***), Senator Patrick requested that CASA provide the Committee with the safety analysis relating to the maintenance criterion specified in the Instrument (Proof *Hansard* p. 27).

On 17 September 2019 the information requested, as well as additional safety reasons for the Instrument, was provided to the Committee[2] and is included at **Annexure B.**

CASA reassures the Committee that a safety analysis was conducted by CASA as a basis for introducing the Instrument. The term 'safety case' that has been used in Committee hearings suggests the existence of a single document entitled *Safety Case* that sets out the safety basis on which CASA made the decision to introduce the Instrument.

As the Committee will see, data and information contained in a number of documents included in this submission informed the decision to make the Instrument on safety grounds, reflecting the relevant factors taken into account in support of that decision, collectively constituting what amounts to a 'safety case'.

In response to the most recent request at the 7 December 2021 hearing that CASA provide a safety case to the Committee to support the making of the Instrument, Ms Spence agreed to provide the affidavits of Mr Chris Monahan, Executive Manager National Operations and Standards, that were filed with the Federal Court on 19 March 2020 and 13 November 2020. These were offered to the Committee on the basis that, amongst other things, they comprehensively set out the safety basis on which the decision to make the Instrument was based. The affidavits are at **Annexures C** and **D**.

CASA appreciates these are lengthy and detailed documents and therefore draws the Committee's particular attention to:

- items CM-7 and CM-16 (**the standard form recommendations**) in **Annexure C,** and
- paragraphs 27-29 and paragraphs 30-35 of the second affidavit at **Annexure D**, which detail the ***Basis for CASA's decision to increase the safety standard applicable to CSFs*** and the ***Safety basis for the provision of the instrument*** respectively.

[2] https://www.aph.gov.au/DocumentStore.ashx?id=0728970b-483c-479b-9641-0e4bbea4c412

CASA also draws the Committee's attention to paragraph 90-92 of the first affidavit at **Annexure C** which highlights under oath that AFA was also provided with a summary of the safety basis for the proposed instrument.

Further CASA notes the judgement handed down by the Federal Court in *Angel Flight Australia v Civil Aviation Safety Authority* on 11 May 2021,[3] a copy of which is provided at **Annexure E**, in which the Court accepted Mr Monahan's evidence that there were sound and rational bases to support CASA's decision to make the Instrument, and that it was *'…reasonable for CASA to form the view that the CSF sector faces higher risks than standard private flights'* (para 365). The Federal Court found that all of the evidence presented by CASA was credible and supportive of CASA's decision to make the Instrument.

Carriage of additional passengers

At the 7 December 2021 hearing, Senator Sterle asked Mr Monahan about his recollection of an exchange of emails with Ms Pagani in relation to the carriage of seven-month-old twins on a Community Service Flight (CSF).

CASA believes that the emails to which the Committee refers are those CASA provides at **Annexure F**.

CASA confirms that, as Mr Monahan indicated in his evidence to the Committee, it would have been a matter for the pilot to determine an accompanying passenger's eligibility to fly and that the carriage of the twin of the patient would have been reasonable in the circumstances described. As the Committee will see by the attached email exchange, at no point did CASA suggest to AFA that the twin of the patient could not fly.

The Instrument, attached for ease of reference at **Annexure G**, defines *a community service flight* as 'a flight provided to a patient, and *any person who accompanies the patient to provide support and assistance . . . '* [subcl 6(3)]. In this respect, the Instrument was drafted to allow for a responsible exercise of discretion on the pilot's part, informed by an appreciation of all relevant considerations.

Federal Aviation Administration (FAA) policy on the conduct of 'community service flights' by private pilots

In its submission and in Mrs Pagani's testimony captured below, AFA stated that there is no United States Federal Aviation policy that recognises a private pilot licence as an entry level requirement and that community service flying is different. Mrs Pagani went on to indicate that Dr Jonathan Aleck, Executive Manager, Legal, International and Regulatory Affairs had misled the Committee in stating such a policy existed.

> **Mrs Pagani:** . . . . Dr Aleck was asked by Senator Patrick about the additional requirements for community service flights. Dr Aleck said this:
>
> **But, similarly, it's recognised in the federal aviation policy on this that a private pilot license is an entry-level requirement and that community service flying is different.**
>
> That was evidence given to this committee. It was wrong. He was wrong. There is no such policy. I've certainly searched as well as I can, and I have not been able to find such a policy. So we have, even at that level, misleading statements to this inquiry.
>
> *Hansard,* p. 23

[3] [2021] FCA 469, available at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2021/469.html?context=1;query=Angel%20Flight;mask_path=.

CASA rejects the claim that Dr Aleck's advice was incorrect and that he misled the Committee in connection with this matter.

In 2012, the United States Congress amended section 40101 of Title 49 of the United States Code which enables the FAA to impose minimum safety standards to ensure the safety of charitable medical flights[4]. On this statutory basis, the FAA published its *Policy Clarification on Charitable Medical Flights* on 22 February 2013[5] (**Annexure I),** in which the kinds of conditions that may be imposed on private pilots conducting such flights are specified. A copy of that Policy was included in CM43 of Mr Monahan's November 2020 affidavit lodged with the Federal Court in the Angel Flight proceedings (**Annexure D**).

The Committee's attention is drawn to the 'Background' discussion in the policy (regulation), which acknowledges that private pilot certificates are considered to be an entry level pilot's licence, and that the purpose of the regulation is to limit the operations of private pilots.

It is CASA's understanding that if conducted in the United States, a Community Service Flight of the kind organised in Australia by AFA would be considered a 'charitable medical flight'.

CASA's ongoing collaboration with Angel Flight Australia

Ms Spence acknowledged at the hearing her disappointment with how AFA has described its interaction with CASA to date as it does not accord with her records and experience and those of the CASA team. CASA has correspondence that demonstrates the professional manner in which its officers have engaged with AFA. CASA is available to provide the material on request and provide Committee members a briefing should that be of value.

CASA reiterates to the Committee that CASA will continue to engage with AFA constructively and in good faith. As noted in the covering letter, a face-to-face meeting was held in Brisbane on Wednesday, 15 December 2021. This meeting was conducted respectfully and in a collaborative sprit by both parties.

Alleged concerns about CASA CEO not providing evidence

In AFA's opening statement to the hearing, Mrs Pagani said that in a Local Court matter, the presiding magistrate had indicated it might be necessary to 'subpoena the CEO of CASA, issue a summons for her arrest to bring her before this court to explain why CASA had not provided information' (Proof *Hansard*, pp. 23 and 24).

CASA assumes the litigation referred to is the criminal prosecution of Mr Andrew Pascoe mounted by the Commonwealth Director of Public Prosecutions (CDPP) on three (3) charges under the Commonwealth Criminal Code. The matter is currently before the Parramatta Local Court.

CASA has conferred with the CDPP and the Australian Government Solicitor (who appeared for CASA in connection with questions related to the production of documents), who both advise they are unaware of any suggestion by the Magistrate that action should be taken against the CEO.

These assurances notwithstanding, CASA has ordered transcripts of all relevant portions of the proceedings to determine if any such remarks were made. CASA has been advised it may take several weeks for these transcripts to be provided. As soon as reasonably practicable, CASA will inform the Committee of the outcome of its review of the transcripts.

[4] Section 821 of the *FAA Modernization Reform Act of 2012* (Pub. L. 112-95, title VIII, s. 821, Feb 14, 2012, 126 Stat. 128). See **Annexure H**.
[5] *Federal Register*, Vol. 78, No. 36, p. 12233-34.

Concluding comment

This submission has not addressed all the issues raised in the hearing and in submissions made by AFA and others on which CASA has differing views. For completeness, and with particular regard to the matters raised in relation to AFA, CASA rejects any assertions that it has misled the Committee or the Federal Court.

CASA appreciates the time of the Committee in receiving and reviewing this evidence and is prepared to assist the Committee with any further questions that may arise as a result of this evidence.

CASA CEO/Director of Aviation Safety – General Aviation Inquiry Opening Statement
7 December 2021

- Thank you very much for the opportunity to address the committee.
- I've been in the role now for just over six months and in that time I have tried to speak to as many people as possible to help ensure I have a good understanding of the needs and expectations of the GA community and what CASA can realistically do to support GA in Australia
- Our primary focus is always aviation safety, but we've also continued to take a pragmatic and proportionate approach to the achievement of this objective.
- The last 18 months have been some of the most challenging the aviation industry has ever faced
    - I'm very proud of the way CASA has responded, with a risk-based approach to providing industry with more flexibility without compromising safety.
    - For the GA community, this included deferring medical renewals where pilots couldn't access a DAME and deferring pilot proficiency checks when pilots weren't able to access flight examiners.
- We'll also continue to work closely with industry as we return to a level of activity that is closer to what we were used to pre-COVID.
- Looking forward, CASA is committed to engaging constructively with the GA community and is very mindful of the challenges GA operators face. While safety is our primary consideration, as required by the Civil Aviation Act, we continue to take very seriously the need to consider cost, economic impact and relevant risks.
- We have been actively engaging with the DPM's General Aviation Advisory Network and have already committed to a number of the priority actions the GAAN identified in their strategy.
- We are also establishing a General Aviation work plan, in which we will clearly articulate the work underway to address long-standing issues raised with us by the GA community, with transparent timelines and schedules, to support effective communication and monitoring of progress. This body of work will build a consolidated picture of all the activity we already have underway for general aviation and assist with prioritisation of where more effort needs to be focussed.
- Some of our immediate focus areas are the flight training sector; maintenance for light aircraft and medical certification.

    - For **Flight Crew Licencing (Part 61):**
        - We are renewing our focus on the framework for Part 61 to address issues that industry have highlighted with us.
        - We intend to re-energise the activity with our Aviation Safety Advisory Panel, and the Technical Working Group that has been established to help us work through the issues and prioritise the necessary reforms.
        - I am focussed on working cooperatively with industry to prioritise this work and address immediate pressure points.
        - I expect this work will also allow us to simplify the Part 61 structure, particularly in the flying training space by reducing the complexity of existing ratings, endorsements, and approvals where appropriate.
        - As part of this work, we will also examine the potential for harmonisation between the recreational and traditional Part 61 flight crew licencing schemes

and explore possibilities for more flexibility with a view to enabling flying training activities aimed at the needs of the GA sector.

- In the near term, some industry priorities for which we hope to have quick solutions include:
  - expanding the privileges for Flight Instructors and Part 141 Flight training organisations
  - shifting the delivery of task specialist training for pilots from Part 141 flying training organisations to allow Part 138 operators where training can be provided in an operationally relevant context
  - introducing a multi-engine helicopter class rating

- In the **maintenance space (Part 43**) we're particularly looking at:
  - Drafting new rules for aircraft maintenance in the general aviation sector which are aimed at reducing costs, providing more flexibility and improving access to aircraft maintenance in regional areas
    - This will be consultation again with the broader industry on these proposals in 2022.
  - We will produce more Plain English Guides that will support providing increased clarity to operators in navigating the rules in the future.
  - We also recognise that there is an opportunity to further expand the licence model to consider how we might tailor and adapt our maintenance engineer licencing arrangements for a General Aviation Focussed (LAME) licence.

- When it comes to **Aviation Medicals**:
  - CASA has already made some positive changes to the issuing of pilot medicals that help attract new participants and retain experienced pilots longer.
  - we are currently working with the Part 67 Technical Working Group to develop options for a revised Basic Class 2 medical as well as a new Class 5 self-declared medical. We plan to consult on these publicly in the new year.

- We recognise that the way to successfully address these issues (and other priorities in the future) is to work closely with the aviation community.
- We are committed to working through our Aviation Safety Advisory Panel and its Technical Working Groups and others who we engage with as we progress this work. We want to support increased clarity and understanding of rules, and co development of policy and regulations.
- We've got a lot of work to do over the coming months but listening to the voices of and supporting the GA community is a very strong focus for me and for the organisation.

Community Service Flights Senate Inquiry – Questions on Notice – Maintenance

Question:

Senator PATRICK: You know that before the parliament—and it's a government bill; it has passed through the Senate, which means it will pass through the lower house—there is a general direction from the parliament saying safety is paramount but you have to consider the effect it has on business operations as well. I put it to you: neither of the ATSB reports goes to maintenance. Can you provide a safety analysis that got you to the point of imposing this particular new criterion? I know Dr Crees has pulled out of flying because of that particular requirement. Where's the analysis that got you to that point? Can you please table that analysis. You must have done some. How did you pick that?

Mr Monahan: When you look at the average number of flight hours by private pilots in Australia, it's roughly 40 to 45.

Senator PATRICK: So you have this laid out in a safety case?

Mr Monahan: Yes. We'll provide that.

Senator PATRICK: A very simple question: can you provide that to the committee?

Mr Monahan: Yes.

Answer:

A risk was identified in the development of the instrument regarding the continuing airworthiness of aircraft used to transport community service flight (CSF) passengers. While the risk identified remained, the safety analysis and risk treatment evolved during the development of the instrument including changes in response to public consultation. The safety analysis considered the following:

Maintenance
Schedule 5 of the *Civil Aviation Regulations 1988* provides that the time-in-service between periodic inspections is to be 100 hours' time-in-service or 12 months, whichever is the earlier. However, for aeroplanes *below 5700 kg engaged in private operations* CASA has previously determined that this inspection may be performed annually irrespective of hours flown. This different treatment was adopted in light of data showing that only 10% of aircraft operated exclusively in private operations would exceed 100 hours in a 12-month period[1].

While the number of "CSF" aircraft affected by the instrument was likely to be low, the consequence of a maintenance failure in a high use private aircraft could be significant. On this basis, and in the interest of safety, CASA formed the view that setting a baseline standard for such flights would deliver a safety benefit for CSF passengers at minimal cost. The instrument does not create a new maintenance obligation, it effectively brings forward what would otherwise be an existing maintenance obligation and expected cost.

Federal Aviation Administration (FAA) Requirements
CASA also had regard to the United States (FAA) *Policy Clarification on Charitable Medical* Flights[2], on the basis of which the FAA issued several exemptions to charitable medical flight organisations granting relief from the requirements of those provisions of the Federal Aviation

[1] Data from Bureau of Infrastructure, Transport and Regional Economics (BITRE).

[2] *Federal Register*, Vol. 78, No. 36 (22 February 2013), pp 12233-12234.

Regulations that would otherwise have prevented private pilots from conducting such flights. In accordance with the FAA's policy, conditions are placed on the exemptions that are 'intended to raise the level of safety for these flights.' One of these conditions imposes higher aircraft airworthiness requirements. CASA considered the FAA's policy for charitable flights in the development of the CSF instrument.

Quantifying the Risk

The likelihood of a mechanical related occurrence increases as parts and components wear. A pattern of increasing failure rates with accumulated use is observable with improvement at times of planned maintenance[3].

From 2008 to 2017 there was a total of 4,798 accidents, incidents and serious incidents classified as *Technical* in General Aviation out of total of 26,373 occurrences. Occurrences classified as *Technical* are the third most prevalent occurrence type with approximately one in every five occurrences attributed to a mechanical issue.

ATSB Occurrence Database[4]

Occurrence Types	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
Operational	1,038	1,083	959	903	840	879	761	707	858	802	**8,830**
Airspace	714	611	525	592	564	575	468	454	566	602	**5,671**
Technical	433	463	485	512	528	434	481	481	503	478	**4,798**
Consequential events	348	378	346	360	380	338	341	382	383	291	**3,547**
Environment	343	384	407	349	314	313	300	317	354	390	**3,471**
Infrastructure	7	5	6	7	8	6	4	4	6	3	**56**

ATSB Occurrence Taxonomy – Technical [5]

Airframe	**Power plant/propulsion**	**Systems**
Doors / exits	Abnormal engine indications	Air/pressurisation
Furnishings and fittings	Auxiliary power unit	Anti-ice protection
Fuselage / wings / empennage	Engine failure or malfunction	Avionics / flight instruments
Landing gear / indication	Propeller / rotor malfunction	Datalink (RPA)
Objects falling from aircraft	Transmission and gearboxes	Electrical
Windows	Other	Fire protection
Other		Flight controls
		Fuel
		Hydraulic

Risk Mitigation

CASA's view is that the carriage of CSF passengers requires a higher level of risk mitigation than carriage of passengers on an ordinary private flight.

The development of instrument CASA 09/19 identified a higher than acceptable continuing airworthiness risk where an aircraft used for a CSF could be flown for an indeterminate number of hours without a maintenance inspection. This risk was not considered acceptable when combined with other risk factors present in CSF such as, potentially low pilot experience,

[3] MacLean L, Richman A, Hudak M. 'Failure Rates for Ageing Aircraft'. *Safety* (February 2018) Vol 4, No 7.

[4] ATSB interactive tool. See https://app.powerbi.com/view?r=eyJrIjoiNzEzMTk5ZTItMTQyMy00ODM4LTg1ODQtODJkZTQ2ODc2ZTg4IiwidCI6Ijk3MzFmOTg3LTg1MDEtNDk5Ni1iZDI3LTBhMGEyY2Y2YzhjYiJ9.

[5] Appendix B – ATSB Transport Safety Report Aviation Research AR-2018-030 Aviation Occurrence Statistics 2008 to 2017.

minimal recurrent training in emergencies and the absence of system-based safety defences and operational controls. CASA considered that it was not acceptable to continue to expose CSF passengers to this elevated risk.

CASA's Proposed Safety Standard – Community Service Flight, dated December 2018
In preparing the draft instrument, further consideration was given to the certification and maintenance requirements applicable to other Australian operations with similar levels of overall risk such as flight schools with a student pilot, parachuting aircraft carrying fare paying parachutists and scenic flights with fare paying passengers. CASA compared the risk profile of these operations together with the applicable maintenance requirements in consideration of whether similar requirements should apply to CSFs. CASA concluded the maintenance requirements applicable to parachuting operations would be an appropriate minimum baseline standard for CSF as they are both private operations where the passenger profile has commercial like elements. These requirements were then amended in response to feedback received during consultation.

Impact
The impact of the maintenance provision in the CSF instrument will vary depending on what other types of operations the aircraft is used for in addition to CSF and how often the aircraft is used[6]. If an aircraft exceeds 100 hours flight time before the annual inspection is due, and the owner wishes to continue to conduct CSF flights, the instrument would require that the annual inspection be brought forward.

The impact of the provision for aircraft being used for CSF was assessed as outlined in the table below.

Types of operation	Impact level
Aerial work, charter or RPT operations + CSF	Nil.
Private operations (including CSF) < 100 hours per year.	Nil.
Private operations (including CSF) > 100 hours per year. (applies to 10% or less of private aircraft)	Approximately $250 per month for each month the 12 month inspection is brought forward (see example below)

Example: The 100 hourly inspection on a single engine aeroplane, that does not require remedial work or additional maintenance, is typically $3,000. Therefore, if an aircraft needs an inspection every 11 months, rather than 12 months, it will in effect be incurring an additional cost equal to the $3,000 price divided by 12 (months) which equals $250.

Safety risk analysis
The safety benefits of these measures significantly outweigh the restrictions imposed. These actions are consistent with CASA's regulatory philosophy where air safety is not compromised, and the proposal reflects a reasonable and proportionate risk-based approach.

[6] Data from BITRE shows that the average number of flight hours by private pilots in Australia is around 40 to 45.

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/03/2020 2:37:37 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	VID222/2019
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Dated: 20/03/2020 2:52:45 PM AEDT Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59
Rule 29.02(1)

Affidavit

No. **VID222 of 2019**

Federal Court of Australia

District Registry: Victoria Registry

Division: General

ANGEL FLIGHT AUSTRALIA (ACN 103 477 069)
Applicant

CIVIL AVIATION SAFETY AUTHORITY
Respondent

Affidavit of: Christopher Paul Monahan

Address: 16 Furzer St, Phillip, ACT 2601

Occupation: Public Servant

Date: 19 March 2020

Contents

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Doc.	Description	Affidavit ref.	Page ref.
CM-8	Letter from Shane Carmody to Marjorie Pagani dated 14 December 2017	P 12, [58]	97 – 98
CM-9	Email from Shane Carmody to Marjorie Pagani dated 21 March 2018	P 13, [63]	99 – 100
CM-10	Email from Marjorie Pagani to Chris Monahan dated 13 April 2018	P 13, [65]	101 – 107
CM-11	Letter from Shane Carmody to Marjorie Pagani dated 23 April 2018	P 14, [69]	108
CM-12	Email from Chris Monahan to Marjorie Pagani dated 12 June 2018	P 14, [71]	109
CM-13	File Note CSF 19 December 2018 - Monahan	P 15, [76]	110 – 111
CM-14	Letter from Marjorie Pagani to Chris Monahan dated 3 December 2018	P 16, [78]	112 – 115
CM-15	Email from Chris Monahan to Marjorie Pagani dated 3 December 2018	P 16, [80]	116
CM-16	'Standard Form Recommendation' by Scott Watson dated 13 December 2018	P 16, [82]	117 – 158
CM-17	Discussion paper: Summary of Proposed Change: Proposed Safety Standard – Community Service Flights	P 16, [84]	159 – 164
CM-18	Exposure draft of the proposed legislative Instrument	P 17, [87]	165 – 168
CM-19	Online response form	P 17, [88]	169 – 176
CM-20	Email from Nat Nagy, ATSB, to Chris Monahan and Marjorie Pagani dated 6 February 2019	P 19, [98]	177
CM-21	Comparative accident rates Feb 2019	P 19, [100]	178 – 193
CM-22	Summary of Consultation; Proposed Safety Standard – Community Service Flights	P 19, [103]	194 – 224
CM-23	Angel Flight's submission regarding proposed legislative Instrument dated 21 Jan 2019	P 20, [106]	225 – 235
CM-24	Little Wings' submission dated 25 January 2019	P 20, [109]	236 – 237
CM-25	Feedback with reference ANON-Z7UJ-QX8D-N	P 21, [114]	238
CM-26	Feedback with reference ANON-Z7UJ-QXDY-P	P 21, [114]	239
CM-27	Feedback with reference ANON-Z7UJ-QXQ5-Y	P 21, [114]	240
CM-28	Feedback with reference ANON-Z7UJ-QXK3-Q	P 22, [126]	241 – 244
CM-29	Feedback with reference ANON-Z7UJ-QXMU-U	P 22, [126]	245
CM-30	Feedback with reference ANON-Z7UJ-QX9W-9	P 22, [126]	246 – 249
CM-31	Feedback with reference ANON-Z7UJ-QXQR-V	P 22, [126]	250 – 251

Doc.	Description	Affidavit ref.	Page ref.
CM-32	'Standard Form Recommendation' by Adam Anastasi dated 11 February 2019	P 23, [132]	252 – 254
CM-33	Instrument CASA 09/19	P 23, [134]	255 – 259
CM-34	NOS Briefing Note dated 15 January 2019	P 24, [136]	260 – 264

I, Christopher Paul Monahan, affirm:

1. I am employed by the respondent (**CASA**) as Executive Manager, National Operations and Standards Division (**NOS**). I have been employed in that position since March 2018. Prior to that, I have been employed by CASA in a variety of positions since April 2016.

2. Immediately prior to my employment with CASA, I was employed as the Senior Defence Official employed by the United States Department of Defence and Defence Attaché from the United States to Azerbaijan.

3. A copy of my curriculum vitae is annexed and marked **CM-1.**

4. The duties of my current position are to manage and lead a division charged with the following:

   (a) responsibility for policy development and legislative implementation of all aviation safety standards: this includes licensing, flight operations, airworthiness, air navigation, airspace, aerodromes and remotely piloted aircraft systems;

   (b) responsibility for oversight of all nationally administered regulatory services and surveillance, including aircraft certification and production, air navigation services, airspace, aerodromes and remotely piloted aircraft systems; and

   (c) responsibility for policy development and briefs related to current and future legislation to Senate Estimates, Office of Prime Minister and Cabinet, Deputy Prime Minister and Department of Infrastructure, Transport, Cities and Regional Development.

5. I am authorised to make this affidavit on CASA's behalf. I make this affidavit based upon facts within my own knowledge and belief, save where I indicate otherwise. Where there are statements of fact or opinion made by me and which are based on my personal knowledge or belief, I say that those facts and opinions are true and correct to the best of my knowledge and belief. Where I have relied upon information provided to me, I have identified the source of that information and believe that information to be true.

6. I am authorised to access and produce documents forming part of the records belonging to or kept by CASA in the course of, or for the purpose of, its business.

Affidavits filed in the proceedings

7. For the purposes of preparing this affidavit, I have reviewed the following affidavits:

   (a) Marjorie Elizabeth Pagani, dated 12 March 2019 (the **first Pagani affidavit**);

   (b) Marjorie Elizabeth Pagani, filed in February 2020 (the **second Pagani affidavit**); and

   (c) Nevin Rupert Agnew dated, 15 March 2019 (the **Agnew affidavit**).

Background to the making of legislative Instrument – CASA 09/19 – Civil Aviation (Community Service Flights – Conditions on Flight Crew Licences) Instrument 2019

8. CASA is responsible for the regulation of civil flying operations in Australia. That includes the regulation of pilots who use aircraft in the conduct of Community Service Flights (**CSFs**).

9. Prior to the enactment of the CASA 09/19 – Civil Aviation (Community Flights – Conditions on Flight Crew Licences) Instrument 2019 (the **CSF Instrument**), CSFs had been regulated on the basis that they were private flights, notwithstanding that pilots of CSFs were able to obtain reimbursement from the flight coordinator for the costs of fuel consumed during the flight. The basis of CASA's treatment of CSFs and other charitable flights in that manner is set out in Aviation Ruling 3/2003.

10. Now produced and shown to me and marked **CM-2** is a true and correct copy of CASA Aviation Ruling 3/2003.

11. The applicant, Angel Flight, is a CSF flight coordinator.

12. In accordance with regulation 206 and regulation 2(7) of the *Civil Aviation Regulations 1988* (Cth) (the **CAR**), regulation of flying operations in Australia depends upon whether the operation in question is:

   (a) a private operation;

   (b) an aerial work operation;

   (c) a charter operation; or

   (d) a regular public transport operation.

13. The legislative regime then imposes differing requirements and obligations on each kind of operation, with the most comprehensive obligations applying to regular public transport operations and the least onerous obligations applying to private operations.

14. In that way, a pragmatic and graduated approach to safety regulation is taken, based on the relative complexity of the operations concerned and the extent to which those organisations expose members of the public to risk.

Community Service Flight organisations in Australia

15. The applicant is one of two significant CSF organisations in Australia.. The other is Little Wings, a not for profit organisation with headquarters in Sydney. The activities of both Angel Flight and Little Wings focus on the coordination of air and ground transport for sick persons living in rural and regional areas who may not have access to timely and affordable means of travelling to receive medical treatment.

16. The air transport component of those activities is what CASA describes as a CSF, and the coordination role played by each organisation in the arrangement of a CSF essentially involves arranging for a sick person in need of transport to be matched with a pilot and an aircraft, which are available to make the relevant flight.

17. While Angel Flight coordinates CSFs Australia-wide, Little Wings only coordinates CSFs within New South Wales. In spite of that difference, the data which has become available to CASA since the commencement of the CSF Instrument by way of flight plan notifications (see clause 10(c) of the CSF Instrument) indicates that Little Wings conducts a similar number of CSFs compared to Angel Flight.

18. In short, Angel Flight's model involves providing a coordination service between patients needing transport and pilots who are prepared to provide that transport. Angel Flight then reimburses the relevant pilots for the costs of fuel consumed during any mission. CSFs are often conducted by pilots holding private pilot licences operating aircraft, which are maintained to private maintenance standards.

19. In March 2018, prior to the making of the CSF Instrument, I had discussions with Little Wings, during which I was told that Little Wings owns its own aircraft and employs approximately seven pilots on a volunteer basis, who are used to conduct CSFs operated by the charity. Donations to the charity are used to meet the running costs of the aircraft and the wages of Little Wings' permanent employees. At the time of my discussions with Little Wings, each of the pilots used by Little Wings to conduct a CSF held at least a commercial pilot licence and the aircraft used were maintained in accordance with a system of maintenance designed by the relevant aircraft manufacturer.

20. Now produced and shown to me and marked **CM-3** is a copy of an email sent by me to Mr Crawford and Mr Carmody dated 3 March 2018, which summarises what I was told during my discussions.

21. As a result, Little Wings' then current operational model met the minimum standards ultimately imposed by CASA in the CSF Instrument, aside from the conditions provided

at section 9(1)(a)(i)-(ii) of the CSF Instrument, namely that the pilot must have conducted a landing within the preceding 30 days in the same class or type of aeroplane.

August 2011 - Aircraft accident near Horsham Victoria

22. On 15 August 2011, a Piper PA-28-180 Cherokee aircraft, with the registration mark VH-POJ, crashed near Horsham in Victoria, fatally injuring all 3 occupants. The aircraft had been engaged in a CSF organised by Angel Flight, to transport passengers from Essendon to their home in Nhill following medical treatment in Melbourne.

23. Subsequently, the Australian Transport Safety Bureau (the **ATSB**) conducted an investigation into the circumstances of the accident involving aircraft VH-POJ. The findings of that investigation were contained in a report published under s 25 of the *Transport Safety Investigation Act 2003* (the **TSI Act**) dated 3 December 2013 and having the reference number AO-2011-100.

(I note that, pursuant to s 27(1) of the TSI Act, a report published by the ATSB under s 25 of that Act is not admissible in evidence in any civil or criminal proceedings.)

August 2014 - Release of discussion paper proposing additional regulation of community sector flights.

24. I have reviewed CASA's business records which record that, on 18 August 2014, CASA released a public discussion paper entitled DP1317OS- Safety Standards for CSFs Conducted on a Voluntary Basis (the **2014 Discussion Paper**).

25. Now produced and shown to me and marked **CM-4** is a true and correct copy of the 2014 Discussion Paper.

26. The 2014 Discussion Paper sought public opinion on 10 different options for regulating CSFs. CASA released the 2014 Discussion Paper because it had become concerned that it may not be appropriate from a safety perspective, for CSFs to continue to be regulated as private flight.

27. The 2014 Discussion Paper canvassed a range of options with the public including whether it was appropriate for an Air Operator's Certificate (**AOC**) to be required for CSFs, or if other mechanisms may be more appropriate for the purpose of accommodating these types of flights, while ensuring that acceptable standards of safety are maintained without imposing unacceptable levels of oversight or "red tape". An AOC is required to be held by operators who conduct (amongst other forms of air operation) commercial, passenger-carrying charter flights.

28. The 10 different options canvassed in the 2014 Discussion Paper ranged from no change to the status quo through to conduct of CSF operations under the authority of an AOC.

29. I have reviewed CASA's business records, which show that CASA received 75 responses to the 2014 Discussion Paper. CASA assessed those responses as being unfavourable to each of the options proposed in the discussion paper; and, on that basis, CASA determined in February 2015 not to proceed with regulatory intervention at that time.

30. A media release, issued by Mr Mark Skidmore, the then Direction of Aviation Safety (the **DAS**) on 13 February 2015, announced that no changes would be made to existing regulatory arrangements at that time. Mr Skidmore noted in the media release that the announcement did not mean that CASA had stopped looking at the issue completely, since the 2014 discussion paper had put forward 10 options. However, the media release noted that, if CASA did propose to explore any those issues further, there would be additional consultation with the aviation industry and the public before any changes were made.

31. Now produced and shown to me and marked **CM-5** is a copy of the media release issued by Mr Skidmore on 13 February 2015.

June 2017 – Aircraft accident at Mount Gambier Airport South Australia

32. On 28 June 2017, a SOCATA TB-10 aircraft with the registration mark VH-YTM collided with terrain shortly after take-off from Mount Gambier Airport in South Australia, fatally injuring the three persons on board and destroying the aircraft. The aircraft was engaged in a CSF organised by Angel Flight to transport a passenger for medical treatment in Adelaide, along with an accompanying family member.

33. Subsequent to the accident involving aircraft VH-YTM, the ATSB conducted an investigation into the circumstances of the accident. The findings of that investigation were recorded in an investigation report which was published on 13 August 2019 and given the reference number AO-2017-069.

July 2017 – CASA recommences review of the safety oversight of CSF

34. Immediately following the accident involving aircraft VH-YTM, in early July 2017, the current DAS and CEO of CASA, Mr Shane Carmody, commissioned a review of CASA's oversight of CSF operations (the **Review**). CASA's Group Executive Manager, Aviation Group, Mr Graeme Crawford, instructed me, in my then role as Manager of the Flight Standards Branch, to take responsibility for the conduct of the Review.

35. On 4 July 2017, immediately upon receipt of those instructions, I sent an email to Mr Scott Watson, who was then the Team Leader, Fixed and Rotary Wing within the Flight Standards Branch, tasking him with the conduct of the Review. In my email which was dated 4 July 2017, I outlined to Mr Watson the key issues, on which I considered that the Review should focus or which the Review should take into account, including:

    (a) how CSF flights are arranged and conducted, including existing processes and procedures within CSF organisations such as Angel Flight;

    (b) how other aviation regulators regulate the conduct of CSFs;

    (c) guidance material produced by foreign CSF organisations on the conduct of CSF operations;

    (d) consideration of potential options for regulatory intervention and their potential cost implications; and

    (e) expectations of passengers.

36. Now produced and shown to me and marked **CM-6** is a copy of my email to Mr Watson of 4 July 2017

37. At that time, it was my understanding that the accident and incident statistics, routinely available to CASA through the ATSB, indicated that, at a minimum, the fatal accident rate in CSF operations appeared to be significantly higher than in other private operations. My understanding was based on calculations performed by Mr Watson and his team pursuant to my instructions. Mr Watson informed me that the calculations had focussed on deriving data based on private flying operations that were most directly comparable to CSF from an operational perspective – that is, private flights conducted in light single or twin engine aircraft. I refer to flights of that kind throughout this affidavit as "standard private flights". On that basis, a range of data in relation to private operations which did not offer a reasonable comparator was excluded from the calculations, including business jet operations and a range of recreational flight activities involving aircraft such Light Sport Aircraft, experimental aircraft, gyrocopters and para-gliders.

38. I instructed Mr Watson that refining this data was something that would need to be done in the context of the Review, to establish whether more definitive data was available and what it demonstrated about the safety of CSF operations as compared to standard private flights.

39. I understood from my conversations with Mr Carmody that the intention of the Review was to put a policy determination and potential way forward to the DAS, outlining the particular safety risks and safety policy issues inherent in the conduct of CSF operations,

to determine whether the current regulation of CSF as private flights was adequate and, if not, to advance options for improving the applicable safety standards.

40. At the same time, the DAS had commissioned Mr Andrew Ward, another CASA officer, to undertake a Regulatory Safety Review (an **RSR**) into the circumstances of the Mount Gambier accident. An RSR is a focussed review, which concentrates on the circumstances of an aviation accident or incident and determines whether and to what extent the applicable regulatory framework, or any regulatory actions taken, or omitted to be taken by CASA, may have contributed to the causes of the accident or incident. In that way, necessary changes to CASA's regulatory practices or processes and/or to the aviation regulatory regime might be identified in a timely way. I was not responsible for the conduct of the RSR which was managed by Mr Andrew Ward.

41. Throughout the course of the Review, numerous meetings were held with participants in the CSF sector, including Angel Flight and Little Wings in relation to the issues identified in paragraph 35 above.

July 2017 – initial engagement with Angel Flight

42. On 26 July 2017, Mr Andrew Ward and I met with Ms Pagani, the Chief Executive Officer of Angel Flight at the Angel Flight corporate offices in Brisbane to discuss issues of concern to CASA arising from the Mount Gambier incident. While Mr Ward's discussion with Ms Pagani focussed on issues arising specifically from the Mount Gambier incident, I was focussed on broader issues concerning CSFs as described in my email to Mr Watson of 4 July 2017. I recall that, during this meeting, there was a discussion initiated by me of the fact that, based on the general statistical data then available to CASA, it appeared to me that the fatal mishap rate for CSF was significantly higher than for standard private flights. I recall that Ms Pagani gave Mr Ward and myself an overview of Angel Flight's practices and procedures when it coordinates a CSF.

August to September 2017 – further discussions with Angel Flight

43. During the period August 2017 to September 2017, I spoke with Ms Pagani on multiple occasions for the purpose of discussing the Review. During our conversations, I recall that I expressed my concerns regarding the fatal mishap rate for CSFs. During our discussions, I said to Ms Pagani that the general statistical data available to CASA (described at paragraph 37 above) indicated that the fatal mishap rate for CSFs was significantly higher than the fatal mishap rate for standard private operations.

44. During our discussions, I told Ms Pagani that CASA was interested to understand what was different between those two types of flights and finding ways to address those risks. In the course of our discussions, I noted that, if some action was deemed appropriate by

CASA, there were many options available including cooperative education programs, collaborative interaction with CSF organisations to promote safety, collaborative safety initiatives between CSF organisations and CASA (potentially led by the charity coordinating the flights) and a variety of regulatory options. I noted that CASA had not reached any conclusion at that point other than that the indicative mishap rate for CSF appeared to be appreciably higher than for standard private flights.

45. I also explained to Ms Pagani that the review was not being driven solely by a focus on previous accidents. I explained that, while the circumstances of those accidents would obviously be relevant, the Review would not be limited to the identified causes of those accidents but would explore the broader range of risks applicable to CSF operations and the options that were available to improve safety standards applicable to CSFs. I also indicated that it was CASA's preference to achieve improvement in applicable safety standards by working collaboratively with CSFs in lieu of any regulatory mandate by CASA.

46. I also recall that, during our discussions, Ms Pagani gave me an overview of the way in which Angel Flight operated and explained some of the processes and procedures they had in place to ensure the safety of the operations they coordinated. When I asked if CASA could have access to the relevant documentation, observe the Angel Flight staff utilising the documentation or audit the extent of Angel Flight's compliance with its own procedures, Ms Pagani said that she would not allow CASA to do so. Ms Pagani said that, since Angel Flight was not an AOC holder, it was not obliged to provide CASA with any operational documentation or data of that nature, and that she preferred not to do so because it may raise privacy issues, and deter pilots from flying for Angel Flight due to what she perceived to be a distrust amongst the pilot cohort of CASA's motives for wanting access to the data. Ms Pagani also commented that she wanted to inform the Angel Flight Board of our initial discussion and that she would get back to CASA when she had an opportunity to discuss my request with the Angel Flight Board and inform us of Angel Flight's intent.

47. Just after the commencement of the Review, I had developed a method of explaining my concerns regarding the apparent fatal accident rate in CSF when compared to standard private flights using concentric circles. The larger circle represented a private pilot conducting a standard private flight other than a CSF. The smaller circle, that is within the larger circle, represented private pilots conducting CSFs. The smaller circle represented the same pilots, using the same aircraft, potentially flying to the same location, under the same conditions and subject to the same regulatory requirements

where the only difference was the goal of the flight – that is, purely private in the larger circle and CSF operations in the smaller circle.

48. During the meeting on 26 July 2017, or during one of our telephone conversations thereafter, I discussed with Ms Pagani the concept of risk as demonstrated by the concentric circle diagram referred to above. During the meeting held on 28 November 2018 which is described later in this affidavit (at paragraphs 74 to 75), I drew those concentric circles on a piece of paper and used the drawing as a means of explaining to Ms Pagani that it appeared to me, on the data then available, that the likelihood of a private pilot having a fatal accident appeared to increase significantly when that pilot was conducting virtually identical operations – that is, operating within the smaller circle representing CSF operations. That suggested to me that operational or other risks factors applicable to a CSF may be different to those which applied to standard private flights and that this was something that CASA would be considering further.

September 2017 – initial recommendation of the Review

49. In or around September 2017, Mr Watson provided me with a Standard Form Recommendation (the **September 2017 SFR**) which he had prepared with the assistance of other officers in his team.

50. Now produced and shown to me and marked **CM-7** is a copy of the September 2017 SFR.

51. At page 6 of the September 2017 SFR, it states that "[a]lthough the number of AF accidents is a statistically small sample and therefore may not be able to form the basis of a statistically valid comparison, it is nonetheless useful to extrapolate and compare the AF accident rate to these statistics ['Australian aviation accident and incident statistics' published by the ATSB].

> AF – two fatal accidents in 22000 flights (rounded up = better)
>
> Fatal accident rate per million departures = 90.9
>
> GA - total fatal accident rate per million departures = 11.3 (worst – 2012)".

52. The September 2017 SFR further states that "[r]egardless of the cause the CSF fatal accident rate is in excess of eight times higher than ATSB GA statistics".

53. I did not consider that the data available at that time was robust enough to form the basis of a statistically valid comparison. I formed that view primarily because the generation of data related to the number of flight hours conducted in the CSF sector was based on the self-reported number of flights conducted by Angel Flight and the data analysis took into account only one measure (fatal accident rate), which I considered may have been unduly influenced by the recent accident.

54. However, the existence of the data referred to the September 2017 SFR continued to provide a basis for my concern that the fatal accident rate in CSF operations was disproportionately high compared to standard private flights and that (as suggested in the September 2017 SFR) the higher accident rate may be contributed to by unique features of CSF operations, which distinguished them from standard private flights.

55. Having regard to those concerns, I requested that Mr Watson continue to pursue data analysis of operations within the CSF sector to determine what other potential sources of data could be obtained to bring greater clarity to the safety profile of CSF operations as they compared to standard private operations.

Further engagement with Angel Flight – October 2017 to May 2018

56. I understand, from discussions with Mr Carmody and Mr Crawford and from reading the second Pagani affidavit, that my initial engagement with Ms Pagani led to a meeting between Ms Pagani and Mr Bristow from Angel Flight and Mr Carmody and Mr Crawford from CASA in Canberra on 27 September 2017.

57. The 27 September 2017 meeting was followed by a further meeting between Ms Pagani and Mr Carmody in Canberra on 5 December 2017 that also included other Angel Flight representatives as well as Mr Crawford and myself from CASA. Based on my recollection of that meeting, paragraph 10 of the second Pagani affidavit accurately sets out the kinds of initiatives that Ms Pagani suggested might form the basis of a Memorandum of Understanding (an **MOU**) between Angel Flight and CASA directed towards enhancing the safety of CSF. Following that meeting, on 14 December 2018, Mr Carmody sent Ms Pagani a letter thanking Angel Flight for its engagement and setting out some further areas that CASA considered would enhance safety outcomes in relation to CSF operations.

58. Now produced and shown to me and marked **CM-8** is a copy of Mr Carmody's letter dated 14 December 2017.

59. During February 2018, I recall making several telephone calls to Ms Pagani for the purpose of discussing her ideas concerning the content of a potential MOU. I recall that we discussed Angel Flight's proposal for the implementation of a mentoring program and Ms Pagani informed me about her engagement with Angel Flight's counterpart organisations based in the United States of America (**USA**) with a view to seeking permission for Angel Flight to utilise some of their systems and processes, including orientation courses and pilot training courses developed specifically for pilots conducting CSF.

60. On 2 February 2018, I telephoned Ms Pagani to seek an update concerning Angel Flight's progress regarding its initiatives. I was informed by Ms Pagani that she had no update to provide at that time.

61. On 20 February 2018, Ms Pagani contacted me by telephone and provided me with an update regarding Angel Flight's engagement with its counterparts in the USA and noted that she was still waiting on a reply from those organisations.

62. On 21 February 2018, I emailed Ms Pagani requesting a further update regarding the initiatives proposed by Angel Flight. I am not aware of CASA having received a reply to my email from Ms Pagani that sets-out progress made by Angel Flight in these areas.

63. On 21 March 2018, Mr Carmody sent an email to Ms Pagani seeking an update from her concerning the proposals discussed in the 5 December 2017 meeting. Now produced and shown to me and marked **CM-9** is a true and correct copy of Mr Carmody's email of 21 March 2018.

64. On 13 April 2018, I received an email from Ms Pagani outlining Angel Flight's initial concept for the changes it proposed to introduce to improve the safety of the CSF which it coordinated.

65. Now produced and shown to me and marked **CM-10** is a true and correct copy of Ms Pagani's email of 13 April 2018.

66. On 20 April 2018, Ms Pagani and I had multiple discussions by telephone, during which we discussed the initiatives proposed by Angel Flight in Ms Pagani's email of 13 April 2018 . During those conversations, I recall asking Ms Pagani that Angel Flight provide further information, including data to support their proposals. The data requested included operational records demonstrating in a practical way how Angel Flight recorded and oversighted its CSF operations and ensured compliance with its own procedures. Ms Pagani declined my request to provide that information. At the time, Ms. Pagani declined my request based on multiple reasons, including concerns about pilot privacy, the need to confirm all the requests with the Angel Flight board, the possibility that CASA already held some of the data I was seeking, as well as the fact that the Angel Flight pilot cohort would be suspicious of CASA motives for requesting that data. I requested she pursue the release of information related to how Angel Flight ensures safe operations with her board and to let me know if this would be possible in the future.

67. On 20 April 2018, I had a discussion with internal stakeholders, including Mr Crawford and Mr Carmody, about the development of Angel Flight's proposals. I recall that the discussion focussed on the concern expressed by all participants, but particularly by

Mr Carmody and Mr Crawford, that the initiatives proposed by Angel Flight had not been adequately developed nor implemented.

68. Subsequently, Mr Carmody wrote to Ms Pagani on 23 April 2018, congratulating Angel Flight on embracing the safety suggestions proposed by CASA and informing her that CASA hoped to see the duty pilot concept and the proposed induction training put in place in the very near term. Mr Carmody also advised Ms Pagani that CASA would be devoting specific resources to assisting Angel Flight to develop its proposed safety enhancements.

69. Now produced and shown to me and marked **CM-11** is a copy of Mr Carmody's letter dated 23 April 2018.

70. I recall that, in late May or early June, I had a discussion with Mr Crawford and Mr Carmody in which Mr Carmody advised me that responsibility for ongoing liaison with Angel Flight in relation to this matter should be shifted to CASA's Safety Education Division (**SED**). On 12 June 2018, I emailed Ms Pagani to advise her that her new contact within CASA would be Mr Andreas Marcelja, the Manager of CASA's Engagement, Communication and Safety Education Branch within SED.

71. Now produced and shown to me and marked **CM-12** is a copy of my email dated 12 June 2018.

Proposal for regulatory intervention – November 2018

72. In or around 8 November of 2018,I had a discussion with Mr Carmody, in which he said words to the effect that he had decided that it may be necessary for CASA to develop a proposal for regulatory intervention in the CSF sector because it appeared to him that Angel Flight was not making adequate progress in formulating and implementing its own safety proposals. Mr Carmody asked me to develop a proposal for legislative intervention to raise the safety standards associated with CSFs for public consultation.

73. On that basis, I tasked Roger Crosthwaite, who was by then the Branch Manager of the Flying Standards Branch, to update, validate and finalise the Review commenced in July 2017 by developing a proposal for the DAS's consideration. That tasking included a further review of the statistical data available to CASA concerning incident and accident rates in the CSF sector.

74. On 28 November 2018, I met with Ms Pagani at Angel Flight's Office in Brisbane. I told Ms Pagani that CASA was now proposing to develop a proposal for legislative intervention to be publicly consulted beginning in December 2018.

75. I have reviewed paragraphs 18 and 19 of the second Pagani affidavit. Ms Pagani's description of what occurred during our meeting on 28 November 2018 does not accord with my recollection of that meeting in the following respects:

(a) My intended purpose of the meeting was to inform Angel Flight of CASA's intention to open public consultation on a proposed legislative intervention to lift standards applicable to CSF operations. I said to Ms Pagani that the timing of the meeting with her was to allow Angel Flight sufficient time to contact its members in advance of the public consultation to maximise participation levels by pilots who conduct CSFs. I said to Ms Pagani that the meeting was not intended to be part of the formal consultation process and I was unable to provide her with precise details of the proposed instrument as the draft had not been finalised at that time. However, we did discuss elements of what I considered the proposed instrument was likely to include – such as pilot qualifications and experience, currency, and maintenance provisions.

(b) During the meeting, Ms Pagani said to me words to the effect that CASA did not have the power to issue a legislative instrument relating to the matters which I had described. I also recall that Ms Pagani said words to the effect that she did not consider that any legislative changes were necessary or appropriate from a safety perspective. I recall that Ms Pagani and I agreed to reserve further discussion of CASA's power to make a legislative instrument of the kind under contemplation for a later date and perhaps for input by legal counsel.

(c) At paragraph 18 of the second Pagani affidavit, Ms Pagani deposes that I said that CASA would be publishing "urgent directions in a few days" and that CASA would seek industry responses "within a period of two weeks". I dispute that I referred to the proposed legislative instrument as "urgent directions" or that I indicated that industry would be given only two weeks to respond to CASA's consultation.

(d) During the meeting, I informed Ms Pagani that CASA intended to open a period of public consultation on 18 December 2018 and that it would run until, at least, 19 January 2019. (In that regard, I note that the consultation period in fact closed on 31 January 2019, taking into account the Christmas and New Year period.)

76. Now produced and shown to me and marked **CM-13** is a copy of my file note made on 19 December 2018, concerning the meeting held on 28 November 2018.

77. On 3 December 2018, I received an email attaching a letter from Ms Pagani, outlining and confirming the concerns held by Angel Flight in relation to CASA's proposed legislative instrument, as she had understood that proposal from our discussions on 28 November.

78. Now produced and shown to me and marked **CM-14** is a copy of Ms Pagani's letter of 3 December 2018.

79. On 3 December 2018, I responded to Ms Pagani's letter of the same day via email, My email confirmed CASA's intention to take a legislative proposal to public consultation and outlined some of the areas on which the provisions of the proposed instrument were likely to focus.

80. Now produced and shown to me and marked **CM-15** is a copy of my email dated 3 December 2018.

Public consultation on proposed CSF Instrument – December 2018

81. The Review into the conduct of CSF operations, which had commenced under my supervision in July 2017, resulted in an SFR to the DAS dated 13 December 2018 (the **December 2018 SFR**). The December 2018 SFR recommended that a legislative instrument be made to impose certain operational limitations in the form of conditions on the flight crew licences of pilots who engage in CSFs.

82. Now produced and shown to me and marked **CM-16** is a copy of the December 2018 SFR.

83. The DAS accepted that recommendation and, on or about 18 December 2018, a discussion paper entitled "Summary of Proposed Change: Proposed Safety Standard – Community Service Flights" (the **2018 Discussion Paper**) was published.

84. Now produced and shown to me and marked **CM-17** is a copy of the 2018 Discussion Paper.

85. The Consultation Hub is a part of CASA's public website on which CASA publicly consults about all of its proposed regulatory change initiatives. Members of the public can use the Consultation Hub to access the documents published by CASA, explaining the proposed changes (including any exposure drafts of proposed legislation) as well to provide their written submissions in response to any identified change initiative using an online response form.

86. On 19 December 2018, the 2018 Discussion Paper and an exposure draft of the proposed legislative Instrument (the **proposed legislative Instrument**) were published on CASA's Consultation Hub.

87. Now produced and shown to me and marked **CM-18** is a copy of the exposure draft of the proposed legislative Instrument.

88. Now produced and shown to me and marked **CM-19** is a copy the document containing the online response form that accompanied the Discussion Paper and the proposed legislative Instrument.

89. Page 2 of the Discussion Paper and page 2 of the online response form stated that CASA was consulting regarding the proposed legislative Instrument because CASA considered that pilots piloting a CSF were potentially exposed to risks of the kind to which pilots of charter flights are exposed and that those risks are exacerbated in the CSF environment.

Meeting with Angel Flight during public consultation process – 17 January 2019

90. On 17 January 2019, myself, Mr Carmody and Mr Crawford met with Angel Flight representatives, Ms Pagani and Mr Bruce Sackson, at CASA's Canberra offices. I understood that the purpose of this meeting was to discuss in detail Angel Flight's position in relation to CASA's proposed legislative initiative now that Angel Flight had had the benefit of reading the Discussion Paper and considering the terms of the proposed instrument. I understood that the meeting was intended to facilitate this discussion in advance of Angel Flight making its formal written submission in response to the Discussion Paper.

91. At the meeting, Ms Pagani again said to CASA representatives that Angel Flight considered that there was no safety basis to change the private classification requirements pursuant to which CSFs were currently conducted. Ms Pagani said words to the effect that none of the conditions in the proposed legislative Instrument was necessary or appropriate. I also recall that Ms Pagani said words to the effect that CASA did not have the power to make an instrument in the terms proposed in the 2018 Discussion Paper.

92. I provided a summary of CASA's safety case for the issue of the proposed legislative Instrument. I covered similar elements to those discussed in previous CASA/Angel Flight meetings that I had attended. My explanation emphasised once again CASA's concern that the risks associated with CSFs were different to those which were encountered during a standard private flight and thus required a higher regulatory base line to appropriately mitigate those risks. There was discussion of the fact that the incident and accident data available to CASA appeared to indicate that the fatal accident rate for CSFs, was significantly higher than in standard private flights. I specifically recall that Ms Pagani said words to the effect that CASA had not provided Angel Flight with the

data analysis which formed the basis of my comments concerning the fatal accident rate in CSFs.

93. A deliberate decision was made not to provide Angel Flight with the specific details of its data analysis, including the specific incident and accident rates calculated, nor to include those details in the Discussion Paper for two primary reasons (which I had discussed with Mr Carmody and Mr Crawford before the meeting with the Angel Flight representatives):

(a) I did not want the public consultation to descend into an argument about the statistics or calculation methods, when the focus needed to be on identifying the key risks in the operational environment and the appropriate mitigators for them (if any). This was a particular risk since release of the analysis would have required extensive explanation of the data sources, assumptions and other methods used in producing it.

(b) The incident and accident rates calculated by CASA in order to compare CSFs with standard private flights as well as other forms of commercial passenger carrying flight indicated that, in some instances (as for the comparison between CSFs and regular public transport flights), CSFs were orders of magnitude less safe. I did not want to unduly alarm the industry or the public, or cause unnecessary damage to public confidence in CSFs by the release of such figures prior to fully understanding the data and if public consultation might provide additional useful context to the data.

Data concerning incident and accident rates

94. Following the DAS's instruction to me in November 2018, to put a proposal for regulatory intervention to him to take to public consultation, I had instructed CASA's Flight Standards Branch to re-visit the safety accident and incident data available to CASA to determine whether statistically meaningful trends could be derived from that data as it related to the comparison of incident and accident rates between CSFs and standard private flights. That safety analysis was conducted in collaboration with experienced statisticians in the Strategic Analysis Section of CASA's Coordination and Safety Systems Branch.

95. The data available for that analysis included data concerning the number of flight hours conducted in certain kinds of operations (including CSFs from 2014) on an annual basis provided by the Bureau of Infrastructure and Regional Economics (the **BITRE**), incident and accident data available to CASA, as well as incident and accident data made available to CASA by the ATSB.

96. The reasonable availability of data as well as the safety rate comparisons able to be drawn from that data between CSF operations and other kinds of operations, including private, charter and regular public transport operations, was especially topical in or around January 2019, because at that time the ATSB was expected shortly to release its draft report into the Mount Gambier accident.

97. I anticipated, that, as part of that report, the ATSB would release an extensive data analysis of the incident and accident rates attributable to CSF operations when compared to other forms of private and commercial operations. Prior to releasing its draft report for comment, the ATSB provided the raw data held by it in relation to incidents and accidents involving CSFs coordinated by Angel Flight as an attachment to an email dated 6 February 2019 addressed to both myself (on behalf of CASA) and Ms Pagani (on behalf of Angel Flight).

98. Now produced and shown to me and marked **CM-20** is a copy of the email from the ATSB dated 6 February 2019.

99. That raw data was taken into account by CASA in finalising the incident and accident rate data, which were made available to the DAS for his consideration prior to the issue of the CSF Instrument.

100. Now produced and shown to me and marked **CM-21** is a copy the concluded data analysis made available to the DAS.

Responses received

101. The period of public consultation concerning the proposed legislative Instrument closed on 31 January 2019.

102. CASA's business records indicate that, in February 2019, CASA published a document titled "Summary of Consultation; Proposed Safety Standard – Community Service Flights" (the **SOC**).

103. Now produced and shown to me and marked **CM-22** is a copy of the SOC.

104. The SOC summarises the feedback received from the consultation process concerning the proposed requirements. The SOC notes that CASA received 233 response to the Discussion Paper. Those responses came from a diverse range of respondents, such as pilots (including pilots who had and continued to operate CSFs), private pilots who had not conducted CSFs, aviation interest groups such as the Aircraft Owners Association of Australia (the **AOPA**), aircraft maintenance personnel as well as Angel Flight and Little Wings.

105. Angel Flight made a written submission on 21 January 2019.

106. Now produced and shown to me and marked **CM-23** is a copy of Angel Flight's submission dated 21 January 2019.

107. In its submission, Angel Flight opposed each of the operational limitations and requirements proposed in the draft legislative instrument. Substantively, Angel Flight asserted that there was no safety basis for CASA to change the existing private regulatory requirements, pursuant to which CSFs then operated. In concluding the submission, Ms Pagani, on behalf of Angel Flight, expressly noted that "None of the CSF or GA [general aviation] crash statistics generally support this change as a safety factor". Similar references to general aviation crash or accident statistics are made throughout the submission.

108. Little Wings made a submission on 25 January 2019.

109. Now produced and shown to me and marked **CM-24** is a copy of Little Wings' submission dated 25 January 2019.

110. In its submission, Little Wings stated that it "... is supportive of any increase in the safety of flight operations in the community services flights area. We are also very aware and concerned about placing an additional financial burden on both volunteer flight crew and volunteer organisations assisting with the coordination of these flights". Little Wings submission was, by and large, supportive of the range of measures proposed under the draft Instrument but did "... not support the requirement for the engines to be required to be maintained to AD/ENG/4,AD/ENG/5" as it believed that requirement "... would create a significant financial burden with little to no safety Increase, resulting in less opportunity to conduct flights".

Amendments resulting from consultation

111. Page 13 of the SOC summarises the changes that were made to the proposed CSF instrument due to the responses received during consultation and explains the basis for them.

Definition of CSF and passenger limitation

112. After reviewing the feedback that was received concerning the definition of CSF, which had appeared in clause 6 of the draft instrument, along with the initial passenger cap (5 passengers including the person being transported) in clause 9, I decided after discussing the matter with staff in my division, including Mr Crosthwaite and Mr Watson, that the definition of CSF should be revised to make it clearer what constituted a CSF for the purposes of the proposed instrument.

113. Specifically, the concerns captured in the feedback relating to the definition of CSF were to the effect that the definition was too broad and potentially captured flights that were not intended to be the subject of the revised safety standards. Examples of such feedback are in the following submissions set-out at page 28 of the SOC:

i. ANON-Z7UJ-QX8D-N

ii. ANON-Z7UJ-QXDY-P

iii. ANON-Z7UJ-QXQ5-Y

114. Now produced and shown to me and respectively marked **CM-25, CM-26** and **CM-27** is a copy of each of the abovementioned submissions.

115. As initially drafted, the definition of CSF in clause 6 of the proposed legislative Instrument embraced the concept of passengers accompanying a patient (see clause 6(1)(b) of the proposed legislative Instrument). It was determined, following the public feedback received, to refine the definition of CSF by referring to passengers accompanying the patient for the purposes of providing assistance or support. That was done on the basis that it was considered necessary to emphasise that such passengers were considered to be the only persons (other than the patient and the flight crew) with a legitimate need to be transported on a CSF. That change to the definition is now reflected in clause 6(1)(3) of the CSF Instrument.

116. To further emphasise CASA's position in that regard, an associated amendment was made to the general requirements set out in clause 7 to reflect that expectation. That amendment is now clause 7(1)(c) of the CSF Instrument. I considered that this revised clause, along with the passenger cap applying under clause 10(a) of the CSF Instrument (5 passengers maximum) would sufficiently limit the risk exposure associated with a CSF to persons who had a legitimate need to participate in such a flight. In that regard, I note that the proposed passenger cap included in the proposed legislative Instrument gained significant support in the consultation (see pages 9 and 10 of the SOC).

Aircraft maintenance requirements

117. Class B aircraft in Australia can be maintained in accordance with:

(a) the system of maintenance specified by the manufacturer of the relevant aircraft; or

(b) the CASA system of maintenance specified in schedule 5 of the CAR.

118. The majority of light single and twin engine aircraft used in the conduct of CSFs are Class B aircraft.

119. Any aircraft maintained in accordance with the manufacturer's system of maintenance already meets the maintenance requirements of the CSF Instrument.

120. Private aircraft maintained in accordance with Schedule 5 of the CAR must have an annual inspection, referred to as a periodic inspection. Those aircraft can fly an unlimited number of hours within that 12-month period.

121. Aircraft engaged in commercial aerial work activities, which include commercial activities such as aerial mustering, aerial spotting and aerial survey, and whose owners have selected CAR Schedule 5 as their system of maintenance, must have a periodic inspection every 12 months or 100 hours, whichever occurs first.

122. Aircraft engaged in commercial charter or regular public transport operations must meet even higher standards of maintenance.

123. Any aircraft intended to be operated for a commercial purpose must be maintained to a standard which meets (if not exceeds) the requirements of clause 11 of the CSF Instrument, even if the aircraft is also used for private purposes. Thus, private owners who hire their aircraft for commercial use need to ensure that their aircraft are maintained to the minimum standards applicable to the category of commercial operation in which they will be used.

124. The original proposal set out in clause 10 of the proposed legislative Instrument was to impose engine maintenance requirements on aircraft engaged in CSFs, which were equivalent to the maintenance standards applying to aircraft operating in commercial charter operations.

125. Examples of feedback critical of CASA's proposal to require CSF aircraft to be maintained to a higher standard are set-out at pages 25-26 (paragraph C.3) of the SOC and include:

    iv. ANON-7ZUJ-QXK3-Q

    v. ANON-7ZUJ-QXMU-U

    vi. ANON-7ZUJ-QX9W-9

    vii. ANON-7ZUJ-QXQR-V

126. Now produced and shown to me and respectively marked **CM-28**, **CM-29**, **CM-30** and **CM-31** is a copy of each of the abovementioned submissions.

127. 137 respondents (60% of the total 227 respondents) mentioned maintenance standards generally. 111 respondents (49% of the total 227 respondents) made specific reference to various categories of aircraft maintenance, which they considered should apply to

aircraft undertaking CSFs. 66% of those 111 respondents indicated a preference for maintenance to be that required of a private aircraft; and 26% of those 111 respondents suggested that the aerial work maintenance requirements were more appropriate. 61 respondents (27% of the total 227 respondents) noted that the maintenance requirements specified in clause 10 of the proposed legislative Instrument would result in the imposition of significant costs.

128. On the basis of the feedback received, I decided, after discussions with members of my staff, including Mr Crosthwaite and Mr Watson, that lifting the maintenance standards required in the proposed instrument to the aerial work standard, rather than the charter standard, represented a reasonable compromise between the entitlement of passengers carried on CSFs to receive a higher standard of safety than those carried on standard private flights (as was expressed in the 2018 Discussion Paper) and the need to ensure that CASA did not impose unnecessarily costly legislative burdens, which may become a disincentive to the conduct of CSFs. This approach is consistent with the regulatory approach taken in the USA, as set-out at page 11 of the SOC,

129. As a result of the feedback received, less onerous maintenance requirements were imposed than those proposed in the draft instrument.

Issue of CSF Instrument

130. On 8 February 2019, after taking into account the SOC and the changes proposed as a result of the SOC, I endorsed Mr Watson's SFR dated 13 December 2018. My endorsement resulted in drafting instructions being provided to the Legislative Drafting Section in CASA's then Legal and Regulatory Affairs Division (**LARA**), to prepare the version of the proposed instrument, which it was intended to recommend that the DAS sign into force.

131. When the drafting process was completed, the Manager of the Advisory and Drafting, Branch within LARA, Mr Adam Anastasi, forwarded a further SFR dated 11 February 2019 (the **February 2019 SFR**) to the DAS, requesting that he sign and date the draft Instrument CASA 09/19 and approve the associated Explanatory Statement.

132. Now produced and shown to me and marked **CM-32** is a copy of the February 2019 SFR.

133. On 12 February 2019, the DAS made the CSF Instrument under regulation 11.068 of the *Civil Aviation Safety Regulations 1998*.

134. Now produced and shown to me and marked **CM-33** is a copy of Instrument CASA 09/19.

Other Matters

135. Paragraphs 29 and 30 of the second Pagani affidavit refer to an NOS Briefing Note dated 15 January 2019, which was issued with my approval.

136. Now produced and shown to me and marked **CM-34** is a copy of that briefing note.

137. That briefing note makes it clear that the proposed legislative initiative, which culminated in the issue of the CSF Instrument, was not a response to CSF-related accidents or incidents. Rather, the CSF Instrument was made in response to concerns developed within CASA over some years (stretching back at least to the public consultation undertaken in 2014) that there were unique features associated with the conduct of CSFs, which made them different to standard private flights and raised community expectations of the safety standards associated with the conduct of them. The circumstances of previous accidents were relevant in examining the nature of those unique risks; but, as noted earlier in this affidavit, the review went beyond simply reviewing the identified causes of previous accidents.

138. That same sentiment was expressed in my initial email to Mr Watson of 4 July 2017 (see paragraph 35 above and exhibit CM-6), where I indicated to him that the review which I was asking him to prepare was not to be drafted on the basis that the Mount Gambier accident was the driver for it.

139. If CASA's focus was limited purely to the identified causes of previous CSF accidents, then its regulatory response would have been limited purely to addressing matters which had been shown to be causative of those accidents.

140. CASA's focus was broader than that. The focus of the review was to form a view about whether there were unique risks associated with the conduct of CSFs, which were not present in standard private flights; and, if so, to determine what if any regulatory measures could be introduced to lift the safety standards applicable to CSFs regardless of whether the relevant particular risk factors had been identified as a contributory factor in relation to an accident. I considered that this approach would result in a safety outcome which drew, not only on the circumstances of known accidents and incidents, but on:

    (a) the nature of the CSF operational environment;

    (b) the risk mitigators presently in place to control risk;

    (c) reasonable societal expectations about safety standards which should apply to CSF operations;

(d) the approach taken by regulators in other countries to the regulation of CSF operations;

(e) the options available to CASA to make reasonable improvements to safety standards associated with the conduct of CSFs; and

(f) the likely areas of operations where future mishaps are likely to occur based on historical date – for example, controlled flight into terrain, loss of control, landing/landing environment and powerplant/airframe airworthiness.

141. As discussed above in this affidavit, consideration of incident and accident data was a necessary factor in this process as well, but only to the extent that CASA's analysis of the available data confirmed CASA's view that the nature of the CSF operational environment posed higher safety of flight risks than existed in a standard private flight.

Affirmed by the deponent at Canberra)
in the Australian Capital Territory)
on 19 March 2020)
) Signature of deponent

Before me: MAg

Signature of witness:

Name of witness: NEVIN AGNEW

Qualification of witness: Lawyer of the Supreme Court of the Australian Capital Territory

Solicitor ACT Supreme Court

CM-7

ORIGINAL SEA. 17

Australian Government
Civil Aviation Safety Authority

Standard Form of Recommendation (SFR) - FSB

Flight Standards Branch
Aviation Group

Personal Information

To:	Shane Carmody
Title:	Director of Aviation Safety
Through:	Chris Monahan
Title:	Acting Manager Flight Standards Branch
Recommended By:	Scott Watson
Title:	Team Leader Fixed Wing and Rotary
Subject:	Policy Recommendation – Community Service Flights (CSF) conducted for the benefit of a charitable entity
RM8 File:	F13/11133-12 - D17/251539

Details

1.1. Issue

Angel Flight (AF) is a registered charity that coordinates non-emergency flights that primarily transport people (but do occasionally transport cargo) to specialist medical treatment that is difficult to access due to distance / cost reasons. AF processes are mapped at Annex A. The flights occur in various regional and metropolitan areas throughout Australia under conditions of diverse weather, topographic surroundings and airspace complexity which can create challenging flight management issues. CASA Aviation Ruling 2/2003 permits this activity to occur without an AOC.

CSF coordinated by AF have had two fatal accidents involving six fatalities in the last six years – the first on 15 Aug 11 and the second on 28 Jun 17.

AF is not an aviation organisation and the Pilot-in-command (PIC) is solely responsible for the pre-flight preparation and in-flight management. Diverse flight conditions and the perceived pressure associated with transporting passengers to medical appointments creates the potential for an inexperienced PIC to make suboptimal decisions.

This PDD holistically examines the CSF framework to identify whether or not defences can be economically constructed to risk mitigate these potential threats to aviation safety.

1.2. Executive Summary

This PDD recommends the withdrawal of Aviation Ruling 3/2003 and the creation of a CSF developed Code of Practice that outlines, in detail, how operations will be conducted, practices that will be used and what strategies will be used to ensure safe operations. The Code of Practice would implement a

tailored set of low impact CSF safety enhancements. The CSF would then provide CASA with a copy of the Code of Practice for review and endorsement. This PDD will also recommend other options that may provide an increase in safety in the CSF sector.

CSFs carry passengers from a wide spectrum of the general public and are conducted by pilots with varying experience and qualification levels. The PIC qualifications, experience and recency can be either a hazard or a mitigator against other hazards inherent in every flight. This is especially the case where the CSF is carried out in challenging operational situations such as VFR in marginal VMC or where there is a requirement for night VFR operations to complete a flight after a long duty period for the pilot involved.

CSF do not operate under the safety umbrella of an AOC holder's risk identification and management program. In the case of AF, there are no formal mechanisms to support pilots on what can be challenging flights due to the variability of the passengers being carried and the nature and importance of the flight. These factors can impose burdens from both an operational and an emotional decision making perspective.

CASA must consider these matters in the light of its responsibilities under Section 9 of the *Civil Aviation Act 1988* and consider appropriate action to protect against an unreasonable level of risk in order to maintain an acceptable level of safety for the pilots, their passengers (who other than being coordinated for the flight may have no knowledge of the pilot's background or experience) and the public in regard to CSF operations.

This SFR initially outlines the Australian CSF regulatory background, the current processes utilised by AF and compares the CSF pilot experience and training requirements of multiple States. It then examines known CSF accidents and compares the Australian CSF accident rate to available sector wide accident data in order to estimate whether current CSF operations are being conducted at an acceptable level of safety. Lastly, it identifies policy options and recommends the adoption of a specific policy.

1.3. Background (current policy)

Australian legislation / regulation

Reg 206 of CAR 1988 specifies that it is a requirement for an operator to hold an AOC to conduct aerial work, charter or regular passenger transport operations (see Annex B). CASA Aviation Ruling 3/2003 (the ruling – see Annex C) outlined that a person may conduct certain charitable operations without holding an AOC. Therefore, charitable operations conducted under the provisions of this ruling are private operations. Legally, CASA is only regulating the person conducting the charitable operation (ie. for AF – the pilot). As AF is not an aviation organisation, CASA does not directly oversight or regulate this

organisation. Changes made by the CSF organisation are essentially voluntary but CASA can regulate the pilot to produce the desired effect if it chooses too. Reg 2(7)(d) and 2(7A) of CAR 1988 specify what operations are considered to be private operations (see Annex B). The ruling does not reference these regulations nor does it specify how an operation conducted for AF interacts with these requirements. Potentially, although the operation is not required to hold an AOC, it may not meet the regulatory definition of what constitutes a private operation either.

Reg 61.505 of CASR 1998 limits the holder of a Private Pilot License to the conduct of private operations or an operation where the license holder is receiving flying training (see Annex C).

CAO 48.1 Instrument 2013 does not prescribe any fatigue or duty limits for private operations.

Project OS 13/25 (Safety standards for CSF conducted on a voluntary basis) was approved on 25 Nov 13. The key aims of this project were to develop appropriate standards for CSF that balanced the safety risks inherent with the activity with rational approaches to the mitigation of those risks whilst recognising the social utility of the activity.

Discussion Paper DP1317OS was issued as part of this project on 18 Aug 14 and comments closed on 16 Oct 14. The DP outlined ten potential options (see Annex C). CASA's preferred option was for the introduction of a CSF ASAAO (option 5) however if this did not eventuate then the secondary preferred option was the introduction of a pilot registration system with specific pilot experience and training requirements, operational limitations and minimum aircraft standards (a combination of options 3, 4, 7, 8 and 9).

There was significant widespread opposition to the DP from AF, rural and regional councils and sections of the public. There was also opposition from existing AOC holders. No further action after the closure of comments was undertaken by CASA.

Current charitable entity – Angel Flight (AF)

AF has, as at 7 Jul 17, conducted 21105 total flights (termed as "missions" on their website) since April 2003[1]. It currently conducts approximately one flight per day on average.AF coordinates operations across Australia with a growing network of volunteer pilots (currently ~2900). AF promotes that its pilots "come from all walks of life and donate their time, their skills and most of their aircraft costs for each flight"[2]. Instrument ratings are not mandated for assignment to a flight and all operational go/no go and operational control decisions rest with the

[1] Angelflight.org.au
[2] Angelflight.org.au

P.IC of the flight.

All flights are free to the passengers and AF subsidises the fuel used on flights, negotiates the waiver of landing fees at many supporting airports around the country and arranges the credit of any air navigation charges through the support of Airservices Australia[3] for the flights.

The minimum pilot requirements prior to registration with AF and the currency requirements checked by AF prior to a flight are outlined at Annex A. AF requires aircraft utilised to be Australian certified, factory assembled and VH registered and not in the 'Experimental', 'Amateur Built' or 'War bird Category'.

Prior to each flight, AF pilots being utilised are required to complete a pre-flight "tick and flick" document shown at Annex A[4]. This document contains some of the CASA regulatory requirements but not all. Pilots bid for a flight on the basis that their aircraft is airworthy and their qualifications and experience are adequate for the flight[5]. The factors AF considers in awarding a flight to a pilot are at Annex A. When ascertaining which bid it will accept, AF does not consider the Night VMC [sic: terminology is that used by AF – not the same as CASA] or IFR competency of the pilot or the airworthiness of the aircraft[6]. Determining the airworthiness of the aircraft and the suitability of piloting qualifications and experience for a particular flight is exclusively the pilot's responsibility.

No AF staff member discusses or provides informed oversight of an AF pilot's pre-flight planning, weather considerations, operational contingency procedures, fatigue management plan or any other aviation related matter. No discussion is entered into regarding the relevant importance or otherwise of the medical appointment of the passenger(s) with the AF pilot. AF pilots are told upon induction and reminded at the bottom of the pre-flight "tick and flick" that aviation safety requirements are to prevail over schedule considerations and that no passenger is accepted for carriage that "must" make the applicable medical appointment for which they are on the AF. AF passenger notification and acceptance procedures are outlined in Annex A.

AF procedures fully incorporate two, and partially incorporate one, of the options outlined in DP 1317OS. The fully incorporated options include a mandatory Class 1 or Class 2 medical (no RA-Aus medical) and a pre-flight passenger acknowledgement of the risks involved in a flight without the regulatory oversight of commercial passenger transport operations. The partially incorporated option is that AF requires a PPL but does not require the completion of CPL theory subjects.

Current charitable entity and charitable operator – Little Wings

[3] Angelflight.org.au/pilots
[4] Angel Flight Website – Pilot Bid Document
[5] Extracted from CASA Interview with Angel Flight CEO on 26 Jul 17
[6] Extracted from CASA Interview with Angel Flight CEO on 26 Jul 17

Little Wings commenced operations based at Bankstown in 2012. Little Wings' mission is to provide free and safe flight and ground transport service for children from rural and regional NSW to access specialised medical services and treatment in major centres[7]. Unlike AF, Little Wings actually undertakes the CSF vice coordinating volunteer pilots and aircraft.

Little Wings uses a dedicated aircraft (Piper Malibu Mirage) which is equipped and flown under the IFR by instrument rated pilots holding a commercial pilots license. According to their website Little Wings also have Quality Management Procedures embedded in their operation.

The Little Wings funding strategy appears to use donated funds and equipment to run the operation as a whole, rather than the potentially more complex model used by AF.

1.4. Discussion

There have been two AF flights where a multiple fatality accident has occurred in the last six years.

Section 3A of the Civil Aviation Act 1988 states:

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

Section 9A of the Civil Aviation Act 1988 states:

> *In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.*

The wording of CASA Aviation Ruling 3/2003 should be reviewed by CASA as the current operational AF model potentially does not accord with that described in the ruling. Additionally, although the ruling states that certain operations are not commercial operations, the ruling does not discuss these operations in the context of the definition of private operations at reg 2 of CAR 1988. Nor does the ruling specify how these operations relate to the restrictions on what operations a PPL holder may conduct that are stated in reg 61.505 of CASR 1998.

The application of CASA Aviation Ruling 3/2003 has resulted in the exposure of passengers to safety risks greater than that accepted for charter or regular passenger transport (RPT) operations. Although AF requires patients and accompanying passengers to sign an extensive waiver and release from liability, it is doubtful that the persons involved, as non-aviation professionals,

[7] Littlewings.org.au

understand the relative risks of private flight versus charter or RPT flight.

The ATSB regularly publishes summaries of Australian aviation accident and incident statistics. In a variety of reports and statistical summaries (see Annex C) the ATSB has found that the fatal accident rate for General Aviation Private / Business flights has approximated 20 fatal accidents per 1,000,000 flight hours. From 2006-2014, all General Aviation types averaged 8-9 fatal accidents per million departures. The report states that aerial agriculture and private / business flights had the highest and second highest rates followed by survey and photography, aerial mustering and lastly flying training.

Although the number of AF accidents is a statistically small sample and therefore may not be able to form the basis of a statistically valid comparison, it is nonetheless useful to extrapolate and compare the AF accident rate to these statistics.

AF – two fatal accidents in 22000 flights (rounded up = better)
Fatal accident rate per million departures = 90.9

GA – total fatal accident rate per million departures = 11.3 (worst – 2012)

Regardless of the cause the CSF fatal accident rate is in excess of eight times higher than the ATSB GA statistics.

Whilst the exact cause of this statistical difference cannot be positively determined, it is likely that the contributing factors include: the variability of CSF flight conditions, the relative inexperience and lack of human factors training of AF pilots compared to commercial pilots and the lack of mandatory fatigue limits for private operations combined with the "medical" overtones of the service being provided.

The ATSB previously stated in its response to the CASA DP1317OS advised that:

> While the ATSB was unable to ascertain the age demographic of Australian Angel Flight pilots, consideration of (the) four overseas accidents that involved flights that were organised by various Angel Flight agencies identified that the age range of the pilots was from 57 to 81 years old.
>
> A research article by the US National Transportation Safety Board published in 2007 examined general aviation accidents in degraded visibility and identified several variables that were significantly associated with accident involvement. These included:
>
> (a) pilot age at the time of the accident (with the highest proportion of accidents involving pilots over 60)
> (b) pilot age at certification (with pilots certified at or before age 25 having the lowest accident involvement)
> (c) the pilot not holding an instrument rating increased the accident risk by nearly five times
> (d) commercial pilots had a lower accident involvement than student or private

pilots, and

(e) private flights had a higher accident involvement than flights conducted for commercial purposes

In conclusion, the ATSB outlined in their response "the varied circumstances under which voluntary community service flights can be undertaken lead to a resulting variation in the associated safety risk. The ATSB believes that, having regard to the community service objectives of such flights, passengers contemplating such non-commercial flights should be informed of the likely risk in order to allow them to make an informed decision on whether to participate.

As previously stated, passengers are being informed of the risk in broad terms that state the risk of an AF is higher than that of a commercial flight. However, the occurrence of a second accident – noting that the cause is still under investigation by the ATSB – questions whether CASA continuing to permit CSF operations under the current "open and unregulated" framework is appropriate.

Entities similar to AF exist in the United States, Canada and New Zealand (see Annex B). In general the minimum pilot requirements in the United States and Canada are higher than those required by AF (see Annex B). None of these countries currently require their CSF operators to hold the equivalent of an AOC. The reasons for this vary and are specific to the regulations of each country (see Annex C).

However, the United States does regulate – via conditions contained in an Exemption – certain requirements that are placed on a PPL holder who intends to conduct CSF style operations. These conditions were a response to multiple CSF accidents in the United States.

The US National Transportation Safety Board (NTSB), when responding to investigations of four accidents that killed eight people and seriously injured two between 2007 and 2008 (each of which involved flights providing charitable medical transportation), formed the following views with respect to CSF style operations involved in the accidents[8]:

- each of the four pilots in these accidents failed to fully accomplish these tasks [listed following];
- in these accidents, the pilots demonstrated shortcomings in sound aeronautical decision-making by failing to adequately assess the weather and their inability to operate the airplane in those conditions;
- that these pilots did not provide the passengers with the basic level of safety that passengers in these circumstances have a right to expect;
- the voluntary pilot organization arranging or fostering the flights made no attempt to verify the pilots' currency;
- that the pilot's lack of currency in conducting the flight in instrument conditions placed the passengers at higher risk for an accident;
- the typical patient seeking a charitable medical flight is not likely

[8] https://www.ntsb.gov/safety/safety-recs/recletters/A-10-102-104.pdf

aware of the significant differences in pilot training, pilot qualifications, or FAA oversight for a charitable medical flight operated under Part 91 compared to commercial flights operated under 14 CFR Parts 121 or 135;

- although many of the volunteer pilots who provide charitable medical transportation are highly skilled, proficient in operating their aircraft, and prepared to execute an appropriate response to changing flight conditions or emergencies, others may not be;
- the NTSB is concerned that the pilots flying charitable medical flights receive no guidance, additional training, or oversight regarding aeronautical decision-making, proper pre-flight planning, or the risk of self-induced pressure; and
- the pilots may have been subject to self-induced pressure to start or complete the flight because of their passengers' serious medical conditions.

Note - The NTSB's study of helicopter emergency medical services (HEMS) accidents cited time pressures as a risk factor in HEMS flights, and a similar risk can exist for charitable medical flights: the desire to get a patient to medical treatment quickly.

Based in these accidents, the NTSB recommended that the Air Care Alliance (an umbrella CSF organisation in the United States – see Annex C):

- Require voluntary pilot organizations to verify pilot currency before every flight. (A-10-102)
- Require that voluntary pilot organizations inform passengers, at the time of inquiry about a flight, that the charitable medical flight would not be conducted under the same standards that apply to a commercial flight (such as under 14 Code of Federal Regulations Part 121 or Part 135). (A-10-103)
- In conjunction with your affiliate organizations and other charitable medical transport organizations, develop, disseminate, and require all voluntary pilot organizations to implement written safety guidance, best practices, and training material for volunteer pilots who operate charitable patient transport flights under 14 Code of Federal Regulations Part 91. The information should address, at a minimum, aeronautical decision-making; proper pre-flight planning; pilot qualification, training, and currency; and self-induced pressure. (A-10-104)

Analysis of Australian CSF

None of AF's processes are currently governed by regulation. AF could change any of these processes (pilot induction, pilot standards, passenger pre-briefing and awareness forms etc) at any time.

The minimum experience requirements of Australian AF pilots are lower than their US and Canadian counterparts.

AF has made implemented the partial equivalents of two of the NTSB recommendations.

AF has haphazardly implemented the first recommendation regarding checking pilot currency before flight. AF has, on repeated occasions, made it clear that it is not an aviation operation and that currency is a pilot responsibility.

AF has potentially implemented the second recommendation regarding passenger awareness of lower CSF safety standards compared to commercial flights. However, the AF passenger waiver is legally technical and there is considerable potential that passengers are unaware of the extent to which they are absolving AF of any liability. It is equally doubtful that passengers understand the difference between commercial and private safety standards.

CASA has not regulated or provided guidance material equivalent to any of the NTSB recommendations regarding CSF.

AF indicates they have over 2900 pilot registrations. By any practical measure this is a large number which would represent a challenge to provide ongoing overarching support for in regard to levels of competency and proficiency of each individual pilot. This would be a sizeable undertaking even for a mature, high capacity RPT AOC.

AF is increasing the scale of its operations over time. Increasing numbers of flights statistically increases the frequency of accidents assuming the likelihood of an accident remains constant. Unless CASA undertakes some form of action, changes to the likelihood of an AF accident are unlikely to change.

The cause of the recent 2017 CSF accident has yet to be determined. It is possible that this accident was due to other than pilot error or mechanical failure. As previously stated, the extrapolated AF fatal accident rate is a subjective measure at best due to the low statistical sample. However, the significant multiple of this rate compared to the ATSB GA data is a cause for concern and does warrant some form of CASA action pending the outcome of the ATSB investigation of the 2017 CSF accident.

It is apparent that CSF have significant operational complexities, particularly without the support of a safety system based organisational structure. PICs would ideally be experienced, operationally recent and well versed in flight management, human factors and threat and error management skills.

Analysis of AF operations – applicability of current ruling

The ruling permits a charitable operation to make a profit when undertaking a

CSF provided the profits are donated to a charitable entity.

The AF model may not fit within the strictures of the ruling as AF as the charitable entity is not receiving funds from the charitable operation but instead the charitable entity is funding the charitable operation. Rather than the charitable entity receiving a benefit, the passenger appears to be the one benefiting in this model.

The ruling should therefore be reviewed for appropriateness and accuracy. In undertaking this review, CASA should consider how Reg 2 of CAR 1988 applies to the conduct of CSF. Additionally, CASA should consider whether or not the issue of a general Exemption would be a more appropriate legal vehicle for CSF and, if so, CASA could consider imposing appropriate conditions on CSF as part of the exemption.

Discussion of alternatives

There are five broad areas for possible improvement:

- internal AF processes that do not require AF to hold an AOC,
- entry control requirements for pilots undertaking CSF,
- ongoing training of pilots undertaking CSF,
- regular checking of pilots undertaking CSF, and
- mandating maintenance requirements for aircraft used for CSF.

AF process improvements

AF does not currently utilise "duty pilots" which are a common safety mechanism used across the flight training, commercial and military sectors. In the case of AF, their status as a charity and the goodwill this generates makes it highly likely that AF could source a roster of highly experienced pilots for little or no cost to undertake a rostered "duty pilot" role. This role would not function as a "gatekeeper" as AF is not an aviation organisation but rather a voice of experience to listen to a short verbal briefing by the AF pilot on the relevant flight conditions (route, weather, fatigue, recent experience).

AF currently utilises a self-generated currency checking form. As AF is not an aviation organisation, an alternative approach could be to require AF pilots to undertake the CASA endorsed, online Pilot Check available on the VFR pilot guide website (see Annex A). Although this does not cover IFR pilots, CASA could develop a similar website for IFR pilots.

Entry control for pilots undertaking CSF

Controls implemented prior to pilots undertaking CSF should aim to meet the third recommendation of the NSTB previously discussed which also meets option 10 of the previous CASA CSF DP. This is the development of appropriate safety education and training material for CSF pilots at no cost to either a

charitable entity or an AF pilot.

Suggested topics in this education and training material are:

a. Proper pre-flight planning;
b. Risk assessment and management skills;
c. Basic and enhanced aeronautical in-flight decision-making;
d. Minimum recommended pilot qualifications, training, and currency; and
e. Strategies for coping with self-induced tasking pressure in dynamic operational medical passenger environments.

Practical methods for implementing this training and education could involve:

a. development of this material into a Part 61 based AC;
b. use of Part 141 certificate holders and the inclusion of this training during CSF volunteer pilots CASR Part 61 flight reviews;
c. face to face meetings and workshops with volunteer pilot groups;
d. online course content development in HF/NTS and risk assessment and management; and
e. engagement with CSF coordinating bodies on the development of practical tools for pilot use such as go/no go checklists and in-flight risk assessment and hazard management checklists. These may also include development of advisory divert to nearest suitable aerodrome protocols if baseline safety parameters for a flight are not being met.

CASA does not currently mandate any fatigue or duty period requirements for private operations. Although CSF are not commercial operations, they are carrying passengers and therefore some additional safety requirements are considered necessary. In a similar fashion to the US FAA, CASA should consider the introduction of statutory minimum set of fatigue and flight and duty limits for CSF volunteer pilots based on CAO 48.1 Instrument 2013 Appendix 1. Basic Limits.

Ongoing training for pilots undertaking CSF

HF training should be repeated at regular intervals by pilots undertaking CSF – suggested every two years.

Regarding the minimum experience levels of CSF pilots, CASA could develop a Part 61 based AC outlining the recommended minimum requirements for volunteer pilots prior to commencement of CSF style operations. The AC should specifically advise:

a. Minimum hours total/PIC/night/IF/type and model of aircraft,
b. Minimum recency considerations,
c. Methods for regaining recency,

d. Risk assessment and hazard management skill sets,
e. Recommendations for instrument ratings for all CSF flights or CSF flight which may be flown at night,
f. Methods for coping with tasking pressure of CSF operations, and
g. Aircraft minimum equipment recommendations.

Checking for pilots undertaking CSF

Pilots with an instrument rating already have multiple currency and check requirements, however VFR pilots are only required to be checked via Flight Review once every 24 months and this review is quite limited.

CASA could require pilots wishing to undertake a CSF to complete a Flight Review every 12 months with every second Flight Review required to encompass a cross-country flight as this is representative of the types of flying conducted for CSF.

Maintenance of aircraft undertaking CSF

No additional requirements are currently placed on aircraft undertaking CSF. However, an analogous regulated activity is the transport of parachutists in a drop aircraft. The Australian Parachuting Federation mandates slightly more frequent maintenance requirements on these aircraft compared to an aircraft solely used in private operations (see Annex C). Under traditional PPL rules operators are required to perform maintenance every 12 months, under the APF requirements operators are required to perform maintenance every 12 months or 100 flight hours, whichever comes first.

The addition of a similar requirement for aircraft utilised in a CSF would impact on those pilots who hire aircraft as the owners of the aircraft are unlikely to pay for additional maintenance for an activity they do not personally undertake.

Method of implementing improvements

If the Aviation Ruling is withdrawn, then CSF organisations will be required to possess an AOC unless CASA determines an alternate path.

To formalise the baseline level of safety for CSF, CASA and AF should agree to codify a baseline set of processes and standards via either a voluntary Code of Practice, a Letter/Deed of Agreement, Memorandum of Understanding (MoU) or via conditions on an exemption instrument issued in place of Aviation Ruling 3/2003. Except for the exemption pathway, all of these options are non-legislative in nature although they would require legal drafting and oversight to implement.

If assessed as necessary by CASA in the context of reg 61.505 of CASR 1998, publish a general exemption for PPL holders to conduct CSF flights.

1.5. Options

1. Maintain Aviation Ruling 3/2003 without amendment combined with no changes to AF CSF.
2. Regulate to impose either of the CASA preferred options from DP 1317OS from 2014.
3. Withdraw Aviation Ruling 3/2003 and implement a tailored package of safety enhancements underpinned by a CSF entity Code of Practice endorsed by CASA..

1.6. Recommendations

It is recommended that:

1. Option 3 be implemented immediately.

Specifically, in implementing this option CASA should:

1. Withdraw Aviation Ruling 3/2003 and replace the ruling with individual formal agreements with AF (and each individual CSF charitable entity).
2. Encourage CSF entities to have an external audit of their processes to ensure layered, reproducible defences to mitigate risks in this sector.
3. Recommend requiring that VFR CSF pilots conduct a Flight Review focussed on CSF mission essentials at the 12 month point i.e. between 24 month reviews
4. Develop a Part 61 based AC outlining the earlier recommended topics.
5. Develop an entry and re-currency training package focussing on CSF risks and human factors that CSF pilots are required to complete prior to undertaking CSF operations.
6. Discuss CASA provided Human Factors and Non-Technical Skills seminars focussed on CSF critical areas.
7. Discuss requiring a Fatigue Risk Management System appropriate to CSF operations.
8. Discuss requiring the use of a rostered "duty pilot".
9. Discuss with AF the use of the online VFR Pilot Checklist.
10. Develop an online IFR Pilot Checklist.

Signed:
Name: Scott Watson
Title: Team Leader Fixed Wing and Rotary
Branch: Flight Standards Branch
Date: September 17

Decision by Delegate

The recommended course of action is:

APPROVED / NOT APPROVED

Signed:
Name: Shane Carmody
Title: Director of Aviation Safety

Date: September 17

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Annex A to
SFR FSB D17/251539

Angel Flight Process Map

Australian Government
Civil Aviation Safety Authority

Standard Form of Recommendation (SFR) - FSB

Form 1598 01/2017

1 of 1

69

Australian Government
Civil Aviation Safety Authority

Standard Form of Recommendation (SFR) - FSB

Flight Standards Branch
Aviation Group

Angel Flight Internal Policies

Angel Flight Pilot Pre-flight Checklist

Please confirm that you are current for all aspects of the flight and have:

A current Class 1 OR Class 2 medical	☒
A current licence with rating/s and endorsement/s for the aircraft you will be flying	☒
VFR Flight: A minimum of 5 hours PIC (not PICUS) on type	☐
Aeroplane Flight Review, and/or proficiency check	☒
Carriage of passengers - 90 day recency	☒

Additionally (for IFR Flights) please indicate if you have:

An IFR flight test renewal/proficiency check	☐
For an IFR flight - minimum 10 hours PIC on type	☐

Finally:

Other than the patient's airport of origin and the destination airport please list all airports involved if you were to conduct this AF.	
Other Comments	

Please Remember

Never compromise safety in any way in order to complete a flight. Cancelling a flight is considered a demonstration of good judgment and will never be criticized. Any legs with passengers on board must be flown during daylight. If night current, pilot positioning or return to base may be flown outside of daylight at the pilot's discretion..

Angel Flight Passenger Notification & Acceptance Procedures

Referrer Guidelines Pre-Flight[9]. Prior to a passengers' first flight, Medical Referrers are instructed to make known to passengers the following:

- Under Civil Aviation Safety Authority (CASA) rules, the pilot is responsible for the safety of the flight. Angel Flight will coordinate between pilots and passengers; however responsibility for the flight and the airworthiness of the aircraft rests with the pilot.
- Pilots make final decisions regarding the completion of all flights. A pilot may choose to delay or cancel a flight due to weather, mechanical difficulties, illness or any other reason. If a pilot cancels, Angel Flight will use its best endeavours to arrange an alternative solution; however please be mindful that the passengers may have to make their own arrangements. Angel Flight may arrange an alternative pilot/ aircraft; reserving a seat on a commercial airline (at Angel Flight's expense), arranging overnight accommodation and meals for passengers and pilots; and requesting appointments be rescheduled.

Passenger Guidelines Pre- Flight[10]. Angel Flight documentation signed by all passengers specifically draws to their attention, the following information:

- Passengers are aware that Angel Flight is a charity, not a commercial flying operation, or an aviation organisation of any kind. Because of this, the pilots volunteering to do flights for Angel Flight may not necessarily have the same qualifications and training as commercial pilots. In addition, the aircraft they fly may not necessarily meet the maintenance standards required of commercially operated aircraft. Whilst exceeding the standards required for private flight by Australia's Civil Aviation Safety Authority, the aviation activity will not have the assurance of airline-level safety, nor commercial operation, for example- of those aircraft and pilots regulated by an Air Operation Certificate.
- Passengers are aware that Pilots make the final decisions about their flights. A pilot may delay or cancel a flight because of bad weather or other safety factors. We ask our passengers either to have a back-up plan or to be able to reschedule their appointments. Angel Flight will use its best endeavours to make alternate transport arrangements, however please be mindful that you may still have to make your own arrangements.
- In accordance with Civil Aviation Safety Authority (CASA) rules, the pilots are responsible for the safety of the flight. Angel Flight will coordinate between pilots and passengers; however responsibility for the flight and the airworthiness of the aircraft rests with the pilot.
- All passengers will be asked to sign a Liability Waiver before the day of the flight releasing Angel Flight and its volunteers from liability. If a passenger is under eighteen (18) years of age, a legal guardian will be asked to sign on their behalf.

Pre-Flight Passenger Acknowledgement[11]. When making an Angel Flight request, passengers are required to answer the following questions:

- Aware that travel will be a private flight in a light aircraft?
- Aware that the aircraft and/or the pilot's qualifications will not be the same as the standard of commercial or airline transport?
- Understood and be freely willing to sign the Passenger Guidelines, Waiver and Release of Liability forms?

[9] Angel Flight Request Document July 2015
[10] Angel Flight Passenger Guidelines July 2015

Pre-Flight Passenger Waivers & Release of Liability[12]. Before Angel Flight accepts a passenger for a flight transfer, the passenger is required to sign a waiver and release of liability form intended to be a legally binding document. The form requires the passenger to unconditionally acknowledge and agree inter alia:

(a) I personally and voluntarily accept and assume all risk and responsibility of undertaking the Flight and riding in the Aircraft, including for all harm, trauma, shock and other injury that I may suffer (including personal injury and death) and damage to property irrespective of whether any of the foregoing was foreseeable or not or caused by the negligence of any person (including any of the Released Parties). In particular (and without limiting this release) I acknowledge that such risks may include:
- turbulence, and all other adverse weather and flight conditions;
- (ii) mechanical or equipment malfunctions and failures, including those arising out of negligence;
- (iii) emergency landings;
- (iv) accidents and all other Flight and on ground incidents including all those arising out of Pilot error or resulting from any cause including negligence.

(b) the Released Parties have agreed to provide the Flight at my request and I am riding in the Aircraft voluntarily, of my own free choosing and will after careful consideration of the risks associated with riding in the Aircraft.

(c) the Flight may not be commenced or completed.

(d) I have considered other forms of transportation and, after considering such, I have chosen to ride in the Aircraft.

(e) I am not required to ride in the Aircraft and I do not have a medical condition which otherwise necessitates my riding in the Aircraft.

(f) I understand that the Flight does not constitute a medical flight and the Aircraft is not a charter or ambulance aircraft and is not performing any ambulance or similar function.

(g) I understand that the Aircraft is not equipped with any medical equipment and no medical assistance can be provided to me on the Aircraft.

[12] Angel Flight Request Document July 2015

Australian Government
Civil Aviation Safety Authority

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Annex B to
SFR FSB D17/251539

Description of overseas CSF

United States

The Air Care Alliance (ACA) is an US based group founded in 1990 that acts as an umbrella organisation for volunteer pilot based Public Benefit Flying (PBF) organisations. PBF organisation members use their aircraft to transport needy patients, to assist in disaster relief, to fly environmental support missions, to relocate wild or domestic animals, to provide educational flights for youth, and for many other missions of community and humanitarian support.

The ACA directory covers over 60 CSF style groups including 9 Angel Flight chapters throughout the USA. US Angel flight operations (though substantially similar in structure and nature of operations) have differing pilot experience and qualification requirements (see later in this Annex).

Canada

Hope Air is a registered, charitable organisation that arranges and provides free flights to Canadians who cannot afford the cost of an airline ticket to travel to a medical appointment or specialised medical technologies that usually exist only in larger urban centres. Hope Air offers the following programs or services to flight applicants:

- The Flight Purchase Program where cash donations from donors are used to directly purchase flights on commercial airlines;
- The Commercial Airline Donation Program where Canadian commercial airlines donate seats or flight passes;
- The Volunteer Pilot Program (VPP) where private pilots from across Canada volunteer their time and general aviation aircraft to service communities not well served by commercial airlines; and
- The Business Aviation Program (previously referred to as the Corporate Aviation Program) where eligible corporate aircraft owners donate their aircraft and flight crew to transport the flight applicant on, typically, long-haul routes, where the flight applicant has an immune deficiency and commercial air travel would not be appropriate.

Hope Air arranged over 11,000 free flights in 2016 via a combination of in partnership arrangements with several airline providers, their business aviation program matching empty seats on corporate flights with a child travelling for a medical appointment and the volunteer pilot program. The majority of these flights were via the commercial

airline flight and seat purchase and donation program. Hope Air pilot requirements are specified later in this Annex.

New Zealand

Angel Flight New Zealand (AFNZ) commenced operations in 2011. To date AFNZ have flown approximately 151 missions and operate with 74 registered pilots. AFNZ is funded by private donations from individuals, Rotary, Service Clubs, Companies large and small and deceased estates[13]. These donations pay for:

- A Commercial Flight Fund so if AFNZ do not have a Pilot available they can pay to transport cases by an Airline Flight.
- Limited uniforms for AFNZ Volunteer Earth Angels and Pilots.
- Aeronautical Charts for AFNZ Pilots.
- AFNZ administration costs.

Pilots wishing to volunteer for an Angel Flight NZ "mission" must have at least 250 hours PIC and have a current BFR for a 4 seat (or more) aircraft. Pilots are required to have similar qualifications and experience to Australian AF volunteer pilots (see later in this Annex).

CSF minimum pilot experience requirements – comparison

United States

US Angel flight operations (though substantially similar in structure and nature of operations to Australia) have differing pilot experience and qualification requirements. For example:

- Angel Flight Mid Atlantic requires 500 hrs total / 400 hrs PIC and an Instrument Rating (IR).
- Angel Flight West requires 250 hrs PIC / 75 hrs cross country and an IR is NOT required.
- Angel Flight Oklahoma requires 250 hrs PIC / 25 hrs on each single engine aircraft type / 75 hrs on each multi-engine aircraft type and an IR is required.
- Angel Flight East requires 300 hrs total ("logged") and an IR is required.
- Angel Flight North East requires 500 hrs total / 400 hrs PIC and an IR is required.

All require a minimum of a Private Pilot Licence (PPL) and statuary recency (or greater) and many additionally require the pilot to have completed the FAA WINGS—

[13] http://angelflightnz.co.nz/about-us

Pilot Proficiency Program. The objective of this program is to reduce the number of accidents in General Aviation (GA) by assisting pilots to find educational opportunities designed to help them apply the principles of risk assessment and risk management (RM) to their operations. See Annex C for further details.

In addition to these initiatives the US AOPA – Air Safety Institute has designed a specific online Public Benefit Flying course, which can be accessed through the various US Angel Flight website pilot pages and US Angel Flight pilots are encouraged to complete this course.

Canada

The minimum pilot qualifications required by Hope Air for the Volunteer Pilot Program are as follows:

- Valid Canadian PPL, CPL or ATPL,
- 500 hrs total time,
- 400 hrs PIC,
- 50 hrs in make and model,
- 30 hrs in the past 12 months, and
- Instrument rating is not a pre-requisite.

New Zealand

AFNZ requires similar qualifications and experience to Australian AF volunteer pilots. The AFNZ website states the pilot must have:

1. A minimum of 250 hrs PIC (this would take the average private pilot 3-5 years).
2. A minimum of 50 hrs in the last 12 months and 25 hours in the last six months, unless they have passed a Biannual Flight Review (BFR) in the last 12 months.
3. They must have passed a BFR in the last 24 months. A BFR is conducted by a CAA approved instructor who must carry out the CAA BFR List of Prescribed tasks to the satisfaction of the instructor.
4. Pilots must adhere to all CAA regulations at all times.
5. The overriding rule on every flight is 'safety above everything else'. A pilot may need to cancel a flight right up to the time of departure if they believe an aircraft or weather issue will make the flight unsafe. Cancellation of a flight for any reason will be seen as a demonstration of good judgement and will never be criticized.
6. Before pilots undertake any AFNZ they will be required to confirm that they hold:

a. Current NZ PPL or CPL or ATPL,
b. Current Medical Certificate, and
c. Current Biannual Flight Review (BFR).

No other experience or qualification requirements to cope with potential risks of CSF operations are specified by AFNZ however they have a very direct passenger waiver warning on their website which outlines:

> *"light aircraft flying is generally a safe activity but there are risks in flying just like there are in road transport. Should you not be prepared to give up any and all of your rights to recover any losses for personal injury or death arising from your flight, however caused, you should travel by some other means".*

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Annex C to
SFR FSB D17/251539

ICAO Standards (similarities / differences / compliances)

Annex 6 – Operation of Aircraft – Part I applies to aeroplanes engaged in international air transport operations and Australia generally, and where applicable, also applies these standards to domestic air transport operations. Currently, Australia regulations do not specify what is considered "air transport". However, future CASR is drafted to combine current aerial work (medical transport), charter and regular passenger transport operations under air transport operations. However, CASA Aviation Ruling 3/2003 has excluded CSF from being considered a commercial operation under CAR 206 and therefore CSF could be assumed to be excluded from air transport operations.

Annex 6 – Operation of Aircraft – Part II applies to aeroplanes engaged in general aviation operations and would apply where such standards have been incorporated into Australia legislation. No specific ICAO standard is relevant to this policy determination.

Foreign NAA Policies (FAA / EASA / additional as applicable)

United States Federal Aviation Regulations (FAR)

FAR 119.1 outlines whether an operator requires an AOC. US CSF operations fall into the area of common carriage titled "private carriage" (see below) and therefore do not require certification under FAR Part 119 and are operated as non-certified operations under FAR Part 91.

FAR 119.1 – Applicability:

This part applies to each person operating or intending to operate civil aircraft

(1) As an air carrier or commercial operator, or both, in air commerce; or
(2) When common carriage is not involved, in operations of U.S.-registered civil airplanes with a seat configuration of 20 or more passengers, or a maximum payload capacity of 6,000 pounds or more.

When *common carriage* is not involved or operations not involving *common carriage* means any of the following:

(1) Non-common carriage.
(2) Operations in which persons or cargo are transported without compensation or hire.
(3) Operations not involving the transportation of persons or cargo.
(4) Private carriage.

Non-common carriage is defined as meaning "an aircraft operation for compensation or hire that does not involve a holding out to others".

FAR 61.113(c) provisions (see below) require US CSF operations to be issued an exemption to allow volunteer pilots to be reimbursed fuel costs incurred whilst conducting charitable flights for medical purposes. These exemptions are typically issued to the charitable entity (example below – Angel Flight New England) to allow "it's" volunteer pilots to be reimbursed for fuel cost, not the pilot themselves.

The issue of these FAR Part 61.113(c) exemptions allows the FAA to add some quite stringent conditions to the operation of charitable medical flights in the interests of managing the risk of the operations and enhancing their safety (see Annex A).

FAR 61.113 — Private pilot privileges and limitations:

Pilot in command where Part 61.113 outlines:

(a) *Except as provided in paragraphs (b) through (h) of this section, no person who holds a private pilot certificate may act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may that person, for compensation or hire, act as pilot in command of an aircraft.*

and

(c) *A private pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees*

These provisions therefore require an exemption to be issued to FAR Part 61.113 to allow volunteer pilots to be reimbursed fuel costs incurred whilst conducting charitable flights for medical purposes.

United States Sample Exemption

Angel Flight NE FAA Fuel Waiver Extension 10360C

This exemption terminates on June 30, 2017 unless sooner superseded or rescinded.
It supersedes Exemption No. 10360A.

1. - 3. Angel Flight NE Requirements

PILOT REQUIREMENTS: Conditions and Limitations

4. All pilots operating under the terms of this exemption must possess the following certificates, qualifications and aeronautical experience---

a. An instrument rating or ATP certificate that is appropriate to the aircraft being flown;

b. A minimum total time of 500 hours, with no less than 400 hours as PIC, and a minimum of 50 hours in the specific make and model of the aircraft being flown;
c. A minimum of 50 hours as PIC must have been logged within the preceding 12 calendar months immediately preceding the month of the flight;
d. A minimum of 12 hours flown and logged within the preceding 3 calendar months prior to the month of the flight. In lieu of this requirement, a pilot may have logged 2 hours of flight training with a certified flight instructor within the preceding 3 calendar months prior to the month of the flight;
e. A second - class medical certificate (per FAA Part 61.23(d)(2)(i) and 61.2);
f. Within the preceding 12 calendar months, an instrument proficiency check (IPC) meeting the requirements of FAA Part 61.57(d). The IPC must be conducted in accordance with the Instrument Rating Practical Test Standards. This requirement can be substituted by a FAA practical test for an ATP certificate or instrument rating.
g. A current flight review (per FAA Part 61.56(a)) in the same aircraft category, class and type (if a type rating is required) being flown;
h. Meets the recent flight experience requirements of FAA Part 61.57(c) or(d), as appropriate, in the same aircraft category, class, and type (if a type rating is required) being flown;
i. For all operations under this exemption, the pilots must meet the recent flight experience requirements for night operations (per FAA Part 61.57 (b) in an aircraft of the same category, class, and type (if a type rating is required).

5. All operations under this exemption must be in compliance with the following flight duty, rest, and flight time limitations (a duty day starts when the pilot arrives at the airport and begins preparation for the flight and terminates upon completion of the post flight of the aircraft):

a. No pilot may fly more than 8 hours of flight time (per FAA 61.1) within any 24-consecutive - hour duty day period;
b. No pilot may perform a duty day in excess of 12 consecutive hours; and
c. Once the pilot has performed 12 consecutive hours of duty, the pilot must rest a period of at least 12 hours before conducting another flight.

US FAA AC 51-91J – WINGS Pilot Proficiency Program

Excerpt (https://www.faasafety.gov/WINGS/pub/learn_more.aspx):

1. PURPOSE. The objective of the WINGS—Pilot Proficiency Program is to reduce the number of accidents in General Aviation (GA) by assisting airmen to find educational opportunities designed to help them apply the principles of risk assessment and risk management (RM). When properly applied, these principles will help mitigate accident causal factors associated with common pilot errors, lack of proficiency, and faulty knowledge. The Federal Aviation Administration's (FAA) purpose is to encourage the majority of GA pilots, through WINGS, to engage in ongoing, targeted flying tasks and learning activities keyed to identified risks and which are designed to mitigate those risks. The FAA continually collects and assesses its databases to identify the risks associated with GA flying and incorporates risk mitigation strategies into initial and ongoing pilot education.

3. BACKGROUND. To address accident causal factors associated with common pilot errors, lack of proficiency, and faulty knowledge, the FAA developed a voluntary pilot education and proficiency program (i.e., WINGS) and made it available via the Internet to all pilots at all certificate levels. The WINGS Program consists of learning activities and tasks selected to address the documented causal factors of aircraft accidents. Accomplishment of a

phase of WINGS requires the participating pilot to demonstrate proficiency in specified knowledge and skill tasks. The FAA encourages pilots to participate in ongoing aviation educational learning and skill-building events with an instructor. The WINGS Program provides the opportunity, the structure, and the recognition for pilots to continue their aviation education. This ongoing effort fosters new learning, review, and flight proficiency in the areas of operation found in current practical test standards (PTS). The FAA further encourages pilots to maintain proficiency by using the WINGS Program. To this end, the WINGS Program has three levels of participation: Basic WINGS, Advanced WINGS, and Master WINGS. Within each level, a pilot may earn phases of WINGS as explained below and at www.FAASafety.gov.

Transport Canada

Decision No. 390-A-2013 (Decision) determined that an "air service" is one that is:

1. *offered and made available to the public;*
2. *provided by means of an aircraft;*
3. *provided pursuant to a contract or arrangement for the transportation of passengers or goods; and*
4. *offered for consideration.*

The Decision informed the air industry of the criteria the Agency would apply, going forward, to determine what constitutes an "air service" within the meaning of subsection 55(1) of the Canada Transportation Act (CTA).

Initially the Decision applied to CSF style flights and the Agency required them to be licenced as an air service within the meaning of subsection 55(1) of the CTA.

On January 15, 2014, a CSF operator "Hope Air" requested that the Agency review this matter again based on the four criteria identified in the Decision. As a result of this review the Agency found that Hope Air's services, including its Volunteer Pilot Program and Business Aviation Program, were not being provided pursuant to a contract or arrangement for the transportation of passengers or goods for consideration, thus not meeting all 4 criteria and removed the need for the licence for CSF style operations.

New Zealand Civil Aviation Regulations

Under NZ regulation an ***Air operation*** means an air transport operation, a commercial transport operation, or an adventure aviation operation:

CAR 119.5 Requirement for certificate:

(a) A person having operational responsibility for an air operation must hold, and comply with, an air operator certificate issued under this Part.

An *Air transport operation* means an operation for the carriage of passengers or goods by air for hire or reward except—

(1) a commercial transport operation:
(2) an adventure aviation operation:
(3)....
(4)....
(5).....

A *Commercial transport operation* means an operation for the carriage of passengers or goods by air for hire or reward—

(1) where—
(i) each passenger is performing, or undergoing training to perform, a task or duty on the operation; or
(ii) the passengers or goods are carried to or from a remote aerodrome—
(2).....

The presumption is that AFNZ operations are not conducted for hire or reward despite landing fees being waived at a number of aerodromes for AFNZ operations and therefore fall out of the requirement for certification under NZ CAR Part 119, however no NZ CAA determinations or rulings appear to address CSF type operations to confirm this is their policy.

Safety Studies / Formal Risk Assessments (Flight Safety Foundation / Foreign NAA / CASA / military)

ATSB Aviation Research and Analysis Report B2006/0002

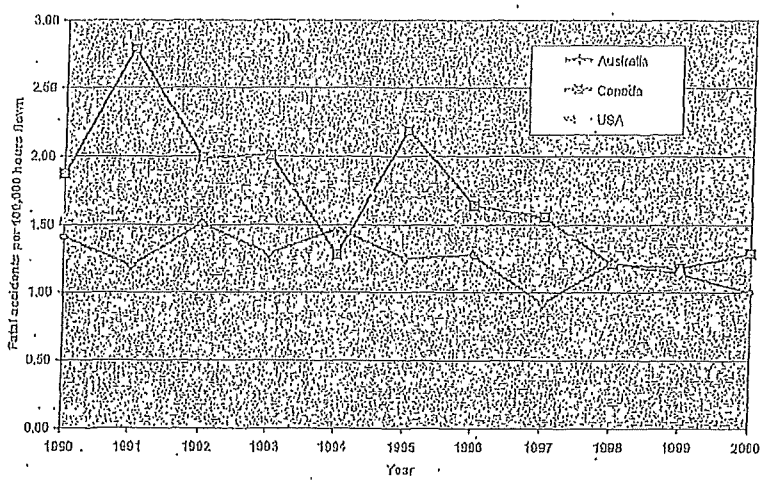


Figure 1 – General Aviation fatal accidents per 100,000 hours flown

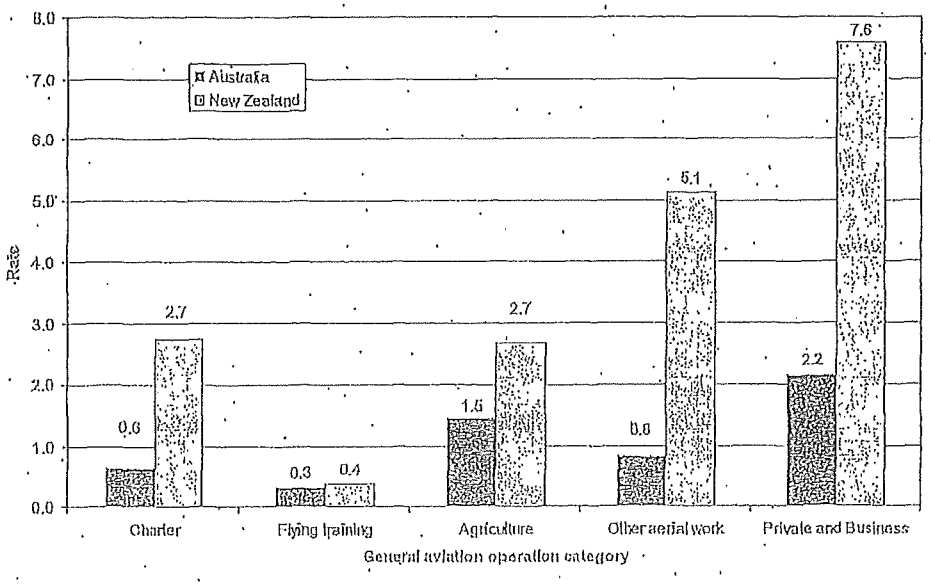
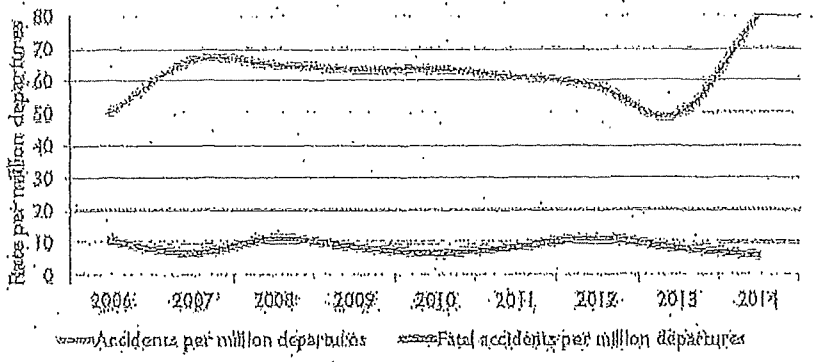


Figure 2 – General Aviation average annual fatal accidents by operation type (1995-2004) per 100,000 hours flown

ATSB Accident Statistics 2006-2014

Figure 15: General aviation accident and fatal accident rate (per million departures, VH registered aircraft only), 2006 to 2014



Private/business/sports aviation

Private/business and sports aviation generally describes aircraft that are being operated for pleasure or recreation, or are being used for a business or professional need. It is often difficult to distinguish between business and private operations, so they are aggregated for the purposes of this report.

It is important to note that only aircraft conducting these operations that are registered on the Australian civil aircraft (VH-) register are included in this section. Sports and recreational aircraft that are registered under RAAO schemes are considered separately in the *Recreational* section of this report.

Private/business and sports aviation operations have the greatest number of reported accidents (65) of any GA operation type in 2015. However, this operation types had the equal second lowest number of fatalities (8 from 6 accidents) in the last 10 years.

In 2014, the accident rate – per hour flown – for private/business and sports aviation was significantly higher than for any of the previous nine years.

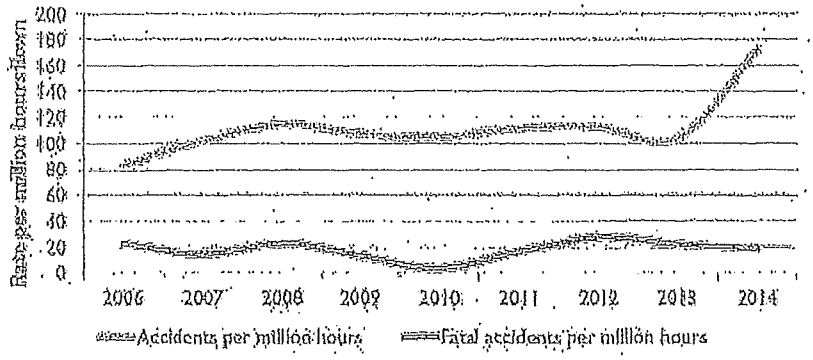
The most common occurrences reported to the ATSB in 2015 concerning private/business and sports aircraft were engine failure or malfunction, landing gear/indication and collision with terrain. The most common accidents were collision with terrain, and the most common serious incidents were near collisions and engine failure or malfunction.

The number of occurrences in the private/business operation type is significantly greater than those of sports aviation.

Table 18: Private/business/sports aviation (VH-registered) aircraft occurrences (including gliding), 2006 to 2015

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of aircraft involved										
Incidents	205	212	185	201	160	191	168	136	187	172
Serious incidents	15	24	17	21	21	38	43	45	28	35
Serious injury accidents	5	5	9	6	8	7	3	4	9	3
Fatal accidents	15	9	13	8	2	9	15	11	9	6
Total accidents	55	65	65	65	59	61	61	52	62	65
Number of people involved										
Serious injuries	10	7	14	7	10	12	6	6	14	5
Fatalities	25	18	23	8	3	17	23	20	14	8
Rate of aircraft involved										
Accidents per million hours	83.4	102.3	114.7	107.7	105.0	112.2	112.8	104.1	172.8	N/A
Fatal accidents per million hours	22.7	14.2	22.9	13.3	3.6	16.6	27.7	22.0	19.0	N/A

Figure 18: Accident rate for aircraft (VH- registered) involved in private/business/sport (including gliding) (per million hours flown), 2006 to 2014



Australian Government
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Flight Standards Branch
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Accident or Incident Investigations (ATSB / NTSB or similar)

ATSB Transport Safety Report AO-2011-100 – 3 December 2013

VFR flight into dark night conditions and loss of control involving Piper PA-28-180, VH-POJ 31 km north of Horsham Airport

What happened:

On 15 August 2011, the pilot of a Piper PA-28-180 Cherokee aircraft, registered VH-POJ, was conducting a private flight transporting two passengers from Essendon to Nhill, Victoria under the visual flight rules (VFR). The flight was arranged by the charity Angel Flight to return the passengers to their home location after medical treatment in Melbourne. Global Positioning System data recovered from the aircraft indicated that when about 52 km from Nhill, the aircraft conducted a series of manoeuvres followed by a descending right turn. The aircraft subsequently impacted the ground at 1820 Eastern Standard Time, fatally injuring the pilot and one of the passengers. The second passenger later died in hospital as a result of complications from injuries sustained in the accident.

What the ATSB found:

The ATSB found that the pilot landed at Bendigo and accessed a weather forecast before continuing towards Nhill. After recommencing the flight, the pilot probably encountered reduced visibility conditions approaching Nhill due to low cloud, rain and diminishing daylight, leading to disorientation, loss of control and impact with terrain. One of the passengers was probably not wearing a seatbelt at the time of the accident.

The ATSB also established that flights are permitted under the visual flight rules at night (night VFR) in conditions where there are no external visual cues for pilots. In addition, pilots conducting such operations are not required to maintain or periodically demonstrate their ability to maintain aircraft control with reference solely to flight instruments.

US NTSB Safety Recommendation dated 9 Jun 10 – A-10-102 through -104

Excerpt:

Background

The National Transportation Safety Board (NTSB) is an independent federal agency charged by Congress with investigating transportation accidents, determining their probable cause, and making recommendations to prevent similar accidents from occurring. We are providing the following information to urge The Air Care Alliance (ACA) to take action on the safety recommendations

in this letter. The NTSB is vitally interested in these recommendations because they are designed to prevent accidents and save lives.

These recommendations address verification of pilot currency; passenger awareness of operating standards; and the need for dissemination of safety guidance, information about best practices, and training material for pilots and organizations providing charitable medical transport flights. These recommendations are derived from the NTSB's investigations of four accidents that killed eight people and seriously injured two between September 26, 2007, and August 12, 2008; each involved flights providing charitable medical transportation. These recommendations are supported by the evidence collected and the analysis performed during each investigation; supporting information is discussed below. The NTSB would appreciate an initial response from you within 90 days addressing the actions you have taken or intend to take to implement our recommendations.

Recommendations

Require voluntary pilot organizations to verify pilot currency before every flight. (A-10-102)

Require that voluntary pilot organizations inform passengers, at the time of inquiry about a flight, that the charitable medical flight would not be conducted under the same standards that apply to a commercial flight (such as under 14 *Code of Federal Regulations* Part 121 or Part 135). (A-10-103)

In conjunction with your affiliate organizations and other charitable medical transport organizations, develop, disseminate, and require all voluntary pilot organizations to implement written safety guidance, best practices, and training material for volunteer pilots who operate charitable patient transport flights under 14 *Code of Federal Regulations* Part 91. The information should address, at a minimum, aeronautical decision-making; proper preflight planning; pilot qualification, training, and currency; and self-induced pressure. (A-10-104)

AS Government / Departmental Policies

CASA Discussion Paper DP1317OS

Discussion Paper DP1317OS was issued as part of this project on 18 Aug 14 and comments closed on 16 Oct 14. The DP outlined ten potential options as follows:

Administrative options

1. Option 1 – do nothing
2. Option 2 – status quo with passenger safety briefing / acknowledgement
3. Option 3 – additional pilot training and checking requirements

4. Option 4 – implementation of a volunteer community service pilot registration system
5. Option 5 – use of an Approved Self-Administering Aviation Organisation (ASAAO)
6. Option 6 – conduct of operations under an AOC.

Operational options

7. Option 7 – flight-crew licencing requirements
8. Option 8 – aircraft operational limitations
9. Option 9 – aircraft certification and maintenance requirements.
10. Option 10 – public education program

CASA's preferred option was for the introduction of a CSF ASAAO (option 5) however if this did not eventuate then the secondary preferred option was the introduction of a pilot registration system with specific pilot experience and training requirements, operational limitations and minimum aircraft standards (a combination of options 3, 4, 7, 8 and 9).

ATSB submission to CASA DP1317OS

The Australian Transport Safety Bureau (ATSB) supports the Civil Aviation Safety Authority (CASA) review of voluntary community service flights. While not commenting directly on the proposed options, the ATSB offers the following information that may assist CASA to assess the level of regulation that is appropriate for such flights.

As identified by CASA in discussion paper DP1317OS, the variation in pilot experience/qualification and the aircraft that are used for voluntary community service flights represent a potential safety issue due to the corresponding variation in associated safety risk. The ATSB investigation of a fatal accident that was operating as an Angel Flight (AO-2011-100) detailed the following demographic information for pilots registered to conduct Angel Flight 'missions':

> *As at June 2013, Angel Flight had coordinated about 14,800 'missions' and had 2,600 pilots registered for consideration to conduct such flights of which 587 pilots had actually flown missions. Demographic information provided by Angel Flight identified that the average PIC hours was about 2,400 with 64 per cent of pilots holding an instrument rating and 16 per cent holding a night VFR rating. About 61 per cent of pilots held a private pilot licence with the remainder holding at least a commercial pilot licence.*

While the ATSB was unable to ascertain the age demographic of Australian Angel Flight pilots, consideration of four overseas accidents that involved flights that were

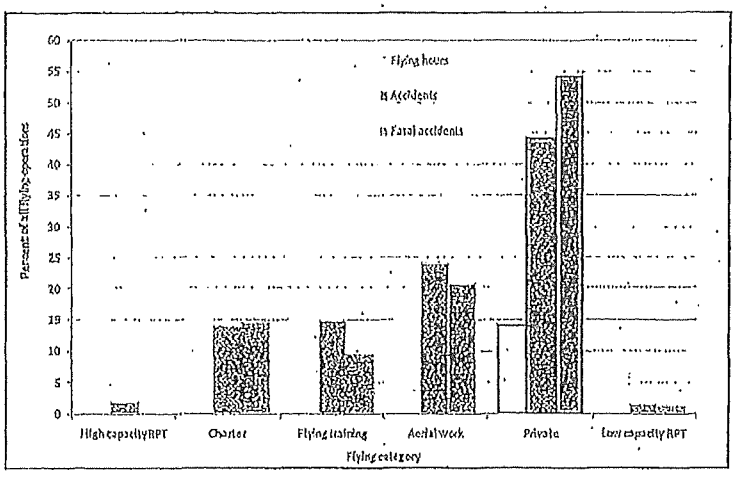
organised by various Angel Flight agencies identified that the age range of the pilots was from 57 to 81 years old.

A research article by the US National Transportation Safety Board published in 2007 examined general aviation accidents in degraded visibility and identified several variables that were significantly associated with accident involvement. These included:

- pilot age at the time of the accident (with the highest proportion of accidents involving pilots over 60)
- pilot age at certification (with pilots certified at or before age 25 having the lowest accident involvement)
- the pilot not holding an instrument rating increased the accident risk by nearly five times
- commercial pilots had a lower accident involvement than student or private pilots
- private flights had a higher accident involvement than flights conducted for commercial purposes

During the course of the investigation, the ATSB became aware of the (United States) Aircraft Owners and Pilots Association training course 'Public Benefit Flying: Balancing Safety and Compassion'. This initiative identified that pilots conducting volunteer humanitarian flights may be exposed to factors that are detrimental to safe decision-making and provided strategies to assist pilots in dealing with these.

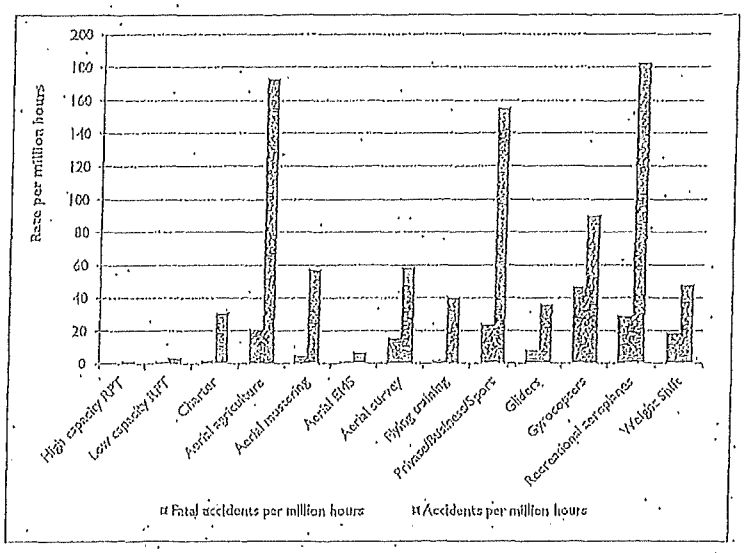
Investigation report AO-2011-100 also detailed the relative levels of safety between commercial and non-commercial flights. Specifically, the following graph compares the accident trends in private and other operations in Australia between 1999 and 2008:



Source: ATSB

As can be seen, the largest proportion of accidents occurred during private flights despite such flights representing the second lowest number of flying hours.

More recent analysis by the ATSB, summarised in the following graph, considered the rate of accidents and fatal accidents (Australian-registered aircraft only) by operation type between 2004 and 2012.[14] That analysis identified that the accident rate for private flights is significantly higher than for almost all other types of operation, and comparable to aerial agriculture and recreational aeroplanes. The fatal accident rate for private flights was similarly high when compared with other operation types, with only gyrocopters and recreational aeroplanes having a higher fatal accident rate.



Source: ATSB

The ATSB has also conducted analysis of the relative level of safety between transport by air and road. That analysis indicates that the accident rate for private flights is similar to that of motorcycle accidents, which is itself higher than the motor vehicles accident rate.

In the light of the possibility canvassed in discussion paper DP1317OS that amateur-built aircraft could be used for voluntary community service flights, ATSB research

[14] Activity data for each operation type is provided by the Bureau of Infrastructure, Transport and Regional Economics (BITRE), except for the following where information on hours flown and number of departures was not collected between 2004 and 2012: Fire control, Other/unknown GA, Sport aviation, Foreign-registered GA. Accident and fatal accident rates are based on those accidents from 2004 to 2012 only, as activity data was not yet available for 2013 at the time of writing. Recreational aviation accident rates are based on accidents from 2004 to 2011, and gliding accident rates are based on 2005 to 2012, as data was only available for those years at the time of writing. Private/Business/Sport excludes gliding.

reviewing the relative safety of amateur-built aircraft compared to factory-built identified that:

> *Amateur-built aircraft had an accident rate three times higher than comparable factory-built certified aircraft conducting similar flight operations between 1988 and 2010. The fatal and serious injury accident rate was over five times higher in amateur-built aircraft, in particular due to relatively more serious injury accidents.*
>
> *The pilots of amateur-built aircraft involved in accidents were significantly more experienced overall than factory-built aircraft accident pilots. However, they were significantly less experienced on the aircraft type that they were flying at the time of the accident.*

In conclusion, the varied circumstances under which voluntary community service flights can be undertaken lead to a resulting variation in the associated safety risk. The ATSB believes that, having regard to the community service objectives of such flights, passengers contemplating such non-commercial flights should be informed of the likely risk in order to allow them to make an informed decision on whether to participate.

Australian Government
Civil Aviation Safety Authority

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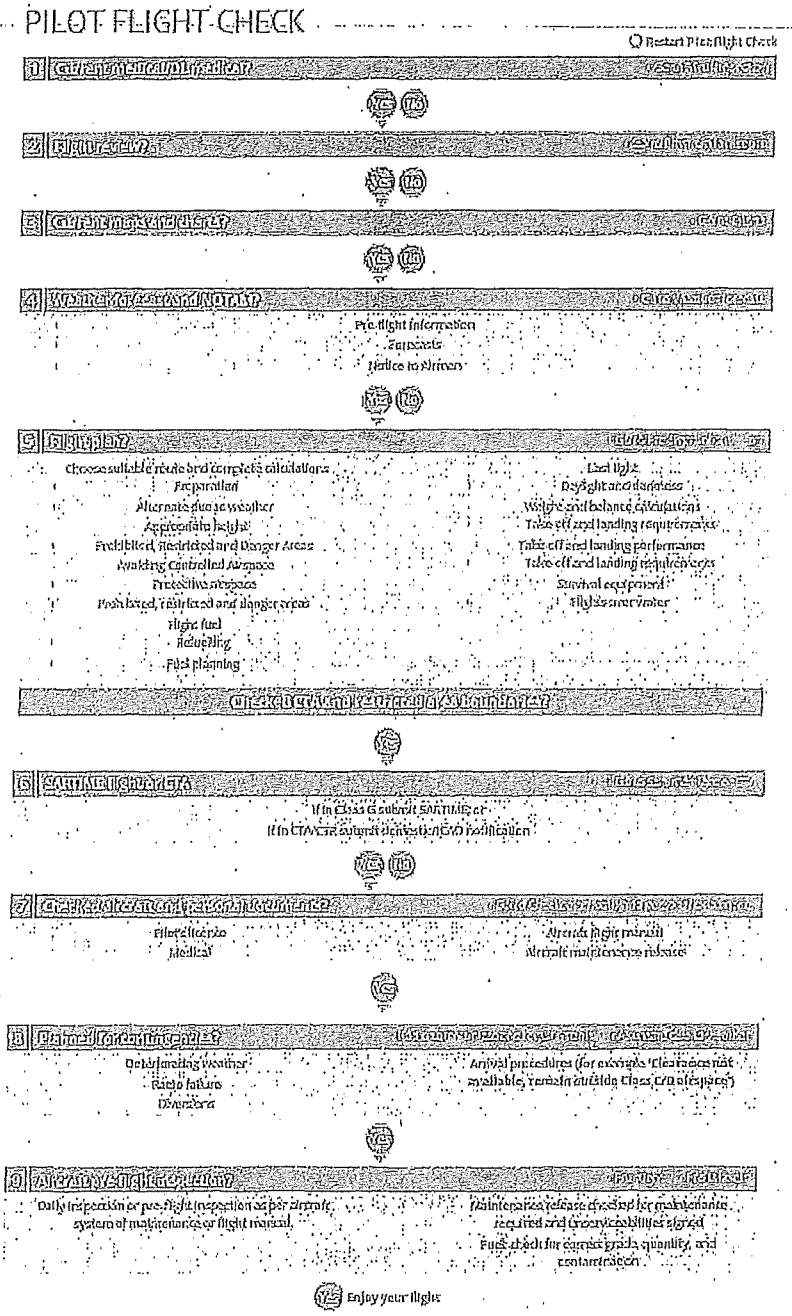
CASA online VFR Flight Guide – Pilots Checklist

Available at: vfrg.casa.gov.au



Australian Government
Civil Aviation Safety Authority

Standard Form of Recommendation (SFR) - FSB

Flight Standards Branch
Aviation Group

AS Legislation or Regulation (CASA Instruments / Criminal Code or additional)

Regulation 2(7) and 2(7A) of the *Civil Aviation Regulations 1988*

(7) For the purposes of these Regulations:

(d) an aircraft that is flying or operating for the purpose of, or in the course of:
- (i) the personal transportation of the owner of the aircraft;
- (ii) aerial spotting where no remuneration is received by the pilot or the owner of the aircraft or by any person or organisation on whose behalf the spotting is conducted;
- (iii) agricultural operations on land owned and occupied by the owner of the aircraft;
- (iv) aerial photography where no remuneration is received by the pilot or the owner of the aircraft or by any person or organisation on whose behalf the photography is conducted;
- (v) the carriage of persons or the carriage of goods without a charge for the carriage being made other than the carriage, for the purposes of trade, of goods being the property of the pilot, the owner or the hirer of the aircraft;
- (vi) the carriage of persons in accordance with subregulation (7A);
- (vi) the carriage of goods otherwise than for the purposes of trade;
- (vii) flight training, other than the following:
  - (A) Part 141 flight training (within the meaning of regulation 141.015 of CASR);
  - (B) Part 142 flight training (within the meaning of regulation 142.015 of CASR);
  - (C) balloon flying training (within the meaning of subregulation 5.01(1)) for the grant of a balloon flight crew licence or rating; or
- (viii) any other activity of a kind substantially similar to any of those specified in subparagraphs (i) to (vi) (inclusive);

shall be taken to be employed in private operations.

(7A) An aircraft that carries persons on a flight otherwise than in accordance with a fixed schedule between terminals, is employed in a private operation if:
- (a) public notice of the flight has not been given by any form of public advertisement or announcement; and
- (b) the number of persons on the flight, including the operating crew, does not exceed 6; and
- (c) no payment is made for the services of the operating crew; and
- (d) the persons on the flight, including the operating crew, share equally in the costs of the flight; and
- (e) no payment is required for a person on the flight other than a payment under paragraph (d).

Regulation 206 of the *Civil Aviation Regulations 1988*

206 Commercial purposes (Act, s 27(9))

(b) charter purposes, being purposes of the following kinds:

(i) the carriage of passengers or cargo for hire or reward to or from any place, other than carriage in accordance with fixed schedules to and from fixed terminals or carriage for an operation mentioned in subregulation 262AM(7) or under a permission in force under subregulation 317(1);

(ii) the carriage, in accordance with fixed schedules to and from fixed terminals, of passengers or cargo or passengers and cargo in circumstances in which the accommodation in the aircraft is not available for use by persons generally;

Regulation 61.505 of the *Civil Aviation Safety Regulations 1998*

61.505 Privileges of private pilot licences

Subject to Subpart 61.E and regulation 61.510, the holder of a private pilot licence is authorised to pilot an aircraft as pilot in command or co-pilot if:

(a) the aircraft is engaged in a private operation; or

(b) the holder is receiving flight training.

Note 1: Subpart 61.E sets out certain limitations that apply to all pilot licences, and ratings and endorsements on pilot licences.

Note 2: The holder of a private pilot licence is also authorised to taxi an aircraft in certain circumstances: see regulation 61.430.

Note 3: The holder of a private pilot licence is also authorised to transmit on a radio frequency of a kind used for the purpose of ensuring the safety of air navigation: see regulation 61.435.

CASA Aviation Ruling 3/2003 – relevant extract

Ruling

6 Subject to this ruling a person may conduct a charitable operation without holding an AOC.

7 A person wishing to rely on this ruling should make their own enquiries to ensure that an entity is currently endorsed as a 'deductible gift recipient' for the purposes of the definition of charitable entity (see definition in paragraph 13 below).

8 A charitable operation can make a profit where those profits are donated to the charitable entity. It is acceptable for the operator to recoup the operator's genuine costs and to donate only the profits of the charitable operation.

9 Subject to this ruling, CASA is not concerned with the form of benefit conferred on the charitable entity as a result of the charitable operation.

10 If a charitable operation is also conducted partly for a commercial purpose prescribed by CAR 206 (ie the operation has more than 1 purpose), it must be conducted under the authority of an AOC. This conclusion applies even if the operation is conducted primarily as a charitable operation and the CAR 206 commercial purpose is only a subsidiary purpose.

11 Situations in which a charitable operation may also be for a commercial purpose include, but are not limited to:

11.1 the operator donates some of the profits of the operation to a charitable entity and keeps the rest;

11.2 the charitable operation is conducted partially for the purpose of generating publicity for a person engaged in commerce (whether the operator or some other person).

12 There may be circumstances when a charitable operation generating publicity for a person engaged in commerce will not be for a 'commercial purpose'. CASA will examine submissions that a particular proposed charitable operation does not need to be conducted under an AOC even though it will generate publicity for a person engaged in commerce.

Regulatory Impact – Cost (Monetary / Time / Resources)

Impact on CSF

Option 1 – Nil.

Option 2 – Considerable monetary, cost and resource impacts due to required investment to achieve ASAAO (CASR Part 149 now) status.

Option 3 – Medium resource impost as AF pilots would require additional training, potentially reducing the utility of the service being provided due to pilots withdrawing themselves from the available pool. Minor imposition of monetary cost and time involved in changing internal AF pilot procedures to utilise the CASA online VFR and IFR Pilot Checklists. Slightly greater imposition of time and resources to setup a "duty pilot" system.

Impact on CASA

Option 1 – Negative publicity from elements of the media seeking to highlight government inaction on a safety issue. Likely to occur when the ATSB investigation report is released.

Option 2 – Highly significant negative political outcomes due to the perception that CASA is over-regulating what is perceived as an "essential service". Highly likely to synergise with existing themes regarding CASA over-regulation of the GA sector. Development of an ASAAO is unlikely due to the cost and therefore the CSF service provision could easily fail with the likely result being a politically induced retreat by CASA from this policy position.

Option 3 – Minor imposition of resources to develop an online IFR Pilot Checklist. Moderate resource cost involved in the development of a formal agreement between CASA and CSF charitable entities. Moderate resource cost involved in the development of a Part 61 based AC. Current constrained specialist FSB resources – suggest outsourcing the developing of this AC to a consultancy. Moderate ongoing cost in delivering CSF pilot training. Constrained CASA specialist ASA resources – suggest expanding the delivery of this training to Part 141 and Part 142 operators..

Benefits (Safety / Sector of economy / Public interest / Social / Environmental)

Option 1 – Nil. Continued potentially lower level of safety than GA sector. Likely positive public relations due to lack of perceived CASA over-regulation.

Option 2 – Significant safety improvements either through an ASAAO or enhanced pilot training BUT potential negative effects are the weakening or failure of the CSF service.

Option 3 – Improved safety at minimal cost to CSF charitable entities.

Compliance Implementation Methodology (CASA / Operators / affected agencies [ATSB / Airservices Australia / BoM)

Option 1 – Nil.

Option 2 – Regulation, additional licensing or pilot CSF registration requirements.

Option 3 – Any of either a CSF Code of Practice, Letter of Agreement between CASA and CSF charitable entities or the modification of Aviation Ruling 3/2003 into a conditions based general CASR Part 11 Exemption. Mandated additional training delivered by CASA or approved operators (Part 141 / 142) and supported by significant guidance material.

Stakeholder Consultation (if required)

Significant.

Considerable internal and external policy communication and education will be needed. Coordination across multiple CASA branches will be required in an environment of existing high workload (regulatory reform, ICAO).

CM-16

Australian Government
Civil Aviation Safety Authority

Standard Form of Recommendation (SFR)
Flight Standards Branch

Information

To:	Christopher Monahan
Title:	Executive Manager National Operations and Standards Division
Through:	Roger Crosthwaite
Title:	A/Manager Flight Standards Branch
Recommended By:	Scott Watson
Title:	Section Manager Flight Operations Standards
Issue Type	Legislative Instrument
Subject:	Policy recommendation – Community Service Flights
File:	D18/627009

12/19 note SFR was prepared in Dec 2018 and used for the purpose of the draft instrument and consultation.

Details

Issue

Community Service Flight (CSF) operations are non-emergency flights that primarily transport people to specialist medical treatment and are coordinated by charitable organisations. These flights are conducted by volunteer pilots under conditions that can sometimes be challenging. They are not, however, conducted under the safety umbrella of an AOC holder's risk identification program. There are currently no mandated minimum qualification or experience requirements for Australian CSF pilots beyond those that apply to private pilots.

Since 2011, there have been two CSF accidents resulting in six fatalities. CASA is also aware of multiple accidents and fatalities involving similar operations in the USA.

Between the 2011 and 2017 accidents, CASA commenced project OS 13/25 to investigate potential safety risks associated with CSF operations and balance these risks with the social needs and benefits of CSF activities, and develop standards. A discussion paper[1] that was published in August 2014 seeking comment on 10 options received significant opposition. Following this feedback, CASA indicated it would not take any immediate action; however, it would monitor the sector and implement actions in the future if necessary.

Following the 2017 accident, CASA engaged with the relevant charitable organisations to encourage the sector to implement voluntary safety enhancements. While some actions have been taken by the sector, CASA considers it is appropriate to establish a regulatory baseline that provides clarity regarding an appropriate minimum safety standard.

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[1] DP 1317OS: *Safety standards for flights conducted on a voluntary basis carrying people in small aircraft for the purpose of facilitating access to non-emergency medical and health services (2014)*

Executive Summary

The main object of the *Civil Aviation Act 1988* (the Act) is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with emphasis on preventing aviation accidents and incidents. To accomplish CASA's function of conducting the safety regulation of civil air operations in Australia's territory, one of the methods outlined in the Act is for CASA to conduct regular reviews of the system of civil aviation safety to identify safety-related trends and risk factors to improve the system.

Achieving an acceptable level of safety for the CSF sector using existing measures is problematic given the current operating and oversight framework. It is recommended that CASA introduce minimum CSF pilot experience, licensing and medical requirements, require flights at night to be conducted using instrument instead of visual procedures and require slightly enhanced aircraft maintenance requirements in line with other operations within Australia involving similar participants.

The recommended actions are proportionate when compared to other uncertificated operations[2] within Australia and similar foreign requirements.

Background (current policy)

The carriage of passengers for hire or reward and not in accordance with fixed schedules – except in circumstances tightly defined by regulation – s classified as a charter operation and requires the operator to hold an AOC (refer to Attachment A for a copy of regulation 206 of Civil Aviation Regulation 1988).

CASA Aviation Ruling 3/2003 determines a person may conduct certain passenger carrying operations for hire or reward without holding an AOC. Legal and Regulatory Affairs Division has advised FSB that this ruling is not applicable to CSF as the person conducting the CSF (the pilot) is not carrying out the operation for the benefit of a charitable entity but instead for the benefit of a passenger being carried.

It is presumed that the CSF sector has interpreted ruling 3/2003 as providing that, although certain rewards are sometimes received by the PIC, the PIC of a CSF is conducting a charitable operation and not a charter operation and that the CSF is a private operation. For a flight to be considered a private operation, two of the requirements that must be met are there must be no charge for the carriage of persons (CAR 2((d)(v) – annex A) and all persons on the flight, including the pilot must share equally in the flight costs (CAR 2(7A)(d) – annex A).

Reg 61.505 of CASR 1998 limits the holder of a Private Pilot Licence (PPL) to the conduct of private operations or an operation where the licence holder is receiving flying training – refer to Attachment A.

[2] The requirements for jump pilots undertaking training or tandem jump descents with participants that are not fully informed.

CAO 48.1 Instrument 2013 does not prescribe any fatigue or duty limits for private operations.

Discussion Paper DP1317OS was issued on 18 Aug 2014 as part of Project OS 13/25 (Safety standards for CSF operations conducted on a voluntary basis – approved on 25 Nov 13) with consultation ending on 16 Oct 2014. The DP outlined ten options (annex A). CASA's preferred option was the introduction of a CSF Approved Self-administering Aviation Organisation (ASAO) (option 5) and the secondary preference was the introduction of a pilot registration system with specific pilot experience and training requirements, operational limitations and minimum aircraft standards (a combination of options 3, 4, 7, 8 and 9). There was opposition to the DP from multiple parties. Following the consultation CASA advised (D14/471564) that no further action would be taken but CASA would continue to evaluate the necessity for action in the future.

Discussion – outlining the problem

CSF operations can be conducted day or night, in varying weather, with passengers of different complexities and from familiar and unfamiliar aerodromes. CSF operations have considerable potential complexity for pilots who can have minimal experience levels. CSF flight operations are not supported by an organisational safety system that would be required of either an ASAO or AOC based organisation. Processes to ensure that pilots continue to satisfy the requirements for undertaking CSF operations after they are initially accepted by the charitable organisation, or to require pilots to report incidents to enable continual safety improvement, are not consistently in place across the CSF sector.

The lack of direct safety risk mitigators and the reliance on individual pilot assessments regarding mission acceptance, commencement or continuance, results in an increased need for Pilots in Command (PIC) to be experienced, operationally recent and well versed in in-flight management, human factors and threat and error management skills. Persons travelling in CSF aircraft are subject to flight operations of increased risk compared to charter or RPT flights.

Following the 2017 CSF accident, CASA encouraged the charitable organisations to implement voluntary safety enhancements. However, meaningful safety improvements have not been realised.

Many of these flights are carried out in challenging operational situations such as VFR in marginal VMC or where there is a requirement for night VFR operations. The lack of maximum duty periods leaves pilots to self-assess their fatigue levels.

There are currently no legislative minimum flight crew licensing, experience or medical requirements for Australian CSF pilots. Australian charitable organisations coordinating CSF do specify minimum requirements for their volunteer pilots however these requirements are generally lower than many of those mandated by similar foreign organisations. A detailed comparison of the minimum experience requirements for the United States, Canada, New Zealand and Australia can be found in Attachment B.

For several decades, the Australian aviation legislative framework has been evolving towards a risk and participant-based structure. Different operations are regulated in different ways depending upon the risks associated with the operation and the type of non-crew persons directly involved in the operation, depending on how informed they are about the safety risks of the operation. Broadly, non-crew can be classified as uninformed participants, informed participants or passengers.

Current charitable organisation practices require the person for whom the CSF is arranged to sign a waiver acknowledging that the CSF is conducted to a lower safety standard than a commercial flight. While the waiver indicates the person is an informed person, it is unlikely they truly understand the safety differences (and the safety data) between, for example, a passenger carrying charter flight and a CSF. These persons can realistically only be considered uninformed participants.

The charitable organisations that coordinate CSF pilots and passengers are not aviation organisations. CASA cannot require these organisations to implement any process or procedural changes. CASA does have an educational and regulatory relationship with CSF pilots, aircraft used to conduct CSF and therefore, indirectly, with CSF passengers.

Although the two Australian CSF accidents are a statistically small sample, the fatal accident rate when compared to General Aviation (GA) is several multiples higher. The CSF fatal accident rate is approximately 90.9 per million departures, with the GA fatal accident rate 11.3 per million departures.[3] It is important to note that in general terms CSF and GA pilots are drawn from the same cohort.

A 2007 research article by the US National Transportation Safety Board examined general aviation accidents in degraded visibility and identified several variables that were significantly associated with accident involvement. These included:

- The pilot not holding an instrument rating increased the accident risk by nearly five times.
- Commercial pilots had a lower accident rate than private pilots; and
- Private flights had a higher accident rate than flights conducted for commercial purposes.[4]

Discussion – comparison to similar activities

Since the DP was issued, CASA has examined the similarities and differences between Australian CSF, foreign CSF, other Australian uncertificated operations and some Australian certificated operations that utilise pilots early in their careers (whilst their hours and experience are relatively low)[5].

[3] These figures are based on 22000 identified CSF flights. The GA figures are from 2012 which were the highest annual figure for the same reporting period.
[4] This information was supplied by the ATSB in response to DP 1317OS.
[5] Instructor Rating (Aeroplane), Jump pilots (Aeroplane) and Adventure Pilot (Aeroplane)

The relative examples of uncertificated operations used for these comparisons were adventure flight operations conducted under Part 132 of CASR and parachuting operations conducted as private operations. Certificated operations included in the comparison include small charter operations and flight training organisations. Foreign CSF were from the USA, Canada and New Zealand.

A table at Attachment B compares the qualifications, experience and other requirements for the different entities. In general, the minimum pilot requirements in the United States and Canada are higher than those required by the Australian charitable organisations. None of these countries currently require their CSF operators to hold the equivalent of an AOC. Brief descriptions of the foreign CSF organisations are contained in Attachment A.

Australian operations – risk comparison

Broadly, CSF pilots can operate from a variety of unfamiliar locations in varying weather conditions with no organisational oversight or safety support. They are highly reliant on their own personal skills, knowledge and standards. They are transporting passengers with a very limited understanding of the relative risks between CSF and charter operations.

Other operations such as charter (in small aeroplanes with low time pilots), parachuting and adventure flights are conducted under organisational supervision or within a regulated framework. Passengers on these flights are reasonably informed participants when compared to an air transport passenger or a CSF passenger. The required minimum hours are usually exceeded in normal practice. These flights operate A to A flights usually in good weather and reasonably familiar environments and conditions.

Noting these differences, it is apparent that to provide a modicum of safety equivalence between CSF and other operations carrying uninformed participants, CSF pilot experience requirements should be increased above those for private pilots conducting a private operation. More experienced pilots have normally been exposed to a broader range of meteorological and operational conditions and have experience operating from "A to B to C to A" compared to "A to A".

Discussion – CSF pilot experience requirements

At the time of the DP, CASA's first preference was the introduction of an ASAO (option 5) received significant negative feedback. CASA's second preference was the introduction of a pilot registration system (option 4) with specific pilot experience (option 7) and training requirements (option 3), operational limitations (option 8) and minimum aircraft standards (option 9).

A significant majority of respondents stated that options 3 to 6 were not acceptable. These options would have imposed the highest costs on the CSF sector, either through a requirement for certification of some form (ASAO or AOC) or via increased pilot training and checking frequency. A brief analysis of the benefits and impacts of all DP options is contained at Attachment A. As is customary for a public DP, not all options result in

significant safety improvements. Options that have the greatest safety improvement may have the highest industry cost impacts and more likely to be rejected.

Although still categorised by a majority of respondents as not acceptable, options 7 to 9 attracted less negative feedback compared to options 2 to 6.

CASA previously indicated it would continue to monitor the CSF sector and, if necessary, implement regulatory actions. CASA has a responsibility as the national regulator to ensure adequate safety levels within civil aviation. Noting the lack of voluntary safety improvement action within the CSF sector and the higher risk exposure to uninformed participants, CASA has to consider taking appropriate action.

As an initial measure, CASA could implement options without a significant cost burden, such as minimum CSF pilot experience levels, operational limitations and enhanced CSF aircraft maintenance, that would not have a significant negative impact on the volunteer CSF sector.

Option analysis

Option 7 (flight crew licensing requirements)

Respondent comments focused on

- a lack of necessity to impose any requirements as the charitable organisations already impose their own requirements;
- the excessive nature of requiring 500 hours PIC if a PPL holder did not have 10 hours on type in the aircraft to be used for the CSF; and
- requiring a CASA class 1 or 2 medical was excessive and that a RAMPC or RA-Aus medical should be sufficient.

Since the DP was issued, CASA has focused on establishing the similarities and differences between other Australian non-certificated operations. Noting the experience requirements of these other operations and the varying risk exposure when comparing them to CSF operations, it is considered an appropriate outcome. Private Pilot Licence (PPL) holders have increased hours requirements (400 hours total flight time in aeroplanes or helicopters and 250 hours flight time as PIC in the same) as well as recent and type specific experience. Recreational Pilot Licence (RPL) holders will be excluded from conducting this type of operation.

The minimum medical standard is Class 1 or 2, with the Class 2 basic being excluded. This is in line with other safety industries (Rail) within Australia where sudden incapacity or collapse (e.g. from heart attack or blackout) may result in a serious incident affecting the public.

Recency requirements on the specific aircraft type in which the flight is conducted provide assurance that the pilot is competent on the specific type of aircraft in which the flight is conducted. CASA regulations do not specify aircraft specific recent experience requirements, especially where many different types of aircraft can be flown under the

privileges of a class rating that cover numerous types. Additionally, the majority of accidents and incidents occur in the approach and landing phases of flight.

Option 8 (aircraft operational limitations)

The responses to this option identified that there were no significant objections to the options themselves but rather that industry perceived them to be unnecessary. However, CASA's responsibility as a regulator to ensure an adequate level of safety requires that there be clear and unambiguous requirements where certain operations are perceived as increasing the level of risk to an unacceptable level.

The risks of inadvertent entry into IMC at night is greater when clouds cannot be detected when there is little or no ambient lighting. The loss of a visual horizon for pilot who do not hold an instrument rating increases the risk of spatial disorientation that can lead to a loss of control in flight.

Therefore, it is recommended that the restrictions recommended by option 8 (passengers limited to 5 [see annex] and no night VFR) be implemented and that additional restrictions – that should not impact on the CSF sector but that would clarify matters for the sector – also be put in place (CSF only in aeroplanes, mandatory flight notification for VFR in line with RPT and CHTR, flight notification to identify the flight as CSF).

Option 9 (aircraft certification and maintenance requirements)

Following consideration of the different certification and maintenance requirements applicable to other Australian aviation operations with overall risk similarities (passenger type, operation type etc), it is recommended that CSF operations be required to utilise the same maintenance requirements that CASA has implemented for parachute jump aircraft. These requirements are not onerous but set a minimum baseline standard that is appropriate for the CSF sector at this time.

Consultation

Feedback from both internal and external stakeholders (external via the responses to DP 1317OS) indicates the applying limitations on pilot licences is the most appropriate form of safety intervention. ATSB recommendations have been considered in preparing this proposal.

The safety benefits of increasing the required experience and operational levels more than offset the restrictions imposed by the policy. Therefore, the proposal is consistent with CASA's regulatory philosophy in that air safety is not compromised by taking this risk-based approach. Further justification of the rationale of the proposed changes can be found in Attachment A.

It is important to note that CASA has limited visibility on how many pilots and services would be impacted by the proposed changes.

Australian Government
Civil Aviation Safety Authority

Standard Form of Recommendation (SFR)
Flight Standards Division

Options

1. Do nothing.
2. CASA implement either of the preferred options from DP 1317OS (ASAO for the CSF sector or require a full AOC for any organisation conducting CSF operations).
3. CASA implement conditions on pilot licences encompassing minimum pilot in command experience, CSF operational limitations and CSF aircraft maintenance requirements.

Recommendation

It is recommended that Option 3 be implemented as follows:

1. CASA make a legislative instrument placing the recommended conditions on all pilot licences (Attachment C contains drafting instructions).
2. CASA publicly consult on the drafted legislative instrument from mid-Dec 2018 to 31 Jan 2019 (due to the Christmas and New Year period).
3. Internal and external communications be executed as described in Attachment A.

Signed:

Name:
Scott Watson

Title:
Manager Operations Standards

Branch:
Flight Standards

Date:
13 Dec 18

Approvals

Approved / Not Approved	
Signed:	
Name:	Christopher Monahan
Title:	Executive Manager
Division:	National Operations and Standards
Date:	8/2/19

Australian Government
Civil Aviation Safety Authority

Standard Form of Recommendation (SFR)
Flight Standards Division

Annex A to SFR FSB D18/627009

Australian Legislation or Regulation (CASA Instruments / Criminal Code or additional)

Section 3A of the Civil Aviation Act 1988 states:

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

Section 9A of the Civil Aviation Act 1988 states:

In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.

Regulation 2(7) and 2(7A) of the *Civil Aviation Regulations 1988*

(7) For the purposes of these Regulations:

(d) an aircraft that is flying or operating for the purpose of, or in the course of:
- (i) the personal transportation of the owner of the aircraft;
- (ii) aerial spotting where no remuneration is received by the pilot or the owner of the aircraft or by any person or organisation on whose behalf the spotting is conducted;
- (iii) agricultural operations on land owned and occupied by the owner of the aircraft;
- (iv) aerial photography where no remuneration is received by the pilot or the owner of the aircraft or by any person or organisation on whose behalf the photography is conducted;
- (v) the carriage of persons or the carriage of goods without a charge for the carriage being made other than the carriage, for the purposes of trade, of goods being the property of the pilot, the owner or the hirer of the aircraft;
- (va) the carriage of persons in accordance with subregulation (7A);
- (vi) the carriage of goods otherwise than for the purposes of trade;
- (vii) flight training, other than the following:
  - (A) Part 141 flight training (within the meaning of regulation 141.015 of CASR);
  - (B) Part 142 flight training (within the meaning of regulation 142.015 of CASR);
  - (C) balloon flying training (within the meaning of subregulation 5.01(1)) for the grant of a balloon flight crew licence or rating; or
- (viii) any other activity of a kind substantially similar to any of those specified in subparagraphs (i) to (vi) (inclusive);

shall be taken to be employed in private operations.

(7A) An aircraft that carries persons on a flight, otherwise than in accordance with a fixed schedule between terminals, is employed in a private operation if:

(a) public notice of the flight has not been given by any form of public advertisement or announcement; and

(b) the number of persons on the flight, including the operating crew, does not exceed 6; and

(c) no payment is made for the services of the operating crew; and

(d) the persons on the flight, including the operating crew, share equally in the costs of the flight; and

(e) no payment is required for a person on the flight other than a payment under paragraph (d).

Regulation 206 of the *Civil Aviation Regulations 1988*

206 Commercial purposes (Act, s 27(9))

(b) charter purposes, being purposes of the following kinds:

(i) the carriage of passengers or cargo for hire or reward to or from any place, other than carriage in accordance with fixed schedules to and from fixed terminals or carriage for an operation mentioned in subregulation 262AM(7) or under a permission to fly in force under subregulation 317(1);

(ii) the carriage, in accordance with fixed schedules to and from fixed terminals, of passengers or cargo or passengers and cargo in circumstances in which the accommodation in the aircraft is not available for use by persons generally;

Regulation 61.505 of the *Civil Aviation Safety Regulations 1998*

61.505 Privileges of private pilot licences

Subject to Subpart 61.E and regulation 61.510, the holder of a private pilot licence is authorised to pilot an aircraft as pilot in command or co-pilot if:

(a) the aircraft is engaged in a private operation; or

(b) the holder is receiving flight training.

Note 1: Subpart 61.E sets out certain limitations that apply to all pilot licences, and ratings and endorsements on pilot licences.

Note 2: The holder of a private pilot licence is also authorised to taxi an aircraft in certain circumstances: see regulation 61.430.

Note 3: The holder of a private pilot licence is also authorised to transmit on a radio frequency of a kind used for the purpose of ensuring the safety of air navigation: see regulation 61.435.

CASA Aviation Ruling 3/2003

CASA Legal has advised FSB that this Aviation Ruling is not applicable to Australian CSF operations (Angel Flight and Little Wings). It provides an interpretation of aviation law that is related to a person conducting a flight directly for the benefit of a charitable entity – it does

not encompass a person conducting a flight for the benefit of another person which is the broad scope of CSF.

CASA Instrument 06/16 – Direction – conduct of parachute training operations – relevant extract

(4) A jump aircraft that is not a Class A aircraft must either:

(a) be maintained in accordance with an approved system of maintenance; or

(b) undergo a maintenance release inspection at the earlier of 100 flight hours and 12 months, and have all engines maintained in accordance with:

(i) for piston engines — requirement 2 of AD/ENG/4; and

(ii) for turbine engines — requirement 1 of AD/ENG/5.

Description of overseas CSF organisations

United States

The Air Charity Network is an US based group founded in 1990 that acts as an umbrella organisation for volunteer pilot based Public Benefit Flying (PBF) organisations. PBF organisation members use their aircraft to transport needy patients, to assist in disaster relief, to fly environmental support missions, to relocate wild or domestic animals, to provide educational flights for youth, and for many other missions of community and humanitarian support.

The network includes many CSF style groups including 9 Angel Flight chapters throughout the USA. US Angel flight operations (though substantially similar in structure and nature of operations) have differing pilot experience and qualification requirements (see annex B).

Canada

Hope Air is a registered, charitable organisation that arranges and provides free flights to Canadians who cannot afford the cost of an airline ticket to travel to a medical appointment or specialised medical technologies that usually exist only in larger urban centres. Hope Air offers the following programs or services to flight applicants:

- The Flight Purchase Program where cash donations from donors are used to directly purchase flights on commercial airlines;
- The Commercial Airline Donation Program where Canadian commercial airlines donate seats or flight passes;
- The Volunteer Pilot Program (VPP) where private pilots from across Canada volunteer their time and general aviation aircraft to service communities not well served by commercial airlines; and
- The Business Aviation Program (previously referred to as the Corporate Aviation Program) where eligible corporate aircraft owners donate their aircraft and flight crew to transport the flight applicant on, typically, long-haul routes, where the flight applicant has an immune deficiency and commercial air travel would not be appropriate.

Hope Air arranged over 11,000 free flights in 2016 via a combination of in partnership arrangements with several airline providers, their business aviation program matching empty seats on corporate flights with a child travelling for a medical appointment and the volunteer

pilot program. The majority of these flights were via the commercial airline flight and seat purchase and donation program. Hope Air pilot requirements are specified in annex B.

New Zealand

Angel Flight New Zealand (AFNZ) commenced operations in 2011. To date AFNZ have flown approximately 151 missions and operate with 74 registered pilots. AFNZ is funded by private donations from individuals, Rotary, Service Clubs, Companies large and small and deceased estates[6]. These donations pay for:

- A Commercial Flight Fund so if AFNZ do not have a Pilot available they can pay to transport cases by an Airline Flight.
- Limited uniforms for AFNZ Volunteer Earth Angels and Pilots.
- Aeronautical Charts for AFNZ Pilots.
- AFNZ administration costs.

Pilots wishing to volunteer for an Angel Flight NZ "mission" must have at least 250 hours PIC and have a current BFR for a 4 seat (or more) aircraft. Pilots are required to have similar qualifications and experience to Australian AF volunteer pilots (see annex B).

Foreign NAA Policies (FAA / EASA / additional as applicable)

See annex B for experience and qualification requirements table comparing foreign and Australian CSF pilot minimums and other Australian selected pilot activities.

United States Federal Aviation Regulations (FAR)

FAR 119.1 outlines whether an operator requires an AOC. US CSF operations fall into the area of common carriage titled "private carriage" (see below) and therefore do not require certification under FAR Part 119 and are operated as non-certified operations under FAR Part 91.

FAR 119.1 – Applicability:

This part applies to each person operating or intending to operate civil aircraft

(1) As an air carrier or commercial operator, or both, in air commerce; or
(2) When common carriage is not involved, in operations of U.S.-registered civil airplanes with a seat configuration of 20 or more passengers, or a maximum payload capacity of 6,000 pounds or more.

When *common carriage* is not involved or operations not involving *common carriage* means any of the following:

(1) Non-common carriage.
(2) Operations in which persons or cargo are transported without compensation or hire.
(3) Operations not involving the transportation of persons or cargo.

[6] http://angelflightnz.co.nz/about-us

(4) Private carriage.

Non-common carriage is defined as meaning "an aircraft operation for compensation or hire that does not involve a holding out to others".

FAR 61.113(c) provisions (see below) require US CSF operations to be issued an exemption to allow volunteer pilots to be reimbursed fuel costs incurred whilst conducting charitable flights for medical purposes. These exemptions are typically issued to the charitable entity (example below – Angel Flight New England) to allow "it's" volunteer pilots to be reimbursed for fuel cost, not the pilot themselves.

The issue of these FAR Part 61.113(c) exemptions allows the FAA to add some quite stringent conditions to the operation of charitable medical flights in the interests of managing the risk of the operations and enhancing their safety (see Annex A).

FAR 61.113 — Private pilot privileges and limitations:

Pilot in command where Part 61.113 outlines:

(a) Except as provided in paragraphs (b) through (h) of this section, no person who holds a private pilot certificate may act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may that person, for compensation or hire, act as pilot in command of an aircraft.

and

(c) A private pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees

These provisions therefore require an exemption to be issued to FAR Part 61.113 to allow volunteer pilots to be reimbursed fuel costs incurred whilst conducting charitable flights for medical purposes.

United States Sample Exemption (Angel Flight NE FAA Fuel Waiver Extension 10360C)

This exemption terminates on June 30, 2017 unless sooner superseded or rescinded.

It supersedes Exemption No. 10360A.

1-3. Angel Flight NE Requirements

PILOT REQUIREMENTS: Conditions and Limitations

4. All pilots operating under the terms of this exemption must possess the following certificates, qualifications and aeronautical experience---

a. An instrument rating or ATP certificate that is appropriate to the aircraft being flown;
b. A minimum total time of 500 hours, with no less than 400 hours as PIC, and a minimum of 50 hours in the specific make and model of the aircraft being flown;
c. A minimum of 50 hours as PIC must have been logged within the preceding 12 calendar months immediately preceding the month of the flight;
d. A minimum of 12 hours flown and logged within the preceding 3 calendar months prior to the month of the flight. In lieu of this requirement, a pilot may have logged 2 hours of flight training with a certified flight instructor within the preceding 3 calendar months prior to the month of the flight;
e. A second - class medical certificate (per FAA Part 61.23(d)(2)(i) and 61.2);
f. Within the preceding 12 calendar months, an instrument proficiency check (IPC) meeting the requirements of FAA Part 61.57(d). The IPC must be conducted in accordance with the Instrument Rating Practical Test Standards. This requirement can be substituted by a FAA practical test for an ATP certificate or instrument rating.
g. A current flight review (per FAA Part 61.56(a)) in the same aircraft category, class and type (if a type rating is required) being flown;
h. Meets the recent flight experience requirements of FAA Part 61.57(c) or(d), as appropriate, in the same aircraft category, class, and type (if a type rating is required) being flown;
i. For all operations under this exemption, the pilots must meet the recent flight experience requirements for night operations (per FAA Part 61.57 (b) in an aircraft pf the same category, class, and type (if a type rating is required).

5. All operations under this exemption must be in compliance with the following flight duty, rest, and flight time limitations (a duty day starts when the pilot arrives at the airport and begins preparation for the flight and terminates upon completion of the post flight of the aircraft):

a. No pilot may fly more than 8 hours of flight time (per FAA 61.1) within any 24-consecutive -hour duty day period;
b. No pilot may perform a duty day in excess of 12 consecutive hours; and
c. Once the pilot has performed 12 consecutive hours of duty, the pilot must rest a period of at least 12 hours before conducting another flight.

US FAA AC 51-91J – WINGS Pilot Proficiency Program

Excerpt (https://www.faasafety.gov/WINGS/pub/learn_more.aspx):

1. PURPOSE. The objective of the WINGS—Pilot Proficiency Program is to reduce the number of accidents in General Aviation (GA) by assisting airmen to find educational opportunities designed to help them apply the principles of risk assessment and risk management (RM). When properly applied, these principles will help mitigate accident causal factors associated with common pilot errors,

lack of proficiency, and faulty knowledge. The Federal Aviation Administration's (FAA) purpose is to encourage the majority of GA pilots, through WINGS, to engage in ongoing, targeted flying tasks and learning activities keyed to identified risks and which are designed to mitigate those risks. The FAA continually collects and assesses its databases to identify the risks associated with GA flying and incorporates risk mitigation strategies into initial and ongoing pilot education.

2. BACKGROUND. To address accident causal factors associated with common pilot errors, lack of proficiency, and faulty knowledge, the FAA developed a voluntary pilot education and proficiency program (i.e., WINGS) and made it available via the Internet to all pilots at all certificate levels. The WINGS Program consists of learning activities and tasks selected to address the documented causal factors of aircraft accidents. Accomplishment of a phase of WINGS requires the participating pilot to demonstrate proficiency in specified knowledge and skill tasks. The FAA encourages pilots to participate in ongoing aviation educational learning and skill-building events with an instructor. The WINGS Program provides the opportunity, the structure, and the recognition for pilots to continue their aviation education. This ongoing effort fosters new learning, review, and flight proficiency in the areas of operation found in current practical test standards (PTS). The FAA further encourages pilots to maintain proficiency by using the WINGS Program. To this end, the WINGS Program has three levels of participation: Basic WINGS, Advanced WINGS, and Master WINGS. Within each level, a pilot may earn phases of WINGS as explained below and at www.FAASafety.gov.

Transport Canada

Decision No. 390-A-2013 (Decision) determined that an "air service" is one that is:

1. offered and made available to the public;
2. provided by means of an aircraft;
3. provided pursuant to a contract or arrangement for the transportation of passengers or goods; and
4. offered for consideration.

The Decision informed the air industry of the criteria the Agency would apply, going forward, to determine what constitutes an "air service" within the meaning of subsection 55(1) of the Canada Transportation Act (CTA).

Initially the Decision applied to CSF style flights and the Agency required them to be licenced as an air service within the meaning of subsection 55(1) of the CTA.

On January 15, 2014, a CSF operator "Hope Air" requested that the Agency review this matter again based on the four criteria identified in the Decision. As a result of this review the Agency found that Hope Air's services, including its Volunteer Pilot Program and Business Aviation Program, were not being provided pursuant to a contract or arrangement

for the transportation of passengers or goods for consideration, thus not meeting all 4 criteria and removed the need for the licence for CSF style operations.

New Zealand Civil Aviation Regulations

Under NZ regulation an *Air operation* means an air transport operation, a commercial transport operation, or an adventure aviation operation:

CAR 119.5 Requirement for certificate:

(a) A person having operational responsibility for an air operation must hold, and comply with, an air operator certificate issued under this Part.

An Air transport operation means an operation for the carriage of passengers or goods by air for hire or reward except—

(1) a commercial transport operation:
(2) an adventure aviation operation:
(3)...
(4)....
(5).....

A Commercial transport operation means an operation for the carriage of passengers or goods by air for hire or reward—

(1) where—
(i) each passenger is performing, or undergoing training to perform, a task or duty on the operation; or
(ii) the passengers or goods are carried to or from a remote aerodrome—
(2).....

The presumption is that AFNZ operations are not conducted for hire or reward despite landing fees being waived at a number of aerodromes for AFNZ operations and therefore fall out of the requirement for certification under NZ CAR Part 119, however no NZ CAA determinations or rulings appear to address CSF type operations to confirm this is their policy.

Safety Studies / Formal Risk Assessments (Flight Safety Foundation / Foreign NAA / CASA / military)

US NTSB report responding to four CSF fatal accidents

The four accidents resulted in eight fatalities and two seriously injured persons between 2007 and 2008 (each of which involved flights providing charitable medical transportation). Following these accidents, the NTSB formed the following views with respect to CSF style operations involved in the accidents[7]:

- each of the four pilots in these accidents failed to fully accomplish these tasks [listed following];

[7] https://www.ntsb.gov/safety/safety-recs/recletters/A-10-102-104.pdf

- in these accidents, the pilots demonstrated shortcomings in sound aeronautical decision-making by failing to adequately assess the weather and their inability to operate the airplane in those conditions;
- that these pilots did not provide the passengers with the basic level of safety that passengers in these circumstances have a right to expect;
- the voluntary pilot organization arranging or fostering the flights made no attempt to verify the pilots' currency;
- that the pilot's lack of currency in conducting the flight in instrument conditions placed the passengers at higher risk for an accident;
- the typical patient seeking a charitable medical flight is not likely aware of the significant differences in pilot training, pilot qualifications, or FAA oversight for a charitable medical flight operated under Part 91 compared to commercial flights operated under 14 CFR Parts 121 or 135;
- although many of the volunteer pilots who provide charitable medical transportation are highly skilled, proficient in operating their aircraft, and prepared to execute an appropriate response to changing flight conditions or emergencies, others may not be;
- the NTSB is concerned that the pilots flying charitable medical flights receive no guidance, additional training, or oversight regarding aeronautical decision-making, proper pre-flight planning, or the risk of self-induced pressure: and
- the pilots may have been subject to self-induced pressure to start or complete the flight because of their passengers' serious medical conditions.

Note - The NTSB's study of helicopter emergency medical services (HEMS) accidents cited time pressures as a risk factor in HEMS flights, and a similar risk can exist for charitable medical flights: the desire to get a patient to medical treatment quickly.

Excerpt (report dated 9 June 2010):

Background

The National Transportation Safety Board (NTSB) is an independent federal agency charged by Congress with investigating transportation accidents, determining their probable cause, and making recommendations to prevent similar accidents from occurring. We are providing the following information to urge The Air Care Alliance (ACA) to take action on the safety recommendations in this letter. The NTSB is vitally interested in these recommendations because they are designed to prevent accidents and save lives.

These recommendations address verification of pilot currency; passenger awareness of operating standards; and the need for dissemination of safety guidance, information about best practices, and training material for pilots and organizations providing charitable medical transport flights. These recommendations are derived from the NTSB's investigations of four accidents that killed eight people and seriously injured two between September 26, 2007, and August 12, 2008; each involved flights providing charitable medical transportation. These recommendations are supported by the evidence collected and the analysis performed during each investigation; supporting information is discussed below. The NTSB would appreciate an initial response from you within 90 days addressing the actions you have taken or intend to take to implement our recommendations.

Recommendations

Require voluntary pilot organizations to verify pilot currency before every flight. (A-10-102)

Require that voluntary pilot organizations inform passengers, at the time of inquiry about a flight, that the charitable medical flight would not be conducted under the same standards that apply to a commercial flight (such as under 14 *Code of Federal Regulations* Part 121 or Part 135). (A-10-103)

In conjunction with your affiliate organizations and other charitable medical transport organizations, develop, disseminate, and require all voluntary pilot organizations to implement written safety guidance, best practices, and training material for volunteer pilots who operate charitable patient transport flights under 14 *Code of Federal Regulations* Part 91. The information should address, at a minimum, aeronautical decision-making; proper preflight planning; pilot qualification, training, and currency; and self-induced pressure. (A-10-104)

Australian charitable organisation process comparison to the NTSB recommendations

Checking pilot currency before flight has not been consistently implemented by Australian charitable organisations as they are not aviation operations and regard currency as a pilot responsibility.

Australian charitable organisations have implemented the second recommendation regarding passenger awareness of lower CSF safety standards compared to commercial flights. However, some of the acknowledgement forms are legally technical and passengers remain potentially unaware of the nature of the risks. It is doubtful that passengers understand the difference between commercial and private safety standards.

ATSB Aviation Research and Analysis Report B2006/0002

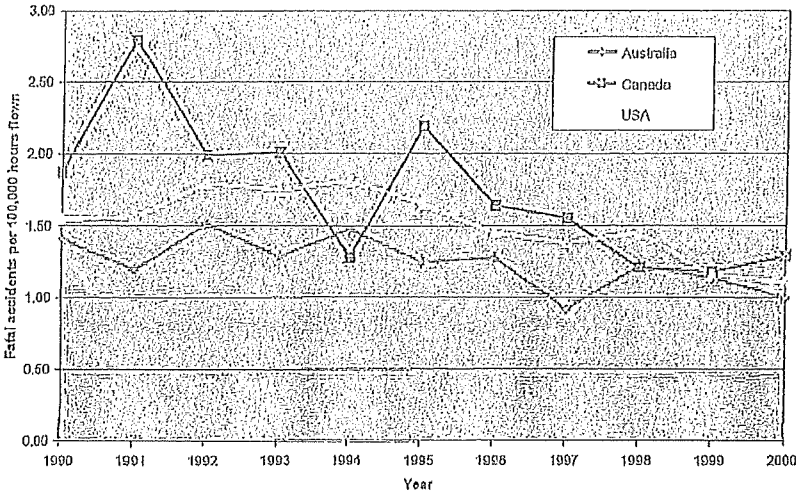


Figure 1 – General Aviation fatal accidents per 100,000 hours flown

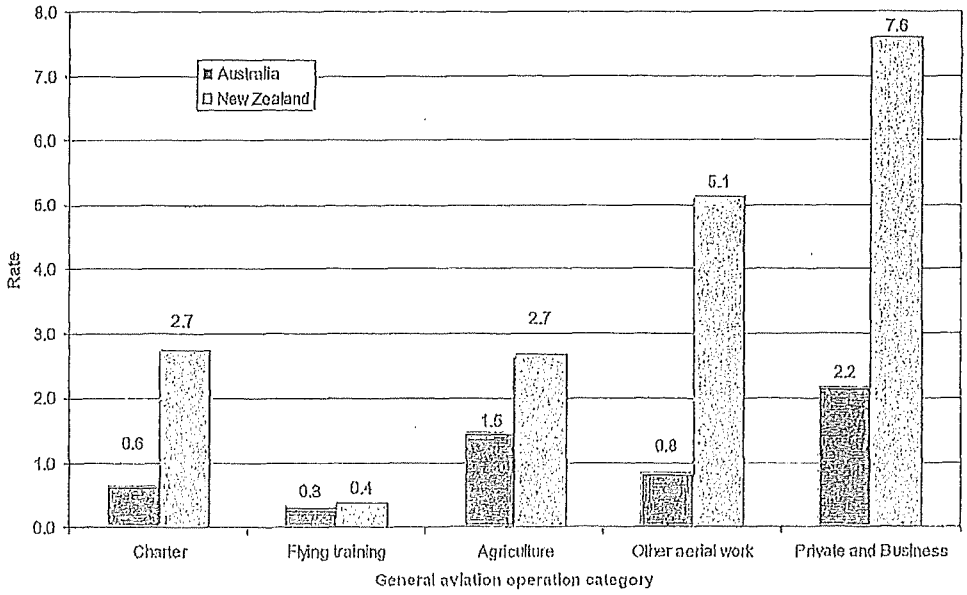


Figure 2 – General Aviation average annual fatal accidents by operation type (1995-2004) per 100,000 hours flown

ATSB Accident Statistics 2006-2014

Figure 12: Accident rate for charter aircraft (VH- registered) (per million departures), 2006 to 2014

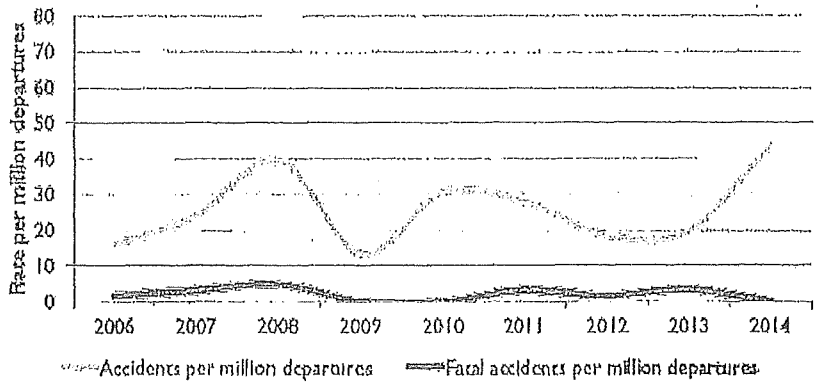
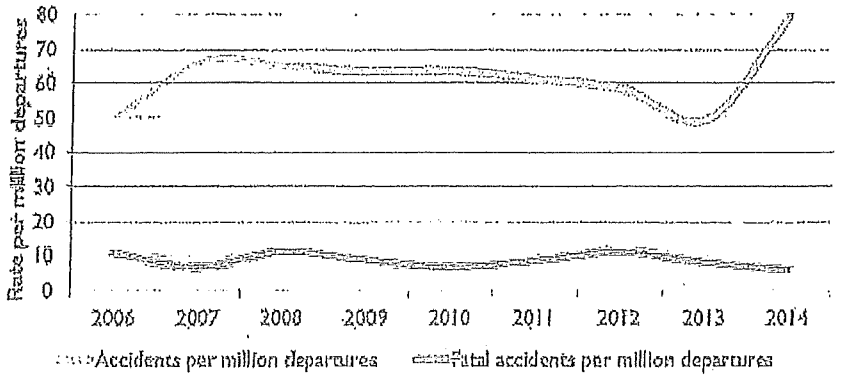


Figure 15: General aviation accident and fatal accident rate (per million departures, VH-registered aircraft only), 2006 to 2014



Private/business/sports aviation

Private/business and sports aviation generally describes aircraft that are being operated for pleasure or recreation, or are being used for a business or professional need. It is often difficult to distinguish between business and private operations, so they are aggregated for the purposes of this report.

It is important to note that only aircraft conducting these operations that are registered on the Australian civil aircraft (VH-) register are included in this section. Sports and recreational aircraft that are registered under RAAO schemes are considered separately in the *Recreational* section of this report.

Private/business and sports aviation operations have the greatest number of reported accidents (65) of any GA operation type in 2015. However, this operation types had the equal second lowest number of fatalities (8 from 6 accidents) in the last 10 years.

In 2014, the accident rate – per hour flown – for private/business and sports aviation was significantly higher than for any of the previous nine years.

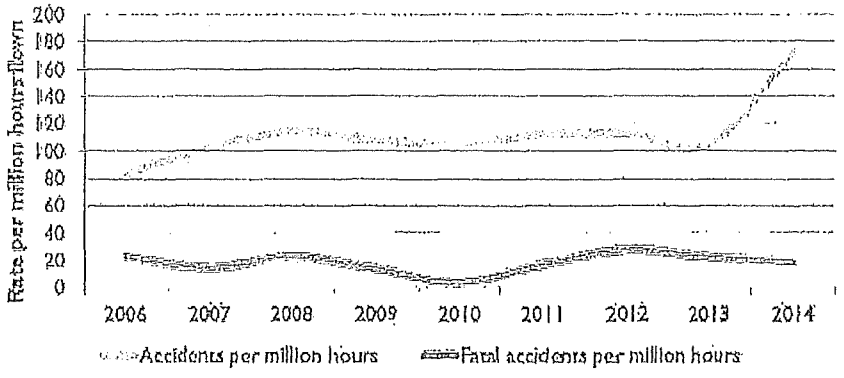
The most common occurrences reported to the ATSB in 2015 concerning private/business and sports aircraft were engine failure or malfunction, landing gear/indication and collision with terrain. The most common accidents were collision with terrain, and the most common serious incidents were near collisions and engine failure or malfunction.

The number of occurrences in the private/business operation type is significantly greater than those of sports aviation.

Table 18: Private/business/sports aviation (VH-registered) aircraft occurrences (including gliding), 2006 to 2015

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of aircraft involved										
Incidents	205	212	185	201	160	191	168	136	187	172
Serious incidents	15	24	17	21	21	38	43	45	28	35
Serious injury accidents	5	5	9	6	8	7	3	4	9	3
Fatal accidents	15	9	13	8	2	9	15	11	9	6
Total accidents	55	65	65	65	59	61	61	52	82	65
Number of people involved										
Serious injuries	10	7	14	7	10	12	6	6	14	5
Fatalities	25	18	23	8	3	17	23	20	14	8
Rate of aircraft involved										
Accidents per million hours	83.4	102.3	114.7	107.7	105.0	112.2	112.8	104.1	172.8	N/A
Fatal accidents per million hours	22.7	14.2	22.9	13.3	3.6	16.6	27.7	22.0	19.0	N/A

Figure 18: Accident rate for aircraft (VH- registered) involved in private/business/sport (including gliding) (per million hours flown), 2006 to 2014



Accident or Incident Investigations (ATSB / NTSB or similar)

ATSB Transport Safety Report AO-2011-100 – 3 December 2013

VFR flight into dark night conditions and loss of control involving Piper PA-28-180, VH-POJ 31 km north of Horsham Airport

What happened:

On 15 August 2011, the pilot of a Piper PA-28-180 Cherokee aircraft, registered VH-POJ, was conducting a private flight transporting two passengers from Essendon to Nhill, Victoria under the visual flight rules (VFR). The flight was arranged by the charity Angel Flight to return the passengers to their home location after medical treatment in Melbourne. Global Positioning System data recovered from the aircraft indicated that when about 52 km from Nhill, the aircraft conducted a series of manoeuvres followed by a descending right turn. The aircraft subsequently impacted the ground at 1820 Eastern Standard Time, fatally injuring the pilot and one of the passengers. The second passenger later died in hospital as a result of complications from injuries sustained in the accident.

What the ATSB found:

The ATSB found that the pilot landed at Bendigo and accessed a weather forecast before continuing towards Nhill. After recommencing the flight, the pilot probably encountered reduced visibility conditions approaching Nhill due to low cloud, rain and diminishing daylight, leading to disorientation, loss of control and impact with terrain. One of the passengers was probably not wearing a seatbelt at the time of the accident.

The ATSB also established that flights are permitted under the visual flight rules at night (night VFR) in conditions where there are no external visual cues for pilots. In addition, pilots conducting such operations are not required to maintain or periodically demonstrate their ability to maintain aircraft control with reference solely to flight instruments.

Australian Government / Departmental Policies

CASA Discussion Paper DP1317OS

Discussion Paper DP1317OS was issued as part of this project on 18 Aug 14 and comments closed on 16 Oct 14. The DP outlined ten potential options as follows:

Administrative options

- Option 1 – do nothing
- Option 2 – status quo with passenger safety briefing / acknowledgement
- Option 3 – additional pilot training and checking requirements
- Option 4 – implementation of a volunteer community service pilot registration system
- Option 5 – use of an Approved Self-Administering Aviation Organisation (ASAAO)
- Option 6 – conduct of operations under an AOC.

Operational options

- Option 7 – flight-crew licencing requirements
- Option 8 – aircraft operational limitations
- Option 9 – aircraft certification and maintenance requirements.
- Option 10 – public education program

CASA's preferred option was for the introduction of a CSF ASAAO (option 5) however if this did not eventuate then the secondary preferred option was the introduction of a pilot registration system with specific pilot experience and training requirements, operational limitations and minimum aircraft standards (a combination of options 3, 4, 7, 8 and 9).

ATSB submission to CASA DP1317OS

The Australian Transport Safety Bureau (ATSB) supports the Civil Aviation Safety Authority (CASA) review of voluntary community service flights. While not commenting directly on the proposed options, the ATSB offers the following information that may assist CASA to assess the level of regulation that is appropriate for such flights.

As identified by CASA in discussion paper DP1317OS, the variation in pilot experience/qualification and the aircraft that are used for voluntary community service flights represent a potential safety issue due to the corresponding variation in associated safety risk. The ATSB investigation of a fatal accident that was operating as an Angel Flight (AO-2011-100) detailed the following demographic information for pilots registered to conduct Angel Flight 'missions':

> *As at June 2013, Angel Flight had coordinated about 14,800 'missions' and had 2,600 pilots registered for consideration to conduct such flights of which 587 pilots had actually flown missions. Demographic information provided by Angel Flight identified that the average PIC hours was about 2,400 with 64 per cent of pilots holding an instrument rating and 16 per cent holding a night VFR rating. About 61 per cent of pilots held a private pilot licence with the remainder holding at least a commercial pilot licence.*

While the ATSB was unable to ascertain the age demographic of Australian Angel Flight pilots, consideration of four overseas accidents that involved flights that were organised by various Angel Flight agencies identified that the age range of the pilots was from 57 to 81 years old.

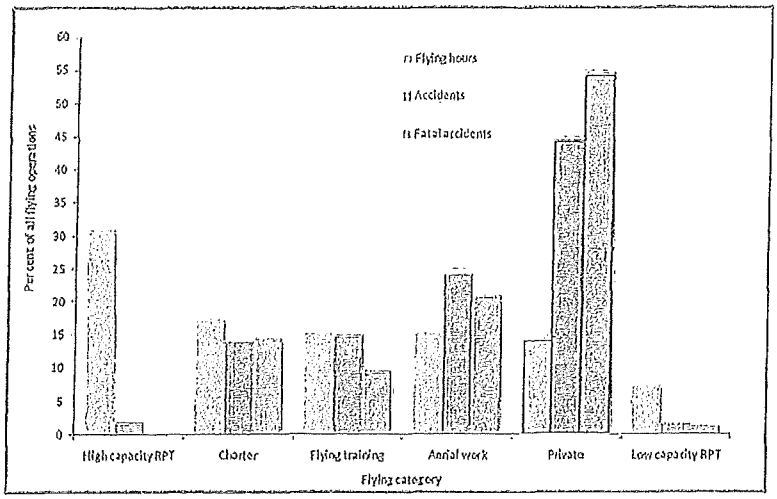
A research article by the US National Transportation Safety Board published in 2007 examined general aviation accidents in degraded visibility and identified several variables that were significantly associated with accident involvement. These included:

- pilot age at the time of the accident (with the highest proportion of accidents involving pilots over 60)
- pilot age at certification (with pilots certified at or before age 25 having the lowest accident involvement)

- the pilot not holding an instrument rating increased the accident risk by nearly five times
- commercial pilots had a lower accident involvement than student or private pilots
- private flights had a higher accident involvement than flights conducted for commercial purposes

During the course of the investigation, the ATSB became aware of the (United States) Aircraft Owners and Pilots Association training course 'Public Benefit Flying: Balancing Safety and Compassion'. This initiative identified that pilots conducting volunteer humanitarian flights may be exposed to factors that are detrimental to safe decision-making and provided strategies to assist pilots in dealing with these.

Investigation report AO-2011-100 also detailed the relative levels of safety between commercial and non-commercial flights. Specifically, the following graph compares the accident trends in private and other operations in Australia between 1999 and 2008:



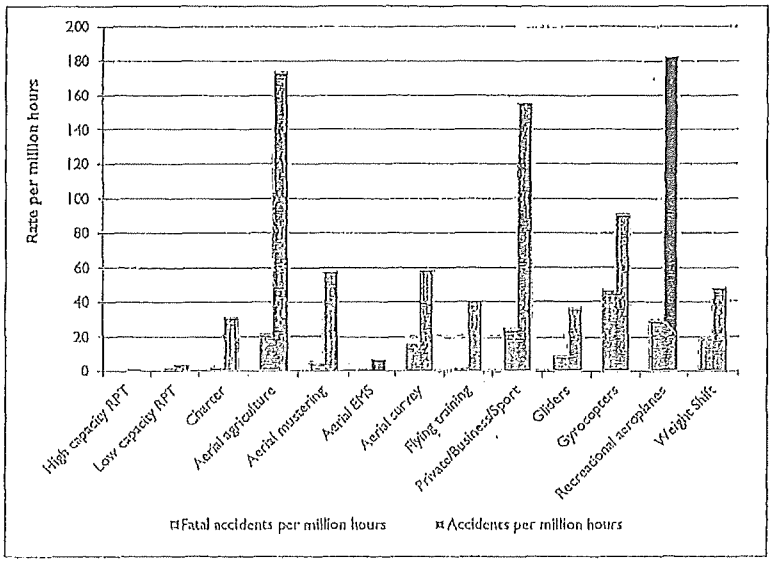
Source: ATSB

As can be seen, the largest proportion of accidents occurred during private flights despite such flights representing the second lowest number of flying hours.

More recent analysis by the ATSB, summarised in the following graph, considered the rate of accidents and fatal accidents (Australian-registered aircraft only) by operation type between 2004 and 2012.[8] That analysis identified that the accident rate for private flights is significantly higher than for almost all other types of operation, and comparable to aerial

[8] Activity data for each operation type is provided by the Bureau of Infrastructure, Transport and Regional Economics (BITRE), except for the following where information on hours flown and number of departures was not collected between 2004 and 2012: Fire control, Other/unknown GA, Sport aviation, Foreign-registered GA.
Accident and fatal accident rates are based on those accidents from 2004 to 2012 only, as activity data was not yet available for 2013 at the time of writing. Recreational aviation accident rates are based on accidents from 2004 to 2011, and gliding accident rates are based on 2005 to 2012,as data was only available for those years at the time of writing. Private/Business/Sport excludes gliding.

agriculture and recreational aeroplanes. The fatal accident rate for private flights was similarly high when compared with other operation types, with only gyrocopters and recreational aeroplanes having a higher fatal accident rate.



Source: ATSB

The ATSB has also conducted analysis of the relative level of safety between transport by air and road. That analysis indicates that the accident rate for private flights is similar to that of motorcycle accidents, which is itself higher than the motor vehicles accident rate.

In the light of the possibility canvassed in discussion paper DP1317OS that amateur-built aircraft could be used for voluntary community service flights, ATSB research reviewing the relative safety of amateur-built aircraft compared to factory-built identified that:

> *Amateur-built aircraft had an accident rate three times higher than comparable factory-built certified aircraft conducting similar flight operations between 1988 and 2010. The fatal and serious injury accident rate was over five times higher in amateur-built aircraft, in particular due to relatively more serious injury accidents.*
>
> *The pilots of amateur-built aircraft involved in accidents were significantly more experienced overall than factory-built aircraft accident pilots. However, they were significantly less experienced on the aircraft type that they were flying at the time of the accident.*

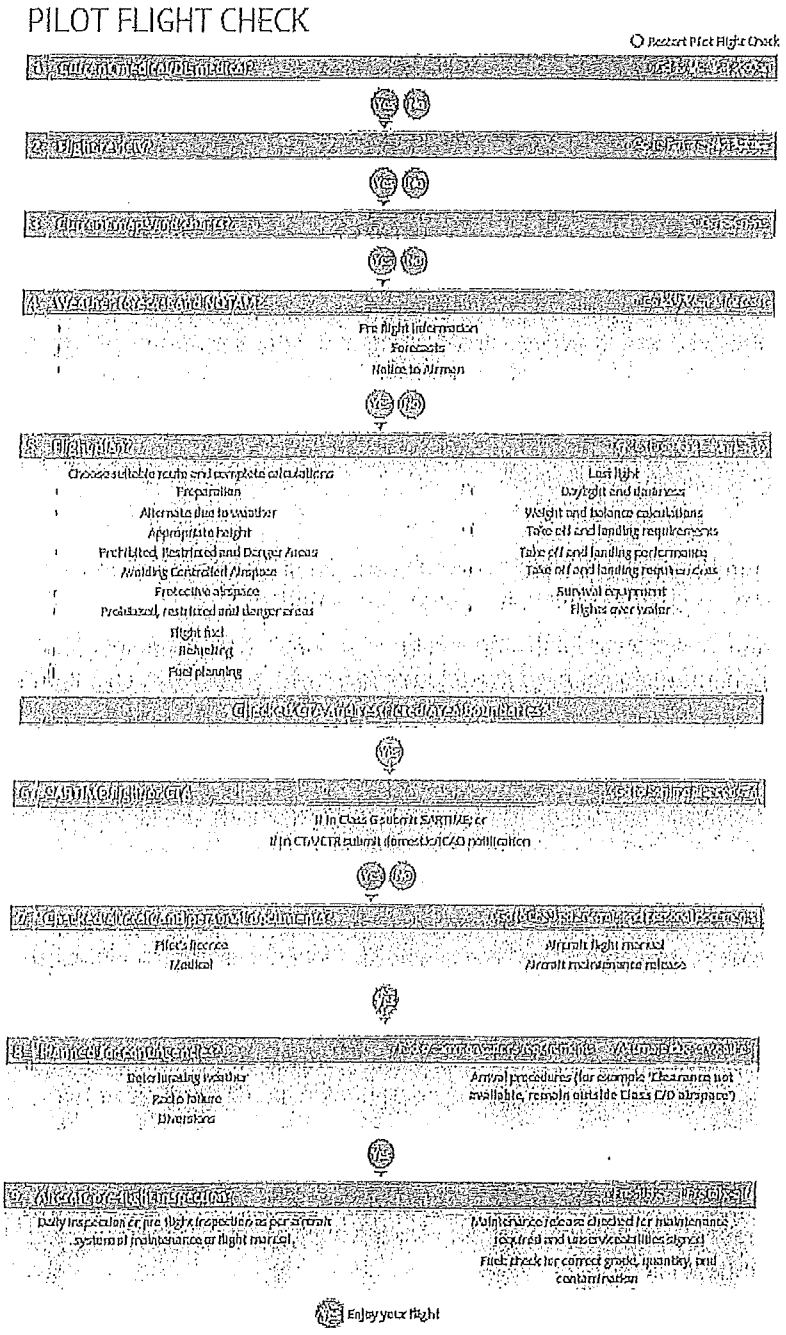
In conclusion, the varied circumstances under which voluntary community service flights can be undertaken lead to a resulting variation in the associated safety risk. The ATSB believes that, having regard to the community service objectives of such flights, passengers contemplating such non-commercial flights should be informed of the likely risk in order to allow them to make an informed decision on whether to participate.

Australian Government
Civil Aviation Safety Authority

Standard Form of Recommendation (SFR)
Flight Standards Division

CASA online VFR Flight Guide – Pilots Checklist

Available at: vfrg.casa.gov.au



Australian CSF sample passenger briefing / acknowledgement requirements

Angel Flight Passenger Notification & Acceptance Procedures

Referrer Guidelines Pre-Flight[9]. Prior to a passengers' first flight, Medical Referrers are instructed to make known to passengers the following:

- Under Civil Aviation Safety Authority (CASA) rules, the pilot is responsible for the safety of the flight. Angel Flight will coordinate between pilots and passengers; however responsibility for the flight and the airworthiness of the aircraft rests with the pilot.
- Pilots make final decisions regarding the completion of all flights. A pilot may choose to delay or cancel a flight due to weather, mechanical difficulties, illness or any other reason. If a pilot cancels, Angel Flight will use its best endeavours to arrange an alternative solution; however please be mindful that the passengers may have to make their own arrangements. Angel Flight may arrange an alternative pilot/ aircraft; reserving a seat on a commercial airline (at Angel Flight's expense), arranging overnight accommodation and meals for passengers and pilots; and requesting appointments be rescheduled.

Passenger Guidelines Pre- Flight[10]. Angel Flight documentation signed by all passengers specifically draws to their attention, the following information:

- Passengers are aware that Angel Flight is a charity, not a commercial flying operation, or an aviation organisation of any kind. Because of this, the pilots volunteering to do flights for Angel Flight may not necessarily have the same qualifications and training as commercial pilots. In addition, the aircraft they fly may not necessarily meet the maintenance standards required of commercially operated aircraft. Whilst exceeding the standards required for private flight by Australia's Civil Aviation Safety Authority, the aviation activity will not have the assurance of airline-level safety, nor commercial operation, for example- of those aircraft and pilots regulated by an Air Operation Certificate.
- Passengers are aware that Pilots make the final decisions about their flights. A pilot may delay or cancel a flight because of bad weather or other safety factors. We ask our passengers either to have a back-up plan or to be able to reschedule their appointments. Angel Flight will use its best endeavours to make alternate transport arrangements, however please be mindful that you may still have to make your own arrangements.
- In accordance with Civil Aviation Safety Authority (CASA) rules, the pilots are responsible for the safety of the flight. Angel Flight will coordinate between pilots and passengers; however responsibility for the flight and the airworthiness of the aircraft rests with the pilot.

[9] Angel Flight Request Document July 2015
[10] Angel Flight Passenger Guidelines July 2015

- All passengers will be asked to sign a Liability Waiver before the day of the flight releasing Angel Flight and its volunteers from liability. If a passenger is under eighteen (18) years of age, a legal guardian will be asked to sign on their behalf.

Pre-Flight Passenger Acknowledgement[11]. When making an Angel Flight request, passengers are required to answer the following questions:

- Aware that travel will be a private flight in a light aircraft?
- Aware that the aircraft and/or the pilot's qualifications will not be the same as the standard of commercial or airline transport?
- Understood and be freely willing to sign the Passenger Guidelines, Waiver and Release of Liability forms?

Pre-Flight Passenger Waivers & Release of Liability[12]. Before Angel Flight accepts a passenger for a flight transfer, the passenger is required to sign a waiver and release of liability form intended to be a legally binding document. The form requires the passenger to unconditionally acknowledge and agree inter alia:

- I personally and voluntarily accept and assume all risk and responsibility of undertaking the Flight and riding in the Aircraft, including for all harm, trauma, shock and other injury that I may suffer (including personal injury and death) and damage to property irrespective of whether any of the foregoing was foreseeable or not or caused by the negligence of any person (including any of the Released Parties). In particular (and without limiting this release) I acknowledge that such risks may include:
  - turbulence, and all other adverse weather and flight conditions;
    - mechanical or equipment malfunctions and failures, including those arising out of negligence;
    - emergency landings;
    - accidents and all other Flight and on ground incidents including all those arising out of Pilot error or resulting from any cause including negligence.
- the Released Parties have agreed to provide the Flight at my request and I am riding in the Aircraft voluntarily, of my own free choosing and will after careful consideration of the risks associated with riding in the Aircraft.
- the Flight may not be commenced or completed.
- I have considered other forms of transportation and, after considering such, I have chosen to ride in the Aircraft.
- I am not required to ride in the Aircraft and I do not have a medical condition which otherwise necessitates my riding in the Aircraft.
- I understand that the Flight does not constitute a medical flight and the Aircraft is not a charter or ambulance aircraft and is not performing any ambulance or similar function.

[12] Angel Flight Request Document July 2015

- I understand that the Aircraft is not equipped with any medical equipment and no medical assistance can be provided to me on the Aircraft.

Regulatory Impact – Cost (Monetary / Time / Resources)

Safety impact on CSF passengers

Option 1 – Nil. No improvement in safety.

Option 2 – Nil. CSF passengers lack the knowledge to effectively understand the differences in risk between CSF and charter operations.

Option 3 – High. Likely to be the most effective method of increasing CSF safety standards (aside from certificated operations) as it directly impacts the most vulnerable part of the CSF aviation system (the pilot).

Option 4 – Minor. Registration and associated information collection would provide additional data for CASA to potentially evaluate sector safety in the future.

Option 5 – High. Proven effective methodology for increasing systems based support for CSF pilots and the CSF operations.

Option 6 – High. Proven effective methodology for increasing systems based support for CSF pilots and the CSF operations.

Option 7 – Minor. Most current CSF pilots would meet the proposed requirements and therefore safety impacts from this measure alone are not expected to be significant.

Option 8 – Moderate. Night VFR operations contain significant additional risks for pilots with low recency and frequency of flight operations. No longer permitting night VFR CSF would increase safety outcomes and remove a significant risk factor. Limiting the number of persons on board to a total of 6 is likely to have a MINOR impact due to the very low number of CSF currently conducted with persons on board greater than 6.

Option 9 – Minor. Increased frequency of maintenance does provide an additional risk mitigator, but it is likely to only provide a small safety enhancement.

Option 10 – Minor. Broader understanding of CSF risks is unlikely to significantly impact overall CSF safety.

Impact on charitable organisations

Option 1 – Nil.

Option 2 – Nil. The relevant charitable entities are conducting these briefings as part of their standard processes and therefore CASA does not need to regulate in this area.

Option 3 – Moderate impact if pilots withdraw themselves from the pool of volunteer pilots instead of undertaking the required training.

Option 4 – Minor impact. Nil cost to pilots to register with CASA. Not anticipated to result in a significant loss of volunteer pilots willing to conduct CSF.

Option 5 – Considerable monetary, cost and resource impacts due to required investment to achieve ASAAO (CASR Part 149 now) status.

Option 6 – Considerable monetary, cost and resource impacts due to required investment to achieve AOC.

Option 7 – Minor impact. Licensing and experience requirements are not anticipated to be a problem except for a small number of existing CSF pilots.

Option 8 – Minor impact. Slight monetary, cost and resource impacts due to potential increased overnight costs for pilots.

Option 9 – Minor impact. Only a small number of CSF pilots are expected to withdraw instead of complying with this requirement. It is minimal unless a significant amount of annual flying is undertaken.

Option 10 – Moderate due to the anticipated increased volume of enquiries from potential passengers. Once fact sheets produced impact will significantly reduce.

Impact on CSF Pilots

Option 1 – Nil.

Option 2 – Minor. Small additional administrative impacts.

Option 3 – Moderate. Some pilots could be expected to withdraw from conducting CSF instead of paying the additional cost of more frequent checking.

Option 4 – Minor. Small additional administrative impacts.

Option 5 – Minor. Aside from anticipated operations manual of some form, minimal impact on the volunteer pilots.

Option 6 – Minor. Aside from anticipated operations manual of some form, minimal impact on the volunteer pilots.

Option 7 – Significant cost associated with additional Flight Review and cost in time and money involved in passing CPL theory exams.

Option 8 – Slight additional investment in time if required to overnight due to inability to conduct a night VFR CSF.

Option 9 – Nil direct impact unless aircraft owned by Pilot. Moderate impact due to additional frequency of required maintenance.

Option 10 – Nil.

Impact on CASA

Option 1 – Negative publicity from elements of the media seeking to highlight government inaction on a safety issue. Potential to occur when the ATSB investigation report into the 2017 accident is released.

Option 2 – Slight monetary, cost and resource impacts due to evaluation and assistance to charitable organisations.

Option 3 – Slight monetary, cost and resource impacts due to increased administration associated with monitoring increased CSF pilot training and checking requirements.

Option 4 – Moderate ongoing cost in delivering CSF pilot training. Constrained CASA specialist ASA resources – suggest expanding the delivery of this training to Part 141 and Part 142 operators.

Option 5 – Very High – potential perception that CASA is over-regulating what is perceived as an "essential service". Highly likely to synergise with existing themes regarding CASA over-regulation of the GA sector.

Option 6 – Very High – potential perception that CASA is over-regulating what is perceived as an "essential service". Highly likely to synergise with existing themes regarding CASA over-regulation of the GA sector.

Option 7 – High – perception that CASA is over-regulating what is perceived as an "essential service". Industry criticism likely to focus on the fact that none of the CSF accident pilots had experience less than that proposed to be required under this option. Highly likely to synergise with existing themes regarding CASA over-regulation of the GA sector.

Option 8 – Moderate – some perception that CASA is over-regulating what is perceived as an "essential service".

Option 9 – Moderate – some perception that CASA is over-regulating what is perceived as an "essential service".

Option 10 – High – significant perception that CASA is overstating the risks for passengers associated flying on a CSF. Highly likely to synergise with existing themes regarding CASA "destroying" GA.

Benefits (Safety / Sector of economy / Public interest / Social / Environmental)

Option 1 – Enables the conduct of community service flights with the lowest regulatory cost impositions. No identifiable benefits.

Option 2 – Nil. Creates the impression of a benefit without providing sufficient education of the involved CSF passenger so that they understand the risk implications. Only effective in conjunction with option 10.

Option 3 – Significant increase in safety due to increased checking of pilots for competency and increased professional knowledge base of pilots.

Option 4 – Public interest benefit as this option provides increased data for the regulator on which to base future decisions.

Option 5 – Considerable increase in safety through the application of full regulatory oversight and increased organisational accountabilities.

Option 6 – Considerable increase in safety through the application of full regulatory oversight and increased organisational accountabilities.

Option 7 – Public interest benefit by increasing the clarity for all involved parties as to the minimum CSF pilot qualification, experience and other requirements. Additionally, clear risk relationship to other Australian aviation operations.

Option 8 – Considerable increase in safety through the application of full regulatory oversight and increased organisational accountabilities.

Option 9 – Lowers the likelihood of accidents and incidents through a modest increase in the frequency of aircraft maintenance depending on aircraft usage rates.

Option 10 – Social and public interest benefits due to increased transparency with the public and therefore potential and current CSF passengers.

DP 1317OS – overall option disposition

Option 1 (do nothing)

CASA does not consider this an acceptable option in the absence of significant, sustained and implemented CSF sector voluntary safety initiatives.

Option 2 (passenger safety acknowledgements)

This option has been implemented by the CSF sector. However, even with the safety acknowledgment, CASA still considers CSF passengers to be uninformed participants due to their overall lack of aviation regulatory structure and requirements and does not consider that this option, when implemented in isolation, has significant safety benefits.

Option 3 (additional pilot training and checking requirements)

CASA has determined that, at the present time, these additional cost burdens on industry are not essential to the safety of air navigation.

Option 4 (CSF pilot registration system)

The implementation of this option, as proposed in the DP, would have been overly burdensome to a volunteer aviation sector. However, if implemented in a way similar to that proposed for recreational drone registration, i.e. quick and easy via the upgraded CASA portal, the option could be implemented very simply. However, the safety benefits of the registration system are low unless coupled to other safety initiatives directed at improved pilot safety outcomes and other options with a higher safety return should be considered for implementation prior to this option.

Option 5 (use of an ASAO)

After considering industry responses to the DP on this matter, it is evident that the CSF sector would not be willing to implement this option and, if CASA were to require an ASAO to exist for the sector, this would have significant adverse impacts on the functioning of the sector. Whilst there would be large safety benefits, other options to increase safety should be explored first and only if all other avenues have proven ineffective should options 5 or 6 be considered.

Option 6 (conduct of operations under an AOC)

After considering industry responses to the DP on this matter, it is evident that the CSF sector would not be willing to implement this option and, if CASA were to require an AOC for an organisation to undertake CSF, this would have significant adverse impacts on the functioning of the sector. Whilst there would be large safety benefits, other options to increase safety should be explored first and only if all other avenues have proven ineffective should options 5 or 6 be considered.

Option 7 (flight crew licencing / pilot experience requirements)

Respondent comments focused on a lack of necessity to impose any requirements as the charitable organisations already impose their own requirements, the excessive nature of requiring 500 hours PIC if a PPL holder did not have 10 hours on type in the aircraft to be used for the CSF and that requiring a CASA class 1 or 2 medical was excessive and that a RAMPC or RA-Aus medical should be sufficient.

These comments have been considered. Noting the comparison analysis to comparable foreign minimums, the requirements for similar domestic operations and the relatively benign weather and terrain in Australia, it is recommended that the following licensing and experience requirements for a CSF pilot be implemented:

1. ATPL with any experience. Minimum hours not necessary due to the completion of ATPL theory and the ATPL flight test.
2. CPL with any experience. Minimum hours not necessary due to the completion of CPL theory and the CPL flight test.
3. PPL with the following minimum experience:
   a. 400 hours flight time in aeroplanes or helicopters,
   b. 250 hours flight time as pilot in command in aeroplanes or helicopters; and
   c. For a CSF conducted in a multi-engine aeroplane – minimum 100 hours on

multi-engine aeroplanes. Multi-engine aeroplane are significantly more complicated to operate. Noting the elevated responsibility to this style of passenger, it is appropriate to impose this increased requirement.

4. Minimum one landing in the last 30 days prior to conducting the CSF. The minimum requirement for carriage of passengers under Part 61 of CASR does not take into account a graduated passenger / participant risk analysis and only sets the absolute minimum for private operations.
5. For a VFR CSF – minimum 10 hours on the type of aeroplane used in the CSF. It is not recommended that this requirement be linked to the *class* of aeroplane as opposed to the *type* of aeroplane as even within classes there can be technically significant differences and, noting the elevated responsibility to this style of passenger, it is appropriate to impose this increased requirement.
6. For an IFR CSF – minimum 20 hours on the type of aeroplane used in the CSF. It is not recommended that this requirement be linked to the *class* of aeroplane as opposed to the *type* of aeroplane as even within classes there can be technically significant differences and, noting the elevated responsibility to this style of passenger, it is appropriate to impose this increased requirement.
7. Class 1 or 2 medical certificate is required, Class 2 basic medical is excluded. Noting the elevated responsibility to this style of passenger, it is appropriate to impose this increased requirement.
8. Each CSF must be identified and recorded in the pilot's logbook. This is an appropriate requirement as it enables enhanced accident and incident investigation.

Option 8 (aircraft operational limitations)

This option received the highest level of acceptability (40%) of all options aside from do nothing and passenger acknowledgement of risk.

Globally, aviation risks are generally related to passenger numbers – not total persons on board. Noting that the vast majority of CSF are conducted as single pilot operations, this option is equivalent to permitting a maximum of 5 passengers. This number of passengers is a common global "step" for requiring additional safety protections.

Noting that additional pilot training and checking and organisational supervision options are not recommended to be implemented at this time, CASA considers that implementing a restriction limiting CSF to five passengers is appropriate. If further safety protections (beyond those recommended in this SFR) are implemented at a later date then this limit could be re-evaluated.

In addition to those aspects articulated in option 8 of the DP, noting the type of passenger being carried during CSF and the responsibility of CASA to maintain an appropriate level of safety, it is recommended that all VFR CSF be required to submit a SARTIME or FLIGHT NOTE as per certain other aerial work or private flights. Currently, a VFR CSF is not required to submit any flight notification. To enable appropriate identification and enhanced awareness of these flights as CSF by the aviation system, the flight notify (whether full flight details or flight note) must contain an annotation identifying the flight as a CSF. This can be

accomplished by entering a "RMK/CSF" in Item 18 of the flight notification form or the remarks section of the flight note.

Option 9 (aircraft certification and maintenance requirements)

Whilst this option received a higher level of acceptability compared to most other options, some responses identified that many owner-builder aircraft are better equipped than manufacturer-built aircraft.

After examining maintenance requirements for similar domestic operations, it is recommended that CASA require CSF aircraft to be maintained in an equivalent manner to parachuting aircraft. Whilst parachuting aircraft are not operating in the wide variety of weather conditions of CSF, the implementation of an equivalent standard of maintenance to another operation involving a participant between a fare paying passengers and a recreational private flight is an appropriate initial action. If this option in conjunction proves ineffective then further maintenance requirements could be evaluated at that time.

An aircraft used for CSF operations that is not a class A aircraft must either:

- be maintained in accordance with an approved system of maintenance; or
- undergo a maintenance release inspection at the earlier of 100 flight hours or 12 months, and have all engines maintained in accordance with:
  - for piston engines – requirement 2 of AD/ENG/4; and
  - for turbine engines – requirement 1 of AD/ENG/5.

Option 10 (public education program)

This option was proposed to complement either option 1 (do nothing) or option 2 (passenger safety acknowledgment). Respondent comments focused on the difficulty of reaching the general public with a truly informative education campaign that wouldn't eventually negatively affect the CSF sector. Some respondents pointed out that the charitable organisations already had their own education programs for passengers.

The difficulties with implementing an appropriate public education campaign are acknowledged. This option should be further considered if other options prove to be ineffective over an appropriate period of time.

Compliance Implementation Methodology (CASA / Operators / affected agencies [ATSB / Airservices Australia / BoM)

If made, the conditions imposed on all pilots via the legislative instrument would be communicated to pilots via direct email communication and via an AIP Supplement and AIP amendment. Charitable organisations would also be requested to communicate the requirements to their volunteer pilots.

CASA would create a section for community service flights on the CASA public website. CASA will explore whether other communication mediums such as the regular Aviation Safety Seminars should also be utilised. Internal CASA communications would also occur.

Through the respective CSF co-ordinating agencies.

Stakeholder Consultation (if required)

It is recommended that the legislative instrument be subject to public consultation and that this consultation include a summary of responses from DP 1317OS.

Annex B to
FSB SFR D18/627009

Country	Company requirements	Pilot experience No. of Hours / IR					Additional requirements
		Total hours	PIC hours	Inst Rating	X-country hours	Make / model	
USA	Angel Flight North East	500	400	Required		50 hours each make / model If flying a ME or a turbine – min 100 hours in the type being flown	A minimum of 50 hours as PIC must have been logged within the 12 calendar months immediately preceding the month of the flight, or A minimum of 12 hours flown and logged within the previous 90 days o This can be waived if a pilot completes 2 hours of dual training with a certified flight instructor within the 3 calendar months preceding the month of the flight A valid medical certificate Current flight review Minimum of one million dollars ($1,000,000) liability insurance with not less than $100,000 per seat shall be in force on any aircraft to be used for angel flights Aircraft must be properly registered, licensed, airworthy, and we recommend that the engine time since new or last overhaul be less than the manufacturer's recommended Time Between Overhaul (TBO)
	Angel Flight Mid-Atlantic		500 (if flying a piston) 1000 (if flying a turbine) (hours don't have to be all turbine or all piston)	Required		50 hours each make / model If flying a turbine – min 100 hours turbine	Either: o A minimum of 50 hours as PIC must have been logged within the 12 calendar months immediately preceding the month of the flight, or o A minimum of 12 hours flown and logged within the previous 90 days This can be waived if a pilot completes 2 hours of dual training with a certified flight instructor within the 3 calendar months preceding the month of the flight A valid medical certificate Current flight review Minimum of one million dollars ($1,000,000) liability insurance with not less than $100,000 per seat shall be in force on any aircraft to be used for angel flights Aircraft must be properly registered, licensed, airworthy, and we recommend that the engine time since new or last overhaul be less than the manufacturer's recommended Time Between Overhaul (TBO)
	Angel Flight East	300		Required			Access to a plane with at least 4 seats Must have appropriate liability insurance Command Pilot Manual provided to all pilots – strongly suggests all flights be conducted IFR Requirement for all children under 2 to be in an approved child restraint – not in a parent's lap.
	Angel Flight Southeast		250 (only req for PPC – not CP or ATP)	Required (except if flying within Florida)	75 (for PPC and CP but not ATP)		Significant and detailed operational restrictions in the Pilots Manual (total weight of passengers and cargo plus many more): o Flights daylight only (preferably morning); o Must file flight plan with flight following. Flight review within last 24 months OR instrument proficiency check OR insurance approved recurrent training course 50 hours PIC within last 12 months at time of application Current medical Minimum of $500,000 liability insurance with not less than $100,000 per seat shall be in force on any aircraft to be used for angel flights
	Angel Flight Oklahoma		250	Required		25 hours each SE type	Valid and current private (or higher) certificate, with class/type ratings and endorsements required for aircraft

						75 hours each ME type or turbine type	• 50 hours as PIC in last 12 months (waived with a flight review or completion of Wings phase in last 3 months) • Valid & current class II or higher medical certificate • Must have liability insurance • Must fly IFR
	Angel Flight Central	500 (not req if CP held and meet PIC req)	250	Highly desired		25 hours each make/model for SE 50 hours each make/model for ME/turbo-prop/jet	• Complete the AOPA air safety institute online course (Public Benefit Flying—balancing safety and compassion) • Pilots over 80 years of age must have a safety pilot under 80 • Experience: o 8 hours PIC in previous 90 days; or o 2 hours dual with a certified flight instructor in the previous 90 days; or o 4 hours as PIC in the previous 30 days o Any of the above must be in the current category, class and type of aircraft that will be used for flying AFC passengers • Current medical • Min PPC • Aircraft must be airworthy as per FARs • Minimum of one million dollars ($1,000,000) liability insurance with not less than $100,000 per seat shall be in force on any aircraft to be used for angel flights OR equivalent non-owned
	Angel Flight West		250 (if PPC held no req for CP or ATP)	Not required	75 (for PPC and CP but not ATP)		• A current PPL, CPL or ATPL • Current medical including basic • The pilot applicant must supply a copy of the Certificate of Insurance applicable to the aircraft that will be used for AFW missions providing at least $500,000 liability coverage with a minimum per-seat coverage of $100,000
Canada	Hope Air	500	400	Not required		50 hours each make/model	• Valid Canadian PPL, CPL or ATPL • 30 hours flying logged in the past 12 months
New Zealand	Angel Flight New Zealand	Not specified	250	Not required		50 hrs in past 12 months 25 hrs in part 6 months (unless passed a BFR[23] in the last 12 months)	• Current NZ PPL, CPL or ATPL • Current Medical Certificate • Current BFR (must have passed a BFR in the last 24 months)
Australia (current)	Angel Flight	Not specified	250	Not required		• VFR—5 hours PIC on type • IFR—10 hours PIC on type	• Current PPL, CPL or ATPL
Australia (proposed)	CSF Aeroplane Only No change to existing guidelines	400 Safety assumption is that with this number of hours the PIC has been exposed to reasonable range of meteorological and operational conditions	250 No change to existing guidelines	IFR not required No changes to existing guidelines		VFR—10 hours PIC on type IFR—20 hours PIC on type Safety assumption for lower requirements than overseas is that AUS weather and terrain is more	Broadly, CSF pilots can operate from a variety of unfamiliar locations in varying weather conditions with no organisational oversight or safety support. They are highly reliant on their own personal skills, knowledge and standards. They are transporting passengers with a very limited understanding of the relative risks between CSF and charter operations. Current PPL, CPL or ATPL No change to existing guidelines One day or night landing in last 30 days on the type or class (as appropriate) of aircraft used in the CSF flight

[23] Biannual Flight Review (BFR). A BFR is conducted by an approved CAA Instructor. The pilot must carry out the BFR List of Prescribed tasks to the satisfaction of the instructor.

						benign than US, CAN, NZ. For multi-engine aeroplane – minimum 100 hours flight time as pilot in command in multi-engine aeroplanes. Multi-engine aeroplanes are more complex and by their design may have unique handling characteristics following the loss of an engine and associated performance degradation which must be managed.	Safety assumption is to ensure recency on a similar aircraft for non-complex aircraft or the same type for complex aircraft. Provides assurance that the pilot has recent practice in the accident critical approach and landing phase of flight. CASA regulations: Reg 61.395 requires a pilot to conduct at least 3 landings in the last 90 days prior to carrying passengers. These 3 landing can all occur on the one day which could be 89 days prior to carrying passengers and not necessarily in an aircraft of the type or class used to conduct the CSF. Night VFR is excluded Unacceptable risk to safety. The risks of inadvertent entry into IMC at night is greater when clouds cannot be detected when there is little or no ambient lighting. The loss of a visual horizon for pilot who do not hold an instrument rating increases the risk of disorientation that can lead to a loss of control inflight. Current Class 1 or 2 Medical Certificate – no basic class 2. This is in line with other safety industries (Rail) within Australia where sudden incapacity or collapse (e.g. from heart attack or blackout) may result in a serious incident affecting the public. Minimum standards for maintenance to be undertaken at the earlier of 100 flight hours or 12 months. These standards are the same as if the aeroplane is used for charter, hire or flying training.
Instructor Rating (Aeroplane)	NA – reg 61.1185 of CASR	200	100	Not required			• Current PPL, CPL or ATPL • Must meet the requirement for the grant of at least one training endorsement. • Minimum hours are usually exceeded in normal practice. Normal practice is most instructors have a minimum of a CPL • Instructors conduct their flights under the organisational supervision of a flight training operator. • The passenger / trainee being transported is a reasonably informed participant compared to an air transport passenger or a CSF passenger. • Instructors generically operate A to A and, at the junior level, in controlled circumstances and reasonable weather.
Jump pilots (Aeroplane)	NA – future Part 105 and planned jump pilot direction under current rules	200	100	Not required		VFR – 10 hours PIC on type	• 100 hours ME • Jump pilots operate A to A flights in generically good weather and reasonably familiar environments and conditions. • The passenger being transported is a reasonably informed participant (for tandem / trainee parachutists) and a fully informed participant for a trained parachutist.
Adventure flights pilots (Aeroplane)	NA – Instrument 07/17 (conditions on authorisations)	150 (inferred from CPL minimums)	70 (inferred from CPL minimums)	Not required	20 (inferred from CPL minimums)		• Current CPL or ATPL • Adventure flight pilots operate A to A flights in generically good weather and familiar environments and conditions. • Experience is normally well in excess of minimum CPL hours requirements due to the type of aircraft being operated. • The passenger being transported is required by regulation (aviation law) to be fully informed of the risks of the flight, the airworthiness status of the aircraft being used compared to "normal" aircraft and are therefore a reasonably informed participant.

Australian Government
Civil Aviation Safety Authority

Annex C to FSB SFR D18/627009

Drafting instructions for LARA

What is the required commencement date and duration?

- Commencement – One (1) month after making (consultation closes end of January, aiming for making / signature by the DAS in mid-February).
- Duration – 3 years.

Note: The legislative instrument will be reviewed on the completion of project OS 13/25 and if necessary, rolled into the Part 91 MOS.

Who does it apply to?

- All Pilots who currently or prospectively wish to undertake CSF.

What is required?

- Proposed definition of a community service flight – a flight operation to provide transportation to an individual for medical purposes (not permitted to carry more than one person requiring medical services simultaneously) where the pilot in command has volunteered to provide such transportation.
  - This definition has been provided to LARA as an example of a suitable definition. It is acknowledged that this may be modified as part of the drafting process.
  - This has been sourced and appropriately modified from the FAA definition of a "charitable medical operation" (sourced from FAA exemption 10360C – granted to Angel Flight Northeast in 2015 – see below for this definition).

> Charitable Medical Flight (CMF): A flight operation to provide transportation for an individual or organ for medical purposes (and for other associated individuals), if the aircraft owner or operator has volunteered to provide such transportation.

- The following *minimum flight crew licensing, experience and medical requirements*:
  - A pilot in command of an aeroplane for the purpose of a CSF must hold:
    - an Air Transport Pilot Licence with an aeroplane category rating – ATPL(A), or
    - a Commercial Pilot Licence with an aeroplane category rating – CPL(A), or
    - a Private Pilot Licence with an aeroplane category rating – PPL(A).
  - Pilot in command of a CSF must have the following aeronautical experience requirements:
    - For the holder of an ATPL(A) or a CPL(A) – nil additional.
    - For the holder of a PPL(A):
      - 400 hours flight time in aeroplanes or helicopters.

- 250 hours flight time as pilot in command in aeroplanes or helicopters.
- Flight time is defined as per reg 61.080 of CASR.
- Flight time as pilot-in command is as per reg 61.090 of CASR.
- For a CSF conducted in a multi-engine aeroplane – minimum 100 hours flight time as pilot in command in multi-engine aeroplanes. Multi-engine aeroplane defined as per reg 61.010 of CASR.

– a landing in the type or class of aeroplane (as appropriate) used in the CSF in the last 30 days.
– for a VFR flight – 10 hours on the type of aeroplane used in the CSF.
– for an IFR flight – 20 hours on type of aeroplane used in the CSF.
  - Include a NOTE in the instrument following these 2 requirements (IFR and VFR hours on type) reminding pilots of their requirement to ensure general competency before conducting a flight as per reg 61.385 of CASR.

– Class 1 or 2 medical required, Class 2 basic excluded.
– Each CSF must be identified and recorded in the pilot's logbook.

- The following operational restrictions on flight sectors conducted as a CSF operation:
  – Operations are to be limited to aeroplanes only.
  – VFR operations are limited to day only – no night VFR operations.
  – Number of passengers is limited to 5.
  – All instances of a pilot conducting a CSF under the VFR requires, at a minimum, the submission of FULL FLIGHT DETAILS or FLIGHT NOTE or SARTIME as per AIP ENR 1.10 (as in force from time to time). The FULL FLIGHT DETAILS or FLIGHT NOTE is required to identify the flight as a CSF in Item 18 of the FULL FLIGHT DETAILS using "RMF/CSF" or in the remarks section of the FLIGHT NOTE.
- An aircraft used for CSF operations that is not a class A aircraft must either:
  – be maintained in accordance with an approved system of maintenance; or
  – undergo a maintenance release inspection at the earlier of 100 flight hours or 12 months, and have all engines maintained in accordance with:
    - for piston engines – requirement 2 of AD/ENG/4; and
    - for turbine engines – requirement 1 of AD/ENG/5.

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 13/11/2020 6:16:12 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	VID222/2019
File Title:	ANGEL FLIGHT AUSTRALIA v CIVIL AVIATION SAFETY AUTHORITY
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 13/11/2020 6:16:16 PM AEDT Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Form 59
Rule 29.02(1)

Affidavit

No. **VID222 of 2019**

Federal Court of Australia

District Registry: Victoria Registry

Division: General

ANGEL FLIGHT AUSTRALIA (ACN 103 477 069)
Applicant

CIVIL AVIATION SAFETY AUTHORITY
Respondent

Affidavit of: Christopher Paul Monahan

Address: 16 Furzer St, Phillip, ACT 2601

Occupation: Public Servant

Date: 13 November 2020

Contents

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Doc.	Description	Affidavit ref.	Page ref.
CM-44	FAA exemption to various volunteer flight organisations - October 2010	P 21, [65]	200 – 210
CM-45	*Failure Rates for Aging Aircraft* by MacLean et al	P 21, [66]	210 – 223
CM-46	CASA strategic analysis section table	P 22, [69]	224 – 225
CM-47	CASA strategic analysis section table	P 22, [70]	226 – 227

I Christopher Paul Monahan affirm:

1. I am authorised to make this affidavit on the respondent's (**CASA's**) behalf. I make this affidavit based upon facts within my own knowledge and belief, save where I indicate otherwise. Where there are statements of fact or opinion made by me and which are based on my personal knowledge or belief, I say that those facts and opinions are true and correct to the best of my knowledge and belief. Where I have relied upon information provided to me, I have identified the source of that information and believe that information to be true.
2. I am authorised to access and produce documents forming part of the records belonging to or kept by CASA in the course of, or for the purpose of, its business.

Affidavits filed in the proceedings

3. For the purposes of preparing this affidavit, I have reviewed the following affidavits:
    a. Marjorie Elizabeth Pagani, dated 12 March 2019 (the **first Pagani affidavit**);
    b. Marjorie Elizabeth Pagani, dated 15 March 2019 (the **second Pagani affidavit**);
    c. Marjorie Elizabeth Pagani, dated 15 March 2019 (the **third Pagani affidavit**);
    d. Marjorie Elizabeth Pagani, dated 18 March 2019 (the **fourth Pagani affidavit**);
    e. Marjorie Elizabeth Pagani, filed 14 February 2020 (the **fifth Pagani affidavit**);
    f. Marjorie Elizabeth Pagani, dated 15 June 2020 (the **sixth Pagani affidavit**);
    g. Nevin Rupert Agnew, dated 15 March 2019 (the **first Agnew affidavit**);
    h. Nevin Rupert Agnew, dated 18 March 2019 (the **second Agnew affidavit**);
    i. Kevin Bartlett, dated 7 August 2020 (the **7 August Bartlett affidavit**);
    j. Kevin Bartlett dated 26 August 2020 (the **26 August Bartlett affidavit**); and
    k. Owen Crees, dated 15 June 2020 (the **Crees affidavit**).
4. I have previously affirmed an affidavit dated 19 March 2020 (**my previous affidavit**) in these proceedings.

Data concerning incident and accident rates in the Community Services Flight sector

5. At paragraphs 94 – 100 of my previous affidavit, I referred to the data analysis prepared by CASA (the **CASA data analysis**) concerning incident and accident rates arising from the conduct of Community Service Flights (**CSFs**). The completed CASA data analysis is annexure CM-21 to my previous affidavit.

6. As noted at paragraph 95 of my previous affidavit and in the CASA data analysis, the data sources which were used in construction of the CASA data analysis were the Bureau of Infrastructure and Regional Economics (**BITRE**) in relation to annual flight hours flown in different sectors of the aviation industry and the Australian Transport Safety Bureau (**ATSB**) in relation to incident and accident rates arising from different kinds of aircraft operation.

7. As noted at paragraph 95 of my previous affidavit and in the CASA data analysis, the BITRE only commenced capturing data in relation to the conduct of CSFs from 2014 onwards. This meant that, in developing longer term trend data over a 10-year period (that is, 2008-2017), and per million flight hours, a degree of extrapolation of the available data had to be used. In that regard, an average of the number of CSF flights captured for the years 2014-2018 was used as a basis for calculating likely flight data in the years 2008-2013.

8. There was no other reliable official source, from which data in relation to the number of CSFs conducted in the period 2008-2013 could be sourced. While Angel Flight Australia (**AFA**) kept a running count of the number of flights coordinated by AFA on its public website (see page 192 of my previous affidavit which forms part of annexure CM-16 to that affidavit), no information was provided to CASA about the basis upon which AFA had calculated that number. For instance, it was not clear what AFA considered to be a flight:

   (a) Did a flight consist of each take-off and landing associated with a particular engagement to transport a patient? In that case, the engagement may comprise multiple flights, including some during which the patient was not onboard (for example, if the pilot had to reposition the aircraft in order to pick up the patient or return home if the pilot's home aerodrome was different to the aerodrome, to which the patient was returned after receiving medical treatment).

   (b) Or was a flight counted as a single completed engagement, which may involve multiple take-offs and landings?

9. Furthermore, no information was able to be obtained from AFA, which would allow CASA to understand the systems that were used to record their total flight numbers so as to allow CASA to form a view about the likely reliability of AFA's figures. As noted at paragraph 46 of my previous affidavit, I had asked Ms Pagani whether CASA could have

access to its documentation and audit CASA's processes and procedures, but that request was denied. Although Ms Pagani indicated to me that she would take my request to the AFA Board before reverting to me with AFA's position, I received no further communication in relation to that request. I understood from that absence of communication that the Board supported Ms Pagani's view that AFA would not provide CASA with the access that CASA had requested. Although I cannot now recall the dates on which they were made, I also recall that I made other specific oral requests to Ms Pagani for access to data and information concerning the nature and extent of AFA's operations. On each occasion, I recall that Ms Pagani either outright refused that access or indicated to me that my request would have to be considered by the AFA Board. Ultimately however, neither Ms Pagani nor the AFA Board followed up with me in relation to those requests.

10. Taking those limitations of the data available into account, the experienced statisticians in the Strategic Analysis Section of CASA's Coordination and Safety Systems Branch conducted the CASA data analysis in order to compare incident and accident rates in the CSF sector with incident and accident rates in other sectors of the industry, such as comparable private flying, passenger carrying charter and regular public transport operations.

11. Amongst other comparators, the CASA data analysis examined three key statistical figures by way of comparison – the fatal accident rate, the accident rate and the incident rate.

    (a) The fatal accident rate is a measure of accidents (occurring in a particular sector of the aviation industry), in which one or more fatalities have occurred within the timeframe under consideration.

    (b) The accident rate is a measure of all accidents, whether involving fatalities or not (occurring in a particular sector of the aviation industry) within the timeframe under consideration.

    (c) The incident rate is a measure of all incidents (occurring in a particular sector of the aviation industry) within the timeframe under consideration.

    The difference between an accident and an incident is that an incident does not involve or result in damage to the aircraft or to property on the ground.

12. The fatal accident rate calculations for CSF flights were made based on fatal CSF accidents which occurred on 15 August 2011 and 28 June 2017.

13. The incident and accident rates for CSF flights took into account data provided to CASA (and to AFA at the same time) by the ATSB, via email dated 6 February 2019 – see paragraphs 97 - 99 of my previous affidavit.

14. The CASA data analysis showed that all of the fatal accident rate, the accident rate and the incident rate were higher in the CSF sector when compared to standard private flights.

15. The fatal accident rate in the CSF sector (per million flight hours) was 5.4 times higher than in standard private flights; the accident rate in the CSF sector was 1.5 times higher than in standard private flights; and the incident rate in the CSF sector was 4.5 times higher than in standard private flights.

16. Aviation is an inherently safe activity, in which incident and accident rates are traditionally low.

    (a) Against that background of generally low incident and accident rates, significant percentage increases in comparative incident and accident rates can be a cause for concern for CASA as the industry regulator, responsible for aviation safety.

    (b) Increases of between 1.5 and 5.4 times are considered to be significant by CASA and an indicator of a need for CASA to attempt to identify the potential causes for the increase.

    (c) For context, an increase of that scale indicates that, for every million flight hours accumulated, CSFs are 140% more likely to have an incident than a standard private flight, 450% more likely to have an accident than a standard private flight, and 540% more likely to have a fatal accident than a standard private flight.

    (d) It was also significant, from my perspective, that the CASA data analysis showed that CSFs had higher rates than standard private flights in each of the three categories studied, not only one or two of those categories.

17. In the context of the comparison of the fatal accident, accident and incident rates between CSFs and standard private flights, the CASA data analysis showed that, in each case, CSF activities were significantly less safe than standard private flights. I considered that comparison to be significant, because the operational environment between CSFs and standard private flights should be substantially similar if not identical – that was the reason for the comparison. Therefore (keeping in mind the relatively low incident and accident rates associated with aviation as a whole), I considered that the significant increase in those comparative rates tended to support a conclusion that the operational environment that confronted pilots conducting CSFs was more challenging and involved higher levels of risks when compared with standard private flights. That is the concern articulated at paragraph 47 of my previous affidavit – namely, that such significant disparity in the comparative rates should not exist in a situation where, nominally, the same pilot is using the same aircraft, flying to the same location under the same conditions and regulatory requirements, with the only difference being the purpose of the flight.

18. However, as noted in my previous affidavit, the outcomes of the CASA data analysis was only one factor which I took into account in making my recommendation to the Director of Aviation Safety (the **DAS**) that he issue the *CASA 09/19 – Civil Aviation (Community Services Flights – Conditions on Flight Crew Licences) Instrument 2019* (the **CSF Instrument**). As detailed at paragraph 140 of my previous affidavit, CASA took into account a range of other matters in determining whether to issue a CSF Instrument and what the terms of that Instrument should be.

19. The significance of the outcome of the CASA data analysis for me was that it confirmed empirically that there was a data-driven basis to support a conclusion that the CSF operating environment, when compared to standard private flights, involved higher levels of operational risk, which were more likely to contribute to an incident, accident or fatal accident. I also considered that it was a reasonable assumption that, unless some aspect of the CSF operating environment was changed, CASA could expect the incident, accident and fatal accident rates to remain the same or even worsen.

Key differences between CSF operational environment when compared to standard private flights

19. As was noted at paragraphs 24 – 31 of my previous affidavit, from as early as 2014, CASA had been considering whether the CSF operational environment was such that it required CSFs to be regulated in a different way to standard private flights.

20. In order to verify the previously expressed view that the CSF operating environment is different from that of a usual private flight, as part of the review which led to the issue of the CSF Instrument, I asked the Branch Manager Flight Standards, Mr Roger Crosthwaite, and his team to conduct a comparative review of the CSF operational environment in contrast to the standard operating environment to determine what if any differences existed. The Flight Standards Branch forms part of the National Operations and Standards Division, of which I am the Executive Manager, and comprises staff with a substantial and diverse range of aviation experience as pilots in all forms of private, commercial (including charter and regular public transport operations) and military flying operations, as well qualifications and experience in aviation safety investigation. My instructions to Mr Crosthwaite were given in early to mid- November 2018, shortly after I was requested by the DAS to develop a policy proposal for him to consider whether there was a need for regulatory intervention in the CSF sector (see paragraph 72-73 of my previous affidavit). From that time, until I made the recommendation to the DAS to sign the CSF Instrument, I met with Mr Crosthwaite and members of his team as necessary, initially on a daily basis and then several times a week to check on their progress and to be kept appraised of the sources of information that they were taking into account.

21. In conducting this review, Mr Crosthwaite and his team told me during our regular meetings that they had regard to a range of published reports and other material relating to the conduct of CSF operations as to the way in which such operations are conducted in the United States and other countries. A range of studies relating to the impacts of pilot experience as well as causes of aviation incidents and accidents was also considered by the team.

    Now produced and shown to me and marked **CM-35** is a list of the various published studies and reports relating to the impacts or pilot experience as well as incident/accident causation, which were considered by me. I personally kept that list of the documentary evidence, which was taken into account as part of the review, and I reviewed each of the sources referred to in it.

22. The review was also informed by the aviation experience of the pilots employed in the branch. Throughout the review, the staff members who I most frequently engaged with were Mr Crosthwaite, and Mr Scott Watson, the Manager of the Flight Operations Section. I am informed by Mr Crosthwaite and Mr Watson, and I believe that they have the following aviation qualifications and experience:

    (a) Mr Crosthwaite is the holder of an Australian Air transport Pilot Licence (**ATPL**) and a New Zealand CPL, both in the aeroplane category. He has accumulated approximately 5,000 hours total aeronautical experience, over more than 16 years providing flying instruction and conducting flight testing in light single and twin engine aircraft types. This experience includes appointments as the Chief Flying Instructor of a flight training organisation. Mr Crosthwaite has worked for CASA since 2002 performing a range of roles primarily related to standards development.

    (b) Mr Watson holds an Australian ATPL in the aeroplane category. He has accumulated over 6,800 hours of aeronautical experience over twenty years in military and civil flying operations. He has flown light single engine aircraft such as the Piper PA28 Cherokee right through to large multi-engine transport aircraft such as the Lockheed C130 Hercules and the Embraer E190. During his career with the Royal Australian Air Force (**RAAF**), he was a qualified flying instructor and a check-captain responsible for maintaining the competency standards of RAAF flight crew. Prior to joining CASA in 2016, Mr Watson was employed by Virgin Australia as a pilot flying commercial passenger carrying regular public transport operations.

23. I contributed my own experience as a pilot to the regular discussions referred to in paragraphs 20-21 above. I have accumulated more than 3,500 hours of total aeronautical experience in military aviation, flying a range of single and twin engine turbo-prop and jet

aircraft types including the McDonnell Douglas F-15A and F-15C Eagle, North American Rockwell OV-10 Bronco, Beechcraft King Air 300 and 350 Lockheed C-130 Hercules, and Lockheed Martin KC-135 I have extensive experience as an operational test and evaluation pilot and as an air and ground accident investigator. I have held qualifications and performed roles including instructor pilot, flight examiner, operational check flight pilot, and functional check flight pilot .The role of a military check pilot is to ensure that pilots meet and maintain levels of competency appropriate to the flying role in which they are deployed. My aviation experience also includes multiple military command positions that were responsible for the full spectrum of aviation operations, including test and evaluation programs and the risk analysis that supports those operations.

24. Having regard to my discussions with Mr Crosthwaite, Mr Watson and other members of Mr Crosthwaite's team, and based on my own experience as a pilot, I was satisfied by the conclusion of the review that the CSF operational environment involved a set of human factors challenges, which are not normally present in the standard private operating environment. Human factors refer to the range of variables, which impact on human performance and decision-making, such as fatigue, stress and mental workload – to name but a few. Human factors are significant in aviation because they have significant potential to impact on the safe performance of flying activities by pilots, particularly the quality of their decision-making. The key human factors, which I was satisfied were more likely to be present in a CSF than in a standard private flight were as follows:

    (a) There was significant potential for some pilots to experience self-induced pressure, having taken on the responsibility of delivering an unknown, ill patient for important medical treatment at an appointed time, often with the expectation of a same-day return. The team reported to me that the fact that pilots operating CSFs may also be reimbursed for the operating costs associated with the flights may contribute to heightening this level of self-induced pressure. Self-induced pressure to complete "the mission" in those circumstances may contribute to pilots making poor decisions or stretching themselves beyond their level of ability or training. This factor had been specifically commented on in accident investigations reports involving CSFs or equivalent operations in the United States and in Australia.

        For example, now produced and shown to me and marked **CM-36,** is a true copy of a safety recommendation dated 9 June 2010, made by the National Transportation Safety Board (the **NTSB**) of the United States following an NTSB investigation into four separate accidents involving charitable medical flights conducted under the auspices of the Air Care Alliance.

(b) There was significant potential for pressure to be applied on pilots, directly or indirectly, by passengers expecting to be delivered on time for important medical care. In that regard the pressure of client expectations is a well understood aspect of commercial charter flying and it is a fundamental aspect of human factors training for commercial pilots that they will need to be prepared to resist pressure imposed by passengers who are paying for a service and expect their requirements to be met.

Now produced and shown to me and marked **CM-37** is a copy of the CASA publication Safety Behaviours: Human Factors for Pilots (2nd Edition), which notes (at page 11) that "get-there-itis" on the part of paying passengers was a common challenge, which may affect pilot decision-making. "Get-there-itis" is a colloquial expression, which refers to the capacity of a fixation on reaching the intended destination to impact adversely on a pilot's ability to make sound judgements about whether it is safe or prudent to continue a flight to the planned destination in the face of changing variables (such as weather), which might affect the pilot's ability to ensure the safety of the flight.

(c) Mr Crosthwaite and his team told me that they had formed the view (with which I agreed based on my own professional experience) that, although CSF passengers were not paying the pilot directly as was the case in a charter operation, there were significant parallels that were conducive to the development of this particular scenario. In particular:

(i) while the passengers were not paying directly, the pilot was nonetheless receiving remuneration for conducting the flight in the form of reimbursement for fuel costs; and

(ii) the passengers had a pressing need for the flight to be completed as intended, since the alternative might mean having to delay important health care or treatment.

(d) Guidance material produced by the Aircraft Owners and Pilots Association (the **AOPA**) in the United States has also noted the potential for that kind of pressure (referred to in the publication as "mission imperative") to be exerted in charitable or public interest flights which are substantially similar in nature and intent to CSFs.

Now produced and shown to me and marked **CM-38** is the guidance material produced by the AOPA for the assistance of volunteer pilots entitled "Volunteer Pilots – Recommendations for Enhanced Safety" (the **AOPA guidance**).

(e) Since pilots had no control over the locations from which the patients were to be collected and the destinations to which they were required to be delivered, pilots were more likely to find themselves having to operate into unfamiliar locations or in unfamiliar, complex airspace in order to deliver a patient. That is not an aspect of standard private flying, where pilots can choose their own departure and arrival points and operate in conditions where they are comfortable.

25. Each of the features of the CSF operating environment identified in paragraph 24 above is more frequently associated with the operating environment encountered by commercial pilots undertaking passenger carrying, commercial charter, operations, rather than standard private flights. However, unlike in the context of a standard private flight, commercial charter flights are regulated in a way that provides additional support to pilots in managing the kinds of pressures identified in paragraphs 24(a) – (e) above. Private pilots conducting CSFs, who may have limited levels of aeronautical experience, do not have access to those additional organisational safety supports.

26. For example, the regulatory regime provides that a commercial charter flight must involve the following additional individual and organisational supports for pilots, which are not present in a standard private flight:

(a) pilots of such flights must hold a commercial pilot licence (a **CPL**), which requires higher levels of practical and theoretical training and greater hours of aeronautical experience to obtain than a private pilot licence (a **PPL**); by way of contrast, regulation 61.505 of the *Civil Aviation Safety Regulations 1998* (the **CASR**) provides that the privileges of a PPL holder are limited to piloting an aircraft engaged in a private operations or receiving flight training, whereas regulation 61.570 of the CASR provides that the privileges of a CPL holder extend to piloting (as pilot in command) aircraft engaged in any operation (with limited exceptions) and being a co-pilot of an aircraft engaged in any operation;

(b) commercial charter flights must only be conducted by the holder of an Air Operator's Certificate (an **AOC**) – see section 27(2) and section 29(1) of the *Civil Aviation Act 1988*; the holder of the AOC must have in place the following organisational safety supports to assist pilots to manage the pressures associated with charter flights:

(i) Documented standard operating procedures to assist in all aspects of flight planning, including weather, fuel management and aerodrome information; pursuant to regulation 215 of the *Civil Aviation Regulations 1988* (the **CAR**), an AOC holder must have an operations manual for the use and guidance of their operational personnel.

Now produced and shown to me and marked **CM-39** is a copy of the CASA publication Civil Aviation Advisory Publication 215-1(3.2), which provides guidance to AOC holders on the preparation of operations manuals.

(ii) A senior supervisory pilot (generally known as a Chief Pilot), who is available to pilots at all times to assist in making operational decisions and to ensure that commercial imperatives do not compromise safety; the responsibilities of the Chief Pilot of an AOC holder are set out in Appendix 1 of *Civil Aviation Order* (**CAO**) 82.0.

Now produced and shown to me and marked **CM-40** is a true copy of Appendix 1 to CAO 82.0.

Basis for CASA's decision to increase the safety standards applicable to CSFs

27. Following discussions with Mr Crosthwaite, Mr Watson and other members of Mr Crosthwaite's team, and following the public consultation on the draft of the CSF instrument, which was conducted in December 2018 and January 2019 (see paragraphs 81 - 110 of my previous affidavit), I was satisfied that the CSF operating environment was more challenging than the operating environment encountered during a standard private flight. Specifically:

(a) I considered the differences in the operational environment, as described at paragraph 24 above, to be significant from a safety perspective to an extent that required regulatory intervention from CASA in order to attempt to address the additional safety issues.

(b) I considered that the safety trend data concerning the comparative incident, accident and fatal accident rates derived during the CASA data analysis also supported my conclusion in that regard because that data showed that CSF operations had increased rates in each of the three categories considered (incident, accident and fatal accident).

28. A further consideration, which I also took into account in determining that it was necessary for CASA to introduce legislative measures in an effort to mitigate more effectively the greater levels of risk associated with the CSF operational environment, reflected community expectations about the level of risk, to which passengers would be exposed on such a flight. In making judgments about what the community was likely to expect in relation to the level of safety associated with CSFs, I was particularly informed by the different levels of safety assigned to private and commercial flights respectively by the aviation regulatory framework – see paragraphs 12-14 of my previous affidavit.

29. With that in mind, taking into account the following:

(a) pilots operating a CSF were being remunerated for the operating expenses associated with the flight, which aligned those flights more closely with a commercial charter flight than a standard private flight;

(b) the operating environment presented "human factors" challenges akin to a commercial charter flight;

(c) the flights were often arranged or coordinated by a third party entity, such as AFA, in circumstances where the pilot might never have met the intended passengers;

(c) the average member of the public carried on a CSF had a limited ability to comprehend the difference in safety standards, which applied to standard private flights as compared to more highly regulated charter and regular public transport flights; and

(d) the circumstances in which the flights were being offered (free transportation for patients who would have difficulty accessing or affording travel to the location where necessary treatment was offered), so that some passengers might feel that they had no real alternative but to accept the flights;

I considered that the general public would reasonably expect that the safety standards associated with CSFs would be set at a higher level than applied to standard private flights.

Safety basis for the provisions of the instrument

30. Having concluded that there was a sound safety basis for CASA to consider an increase in the safety standards applicable to CSFs, I next consulted with Mr Crosthwaite and his team in order to determine what additional safety requirements could be applied to CSFs in order to mitigate the additional risks, which we had identified as applying to those flights, and to meet public expectations about acceptable levels of safety.

31. As the Executive Manager, National Operations and Standards Division, one of my primary responsibilities is the management of the process by which CASA develops and implements safety standards. In my experience, where CASA is considering altering the safety standards that apply to a particular flying activity, there are four main levers, which are generally used to make the appropriate adjustments:

(i) pilot training and experience;

(ii) ongoing pilot recency and proficiency requirements;

(iii) aircraft airworthiness; and

(iv) medical standards.

32. As noted at paragraph 140 of my previous affidavit, when considering how to employ those regulatory levers to increase the level of safety associated with CSFs, I took into account a range of factors designed to make reasonable adjustments to the regulatory requirements for the conduct of CSFs in order to prevent future accidents. As noted in my previous affidavit, this went beyond a focus on the circumstances of previous accidents.

33. In terms of preventing future incidents and accidents, safety data have consistently recorded that the most common causes of aircraft accidents and incidents in Australia are thematically operational (terrain collisions and aircraft control) or technical issues (mainly engine failure or malfunction). The majority of fatal accidents in General Aviation were operational. Now produced and shown to me and marked **CM-41** is the ATSB's 'Aviation Occurrence Statistics 2010 to 2019' report dated 29 April 2020. Many of these operational accidents and incidents take place in the approach and landing phase of flight.

34. In determining what additional requirements should be considered for CSFs in Australia, I took note of the regulatory approach taken by the Federal Aviation Administration of the United States (the **FAA**), which has grappled with safety issues arising from the conduct of charitable and public benefit flights in that country for many years now. I also took into account the safety standards adopted by charitable or public benefit flight organisations in the United States, Canada and New Zealand.

35. Having regard to the various considerations I have outlined at paragraphs 30 – 34 above, when I recommended to the DAS that he sign the CSF Instrument into effect, I considered that those clauses would be reasonably calibrated to have the safety improvements on CSFs which I set out below.

Clause 7(1)(c) and 10(1)(a) – limitation on persons carried on a CSF

36. As I explained in paragraphs 115 and 116 of my previous affidavit, the passenger cap imposed under clause 7(1)(c), in combination with clause 10(1)(a), of the CSF Instrument was designed to limit risk exposure and to lessen operational risks. I had two considerations in mind here:

    (a) Given that I was satisfied that the CSF operational environment involved higher risks than a standard private flight, I considered it appropriate to limit the level of exposure to those higher risks, to those people who had a legitimate need connected to the purpose of the flight to travel on that flight – in general, that would be the volunteer pilot, the patient and the patient's support person.

    (b) Furthermore, keeping in mind that a CSF might, from time to time, involve the transport of multiple patients and support persons, I considered it necessary to ensure that the number of passengers on board did not increase the "human factors" challenges faced by the pilot in ensuring that the flight was conducted

safely. As noted in paragraph 24(b) above, passengers are a likely source of pressure on pilots. Limiting the number of passengers on board therefore had the intended safety benefit of limiting the amount of pressure, with which the pilot may have to deal in-flight on account of passenger behaviours. I considered that a limit of 5 passengers was a reasonable number in that regard.

37. In making that recommendation, I understood from my discussions with AFA and Little Wings that most CSFs involved the transport of only one patient. I also understood from those discussions that, from time to time, more than one patient and attendant support persons may be carried on the one flight. Therefore, I did not consider this requirement would overly impede the continuation of the considerable majority CSF activities in Australia.

Clause 9 – aeronautical experience requirements

38. The aviation regulatory regime frequently imposes minimum requirements in relation to aeronautical experience as an entry level requirement to the holding of a particular authorisation, or the performance of a particular activity. To take two examples:

    (a) regulation 61.525 of the CASR specifies that an applicant for a PPL in the aeroplane category must have at least 35 hours of aeronautical experience, with that experience to be made up of flight hours obtained in a number of different flying environments; and

    (b) clause 4.1 of *Civil Aviation Order 82.0* specifies that an AOC holder, whose AOC authorises the conduct of charter operations, must ensure that a person does not act as pilot in command of a multi-engine aeroplane with a maximum take-off weight below 5700kg unless:

        (i) for Visual Flight Rules (**VFR**) operations, the pilot must have at least 100 hours experience as pilot in command of multi-engine aeroplanes, or have at least five hours experience as pilot in command of the aircraft type being flown (in addition to the flight time accrued obtaining the endorsement to fly that aircraft type); and

        (ii) for Instrument Flight Rules (**IFR**) operations, the pilot must have at least 10 hours experience as pilot in command of the aircraft type, which may include flight time accrued as pilot in command under supervision.

39. Provisions of that nature are based on the assumption that minimum levels of particular kinds of flying experience are necessary before a person can safely be entrusted to perform particular flying activities. In imposing such minimum requirements, the regulatory framework takes into account the complexity of the flying task and the risk exposure

associated with it – for instance, whether the flight involves the carriage of passengers, the type of aircraft used and the flying conditions likely to be encountered.

40. Given the increased safety challenges associated with CSFs and the fact that they were conducted by a pilot who was not provided with any operational support to assist in the management of those increased challenges, I considered that there was a need for CSF pilots to have levels of aeronautical experience, which went beyond the minimum standards applying to a standard private flight.

41. In considering to what extent it was necessary to impose higher aeronautical experience requirements on pilots operating CSFs beyond those which would normally apply to the holder of a PPL, I reviewed the findings of a number of studies, which have considered the impact of aeronautical experience on pilot performance as well as the causal factors routinely contributing to aircraft accidents and incidents. The list of the studies taken into account is at **CM-35**.

42. I understood those studies to demonstrate that there is a significant benefit to be gained from pilot experience in the selection of optimal operational decisions and ensuring flight safety. I also understood those studies to demonstrate that the benefits of experience on performance are enhanced if they are combined with recent experience in the performance of the task.

43. One of the studies, which I reviewed, was performed by the FAA and examined the conclusions reached by Paul Craig in his 2001 book *The Killing Zone*. In that book, Craig presented evidence that accident rates decline dramatically over time for pilots with more than 350 hours of total aeronautical experience. Craig showed that more mishaps occur between 50 and 350 hours of aeronautical experience before declining. The FAA study entitled *Predicting Accident Rates From General Aviation Pilot Total Flight Hours* (the **FAA Study**) did not align completely with Craig's work, but did validate his conclusion that there was a zone of high risk for accident rates amongst general aviation pilots early in their flying careers. However, the FAA study determined that the range of high risk may extend further than the 350 hours identified by Craig, possibly extending as far as 2000 total flight hours of experience.

    Now produced and shown to me and marked **CM-42** is a true copy of the FAA study.

44. I also took into account the fact that even AFA itself did not accept that the base level of aeronautical experience necessary to obtain a PPL (35 or 40 hours depending on the flight training undertaken by the candidate) was acceptable for safe conduct of CSFs. While not binding upon itself, AFA sets its own minimum requirements for aeronautical experience, which far exceeds that mark – see in that regard, paragraph 22 of the first Pagani affidavit.

45. Finally, as noted above at paragraph 34, I took into account the aeronautical experience requirements imposed by large charitable or public benefit flight organisations in the United States, Canada and New Zealand.

(a) In the United States, a variety of separate Angel Flight organisations imposed a range of minimum experience requirements on pilots ranging from 250 – 500 hours of total aeronautical experience. In many cases, those organisations also required pilots to hold a current instrument rating.

(b) In Canada, Hope Air, a large charitable flight coordinator required pilots to have 500 hours of total aeronautical experience with 50 hours accrued in the make and model of aircraft to be flown.

c) In New Zealand (**NZ**), Angel Flight NZ required pilots to have 250 hours of total aeronautical experience. The details of the comparative requirements imposed by those organisations are summarised in tabular form in annexure B to the standard from recommendation (the **SFR**) authored by Scott Watson, which can be found at pages 154 – 156 of my previous affidavit as part of annexure CM-16.

46. I also took into account that AOPA Guidance specifically noted that pilots with less that 200 hours of total experience should refrain from engaging in volunteer flight operations because they are involved in significantly more accidents than pilots with more than 200 hours experience.

General requirements

47. Clause 9(1)(a) of the CSF Instrument requires that, prior to undertaking a CSF, a pilot must have conducted one take-off and one landing in the class or the type of the aircraft to be used for the CSF. Take-off and landing are two of the highest risk phases of flight and, as noted above at paragraph 33, accidents in the approach and landing phase of flight are common. Keeping in mind the higher risks associated with take-off and landing (relative to operations in the cruise phase of flight), I considered it appropriate that pilots not undertake a CSF unless they had completed a recent take-off and landing in the aircraft ,which was to be used for the flight. Regulation 61.395 of the CASR provides that a flight crew licence holder may only conduct a flight carrying passengers if, within the 90 days prior to the flight, the pilot has conducted at least three take-offs and three landings in an aircraft of the category to be used for the flight. However, those three take-offs and landings could all be conducted on the one day, meaning that the pilot would be current for passenger-carrying for the next 89 days. Further, regulation 61.395 only requires the take-offs and landings to be conducted in the same category of aircraft (that is, aeroplane or helicopter) but not the same type of aircraft. "Aeroplane" refers to a broad category of fixed wing aircraft. Within the aeroplane category, there are a vast number of different

designs and makes (referred to as "types") of aircraft such as the Cessna 172, the Beechcraft Bonanza and the Cirrus SR22T – to name only three. Each type of aircraft may have substantially different performance and handling characteristics, different instrumentation and operational control configurations as well as different operational procedures.

48. The additional requirements imposed in clause 9(1)(a) of the CSF Instrument were intended to serve two safety purposes:

    (a) to ensure that the pilot's skills in those critical phases of flight are suitably sharpened by recent practice within the 30 days before the flight In this regard, I note that the AOPA Guidance recommends that volunteer pilots conduct at least one landing in the 30 days prior to a volunteer flight; and

    (b) if the pilot is unfamiliar with the relevant aircraft type to be used for the CSF, to ensure that the pilot goes through the process of familiarising himself or herself with the critical take-off and landing procedures for the aircraft prior to conduct of the CSF.

49. I did not consider those requirements to impose an unreasonable burden, given that the relevant pilot could acquit those requirements on the day of the relevant CSF. For instance, if the pilot had to travel from a departure aerodrome to an intermediate aerodrome to collect the patient before flying to a destination aerodrome, then the take-off from the departure aerodrome and the landing at the intermediate aerodrome would satisfy the requirements of this clause prior to collection of the patient. Similarly, if there was no intermediate aerodrome, a single take-off and landing without the patient on board prior to the departing the departure aerodrome would also meet the requirements of this clause.

50. Clause 9(1)(b) of the CSF Instrument requires a pilot to have at least 10 hours flight time in the relevant aircraft type before conducting a CSF under the VFR in that aircraft type. This clause is intended to ensure that the pilot is sufficiently familiar with operational procedures and the handling characteristics of the aircraft to be used in the CSF to confidently manage any in-flight occurrence. Based on my own experience as a pilot, particularly in the flight-test environment, I am aware that increases in pilot experience in the operation of a particular aircraft type can be critical in all stages of a flight, where the familiarity born out of that experience can save critical seconds in managing or responding to unexpected situations. I note that this requirement is broadly consistent with AFA's own self-imposed requirements of 5 hours on aircraft type for VFR flights – see paragraph 22 of the first Pagani Affidavit.

51. Clause 9(1)(c) of the CSF Instrument is similar in its intent to clause 9(1)(a), albeit that it requires 20 hours of flight time in the aircraft if the CSF is to be conducted under the IFR. The reason for the imposition of a higher experience threshold is that IFR operations are much more complex and demanding than VFR operations. IFR operations are conducted in instrument meteorological conditions (**IMC**), in which the pilot's ability to navigate and control the aircraft via visual reference to the horizon and terrain below the aircraft is totally or substantially obscured by cloud. In those circumstances, the pilot must be skilled in the use of the aircraft instruments and navigation equipment in order to operate the aircraft safely. Flying under IFR conditions is considerably more demanding than flight under VFR conditions. I note that this requirement is broadly consistent with AFA's own self-imposed requirements of 10 hours on aircraft type for IFR flights – see paragraph 22 of the first Pagani Affidavit

52. Clause 9(1)(d) of the CSF instrument provides that a pilot must have 25 hours of flight time as a pilot in command of a multi-engine aeroplane before conducting a CSF in such an aircraft. This minimum experience requirement is based on the relative complexity of operating a multi-engine aircraft, compared to a single engine aircraft. Multi-engine aircraft are generally more complex and of higher performance than single engine aircraft. That is particularly the case in relation to the management of the failure of one engine in a multi-engine aircraft, where the pilot must be familiar with the asymmetric flight characteristics of the aircraft in order to fly it safely on the remaining engine.

Additional requirements for private pilots

53. The PPL is the second lowest level of pilot licence issued under Part 61 of the CASR. As noted in paragraph 44 above, it takes between 35 and 40 hours of flight training to obtain a PPL. Furthermore, because they do not fly to earn their livelihood, PPL holders fly considerably less than commercial pilots and therefore, accrue flight experience much more slowly. That means that even a person who has held a PPL for 5 to 10 years may still be a relatively inexperienced pilot, having regard to that person's total accumulated aeronautical experience.

54. Having regard to the more challenging operational environment associated with the performance of CSFs, I formed the view that it was appropriate that PPL holders accrue at least 400 hours total flight time, with 250 hours in command of an aircraft, before being entrusted with the responsibility of safely transporting patients and carers on CSFs.

55. The threshold of 400 hours total flight time was selected for a number of reasons, including:

(a) it is 50 hours beyond the level identified by Paul Craig (as reported in the FAA Study) as the point at which the accident rate for inexperienced pilots starts to decline;

(b) it is broadly consistent with the total flight time requirements for CSF pilots imposed by charitable and public interest flight coordinators in the United States, Canada and New Zealand (noted in paragraph 45 above), demonstrating the value that experienced volunteer flight coordinators place on such minimum experience requirements as a safety mitigation for flights coordinated by them.

56. The additional requirement for 250 hours as pilot in command of an aeroplane or helicopter is designed to ensure that the total of 400 hours of accumulated flight referred to in clause 9(3)(a) of the CSF instrument is comprised of a significant percentage (more than 50%) of flight time, in which the pilot has been pilot in command of the aircraft. Flying an aircraft as pilot in command is a different experience to flying while under instruction with a flight instructor on board, or as a co-pilot with another pilot on board who is in command of the aircraft. Flying as pilot in command means that the pilot in question is solely responsible for making all operational decisions necessary to ensure that the flight is conducted safely. That requirement was designed to ensure that CSF pilots, who are PPL holders, have sufficient experience in making command decisions to be entrusted with the safe conduct of a CSF. I note that the requirement for 250 hours as pilot in command is identical to AFA's own self-imposed requirement for pilot experience for pilots who do not hold a CPL – see paragraph 22 of the first Pagani affidavit.

Clause 10 – operational and notification requirements

57. Clause 10(b) of the CSF Instrument prevents operation of an aircraft engaged in a CSF under the VFR at night. Flights under the VFR at night are more challenging than VFR flights conducted by daylight. That is because darkness makes navigating the aircraft and controlling it by reference to a visual horizon more difficult. I read the Australian Transport Safety Bureau investigation into the 2011 crash, near Horsham in Victoria, of a CSF coordinated by AFA and I understood that investigation to have identified spatial disorientation due to decreasing light as a likely contributing factor to that accident. The AOPA Guidance also noted that night time operations (whether under the VFR or the IFR) are associated with higher risks than day time operations.

58. Preventing CSFs from being conducted by night under the VFR therefore acts as a safety mitigator against the higher levels of risk associated with VFR flight of this kind. I note in this regard that AFA does not allow flights coordinated by it to be flown in Night VFR conditions – see paragraph 33(k) of the first Pagani affidavit.

59. Clauses 10(c) and (d) of the CSF Instrument require pilots of CSFs to lodge a flight notification with Airservices Australia identifying the flight as a CSF and to record the flight in their personal log books along with a notation identifying the flight as a CSF.

60. Both of those clauses are designed to assist CASA to collect data to establish the numbers of CSFs being conducted in Australia, who is flying the CSFs and what aircraft are being used. The difficulties associated with the collection of information concerning the number of CSFs conducted on an annual basis for the purpose of the CASA data analysis have been noted above in paragraph 8. By cross-referencing flight notifications (which CASA can obtain from Airservices Australia) with entries in pilot log books, I anticipated that CASA would be able to obtain a much clearer picture of how many CSFs are being flown, who is flying them, and what aircraft are being utilised. The data concerning CSF operations conducted on an annual basis collected by the Bureau of Infrastructure and Regional Economics does not include that level of granularity and is in any event, dependent on self-reporting by aircraft owners and operators in circumstances where there was no requirement for pilots (prior to issue of the CSF Instrument) to record which flights conducted by them were CSFs. It is anticipated that compliance with those clauses by pilots conducting CSFs will give CASA access to a more complete and meaningful range of data about the conduct of CSFs to use in future analysis of operational safety trends affecting CSF operations. I considered that the small additional regulatory burden associated with the making of a flight notification and a notation in the pilot's personal logbook (where the details of the flight would need to be recorded in any event) to be significantly offset by the quality of the additional safety data that compliance with these requirements would make available to CASA to inform future safety decisions relating to CSFs.

Clause 11 – maintenance requirements

61. As noted in my previous affidavit at paragraph 120, private aircraft operated in Australia are entitled to be maintained pursuant to Schedule 5 of the *Civil Aviation Regulations 1988* (the **CAR**) on the basis that they are subjected to a periodic maintenance inspection every 12 months. These aircraft may fly an unlimited number of hours during the 12 months between periodic maintenance inspections.

62. Aircraft involved in commercial aerial work activities, on the other hand, may be maintained pursuant to Schedule 5 of the CAR; however, they must have a periodic inspection once every 12 months or 100 hours, whichever occurs first.

63. As noted in my previous affidavit at paragraph 128, following public consultation on the draft of the CSF Instrument, I determined that I should recommend to the DAS that the CSF Instrument incorporate a clause requiring CSF aircraft to be maintained to at least the aerial work standard. Aerial work involves activities such as the aerial application of

chemicals, aerial survey, mustering and for that reason the maintenance standards are lower than what apply to charter operations which involve the carriage of fare paying passengers from destination to another.

64. In making that recommendation, I had regard to the FAA *Policy Clarification on Charitable Medical Flights*, on the basis of which the FAA issued several exemptions to charitable medical flight organisations, granting relief from the requirements of those provisions of the United States Federal Aviation Regulations that would otherwise have prevented private pilots from conducting such flights. In accordance with the FAA's policy, conditions are placed on the exemptions that are "intended to raise the level of safety for these flights". One of those conditions imposes higher aircraft airworthiness requirements.

Now produced and shown to me and marked **CM-43** is a true copy of the FAA Policy Clarification on Charitable Medical Flights.

65. The exemptions issued by the FAA in relation to reimbursement of volunteer pilots, for fuel costs incurred in conducting charitable medical flights, generally impose a more stringent range of requirements upon volunteer flight coordinators than the CSF Instrument. For example, an exemption issued by the FAA to a range of charitable flight organisations in October 2010 imposed a range of requirements for documentation of flights, minimum pilot experience and qualifications, flight, duty and rest limitations, pilot training, recurrent training and aircraft maintenance. In the case of that particular exemption, it required aircraft used for volunteer flights to have their components overhauled prior to reaching the manufacturer's recommended time between overhaul. That maintenance standard is more onerous than the aerial work maintenance standard imposed under the CSF Instrument.

Now produced and shown to me and marked **CM-44** is a true copy of the exemption issued by the FAA to various named volunteer flight organisations in October 2010.

66. I expected that the imposition of the requirement, requiring CSF aircraft to be maintained to at least the aerial work standard, would increase the safety standards applicable to CSFs, because the likelihood of a mechanical-related occurrence increases as parts and components wear. A pattern of increasing failure rates with accumulated use is observable with improvement at times of planned maintenance.

Now produced and shown to me and marked **CM-45** is a true copy of an article entitled *Failure Rates for Aging Aircraft* extracted from the Multi-Disciplinary Publishing Institute (**MDPI**) Safety Journal which demonstrates this correlation.

67. Allowing aircraft operating CSFs to accumulate unlimited hours over a 12-month period therefore increased the risk of mechanical failure in such aircraft beyond that associated with the aerial work maintenance standard. I considered that this increased level of risk

was unacceptable, when combined with other risks associated with CSFs, including potentially low pilot experience (as noted above, PPL holders tend to have low levels of aeronautical experience, even if they have held their licences for some years), minimal requirements for pilots to have recent experience in the operation of the relevant aircraft type and the absence of system-based safety defences and operational controls, such as would be found within an AOC organisation conducting commercial charter operations. Given the already challenging operational environment confronting CSF pilots, I considered that it was appropriate to take proportionate steps to reduce the possibility of a major additional safety risk arising in the form of an engine failure or other aircraft system malfunction.

68. Given the more challenging operational environment associated with CSFs, and that the pilots were being reimbursed for their operational costs, I also considered that there would be a strong public expectation that maintenance standards applicable to aircraft operating such flights would be higher than the base level private aircraft requirements specified in Schedule 5 of the CAR.

69. An analysis conducted by CASA's Strategic Analysis Section of data supplied by the BITRE in relation to aircraft utilisation rates in the period 2015-2017 indicates that the overwhelming majority of private aircraft in Australia are operated for less than 100 hours per year. The analysis concluded that, during the relevant period, there were on average 4991 aircraft (including helicopters) used for purely private purposes, of which, on average, only 507 aircraft exceeded 100 hours flight time per year.

Now produced and shown to me and marked **CM-46** is a copy of the table setting out the results of the analysis conducted by the Strategic Analysis Section.

70. CASA's Strategic Analysis Section also conducted an analysis of the average utilisation rate of aircraft in private (non-commercial) operations only, across the 2015-2017 period based on the BITRE data. That analysis revealed that the average utilisation rate for private purposes of fixed wing aircraft was 55.10 hours in 2015, 50.48 hours in 2016 and 52.00 hours in 2017.

Now produced and shown to me and marked **CM-47** is a table setting out the details of this analysis and setting out the average private hours flown by aircraft in Australian in the period 2015-2017.

71. On the basis of those figures, I do not consider that this minor modification to the maintenance standards associated with CSFs will have a substantial impact on the willingness of volunteer pilots to participate in CSFs.

7 August Bartlett Affidavit

72. In his affidavit of 7 August 2020, Mr Bartlett deposes to a range of matters set out at paragraphs 7(a)-(f), which are suggested to be "contrary to the respondent's stated position" in relation to the making of the CSF instrument.

73. As to paragraph 7(a) of Mr Bartlett's affidavit, it is unclear to me on what basis Mr Bartlett reaches the conclusion that most of CASA's internal communications relating to the issue of the CSF instrument relate to AFA and not to the CSF sector generally.

74. AFA is the largest CSF coordinator in Australia, and therefore engagement by AFA with CASA played a significant part in CASA's consultations before CASA took steps to modify the safety standards applicable to CSF operations. I have detailed the nature and extent of that engagement at some length in my previous affidavit. At all times, however, it was my intention to ensure that any additional regulatory requirements which might be placed upon CSFs would apply to all pilots engaged in such flights – not only those pilots operating flights coordinated by AFA. This was on the basis that the operational risk and challenges encountered by pilots conducting CSFs were considered to be identical, regardless of who coordinated the relevant flight.

75. As to paragraph 7(b) of the 7 August Bartlett affidavit, I categorically deny that it was my intention that the CSF instrument would not adversely affect any CSF operators other than AFA. As noted above, it was always my intention that the CSF instrument would apply to all CSFs, regardless of who conducted them. I note that the emails forming MP-48 to the sixth Pagani affidavit took place early in November 2018, as CASA was in the early stages of considering what kind of regulatory intervention should be made in the CSF sector.

76. To the extent that the email from Mr Gilbert to Mr Hibberd dated 6 February 2019 forming part of annexure MP-50 to the sixth Pagani Affidavit suggests that Little Wings and Fun Flight would not be affected by the terms of the proposed CSF Instrument because they "do not act as a third party organiser of non-urgent medical flights", that statement is incorrect. In its terms, the CSF Instrument defines a CSF as (amongst other things) a flight coordinated, arranged or facilitated by an entity for a charitable or community service purpose. That description captures the operations of Little Wings. I am aware from later enquiries conducted by CASA staff that Fun Flight is not in fact a CSF coordinator to whom the CSF Instrument applies. It may be that what Mr Gilbert intended to convey, in the relevant paragraphs of his email, was that the initial impact of the instrument would potentially be felt more by AFA than by Little Wings. If that is what Mr Gilbert meant, then I agree with that assessment because, as noted in my previous affidavit at paragraph 21, Little Wings had already arranged its activities on a voluntary basis in a way that met or exceeded the minimum requirements imposed by the CSF Instrument.

77. As to paragraph 7(c) of the 7 August Bartlett affidavit, it has for many years been CASA's position that CSFs (at least those conducted using the volunteer arrangements employed by AFA) are private flights, which do not, from a safety perspective, require the additional levels of safety assurance which must be implemented by the holder of an AOC. The emails referred to by Mr Bartlett in this paragraph of his 7 August 2020 affidavit all occurred during periods prior to the issue of the CSF Instrument and reflected the range of issues, proposals and other matters under consideration by CASA, as we formulated what became our final solution to our safety concerns. They also reflect a range of methods considered by CASA for affecting the safety improvements which were considered necessary, including by the use of guidance material such as an Advisory Circular or via compulsory methods such as the exercise of CASA's powers under Part 11 of the CASR. Ultimately, however, the CSF Instrument was made in the exercise of CASA's powers under regulation 11.068 of the CASR. This choice of legislative mechanism proceeded on the basis that CSFs are private flights which are not required to be conducted under the auspices of an AOC. This reflects my conclusion, which the DAS accepted, that the safety issues affecting CSFs did not require that these flights be regulated as commercial operations requiring an AOC, but rather, that there was a need to introduce minor additional safety assurance measures to the conduct of CSFs, to lift the level of safety assurance above that which applies to a standard private flight.

78. As to paragraph 7(f) of the 7 August Bartlett affidavit, it is a matter of routine for CASA to liaise with the ATSB in relation to its investigations into aircraft accidents and incidents. This is to ensure that there are open lines of communication, through which the ATSB can make CASA aware of any safety issues emerging from its investigations which might require a regulatory response. In the context of Mr Carmody's email of 24 October 2018, the ATSB was at that time in the late stages of finalising its report into the accident at Mt Gambier involving a CSF coordinated by AFA, which occurred on 27 June 2017. As I noted in my previous affidavit at paragraphs 94-100, CASA did liaise with the ATSB in order to obtain from them statistical data relating to the number of incidents and accidents involving CSFs to be used in the CASA data analysis. However, beyond that, I was careful to ensure that the regulatory review of CSFs, which was being conducted by CASA, was kept separate and distinct from the ATSB's investigation of the Mt Gambier accident. For that reason, I did not consult with the ATSB on any aspects of the proposed measures which CASA was considering introducing. I am unaware of any other person in CASA engaging in such consultations.

Review of operation of the CSF instrument

79. The CSF Instrument remains in force for 3 years from the date of its making. During that period, it is intended that the operation of the CSF Instrument will be monitored to

establish whether it is having the safety impact that was intended, and whether it is having any other unanticipated consequences on the safe and efficient conduct of CSFs. Under direction from the DAS, a review of the first 12 months of operation of the CSF Instrument based on data collected from Airservices Australia, from pilots conducting CSFs, and from owners of aircraft used in the conduct of CSFs is nearing completion.

80. It is intended that further reviews will be conducted, as the available pool of data (generated by compliance by pilots with the terms of the instrument) grows, and prior to the expiry of the CSF Instrument, to determine whether the CSF Instrument should be reissued in its present form, or whether its terms should be varied, or whether it can be withdrawn altogether based on the analysis of that data.

Sworn by the deponent at Canberra
in the Australian Capital Territory
on 13 November 2020

Before me:

)
)
)
)
)

Signature of deponent

Signature of witness:

Name of witness: Anthony James Carter

Qualification of witness:

Australian Legal Practitioner

Annexure CM-43

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA REGISTRY

Angel Flight Australia (ACN 103 477 069)
Applicant

Civil Aviation Safety Authority
Respondent

This is the document referred to as 'CM-43' in the affidavit of Christopher Paul Monahan affirmed in the Australian Capital Territory on 13 November 2020 before me Anthony James Carter, Australian Legal Practitioner.

Deponent _Witness: _____

(a) Effective Date

This AD is effective February 22, 2013 to all persons except those persons to whom it was made immediately effective by Emergency AD 2013–02–51, issued on January 16, 2013, which contained the requirements of this amendment.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 787–8 airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 24, Electrical power.

(e) Unsafe Condition

This AD was prompted by recent incidents involving lithium ion battery failures that resulted in release of flammable electrolytes, heat damage, and smoke on two Model 787–8 airplanes. The cause of these failures is currently under investigation. We are issuing this AD to prevent damage to critical systems and structures, and the potential for fire in the electrical compartment.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Modification or Other Action

Before further flight, modify the battery system, or take other actions, in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(i) Related Information

For more information about this AD, contact: Robert Duffer, Manager, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6493; fax: 425–917–6590; email: *Robert.Duffer@faa.gov.*

(j) Material Incorporated by Reference

None.

Issued in Renton, Washington, on February 1, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–04004 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 61

Policy Clarification on Charitable Medical Flights

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Policy.

SUMMARY: The FAA is issuing this notice of policy to describe its policy for volunteer pilots operating charitable medical flights. Charitable medical flights are flights where a pilot, aircraft owner, and/or operator provides transportation for an individual or organ for medical purposes. This notice of policy is in response to Section 821 of Public Law 112–95, Clarification of Requirements for Volunteer Pilots Operating Charitable Medical Flights.

DATES: This action becomes effective on February 22, 2013.

FOR FURTHER INFORMATION CONTACT: John Linsenmeyer, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; fax (202) 385–9612; email *john.linsenmeyer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 61.113(a) of Title 14 Code of Federal Regulations (14 CFR) states that no person who holds a private pilot certificate may act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may that person, for compensation or hire, act as pilot in command of an aircraft.

Section 61.113(c) states that, for any flight carrying passengers, a private pilot may not pay less than the pro rata share of the operating expenses (fuel oil, airport expenditures, or rental fees). This prohibition means that a private pilot can pay more, but not less, of these expenses when split equally among all the people aboard the aircraft. Private pilot certificates are considered to be an entry-level pilot's license, and the purpose of this regulation is to limit the operations of private pilots commensurate to their certification level. Pilots wishing to pay less than their pro rata share (or fly for hire) must obtain a commercial pilot certificate, which has higher certification requirements and may be required to comply with additional operating requirements.

Some pilots and other individuals have recognized a need to provide transportation services for conveyance of people needing non-emergency medical treatment. Section 821 of Public Law 112–95, requires, with certain limitations, that the FAA allow an aircraft owner or operator to accept reimbursement from a volunteer pilot organization for the fuel costs associated with a flight operation to provide transportation for an individual or organ for medical purposes (and for other associated individuals).

Volunteer pilot organizations have petitioned the FAA for exemption from the requirements of § 61.113(c) so that their pilots can be reimbursed for some or all of the expenses they incur while flying these flights. To allow compensation for expenses for the transportation of individuals, these private pilots are participating in an activity that would otherwise be prohibited by § 61.113(c).

The FAA has determined this activity can be conducted safely with limits applied to the organizations, pilots, and aircraft. Beginning in 2010, the FAA issued several exemptions to charitable medical flight organizations granting relief from the requirements of § 61.113(c). The exemptions contain conditions and limitations that are intended to raise the level of safety for these flights. These conditions and limitations include:

1. Developing of a pilot qualification and training program;
2. Authenticating pilots' FAA certification;
3. Requiring flight release documentation;
4. Imposing minimum pilot qualifications (flight hours, recency of experience, etc.);
5. Requiring a 2nd class FAA medical certificate;
6. Requiring the filing of an instrument flight plan for each flight;
7. Restricting pilots to flight and duty time limitations;
8. Requiring mandatory briefings for passengers;
9. Imposing higher aircraft airworthiness requirements; and
10. Requiring higher instrument flight rules (IFR) minimums.

The FAA recognizes the practical implications and benefits from this type of charity flying and will continue to issue exemptions for flights described

by Section 821 of Public Law 112–95. The FAA will continuously update these conditions and limitations as necessary to best ensure these operations meet this equivalent level of safety.

Issued in Washington, DC, on February 14, 2013.

John M. Allen,

Director, Flight Standards Service.

[FR Doc. 2013–04052 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2012–0159]

RIN 1625–AA01

Anchorages; Captain of the Port Puget Sound Zone, WA

Correction

In rule document 2013–03121, appearing on pages 9811–9814 in the issue of Tuesday, February 12, 2013, make the following correction:

§ 110.230 [Corrected]

■ On page 9813, in the third column, on the eighteenth line from the top, "latitude 47°7′30″ N" should read "latitude 47°47′30″ N".

[FR Doc. C1–2013–03121 Filed 2–21–13; 8:45 am]

BILLING CODE 1505–01–D

POSTAL SERVICE

39 CFR Part 111

Promotions and Incentive Programs for First-Class Mail and Standard Mail

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service will revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 709.3 to include new promotions and incentive programs that will be offered at various time periods during calendar year 2013 for Presorted and automation First-Class Mail® cards, letters, and flats, and Standard Mail® letters, flats, or parcels.

DATES: *Effective date:* March 4, 2013.

FOR FURTHER INFORMATION CONTACT: Krista Becker at 202–268–7345 or Bill Chatfield at 202–268–7278. Email contacts are: *mobilebarcode@usps.gov* for the Mobile Coupon/Click-to-Call, Emerging Technologies, Product Samples, and Mobile Buy-It-Now programs; and *earnedvalue@usps.gov* or *picturepermit@usps.com* for the two other programs.

SUPPLEMENTARY INFORMATION: The Postal Service filed a notice with the Postal Regulatory Commission (PRC) (Docket No. R2013–1) on October 11, 2012 to offer six new promotions in 2013 and the PRC approved the 2013 promotions on November 16, 2012.

In this final rule, the Postal Service provides a description of the eligibility conditions for the various promotional programs and the revised mailing standards to implement the programs. The types of eligible mailpieces are listed in the descriptions for each promotion. EDDM-Retail® mailings are not eligible for participation in any of the promotions. OMAS and official government mailings are eligible for participation in the Earned Value Reply Mail promotion only. Registration for must be made separately for each promotion through the Business Customer Gateway.

Summary of Promotional Programs

The six promotional programs, in calendar order are:

1. Direct Mail Mobile Coupon and Click-to-Call
2. Earned Value Reply Mail
3. Emerging Technologies
4. Picture Permit Imprint
5. Product Samples
6. Mobile Buy-It Now

Postage Payment for Mobile Coupon/Click-to-Call, Emerging Technologies, and Mobile Buy-It Now

The following parameters apply to the Mobile Coupon/Click-to-Call, Emerging Technology, and Mobile Buy-It Now promotions.

Mailing documentation and postage statements must be submitted electronically. Mailings entered by an entity other than the mail owner must identify the mail owner and mail preparer in the by/for fields. Full-service mailings are limited to 9,999 pieces if submitted via Postal Wizard. If some pieces in a mailing are not claiming a promotion discount, separate postage statements must be used for pieces not claiming the discount and for pieces claiming the discount. All discounts must be claimed on the electronic postage statement at the time of mailing and will not be rebated at a later date.

Postage payment methods will be restricted to permit imprint, metered postage, or precancelled stamps. Pieces with metered postage must bear an exact amount of postage as stipulated by the class and shape of mail. Affixed postage values for metered mailings will be as follows:

First-Class Mail postcards	$0.20
First-Class Mail automation and (PRSTD) machinable letters	0.25
First-Class Mail nonmachinable letters	0.45
First-Class Mail automation and Presorted flats	0.35
STD Mail Regular letters	0.12
STD Mail Regular flats	0.13
STD Nonprofit letters	0.05
STD Nonprofit flats	0.06

Mailings with postage paid by metered or precancelled stamp postage will have the percentage discount deducted from the additional postage due, except for Value Added Refund mailings, which may include the amount of the discount with the amount to be refunded.

Description of Promotional Programs

Mobile Coupon/Click-to-Call

This promotion provides an upfront 2 percent postage discount for presort and automation mailings of First-Class Mail letters, postcards, or flats and Standard Mail (including Nonprofit) letters and flats that integrate mail with mobile technology and promote the value of direct mail. There are two separate ways to participate within the one overall program: Mobile Coupon and Click-to-Call. Mailers may participate in one or both ways, but only one discount may apply per mailing. The Mobile Coupon option will encourage mailers to integrate hard-copy coupons in the mail with mobile platforms for redemption. The Click-to-Call option will drive consumer awareness and increase usage of mail with mobile barcodes that provide click-to-call functionality.

For the Mobile Coupon program, at least one of the following options apply:

1. The mailpiece must be a coupon, entitling only the recipients to a discount off a product or service.

2. The mailpiece must contain either mobile-print technology (such as a 2D barcode or smart tag) that can be scanned by a mobile device linking to a mobile coupon or a short number to be used to initiate a text communication that then triggers a SMS/EMS or MMS message with a one-time coupon or code. Texts that allow an option for ongoing coupons via text are not eligible.

Coupon recipients must be able to present physical coupons or coupons stored on mobile devices at any of the mailer's retail locations that exist. For mailers who do not have retail

FEDERAL COURT OF AUSTRALIA

Angel Flight Australia v Civil Aviation Safety Authority [2021] FCA 469

File number(s): VID 222 of 2019

Judgment of: **ANDERSON J**

Date of judgment: 11 May 2021

Catchwords: **STATUTORY INTERPRETATION** – Civil Aviation Safety Authority made instrument designated as *CASA 09/19 – Civil Aviation (Community Service Flights – Conditions on Flight Crew Licences) Instrument 2019* – Applicant seeks orders quashing the instrument and other declaratory relief – whether the instrument is *ultra vires* in that it fell beyond power conferred by regulation 11.068 of the *Civil Aviation Safety Regulations 1998* (Cth) – whether the "class of authorisation" specified in the instrument is not a "class of civil aviation authorisation" specified by the *Civil Aviation Safety Regulations 1998* (Cth) – whether the instrument was not authorised by regulation 11.068 of the *Civil Aviation Safety Regulations 1998* (Cth) – whether the instrument is expressed to apply in relation to a type of aviation operation ("community service flights") and not a class of persons – whether the instrument is properly a "legislative instrument"

ADMINISTRATIVE LAW – unreasonableness and reasonable proportionality – whether the instrument is unreasonable or not reasonably proportionate – whether the Civil Aviation Safety Authority's assessment of risks was not justified on any reasonable ground – whether that assessment was irrational – whether the conditions imposed by the instrument had an insufficient connection to the power conferred by regulation 11.068 of the *Civil Aviation Safety Regulations 1998* (Cth)

Held: relevant instrument not *ultra vires* or unreasonable

Legislation: *Civil Aviation Act 1988* (Cth), ss 3, 3A, 9, 9A, 16, 30DT, 30DU, 30DW, 30DX, 30DY, 30DZ, 98

Civil Aviation Safety Regulations 1998 (Cth), Part 11, Part 13 and regs 61.005, 61.010

Legislation Act 2003 (Cth), ss 8(2), 38 and 42

CASA 09/19 – Civil Aviation (Community Service Flights – Conditions on Flight Crew Licences) Instrument 2019

Cases cited:	*Attorney-General (South Australia) v Adelaide Corporation* (2013) 249 CLR 1
	Austral Fisheries Pty Ltd v Minister for Primary Industries and Fisheries (1992) 37 FCR 463
	Australian Maritime Officers' Union v Assistant Minister for Immigration and Border Protection [2015] FCAFC 45
	Brett Cattle Company Pty Ltd v Minister for Agriculture [2020] FCA 732
	Donohue v Australian Fisheries Management Authority [2000] FCA 901
	Graham v Minister for Immigration (2017) 263 CLR 1
	Master Education Services Pty Ltd v Ketchell (2008) 236 CLR 101
	McEldowney v Forde [1969] 2 All ER 1039
	Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541
	Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
	Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611
	Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd (1993) 40 FCR 381
	O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356
	Parramatta City Council v Pestell (1972) 128 CLR 305
	Re Dingjan; Ex parte Wagner (1995) 183 CLR 323
	RG Capital Radio Ltd v Australian Broadcasting Authority [2001] FCA 855
	SAT FM Pty Ltd v Australian Broadcasting Authority (1997) 75 FCR 604
	Stephens v Commonwealth of Australia [2017] FCAFC 31
	Widgee Shire Council v Bonney (1907) 4 CLR 977
Division:	General Division
Registry:	Victoria
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	376
Date of hearing:	16-17 March 2021

Counsel for the Applicant:	Bret Walker SC and Philip Boncardo
Solicitor for the Applicant:	Sparke Helmore Lawyers
Counsel for the Respondent:	Peter Hanks QC and Dr Laura Hilly
Solicitor for the Respondent:	Minter Ellison

ORDERS

VID 222 of 2019

BETWEEN: **ANGEL FLIGHT AUSTRALIA (ACN 103 477 069)**
Applicant

AND: **CIVIL AVIATION SAFETY AUTHORITY**
Respondent

ORDER MADE BY: **ANDERSON J**

DATE OF ORDER: **11 MAY 2021**

THE COURT ORDERS THAT:

1. The applicant's further amended originating application dated 19 August 2020 is dismissed.
2. The applicant is to pay the respondent's costs of and incidental to the application.

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

REASONS FOR JUDGMENT

ANDERSON J:

INTRODUCTION

1 The applicant (**Angel Flight**), by its further amended originating application filed 19 August 2020, applies to the Court for review of a decision of the respondent, the Civil Aviation Safety Authority (**CASA**), to make the instrument designated as *CASA 09/19 – Civil Aviation (Community Service Flights – Conditions on Flight Crew Licences) Instrument 2019* (**Instrument**).

2 Angel Flight seeks an order quashing the Instrument together with various orders for declaratory relief.

3 Angel Flight relies upon four grounds of review. Angel Flight abandoned Ground 4, which related to an alleged breach of the rule of natural justice. The grounds that are still pressed may be grouped into two categories as follows:

(a) **Grounds 1, 2 and 3**: the Instrument is said to be *ultra vires* in that it fell beyond the power conferred by regulation 11.068 of the *Civil Aviation Safety Regulations 1998* (Cth) (**CASR**);

(b) **Ground 5**: it is said that CASA's exercise of power under regulation 11.068(1) was unreasonable and/or not reasonably proportionate in relation to:

(i) the making of the Instrument; and

(ii) the making of cll 7(c), and/or 9, and/or 10, and/or 11 of the Instrument.

4 For the reasons that follow, Angel Flight has not established these grounds of review. Angel Flight's application wi**l** be dismissed, with costs.

SOME FACTUAL BACKGROUND

5 Before setting out each parties' evidence, some uncontroversial factual matters should be set out.

6 First, it was not in dispute that, on or around 15 August 2011, an aircraft, with the registration mark VHPOJ, crashed near Horsham in Victoria, fatally injuring all three occupants. The aircraft had been engaged in a Community Service Flight (**CSF**) organised by Angel Flight.

7 Second, on or around 28 June 2017, an aircraft with the registration mark VH-YTM collided with terrain shortly after take-off from Mount Gambier Airport in South Australia, fatally injuring the three persons on board and destroying the aircraft. The aircraft was engaged in a CSF organised by Angel Flight.

8 Regulation following those events is the subject of this proceeding and it would appear that the parties do not agree about matters relating to the cause of those accidents. However, as I understood it, it is uncontroversial that those accidents occurred.

ANGEL FLIGHT'S EVIDENCE

9 Angel Flight tendered and relied on the following affidavit material:

(a) the affidavit of Marjorie Pagani sworn 12 March 2019 at [1]-[2], [10]-[29], [33], [35], [52], [59]-[61], [65] and [74]-[79] and annexure "MP-1";

(b) the affidavit of Marjorie Pagani sworn 18 March 2019 at [20]-[23];

(c) the affidavit of Marjorie Pagani sworn 14 February 2020 at [25]-[27], [33] and [36], and annexures "MP-19" to "MP-25" (inclusive);

(d) the affidavit of Owen Crees sworn 15 June 2020 at [1]-[2], [4], [6] and [8]-[14] and [17] and annexures "OC-1" to "OC-2";

(e) the affidavit of Marjorie Pagani sworn 15 June 2020 at [18]-[19], [21]-[23], [35], [42], [47]-[51], [56], [64]-[65], [67]-[69], and annexures "MP-31", "MP-35", "MP-45", "MP-47"-"MP-49" and "MP-51".

10 These were collectively marked Exhibit A.1 in the course of the hearing and are set out in the Court Book (**CB**) at 24. This evidence was also subject to a Ruling on the Parties' Joint Schedule of Objections (**Ruling on Evidence**) which I made on 11 March 2021 in this proceeding.

Relevant evidence of Marjorie Elizabeth Pagani

11 Ms Pagani is the Chief Executive Officer, Company Secretary and a Director of Angel Flight. Ms Pagani deposed to the following relevant matters.

12 Angel Flight was established in 2003 and is registered as a "large charity" with the Australian Charities and Not- for-profits Commission. Angel Flight coordinates non-emergency flights for transportation to the destinations and back (if need be) of:

(a) patients of all ages needing medical treatment at destinations where other forms of transport are not available, are physically and emotionally taxing or are unaffordable;

(b) blood and blood products;

(c) medical drugs; and

(d) family members for compassionate reasons.

13 Angel Flight operates in every Australian state and mainland territory, although primarily the requirements are for the service to operate in the southern and eastern states and Western Australia.

14 Since 2003, Angel Flight has coordinated more than 46,000 flights for 11,343 patients, carers and family members. Flights are provided free of charge to the user, including for companions or carers travelling with a patient. Subject to demand and aircraft size, a flight may provide transportation assistance to more than one patient or family. Angel Flight accepts assistance from the owners and pilots of jet aircraft for a combination of flights where there are several families needing to go to a particular city from d ifferent towns along the same or similar track. Angel Flight also provides free car transportation between airports and medical facilities and nearby accommodation. This ground transportation is provided by volunteer drivers. Angel Flight currently has 3,300 volunteer pilot registrations and 4,500 volunteer driver registrations.

15 The primary focus of Angel Flight is the transport of disadvantaged rural people, from all over Australia, to major centres for medical treatment where commercial flights are unaffordable or unavailable and where otherwise very long drives on outback roads would be required. Angel Flight regularly provides compassionate flights for terminally ill patients in city hospitals who want to go home to be with their families, to re unite parents and children separated for lengthy periods due to medical treatment or illness, or to transport deceased premature babies or young children back to the family's home town so that they can be farewelled. Angel Flight pilots do not carry aeromedical staff or medical equipment. The flights are not an alternative to the Royal Flying Doctor Service or any air ambulance service.

16 Angel Flight does not employ pilots or own aircraft or vehicles. Flights are conducted by volunteer pilots who own the aircraft or hire aircraft at their own cost. Angel Flight's charitable endeavours are entirely dependent upon the willingness of volunteer pilots to offer their time, skills and aircraft.

17 The procedures adopted by Angel Flight in coordinating a flight are as follows:

(a) a registered health professional contacts Angel Flight with a flight request enquiry;

(b) Angel Flight assesses whether, in general terms, the request is within its parameters;

(c) the health professional is then sent relevant documents, including a "Flight Request Form", "Referrer Guidelines", "Medical Clearance requirement document", "Passenger Guidelines" and "Passenger Waivers";

(d) the passengers, including all adult accompanying persons, are required to execute the "Passenger Guidelines" and certain waivers and releases of liability, to affirm that they have read and understood the documents;

(e) the passengers are required to watch a video detailing the types of aircraft likely to be used, manner of entry and exit, luggage requirements and size restrictions;

(f) a medical certificate must be issued by the treating doctor, advising that the passengers are fit to fly on a light aircraft, and will not require medical assistance. This document is required to be signed and sent to Angel Flight;

(g) after the above executed documents are received, the flight is posted on "the billboard" for "pilot application";

(h) pilots apply for the mission. These applications are assessed against parameters such as distance, speed, comfort, fuel, exit and entry issues, and freight requirements (such as prams, baby capsules etc);

(i) a pilot is then allocated the mission;

(j) all communications are with Angel Flight, and not directly between the passenger and the pilot or the driver;

(k) pilots are encouraged (both orally and in documents, including in the "Pilot Handbook") to cancel the mission at any time if there is any uncertainty about any matters. No flights are planned for before or after last light. Angel Flight does not accept any flights planned for night flying, and does not permit the use of the "Night [visual flight rules (**VFR**)]" rating. "Backup plans" depend upon the circumstances of an individual request, but may include arranging a seat on commercial air transport (where available), a short drive to the nearest regular public transport airport, or requesting that the referring health professional reschedule the appointment. In some cases, the passenger may elect to drive;

(l) no patient is guaranteed a flight or drive. If a mission is allocated, patients are advised that there is no guarantee that the mission will proceed but, if it does not, Angel Flight will take all possible steps to implement a backup plan;

(m) upon cancellation of a flight, all communications are between Angel Flight, the passenger and the health professional. The pilot is not required to undertake any of these tasks;

(n) Ms Pagani deposes that there are very few pilots who have not cancelled at least one mission and that this is "accepted and expected";

(o) Ms Pagani deposes that passengers and health professionals "frequently cancel flights if plans change for them" and this is "accepted and expected";

(p) Ms Pagani deposes that, in the case of compassionate or respite flights, and those involving the transport of deceased children with their parents, the contact with Angel Flight is made through social workers at major hospitals, and the same procedures are followed. In the case of very long distances to transfer terminally ill passengers home or to respite care, jet passenger services are used. Angel Flight tries to avoid light aircraft flight times of more than 2.5 hours, although in the case of the border-country flights, this will be exceeded. Angel Flight tries to utilise jet aircraft volunteers where possible on longer flights or in respect of those with more than five passengers. Many compassionate flights have been, for example, from Sydney to Darwin, Karratha and Broome, and at times Brisbane to Cairns.

18 Ms Pagani deposes that Angel Flight is one of three charities which provides CSFs. The others are "Wings 4 Kidz" and "Little Wings".

Evidence of Dr Owen Crees

19 Dr Crees has held a private pilot's licence since 1978. He has been a volunteer with Angel Flight since 2004 and a director of Angel Flight since December 2019. Ms Pagani's affidavit sworn 18 March 2019 deposes that Dr Crees has a Bachelor of Science (Hons), Master of Science and PhD in Chemistry and is the retired Chief Executive Officer and Director of Research Laboratories Australia Ltd, and retired Director of Green Pool Commodity Analysts, Neopec Pty Ltd, Advanced Imagining Processes South Australia (Switzerland) and Tonejet PLC (UK).

20 Dr Crees prepared an analysis of the accident rates for Angel Flight compared to other private operations using internal Angel Flight data, the reports from the Bureau of Infrastructure and Regional Economics (**BITRE**) concerning aircraft activity, and the Australian Transport Safety Bureau (**ATSB**) records of aviation accidents. Dr Crees's analysis indicates that the fatal accident rate for Angel Flight is not significantly different from that of other general aviation flying. That is, in Dr Crees' opinion, it is not possible to claim that Angel Flight has a higher rate of fatal accidents than private, business and sports aviation. Dr Crees's report was annexure "MP24" to the affidavit of Ms Pagani filed on 14 February 2020 in this proceeding.

21 Dr Crees deposes that the "ATSB Aviation Occurrence Statistics Report 2008 – 2017" quotes an average rate of fatal accidents for aeroplanes in private operatio ns of 20.3 per million hours. Dr Crees's calculations for Angel Flight over almost its entire history from 2005 to 2017 revealed a fatal accident rate of 40 per million hours. Dr Crees deposes that, at this rate, there have been only two fatal accidents associated with Angel Flight and the difference between Angel Flight and the "ATSB Aviation Occurrence Statistics Report 2008 – 2017" data "is not statistically significant". Dr Crees deposes that it is not possible to claim that Angel Flight has a higher rate of fatal accidents.

22 As I have stated, Dr Crees prepared a report which was annexure "MP-24" to the affidavit of Ms Pagani filed on 14 February 2020 in this proceeding. That report was titled "Analysis of Angel Flight Accident Data". Dr Crees's report stated (among other things):

> In a document filed by CASA … on 15 March [2019], [it was] claimed that the fatal accident rate for community service flights in the period 2008 – 2017 was five times higher than for private/business/sport aviation. [The document] quoted a fatal accident rate of 112.7 per million hours for community service flights compared to 20.86 per million hours for private/business/sport aviation. It is understood [that the document] relied on BITRE (Bureau of Infrastructure and Regional Economics) data for that period, notwithstanding:
>
> - BITRE did not collect data on community service flights until 2014;
> - the definition of community service flights used by BITRE is so broad as to include charities such as Angel Flight, Little Wings, Wings4kidz, and Funflight as well as other local charity events;
> - aircraft log books and maintenance releases do not record the purpose for which an aircraft was used on each flight so it is impossible for many operators to identify community service flights for individual aircraft;
> - … an average of only 45 owners responded compared to the average of more than 200 different aircraft used in Angel Flight operations in the period …

…

Angel Flight has been able to analyze [sic] its own data but does not have access to data from the other community service flight providers.

…

Fatal accident rates 2008 – 2016

This is the only period where matching data are available from both Angel Flight and ATSB records and, therefore, the only data suitable for valid comparisons.

…

There was only one fatal Angel Flight accident in this period, giving an estimated rate of fatal accidents of 24.1 per million hours. This is not 112.7 per million hours, as claimed by CASA, nor is it five times the result for private/business/sports aviation. Rather, it is very similar to the rate for private/business/sports aviation and the difference is not statistically significant i.e. it is not possible to claim that Angel Flight has a higher rate of fatal accidents than private/business/sports aviation.

Fatal accident rates 2005 - 2017

The period 2008 – 2016 does not include the Mt. Gambier accident that occurred in 2017. However, Angel Flight has flight data for all but its first two years of operation so it is possible to extend the analysis of its operations to 2005-2017. For this period, the fatal accident rate is 40.2 per million hours but the difference between this result and the ATSB rate for private/business/sports aviation is not statistically significant i.e. it is still not possible to claim that Angel Flight has a higher rate of fatal accidents.

ALL ACCIDENTS

Accident rates (all accidents) 2008 - 2016

It is also possible to compare the rates for all accidents in the two sectors as they are important in comparing the risks involved in Angel Flight operations compared to private/business/sports aviation.

The ATSB report shows that the average rate of all accidents for aeroplanes in the period 2008 – 2016 was 150.9 per million hours.

For the same period, there were three Angel Flight accidents (including one fatal), giving an average rate of rate [sic] 74 per million hours. Although this result is only half the rate for other private operations, the difference is not statistically significant i.e. it is not possible to claim that Angel Flight has a higher or lower accident rate.

Accident rates (all accidents) 2005 - 2017

As above, to make any comparison between Angel Flight and ATSB data beyond 2008 – 2016, one must assume that the accident rate for all general aviation was constant over the extended period.

For the period 2005 – 2017, there were four Angel Flight accidents (including the two fatal accidents) at an average rate of 75 per million hours. Again, this is only half the ATSB 2008- 2016 rate for private/business/sports aviation but, again, the difference is not statistically significant i.e. it is not possible to claim that Angel Flight has a higher or lower accident rate.

(Bold and underlined text in the original.)

Cross-examination of Dr Owen Crees

23 Dr Crees was cross-examined on the first day of trial. The following summarises propositions with which Dr Crees agreed, or accepted, in the course of his cross-examination.

24 In cross-examination, Dr Crees accepted that he was not independent from Angel Flight having been a volunteer since 2004 and a director of Angel Flight since December 2019. Dr Crees accepted that he had advocated on behalf of Angel Flight in opposition to the Instrument.

25 Dr Crees used data from Angel Flight's database to prepare his report. He did not attach any of that internal data to his affidavit. Dr Crees understood that Mr Monahan (of CASA), in formulating the Instrument, had said that CASA did not have access to the internal data from Angel Flight.

26 Dr Crees accepted that, in carrying out his calculations, he did not have access to data from other CSF operators. His analysis was to carry out calculations based on a particular data set. At least part of that data set was derived from Angel Flight. Dr Crees also had regard to general aviation accident rate data.

27 Dr Crees's results differ from the results at which CASA arrived. Dr Crees accepted that the results that he arrived at were based on different data from the data used by CASA.

28 In re-examination, Dr Crees was asked whether, in the course of preparing his report, Dr Crees had seen any material that was an analysis of a death said to have been caused on a CSF. Dr Crees said he had seen an ATSB investigation of an accident that occurred near Horsham, Victoria, in 2011.

CASA'S EVIDENCE

29 CASA tendered the affidavits of Christopher Paul Monahan, affirmed 19 March 2020 and 13 November 2020, as amended by the corrections identified in the Respondent's solicitors' letter dated 22 February 2021 (see CB 318) and marked collectively Exhibit R.1. These affidavits were also subject to the Ruling on Evidence dated 11 March 2021.

Evidence of Christopher Paul Monahan

Mr Monahan's role

30 Mr Monahan is the Executive Manager, National Operations and Standards Division (**NOS**) of CASA. He has been employed in that position since March 2018.

31 Mr Monahan's duties in his current position at NOS are to manage and lead the division charged with the responsibility for policy development and legislative implementation of all aviation safety standards. The NOS is responsible for oversight of all nationally-administered regulatory services and surveillance, including aircraft certification and production, air navigation services, airspace, aerodromes and remotely-piloted aircraft systems.

CSFs

32 Mr Monahan gave evidence that, prior to the enactment of the Instrument, CSFs had been regulated on the basis that they were private flights, notwithstanding that pilots of CSFs were able to obtain reimbursement from the flight coordinator for the costs of fuel consumed during the flight. Angel Flight is a CSF organisation.

33 Mr Monahan deposed that Angel Flight is one of two "significant CSF organisations" in Australia. The other is Little Wings, a not for profit organisation with headquarters in Sydney. As Mr Monahan understands it, the activities of both Angel Flight and Little Wings focus on the coordination of air and ground transport for sick persons living in rural and regional areas who may not have access to timely and affordable means of travelling to receive medical treatment.

34 Mr Monahan deposed that, as he understands the position, Angel Flight provides a coordination service between patients needing transport and pilots who are prepared to provide that transport. Angel Flight then reimburses the relevant pilots for the cost of fuel consumed on any mission. CSFs are often conducted by pilots holding private pilot licences operating aircraft, which are maintained to private maintenance standards.

The August 2011 accident

35 Mr Monahan understands that, on 15 August 2011, a Piper PA-28-180 Cherokee aircraft, with the registration mark "VHPOJ", crashed near Horsham in Victoria, fatally injuring all three occupants. Mr Monahan understands the aircraft had been engaged in a CSF organised by Angel Flight, to transport passengers from Essendon to their home in Nhill following medical treatment in Melbourne.

36 Mr Monahan deposes that the ATSB conducted an investigation into the circumstances of the accident involving aircraft VH-POJ. The findings of that investigation were contained in a report dated 3 December 2013 and published under s 25 of the *Transport Safety Investigation*

Act 2003 (Cth) (***TSI Act***). That report was not tendered in evidence nor was its contents referred to by Mr Monahan in his evidence due to the prohibition from admitting the report into evidence in any civil or criminal proceeding pursuant to s 27(1) of the *TSI Act*. Section 27(1) provides that "[a] report under section 25 [of the *TSI Act*] is not admissible in evidence in any civil or criminal proceedings".

The 2014 Discussion Paper

37 On 18 August 2014, CASA released a public discussion paper entitled "DP13170S – Safety Standards for CSFs Conducted on a Voluntary Basis" (**2014 Discussion Paper**).

38 The 2014 Discussion Paper sought public opinion on 10 different options for regulating CSFs. CASA released the 2014 Discussion Paper because it had become concerned that CSFs continuing to be regulated as private flights may not be appropriate from a safety perspective.

39 The 2014 Discussion Paper canvassed a range of options with the public including whether it was appropriate for an Air Operator's Certificate (**AOC**) to be required for CSFs, or if other mechanisms may be more appropriate for the purpose of accommodating these types of flights, while ensuring that acceptable standards of safety are maintained without imposing unacceptable levels of oversight or "red tape". Mr Monahan deposes that an AOC is required to be held by operators who conduct (amongst other forms of air operation) commercial, passenger-carrying charter flights.

40 The 2014 Discussion Paper canvassed 10 different options, which ranged between two poles, being "no change to the status quo" through to ensuring "CSF operations [were] under the authority of an AOC".

41 Mr Monahan's evidence was that CASA assessed the responses received by CASA to the 2014 Discussion Paper as "unfavourable" to each of the options proposed and not supportive of any change. CASA then determined in February 2015 not to proceed with regulatory intervention at that time.

The 2017 accident

42 Mr Monahan's evidence was that, as he understands it, on 28 June 2017, a SOCATA TB-10 aircraft with the registration mark "VH-YTM" collided with terrain shortly after take-off from Mount Gambier Airport in South Australia, fatally injuring the three persons on board

and destroying the aircraft. Mr Monahan understands that the aircraft was engaged in a CSF organised by Angel Flight to transport a passenger for medical treatment in Adelaide, along with an accompanying family member.

43 Subsequent to the accident involving aircraft VH-YTM, the ATSB conducted an investigation into the circumstances of the accident. The findings of that investigation were recorded in an investigation report which was published on 13 August 2019 (and had the reference number reference number AO-2017-069). That report was not tendered in evidence in this proceeding.

A review by CASA

44 Mr Monahan's evidence was that, immediately following the accident involving aircraft VH-YTM, in early July 2017, the current Director of Aviation Safety and CEO of CASA, Mr Shane Carmody, commissioned a review of CASA's oversight of CSF operations (**Review**). CASA's Group Executive Manager, Aviation Group, Mr Graeme Crawford, instructed Mr Monahan, as the then Manager of the Flight Standards Branch, to take responsibility for conducting the Review.

45 On 4 July 2017, Mr Monahan tasked Mr Scott Watson, the then Team Leader of the "Fixed and Rotary Wing" within the Flight Standards Branch, with conducting the Review. At the time, it was Mr Monahan's understanding that the accident and incident statistics, routinely available to CASA through the ATSB, indicated that, at a minimum, the fatal accident rate in CSF operations appeared to be significantly higher than in other private operations.

46 Throughout the course of the Review, numerous meetings were held with participants in the CSF sector, including Angel Flight and Little Wings in relation to the issues the subject of the Review.

The 2017 "Standard Form Recommendation"

47 In or around September 2017, Mr Watson provided Mr Monahan with a "Standard Form Recommendation" (**September 2017 SFR**). The September 2017 SFR stated (among other things):

> The ATSB regularly publishes summaries of Australian aviation accident and incident statistics. In a variety of reports and statistical summaries[,] … the ATSB has found that the fatal accident rate for General Aviation Private / Business flights has approximated 20 fatal accidents per 1,000,000 flight hours. From 2006-2014, all General Aviation types averaged 8-9 fatal accidents per million departures. The

> report states that aerial agriculture and private/ business flights had the highest and second highest rates followed by survey and photography, aerial mustering and lastly flying training.
>
> Although the number of [Angel Flight] accidents is a statistically small sample and therefore may not be able to for m the basis of a statistically valid comparison, it is nonetheless useful to extrapolate and compare the [Angel Flight] accident rate to these statistics.
>
> > [Angel Flight] – two fatal accidents in 22000 flights (rounded-up = better) Fatal accident rate per million departures = 90.9
> >
> > [General Aviation] – total fatal accident rate per million departures 11.3 (worst – 2012)[.]
>
> Regardless of the cause[,] the CSF fatal accident rate is in excess of eight times higher than the ATSB [General Aviation] statistics.

48 Mr Monahan did not consider that the data available at the time of September 2017 SFR was robust enough to form a statistically valid comparison between the CSF sector and the general private aviation sector. Notwithstanding, Mr Monahan considered that the existence of the data referred to in the September 2017 SFR provided a basis for Mr Monahan's concern that the fatal accident rate in CSF operations was disproportionately high compared to standard private flights and that the higher accident rate may be contributed to by unique features of CSF operations which distinguished them from standard private flights.

49 Mr Monahan instructed Mr Watson to continue to pursue data analysis of operations within the CSF sector to determine what other potential sources of data could be obtained to bring greater clarity to the safety profile of CSF operations as they compared to standard private operations.

The 2018 "Standard Form Recommendation"

50 The Review into the conduct of CSF operations continued as did the discussions with participants in the CSF sector resulting in a standard form recommendation to the Director of Aviation Safety dated 13 December 2018 (**December 2018 SFR**). The December 2018 SFR recommended that a legislative instrume nt be made to impose certain operational limitations in the form of conditions on the flight crew licences of pilots who engage in CSFs.

51 The December 2018 SFR identified the "issue" as follows:

> Since 2011, there have been two CSF accidents resulting in six fatalities. CASA is also aware of multiple accidents and fatalities involving similar operations in the USA.
>
> Between the 2011 and 2017 accidents, CASA commenced project OS 13/25 to investigate potential safety risks associated with CSF operations and balance these

risks with the social needs and benefits of CSF activities, and develop standards. A discussion paper that was published in August 2014 seeking comment on 10 options received significant opposition. Following this feedback, CASA indicated it would not take any immediate action; however, it would monitor the sector and implement actions in the future if necessary.

Following the 2017 accident, CASA engaged with the relevant charitable organisations to encourage the sector to implement voluntary safety enhancements. While some actions have been taken by the sector, CASA considers it is appropriate to establish a regulatory baseline that provides clarity regarding an appropriate minimum safety standard.

52 The December 2018 SFR outlined "the problem" as follows:

> … CSF operations have considerable potential complexity for pilots who can have minimal experience levels. CSF flight operations are not supported by an organisational safety system that would be required of either an ASAO or AOC based organisation. Processes to ensure that pilots continue to satisfy the requirements for undertaking CSF operations after they are initially accepted by the charitable organisation, or to require pilots to report incidents to enable continual safety improvement, are not consistently in place across the CSF sector.
>
> The lack of direct safety risk mitigators and the reliance on individual, pilot assessments regarding mission acceptance, commencement or continuance, results in an increased need for Pilots in Command (PIC) to be experienced, operationally recent and well versed in in-flight management, human factors and threat and error management skills. Persons travelling in CSF aircraft are subject to flight operations of increased risk compared to charter or RPT flights.
>
> Following the 2017 CSF accident, CASA encouraged the charitable organisations to implement voluntary safety enhancements. However, meaningful safety improvements have not been realised.
>
> Many of these flights are carried out in challenging operational situations such as VFR in marginal VMC or where there is a requirement for night VFR operations. The lack of maximum duty periods leaves pilots to self-assess their fatigue levels.
>
> There are currently no legislative minimum flight crew licensing, experience or medical requirements for Australian CSF pilots. Australian charitable organisations coordinating CSF do specify minimum requirements for their volunteer pilots however these requirements are generally lower than many of those mandated by similar foreign organisations …
>
> For several decades, the Australian aviation legislative framework has been evolving towards a risk and participant-based structure. Different operations are regulated in different ways depending upon the risks associated with the operation and the type of non-crew persons directly involved in the operation, depending on how informed they are about the safety risks of the operation. Broadly, non-crew can be classified as uninformed participants, informed participants or passengers.
>
> Current charitable organisation practices require the person for whom the CSF is arranged to sign a waiver acknowledging that the CSF is conducted to a lower safety standard than a commercial flight. While the waiver indicates the person is an informed person, it is unlikely they truly understand the safety differences (and the safety data) between, for example, a passenger carrying charter flight and a CSF. These persons can realistically only be considered uninformed participants.

The charitable organisations that coordinate CSF pilots and passengers are not aviation organisations. CASA cannot require these organisations to implement any process or procedural changes. CASA does have an educational and regulatory relationship with CSF pilots, aircraft used to conduct CSF and therefore, indirectly, with CSF passengers.

Although the two Australian CSF accidents are a statistically small sample, the fatal accident rate when compared to General Aviation (GA) is several multiples higher. The CSF fatal accident rate is approximately 90.9 per million departures, with the GA fatal accident rate 11.3 per million departures. It is important to note that in general terms CSF and GA pilots are drawn from the same cohort.

A 2007 research article by the US National Transportation Safety Board examined general aviation accidents in degraded visibility and identified several variables that were significantly associated with accident involvement. These included:

- The pilot not holding an instrument rating increased the accident risk by nearly five times[;]
- Commercial pilots had a lower accident rate than private pilots; and
- Private flights had a higher accident rate than flights conducted for commercial purposes.

(Citations omitted.)

53 The December 2018 SFR conducted a "comparison to similar activities" which stated (among other things):

Broadly, CSF pilots can operate from a variety of unfamiliar locations in varying weather conditions with no organisational oversight or safety support. They are highly reliant on their own personal skills, knowledge and standards. They are transporting passengers with a very limited understanding of the relative risks between CSF and charter operations.

Other operations such as charter (in small aeroplanes with low time pilots), parachuting and adventure flights are conducted under organisational supervision or within a regulated framework. Passengers on these flights are reasonably informed participants when compared to an air transport passenger or a CSF passenger. The required minimum hours are usually exceeded in normal practice …

Noting these differences, it is apparent that to provide a modicum of safety equivalence between CSF and other operations carrying uninformed participants, CSF pilot experience requirements should be increased above those for private pilots conducting a private operation …

54 The December 2018 SFR referred to the following "option analysis":

Option 7 (flight crew licensing requirements)

Since the DP was issued, CASA has focused on establishing the similarities and difference between other Australian non-certificated operations … Private Pilot Licence (PPL) holders have increased hours requirements (400 hours total flight time in aeroplanes or helicopters and 250 hours flight time as [Pilot in Command] in the same) as well as recent and type specific experience …

The minimum medical standard is Class I or 2, with the Class 2 basic being excluded.

This is in line with other safety industries (Rail) within Australia where sudden incapacity or collapse (e.g. from heart attack or blackout) may result in a serious incident affecting the public.

Recency requirements on the specific aircraft type in which the flight is conducted provide assurance that the pilot is competent on the specific type of aircraft in which the flight is conducted. CASA regulations do not specify aircraft specific recent experience requirements, especially where many different types of aircraft can be flown under the privileges of a class rating that cover numerous types. Additionally, the majority of accidents and incidents occur in the approach and landing phases of flight.

Option 8 (aircraft operational limitations)

… CASA's responsibility as a regulator to ensure an adequate level of safety requires that there be clear and unambiguous requirements where certain operations are perceived as increasing the level of risk to an unacceptable level.

The risks of inadvertent entry into [instrument meteorological conditions (**IMC**)] at night is greater when clouds cannot be detected when there is little or no ambient lighting. The loss of a visual horizon for pilot who do not hold an instrument rating increases the risk of spatial disorientation that can lead to a loss of control in flight.

Therefore, it is recommended that the restrictions recommended by option 8 (passengers limited to 5 … and no night VFR) be implemented and that additional restrictions — that should not impact on the CSF sector but that would clarify matters for the sector — also be put in place (CSF only in aeroplanes, mandatory flight notification for VFR in line with RPT and CHTR, flight notification to identify the flight as CSF).

Option 9 (aircraft certification and maintenance requirements)

Following consideration of the different certification and maintenance requirements applicable to other Australian aviation operations with overall risk similarities (passenger type, operation type etc), it is recommended that CSF operations be required to utilise the same maintenance requirements that CASA has implemented for parachute jump aircraft. These requirements are not onerous but set a minimum baseline standard that is appropriate for the CSF sector at this time.

(Italicised text in the original.)

55 The December 2018 SFR identified the following "options":

1. Do nothing.

2. CASA implement either of the preferred options from DP 13170S (ASAO for the CSF sector or require a full AOC for any organisation conducting CSF operations).

3. CASA implement conditions on pilot licences encompassing minimum pilot in command experience, CSF operational limitations and CSF aircraft maintenance requirements.

56 The December 2018 SFR made the following recommendation:

It is recommended that Option 3 be implemented as follows:

1. CASA make a legislative instrument placing the recommended conditions on all

pilot licences …

2. CASA publicly consult on the drafted legislative instrument from mid-Dec 2018 to 31 Jan 2019 (due to the Christmas and New Year period).

3. Internal and external communications be executed as described in [an] Attachment [to the December 2018 SFR] …

57 The December 2018 SFR concluded as follows:

> The main object of the *Civil Aviation Act 1988* (the Act) is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with emphasis on preventing aviation accidents and incidents. To accomplish CASA's function of conducting the safety regulation of civil air operations in Australia's territory, one of the methods outlined in the Act is for CASA to conduct regular reviews of the system of civil aviation safety to identify safety-related trends and risk factors to improve the system.
>
> Achieving an acceptable level of safety for the CSF sector using existing measures is problematic given the current operating and oversight framework. It is recommended that CASA introduce minimum CSF pilot experience, licensing and medical requirements, require flights at night to be conducted using instrument instead of visual procedures and require slightly enhanced aircraft maintenance requirements in line with other operations within Australia involving similar participants.
>
> The recommended actions are proportionate when compared to other uncertificated operations within Australia and similar foreign requirements.
>
> …

58 The Director of Aviation Safety, Mr Carmody, accepted the recommendations contained in the December 2018 SFR.

The 2018 Discussion Paper

59 On or about 18 December 2018, a discussio n paper entitled "Summary of Proposed Change: Proposed Safety Standard — Community Service Flights" (**2018 Discussion Paper**) was published.

60 On 19 December 2018, the 2018 Discussion Paper and an exposure draft of the proposed legislative instrument (**proposed legislative instrument**) were published on CASA's "Consultation Hub" to a low access to members of the public.

61 The 2018 Discussion Paper stated:

> CASA is proposing to introduce a new minimum safety standard for community service flights (CSFs). The new standard relates to:
>
> - licensing and medical requirements for pilots
> - minimum CSF pilot experience
> - a requirement that flights at night be conducted under the instrument flight

rules (IFR)

- maintenance-related enhancements consistent with requirements governing similar operations in Australia.

CSFs are non-emergency flights coordinated by registered charitable organisations and conducted for the purpose of transporting people to receive specialist medical treatment. These organisations are not air service providers. CSFs are conducted by volunteer pilots who are solely responsible for the safe conduct of these flights. CSFs can be conducted by day or night, in varying weather conditions, from and to familiar or unfamiliar aerodromes carrying passengers with a variety of medical conditions and needs. CSFs can pose potentially significant challenges for pilots who may have limited flight experience. These flights can be carried out in difficult operational situations including marginal visual meteorological conditions (VMC) and night VFR operations.

CSFs are not conducted under the safety umbrella of an Air Operator's Certificate (AOC) or necessarily under what may come to be an Approved Self-administering Aviation Organisation (ASAO) … There are currently no legislated minimum qualifications or experience requirements for Australian CSF pilots other than the standard requirements that apply to the Private Pilot Licence (PPL).

Australian organisations coordinating CSF specify minimum requirements for their volunteer pilots. These requirements differ substantially between organisations and are generally less demanding than those mandated by similar foreign organisations.

62 The 2018 Discussion Paper continued:

Operations conducted under an AOC are supported by a comprehensive organisational safety system or a formal safety management system (SMS). Operations in the CSF sector are not required to have any equivalent processes, procedures or risk defences. CASA currently does not have assurance that the CSF sector has consistent processes in place to ensure that pilots who satisfy initial entry requirements into the organisation continue to satisfy the requirements for undertaking CSF operations. After a pilot is initially deemed acceptable by the organisation, he or she does not need to comply with any requirement to report incidents to the coordinating organisation, which would assist that organisation in assessing a pilot's competence and skill, or in making safety improvements in their organisation's arrangements.

This lack of safety risk mitigators and the reliance on individual pilot assessments regarding mission acceptance, commencement or continuance, results in an increased need for pilots in command to have appropriate and recent flight time experience, and to be well versed in in-flight management, human factors and threat-and-error management skills …

63 The 2018 Discussion Paper then set out the requirement which CASA proposed to impose on the CSF sector.

Revisiting the data

64 As to the data concerning "incident and accident rates", Mr Monahan deposes that he instructed CASA's Flight Standards Branch to re- visit the safety accident and incident data available to CASA to determine whether statistically meaningful trends could be derived

from that data as it related to the comparison of incident and accident rates between CSFs and standard private flights. That safety analysis was conducted by CASA in collaboration with experienced statisticians in the "Strategic Analysis Section" of CASA's "Coordination and Safety Systems Branch".

65 The data available for that analysis included data concerning the number of flight hours conducted in certain kinds of operations (including CSFs from 2014) on an annual basis provided by BITRE, incident and accident data available to CASA, as well as incident and accident data made available to CASA by the ATSB.

66 Mr Monahan anticipated that the ATSB, as part of its report into the June 2017 Mount Gambier accident, would release an extensive data analysis of the incident and accident rates attributable to CSF operations when compared to other forms of private and commercial operations. Prior to releasing its draft report for comment, the ATSB provided "raw data" held by it in relation to incidents and accidents involving CSFs coordinated by Angel Flight as an attachment to an email dated 6 February 2019 addressed to both Mr Monahan and Ms Pagani, the CEO of Angel Flight. That attachment stated (among other things):

> By comparing accident rates and fatal accident rates for CSF with Private/Business/Sports (excluding gliding) over the past 10 years (2008 to 2017), [the] CSF accident rate is 1.5 times higher than that for Private/Business/Sports, excluding the gliding accident rate. However, CSF's fatal accident rate is 5.4 times tha[n] for Private/Business/Sports (excluding gliding).
>
> Assuming that all accidents from CSF have been accounted for over the past 10 years, the accuracy of the estimated accident rate is very much dependent on the accuracy of CSF's activity (i.e. flight hours). If CSF's activity has been accurately reported, the small difference in the accident rates between CSF and Private/Business/Sports (excluding gliding) is statistically insignificant. However, since CSF's fatal accident rates are 5 times that for Private/Business/Sports (excluding gliding), this appears to be statistically significant.
>
> A further review of the two fatal accidents in 2011 and 2017 suggests that both pilots were under VFR, but the weather/visibility conditions may have required IFR (2011's accident occurred at night, while in 2017 it was the result of reduced visibility with fog, as pointed out by the ATSB's investigation which is still ongoing).
>
> Another general observation based on the comparative nature of CSF and Private/Business/Sports (excluding gliding) activities is that a pilot undertaking a private flight is not subject to client pressure, while a CSF pilot who has a single-minded focus to complete the mission and get the client to the destination. This suggests that, when the weather is unfavourable, a private pilot is highly likely to cancel or delay the flight, while a CSF pilot may not be able to (or less willing to) cancel the flight (mission-itis or get-there-it is).

67 I will refer to this in these reasons as the "**Raw Data**".

68 Mr Monahan's evidence was that the Raw Data provided by the ATSB was taken into account by CASA in finalising the incident and accident rate data, which was made available to the Director of Aviation Safety, Mr Carmody, for his consideration prior to the issue of the Instrument.

CASA's assessment

69 Mr Monahan's evidence was that CASA's data analysis examined three key statistical figures by way of comparison. First, the "fatal accident rate", which is a measure of accidents occurring in a particular sector of the aviation industry, in which one or more fatalities have occurred within the timeframe under consideration. Second, the "accident rate", which is a measure of all accidents, whether involving fatalities or not, occurring in a particular sector of the aviation industry, within the timeframe under consideration. Third, the "incident rate", which is a measure of all incidents, occurring in a particular sector of the aviation industry, within the timeframe under consideration.

70 The difference between an accident and an incident is that an incident does not involve or result in damage to the aircraft or to property on the ground.

71 Mr Monahan's evidence was that the CASA data analysis showed that each of the fatal accident rate, the accident rate and the incident rate were higher in the CSF sector when compared to standard private flights. CASA's analysis indicated that the fatal accident rate in the CSF sector was 5.4 times higher than in standard private flights; the accident rate in the CSF sector was 1.5 times higher than in standard private flights; and the incident rate in the CSF sector was 4.5 times higher than in standard private flights.

72 Mr Monahan's evidence was that aviation is an inherently safe activity, in which incident and accident rates are low. In that context, the comparison of the fatal accident, accident and incident rates between CSFs and standard private flights, on CASA's analysis, showed that, in each case, CSF activities were significantly less safe than standard private flights. Mr Monahan considered that comparison to be of significance because, in Mr Monahan's view, the operational environment between CSFs and standard private flights should be substantially similar if not identical. In light of the low incident and accident rates associated with aviation as a whole, Mr Monahan considered that the significant increase in those comparative rates tended to support a conclusion that the operational environment that confronted pilots conducting CSFs was more challenging and involved higher levels of risk when compared with standard private flights.

73 The CASA data analysis had some significance to Mr Monahan. In Mr Monahan's view, it provided data to support a conclusion that the CSF operational environment, when compared to standard private flights, involved higher levels of operational risk, which were more likely to contribute to an incident, accident or fatal accident.

74 Mr Monahan asked the "Branch Manager Flight Standards", Mr Roger Crosthwaite, and his team at CASA to conduct a comparative review of the CSF operational environment in contrast to the standard operating environment to assess what, if any, differences existed. The Flight Standards Branch (of which Mr Monahan is the Executive Manager) comprises staff with a substantial and diverse range of aviation experience as pilots in all forms of private, commercial and military flying operations, as well as qualifications and experience in aviation safety investigations.

75 The review conducted by the Flight Standards Branch concluded that the CSF operational environment involved a set of "human factor challenges", which are not normally present in the standard private operational environment. "Human factors" refer to a range of variables that impact on human performance and decision making. These included, for example, fatigue, stress and mental workload. Mr Monahan deposed that human factors are significant in aviation because they have a significant potential to impact on the safe performance of flying activities by pilots, particularly the quality of decision making.

76 Having considered the work undertaken by the Flight Standards Branch, Mr Monahan's understanding was that the key human factors which were more likely to be present in a CSF than in any standard flight included five matters.

77 First, Mr Monahan assessed that there was self- induced pressure as a result of the pilot having taken on the responsibility of delivering an unknown patient for important medical treatment at an appointed time, often with the expectation of a same day return. Mr Monahan deposed that self- induced pressure to complete "the mission" may contribute to pilots making poor decisions or stretching themselves beyond their level of ability or training.

78 Second, Mr Monahan considered that there was significant potential for pressure to be applied on pilots, directly or indirectly, by passengers expecting to be delivered on time for important medical care. Mr Monahan deposed that the pressure of client expectations is well understood in commercial charter flying.

79 Third, although CSF passengers were not paying the pilot directly as per the case of a charter operation, Mr Monahan assessed that passengers nonetheless had a pressing need for the flight to be competed as intended, since the alternative might mean having to delay important health care or treatment.

80 Fourth, Mr Monahan deposed that guidance material produced by the Aircraft Owners and Pilots Association in the United States has noted the potential for that kind of pressure (referred to in the publication as the "mission imperative") to be exerted in charitable or public interest flights which are substantially similar in nature and intent to CSFs.

81 Fifth, Mr Monahan deposed that, since pilots have no control over the locatio ns from which patients were to be collected and the destinations to which they were required to be delivered, pilots were more likely to find themselves having to operate in unfamiliar locations or in unfamiliar, complex air space in order to deliver a patient. Mr Monahan deposed that such matters are not an aspect of standard private flying, where pilots can choose their own departure and arrival points and operate in conditions where they feel comfortable.

82 Mr Monahan's evidence was that each of the above human factors is more frequently associated with the operational environment encountered by commercial pilots undertaking passenger carrying, commercial charter, operations, rather than standard private flights. Unlike in the context of a standard private flight, commercial charter flights are regulated to impose higher levels of practical and theoretical training, greater hours of aeronautical experience and have access to additional organisational safety supports.

83 Mr Monahan's evidence was that the review and analysis undertaken by CASA gave him an understanding that the CSF operational environment was more challenging than the operational environment encountered during a standard private flight. As a consequence, Mr Monahan determined that the safety associated with CSFs would need to be set at a higher level than that which applied to standard private flights.

84 Based on CASA's assessment, Mr Monahan recommended to the Director of Aviation Safety, Mr Carmody, that he sign the Instrument into effect which would introduce safety improvements to the CSF sector.

85 After a period of public consultation concerning the proposed legislative Instrument and taking into account some proposed changes to the Instrument, on 12 February 2019, the

Director of Aviation Safety, Mr Carmody, made the Instrument under regulation 11.068 of the CASR.

Cross-examination of Mr Monahan

86 Mr Monahan was cross-examined on the first day of the trial of this proceeding. The following is a summary of the cross-examination of Mr Monahan.

87 Mr Monahan was referred to a document titled:

> Standard Form Recommendation (SFR) – FSB …
>
> Accident or incident investigations (ATSB / NTSB or similar)
>
> ATSB Transport Safety Report AO-2011-100 —3 December 2013[.]

88 Mr Monahan agreed that that document was a standard form of recommendation within CASA. It was part of the September 2017 SFR (referred to earlier in this judgment).

89 That document stated (among other things):

> **What happened:**
>
> On 15 August 2011, the pilot of a Piper PA-28-180 Cherokee aircraft, registered VH-P0J, was conducting a private flight transporting two passengers from Essendon to Nhill, Victoria under the visual flight rules (VFR). The flight was arranged by the charity Angel Flight to return the passengers to their home location after medical treatment in Melbourne. Global Positioning System data recovered from the aircraft indicated that when about 52 km from Nhill, the aircraft conducted a series of manoeuvres followed by a descending r ight turn. The aircraft subsequently impacted the ground at 1820 Eastern Standard Time, fatally injuring the pilot and one of the passengers. The second passenger later died in hospital as a result of complications from injuries sustained in the accident.
>
> **What the ATSB found**:
>
> The ATSB found that the pilot landed at Bendigo and accessed a weather forecast before continuing towards Nhill. After recommencing the flight, the pilot probably encountered reduced visibility conditions approaching Nhill due to low cloud, rain and diminishing daylight, leading to disorientation; loss of control and impact with terrain. One of the passengers was probably not wearing a seatbelt at the time of the accident.
>
> The ATSB also established that flights are permitted under the visual flight rules at night (night VFR) in conditions where there are no external visual cues for pilots. In addition, pilots conducting such operations are not required to maintain or periodically demonstrate their ability to maintain aircraft control with reference solely to flight instruments.

90 Mr Monahan agreed that this text constituted the only place in the evidence concerning information and conclusions about this fatal accident as to implications for the safe operations of certain kinds of flights. Mr Monahan agreed that it was the ATSB that

conducted investigations into the August 2011 fatal accident referred to in this document. Mr Monahan agreed that, as to the August 2011 accident, this was the material which Mr Monahan and his colleagues had regard to in forming a recommendation that was ultimately produced in the Instrument.

91 Mr Monahan accepted that the conditions imposed by the Instrument found no reflection in the two paragraphs of the ATSB report which stated what the ATSB found in respect to the 15 August 2011 accident. Mr Monahan accepted that there was no "root cause analysis" undertaken by CASA into the two relevant fatal accidents (one in 2011 and one in 2017) which led to any of the recommendations contained in the Instrument. Mr Monahan accepted that there was no "root cause analysis" leading to any recommended content of the Instrument because there was no such "root cause analysis" consideration by Mr Monahan or his colleagues.

92 Mr Monahan said that the relevant two fatal accidents provided the stimulus for further inquiries by CASA concerning CSFs but the two accidents were not the reason for making the Instrument. The two accidents precipitated the discuss ion, but they were not the reason that the Instrument was eventually made. The two accidents drew CASA's attention to CSFs.

93 Mr Monahan accepted that those persons at CASA who had looked at the 15 August 2011 accident before Mr Monahan commenced at CASA did not consider that the 15 August 2011 accident provided justification for any particular condition to be imposed on CSFs. Mr Monahan also accepted that a second fatal accident in 2017 did not provide any root causes to justify any particular condition to be imposed on CSFs. Mr Monahan said that the conditions under which CSFs are conducted are different from a normal private flight. Mr Monahan accepted that there was nothing concerning the circumstances of either of the fatal accidents that informed to any degree the making of the Instrument. For example, there was nothing as to the root cause, as to the training or experience of the pilots, as to the conduct of passengers, or as to the particulars routes or mission.

94 Mr Monahan said that there were conditions peculiar to CSFs as opposed to ordinary private flights. However, Mr Monahan accepted that, in respect of the two fatal accidents, he had no information as to whether any generalised differences between CSFs and ordinary private flights were in operation in the two fatal accidents.

95 Mr Monahan said that CASA had incident and accident data from BITRE and ATSB regarding the two fatal accidents. Mr Monahan accepted that statistical analysis was a means by which information about the two fatal accidents could be used to test CASA's hypothesis about CSFs compared to ordinary private flights.

96 Mr Monahan accepted that he knew nothing about any of the accidents or incidents so as to attribute their occurrence to anything which is peculiar to CSFs. Mr Monahan accepted that there was nothing in the facts or "root cause analysis" of the second fatal accident which, on their own, justified the imposition of the conditions on CSFs. Mr Monahan accepted that he did not, in his affidavits, raise any disagreement with the data analysis set out in Mr Crees's affidavit.

97 Mr Monahan accepted that the comparator CASA used to compare CSFs was "other ordinary private flights". However, CASA excluded from that comparator group "gliders", "crop dusting" flights, "balloons" and "gyrocopters". Mr Monahan said that such flights were excluded because they were not "similar type operations". Mr Monahan said, for example, that gliders were excluded from the comparator group because gliders do not have an engine and they do not have a "passenger carrying charter-like operation". Mr Monahan said that CASA, in conducting its analysis, tried not to exclude from the comparator group those operations which were similar to CSFs. Mr Monahan accepted that his affidavits in this proceeding did not include any justification for how the comparator group was formulated, and, in particular, why it included (what were referred to in cross-examination as) "country aerodrome joy flights". Mr Monahan also agreed that his evidence did not set out an analysis of any relation between accidents and numbers of passengers.

98 Mr Monahan said that there was a difference between CSFs and private flights. The difference in CSFs is that the people present may be under medical stress, and that the mere presence of that type of passenger creates a different condition in the CSF aircraft that warranted attention.

99 Mr Monahan accepted that he did not have data concerning the passenger numbers carried by CSFs. Mr Monahan accepted that the desirable support of empirical justification, for the imposition of conditions concerning the number of passengers on CSFs, positively required him to obtain such data or to accept that he had no empirical support for such a condition.

100 Mr Monahan accepted that he did not have data differentiating between CSFs and ordinary private flights in respect to the requirement concerning the completion of a minimum amount of flight time. The data he had was provided by BITRE and studies reviewed of other comparative nations.

101 Mr Monahan said there were two reasons for imposing more requirements with respect to CSFs concerning recordkeeping. First, there was a lack of data on these matters, and a recordkeeping requirement enabled an understanding of, for example, how many people have flown, where they have flown, and how many passengers were being carried. Second, Mr Monahan stated that CSF conduct, operationally, was a different type of flight that has a higher accident rate (as assessed by CASA) that warrants attention and, by having more data, CASA can assess if it can understand CSFs more effectively with more data going forward.

102 Mr Monahan believed that CASA had sufficient information about the "general pool" of private flights based on "the BITRE data" and other data which gave CASA a baseline, but CASA did not know much about CSF operations. That was the justification for the imposition of the recordkeeping condition. CASA wanted to find out more specifically about the smaller group, which was CSFs.

103 Mr Monahan was referred to cl 11 of the Instrument, which is titled "Aeroplane maintenance requirements". Mr Monahan said that maintenance of aircraft was a matter obviously germane to safety regardless of the type of flight being undertaken. Mr Monahan accepted that there was nothing special about CSFs which imposed differential stresses or strains justifying differential maintenance requirements. There was no data collected or analysed during consideration of the making of the Instrument that suggested that there was anything about CSFs that informed a particular need for aeroplane maintenance requirements such as is found in cl 11 of the Instrument.

104 Mr Monahan said that the maintenance requirements in the Instrument apply to CSFs for the additional risk attributed to those flights. Mr Monahan said that the risk exposure is how often someone is exposed to a risk of a maintenance-related incident. Mr Monahan accepted that there was no body of data, upon which there was performed any analysis or consideration in producing the Instrument, concerning aircraft maintenance and the two fatal accidents.

105 Mr Monahan accepted that CASA looked to the approach of foreign jurisdictions as a cue to consider what the position in Australia might justify. That was one of the elements in CASA's consideration.

106 Mr Monahan said that he believed that, as a consequence of s 27(1) of the *TSI Act*, there were restrictions on his ability to discuss the work which the ATSB conducts in relation to investigations on behalf of the Commonwealth government. This, Mr Monahan said, was part of an information sharing agreement which CASA has with ATSB. Mr Monahan said that, because of this prohibition, he could not discuss the nature of the comments the ATSB made in their reports into the fatal accidents.

107 Mr Monahan said that the ATSB report provided information to CASA concerning the two fatal accidents. CASA does not itself do investigations like the ATSB. Mr Monahan said that the two fatal accidents were unusual and, even before the ATSB report came out in full, had drawn CASA's attention because, in Mr Monahan's words, it is "unusual to have two fatal accidents occur in one sector, or even one subsector, and that was … the start of the process that [CASA] used to gather data as much as [it could], [to] try to analyse that data, [and to] identify … risks that might be unique to … those circumstances".

PARTIES' SUBMISSIONS

108 Angel Flight relied upon its written submissions dated 6 July 2020, 23 December 2020 and 25 February 2021. At the hearing, Mr Bret Walker SC appeared with Mr Phillip Boncardo of counsel.

109 CASA relied upon its written submissions dated 5 February 2021. At the hearing, Mr Peter Hanks QC and Dr Laura Hilly of counsel appeared on behalf of CASA.

LEGISLATIVE FRAMEWORK

110 The legislative framework which provides the relevant powers and functions of CASA was not in dispute between the parties. The partie s' submissions conveniently summarised the relevant legislative framework as follows.

CASA's general powers and functions

111 CASA was established by s 8 of the *Civil Aviation Act 1988* (Cth) (***CA Act***). The main object of the *CA Act* is to "establish a regulatory framework for maintaining, enhancing and

promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents": *CA Act*, s 3A.

112 CASA's functions are prescribed by s 9 of the *CA Act*. CASA has the function of "conducting the safety regulation of", among other things, "civil air operations in Australian territory" (*CA Act*, s 9(1)(a)), by means that include:

(a) "developing and promulgating appropriate, clear and concise aviation safety standards": *CA Act*, s 9(1)(c); and

(b) "conducting regular reviews of the system of civil aviation safety in order to monitor the safety performance of the aviation industry, to identify safety-related trends and risk factors and to promote the developme nt and improvement of the system": *CA Act*, s 9(1)(g).

113 In "exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration": *CA Act*, s 9A(1). In the performance of its functions and the exercise of its powers, CASA "must, where appropriate, consult with", among others, "relevant bodies and organisations": *CA Act*, s 16.

CASA's power to make the Instrument

Part VIII of the CA Act

114 Section 98 of the *CA Act* is in Part VIII of the *CA Act*. It empowers the Governor-General to make regulations not inconsistent with the *CA Act*, including regulations:

(a) "prescribing matters required or permitted by the *CA Act* to be prescribed": *CA Act*, s 98(1)(a); and

(b) "prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the *CA Act*": *CA Act*, s 98(1)(b).

115 Section 98(5A) of the *CA Act* provides:

> The regulations may empower CASA to issue instruments in relation to the following:
>
> (a) matters affecting the safe navigation and operation, or the maintenance, of aircraft;
>
> (b) the airworthiness of, or design standards for, aircraft.
>
> An instrument must not prescribe a penalty.

116 Section 98(5AA) of the *CA Act* provides that an instrument issued under s 98(5A)(a):

> … is a legislative instrument if the instrument is expressed to apply in relation to:
>
> (a) a class of persons; or
>
> (b) a class of aircraft; or
>
> (c) a class of aeronautical product.

117 Section 98(5AB) provides that an instrument issued under s 98(5A)(a):

> … is not a legislative instrument if the instrument is expressed to apply in relation to:
>
> (a) a particular person; or
>
> (b) a particular aircraft; or
>
> (c) a particular aeronautical product.

Part 11 of the CASR

118 The Governor-General has made the CASR. Part 11 of the CASR "sets out administrative provisions for the regulation of civil aviation": CASR, reg 11.005. Subpart 11.BA contains rules about granting authorisations, including the duration of, and the imposition of conditions on, authorisations.

119 Regulation 11.068, which appears in Subpart 11.BA, provides:

> (1) For subsection 98(5A) of the [*CA Act*], CASA may issue a legislative instrument that imposes a condition relating to a matter mentioned in that subsection on a specified class of authorisations.
>
> (2) The class of authorisations may include authorisations granted before the imposition of the condition.
>
> (3) A condition imposed by a legislative instrument issued under subregulation (1) is taken to be a condition of every authorisation of the class mentioned in the instrument.
>
> (4) A condition imposed by a legislative instrument issued under subregulation (1) takes effect:
>
> (a) for an authorisation that takes effect before the day on which the instrument comes into force:
>
> (i) when the instrument comes into force; or
>
> (ii) if a later time is stated in the instrument – at that time; and
>
> (b) for an authorisation granted on or after the day on which the instrument comes into force:
>
> (i) when the authorisation comes into effect; or
>
> (ii) if a later time is stated in the instrument – at that time.

120 Regulation 11.077(1) provides that a person commits an offence if a "person holds an authorisation subject to a condition imposed under regulation … 11.068 … and the person contravenes the condition". The offence is one of strict liability and has a maximum penalty of 50 penalty units: CASR, regulation 11.077(2).

121 "Authorisation" is defined by regulation 11.015 for the purposes of Part 11 of the CASR to mean a "civil aviation authorisation" other than "an AOC", "a delegation", "the appointment of an authorised person", "an authorisation issued by ASAO" (being an approved self-administering aviation organisation under Part 149 of CASR) and certain approvals and qualifications. A note to regulation 11.015 provides that the definition of "civil aviation authorisation" is that specified in s 3 of the *CA Act*.

122 "Civil aviation authorisation" is defined as follows under s 3 of the *CA Act*:

> *civil aviation authorisation* means an authorisation under [the *CA Act*] or the regulations to undertake a particular activity (whether the authorisation is called an AOC, permission, authority, licence, certificate, rating or endorsement or is known by some other name).

123 Neither the *CA Act* nor the CASR defines "class of authorisations" for the purpose of regulation 11.068 of the CASR.

124 "Aircraft" are defined by s 3 of the *CA Act* to mean "any machine or craft that can derive support in the atmosphere from the reactions of the air, other than the reactions of the air against the earth's surface". "Aeronautical product" is defined by s 3 of the *CA Act* to mean "any part or material that is, or is intended by its manufacturer to be, a part of or used in an aircraft, unless excluded by the regulations".

Part III of the CA Act

125 Part III of the *CA Act* deals with the regulation of civil aviation. Division 3D of Part III is titled "Demerit points scheme". Section 30DT provides that "regulations may prescribe … offences to which [Division 3D] applies … and the number of points that are incurred in relation to an offence". Section 30DU of the *CA Act* states that the "regulations must prescribe classes to which civil aviation authorisations belong, having regard to the activities covered by the civil aviation authorisations". Section 30DW provides that, in certain circumstances, the "holder of a civil aviation authorisation" will incur "demerit points for a prescribed offence" (being "an offence prescribed under section 30DT"). Section 30DX(1) provides that, if "the holder of a civil aviation authorisation incurs demerit points, the demerit

points are incurred in relation to the class of authorisations to which the offence relates ". Incurring demerit points may result in the suspension of a civil aviation authorisation or its cancellation: see *CA Act*, ss 30DY-30ED.

Part 13 of the CASR

126 Part 13 of the CASR is titled "Enforcement procedures". Regulation 13.370(1) provides that all offences under the *Civil Aviation Regulations 1988* (Cth) and the CASR that are specified as "strict liability offences" are offences to which the demerit points scheme in Division 3D of Part III of the *CA Act* applies. Regulation 13.370(2) provides the number of demerit points that are incurred in relation to relevant offences. The number of demerit points depends on the maximum number of penalty units applicable to an offence. Relevantly for present purposes, regulation 13.370(2)(b) provides that, if the maximum penalty for an offence is 26 penalty units or more, 3 demerit points will be incurred.

127 Clause 13.375 of the CASR is entitled "Classes of civil aviation authorisations". It provides:

> For the purposes of section 30DU of the [*CA Act*], a civil aviation authorisation mentioned in column 2 of an item in table 13.375 belongs to the class of civil aviation authorisation mentioned in column 3 of the item.

128 The CASR then sets out the following table, which is titled "Table 13.375":

Table 13.375 Classes of civil aviation authorisations

Column 1 Item	Column 2 Particular civil aviation authorisations	Column 3 Class of civil aviation authorisation
1	a certificate issued under section 27 of the Act	Air operator certificate
2	a certificate issued under Part 47 of CASR	Certificate of registration
3	a certificate issued under regulation 30 of CAR	Certificate of approval
4	an aircraft engineer licence	Authorisation to perform maintenance certification and issue certificate of release to service
4A	an authority mentioned in regulation 33B or 33C of CAR	Maintenance authority
5	a licence referred to in paragraph 5.08(b) of CAR	Flight radiotelephone licence
6	a licence referred to in paragraph 5.08(a) of CAR or a pilot licence	Pilot licence
7	a flight engineer licence	Flight engineer licence
8	a certificate issued under Part 6 of CAR or Part 67 of CASR	Medical certificate

Column 1 Item	Column 2 Particular civil aviation authorisations	Column 3 Class of civil aviation authorisation
9	a licence or authorisation issued under Part 65 of CASR	Air traffic control licence
10	a certificate issued under Subpart 101.F of CASR	RPA certificate
11	a certificate issued under Subpart 139.B of CASR	Aerodrome certificate
12	an approval granted under Subpart 139.H of CASR	ARFFS approval
12A	an approval granted under regulation 141.035 or 142.040	Flying training authorisation
12B	a certificate issued under regulation 141.060 or 142.110	Flying training authorisation
13	an approval granted under Part 143 or 172 of CASR	ATS approval
14	an approval granted under Part 171 of CASR	Aeronautical telecommunication and radionavigation provider approval
15	a certificate or authorisation issued under Part 173 of CASR	Instrument flight procedure approval

129 As will be apparent, "particular civil aviation authorisations" are set out in column 2 of table 13.375. These include specified kinds of certificates and authorisations (such as an air operator certificates issued by CASA under s 27 of the *CA Act*, or certificates or authorisations issued under Part 173 of the CASR). Certain "classes of civil aviation authorisation" are then set out in column 3 of table 13.375.

THE INSTRUMENT

130 As indicated above, on 12 February 2019, Mr Shane Carmody, Director of Aviation Safety, acting on behalf of CASA, purportedly made the Instrument pursuant to regulation 11.068 of the CASR. The Instrument was amended shortly thereafter by "*CASA 13/19 – Civil Aviation (Community Service Flights – Conditions on Flight Crew Licences) Amendment Instrument 2019*" (**Amending Instrument**), which was registered on 8 April 2019 and commenced on 9 April 2019. The parties' submissions indicated that the amendments made to the Instrument are immaterial to these proceedings.

131 The Instrument commenced on 19 March 2019: Instrument, cl 2(a). The Instrument was subject to the tabling and disallowance process in Chapter 3, Part 2 of the *Legislation Act 2003* (Cth) (***Legislation Act***): see ss 8(2), 38 and 42 of the *Legislation Act*. The Instrument has also been published on the Federal Register of Legislation in accordance with Chapter 2, Part 1 of the *Legislation Act*.

132 The Explanatory Statement (at page 1) for the Instrument notes that CASA:

> … has assessed that community service flight operations have a higher risk of an accident or incident due to the existence of risk factors that are not usually present in baseline private operations. The purpose of the instrument is to mitigate this risk by placing conditions on flight crew licence holders conducting such operations that relate to requirements on the pilot (licence requirements, aeronautical experience, recency and medical fitness), operational and notification requirements and aircraft maintenance requirements.

133 The provisions of the Instrument which are relevant to the present proceeding are:

(a) Clause 4 provides that the Instrument "applies in relation to a flight in an aircraft conducted as a private operation".

(b) Clause 5 provides that, "[f]or the purposes of regulation 11.068 of CASR", the Instrument "imposes conditions on flight crew licences".

(c) Clause 6(1) provides that a flight is a "community service flight" if it meets the description in cll 6(2)-(5) of the Instrument. Clauses 6(2)-(5) provide:

> (2) The flight involves:
>
> (a) the transport of one or more individuals (a ***patient***) to a destination for the purpose of each such individual receiving non-emergency medical treatment or services at the destination; or
>
> (b) the transport of a patient from a destination mentioned in paragraph (a) (the ***treatment destination***) to another treatment destination; or
>
> (c) the transport of a patient from a treatment destination:
>
> (i) back to a place from which the patient departed for a treatment destination; or
>
> (ii) to a destination at which the patient resides.
>
> (3) The flight is provided to a patient, and any person who accompanies the patient to provide support and assistance, without a charge being made to any of those persons for their carriage.
>
> (4) Medical treatment is not provided on board the aircraft for the flight, other than the administering of medication or in response to an unexpected medical emergency.
>
> (5) The flight is coordinated, arranged or facilitated by an entity for a charitable purpose or community service purpose.
>
> *Note* Section 2B of the *Acts Interpretation Act 1901* defines ***charitable purpose*** as having the meaning given by Part 3 of the *Charities Act 2013*.
>
> (Bold and italicised text in the original.)

(d) Clause 7(1)(c) imposes a condition on a flight crew licence by way of a limitation on the number of persons to be carried on a community service flight. It provides that:

> [i]t is a condition on a flight crew licence that its holder must not operate an aircraft for a community service flight unless … the aeroplane does not carry on board any persons other than:
>
> (i) a patient mentioned in paragraph 6(2)(a), and any other passenger who accompanies a patient to provide support and assistance; and
>
> (ii) the operating crew …

(e) Clause 9 imposes a "condition on a flight crew licence that its holder must not pilot an aeroplane operated for a community service flight" unless the holder has the particular aeronautical experience set out in cll 9(1)(a)-(d).

(f) Clause 10 imposes "a condition on a flight crew licence that its holder must not pilot an aeroplane operated for a community service flight unless", among other things, the holder submits the relevant flight notification to Airservices Australia that "identifies the flight as a community service flight" and the holder records that the flight is a community service flight in the relevant logbook (in addition to other logbook requirements prescribed in regulation 61.350 of the CASR).

(g) Clause 11(2) imposes "a condition on a flight crew licence that its holder not pilot an aeroplane for a community service flight" unless the aeroplane meets the maintenance requirements in cl 11(2).

GROUNDS OF REVIEW 1, 2 AND 3 – THE *ULTRA VIRES* GROUNDS

134 Grounds of review 1, 2 and 3 concern the proper construction of the *CA Act* and the CASR. By Grounds 1, 2 and 3, Angel Flight contends that the Instrument was not authorised by regulation 11.068 of the CASR for the following reasons:

(a) the "class of authorisation" specified in the Instrument is not a "class of civil aviation authorisation" prescribed by the CASR: Ground 1;

(b) further or alternatively, the Instrument was not authorised by regulation 11.068 of the CASR because:

(i) the Instrument is expressed to apply in relation to a type of aviation operation ("community service flights") and not a class of persons, aircraft or aeronautical product as required by s 98(5AA) of the *CA Act*;

(ii) pursuant to s 98(5AA) of the *CA Act*, the Instrument is not a "legislative instrument"; and

(iii) regulation 11.068 of the CASR only empowers CASA to make legislative instruments: Ground 2; and

(c) further or alternatively, the Instrument creates a new class of operation, namely "community service flights", the creation of which is not authorised by regulation 11.068 of the CASR: Ground 3.

Angel Flight's submissions on Grounds 1, 2 and 3

Angel Flight's interest

135 Angel Flight submits that it is a not- for-profit charter that coordinates CSFs including by arranging flights for the transportation of persons in need of non-emergency medical attention and services to and from destinations. Angel Flight submits that the Instrument impacts and has the potential to continue to impact the conduct of its charter.

136 Angel Flight submits that it is therefore a person with a particular interest in the Instrument that is not one shared with the general public or a segment of the general public: citing *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 41-42 (per Stephen J) and 75-76 (per Brennan J). Angel Flight submits that it has a special interest in the subject matter of the litigation such that it has standing to bring this application under s 39B of the *Judiciary Act 1903* (Cth) challenging the Instrument.

137 CASA did not contend that Angel Flight does not have standing to bring this application. For the reasons submitted by Angel Flight, I accept that Angel Flight has such standing.

The operation of the Instrument

138 Angel Flight submits that the Instrument is expressed to apply to flights in an aircraft conducted as a private operation: Instrument, cl 4. The Instrument's area of operation was limited to what was defined as "community service flights". CSFs were flights involving the transport of patients and the person who provides support and assistance to the patient, to and from destinations for non-emergency medical treatment or services, and for a charitable or community service purpose: Instrument, cll 6(2)-(5). Angel Flight submits that the Instrument was purportedly issued by CASA as a result of higher accident and incident rates in respect of CSFs and unique risk factors said to pertain to CSFs.

139 Angel Flight submits that the Instrument imposed conditions on a flight crew licence that its holder must not operate an aircraft for a CSF unless particular conditions were met: Instrument, cl 7(1). These conditions included, amongst other things, that:

(a) the aeroplane used to conduct the flight not carry any persons other than a patient, a person who provides support and assistance to the patient (precluding the carriage, for instance, of non-patient siblings and infants), and the operating crew (precluding the carriage, for instance, of new volunteer pilots for metering purposes): Instrument, cl 7(1)(c);

(b) particular aeroplanes not undertake CSFs and pilots not conduct CSFs unless they have particular aeronautical experience: Instrument, cl 9;

(c) aeroplanes used for CSFs not carrying more than five passengers, and the licence holder and the pilot have undergone a periodical inspection within a certain time or a number of flight hours (which was said to elevate the maintenance requirements for the aircraft from the "private category" to that of a "commercial category") and have been issued a certificate of airworthiness less than 12 months before the flight, or have been in service for less than 100 hours since the ticket was issued: Instrument, cl 11(2).

Angel Flight's submissions on the power under regulation 11.068

140 Angel Flight submits that the Instrument fell outside the ambit of the power conferred on CASA by regulation 11.068 of the CASR on a number of bases, including that:

(a) regulation 11.068(1) permits the issuing of instruments about classes of authorisations defined by regulation 13.375 of the CASR and the Instrument does not impose conditions on any of the classes of authorisations in regulation 13.375;

(b) the Instrument impermissibly creates a new class or category of operation; and

(c) the Instrument is not a "legislative instrument" for the purposes of s 98(5AA) of the *CA Act*.

141 Angel Flight submits that a three-step process is required as to whether the Instrument is within the power conferred by regulation 11.068. Angel Flight submits that, first, the Court must determine the meaning of regulation 11.068 to assess the subordinate legislation CASA is authorised to make under that provision. Second, the Court must ascertain the meaning and operation of the Instrument. Third, the Court must decide whether the Instrument falls within regulation 11.068: citing *McEldowney v Forde* [1969] 2 All ER 1039 at 1068 per Diplock LJ; *Stephens v Commonwealth of Australia* [2017] FCAFC 31 at [143].

142 Angel Flights submits that the proper construction and ambit of the law- making power under regulation 11.068 turns on consideration of its subject matter, scope and purpose: citing *Australian Maritime Officers' Union v Assistant Minister for Immigration and Border Protection* [2015] FCAFC 45; 230 FCR 523 at [75]. Angel Flight submits that the relevant context in which to construe the power conferred by regulation 11.068 includes the scheme o f demerit points established by Division 3B of Part III, and the requirement imposed by s 9A(1) of the *CA Act* that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration: citing *Master Education Services Pty Ltd v Ketchell* [2008] HCA 38; 236 CLR 101 at [19].

143 In considering the scope of the instrument-making power conferred on CASA by regulation 11.068, Angel Flight submits that it is relevant that regulation 11.068(1) is contained in Part 11 of the CASR. The purpose of Part 11 is enunciated by regulation 11.005 as being to set out "administrative provisions for the regulation of civil aviation". Angel Flight submits that this specific statement of purpose is pertinent in assessing the intended ambit of the instrument-making power conferred on CASA by regulation 11.068.

144 Angel Flight submits that a number of provisions of Part 11 are pertinent in assessing the scope of the power under regulation 11.068(1). Regulation 11.032 deals with the making of applications for authorisations where previous authorisations have been cancelled. Regulations 11.035-11.047 confer power on CASA to do certain things, such as test or interview persons or require the provision of statutory declarations, in assessing and considering applications for authorisations. Angel Flight submits that these are machinery provisions which facilitate CASA's consideration of applications for authorisations. Regulation 11.050 delineates matters CASA can take into account in assessing applications for authorisations, while regulation 11.055 concerns when CASA may grant an authorisation. Angel Flight also notes that authorisations may, by regulation 11.056, be subject to conditions CASA is satisfied are necessary. Regulation 11.065 concerns when authorisations come into effect. Regulations 11.070-11.075 create general conditions that are imposed on authorisations in relation to particular matters, such as requiring holders of authorisations to inform CASA of changes to the holder's name and address.

145 Angel Flight refers to regulation 11.067, which enables CASA, after an authorisation has come into effect, to impose a condition on the authorisation or otherwise vary a condition of an authorisation. Angel Flight submits that regulation 11.067 allows CASA to prescribe

conditions in relation to individual authorisations, whereas regulation 11.068 concerns the imposition of conditions on specified classes of authorisations.

146 Angel Flight notes that breaches of conditions imposed by regulations 11.056, 11.067 or 11.068 are, by regulation 11.077, an offence. Authorisations are, by regulation 11.080, generally not transferrable to another person. Holders of authorisations may apply for their authorisation to be suspended or cancelled under regulation 11.130.

147 Angel Flight refers to the above provisions of Part 11 to demonstrate the breadth of the power conferred on CASA under regulation 11.068. In Angel Flight's submission, these provisions collectively convey that Part 11 is concerned with regulating the process by which authorisations are obtained and conferred by CASA, imposing conditions on those authorisations (either individually or in relation to a specified class) and providing a means for enforcement of such conditions. In this respect, Angel Flight notes that conditions on authorisations are enforced in two ways. First, by regulation 11.077 prescribing that breach of a condition is an offence punishable by a maximum penalty of 50 penalty units a nd, second, by the demerit points scheme which may lead to the suspension or cancellation of an authorisation.

148 Angel Flight submits that regulation 11.068(1) assumes the existence of a thing, namely a class of authorisation. It, in Angel Flight's submission, permits CASA to impose a condition, by legislative instrument, on a specified class of authorisations. In other words, Angel Flight submits that regulation 11.068(1) presupposes the existence of classes of authorisation and allows CASA, by legislative instrument, to impose conditions about matters detailed in s 98(5A)(a) on a class or classes of authorisations.

149 Angel Flight submits that regulation 11.068(2) is also premised on the existence of authorisations granted before a particular legislative instrument is issued under regulation 11.068(1) and clarifies that such authorisations may be made subject to conditions imposed by a legislative instrument issued under regulation 11.068(1). Angel Flight submits that the phrase "authorisation granted" in regulation 11.068(2) conveys that regulation 11.068(1) is concerned with authorisations granted other than by a legislative instrument issued under regulation 11.068(1).

150 Angel Flight submits that regulation 11.068(3) determines that conditions, prescribed by legislative instruments issued under regulation 11.068(1), are taken to be conditions of every

authorisation of the class mentioned in the Instrument. In Angel Flight's submission, legislative instruments issued under regulation 11.068(1) therefore operate to impose conditions on authorisations, and do not and cannot create classes of authorisations.

151 Angel Flight submits that regulation 11.068(4) concerns when conditions imposed by legislative instruments issued under regulation 11.068(1) take effect. In Angel Flight's submission, it describes when those conditions affect authorisations issued before and after the legislative instrument comes into force: citing CASR, regulation 11.068(4)(a) and (b). In Angel Flight's submission, regulation 11.068(4) shows that the power under regulation 11.068(1) is directed to enabling CASA to issue instruments that impose conditions on authorisations granted pursuant to the *CA Act* or the CASR, rather than enabling CASA to create new or additional classes of authorisation.

152 In Angel Flight's submission, regulation 11.068 is part of a scheme for the imposition by CASA of conditions on classes of authorisations which are enforced by the demerit point system established by Division 3D of Part III of the *CA Act*. This, in Angel Flight's submission, is an important contextual matter, as it indicates that the specified classes of authorisation mentioned in regulation 11.068(1) are the classes of civil aviation authorisation established under regulation 13.375. Angel Flight submits that, if this were not the case, conditions imposed by legislative instruments issued under regulation 11.068(1) would not be able to be effectively enforced by CASA, given that breach of those conditions would not result in the holder of an authorisation incurring demerit points.

153 Angel Flight submits that, when read in context and purposively, regulation 11.068(1) confers a power on CASA to issue legislative instruments that impose conditions on the classes of authorisations defined by regulation 13.375 relating to matters detailed in s 98(5A), being (relevantly for present purposes) matters affecting the safe navigation, operation or maintenance of aircraft. In Angel Flight's submission, there must therefore be a reasonable and rational relationship between an instrument issued under regulation 11.068(1) and the matters detailed in s 98(5A).

154 Angel Flight submits that regulation 11.068(1) only permits CASA to issue instruments that are *legislative* instruments. Angel Flight contends that regulation 11.068(1) must be read in light of s 98(5AA) of the *CA Act*, which sets out the circumstances in which an instrument issued by CASA will be a legislative instrument. Angel Flight submits that, when read with s 98(5AA) of the *CA Act*, the power under regulation 11.068(1) is confined to the issuing of

instruments which are expressed to apply to a class of persons, a class of aircraft or a class of aeronautical product. Angel Flight submits that, if instruments are not expressed to apply to particular classes of person, aircraft or aeronautical product they will, by reason of s 98(5AA), not be legislative instruments. In Angel Flight's submission, as the power under r 11.068(1) is a power to make a *legislative instrument*, an instrument not expressed to have the requisite application to a class of persons, aircraft or aeronautical product will be beyond power.

155 Angel Flight submits that the adjective "expressed" in s 98(5AA) means "clearly indicated" or "distinctly stated". In Angel Flight's submission, the noun "class" in s 98(5AA) refers to a group of persons or things regarded as forming a group because of common attributes, characteristics, qualities or traits. Angel Flight submits that an instrument will not be an instrument of the kind capable of being issued under regulation 11.068(1) if it is not clearly indicated or distinctly stated to apply to one or other of the classes of things set out in s 98(5AA) of the *CA Act*.

Angel Flight's submissions on the conditions imposed by the Instrument

156 Angel Flight submits that the Instrument, by cl 5, purports to impose conditions on flight crew licences. Angel Flight submits that "Flight crew licences" are licences issued under Part 61 of the CASR, and there is no reference to "flight crew licences" or licences issued under Part 61 of the CASR in regulation 13.375 of the CASR.

157 Angel Flight submits that the conditions the Instrument seeks to impose on flight crew licences are set out in cll 7-10 of the Instrument. Angel Flight submits that those conditions are, however, premised on the licence holder engaging in a CSF, as defined by cl 6.

158 In Angel Flight's submission, the substantive effect of the Instrument is to create a class of aviation operation – namely, "community service flights" – and impose conditions on the conduct of such operations. Angel Flight submits that the Instrument uses the device of imposing conditions on flight crew licences to regulate this class of operation. Angel Flight submits that the Instrument purporting to impose conditions on flight crew licences does not detract from its substantive and practical operation. In Angel Flight's submission, the Instrument does not impose conditions on a specified class of authorisations, namely flight crew licences. Rather, Angel Flight submits that it creates a new class of authorisation, being "community service flights" and imposes conditions on that class of flights.

159 In Angel Flight's submission, the Instrument is also not expressed to apply in relation to any class of persons, aircraft or aeronautical product. Clause 4 of the Instrument provides that the Instrument applies in relation to a flight in an aircraft conducted as a private operation. Angel Flight submits that, substantively, the Instrument applies to operations that meet the definition of a "community service flight" under cl 6 of the Instrument.

Angel Flight's submissions on the Instrument falling outside of regulation 11.068(1)

160 In Angel Flight's submission, the Instrument does not impose conditions on any of the classes of authorisation set out in Column 3 to the table in regulation 13.375 of the CASR. Angel Flight submits that the Instrument therefore does not impose conditions on any of the specified class of authorisations defined by regulation 13.375 and is beyond power for this reason.

161 Alternatively, Angel Flight submits that the Instrument defines and creates a new class or category of operations and purports to impose conditions on the conduct of those operations. Angel Flight submits that, in doing so, the Instrument purports to create a class of authorisation otherwise not provided by either the *CA Act* or the CASR. In Angel Flight's submission, the Instrument does not regulate or impose conditions on extant classes of authorisation, but instead creates a new class of authorisation relating to CSFs. Angel Flight submits that the Instrument does not therefore meet the description of subordinate legislation authorised to be made under regulation 11.068(1) and, as a result, is beyond power.

162 Angel Flight submits that the Instrument is expressed by cl 4 to apply to flights in aircraft conducted as private operations. Practically, the Instrument applies to flights that meet the description of a CSF under cl 6. In Angel Flight's submission, the Instrument is not, in form or in substance, "clearly indicated" or "distinctly stated" to apply to any class of persons, aircraft or aeronautical operations. It applies, in Angel Flight's submission, to CSFs.

163 For these reasons, Angel Flight submits that the Instrume nt is beyond the power conferred by regulation 11.068(1) as it is not, by operation of s 98(5AA), a "legislative instrument". Angel Flight submits that the Instrument is therefore *ultra vires* regulation 11.068(1) for this further reason.

CASA's submissions on Grounds 1, 2 and 3

CASA's submissions on "class of authorisations"

164 CASA submits that Ground 1 must be rejected as the "class of authorisations" specified in the Instrument was not required to be a "class of civil aviation authorisation" prescribed by the CASR, including those referred to in regulation 13.375. That is so, in CASA's submission, for the following reasons.

165 CASA identified the following textual matters. First, cl 5 of the Instrument provides that the Instrument "imposes conditions on flight crew licences". Second, a "flight crew licence", according to Part 1 of the Dictionary to the CASR:

> (a) means a flight crew licence within the meaning of Part 61 [of the CASR]; and
>
> (b) includes a certificate of validation of an overseas flight crew licence.

166 Third, regulation 61.005(1) of the CASR provides that Part 61 "sets out the licensing scheme for pilots and flight engineers of registered aircraft".

167 Fourth, regulation 61.010 of the CASR provides definitions for the purpose of Part 61. It defines a "flight crew licence" to mean:

> (a) a pilot licence; or
>
> (b) a flight engineer licence; or
>
> (c) a glider pilot licence.

168 CASA submits that, by reason of the above definitions, the Instrument imposes conditions on "a pilot licence" or "a flight engineer licence" or "a glider pilot licence" but uses the shorthand "flight crew licence" to encompass those classes of licence.

169 In CASA's submission, regulation 13.375 of the CASR includes, as a "class of civil aviation authorisation", both:

(a) a "pilot licence". In this respect, CASA referred to item 6 of table 13.375 of the CASR, which refers to "Pilot licence" in column 3; and

(b) a "flight engineer licence". In this respect, CASA referred to item 7 in table 13.375 of the CASR, which refers to "Flight engineer licence" in column 3.

170 However, CASA noted that regulation 13.375 does not include "a glider pilot licence".

171 In CASA's submission, the inclusion of those two classes of licences (out of the three classes of licence that constitute a "flight crew licence") in regulation 13.375 is immaterial to whether the Instrument, which imposes conditions on "flight crew licences", was authorised by regulation 11.068 of CASR because:

(a) regulation 13.375 of the CASR prescribes, "[f]or the purposes of section 30DU of the [*CA Act*]", the civil aviation authorisations (specified in column 2 of table 13.375) that belong to classes of civil aviation authorisations (specified in column 3 of Table 13.375);

(b) as noted immediately above, that prescription is made for the purposes of s 30DU of the *CA Act*, which is found in Part III, Division 3D of the *CA Act* and provides (along with Part 13 of the CASR) for a demerit points scheme in relation to strict liability offences under the *CA Act* and CASR; and

(c) s 30DU of the *CA Act* provides that the "regulations must prescribe classes to which particular civil aviation authorisations belong, having regard to the activities covered by the civil aviation authorisations". CASA submits that the creation of those classes in table 13.375 then allows the number of demerit points which are incurred, in relation to an offence to which that Division applies, to be determined in relation to that class of authorisation. CASA submits that, in that way, the "classes of civil aviation authorisation" created by regulation 13.375 and table 13.375 have a very specific and directed purpose, focused exclusively on enabling the operation of the demerit point scheme established by the *CA Act* in relation to only specific classes of authorisation.

172 CASA submits that, by contrast, regulation 11.068 provides that CASA may issue a legislative instrument that imposes a condition relating to "matters mentioned" in s 98(5A) on a "specified class of authorisations". In this respect, CASA submits that:

(a) The relevant "matter mentioned in s 98(5A)" is "matters affecting the safe navigation and operation, or the maintenance, of aircraft": *CA Act*, s 98(5A)(a).

(b) Regulation 11.068(1) does not require that the class of authorisation be "prescribed" by the CASR (in contrast to s 30DU of the *CA Act*), and no such classes of authorisation have been prescribed by the CASR or otherwise. Rather, regulation 11.068(1) requires that the class of authorisation be "specified" (that is, "specified" in

the Instrument), and cl 5 of the Instrument "specifies" the class as "flight crew licences" as defined in Part 1 of the Dictionary to the CASR.

(c) Regulation 11.068(2) supports that construction. It provides that "[t]he class of authorisations may include authorisations granted before the imposition of the condition". The use of the word "may" negates any intention by the legislature to fix the "specified class of authorisations" by reference to a pre-determined list.

173 In CASA's submission, the list of "classes of civil aviation authorisations" provided for in regulation 13.375 is not complete, and does not cover every civil aviation authorisation. CASA submits that, for example, glider pilot licences are not included in table 13.375 and, given that the list of civil aviation authorisations is incomplete, fixing the powers in regulation 11.068 by reference to only those classes referred to in table 13.375 would limit CASA's powers to impose conditions on those aviation authorisations. CASA submits that result would unduly curtail CASA's functions and undermine the objects of the *CA Act*.

174 For these reasons, CASA submits that "class of authorisations" specified in the Instrument is not required to be a "class of civil aviation authorisation" prescribed by the CASR including regulation 13.375. For these reasons, CASA contends that Ground 1 must fail.

CASA's submissions on the nature of the Instrument

175 As to the nature of the Instrument, CASA submits that the source of CASA's power to issue the Instrument is found in s 98(5A)(a) of the *CA Act* and regulation 11.068 of the CASR.

176 CASA submits that s 98(5A)(a) of the *CA Act* provides that regulations "may empower CASA to issue instruments in relation to … matters affecting the safe navigation and operation, or maintenance, of aircraft" and "the airworthiness of, or design standards for, aircraft". Regulation 11.068(1) of the CASR then provides that, "[f]or subsection 98(5A) of the [*CA Act*], CASA may issue a legislative instrument that imposes a condition relating to a matter mentioned in that subsection on a specified class of authorisations".

177 CASA submits that s 98(5AA) of the *CA Act*, together with s 98(5AB), serve a definitional function. That is, those subsections deem instruments expressed to apply in relat ion to certain matters of general application to be a legislative instrument (citing s 98(5AA)), or to not be a legislative instrument if expressed to apply in relation to certain matters of specific application (citing s 98(5AB)). However, CASA submits that ss 98(5AA) and 98(5AB) do not exhaust the matters on which an instrument may be made under s 98(5A)(a).

178 CASA submits that s 98(5A)(a) of the *CA Act*, not s 98(5AA), governs the scope of matters about which CASA may issue an instrument. CASA submits that s 98(5AA) does not limit the subject matter of the legislative instruments that CASA may issue. CASA submits that, rather, the subsection deems that, if an instrument is expressed to apply in relation to a class of persons, a class of aircraft or a class of aeronautical product, then that instrument will be a legislative instrument. CASA submits that, as long as an instrument does not fall within a category of instrument expressed in s 98(5AB) (that is, an instrument expressed to apply in relation to a particular person, aircraft or aeronautical product), it may be capable of being characterised as a legislative instrument.

179 CASA submits that it is clear on its face that the Instrument is not expressed to apply in relation to a particular person, aircraft or aeronautical product. CASA contends that the Instrument is expressed to impose conditions on "flight crew licences" and, therefore, the relevant "class of persons" for the purposes of s 98(5AA)(a) consists of persons holding a "flight crew licence" and the Instrument falls within s 98(5AA) because it is an instrument expressed to apply in relation to a "class of persons".

180 CASA submits that, even if the Instrument were not expressed to apply in relation to one of the matters set out in s 98(5AA), it would still properly be characterised as a legislative instrument. In this respect, CASA relied on the Full Federal Court's judgment in *RG Capital Radio Ltd v Australian Broadcasting Authority* [2001] FCA 855; 113 FCR 185 (***RG Capital Radio***) (Wilcox, Branson and Lindgren JJ).

181 CASA submits that this is so for five reasons. First, CASA submits that the Instrument is a prospective rule of general application. Second, CASA submits that the Instrument's legislative character is reflected in Parliament's control over the Instrument, given the Instrument is subject to the tabling and disallowance process in Chapter 3, Part 2 of the *Legislation Act*. Third, CASA submits that the Instrument is published on the Federal Register of Legislation in accordance with Chapter 2, Part 1 of the *Legislation Act* and, in CASA's submission, this requirement of publication, although not a compelling indication, is consistent with the decision to make the Instrument having a legislative character. Fourth, CASA submits that it engaged in wide public consultation before making the Instrument which, in CASA's submission, emphasises the general nature of the Instrument. Fifth, CASA submits that, in making the Instrument, CASA was exercising its functions under the *CA Act*

and, in CASA's submission, such decision- making is consistent with the true characterisation of the Instrument being legislative.

182 CASA submits that, for these reasons, the Instrument is properly characterised as a "legislative instrument" (whether or not it is a legislative instrument of a kind which s 98(5AA) of the *CA Act* describes) and therefore was authorised by regulation 11.068 of the CASR.

CASA's submissions as to whether the Instrument creates a relevant class

183 CASA submits that its response to this ground is similar in substance to its answer to Angel Flight's Ground 1. CASA submits that cl 5 of the Instrument provides that the Instrument "imposes conditions on flight crew licences". The Instrument does not create a new class of operation but, in accordance with regulation 11.068(1), imposes conditions on a specified class of authorisations – namely, "flight crew licences", a class already contemplated by the CASR.

184 CASA submits that the definition of "community service flight" (provided for in cl 6 of the Instrument) is simply a drafting mechanism to identify the circumstances in which those who hold a flight crew licence are obliged to comply with the conditions of the licence attached by cll 7-11.

185 CASA submits that regulation 11.068(1) places no restriction on the conditions, including the conditions of operation by reference to a class of operation, in respect of which CASA may issue a legislative instrument, save that the instrument must relate to a matter mentioned in s 98(5A) of the *CA Act*, including "matters affecting the safe navigation and operation, or the maintenance, of aircraft": *CA Act*, s 98(5A)(a).

186 CASA submits that, accordingly, the Instrument does relate to the matters mentioned in s 98(5A)(a) and imposes conditions on a class of authorisations. CASA submits that, as a result, the Instrument is not unauthorised by reason of the effect that its imposition of conditions has on a class of operations, being CSFs.

Angel Flight's reply submissions

Submissions on class of authorisations

187 By way of reply, Angel Flight submits that CASA does not construe the collocation "class of authorisations" in regulation 11.068 of the CASR in light of the definitional context provided

by the *CA Act* and CASR. Angel Flight submits that the term "authorisation" is defined by regulation 11.015 of the CASR for the purposes of Part 11 of the CASR to mean, relevantly, a "civil aviation authorisation". The definition of "civil aviation authorisation" in s 3 of the *CA Act* defines that term to mean an authorisation under the *CA Act* or regulations to undertake a particular activity. Angel Flight submits that a "class of authorisation" referred to in regulation 11.068(1) is, therefore, a "class of civil aviation authorisation".

188 Angel Flight submits that the classes of civil aviatio n authorisation are set out in column 3 of table 13.375 of the CASR. Angel Flight submits that regulation 13.375 of the CASR is made pursuant to s 30DU of the *CA Act*. Section 30DU provides that the regulations must prescribe classes to which civil aviation authorisations belong, having regard to the activities covered by the civil aviation authorisations. Angel Flight submits that s 30DU requires the regulations to group civil aviation authorisations by reference to particular activities.

189 Angel Flight submits that, contrary to CASA's submissions, s 30DU does not provide that the classes of authorisation it requires to be prescribed by regulation are to be prescribed for the limited purpose of administering the demerit point system established by Division 3D of Part III of the *CA Act*. Angel Flight submits that s 30DU is expressed in general terms. In Angel Flight's submission, the expression "class of authorisation" in regulation 11.068(1) is a shorthand for "class of civil aviation authorisation", and therefore refers to the classes of civil aviation authorisation under regulation 13.375. Angel Flight submits that the context provided by the demerit point system created by Division 3D of Part III of the *CA Act* reinforces this conclusion.

190 Angel Flight submits that the purpose of regulation 11.068(2) is to allow conditions to be imposed (or not imposed) on authorisations granted before a legislative instrument is made under regulation 11.068(1). In Angel Flight's submission, CASA can impose conditions on authorisations from a class of civil aviation authorisations which commence operation before or after the issue of the legislative instrument. Angel Flight submits that regulation 11.068(2) does not enable CASA to specify new or different classes of authorisation.

191 Angel Flight submits that CASA's powers will not be curtailed in any significant manner should the Court adopt Angel Flight's submissions.

192 Angel Flight submits that the word "specified" in "specified class of authorisations" directs attention not to the class of authorisations specified by the relevant legislative instrument but

to the classes of authorisation specified by the CASR. Angel Flight submits that those classes of civil aviation authorisation to which conditions can be imposed under regulation 11.068 are those stated or identified in regulation 13.375. In Angel Flight's submission, there is no warrant for reading "specified" as allowing legislative instruments to create new classes of authorisation.

193 Angel Flight submits that, contrary to CASA's submission, the Instrument purports to impose conditions on "flight crew licences". Angel Flight submits that "flight crew licences" are not referred to as a "class of civil aviation authorisation" in regulation 13.375 of the CASR. Only two sub-classes of "flight crew licences", being pilot and flight engineer licences, are specified in regulation 13.375. Angel Flight submits there is no "class of civil aviation authorisation" compendiously referred to as "flight crew licences" under regulation 13.375.

194 For these additional reasons, Angel Flight submits that the Instrument does not impose conditions on civil aviation authorisations and is therefore *ultra vires* regulation 11.068(1).

Submissions on the nature of the Instrument

195 Angel Flight submits, in respect of Ground 2, that CASA's submissions are based on two erroneous assumptions. First, Angel Flight submits that it would be erroneous to find that s 98(5AA) of the *CA Act* does not exhaustively prescribe when an instrument made by CASA under regulations made pursuant to s 98(5A) are "legislative instruments". Second, Angel Flight submits that, if an instrument is not a "legislative instrument" for the purposes of s 98(5AB), it must, by definition, be a non-legislative instrument.

196 Angel Flight submits that CASA's analysis wrongly presupposes that the expression "legislative instrument" in s 98(5AA) is one that has acquired a technical legal meaning which has been picked up and applied by the legislature. Angel Flight submits that, whether "legislative instrument" is a legal technical expression is debatable, as there is no settled definition of what constitutes a legislative instrument and categories of legislative and administrative instruments may not be mutually exclusive.

197 In Angel Flight's submission, properly construed, s 98(5AA) exhaustively defines the circumstances in which an instrument issued under s 98(5A)(a) will be a legislative instrument. Angel Flight submits that s 98(5A)(a) confers power on CASA to issue "instruments" about particular subject matters and those instruments will be "legislative instruments" if, and only if, they meet one or more of the descriptions set out in s 98(5AA).

Angel Flight submits that, conversely, they will not be "legislative instruments" if they meet the description in s 98(5AB).

198 Angel Flight submits that the Instrument is not expressed to apply to any of the classes of person, aircraft or aeronautical product set out in s 98(5AA). Rather, in Angel Flight's submission, it is expressed to apply to a class of licences (flight crew licences) or a class of flights (community service flights). Angel Flight submits that a class of licences is not a class of persons and the Instrument is therefore *ultra vires* regulation 11.068(1) for this further reason.

CONSIDERATION OF GROUNDS 1, 2 AND 3

199 I reject Angel Flight's submissions that the Instrument was *ultra vires* in that it fell beyond the power conferred by regulation 11.068.

Ground 1

200 Turning to Ground 1, I reject Angel Flight's submission that the "class of authorisation" specified in the Instrument is not a "class of civil aviation authorisation" prescribed by the CASR. This is so for the following reasons.

The legislative framework

201 To briefly recall, the relevant legislative structure is as follows. First, the "regulations may empower CASA to issue instruments in relation to … matters affecting the safe navigation and operation, or the maintenance, of aircraft …": *CA Act*, s 98(5A)(a). Second, such an instrument "is a legislative instrument if the instrument is expressed to apply in relation to … a class of persons": *CA Act*, s 98(5AA)(a). Third, such an instrument is "not a legislative instrument if the instrument is expressed to apply in relation to … a particular person …": *CA Act*, s 98(5AB)(a).

202 Fourth, "[f]or subsection 98(5A) of the [*CA Act*], CASA may issue a legislative instrument that imposes a condition relating to a matter mentioned in that subsection on a specified class of authorisations": CASR, regulation 11.068(1). "A condition imposed by a legislative instrument issued under [regulation 11.068(1)] is taken to be a condition of every authorisation of the class mentioned in the instrument": CASR, regulation 11.068(3). For the purposes of Part 11 of the CASR, the word "authorisation" means, among other things, "a civil aviation authorisation", other than "an AOC", "a delegation", "the appointment of an authorised person", or "an authorisation issued by an ASAO": CASR, regulation 11.015. A

"civil aviation authorisation" means an "authorisation under [the *CA Act*] or the regulations to undertake a particular activity (whether the authorisation is called an AOC, permission, authority, licence, certificate, rating or endorsement or is known by some other name)": *CA Act*, s 3. An "AOC" is an "Air Operator's Certificate issued under Division 2 of Part III" of the *CA Act*: *CA Act*, s 3.

203 Fifth, "[f]or the purposes of regulation 11.068 of CASR", the Instrument "imposes conditions on flight crew licences": Instrument, cl 5. A "flight crew licence" refers to "a flight crew licence within the meaning of Part 61" of the CASR and "includes a certificate of validation of an overseas flight crew licence": CASR, Dictionary. Part 61 of the CASR is titled "Flight crew licensing". Part 61 "sets out the licensing scheme for pilots and flight e ngineers of registered aircraft": CASR, regulation 61.005(1). In Part 61 of the CASR, a "flight crew licence" means "a pilot licence", or "a flight engineer licence", or "a glider pilot licence": CASR, regulation 61.010. By way of example, a "pilot licence" means "any of" "an air transport pilot licence", "a commercial pilot licence", "a multi-crew pilot licence", "a private pilot licence", or "a recreational pilot licence": CASR, regulation 61.010. The general term "licence" in Part 61 means "a flight crew licence": CASR, regulation 61.010. A "privilege", "in relation to a flight crew licence, … means an activity that the holder of the licence … is authorised, under [Part 61 of the CASR], to conduct": CASR, regulation 61.010. If "CASA grants a flight crew licence to a person und er regulation 61.160" and "the person does not already hold a flight crew licence", "CASA must issue to the person a document (the licence document) indicating that the person is authorised to exercise the privileges of … the flight crew licence …": CASR, regulations 61.175(1) and (2).

204 Sixth, the opening words of relevant clauses in the Instrument are as follows:

(a) "[i]t is a condition *on a flight crew licence* that its holder must not operate an aircraft for a community service flight unless …": Instrument, c l 7(1) and 10;

(b) "[i]t is a condition *on a flight crew licence* that its holder must not pilot an aircraft operated for a community service flight if …": Instrument, cl 8(1);

(c) "[i]t is a condition *on a flight crew licence* that its holder must not pilot an aircraft operated for a community service flight unless …": Instrument, cl 9(1);

(d) "[i]t is a condition *on a flight crew licence* that its holder must not pilot the aeroplane for a community service flight unless …": Instrument, cl 11(2) (emphasis added).

The imposition of the conditions

205 In light of this legislative structure and the plain terms of the Instrument, I accept CASA's submission that the function of the Instrument's use of the te rm "flight crew licence" on its terms imposes conditions on a class of persons who are holders of "a pilot licence; or a flight engineer licence; or a glider pilot licence", but the Instrument uses the more general definition of a "flight crew licence" to encompass each of the three classes of licences.

206 In addition, section 98(5AA)(a) of the *CA Act* provides that an instrument under s 98(5A)(a) is "a legislative instrument if the instrument is expressed to apply in relation to a class of persons". Angel Flight submitted that the word "class" in s 98(5AA) refers to a group of persons or things regarded as forming a group because of common attributes, characteristics, qualities or traits. Assuming that interpretation of the word "class" is correct, the Instrument is expressed to apply to a "class of persons": it is expressed to apply to a group of persons that have a common attribute because the Instrument, on its terms, is expressed to apply to persons who all have the attribute of being the "holder" of a "flight crew licence".

Regulation 13.375 and table 13.375

207 As to regulation 13.375 of the CASR, Division 3D of Part III of the *CA Act* is titled "Demerit points scheme". Provisions in this part provide that "[t]he regulations may prescribe … offences to which [the Demerits points scheme] applies … and the number of points that are incurred in relation to an offence": *CA Act*, s 30DT. In addition, the "regulations must prescribe classes to which particular civil aviation authorisations belong, having regard to the activities covered by the civil aviation authorisations": *CA Act*, s 30DU.

208 These provisions (ie ss 30DT and 30 DU of the *CA Act*) are in Part III of the *CA Act*, which is separate from the provisions in Part VIII of the *CA Act* that enable CASA to "issue instruments": see *CA Act*, s 98(5A). Moreover, regulation 13.375 of the CASR appears in a part of the CASR (ie Part 13) that is separate from Part 11 of the CASR. Part 11 of the CASR concerns "Regulatory administrative procedures". Part 13 of the CASR is titled "Enforcement procedures". Regulation 13.375 appears in "Subpart 13K" (which is titled "Voluntary reporting and demerit points schemes ") in "Division 13.K.2" (which is titled "Demerit points scheme"). In addition, regulation 13.375 comes after regulation 13.370, which concerns "Offences to which [the] demerit points scheme applies". Regulation 13.375 is entitled "Classes of civil aviation authorisations". It provides that:

For the purposes of section 30DU of the [*CA Act*], a civil aviation authorisation

> mentioned in column 2 of an item in table 13.375 belongs to the class of civil aviation authorisation mentioned in column 3 of the item.
>
> (Emphasis added.)

Regulation 11.068, Regulation 13.375 and Table 13.375

209 In light of the legislative framework set out above, I reject Angel Flight's submission that there is no indication that the prescription of classes of authorisation under regulation 13.375 is made for a limited purpose and therefore it should be presumed that the classes of civil aviation authorisation defined in regulation 13.375 are the "classes of authorisation" referred to in regulation 11.068(1). I am of this opinion for the following reasons.

210 The plain words of the text in regulation 13.375 identify that the regulation is made for particular purposes, namely "for the purposes of section 30DU" of the *CA Act* and s 30DU of the *CA Act* appears in the Division of the *CA Act* which concerns the "Demerit points scheme". That identifies the universe of purposes to which regulation 13.375 pertains. The regulation is not to be used for any wider purpose as contended by Angel Flight. In my view, it is impermissible to have regard to regulation 13.375 and table 13.375 to conclude that the classes of civil aviation authorisation defined in regulation 13.375 are the "classes of authorisation" referred to in regulation 11.068(1) of the CASR.

211 The fact that regulation 13.375 and the table refer to both a "pilot licence" (see table 13.375, item 6, column 3) and a "flight engineer licence" (see table 13.375, item 7, column 3) is of no consequence and immaterial to whether the Instrument which imposes conditions on "flight crew licences" was authorised by regulation 11.068(1) of CASR. Regulation 13.375 and regulation 11.068 have different purposes and spheres of operation.

212 Section 30DU of the *CA Act* is part of the operative provisions of Division 3D of Part III of the *CA Act* and provides, together with Part 13 of the CASR, for a demerit points scheme in relation to strict liability offences under the *CA Act* and the CASR. Section 30DU provides that:

> The regulations must prescribe *classes* to which particular civil aviation authorisations belong, having regard to the activities covered by the civil aviation authorisations.
>
> (Emphasis added.)

213 The creation of the "classes" referred to in regulation 13.375 allows the number of demerit points which are incurred, in relation to an offence to which that divisio n applies, to be determined in relation to that class of authorisation: see *CA Act*, ss 30D(2)(a) and (b) and

ss 30DX(1) and (3). This is because, if "the holder of a civil aviation authorisation incurs demerit points, the demerit points are incurred in relation to *the class of authorisations* to which the offence relates": *CA Act*, s 30DX(1); see also *CA Act*, s 30DX(3)(a) (emphasis added).

214 The "classes of civil aviation authorisation" created by regulation 13.375 and table 13.375 have a very specific and direct purpose, focused on enabling the operation of the "demerit points scheme" (established under the *CA Act*) in relation to only specific classes of authorisation. They enable the demerit points to be "incurred in relation to the class of authorisations", as opposed to such points being incurred in relation to a "particular civil aviation authorisations". Table 13.375 groups "[p]articular civil aviation authorisations" into "classes of civil aviation authorisations" for the purposes of the demerit po ints scheme, and not for the purposes of the instrument-making power in regulation 11.068.

215 Section 30DX provides that demerit points are "incurred in relation to the class of authorisations to which the [relevant] offence relates": *CA Act*, s 30DX(1). The relevant class of authorisations for the operation of the demerit points scheme is articulated in s 30DX(1) and repeated in s 30DX(3)(a). It is apparent from these provisions that the incurring of demerit points operates across the class of authorisations prescribed by the regulations. That is why s 30DU requires that the regulations "must prescribe classes to which the particular civil aviation authorities belong, having regard to the activities covered by the civil aviation authorisations".

216 Further reference to "class of authorisations" is to be found elsewhere within the Division 3D demerit points scheme, including s 30DY (titled "First-time demerit suspension notice") and s 30DZ (titled "Second-time demerit suspension notice"), which expressly refer to the "class of authorisations" to which those sections apply. By way of example:

(a) "CASA must give the holder of a civil aviation authorisation a demerit suspension notice under [s 30DY(1)] if":

> (a) the holder incurs demerit points for a prescribed offence; and
>
> (b) taken together with demerit points incurred by the holder for offences committed by the holder in the 3 years ending on the day the offence was committed, the holder has incurred at least 12 demerit points in relation to *the same class of authorisations*; and
>
> (c) the holder has not previously been given a demerit suspension notice in relation to *that class of authorisations*.

(*CA Act*, s 30DY(1); emphasis added.)

(b) The "effect of giving the notice" under s 30DY(1) of the *CA Act* is that, "from the start date specified in the notice, all of the holder's civil aviation authorisations of *that class* are suspended for the suspension period", and "the holder is not entitled to be granted a civil aviation authorisation of *that class*, from the date of the notice until the end of the last day on which a civil aviation authorisation *of that class* is suspended as a result of the notice": *CA Act*, s 30DY(2) (emphasis added).

(c) In addition, "CASA must give the holder of a civil aviation authorisation a demerit suspension notice under [s 30DZ] if":

> (a) the holder incurs demerit points for a prescribed offence; and
>
> (b) taken together with demerit points incurred by the holder for offences committed by the holder in the 3 years ending on the day the offence was committed, the holder has incurred at least 6 demerit points in relation to the same *class of authorisations*; and
>
> (c) the holder has, once previously, been given a demerit suspension notice in relation to that *class of authorisations*.
>
> (*CA Act*, s 30DZ(1); emphasis added.)

(d) The effect of giving the notice under s 30DZ(1) is that, "from the start date specified in the notice, all of the holder's civil aviation authorisations *of that class* are suspended for the suspension period ", and "the holder is not entitled to be granted a civil aviation authorisation *of that class*, from the date of the notice until the end of the last day on which a civil aviation authorisation *of that class* is suspended as a result of the notice": *CA Act*, s 30DZ(2); emphasis added.

217 It can be seen from the above analysis that regulation 13.375 is for the limited purposes of s 30DU of the *CA Act* which pertains to the "demerit points scheme" in Division 3D in Part III of the *CA Act*. In my view, regulation 13.375 has nothing to do with a legislative instrument issued pursuant to regulation 11.068(1) that "imposes a condition relating to a matter mentioned" in s 98(5A) of the *CA Act* on a "specified class of authorisations".

218 That position is reinforced by a consideration of regulation 11.068. In my view, regulation 11.068 provides that CASA may issue a legislative instrument that imposes a condition relating to "a matter mentioned" in s 98(5A) of the *CA Act*, on a "specified class of authorisation". The relevant "matter mentioned in s 98(5A)" is a matter "affecting the safe navigation and operation, or maintenance, of aircraft": *CA Act*, s 98(5A)(a). Regulation 11.068(1) does not require that the class of authorisation be "prescribed" by the CASR, which

is in contrast to what is required under s 30DU of the *CA Act* (which provides that the "regulations must prescribe [certain] classes"). Regulation 11.068(1) requires that the "class of authorisations" be "specified". Regulation 11.068(1) ensures it is CASA that "may issue a legislative instrument", and it is that instrument that imposes a relevant condition "on a specified class of authorisations". As a consequence, and in the absence of any contrary textual or contextual indication, it should be accepted that the relevant class can be "specified" by CASA in the Instrument itself. In this respect, cl 5 of the Instrument clearly "specifies" the relevant class as "flight crew licences" (as defined in Part 1 of the Dictionary to the CASR).

219 I accept CASA's submission that support for this construction is found in regulation 11.068(2). It provides that "[t]he class of authorisations *may* include authorisations granted before the imposition of the condition" (emphasis added). The use of the word "may" negates any intention by the legislature to fix the "specified" "classes of authorisations" by reference to some predetermined list (such as the list in table 13.375 of the CASR).

220 There is a further example in the context of the *CA Act* and CASR which demonstrates that the "classes of authorisations" specified in the Instrument are not required to be a "class of civil aviation authorisation" specified by the CASR, including those referred to in regulation 13.375 and table 13.375. Regulation 11.015 is entitled "Definitions for Part [11]", and Part 11 includes regulation 11.068. As indicated above, pursuant to regulation 11.015, the definitions for Part 11 define "authorisation" to mean "a civil aviation authorisation other than" four exceptions which are identified in subsections (a)(i)-(a)(iv) of the definition of "authorisation". Relevantly, the first exception in subsection (a)(i) is the acronym "AOC". Section 3 of the *CA Act* defines the acronym AOC as an "Air Operator's Certificate issued under Division 2 of Part III" of the *CA Act*. The concept of an AOC is used in various ways in the *CA Act*. By way of example:

(a) "[e]xcept as authorised by an AOC" or certain other authorisations, "an aircraft shall not fly into or out of Australian territory": *CA Act*, s 27(2)(a); and

(b) "[a]n AOC may authorise the flying or operation of an aircraft, other than the operation of a foreign registered aircraft on regulated domestic flights, by authorising the flying or operation of aircraft included in a class of aircraft described in the AOC": *CA Act*, s 27(2A).

221 However, an AOC is, pursuant to regulation 11.015 of the CASR, not included in the concept of "a civil aviation authorisation" by reason of the definition contained in regulation 11.015. In these circumstances, when regulation 11.068 says that CASA "may issue a legislative instrument that imposes a condition relating to a matter mentioned" in subsection 98(5A) "on a specified class of authorisations", that does not include an AOC. An AOC cannot be subject to an instrument made under regulation 11.068.

222 That is significant in considering the proper construction and purported interaction of regulation 11.068, regulation 13.375 and table 13.375. It is apparent that regulation 11.068, regulation 13.375 and table 13.375 occupy different universes and are directed to different functions under the CASR and the *CA Act*. That is apparent from column 3 of item 1 in table 13.375, which refers to an AOC or "Air Operator's Certificate" as a "certificate issued under s 27 of the" *CA Act* (see column 2 of table 13.375). An AOC is expressly excluded from the term "authorisation" for the purposes of re gulation 11.068 by reason of subsection (a)(i) of the definition of "authorisation" contained in regulation 11.015. Put another way, CASA cannot, exercising a power which is conferred by regulation 11.068, impose a condition on an AOC given that, by reason of regulation 11.015, an AOC is a class of authorisation that is expressly excluded from the concept of "authorisation" for the purposes of Part 11 of the CASR in which regulation 11.068 appears. As a consequence, the reference to AOCs in table 13.375 indicates that regulation 13.375 and regulation 11.068 have different spheres of operation, and one should not be used to restrict the other.

223 By way of example, if Angel Flight's submissions were accepted, table 13.375 would set out a list of the relevant "classes" of civil aviation authorisation to which regulation 11.068 refers. However, the list in Table 13.375 includes an AOC, which cannot be an "authorisation" for the purposes of regulation 11.068 by reason of subsection (a)(i) of the definition of "authorisation" contained in regulation 11.015. Angel Flight's submissions failed to explain how those two positions can be reconciled.

224 Finally, reference can be briefly made to the legislative history of regulations 11.068 and 13.375 of the CASR. Regulation 13.375 was first introduced in the compilation of the *Civil Aviation Safety Regulations 1998* (Cth) that was prepared on 20 February 2004. That compilation was described as "taking into account amendments up to SR 2004 No. 4". The terms of regulation 13.375 as then introduced reflect its current form. Regulation 11.068 was introduced by the *Civil Aviation Safety Amendment Regulations 2011 (No. 2)* (Cth) and came

into effect on 27 June 2011. That regulation introduced both the current definition of "authorisation" and regulation 11.068, but it did not refer to the already-enacted regulation 13.375 or table 13.375. In these circumstances, it should not be necessarily assumed that regulations 11.068 and 13.375 were drafted together and a concept referred to in regulation 11.068 necessarily reflects a concept referred to in regulation 13.375 or table 13.375. It should not be assumed that the content of a concept in regulation 11.068 is demarcated by a list in table 13.375.

225 For the reasons set out above, I am of the opinion that the func tion of regulation 13.375, and table 13.375, do not and cannot have the function of defining the classes of authorisation that apply for the purposes of regulation 11.068. The "class of authorisations" specified in the Instrument is not required to be a "class of civil aviation authorisation" set out in regulation 13.375 or table 13.375 of the CASR.

226 For the reasons stated, I reject Ground 1.

Ground 2

227 I reject Ground 2 and Angel Flight's submissions that the Instrument is not authorised by regulation 11.068 of the CASR and that the Instrument is not a "legislative instrument" pursuant to s 98(5AA) of the *CA Act*. I am of this opinion for the reasons that follow.

228 Section 98(5A)(a) of the *CA Act* provides that the "regulations may empower CASA to issue instruments in relation to … matters affecting the safe navigation and operation, or the maintenance, of aircraft". Regulation 11.068(1) of the CASR then provides that, "[f]or subsection 98(5A) of the [*CA Act*], CASA may issue a legislative instrument that imposes a condition relating to a matter mentioned in that subsection on a specified class of authorisations".

229 Section 98(5AA) of the *CA Act*, together with s 98(5AB), set out for the purposes of the *CA Act* and the CASR a characteristic that an instrument must have and a characteristic that an instrument must not have. Pursuant to s 98(5AA), an instrument issued under paragraph (5A)(a) "*is* a legislative instrument if the instrument is expressed to apply in relation to" "a class of persons", "a class of aircraft", or "a class of aeronautical product" (emphasis added). Pursuant to s 98(5AB) of the *CA Act*, an instrument issued under paragraph (5A)(a) "is *not* a legislative instrument if the instrument is expressed to apply in relation to" "a particular person", or "a particular aircraft", or "a particular aeronautical product" (emphasis added).

230 The Instrument, by cl 5, provides that, "[f]or the purposes of regulation 11.068 of CASR, [the] [I]nstrument imposes conditions on flight crew licences".

231 A "flight crew licence" is defined in Part 1 of the Dictionary to CASR as meaning "a flight crew licence within the meaning of Part 61 [of the CASR]", and "includes a certificate of validation of an overseas flight crew licence ". Part 61 of the CASR regulates "flight crew licensing". Part 61 "sets out the licensing scheme for pilots and flight engineers of registered aircraft": CASR, regulation 61.005(1).

232 As stated above, it is apparent that the Instrument imposes conditions on flight crew licences. It applies in relation to a class of persons, namely holders of flight crew licences. It is tolerably clear that it does not apply to a particular person, a particular a ircraft, or a particular aeronautical product, and therefore does not fall within s 98(5AB) of the *CA Act*. It is clear on its face that the Instrument is not expressed to apply in relation to a particular person, aircraft or aeronautical product. The relevant "class of persons" for the purposes of s 98(5AA)(a) consists of persons holding a "flight crew licence", and the Instrument falls within s 98(5AA) because it is an instrument expressed to apply in relation to a "class of persons".

233 It may be that, in its *practical effect*, the Instrument applies to a class of persons (namely, holders of flight crew licences) when those holders are engaged in a particular activity (namely, CSFs). However, that does not mean that the Instrument fails to satisfy the requirement in s 98(5AA) of the *CA Act*, being that it be "*expressed to apply* in relation to … a class of persons" (emphasis added). That is because the Instrument expressly imposes conditions on a flight crew licence holder. If a person does not hold such a licence, the Instrument does not apply to them. There is nothing in ss 98(5AA) or 98(5B) which indicates that an instrument under s 98(5A) cannot relate to the activities conducted by a class of persons, as long as the instrument is "expressed to apply in relation to … a class of persons". To the contrary, s 98(5A) expressly contemplates that the instrument will relate to the broad formulation of "matters affecting the safe navigation and operation, or the maintenance, of aircraft". There is nothing in that formulation which indicates CASA cannot make an instrument that, in its effect, applies to a class of persons that are engaged in a particular sector or sub-sector of aviation. In these circumstances, it should not be accepted that the Instrument, which is "expressed to apply" to flight crew licence holders, offends s 98(5AA) of the *CA Act*.

234 For these reasons, I am satisfied that the Instrument is properly characterised as a "legislative instrument" pursuant to s 98(5AA) of the *CA Act* and, as a consequence, was authorised by regulation 11.068. It follows that Ground 2 must be rejected.

235 That position is supported by general principles concerning the nature of a legislative decision. In *RG Capital Radio*, the Full Federal Court referred to the following principles:

(a) "[p]erhaps the most commonly stated distinction between [decisions of an administrative character and decisions of a legislative character] is that legislative decisions determine the content of rules of general, usually prospective, application whereas administrative decisions apply rules of that kind to particular cases": *RG Capital Radio*, [43];

(b) "in [*Queensland Medical Laboratory v Blewett* (1988) 16 ALD 440; 84 ALR 615], Gummow J "identified control by the Parliament as a fundamental characteristic of legislative power reposed in the Executive". That statement may be accepted, on the understanding that Gummow J did not suggest parliamentary control was an essential characteristic of such a power …": *RG Capital Radio*, [52] (internal citations in the original);

(c) the "absence of any provision for disallowance by Parliament points against characterisation of a decision under [the relevant legislative provisions] as legislative": *RG Capital Radio*, [56]. However, "although persuasive, the absence is not fatal to such a characterisation": ibid. No "case declares provision for disallowance to be a litmus test of legislative character", and its "absence is to be taken into account as a factor pointing against that character, but that is a l": ibid;

(d) as to the requirement that the relevant instrument be published, the Full Court did not find that "requirement to be a compelling indication of the legislative character of the decision", but "the requirement of publication is consistent with the decision having a legislative character": *RG Capital Radio*, [58].

(e) in *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 75 FCR 604; (1997) 46 ALD 305 (***SAT FM***), Sundberg J (at 608) treated an obligation of wide public consultation as endowing the relevant decision with "a legislative rather than an administrative character": *RG Capital Radio*, [59];

(f) in *SAT FM*, Sundberg J commented (at 608) that "[t]he subject matter for decision involves complex policy questions", which was "another pointer to a decision … being of a legislative character": *RG Capital Radio*, [63];

(g) the Full Court stated that wide policy considerations are "consistent with a legislative result": *RG Capital Radio*, [66]; and

(h) "the absence of provision for executive variation or control is an indicator that a [relevant] decision … has a legislative character": *RG Capital Radio*, [71].

236 Having regard to those principles, in addition to satisfying the requirement of s 98(5AA)(a) of the *CA* Act, the Instrument is also generally legislative in character, for the following reasons.

237 First, the Instrument is a prospective rule of general application. The Instrument is clearly prospective given it commenced on 19 March 2019 and will be repealed at the end of 18 March 2022: Instrument, cl 1. The Instrument is intended to lay down conditions affecting a class of individuals (namely, individuals who hold and wish to maintain a flight crew licence). As stated above, the Instrument imposes conditions on holders of flight crew licences.

238 Second, as to parliamentary control, the Instrument is subject to the tabling and disallowance process in Chapter 3, Part 2 of the *Legislation Act*: see *Legislation Act*, ss 8(2), 38 and 42.

239 Third, the Instrument is published on the Federal Register of Legislation in accordance with Chapter 2, Part 1 of the *Legislation Act*. The requirement of publication, although not a compelling indication, is consistent with the decision to make the Instrument having a legislative character.

240 Fourth, in making the Instrument, CASA was plainly exercising its functions under the *CA Act*, which includes "developing and promulgating appropriate, clear and concise aviation safety standards": *CA Act*, s 9(1)(c). Decision- making of the kind required in making the Instrument is consistent with the Instrument being characterised as legislative.

241 In these circumstances, the Instrument is properly characterised as a legislative instrument.

242 Ground 2 must be rejected.

Ground 3

243 By Ground 3, Angel Flight submits that the Instrument creates a new class of operation, namely "community service flights", the creation of which is not authorised by regulation 11.068 of the CASR. Ground 3 must be rejected for substantially the same reasons referred to in rejecting Grounds 1 and 2.

244 Angel Flights submits that a "community flight service" is a class of "operation", as opposed to an "authorisation" and, as a consequence, insofar as the Instrument purports to impose conditions on that "operation", the Instrument is not authorised by regulation 11.068. The new "operation" on which conditions are applied is said by Angel Flight to be "community service flights".

245 Clause 5 of the Instrument is unambiguous in its terms. Clause 5 of the Instrument provides that the Instrument "imposes conditions on flight crew licences". The Instrument does not create a new class of operation. The Instrument under regulation 11.068 imposes conditions on a specified class of authorisation, namely "flight crew licences", which, for the reasons stated in considering Grounds 1 and 2, is a class contemplated under the CASR.

246 I accept CASA's submission that the definition of "community service flight" in cl 6 of the Instrument is simply a drafting mechanism to identify the circumstances in which those who hold a flight crew licence are obliged to comply with the conditions of that licence which are stated in cll 7 to 11 of the Instrument. That is made clear by the express terms of cl 5 of the Instrument.

247 There is no warrant in the express language used in regulation 11.068(1) of the CASR to place any restriction on the conditions that may be imposed by reference to a class of operation, save that the Instrument must relate "to a matter mentioned" in s 98(5A) of the *CA Act*, being "matters affecting the safe navigation and operation, or the maintenance of aircraft": *CA Act*, s 98(5A)(a).

248 The Instrument does not create a new class of operation. As a result, Ground 3 must be rejected.

GROUND OF REVIEW 5 – REASONABLENESS AND PROPORTIONALITY

Angel Flight's submissions on Ground 5

249 Angel Flight, by Ground 5, alleges that the exercise of power under re gulation 11.068(1) was "unreasonable and/or not reasonably proportionate" in relation to the making of the Instrument as a whole or cll 7(c), 9, 10 and/or 11 of the Instrument.

Submissions as to the whole of the Instrument

250 Angel Flight submits that, in exercising the power under regulation 11.068(1), CASA was required, in the absence of a legislative intention to the contrary, to act "according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought confine himself": citing *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732; 274 FCR 337 (***Brett Cattle***) at [285] per Rares J, citing *Graham v Minister for Immigration* [2017] HCA 33; 263 CLR 1 at [57].

251 In Angel Flight's submission, the power under regulation 11.068(1) was not one which could be exercised by CASA to result in an operation that was capr icious and irrational, or unable to be justified on any reasonable ground, or such that there was not a reasonable proportionality between the Instrument and the power under regulation 11.068(1) so that the Instrument was not a real exercise of the power: citing *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381 (***Austral Fisheries***) at 399 per Beaumont and Hill JJ; *Brett Cattle* at [300]; *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 982- 983 per Griffith CJ.

252 In Angel Flight's submission, the power under regulation 11.068(1) enabled CASA to impose a condition *relating to* a matter mentioned in s 98(5A) on a specified class of authorisations. Angel Flight submits that the phrase "relating to" is one of broad import and connotes a relationship between two subject matters: citing *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 338 per Brennan J; *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 376 per McHugh J.

253 In Angel Flight's submission, the matters mentioned in s 98(5A) are *matters affecting* the safe navigation and operation, or the maintenance of, aircraft. Angel Flight submits that "affecting" is used in the sense of "acting on" or "producing an effect or change" in one of

the three subjects set out in s 98(5A), namely safe navigation or safe operation of aircraft, or the maintenance of aircraft.

254 In Angel Flight's submission, to be validly within regulation 11.068(1), an instrument issued under that provision must relate to – in the sense of having a direct or indirect relationship with – matters affecting one or other of the following matters:

(a) the safe navigation of aircraft;

(b) the safe operation of aircraft;

(c) the maintenance of aircraft.

255 Angel Flight submits that CASA, in exercising the power under regulation 11.068(1), was required by s 9A(1) of the *CA Act* to regard the safety of air navigation as the most important consideration.

256 Angel Flight submits that the Instrument's Explanatory Statement made clear that the Instrument was issued due to CASA's assessment that CSFs had a "higher risk of accident or incident" due to "risk factors that are not usually present in baseline private operations". Angel Flight notes that the alleged higher risk of accident or incident in CSFs was premised on two fatal accidents, which occurred on 15 August 2011 and 28 June 2017. Angel Flight submits that, based on these two incidents alone, CASA determined that CSFs had a higher accident or incident rate. Angel Flight submits that what risk factors led to this supposed higher accident or incident rate are not apparent from any of the material filed by CASA in this proceeding.

257 Angel Flight submits that documents produced by CASA under discovery reveal tha t the Instrument was not, in fact, issued as a response to CSF-related accidents and incidents. Angel Flight contends that there is no evidence or materials before CASA that pointed to any particular risk factors that pertained to CSFs. In these circumstances, Angel Flight submits that the exercise of the power under regulation 11.068(1) to issue the Instrument was not able to be justified on any reasonable ground and was otherwise capricious and irrational.

Submissions as to particular clauses in the Instrument

258 Alternatively, Angel Flight submits that the following provisions of the Instrument had no direct and substantial connection to the power conferred by regulation 11.068(1).

259 Angel Flight refers to cl 7(c) of the Instrument, which requires that an aeroplane conducting a CSF does not carry on board persons other than crew members, a patient and a single other passenger providing the patient with support and assistance. This pro vision, in Angel Flight's submission, has no rational or reasonable relationship to safe navigation or operation of the aircraft. Angel Flight submits that there "was not a scintilla of evidence or material before CASA that the navigation or operation of a CSF was impacted by the number of persons being transported". In Angel Flight's submission, this provision also has no rational or logical connection with the maintenance of aircraft.

260 Angel Flight submits that cl 10(a) is in a similar category to cl 7(c). In Angel Flight's submission, no reasonable or rational relationship exists between, on the one hand, the requirement that a licence holder not pilot a CSF with no more than five passengers (including any patient) and, on the other hand, the safe navigation or operation of an aircraft conducting a CSF. Angel Flight submits that no information or material was before CASA to enable it to conclude that the power under regulation 11.068(1) could (or should) have been exercised in this manner. In Angel Flight's submission, the stipulation under cl 7(c) was, in the circumstances, capricious and irrational and/or unable to be justified on any reasonable ground.

261 Angel Flight refers to cl 9(1)(a) and its requirement that a flight crew licence holder not pilot a CSF unless they had conducted a landing within the previous 30 days of an aeroplane of a particular class, and cll 9(1)(b)-(d)'s requirement that a licence holder have completed a minimum amount of flight time before conducting a CSF concern. There was, in Angel Flight's submission, no evidence or material before CASA to indicate that this requirement was liable to have any impact whatsoever on the safe conduct of a CSF. Angel Flight submits that there is no evidence that either of the two accidents relied on by CASA, to ground the decision to implement the Instrument, concerned or had anything to do with the relevant pilot's experience landing an aircraft. In those circumstances, Angel Flight submits that there was no reasonable proportionality or rational relationship between cl 9(1) and the requirement under regulation 11.068(1) that the Instrument relate to a matter affecting the safe navigation or operation of aircraft.

262 Angel Flight refers to cll 9(2)-(3) of the Instrument, which impose conditions in relation to the holders of private pilot licences who do not also hold commercial pilot licences and require the conduct of a certain number of hours of flight time before a holder can engage in a

CSF. Angel Flight submits that these provisions concern matters relating to the navigation and operation of aircraft. In Angel Flight's submission, there was, however, nothing in the materials or evidence before CASA that the experience of pilots, by reference to flight time, had any impact on the two fatal accidents which occurred on CSF flights or had anything to do with accidents or incidents in CSFs. Angel Flight submits that there was therefore no reasonable or rational basis for the decision or determination to issue these provisions of the Instrument.

263 Angel Flight refers to cll 10(c) and (d) of the Instrument which impose requirements to log flights as CSFs and make records in personal logbooks about the conduct of CSFs. Angel Flight submits that none of these matters are capable of being seen to reasonably relate to the safe navigation or operation of aircraft involved in a CSF. Nor, in Angel Flight's submission, do they have any reasonable or logical relationship to the maintenance of aircraft. Angel Flight submits that there was no evidence or material before CASA which pointed to such notification and recordkeeping requirements having anything to do with the two fatal accidents CASA relied on to establish that CSFs had higher rates of crashes.

264 Finally, Angel Flight refers to cl 11 of the Instrument, which imposed limitations on when the holder of a flight crew licence could pilot an aeroplane by reference to when the aeroplane had undergone inspections. Angel Flight submits that these requirements plainly related to matters affecting aircraft maintenance. In Angel Flight's submission, there was, however, nothing in the evidence or material before CASA that indicated any relationship at all between the maintenance of aircraft involved in a CSF and the two fatal accidents relied on by CASA to establish that CSFs had a higher rate of incidents and crashing. In Angel Flight's submission, cl 11 had no reasonable or rational relationship to a matter relating to or affecting aircraft maintenance.

CASA'S submissions on Ground 5

265 CASA submits that there is no basis in the evidence to provide any foundation for the allegation that CASA exercised the power under regulation 11.068(1) in a manner which was "unreasonable" and/or "not reasonably proportionate", in relation to the making of the Instrument as a whole or cll 7(c), 9, 10 and/or 11 of the Instrument.

266 CASA submits that the power conferred by regulation 11.068(1) of the CASR is subject to the legal presumption that the legislature intends the power to be exercised: citing *Minister*

for Immigration and Border Protection v SZVFW [2018] HCA 30; 264 CLR 541 (***SZVFW***) at [4] per Kiefel CJ and [80] per Nettle and Gordon JJ.

267 CASA submits that, because the Instrument is a legislative instrument, being a form of delegated legislation, the question is whether the Instrument is capable of being considered to be reasonably proportionate to the pursuit of the purpose of the enabling legislation. That, in CASA's submission, requires a rational relationship (or sufficient connection) between the purpose for which the power is conferred by the enabling legislation and the instrument made in furtherance of that purpose, whether that purpose be widely or narrowly defined: citing *Attorney-General (South Australia) v Adelaide Corporation* [2013] HCA 3; 249 CLR 1 (***Adelaide Corporation***) at [58]-[59] per French CJ; [117]-[118] per Hayne J; [199]-[201] per Crennan and Kiefel JJ; and *Austral Fisheries* at 399 per Beaumont and Hill JJ.

268 CASA submits that an administrative decisio n will not be unreasonable if it lies within the scope of rational decision- making, and "if there is room for a logical or rational person to reach the same decision on the material before the decision maker": citing *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 (***SZMDS***) at [135] per Crennan and Bell JJ.

269 CASA submits that, on judicial review, the process "does not involve substituting a court's view as to how a discretion should be exercised for that of a decision- maker": *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 (***Minister for Immigration v Li***) at [66] per Hayne, Kiefel and Bell JJ; see also [30] per French CJ and [106] per Gageler J.

270 CASA submits that, while the test for legal unreasonableness in respect of an administrative decision remains a stringent one, it is even more so in the context of determining if delegated legislation is reasonably proportionate. CASA submits that a challenge to the validity of a legislative instrument must meet a "much sterner onus" than that applicable where an administrative decision is under review: citing *Donohue v Australian Fisheries Management Authority* [2000] FCA 901; 60 ALD 137 (***Donohue***) at [18] (Heerey J), which cited *Austral Fisheries Pty Ltd v Minister for Primary Industries and Fisheries* (1992) 37 FCR 463 at 477 (O'Loughlin J) (upheld by the Full Court in *Austral Fisheries*). CASA submits that the test involves a "high threshold" and does not invite "judicial merits review of delegated legislation": citing *Adelaide Corporation* at [48] (French CJ)

271 CASA submits that regulation 11.068(1) of the CASR empowers CASA to issue a legislative instrument that imposes a condition relating to a matter mentioned in s 98(5A) of the *CA Act*. The relevant "matters" in s 98(5A) are "matters affecting the safe navigation and operation, or the maintenance, of aircraft". The purpose of the *CA Act* is to "establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents": *CA Act*, s 3A.

272 In these circumstances, CASA submits that the question is then whether the Instrument, and, in particular, cll 7(c), 9, 10 and 11, have a rational relationship with that purpose. CASA submits that the evidence clearly supports a rational relationship with the purpose of the *CA Act*.

273 CASA relies upon the Explanatory Statement which records that CASA had "assessed that community service flights operations have a higher risk of accident or incident due to the existence of risk factors that are not usually present in baseline private operations" and that the purpose of the Instrument was to mitigate that risk "by placing conditions on flight crew licence holders conducting such operations": Explanatory Statement, page 1.

274 CASA submits that both the Explanatory Statement, and the evidence of Mr Monahan, identify those higher risks as including:

(a) operating from unfamiliar locations in varying weather conditions;

(b) the absence or organisational oversight of safety support from a certified air operator, and a lack of organisational safety risk mitigators; and

(c) pressure on pilots that may result from self- induced pressure to start or complete a flight because of a passenger's medical condition (otherwise known as "get-there-itis" or the "mission imperative"): Affidavit of Mr Monahan affirmed 13 November 2020, [24].

275 CASA submits that the evidence of Mr Monahan discloses CASA's concerns about the particular risks presented by CSFs. CASA submits CASA's concerns about those particular risks were long held by CASA. CASA submits that it had consulted the CSF industry including Angel Flight, particularly since 2014, on regulating CSFs in order to respond to these risks.

276 CASA rejects Angel Flight's contention that CASA's assessment of these risks was "premised on two fatal accidents" and that, "[b]ased on these two incidents alone", CASA

"determined that CSF had a higher accident or incident rate". CASA submits that it relied upon a wide range of data to inform the making of the Instrument.

277 CASA rejects any suggestion that any clauses in the Instrument were not each rationally connected to the purpose of the *CA Act*. CASA submits that each clause of the Instrument is supported on the evidence and that the connection between each of the measures, and the safe navigation or operation, or maintenance of the aircraft, is clear.

Angel Flight's reply submissions

278 Angel Flight submits that the risk factors which CASA asserted applied to CSFs were entirely conjectural. Angel Flight submits that none of the factors relied upon by CASA were the subject of any study, evidence or information in relation to CSFs conducted in the Australian context at any time prior to the Instrument being issued. Angel Flight submits that the personal aviation experience of Messrs Crosthwaite, Watson and Monahan did not extend to ever having flown or otherwise participated in a CSF.

279 Insofar as CASA relies upon academic literature and research, Angel Flight submits that such material was detached both geographically and temporally from the Australian CSF sector at the time the Instrument was made and had no rational or logical connection to the circumstances of the Australian CSF sector.

280 Angel Flight contends that there is no evident or intelligible justification for the notion that the CSFs had peculiar or more pronounced risk factors, or that they resembled commercial flights as asserted by Mr Monahan of CASA. Angel Flight submits that there can be no logical or rational basis for CASA to view CSFs as having a peculiar risk profile, or as having higher accident/incident rates and, as a consequence, the Instrument cannot reasonably be viewed as having been adopted by CASA as a means of attaining the ends of the relevant power.

281 Angel Flight submits that, in the circumstances, there was no rational relationship between the purpose for which the power to make legislative instruments under regulation 11.068 (1) was conferred and the Instrument purportedly made in furtherance of that purpose: citing *Adelaide Corporation* at [58] (French CJ). On that basis, Angel Flight submits that the Instrument was invalid.

282 With respect to particular clauses of the Instrument, Angel Flight submits that the passenger restriction conditions under cll 7(c) and 10(a) could only be rationally justified on the basis

that the number of passengers was a factor which contributed to risks peculiar to a CSF. Angel Flight submits that there was no basis for concluding that there were "human factor" challenges unique to CSFs that produced particular risks and, as a result, the passenger restrictions imposed were arbitrary and irrational and cannot reasonably be seen to have been adopted to attain the ends of maintaining, enhancing or promoting aviation safety, or otherwise preventing accidents and incidents.

283 Angel Flight submits that, as there was no material indicating that aeronautical exper ience contributed to any risk factors unique to CSFs or rates of accidents or incidents in CSFs, the requirements under cl 9 lacked any rational connection to the maintenance, enhancement or promotion of aviation safety.

284 Angel Flight submits that the data collection obligations imposed by cll 10(c) and (d) do not, on any analysis, pertain to the safe operation, navigation or maintenance of aircraft. Angel Flight submits that there was no evidence of any material being before CASA indicating that there were maintenance issues with CSF aircraft that created or contributed to the incidents or accidents, or otherwise produced or enhanced risk factors particularly to CSFs. In these circumstances, Angel Flight submits that the maintenance requirements enacted by cl 11 lacked any tenable connection with the maintenance, enhancement or promotion of air safety.

285 Angel Flight by its further written submissions dated 23 December 2020 made the following further submissions.

286 Angel Flight submits that the accident and incident rates calculated by CASA for the CSF sector ought not be accepted as the CSF data was not empirical and was otherwise not reliable. Angel Flight submits that the flawed basis upon which CASA relies on the CSF data, in order to make a comparative assessment of accident and incident rates for the CSF sector, demonstrates that the issue of the Instrument was arbitrary, irrational and unreasonable.

287 Angel Flight submits that no empirical analysis was ever conducted by CASA about the circumstances of CSFs in the Australian aviation sector. Angel Flight submits that no CSF pilots were spoken to or interviewed. Nor, in Angel Flight's submission, were any patients or passengers who were transported on CSFs. Angel Flight submits that, apart from accident data, no statistical or quantitative analysis was engaged in by CASA.

288 As a consequence, Angel Flight submits that there is no objective or rational basis for CASA to have concluded at the time the Instrument was issued that risk factors not present in baseline private operations existed or were more pronounced with CSFs. In Angel Flight's submission, there was no evidence before CASA on which it could have rationally concluded that the CSF operating environment was "more challenging" than the operating environment during a standard private flight. This, in Angel Flight's submission, further conveys that the exercise of power by CASA was arbitrary and unreasonable.

289 Finally, Angel Flight submits, in respect to cll 9, 10(c) and (d) and 11, that there was no evidence before CASA which would justify the imposition of the conditions contained in these clauses.

CONSIDERATION OF GROUND 5

290 I turn to consider Ground 5. First, I set out some relevant principles. Seco nd, I set out and consider certain further, relevant evidence of Mr Monahan and Dr Crees. Third, I apply the relevant principles to the evidence in this proceeding.

Relevant principles

291 The relevant legal principles of jud icial review on the ground of legal unreasonableness were not in dispute between the parties and can be conveniently summarised as follows.

292 Like "any statutory discretionary power, it is subject to the presumption of the law that the legislature intends the power to be exercised reasonably": *SZVFW*, [4]; see also [80] (Nettle and Gordon JJ). Where "it appears that the *dominating, actuating* reason for the decision is outside the scope of that purpose, the discretion has not been exercised lawfully": *SZVFW*, [12] per Kiefel CJ (emphasis added).

293 In *Austral Fisheries*, Beaumont and Hill JJ stated at 398:

> In his work, *Delegated Legislation in Australia and New Zealand* (1977), Professor Pearce said (at par 2):
>
> > "As far as judicial review of delegated legislation is concerned, the principles adopted by the courts when considering the validity of such legislation are, for all practical purposes, the same as those used for judicial review of executive action. The terminology is sometimes a little different – the notions of jurisdiction and error of law are not applied to delegated legislation – but the general doctrine of *ultra vires* is adopted in like manner in regard to delegated legislation as it is to executive action. Hence there is no need to attempt fine distinctions between the two types of activity for the purposes of judicial review."

294 Their Honours continued at 399:

> First, in the absence of an explicit contrary provision, [the relevant provision] should be interpreted so as not to "result in an operation ... which in [the court's] opinion is capricious and irrational" … [T]his approach reflects the rule of common sense (rather than law) that it is not to be expected that Parliament intends legislation to operate in a capricious and irrational way.
>
> Secondly, a determination of a plan will be beyond power if it "could not be justified on any reasonable ground", per Menzies J in *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 323 …
>
> Thirdly, as Mason CJ said in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29:
>
> > "... this Court has held that, in characterising a law as one with respect to a permitted head of power, a reasonable proportionality must exist between the designated object or purpose and the means selected by the law for achieving that object or purpose. The concept of reasonable proportionality is now an accepted test of validity on the issue of ultra vires ... It is a test which governs the validity of statutes as well as that of regulations. So, in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-474, in deciding whether a law was appropriate and adapted to the protection of the environment, in which event the law would have been valid, it was necessary to consider whether the adverse or extraordinary consequences of the law were disproportionate to the achievement of the relevant protection."

295 In *Brett Cattle*, Rares J recently stated at [287]:

> The classic expression of the test for determining the validity of delegated legislation is contained in the reasons of Dixon J in *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155 … Dixon J said:
>
> > **To determine whether a by-law is an exercise of a power**, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. **The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply**. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law**, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power** …
>
> (Emphasis in the original; citations omitted.)

296 Rares J continued at [302]:

> In 1993, Hill J observed when agreeing with Gummow J, in *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 582, that the application of the "reasonably proportionate" test in administrative law was then "still fluid in Australian jurisprudence". Gummow J, with whom Cooper J also agreed …, suggested that when the question is the validity of delegated legislation made pursuant to a valid enactment, "the proportionality principle is differently focused" to

when the issue is the constitutional validity of a law [...] There, Gummow J identified the fundamental question by reference to what Lockhart J had said in *Austral Fisheries* … as being whether the delegated legislation is within the scope of what the Parliament intended when it enacted the legislation conferring the power to make the delegated legislation. Cooper J distilled the test as follows:

> The test of proportionality reflects an underlying assumption that the legislature did not intend that the power to enact delegated legislation would be exercised beyond what was reasonably proportionate to achieve the relevant statutory object or purpose; the test of reasonableness assumes that the legislature did not intend to confer a power to enact delegated legislation which enactment no reasonable mind could justify as appropriate and adapted to the purpose in issue and the subject matter of the grant. **Whether one describes the test as one of "reasonable proportionality" or "unreasonableness", the object is to find the limit set by the legislature for the proper exercise of the regulation or rule making power and then to measure the substantive operation of the delegated legislation by reference to that limit.** In my view there is no substantive difference between the tests as stated.

(Emphasis in the original; citations omitted.)

297 In *Adelaide Corporation*, French CJ (at [56]-[57]) reviewed a number of authorities and stated at [58]-[59]:

> In *South Australia v Tanner* [(1989) 166 CLR 161], which concerned the validity of delegated legislation, the majority noted, without demur, that the parties had accepted "the reasonable proportionality test of validity … namely, whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose" … Their Honours equated that test with the test enunciated by Dixon J in [*Williams v Melbourne Corporation* (1933) 49 CLR 142] and added that it was "in substance, whether the regulation goes beyond any restraint which could be reasonably adopted for the prescribed purpose". The test sets an appropriate limit on the exercise of purposive powers entrusted to a public authority to make delegated legislation. It gives due respect to the authority entrusted by the parliament in the law-making body. Historically, it can be regarded as a development of the high threshold "unreasonableness" test derived from the nineteenth century English authorities. It requires a rational relationship between the purpose for which the power is conferred and the laws made in furtherance of that purpose, whether it be widely or narrowly defined.
>
> The *high threshold test for reasonable proportionality* should be accepted as that applicable to delegated legislation made in furtherance of a purposive power.
>
> (Emphasis added.)

298 Justice Hayne stated at [117]-[118]:

> Consideration of this challenge to the by-law must begin with what was said by Dixon J in *Williams v Melbourne Corporation*. Dixon J said that "[t]o determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject". Examination of the legal and practical operation of the by-law may reveal that "it *could not reasonably* have been adopted as a means of attaining the ends of the power" (emphasis added). He continued by observing that "[i]n such a

case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power". Two fundamental points follow and must not be obscured. The first is that the relevant question is the character of the relevant provisions and the sufficiency of their connection with the relevant by-law making power. And the second is related to the first: the court is concerned not with the expediency of the by-law but with the power to make it. As Fullagar J later pointed out in *Clements v Bull*, this Court's decision in *Williams* discredited the "idea that a by-law could be held invalid because it appeared to a court to be an 'unreasonable' provision".

Because the Court is here concerned with the power to make by-laws, attention must be given in the first instance to the terms of the by-law making power conferred by the statute. As Gummow J said in *Minister for Resources v Dover Fisheries Pty Ltd*, "[t]he fundamental question is whether the delegated legislation is within the scope of what the Parliament intended when enacting the statute which empowers the subordinate authority to make certain laws". Attention can then turn to the legal and the practical effect of the by-law to determine whether it has a sufficient connection to the by-law making power. No doubt that involves a question of degree and judgment. But a conclusion is to be reached paying due regard to "accepted notions of local government" and the fact that "[m]unicipalities and other representative bodies which are entrusted with power to make by-laws are familiar with the locality in which the by-laws are to operate and are acquainted with the needs of the residents of that locality". It is not to be assumed (and no reason was given to the contrary in this appeal) that any more confined understanding of a by-law making power should be preferred. It is against this background that this challenge to validity must be assessed.

(Citations omitted.)

299 Justices Crennan and Kiefel stated at [198]-[201]:

A test of reasonableness has been applied to the making of by-laws by local authorities under statutory power for a long time. In earlier decisions the test was severely constrained. It was thought that an attack on a by-law on the ground that it was unreasonable was not likely to succeed, because it was assumed that the local authority was to be the sole judge of what was necessary, subject only to the qualification that a by-law might be held invalid if it were such that no reasonable person could pass it.

The approach which is now adopted is that of Dixon J in *Williams v Melbourne Corporation*. There, his Honour pointed out that it may not be enough to consider whether, on its face, a by-law appears to be sufficiently connected to the subject matter of the power to make it. The true character of the by-law, its nature and purpose, must be considered in order to determine whether it could not reasonably have been adopted as a means of attaining the purposes of the power. It will often be necessary to examine the operation of the by-law in the area in which it is intended to apply.

The by-law there in question regulated the driving of cattle through the streets of the City of Melbourne. The power said to support it was a power for the regulation of traffic. Dixon J said that the ultimate question was whether, when applied to conditions in the city, the by-law involved such an actual suppression of the use of the streets as to go beyond any restraint which could reasonably be adopted for the purpose of preserving the safety and convenience of traffic in general.

Dixon J's statement of a test of reasonableness bears an obvious affinity with a test of

> proportionality … In *Coulter v The Queen* the relevant criterion of validity was said to be whether the impugned rules "are a reasonable means of attaining the ends of the rule-making power", by reference to *Williams v Melbourne Corporation* …
>
> (Citations omitted.)

300 In addition to those authorities, the following matters should be noted.

301 First, because the Instrument is a legislative instrument and therefore a form of delegated legislation, the relevant enquiry is whether the Instrument is capable of being considered to be reasonably proportionate to the pursuit of the purpose of the enabling legislation. That requires a rational relationship (or sufficient connection) between the purpose for which the power is conferred by the enabling legislation and the instrument made in furtherance of that purpose: *Adelaide Corporation* [58]-[59] per French CJ; [117]-[118] per Hayne J; [199]-[201] per Crennan and Kiefel JJ; and *Austral Fisheries* at 399 per Beaumont and Hill JJ.

302 Second, the Court is "concerned not with the expediency of the [Instrument] but with the power to make it": *Adelaide Corporation* at [117] (per Hayne J). "Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker": *Minister for Immigration v Li* at [66] per Hayne, Kiefel and Bell JJ. The "requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision- maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision- maker": ibid, [30] per French CJ. Expression "of the *Wednesbury* unreasonableness standard in terms of an action or decision that no reasonable repository of power could have taken "attempts, albeit imperfectly, to convey the point that judges should not lightly interfere with official decisions on this ground" …": ibid, [106] per Gageler J (internal quotations in the original; citations omitted).

303 Third, there is "a world of difference between justifiable opinion and sound opinion": *Parramatta City Council v Pestell* (1972) 128 CLR 305 (***Pestell***) at 323 per Menzies J. The "former is one open to a reasonable man; the latter is one that is not merely defensible – it is right": ibid. The "validity of a local rule does not depend on the soundness of a council's opinion; it is sufficient if the opinion expressed is one reasonably open": ibid.

304 Finally, a challenge to the validity of a legislative instrument must meet a "much sterner onus" than judicial review of an administrative decision: *Donohue* at [18] (Heerey J) citing *Austral Fisheries Pty Ltd v Minister for Primary Industries and Fisheries* (1992) 37 FCR 463

at 477 (O'Loughlin J) which was upheld by the Full Court in *Austral Fisheries*. In *Adelaide Corporation*, French CJ referred to the test of reasonably proportionality as a "high threshold test": *Adelaide Corporation*, [59]. Indeed, in closing submissions, senior counsel for Angel Flight accepted that Angel Flight faced a "demanding hurdle" to make out its case on Ground 5.

Further evidence

305 In light of those authorities, the following evidence should be noted.

The evidence of Mr Monahan

306 The cross-examination of Mr Monahan was essentially directed to establishing that the two relevant fatal accidents (referred to above) did not provide any empirical justification or any "root cause analysis" which would justify the imposition of the conditions in the Instrument. The cross-examination of Mr Monahan also sought to demonstrate that CASA had no rational basis for singling out the operation of CSFs for particular treatment and, as such, there was no justification, on any reasonable ground, for the imposition of the conditions in the Instrument.

307 I make the following findings in respect to the evidence relevant to this ground of judicial review.

308 First, I find that Mr Monahan was a forthright and truthful witness who answered questions directly and made concessions where appropriate. I find, as was properly conceded by Angel Flight, that Mr Monahan is an expert who has extensive experience in aviation standards and safety.

309 Second, I accept Mr Monahan's evidence that, informed by Mr Monahan's knowledge and experience, Mr Monahan understood and believed that there were certain risks associated with CSFs. Those risks meant Mr Monahan understood and believed such flights were attended by a higher risk of accident or incident due to, for example, the presence o f risk factors in the CSF context that are not usually present in normal private flight operations.

310 Third, I accept Mr Monahan's evidence that the two fatal accidents, the first occurring on 15 August 2011 and the second occurring on 28 June 2017, were not of themselves the reason for the making of the Instrument but were the stimulus for CASA to make further inquiries in relation to the operation of CSFs. I accept Mr Monahan's evidence that CASA, prior to making the Instrument, considered reports prepared by ATSB in respect to each fatal

accident. Mr Monahan deposed, and I accept that, in formulating the policy position set out in the Instrument, CASA's position was that, while the circumstances of previous accidents "would obviously be relevant", CASA's review "would not be limited to the identified causes of those accidents but would explore the broader range of risks applicable to CSF operations and the options that were available to improve safety standards applicable to CSFs": Affidavit of Mr Monahan affirmed 19 March 2020, [45].

311 Fourth, I accept Mr Monahan's evidence that, after the second fatal accident in early July 2017, the Director of Aviation Safety and CEO of CASA, Mr Carmody, commissioned a review of CASA's oversight of CSF operations. I find that it was a result of this review that CASA undertook further investigation into CSF operations. I find that, as part of this review, at or around 4 July 2017 and thereafter, it was Mr Monahan's understanding that the accident and incident statistics, available to CASA through the ATSB, indicated that, at a minimum, the fatal accident rate in CSF operations appeared to be significantly higher than in other private operations. The intention of the review was to put a policy determination and potential way forward to the Director of Aviation Safety, outlining the particular safety risks and safety policy issues arising in the conduct of CSF operations, to determine whether the current regulation of CSFs as private flights was adequate and, if not, to advance options for improving the applicable safety standards. It was this further review that ultimately resulted in the Flight Standards Branch within CASA producing two standard form recommendations. The first was in September 2017 and the second was in December 2018.

312 To recall, the September 2017 SFR (which is referred to above) set out a number of relevant matters, including the following:

> CSF do not operate under the safety umbrella of an AOC holder's risk identification and management program. In the case of [Angel Flight], there are no formal mechanisms to support pilots on what can be challenging flights due to the variability of the passengers being carried and the nature and importance of the flight. These factors can impose burdens from both an operational and an emotional decision making perspective.
>
> …
>
> There have been two [Angel Flight] flights where a multiple fatality accident has occurred in the last six years.
>
> …
>
> The ATSB regularly publishes summaries of Australian aviation accident and incident statistics. In a variety of reports and statistical summaries …[,] the ATSB has found that the fatal accident rate for General Aviation Private / Business flights has approximated 20 fatal accidents per 1,000,000 flight hours. From 2006-2014, all

General Aviation types averaged 8-9 fatal accidents per million departures. The report states that aerial agriculture and private / business flights had the highest and second highest rates followed by survey and photography, aerial mustering and lastly flying training.

Although the number of [Angel Flight] accidents is a statistically small sample and therefore may not be able to form the basis of a statistically valid comparison, it is nonetheless useful to extrapolate and compare the [Angel Flight] accident rate to these statistics.

> [Angel Flight] – two fatal accidents in 22000 flights (rounded up = better) Fatal accident rate per million departures = 90.9
>
> [General Aviation] — total fatal accident rate per million departures = 11.3 (worst — 2012)

Regardless of the cause the CSF fatal accident rate is in excess of eight times higher than the ATSB GA statistics.

Whilst the exact cause of this statistical difference cannot be positively determined, it is likely that the contributing factors inc lude: the variability of CSF flight conditions, the relative inexperience and lack of human factors training of [Angel Flight] pilots compared to commercial pilots and the lack of mandatory fatigue limits for private operations combined with the "medical" overtones of the service being provided.

The ATSB previously stated in its response to the CASA DP13170S advised that [sic]:

> While the ATSB was unable to ascertain the age demographic of Australian Angel Flight pilots, consideration of (the) four overseas accidents that involved flights that were organised by various Angel Flight agencies identified that the age range of the pilots was from 57 to 81 years old.
>
> A research article by the US National Transportation Safety Board published in 2007 examined general aviation accidents in degraded visibility and identified several variables that were significantly associated with accident involvement. These included:
>
> (a) pilot age at the time of the accident (with the highest proportion of accidents involving pilots over 60)
>
> (b) pilot age at certification (with pilots certified at or before age 25 having the lowest accident involvement)
>
> (c) the pilot not holding an instrument rating increased the accident risk by nearly five times
>
> (d) commercial pilots had a lower accident involvement than student or private pilots and
>
> (e) private flights had a higher accident involvement than flights conducted for commercial purposes
>
> In conclusion, the ATSB outlined in their response the varied circumstances under which voluntary community service flights can be undertaken lead to a resulting variation in the associated safety risk.

…

The US National transportation Safety Board (NTSB), when responding to investigations of four accidents that killed eight people and seriously injured two between 2007 and 2008 (each of which involved flights providing charitable medical transportation), formed the following views with respect to CSF style operations involved in the accidents:

- each of the four pilots in these accidents failed to fully accomplish [certain tasks]
- in these accidents, the pilots demonstrated shortcomings in sound aeronautical decision-making by failing to adequately assess the weather and their inability to operate the airplane in those conditions;
- that these pilots did not provide the passengers with the basic level of safety that passengers in these circumstances have a right to expect;
- the voluntary pilot organization arranging or fostering the flights made no attempt to verify the pilots' currency;
- that the pilot's lack of currency in conducting the flight in instrument conditions placed the passengers at higher risk for an accident;
- the typical patient seeking a charitable medical flight is not likely aware of the significant differences in pilot training, pilot qualifications, or FAA oversight for a charitable medical flight …
- although many of the volunteer pilots who provide charitable medical transportation are highly skilled; proficient in operating their aircraft, and prepared to execute an appropriate response to changing flight conditions or emergencies, others may not be;
- the NTSB is concerned that the pilots flying charitable medical flights receive no guidance, additional training, or oversight regarding aeronautical decision-making, proper pre-flight planning, or the risk of self-induced pressure; and
- the pilots may have been subject to self-induced pressure to start or complete the flight because of their passengers' serious medical conditions.

…

313 I accept Mr Monahan's evidence that he was not satisfied that the data available at the time of the September 2017 SFR was robust enough to form a statistically valid comparison between the CSF sector and the general private aviation sector. I accept that, as at the time of the September 2017 SFR, Mr Monahan had a concern that the fatal accident rate of CSF operations was high compared to standard private flights and that the higher accident rate may be contributed to by unique features of CSF operations that were not present in normal private flight operations. I accept Mr Monahan's evidence that he instructed Mr Watson of the Flight Standard Branch of CASA to pursue further data analysis of operations within the CSF sector so as to obtain greater clarity as to the safety profile of CSF operations when compared to normal private flight operations.

314 I find that the review conducted by Mr Watson at Mr Monahan's direction resulted in the December 2018 SFR. I have already set out above the relevant matters which were stated in this December 2018 SFR. To briefly recall, the December 2018 SFR relevantly stated:

(a) "Since 2011, there have been two CSF accidents resulting in six fatalities. CASA is also aware of multiple accidents and fatalities involving similar operations in the USA".

(b) "The lack of direct safety risk mitigators and the reliance on individual, pilot assessments regarding mission acceptance, commencement or continuance, results in an increased need for Pilots in Command (PIC) to be experienced, operationally recent and well versed in inflight management, human factors and threat and error management skills. Persons travelling in CSF aircraft are subject to flight operations of increased risk compared to charter or RPT flights".

(c) "There are currently no legislative minimum flight crew licensing, experience or medical requirements for Australian CSF pilots …".

(d) "Although the two Australian CSF accidents are a statistically small sample, the fatal accident rate when compared to General Aviation (GA) is several multiples higher …".

(e) "Broadly, CSF pilots can operate from a variety of unfamiliar locations in varying weather conditions with no organisational oversight or safety support. They are highly reliant on their own personal skills, knowledge and standards. They are transporting passengers with a very limited understanding of the relative risks between CSF and charter operations".

(f) "Other operations such as charter (in small aeroplanes with low time pilots), parachuting and adventure flights are conducted under organisational supervision or within a regulated framework. Passengers on these flights are reasonably informed participants when compared to an air transport passenger or a CSF passenger. The required minimum hours are usually exceeded in normal practice. These flights operate A to A flights usually in good weather and reasonably familiar environments and conditions".

(g) "Noting these differences, it is apparent that *to provide a modicum of safety equivalence* between CSF and other operations carrying uninformed participants, CSF

pilot experience requirements should be increased above those for private pilots conducting a private operation" (emphasis added).

315 The December 2018 SFR then referred to certain options, which are set out earlier in these reasons.

316 I accept Mr Monahan's evidence that CASA's review, which culminated in the issue of the Instrument, was not solely a response to CSF-related accidents or incidents. Rather, the Instrument was made in response to concerns developed within CASA over some years that there appeared to be unique features associated with the conduct of CSFs, which made them different to standard private flights. I accept Mr Monahan's evidence that the circumstances of previous accidents were relevant in examining the nature of those unique risks, but CASA's review went beyond simply reviewing matters related to previous accidents.

317 I accept Mr Monahan's evidence that safety analysis conducted by CASA (which was an input into CASA's review, including the December 2018 SFR) included collaboration with experienced statisticians in the Strategic Analysis Section of CASA's Coordination and Safety Systems Branch. I find that the data available for that analysis included data concerning the number of flight hours conducted by different operations including commercial, charter, private and CSFs. I find that the analysis undertaken by CASA's Strategic Analysis Section used data provided by BITRE and incident and accident data made available to CASA by the ATSB. I accept Mr Monahan's evidence that the data made available to CASA by BITRE and the ATSB was taken into account by CASA in finalising the incident and accident data which was made available to the Director of Aviation Safety, Mr Carmody, for his consideration prior to the issue of the Instrument.

318 I accept Mr Monahan's evidence that CASA's data analysed three statistical figures by way of comparison. The first was the fatal accident rate which is a measure of accidents involving one or more fatalities. The second was the accident rate which is a measure of all accidents whether or not fatal. The third was the incident rate which is a measure of all incidents occurring in a particular sector of the aviation industry. (As stated above, the difference between an accident and an incident is that an incident does not involve or result in damage to the aircraft or to property on the ground.) I accept Mr Monahan's evidence that the CASA data analysis indicated to CASA that each of these three key statistical figures – the fatal accident rate, the accident rate and the incident rate – appeared to CASA to be higher in the CSF sector when compared to standard private flights.

319 I accept Mr Monahan's evidence that the CASA data analysis provided a basis to support a conclusion that the CSF operational environment involved higher levels of risk of operation than standard private operations. In this respect, Mr Monahan's evidence, which I accept, was that, although the CASA data analysis was not statistically conclusive, it indicated that the fatal accident rate in the CSF sector was 5.4 times higher than in standard private flights; that the accident rate in the CSF sector was 1.5 times higher than in standard private flight s; and the incident rate in the CSF sector was 4.5 times higher than in standard private flights.

320 Mr Monahan was challenged in cross-examination about whether this analysis could be said to evidence a statistically significant difference between CSFs and "standard private flights". Mr Monahan accepted that he had not put before the Court matters related to whether this data analysis could be said to have statistical significance.

321 However, in relation to this data analysis, Mr Monahan deposes that the ATSB provided the Raw Data held by it in relation to incidents and accidents involving CSFs coordinated by Angel Flight. This Raw Data is referred to earlier in these reasons. The Raw Data stated (among other things):

> By comparing accident rates and fatal accident rates for CSF with Private/Business/Sports (excluding gliding) over the past 10 years (2008 to 2017), CSF accident rate is 1.5 times higher than that for Private/Business/Sports, excluding the gliding accident rate. However, CSF's fatal accident rate is 5.4 times tha[n] for Private/Business/Sports (excluding gliding).

322 The Raw Data also noted that the incident rate in the CSF sector was 4.5 times higher than in standard private flights.

323 In this respect, in his second affidavit affirmed 13 November 2020, Mr Monahan also deposed that:

> Aviation is an inherently safe activity, in which incident and accident rates are traditionally low.
>
> (a) Against that background of generally low incident and accident rates, significant percentage increases in comparative incident and accident rates can be a cause for concern for CASA as the industry regulator, responsible for aviation safety.
>
> (b) Increases of between 1.5 and 5.4 times are considered to be significant by CASA and an indicator of a need for CASA to attempt to identify the potential causes for the increase.

324 I accept this evidence of Mr Monahan.

325 I accept Mr Monahan's evidence that the CASA data indicated that, having regard to a comparison of fatal accident, accident and incident rates between CSF and standard private flights, CSF operations appeared to be significantly less safe than standard private flights. I accept Mr Monahan's evidence that the significant increase in these comparative rates in the CSF sector tended to support a conclusion that the operational environment that confronted pilots conducting CSFs was more challenging and involved higher risk levels when compared with standard private flights.

326 I accept Mr Monahan's evidence that the comparative review of the CSF operational environment, conducted by Mr Roger Crosthwaite and his team in the Branch Manager Flight Standards Division of CASA, concluded that the CSF operational environment involved a set of human factor challenges which are not normally present in standard private operational flights. Those "human factors" refer to a range of variables which impact on human performance and decision making. They include fatigue, stress and mental workload. I accept Mr Monahan's evidence that these human factors are significant in aviation because they have the potential to impact on the safe performance of flying activities by pilots and in particular the quality of their decision making. That evidence was based on, among other things, Mr Monahan's extensive aviation experience, which included 3,500 hours of total aeronautical experience in military aviation, flying a range of single and twin engine "turbo-prop" and jet aircraft.

327 Mr Monahan gave evidence, which I accept, that, having considered the work undertaken by the Flights Standard Branch, Mr Monahan understood and believed that key human factors which were present in CSF operations were more frequently associated with the operational environment encountered by commercial pilots undertaking passenger carrying and commercial charter operations rather than standard private flights. I accept Mr Monahan's evidence that, unlike in the context of a standard private flight, commercial charter flights are regulated to impose higher levels of practical and theoretical training and greater hours of aeronautical experience on pilots who operate in that sector.

328 I accept Mr Monahan's evidence that the analysis undertaken by CASA gave Mr Monahan the understanding that the CSF operational environment was more challenging than the operational environment encountered during a standard private flight. I accept Mr Monahan's evidence that he determined that the safety associated with CSFs would need to be set at a higher level than that which applied to standard private flights.

329 I accept Mr Monahan's evidence that, when CASA is considering altering the safety standards that apply to a particular flying activity, there are four main "levers" that are generally used to make the appropriate adjustments. First, pilot training and experience. Second, ongoing pilot "recency" and proficiency requirements. Third, aircraft airworthiness. Fourth, medical standards. I accept Mr Monahan's evidence that he considered how to employ those regulatory levers to increase the level of safety associated with CSFs.

330 Mr Monahan also gave specific evidence about the clauses which ultimately appeared in the Instrument. I refer to this evidence in more detail below.

331 I accept Mr Monahan's evidence that the matters set out above were the basis upon which he recommended to the Director of Aviation Safety, Mr Carmody, that he sign the Instrument into effect which would introduce certain requirements to the CSF sector.

332 In light of the findings set out above, I find that the review undertaken by CASA provided ample evidence, and a reasonable basis to conclude, that the operational environment in the CSF sector entailed greater risk and a more challenging environment than the operational environment encountered during a standard private flight. I find that the conditions in the Instrument were directed to a very specific end, being safe navigation and operation, or the maintenance, of aircraft engaged in CSFs. I find that the conditions were made in good faith and based on CASA's and Mr Monahan's considerable experience in relation to aviation safety standards. I find that the conditions reflected what Mr Monahan described as the "main levers" that are generally used to make appropriate adjustments to aviation safety standards. Those levers include adjusting matters relating to pilot training and experience, ongoing pilot "recency" and proficiency requirements, and aircraft airworthiness.

The evidence of Dr Crees

333 I am not satisfied that the evidence of Dr Crees provides an adequate or satisfactory foundation for his opinion that it is not possible to claim that Angel Flight has a higher rate of fatal accidents than private, business or sports aviation flights. I am of this view for the following reasons.

334 First, Dr Crees is not an independent expert witness. He has been a volunteer pilot with Angel Flight since 2004 and a Director of Angel Flight since December 2019. In addition, Dr Crees was an advocate on behalf of Angel Flight in opposition to the Instrument.

335 Second, some of the data used by Dr Crees was from internal Angel Flight records. It was cited as "Internal data, Angel Flight Australia" in Dr Crees's report. That data was not exhibited to Dr Crees's report (which was annexure "MP24" to the affidavit of Marjorie Pagani filed 14 February 2020) or to his affidavit. It is not possible to know precisely what internal data Dr Crees had reference to in the preparation of his report and affidavit, nor is it possible to know how that data was collected, or to verify its accuracy. This is in contrast to certain publicly available data from the ATSB, which Dr Crees's report cited and appeared to accept as being accurate.

336 Third, Dr Crees's report states that "Angel Flight has been able to analyze [sic] its own data but does not have access to data from the other community service flight providers". Dr Crees accepted in cross-examination that the results that Dr Crees arrived at in his report were based on different data from the data used by CASA.

337 In these circumstances, Dr Crees's report should not be given meaningful weight. Even if some weight was to be placed on Dr Crees's report (and I do not give it meaningful weight), the main conclusion of Dr Crees's report was that it was not possible to say that there was any statistically significant difference between Angel Flight's relevant accident rates and the relevant rate for private/business/sports aviation flights. A key conclusion was that, as a result, it was not possible to claim that Angel Flight has a higher or lower accident rate. As will become apparent, I do not accept that statistical significance is a necessary foundation for the exercise of CASA's power under regulation 11.068 of the CASR.

338 As to the report of Dr Mortlock and Dr Baker (which was annexure "MP25" to affidavit of Marjorie Pagani filed 14 February 2020), that report was ruled inadmissible by the Ruling on Evidence.

Application of principle

339 On the basis of those factual findings, Angel Flight has not, in my opinion, established on the evidence that the exercise of power under regulation 11.068(1) was "unreasonable and/or not reasonably proportionate" in relation to the making of the Instrument as a whole or in respect of cll 7(c), 9 , 10 and/or 11 of the Instrument. There is, in my opinion, a rational connection between:

(a) the Instrument and the various conditions which it imposes on the holders of flight crew licences; and

(b) the purposes identified in s 3A of the *CA Act* (being establishing a "regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents ") and s 98(5A)(a) of the *CA Act* (namely, "matters affecting safe navigation and operation, or the maintenance, of aircraft").

340 In explaining why that is so, it is important to recall three matters relating to purpose. First, the main object of the *CA Act* is stated in s 3A:

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

341 Second, in "exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration": *CA Act*, s 9A(1). Third, relevant instruments issued by CASA must be "in relation to … matters affecting the safe navigation and operation, or the maintenance, of aircraft": *CA Act*, s 98(5A)(a).

342 In light of those matters, there is an obvious emphasis on safety and an express emphasis on prevention. "Prevention" means "[t]he action of keeping from happening … an anticipated event …" or "[a]ction intended to provide against an anticipated problem or danger": *Oxford English Dictionary* (Oxford University Press, March 2021). There is also an express emphasis on *enhancing* the safety of civil aviation. "Enhancing" in this context refers to "rais[ing] the level of" civil aviation safety: ibid.

343 Having regard to those matters of purpose and context, there is a rational and reasonable basis connecting the conditions imposed by the Instrument, the purposes of the *CA Act* and the requirement in s 98(5A)(a) of the *CA Act* (that is, that the relevant conditions relate to "matters affecting the safe navigation and operation, or the maintenance, of aircraft "). That basis is to be found in two places. First, in the Explanatory Statement which accompanied the Instrument. Second, in the evidence of Mr Monahan.

The Explanatory Statement

344 As to the Explanatory Statement, at page 1, it relevantly provides as follows:

> **Purpose**
>
> The Civil Aviation Safety Authority (CASA) *has assessed* that community service flight operations have a higher risk of an accident or incident due to the existence of risk factors that are not usually present in baseline private operations. The *purpose* of the instrument is to *mitigate this risk* by placing conditions on flight crew licence

holders conducting such operations that relate to requirements on the pilot (licence requirements, aeronautical experience, recency and medical fitness), operational and notification requirements and aircraft maintenance requirements.

(Emphasis added.)

345 In light of the evidence of Mr Monahan, I accept that the assessment of CASA referred to in this statement of purpose was sufficiently sound. A reasonable regulator, having regard to the material that was before CASA, could reasonably have assessed that "community service flight operations have a higher risk of an accident or incident due to the existence of risk factors that are not usually present in baseline private operations ". As stated in this Explanatory Statement, I accept that the "purpose of the [Instrument] is to mitigate this risk by placing conditions on flight crew licence holders".

346 The Explanatory Statement continued:

Overview of instrument

Pilots can operate from a variety of unfamiliar locations in varying weather conditions with no organisational oversight or safety support from a certificated air operator. Pilots conducting such operations might become subject to self-induced pressure to start or complete a flight because of a passenger's medical condition.

The lack of organisation safety risk mitigators and the reliance on individual pilot assessments regarding a pilot's acceptance of a volunteer flight, and the flight's commencement or continuance, results in an increased need for pilots in command to be experienced and operationally recent. CASA has assessed that persons travelling on aircraft conducting community service flights are subject to flight operations of increased risk compared to charter or regular public transport flights. Although such persons are informed that these flights are not charter or regular passenger transport flights, there remains doubt regarding whether a non-aviation professional adequately understands the specific risks posed by this kind of operation.

Since 2011, community service flight accidents have resulted in 6 fatalities. To take account of the elevated risks, *CASA considers it is appropriate to establish a regulatory baseline that provides clarity regarding an appropriate minimum safety standard*. The instrument is intended to introduce reasonable and proportionate additional safety measures.

The instrument places conditions on the licences of flight crew members that conduct community service flights. The conditions introduce safety measures in relation to pilot licensing, medical fitness, and aeronautical experience. Operational requirements include that community service flights at night must be conducted using instrument instead of visual procedures. A community service flight can only be conducted in an aeroplane, and aeroplanes with a lower standard of airworthiness are excluded. There are also enhanced maintenance requirements for some aircraft.

(Emphasis added.)

347 In relation to these statements, based on the evidence of Mr Monahan, I accept that there was evidence which provided a rational and reasonable basis for the statements in this "Overview

of instrument" section. It is apparent from the above extracts of the Explanatory Statement that a rational connection exists between the conditions imposed by the Instrument, the purposes in the *CA Act* (referred to above), and the requirement identified in s 98(5A) of the *CA Act* (that is, that the condition relates to a "matter affecting the safe navigation and operation, or the maintenance, of aircraft").

348 The Explanatory Statement explains that the purpose of the Instrument is to mitigate CSF operational risk by placing conditions on flight crew licence holders conducting those operations. Those conditions relate to pilot licence requirements, aeronautical experience, "recency", level of fitness, operational and notification requirements and air maintenance requirements. It is readily apparent that such conditions have a direct and obvious connection to "the safety of civil aviation, with particular emphasis on preventing a viation accidents and incidents" (*CA Act*, s 3A) and "the safe navigation and operation, or the maintenance, of aircraft", which are the matters in s 98(5A)(a) of the *CA Act*.

349 In this respect, each of the matters referred to in the "Overview of instrument" squarely relate to the topics of pilot training and experience, ongoing pilot "recency" and proficiency requirements and aircraft airworthiness. Moreover, Mr Monahan's unchallenged evidence was that, when CASA is considering altering the safety standards that apply to a particular flying activity, these matters are three of the four main "levers" that are generally used to make the appropriate adjustments.

350 In addition, the Explanatory Statement under the heading "Overview of instrument" identifies the manner in which CSFs are conducted. It observes that these flights are conducted by volunteer pilots under conditions that can be challenging. It observes that pilots can operate from a variety of unfamiliar locations and varying weather conditions with no organisational oversight or safety support from a certificated air operator. It further observes that pilots conducting such operations might become subject to a self- induced pressure to start or complete a flight because of a passenger's medical condition. As stated above, on the evidence, there was a rational and reasonable basis for CASA to make those observations, and these factors are all relevant to the safe navigation and operation of aircraft in the CSF sector and the express purposes of the *CA Act*.

351 The Explanatory Statement further explains that the lack of organisational safety and "risk mitigators", and the reliance on individual pilot assessments, results in an increased need for pilots in command to be experienced and operationally up-to-date. The conditions in the

Instrument are directed to increasing aeronautical experience and the currency of that experience.

352 The Explanatory Statement at page 2 also identifies that, at least as assessed by CASA, CSFs have elevated risk and that the conditions imposed by the Instrument are intended to introduce reasonable and proportionate additional safety measures in relation to the licencing, medical fitness and aeronautical experience of pilots who operate in the CSF sector.

353 The Explanatory Statement identified that, since 2011, community service flight accidents have resulted in 6 fatalities. As I understood it, that is a statement of historical fact.

354 These are all statements from a regulator of air safety to which exper ienced aviation safety professionals have contributed. Angel Flight also accepts that these matters were expressed in good faith. In such circumstances, one can fairly conclude that the matters set out in the Explanatory Statement are overtly rational and reasonable.

355 I do not accept Angel Flight's submissions that it is necessary for CASA to demonstrate by some statistical or empirical analysis that a risk factor exists to justify the validity of a condition in an Instrument made under regulation 11.068(1). I do not accept that establishing a statistical significant difference between two subsectors of the aviation of industry is necessary to sustain the validity of an instrument issued under regulation 11.068 of the CASR. That is to impose a burden upon CASA beyond that required by standards of reasonableness and rationality and the requirements in s 98(5A) of the *CA Act* and regulation 11.068 of CASR. It is sufficient if a rational and reasonable basis exists for CASA to conclude that matters identified in relation to CSFs – such as operating in an unfamiliar location or operating an aircraft in varying weather conditions with no organisational oversight or safety support from a certificated air operator – imposes an elevated risk which the conditions in the Instrument reasonably seek to address and that they are matters affecting the safe navigation and operation, or the maintenance, of aircraft. It is sufficient if the conditions reasonably advance the purposes in the *CA Act* referred to above or if there is a sufficient connection between the conditions and the relevant objectives of the *CA Act*.

356 In this respect, Angel Flight's submissions tended to indicate that, to be valid, it was a requirement for CASA to isolate particular causal links between the circumstances of the CSF sector and the need for the conditions in the Instrument. Angel Flight's submissions tended to indicate that CASA was required to engage in a process of formulating a testable

hypothesis concerning possible causal links, testing that hypothesis through data collection and analysis, and generating an assessment which is likely to be true, including by establishing an acceptable degree of statistical significance.

357 By way of example, in oral closing submissions, senior counsel for Angel Flight submitted:

> MR WALKER: … [T]here were no empirical data or analyses from empirical data or analyses that provided differences with statistical significance which would have, in themselves, justified consideration being given to a differential treatment for the imposition of conditions directed to the all-important purpose of safety.
>
> Now, I accept that pointing to the absence of such material or reasoning, what I will call the empirical approach, is pointing to something which, if present, would plainly have justified, in a way that judicial review would never question, the making of an instrument. And I accept that it's not simply a matter of inverting that and saying, in its absence, therefore, there cannot be an exercise of power lawfully. However, where that is lacking, and if we are correct in the further step of persuading your Honour that there is nothing else that provides the evidently intelligible connection between outcome and purpose so as to satisfy the requirements of the power, then, in our submission, we are not merely well on our way, but we have reached the position where your Honour should vindicate that minimal but critical requirement of rational justification in the exercise of serious administrative powers …
>
> MR WALKER: … [I]n our submission, what you ought to find in accordance with the way that we have written this in the two written submissions in-chief on this point and in the summation that you find in our reply written submission on this point, that there was never an endeavour to connect the imposition of conditions by this instrument in their particular respects with anything that could be learned from the incidents, accidents and fatal accidents about which you have heard … [T]here is nothing in the instrument that can be said to be derived, let alone justified, by lessons learned from any incident, accident or fatal accident or the aggregate of them. There is nothing statistical, in any sense of that word, concerning, for example, numbers of passengers; neither is there anything statistical, whatever one means by that word, about pilot experience, including recency of landings, etcetera …
>
> MR WALKER: … [I]t is equally the case that the idea of simply applying something because it is from overseas without at least something in the nature of investigation, calibration and understanding of comparability would … never be reasonable …
>
> MR WALKER: … [W]hat I hope to persuade your Honour [of] is that once one establishes that there was nothing about the actual accident experience that either produced statistically significant differences between the sectors said to be compared, that in any event, that was an entirely unstable comparison …, totally unstable basis for a comparison which, in any event, produces a difference that cannot be said to be statistically significant …
>
> Then we come to the more pointed lack of any connection … between what was available about the accidents … and … in any of the groups: the CSF group or the private aviation group … [T]here's no connection … between any data or empirical analysis and the content of the instrument, then one seems to be driven in this case, by default, to what I will call the overseas experience. Now, the overseas experience, as your Honour knows, doesn't produce what I'm going to call a parallel exercise, namely, where the same framework of reasoning is present, but with the great advantage of there being, in the overseas cases, empirical data to supply the absence

> that exists in this country …
>
> But when it comes to calling in aid overseas experience, … [y]ou won't find, with respect, a schema of reference to overseas experience by Mr Monahan which points out why certain experience … should be regarded as casting any particular light let alone unfavourable light concerning the safety record of the Australian operations … [Y]our Honour will look in vain for anything in the nature of empirical studies available for the Australian decision-makers from overseas distinguishing in a meaningful way between flights that can be treated as equivalents of CSFs and other flights which can be treated as a sensible comparator for that …
>
> MR WALKER: … [W]e are left with what, in our submission … is nothing other than well-meaning intuition [as the basis for the Instrument].

358 In reply, senior counsel for Angel Flight further submitted as follows:

> MR WALKER: … [The] material does not single out in a way that explains the peculiar risk factor which is the foundation of the reasoning for the instrument. This instrument is not one that says, "For all we know this particular risk factor is common to all kinds of aeronautical operations but we choose, for reasons that a court can't examine by judicial review, to regulate only one segment of the activities" … We are left with the repeated assertion, in the material leading up to the making of the instrument and the ex post facto justification in the evidence, that there is to be discerned, we would respectfully submit, by not much more than surmise that there may be – that is, a hypothesis is raised – something peculiar about the circumstances or conditions of the CSFs which provides the justification for a CSF-specific instrument … Once it is … accepted that that hypothesis was never the subject of any testing, there were no data that were gathered for the purpose of examining that hypothesis, then one is simply left with the possibility that it is true, just as there is the possibility it is not true … [O]ur submission is that when the approach was taken of positing a peculiarity of CSFs in the face of a lack of data and analysis that meant that that may or may not be true, with no indication of a likelihood one way or the other, one's left scraping the bottom of the barrel in terms of the intellectual justification for what happened …
>
> [H]ere, there is a plain statement of intent to address a peculiar risk factor, but the peculiar risk factor is not demonstrated, and of course then the connections all fall apart for the reasons examined in cross-examination that none of those provisions of the instrument address something which any analysis of the any of the accidents, incidents, or fatal accidents might have revealed one way or the other. That's the reason why, in our submission, [when] all proper weight [is] given to the experience of those who considered the making of this instrument, and to overseas … material, … it doesn't make out the peculiar risk factor, let alone the matching of the instrument to meet a peculiar risk factor.

359 I do not accept this type of methodology was required. This is for two reasons. First, there is no indication in the text of the relevant statutory materials that such an assessment, which is largely based on the methods of applied natural science, is necessary. Second, the authorities provide no indication that such methods are required.

360 As to the text of the relevant statutory materials, the "regulations may empower CASA to issue instruments in relation to … matters affecting the safe navigation and operation, or the

maintenance, of aircraft": *CA Act*, s 98(5A)(a). In *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, Toohey and Gaudron JJ at 374 described the words "in relation to" as being "an expression of broad import". Justice McHugh stated at 376 that the "prepositional phrase "in relation to" is indefinite", but, "subject to any contrary indication derived from its context or drafting history, it requires *no more than a relationship, whether direct or indirect, between two subject matters*" (internal quotations in the original; emphasis added).

361 Having regard to those matters, I do not accept that the words "in relation to" in s 98(5A) of the *CA Act* required a connection between the Instrument and "matters affecting the safe navigation and operation, or the maintenance, of aircraft " that was supported by statistical significance or the methods of analysis which were advanced by Angel Flight. It was sufficient if there was "a relationship, whether direct or indirect, between" the two relevant "subject matters". There was, in particular, no requirement to establish that there was a statistically significant difference between the relevant accident and incident rates of CSFs and the relevant rates of other operations. There was no requirement that the conditions in the Instrument be supported by methods that are coextensive with natural science.

362 As to the position in relevant authorities, Dixon J (as his Honour then was) in *Williams v Melbourne Corporation* (1933) 49 CLR 142 (at 155) stated that "the true character of the by-law may … appear to be such that it *could not reasonably have been adopted* as a means of attaining the ends of [the relevant] power" and, in such a case, "the by- law will be invalid" (emphasis added). In *Pestell*, Menzies J stated at 323 that a "sound opinion" is one that is "right", but the "validity of a [relevant] rule *does not depend* on the soundness of a[n] … opinion"; rather, "it is sufficient if the opinion expressed is one *reasonably open*" (emphasis added). In *Adelaide Corporation*, French CJ described the relevant test as requiring "a rational relationship between the purpose for which the power is conferred and the laws made in furtherance of that purpose": *Adelaide Corporation*, [58]. Chief Justice French also stated that the "reasonable proportionality test of validity" was, "in substance, whether the regulation goes beyond any restraint which could be reasonably adopted for the prescribed purpose": ibid. Justice Hayne (at [117]-[118]) described the test as involving "a question of degree and judgment" and stated that the relevant conclusion:

> is to be reached paying *due regard to "accepted notions of local government"* and the fact that *"[m]unicipalities and other representative bodies which are entrusted with power to make by-laws* are familiar with the locality in which the by-laws are to operate and are acquainted with the needs of the residents of that locality". *It is not to be assumed (and no reason was given to the contrary in this appeal) that any more*

confined understanding of a by-law making power should be preferred.

(Emphasis added.)

363 In light of those authorities and the matters referred to, I do not accept Angel Flight's submissions as to the methods of analysis which were said to be required for the purposes of making an instrument under regulation 11.068 of the CASR. I am satisfied that a reasonable regulator, having regard to the material that was before CASA, could reasonably have adopted the conditions in the Instrument as a means of attaining the ultimate end of "maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents": *CA Act*, s 3A.

364 This position is reinforced by the evidence of Mr Monahan.

The evidence of Mr Monahan and the particular conditions

365 On the evidence of Mr Monahan and the findings that I have made in respect to that evidence, I am satisfied that it was reasonable for CASA to form the view that the CSF sector faces higher risks than standard private flights by reason of, amongst other things:

(a) pilots conducting CSFs operating from unfamiliar locations and in varying weather conditions;

(b) the absence of adequate organisational oversight of safety support from a certified air operator, and a lack of adequate organisational safety risk "mitigators"; and

(c) pressure on pilots that may result from self-induced pressure to start or complete a flight because of a passenger's medical condition.

366 Mr Monahan and his expert team within CASA considered that these factors elevated the risk of CSF operations when compared to standard private flight operations. It was accepted by Angel Flight that Mr Monahan and his team are, in fact, experts in air safety with extensive experience, and I so find. In light of Mr Monahan's evidence, I find that CASA considered the CSF sector in a detailed way, made an assessment and imposed certain conditions. Those conditions are based on, and consistent with, the typical "levers" (referred to above) which CASA employs when regulating safety. Those conditions are rationally connected to the object of the *CA Act* and the purposes identified in s 98(5A) of the *CA Act*, being matters affecting the safe navigation and operation, or the maintenance, of aircraft. I am of that opinion for the reasons that follow.

367 In relation to the passenger restriction conditions contained in cll 7 (1)(c) and 10(a), Mr Monahan said those clauses were introduced in order to limit exposure to the higher risks associated with CSFs to those who had a legitimate need, connected to the purpose of the flight, to travel on that flight and not unnecessarily increase the "human factor" challenges faced by pilots conducting CSF. I accept the evidence of Mr Monahan that additional passengers is a source of pressure on pilots and that limiting the number of passengers limits the amount of pressure which a pilot may have to deal with in flight on account of passenger behaviours. I accept Mr Monahan's evidence that he considered that a limit of 5 passengers was a reasonable number, which had regard to Mr Monahan's understanding at the relevant time that CSFs involved the transport of one patient and potential support persons.

368 Clause 8 imposes a condition on a flight crew licence that its holder must not pilot an aeroplane operated for a CSF if the aeroplane is an excluded aeroplane. The excluded aeroplanes include "an amateur-built aircraft accepted under an Amateur Built Aircraft Acceptance" (Instrument, cl 8(2)(a)(ii)), an aeroplane in respect of which "an experimental certificate" is in force (Instrument, cl 8(2)(b)), or an aeroplane that "is not registered" (Instrument, cl 8(2)(c)). That condition is plainly directed to ensuring that, based on CASA's expert knowledge and experience in aviation safety, certain aircraft should not be used for a CSF. It is tolerably clear that CASA has assessed that those types of aircrafts entail particular risks which should not be present in the CSF sector. The categories of "excluded aeroplanes" are limited. The condition in cl 8 is not an absolute prohibition. I was also not taken to any evidence which would suggest that the use of the aeroplanes excluded by cl 8 was reasonably necessary for CSFs. I was not taken to any evidence which suggests how cl 8 is unreasonably broad.

369 The aeronautical experience requirement in cl 9, which increases the minimum requirement of aeronautical experience, is, in Mr Monahan's view, frequently used by CASA to increase aviation safety, with the level of required experience being commensurate to the complexity of the flying task and the risk exposure. I accept Mr Monahan's evidence that safe navigation and operation was the purpose for the introduction of the increased aeronautical experience requirements in cl 9 of the Instrument. In this respect:

(a) I accept Mr Monahan's evidence that the aviation regulatory regime frequently imposes minimum requirements in relation to aeronautical experience as an entry level requirement to the holding of a particular authorisation, or the performance of a

particular activity. I accept Mr Monahan's evidence that provisions of that nature are based on the assumption that minimum levels of particular kinds of flying experience are necessary before a person can safely be entrusted to perform particular flying activities. I accept Mr Monahan's evidence that, in imposing aeronautical experience requirements, Mr Monahan took into account (among other things) the aeronautical experience requirements imposed by large charitable or public benefit flight organisations in the United States, Canada and New Zealand. I also accept that Mr Monahan took into account guidance from the US Aircraft Owners and Pilots Association (**AOPA**) which noted that pilots with less than 200 hours of total experience should refrain from engaging in volunteer flight operations because they are involved in significantly more accidents than pilots with more than 200 ho urs experience.

(b) As to clause 9(1)(a) of the Instrument, it generally requires that, prior to undertaking a CSF, a pilot must have conducted one landing in the class or the type of the aircraft to be used for the CSF. I accept Mr Monahan's evidence that take-off and landing are two of the highest risk phases of flight and accidents in the approach and landing phase of flight are more common. I accept Mr Monahan's evidence that the requirements imposed in clause 9(1)(a) of the Instrument were intended to serve two safety purposes. First, they were directed to ensuring that the pilot's skills in those phases of flight had been used in recent practice within the 30 days before the relevant flight. In this respect, I accept that Mr Monahan had regard to AOPA Guidance which recommends that volunteer pilots conduct at least one landing in the 30 days prior to a volunteer flight. Second, the requirements were directed to ensuring that, if the pilot is unfamiliar with the relevant aircraft type to be used for the CSF, the pilot was to familiarise himself or herself with the critical take-off and landing procedures for the relevant aircraft prior to conducting the CSF.

(c) As to clause 9(1)(b) of the Instrument, it generally requires a pilot to have at least 10 hours flight time in the relevant aircraft type before conducting a CSF under the Visual Flight Rules (**VFR**) in that aircraft type. I accept Mr Monahan's evidence that this clause was intended to ensure that the relevant pilot is sufficiently familiar with operational procedures and the handling characteristics of the aircraft to be used in the CSF in order to be in a position to confidently manage any in- flight occurrence. I accept Mr Monahan's evidence that, based on Mr Monahan's experience as a pilot,

Mr Monahan was aware that increases in pilot experience in the operation of a particular aircraft type can be critical in all stages of a flight, and the familiarity from that experience can save essential seconds in managing or responding to unexpected situations.

(d) As to clause 9(1)(c), it generally requires 20 hours of flight time in the aircraft if the CSF is to be conducted under the Instrument Flight Rules (**IFR**). I accept Mr Monahan's evidence that the intent of cl 9(1)(c) was similar to the inte nt of cl 9(1)(b). I accept Mr Monahan's evidence that the higher experience threshold for CSFs conducted under the IFR was due to IFR operations being much more complex than VFR operations. I accept Mr Monahan's evidence that IFR operations are conducted in "instrument meteorological conditions" (**IMC**), in which the pilot's ability to navigate and control the aircraft by observing the horizon and terrain below the aircraft is substantially (or potentially totally) obscured by cloud.

(e) As to clause 9(1)(d), it generally provides that a pilot must have 25 hours of flight time as a pilot in command of a multi-engine aeroplane before conducting a CSF in such an aircraft. I accept Mr Monahan's evidence that multi-engine aircraft are generally more complex and of higher performance than single engine aircraft, which has particular relevance to managing the failure of one engine in a multiengine aircraft, where the pilot must be familiar with the aircraft in order to fly it safely on the remaining engine.

(f) As to cll 9(2) and 9(3), those clauses impose additional requirements on private pilots. They generally require that the private pilot has aeronautical experience that includes at least 400 hours of flight time conducted in an aeroplane or a helicopter, and at least 250 hours of flight time as pilot in command of an aeroplane or a helicopter. I accept Mr Monahan's evidence that it takes between 35 and 40 hours of flight training to obtain a private pilot licence (**PPL**) and PPL holders fly considerably less than commercial pilots. I accept Mr Monahan's evidence that the 400 hours of total flight time was selected because it is 50 hours beyond the level identified in certain studies as the point at which the accident rate for inexperienced pilots starts to dec line. In addition, it is broadly consistent with the total flight time requirements for CSF pilots imposed by charitable and public interest flight coordinators in the United States, Canada and New Zealand. I accept Mr Monahan's evidence that the additio nal requirement of 250 hours as the "pilot in command" is designed to ensure that the

total of 400 hours of accumulated flight time comprises more than 50% of flight time in which the pilot has been the "pilot in command" of the aircraft. In this respect, I accept Mr Monahan's evidence that flying an aircraft as the "pilot in command" is a different experience, with additional, important responsibilities, when compared to flying while under instruction with a flight instructor on board, or as a co-pilot with another pilot on board who is in command of the aircraft. I accept Mr Monahan's evidence that these requirements were designed to ensure that CSF pilots who are PPL holders have sufficient experience in making command decisions to be entrusted with the safe conduct of a CSF.

370 As to clause 10(b) of the Instrument, it generally prevents operation of an aircraft engaged in a CSF under the VFR at night. I accept Mr Monahan's evidence that flights under the VFR at night are more challenging than VFR flights conducted by daylight. I accept that Mr Monahan took into account AOPA Guidance which noted that night time operations (whether under the VFR or the IFR) are associated with higher risks than day time operations.

371 Clauses 10(c) and (d) of the Instrument require pilots to lodge a flight notification with Air Services Australia, identifying the flight as a CSF, and to record the flight in their personal log books along with a notation identifying the flight as a CSF. I accept Mr Monahan's evidence that those measures were designed to assist CASA to collect data to establish the numbers of CSFs being conducted in Australia, who was flying the CSF and what aircraft are being used. I accept Mr Monahan's evidence that such data will provide CASA with access to a more complete and meaningful range of data about the conduct of CSFs, for use in future analysis of operational safety trends affecting CSF operations, and to inform future safety decisions relating to CSFs.

372 Clause 11 of the Instrument imposes maintenance requirements on CSF. The imposition of maintenance requirements has a direct and rational connection to the purposes identified in s 3A of the *CA Act*, and s 98(5A) of the *CA Act* which expressly refers to "the maintenance of … aircraft". Section 9(1)(c) of the *CA Act* imposes on CASA the function of conducting the safety regulation of civil air operations by developing and promulgating aviation safety standards where "the safety of air navigation [is] the most important consideration": *CA Act*, s 9A(1).

373 In this respect, I accept Mr Monahan's evidence that he expected that the imposition of this requirement, requiring CSF aircraft to be maintained to at least the "aerial work standard",

would increase the safety standards applicable to CSFs because the likelihood of a mechanical- related occurrence increases as parts and components wear. Mr Monahan deposes that private aircraft, maintained in accordance with Schedule 5 of the *Civil Aviation Regulations 1988* (Cth) (**CAR**), must have an annual inspection, which is referred to as a periodic inspection. Those aircraft can fly an unlimited number of hours within that 12-month period. By contrast, aircraft engaged in commercial "aerial work" activities, which include commercial activities such as aerial mustering, aerial spotting and aerial surveying, and whose owners have selected CAR Schedule 5 as their system of maintenance, must have a periodic inspection every 12 months or 100 hours, whichever occurs first. I accept that Mr Monahan considered that the Instrument should incorporate a clause requiring CSF aircraft to be maintained to at least the "aerial work standard". I accept that, in making that recommendation, Mr Monahan had regard to the Federal Aviation Administration of the United States (**FAA**)'s Policy Clarification on Charitable Medical Flights and FAA policy which imposes a condition concerning higher aircraft airworthiness requirements.

Disposition of Ground 5

374 By way of summary, on the evidence, I do not accept that the particular clauses of the Instrument were not each reasonably and rationally connected to the purpose of the *CA Act*. The Instrument could reasonably be adopted in furtherance of the relevant statutory purpose. Put differently, I do not accept that the Instrument could not reasonably have been adopted as a means of attaining the ends of the relevant power. There is a reasonable and rational connection between each of the measures, the purposes of the *CA Act*, and the safe navigation and operation, or maintenance, of aircraft. CASA's exercise of power under r 11.068(1) was not unreasonable or lacking reasonable proportionality in the relevant sense.

375 For these reasons, I reject Ground 5.

DISPOSITION

376 I make the following orders:

(a) The applicant's further amended originating application dated 19 August 2020 will be dismissed.

(b) The applicant pay the respondent's costs of and incidental to the application.

I certify that the preceding three hundred and seventy-six (376) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson.

Associate:

Dated: 11 May 2021

Annexure F

From: Marjorie Pagani
Sent: Friday, 22 March 2019 6:12 PM
To: Monahan, Chris

Subject: Re: CASA reply to Angel Flight Urgent Flight Enquiry of 21 March 2019 [SEC=UNCLASSIFIED]

Chris

I shall circulate this to all pilots as the official CASA interpretation of the legislation.

Marjorie

Marjorie Pagani BA(Hons), LLB, Grad Dip CD, FDRP
Chief Executive Officer
Angel Flight Australia
PO Box 421, Fortitude Valley QLD 4006
Phone: 07 3620 8300 Fax: 07 3852 6646 Mobile: 0418 878 326
Email: Website: www.angelflight.org.au

On 22 Mar 2019, at 16:00, Monahan, Chris wrote:

UNCLASSIFIED

> Ms. Pagani,
>
> My advice to you was that it is not the intent of the instrument to prevent pilots in command of community service flights (CSFs) from making reasonable judgements about whether a prospective passenger may properly be recognised as a person necessary or important as a source of support to the patient being transported.
>
> Rather, the intent is minimise the risks to which people taking advantage of CSFs are exposed, in part by ensuring that all of the people on board the aircraft have a genuine and legitimate need to be there, having regard to the nature and purpose of the flight and the particular needs of the patient.
>
> As formulated, we believe the terms of the instrument allow for a responsible exercise of discretion on the pilot's part, informed by an appreciation of all relevant considerations, including such advice as Angel Flight might provide.
>
> For reasons I am sure you will appreciate, it would be inappropriate for CASA to provide you with what would amount to specific advice about whether a particular, or particular kind, of passenger might or might not properly be carried on a particular flight. This, as said, is properly a matter for the pilot in command.
>
> Kind Regards
>
> Chris Monahan

Chris Monahan
Executive Manager
National Operations and Standards
CASA\Aviation Group
p: 02 6217 1625 m: 0417 281 699
16 Furzer Street, Phillip, ACT 2606
GPO Box 2005, Canberra ACT 2601

Annexure F

www.casa.gov.au

From: Marjorie Pagani
Sent: Friday, 22 March 2019 4:27 PM
To: Monahan, Chris ; ; Carmody, Shane

Subject: Fwd: CASA reply to Angel Flight Urgent Flight Enquiry of 21 March 2019 [SEC=UNCLASSIFIED]

Subject: Fwd: CASA reply to Angel Flight Urgent Flight Enquiry of 21 March 2019 [SEC=UNCLASSIFIED]

The pilot and Angel Flight (not covered by the legislation), are to assess, remotely, each nominated support person as falling within the legislation. So do we and the pilots have to cross-examine the patient as to whether the accompanying children are necessary for the physical or mental wellbeing of the patient? That is, to assess whether they fall into the category of support or assistant persons . Are we or the pilots to adopt a role of assessing psychologist?

This is impossible, unworkable and grossly unfair. Putting the responsibility on the pilots is manifestly unjust and impracticable. Angel Flight is not responsible so do we give the patient details to the pilot and ask him or her to carry out the assessment prior to agreeing to carry the passenger?.

The response by Chris Monahan is unacceptable, confusing, and gives no practical or workable guidance.

Marjorie

Subject: Re: CASA reply to Angel Flight Urgent Flight Enquiry of 21 March 2019 [SEC=UNCLASSIFIED]

Thank you for replying Chris. In short you have appeared to confirm that the children as advised are prohibited from travel, and CASA has the expectation that the patient will travel with the volunteer pilot, and the infants will travel separately (including the 7 month old baby), by road, RPT or charter. So the patient goes with the AF volunteer and the babies go on a separate flight or drive.

With respect, that is an absurd proposition. Further, it does not solve either the breastfeeding problem or the unattended sibling issue.

Angel Flight has not in its history chartered an aircraft as well you are aware.

You appear to be leaving the legislative interpretation to the pilots. In this respect, please note that your published checklist differs from the Instrument

Marjorie

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Annexure F

On 22 Mar 2019, at 13:57, Monahan, Chris wrote:

UNCLASSIFIED

Ms. Pagani,

Thank you for your email of 21 March 2019 regarding an Urgent Flight Inquiry regarding Community Service Flights. On behalf of the CASA Director of Aviation Safety and Chief Executive Officer, Shane Carmody, I have been asked to respond to your request for clarification of aspects of CASA's instrument 09/19, which sets down certain conditions that apply to pilots conducting community service flights (CSF).

The purpose of that instrument is to establish new minimum standards to improve the safety of CSF in light of CASA concerns with the safety record of these particular kinds of operations. CASA considers that instrument 09/19 provides sufficient flexibility for the pilot and Angel Flight to make suitable and reasonable risk-based decisions.

CSF flights should be limited to the minimum number of people required and CASA recognises that not all legitimate sources of support are the same. Instrument 09/19 limits persons accompanying the patient being flown to those providing support. The instrument also contemplates additional operational crew e.g. a mentored pilot if required.

The minimum for any CSF flight with a support person would be three people, the pilot, the patient and the support person. As you are aware, CASA has provided for the pilot and five to allow for circumstances such as an additional patient and/or support persons. This would allow a maximum of the pilot and five passengers on any given CSF and should cater for most circumstances.

The current instrument contemplates the scenarios you mention in your recent letter. It also provides for circumstances where the carriage of more than one person, broadly described as a support person, might be appropriate.

The CSF instrument is directed towards pilots. If the pilot has conducted his/her own risk assessment and reasonably believes the nominated support person(s) are important or necessary, the instrument provides sufficient flexibility for the pilot to make that decision. CASA would expect that before accepting additional risk that the pilot would engage with Angel Flight to ensure that his or her decision is in keeping with Angel Flight's expectations.

I understand that Angel Flight sorties are planned and scheduled well in advance, often by several weeks and with a two-week minimum. More often than not, patients and their families (carers) will know when they'll be travelling and how long they'll be away long before the appointment date, and normally with sufficient time to make necessary arrangements for those who cannot accompany them on an Angel Flight sortie. Prior to endorsing additional passengers on board, and in the interests of risk mitigation, CASA would expect that the pilot and Angel Flight would exhaust other viable options to support the patient. Our understanding of the Angel Flight model suggests that other options including ground transportation, an RPT flight or a charter flight or combinations thereof are available and often used when flights are cancelled on short notice. It is reassuring that Angel Flight has this flexible infrastructure in place to address those rare circumstances that are not expressly specified in the instrument, but which are fairly contemplated by the design of the instrument to cover a broad range of circumstances.

Annexure F

In conclusion, CASA has written the instrument as flexibly as possible to cope with circumstances that might arise. Invariably there will be special cases and Angel Flight, together with volunteer pilots, will need to use judgement and assess these on their merits. The instrument allows for the infrequent situation where additional passengers could travel where it is believed that it is in the interest of the patient's wellbeing that those additional passengers are on board the aircraft. On these occasions the pilot in command of the flight and Angel Flight would need to satisfy themselves that the support provided by the additional passenger was in keeping with the compassionate object of the CSF.

I note that your original email was also addressed to the Deputy Prime Minister, the Honourable Michael McCormack MP. Therefore, I have included the same email address in this reply for the attention of the Deputy Prime Minister for his awareness.

I trust this information is of assistance.

Kind Regards,

Chris Monahan

Chris Monahan
Executive Manager
National Operations and Standards
CASA\Aviation Group
p: 02 6217 1625 m: 0417 281 699
16 Furzer Street, Phillip, ACT 2606
GPO Box 2005, Canberra ACT 2601

www.casa.gov.au

From: Marjorie Pagani
Sent: Thursday, March 21, 2019 3:37 pm
To:
Cc: Carmody, Shane
Subject: URGENT RE Flight Enquiry
Dear Michael and Shane
The problems with your pilot restrictions on CSF flight are rapidly increasing. We have had two significant issues arise today. We have now a real problem with breast-feeding mothers who aren't allowed to take their infant, and also with the refugee families – where the mother takes the children as there is no one else to look after them.
Unless you do something about this urgently, we will be obliged to tell them that we can't carry them because of these rules imposed by CASA and supported by the government.. The next flight (Monday) with a refugee mother was already organised before 19th. They are now asking what they can do with the sibling of the small child being taken by his mother for treatment. The breastfeeding mother with the 7-month old twins is waiting for our response as to why the mother can't take the other twin (as of course, he does not qualify as an assistant/carer or support person for the patient, which is the first of the twins). Likewise in the refugee family problem above, we can't take the small brother because neither does he qualify as a support/assistant carer for the patient (which, in that case, is his sibling as well.)
Shane, please do not respond with 'they can take five passengers'. Mr Gibson said on ABC radio last night he knew nothing of this rule prohibiting anyone but the patient, supporter, and assistant being carried (exact words "well, that's the first I've heard of it"). The rules says clearly that apart from operating crew, the only persons allowed on board are the patient and the person/s whom they bring as supporters or assistants. Clearly these infants don't qualify. I have already explained this problem to you Shane, but to no avail. Your comments to the public, to the Minister, and to the court that these changes won't have an effect on Angel Flight are plainly wrong, however, you

Annexure F

have failed to take into account the very real effect on these rural people. The single-parent families are also affected as they rarely have anyone at home to care for the other siblings.
Your urgent response is required.
Thank you, Marjorie

Australian Government

Civil Aviation Safety Authority

Instrument number CASA 09/19

I, SHANE PATRICK CARMODY, Director of Aviation Safety, on behalf of CASA, make this instrument under regulation 11.068 of the *Civil Aviation Safety Regulations 1998.*

[Signed S. Carmody]
Shane Carmody
Director of Aviation Safety

12 February 2019

CASA 09/19 — Civil Aviation (Community Service Flights — Conditions on Flight Crew Licences) Instrument 2019

Contents

1 Name

This instrument is *CASA 09/19 — Civil Aviation (Community Service Flights — Conditions on Flight Crew Licences) Instrument 2019*.

2 Duration

This instrument:

(a) commences on 19 March 2019; and

(b) is repealed at the end of 18 March 2022.

3 Definitions

Note A number of expressions used in this instrument are defined in CASR or CAR, including the following:

(a) AIP;

(b) amateur-built aircraft;

(c) Amateur Built Aircraft Acceptance, or ABAA;
(d) approved system of maintenance;
(e) CASA maintenance schedule;
(f) certificate of airworthiness;
(g) class B aircraft;
(h) experimental certificate;
(i) flight time;
(j) I.F.R.;
(k) limited category aircraft;
(l) maintenance schedule;
(m) operating crew;
(n) pilot (used as a verb);
(o) registered;
(p) type (for an aircraft);
(q) V.F.R.

In this instrument:

community service flight: see section 6.

periodic inspection has the meaning given by paragraph 2.1 of Part 2 of Schedule 5 to CAR (containing the CASA maintenance schedule).

4 Application

This instrument applies in relation to a flight in an aircraft conducted as a private operation.

5 Conditions on flight crew licences for community service flights

For the purposes of regulation 11.068 of CASR, this instrument imposes conditions on flight crew licences.

Note See Part 1 of the Dictionary to CASR for the definition of ***flight crew licence***.

6 Community service flights

(1) A flight is a ***community service flight*** if it meets the description in subsections (2) to (5).

(2) The flight involves:

(a) the transport of one or more individuals (a ***patient***) to a destination for the purpose of each such individual receiving non-emergency medical treatment or services at the destination; or

(b) the transport of a patient from a destination mentioned in paragraph (a) (the ***treatment destination***) to another treatment destination; or

(c) the transport of a patient from a treatment destination:

(i) back to a place from which the patient departed for a treatment destination; or

(ii) to a destination at which the patient resides.

(3) The flight is provided to a patient, and any person who accompanies the patient to provide support and assistance, without a charge being made to any of those persons for their carriage.

(4) Medical treatment is not provided on board the aircraft for the flight, other than the administering of medication or in response to an unexpected medical emergency.

(5) The flight is coordinated, arranged or facilitated by an entity for a charitable purpose or community service purpose.

Note Section 2B of the *Acts Interpretation Act 1901* defines ***charitable purpose*** as having the meaning given by Part 3 of the *Charities Act 2013*.

7 General requirements

(1) It is a condition on a flight crew licence that its holder must not operate an aircraft for a community service flight unless:

(a) the licence is a private pilot licence, commercial pilot licence or air transport pilot licence; and

(b) the flight is conducted in an aeroplane; and

(c) the aeroplane does not carry on board any persons other than:

(i) a patient mentioned in paragraph 6 (2) (a), and any other passenger who accompanies a patient to provide support and assistance; and

(ii) the operating crew; and

(d) the holder holds a current class 1 or 2 medical certificate.

Note Subpart 67.C of CASR provides for the requirements relating to medical certificates.

(2) To avoid doubt, the provisions of *CASA EX65/18 — Private Pilot Licence Medical Certification (Basic Class 2 Medical Certificate) Exemption 2018* do not apply to the holder of a flight crew licence who operates an aeroplane for a community service flight.

Note An *Aviation Medical Certificate (Basic Class 2)* issued by CASA under *CASA EX65/18 — Private Pilot Licence Medical Certification (Basic Class 2 Medical Certificate) Exemption 2018* is not a class 1 or class 2 medical certificate.

8 Excluded aeroplanes

(1) It is a condition on a flight crew licence that its holder must not pilot an aeroplane operated for a community service flight if the aeroplane is excluded under subsection (2).

(2) For subsection (1), an aeroplane is excluded if:

(a) the aeroplane is:

(i) an amateur-built aircraft accepted under an Amateur Built Aircraft Acceptance; or

(ii) an aircraft in the limited category; or

(b) there is an experimental certificate in force for the aeroplane; or

(c) the aeroplane is not registered.

9 Aeronautical experience requirements

General requirements

(1) It is a condition on a flight crew licence that its holder must not pilot an aeroplane operated for a community service flight unless the holder has aeronautical experience that includes:

(a) a landing, within the previous 30 days, in:

(i) if the community service flight is conducted in an aeroplane that is class rated — an aeroplane of that class; or

(ii) if the community service flight is conducted in an aeroplane that is type rated — that type of aeroplane; and

(b) for a flight that is conducted under the V.F.R. — at least 10 hours of flight time in an aeroplane of the same type as the aeroplane used for the community service flight; and

(c) for a flight that is conducted under the I.F.R. — at least 20 hours of flight time in an aeroplane of the same type as the aeroplane used for the community service flight; and

(d) for a flight that is conducted in a multi-engine aeroplane — at least 25 hours of flight time as pilot in command of a multi-engine aeroplane.

Note See Part 1 of the Dictionary to CASR for the definition of ***type***.

Additional requirements for private pilots

(2) Subsection (3) applies if the holder of a private pilot licence does not also hold a commercial pilot licence or an air transport pilot licence.

(3) It is a condition on the private pilot licence that its holder must not pilot an aeroplane operated for a community service flight unless the holder has aeronautical experience that includes:

(a) at least 400 hours of flight time conducted in an aeroplane or a helicopter; and

(b) at least 250 hours of flight time as pilot in command of an aeroplane or a helicopter.

Note 1 The term ***pilot***, used as a verb, has the meaning given by regulation 61.010 of CASR.

Note 2 For the meaning of ***flight time*** as a pilot in command: see regulation 61.090 of CASR.

10 Operational and notification requirements

It is a condition on a flight crew licence that its holder must not pilot an aeroplane operated for a community service flight unless:

(a) the aeroplane carries no more than 5 passengers (including any patient mentioned in paragraph 6 (2) (a)); and

(b) the aeroplane is not operated under the V.F.R. at night; and

(c) the holder submits a flight notification (within the meaning given by the AIP) to Airservices Australia that:

(i) identifies the flight as a community service flight using the acronym "CSF"; and

(ii) is either "full flight details" or "SARTIME"; and

(d) the holder, in addition to the requirements in regulation 61.350 of CASR to record information about flights in a personal logbook, records that the flight is a community service flight in the logbook.

Note For paragraph (c), the flight can be identified by entering the acronym in the "remarks" section of the flight notification: see AIP ENR 1.10.

11 Aeroplane maintenance requirements

(1) Subsection (2) applies if there is an election in force under regulation 42B of CAR for an aeroplane to use the CASA maintenance schedule for the aircraft's maintenance.

(2) It is a condition on a flight crew licence that its holder must not pilot the aeroplane for a community service flight unless:

(a) the aeroplane has undergone a periodic inspection:

(i) within the last 100 hours of service of the aeroplane; or

(ii) if the aeroplane has been in service for less than 100 hours in the immediately preceding 12 months — within the 12 months; or

(b) both of the following apply:

(i) the aeroplane was issued its current certificate of airworthiness less than 12 months before the flight;

(ii) the aeroplane has been in service for less than 100 hours since the certificate was issued.

---

(2) the potential impact to the aerospace industry of the introduction of a new radio service that operates in the same spectrum allocated to the aeronautical mobile telemetry service.

49 USC 40101 note.

SEC. 821. CLARIFICATION OF REQUIREMENTS FOR VOLUNTEER PILOTS OPERATING CHARITABLE MEDICAL FLIGHTS.

(a) REIMBURSEMENT OF FUEL COSTS.—Notwithstanding any other law or regulation, in administering section 61.113(c) of title 14, Code of Federal Regulations (or any successor regulation), the Administrator of the Federal Aviation Administration shall allow an aircraft owner or operator to accept reimbursement from a volunteer pilot organization for the fuel costs associated with a flight operation to provide transportation for an individual or organ for medical purposes (and for other associated individuals), if the aircraft owner or operator has—

(1) volunteered to provide such transportation; and

(2) notified any individual that will be on the flight, at the time of inquiry about the flight, that the flight operation is for charitable purposes and is not subject to the same requirements as a commercial flight.

(b) CONDITIONS TO ENSURE SAFETY.—The Administrator may impose minimum standards with respect to training and flight hours for single-engine, multi-engine, and turbine-engine operations conducted by an aircraft owner or operator that is being reimbursed for fuel costs by a volunteer pilot organization, including mandating that the pilot in command of such aircraft hold an instrument rating and be current and qualified for the aircraft being flown to ensure the safety of flight operations described in subsection (a).

Definition.

(c) VOLUNTEER PILOT ORGANIZATION.—In this section, the term "volunteer pilot organization" means an organization that—

(1) is described in section 501(c)(3) of the Internal Revenue Code of 1986 and is exempt from taxation under section 501(a) of such Code; and

(2) is organized for the primary purpose of providing, arranging, or otherwise fostering charitable medical transportation.

49 USC 47141 note.

SEC. 822. PILOT PROGRAM FOR REDEVELOPMENT OF AIRPORT PROPERTIES.

Deadline.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Administrator of the Federal Aviation Administration shall establish a pilot program under which operators of up to 4 public-use airports may receive grants for activities related to the redevelopment of airport properties in accordance with the requirements of this section.

(b) GRANTS.—Under the pilot program, the Administrator may make a grant in a fiscal year, from funds made available for grants under section 47117(e)(1)(A) of title 49, United States Code, to an airport operator for a project—

(1) to support joint planning, engineering, design, and environmental permitting of projects, including the assembly and redevelopment of property purchased with noise mitigation funds made available under section 48103 of such title or passenger facility revenue collected under section 40117 of such title; and

(a) Effective Date

This AD is effective February 22, 2013 to all persons except those persons to whom it was made immediately effective by Emergency AD 2013–02–51, issued on January 16, 2013, which contained the requirements of this amendment.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 787–8 airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 24, Electrical power.

(e) Unsafe Condition

This AD was prompted by recent incidents involving lithium ion battery failures that resulted in release of flammable electrolytes, heat damage, and smoke on two Model 787–8 airplanes. The cause of these failures is currently under investigation. We are issuing this AD to prevent damage to critical systems and structures, and the potential for fire in the electrical compartment.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Modification or Other Action

Before further flight, modify the battery system, or take other actions, in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(i) Related Information

For more information about this AD, contact: Robert Duffer, Manager, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6493; fax: 425–917–6590; email: *Robert.Duffer@faa.gov.*

(j) Material Incorporated by Reference

None.

Issued in Renton, Washington, on February 1, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–04004 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 61

Policy Clarification on Charitable Medical Flights

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Policy.

SUMMARY: The FAA is issuing this notice of policy to describe its policy for volunteer pilots operating charitable medical flights. Charitable medical flights are flights where a pilot, aircraft owner, and/or operator provides transportation for an individual or organ for medical purposes. This notice of policy is in response to Section 821 of Public Law 112–95, Clarification of Requirements for Volunteer Pilots Operating Charitable Medical Flights.

DATES: This action becomes effective on February 22, 2013.

FOR FURTHER INFORMATION CONTACT: John Linsenmeyer, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; fax (202) 385–9612; email *john.linsenmeyer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 61.113(a) of Title 14 Code of Federal Regulations (14 CFR) states that no person who holds a private pilot certificate may act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may that person, for compensation or hire, act as pilot in command of an aircraft.

Section 61.113(c) states that, for any flight carrying passengers, a private pilot may not pay less than the pro rata share of the operating expenses (fuel oil, airport expenditures, or rental fees). This prohibition means that a private pilot can pay more, but not less, of these expenses when split equally among all the people aboard the aircraft. Private pilot certificates are considered to be an entry-level pilot's license, and the purpose of this regulation is to limit the operations of private pilots commensurate to their certification level. Pilots wishing to pay less than their pro rata share (or fly for hire) must obtain a commercial pilot certificate, which has higher certification requirements and may be required to comply with additional operating requirements.

Some pilots and other individuals have recognized a need to provide transportation services for conveyance of people needing non-emergency medical treatment. Section 821 of Public Law 112–95, requires, with certain limitations, that the FAA allow an aircraft owner or operator to accept reimbursement from a volunteer pilot organization for the fuel costs associated with a flight operation to provide transportation for an individual or organ for medical purposes (and for other associated individuals).

Volunteer pilot organizations have petitioned the FAA for exemption from the requirements of § 61.113(c) so that their pilots can be reimbursed for some or all of the expenses they incur while flying these flights. To allow compensation for expenses for the transportation of individuals, these private pilots are participating in an activity that would otherwise be prohibited by § 61.113(c).

The FAA has determined this activity can be conducted safely with limits applied to the organizations, pilots, and aircraft. Beginning in 2010, the FAA issued several exemptions to charitable medical flight organizations granting relief from the requirements of § 61.113(c). The exemptions contain conditions and limitations that are intended to raise the level of safety for these flights. These conditions and limitations include:

1. Developing of a pilot qualification and training program;
2. Authenticating pilots' FAA certification;
3. Requiring flight release documentation;
4. Imposing minimum pilot qualifications (flight hours, recency of experience, etc.);
5. Requiring a 2nd class FAA medical certificate;
6. Requiring the filing of an instrument flight plan for each flight;
7. Restricting pilots to flight and duty time limitations;
8. Requiring mandatory briefings for passengers;
9. Imposing higher aircraft airworthiness requirements; and
10. Requiring higher instrument flight rules (IFR) minimums.

The FAA recognizes the practical implications and benefits from this type of charity flying and will continue to issue exemptions for flights described

by Section 821 of Public Law 112–95. The FAA will continuously update these conditions and limitations as necessary to best ensure these operations meet this equivalent level of safety.

Issued in Washington, DC, on February 14, 2013.

John M. Allen,

Director, Flight Standards Service.

[FR Doc. 2013–04052 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2012–0159]

RIN 1625–AA01

Anchorages; Captain of the Port Puget Sound Zone, WA

Correction

In rule document 2013–03121, appearing on pages 9811–9814 in the issue of Tuesday, February 12, 2013, make the following correction:

§ 110.230 [Corrected]

■ On page 9813, in the third column, on the eighteenth line from the top, "latitude 47°7′30″ N" should read "latitude 47°47′30″ N".

[FR Doc. C1–2013–03121 Filed 2–21–13; 8:45 am]

BILLING CODE 1505–01–D

POSTAL SERVICE

39 CFR Part 111

Promotions and Incentive Programs for First-Class Mail and Standard Mail

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service will revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 709.3 to include new promotions and incentive programs that will be offered at various time periods during calendar year 2013 for Presorted and automation First-Class Mail® cards, letters, and flats, and Standard Mail® letters, flats, or parcels.

DATES: *Effective date:* March 4, 2013.

FOR FURTHER INFORMATION CONTACT: Krista Becker at 202–268–7345 or Bill Chatfield at 202–268–7278. Email contacts are: *mobilebarcode@usps.gov* for the Mobile Coupon/Click-to-Call, Emerging Technologies, Product Samples, and Mobile Buy-It-Now programs; and *earnedvalue@usps.gov* or *picturepermit@usps.com* for the two other programs.

SUPPLEMENTARY INFORMATION: The Postal Service filed a notice with the Postal Regulatory Commission (PRC) (Docket No. R2013–1) on October 11, 2012 to offer six new promotions in 2013 and the PRC approved the 2013 promotions on November 16, 2012.

In this final rule, the Postal Service provides a description of the eligibility conditions for the various promotional programs and the revised mailing standards to implement the programs. The types of eligible mailpieces are listed in the descriptions for each promotion. EDDM-Retail® mailings are not eligible for participation in any of the promotions. OMAS and official government mailings are eligible for participation in the Earned Value Reply Mail promotion only. Registration for must be made separately for each promotion through the Business Customer Gateway.

Summary of Promotional Programs

The six promotional programs, in calendar order are:

1. Direct Mail Mobile Coupon and Click-to-Call
2. Earned Value Reply Mail
3. Emerging Technologies
4. Picture Permit Imprint
5. Product Samples
6. Mobile Buy-It Now

Postage Payment for Mobile Coupon/Click-to-Call, Emerging Technologies, and Mobile Buy-It Now

The following parameters apply to the Mobile Coupon/Click-to-Call, Emerging Technology, and Mobile Buy-It Now promotions.

Mailing documentation and postage statements must be submitted electronically. Mailings entered by an entity other than the mail owner must identify the mail owner and mail preparer in the by/for fields. Full-service mailings are limited to 9,999 pieces if submitted via Postal Wizard. If some pieces in a mailing are not claiming a promotion discount, separate postage statements must be used for pieces not claiming the discount and for pieces claiming the discount. All discounts must be claimed on the electronic postage statement at the time of mailing and will not be rebated at a later date.

Postage payment methods will be restricted to permit imprint, metered postage, or precancelled stamps. Pieces with metered postage must bear an exact amount of postage as stipulated by the class and shape of mail. Affixed postage values for metered mailings will be as follows:

First-Class Mail postcards	$0.20
First-Class Mail automation and (PRSTD) machinable letters	0.25
First-Class Mail nonmachinable letters	0.45
First-Class Mail automation and Presorted flats	0.35
STD Mail Regular letters	0.12
STD Mail Regular flats	0.13
STD Nonprofit letters	0.05
STD Nonprofit flats	0.06

Mailings with postage paid by metered or precancelled stamp postage will have the percentage discount deducted from the additional postage due, except for Value Added Refund mailings, which may include the amount of the discount with the amount to be refunded.

Description of Promotional Programs

Mobile Coupon/Click-to-Call

This promotion provides an upfront 2 percent postage discount for presort and automation mailings of First-Class Mail letters, postcards, or flats and Standard Mail (including Nonprofit) letters and flats that integrate mail with mobile technology and promote the value of direct mail. There are two separate ways to participate within the one overall program: Mobile Coupon and Click-to-Call. Mailers may participate in one or both ways, but only one discount may apply per mailing. The Mobile Coupon option will encourage mailers to integrate hard-copy coupons in the mail with mobile platforms for redemption. The Click-to-Call option will drive consumer awareness and increase usage of mail with mobile barcodes that provide click-to-call functionality.

For the Mobile Coupon program, at least one of the following options apply:

1. The mailpiece must be a coupon, entitling only the recipients to a discount off a product or service.

2. The mailpiece must contain either mobile-print technology (such as a 2D barcode or smart tag) that can be scanned by a mobile device linking to a mobile coupon or a short number to be used to initiate a text communication that then triggers a SMS/EMS or MMS message with a one-time coupon or code. Texts that allow an option for ongoing coupons via text are not eligible.

Coupon recipients must be able to present physical coupons or coupons stored on mobile devices at any of the mailer's retail locations that exist. For mailers who do not have retail