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TRANSCRIPT OF PROCEEDINGS

O/N H-1495782

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

ANDERSON J

No. VID 222 of 2019

ANGEL FLIGHT AUSTRALIA

and

CIVIL AVIATION SAFETY AUTHORITY

MELBOURNE

9.55 AM, TUESDAY, 16 MARCH 2021

MR WALKER appears with MR P. BONCARDO for the applicant
MR P.J. HANKS QC appears with DR L. HILLY for the respondent

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MR WALKER: May it please your Honour, I appear with my learned friend, MR BONCARDO, for the applicant.

HIS HONOUR: Mr Walker.

5

MR P.J. HANKS QC: And, your Honour, first I apologise for a lack of punctuality. And then I announce my appearance with DR HILLY for the respondent.

HIS HONOUR: Mr Hanks. Thank you. Mr Walker.

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MR WALKER: Your Honour, in light of the exchange of written submissions, including the supplement pursuant to your Honour's direction and the nature of the issues, the course I intend to take in opening is as follows: first, to remind your Honour that a deal of the material in the opening exchange of written submissions
15 and of the evidentiary material in affidavit and annexures concerns what is no longer at issue, namely, the procedural fairness question.

HIS HONOUR: Yes.

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MR WALKER: Next, I intend to start by reminding your Honour of the provisions with which you will now be familiar concerning the manner in which the impugned instrument is to be viewed - - -

HIS HONOUR: Yes.

25

MR WALKER: - - - concerning the first of our arguments, which is an ultra vires argument.

HIS HONOUR: Yes.

30

MR WALKER: As your Honour knows – and I shall seek to extract from this example of the Australian genius for legislation by puzzle-making – at the heart of our argument is the notion of class, but it's not quite so simple. There's more to it than that.

35

HIS HONOUR: Yes.

MR WALKER: The second part of the case is what might be called the only kind of merits review conceptually possible in judicial review, by which I mean, of course,
40 the variously named argument in the doctrine that, in order to be within power, certain exercises of administrative power pursuant to legislation have to have a sufficient requisite rational justification, either as a matter of kind or degree, in order to be within power. And let me make it clear, in that formulation, I don't, of course, intend to do anything such as to reverse an onus. We have to show that it lacked that
45 requisite minimal rationality.

HIS HONOUR: Yes.

MR WALKER: Can I turn, then, to the statutory framework, which we will convey, also by way of an opening – relatively brief, I hope – concerning the ultra vires point.

5

HIS HONOUR: Yes.

MR WALKER: As your Honour appreciates and I'm sure from having read the material, there's quite a few ways in which one could start this sequence of instrument and statute and the steps of legislative edict in between. I'm going to start with the product. So starting in court book 13 with the instrument dubbed CASA-09/19, which I will likely from now on call the community service flights instrument.

10

HIS HONOUR: Yes.

15

MR WALKER: One sees its heading, after the authorisation by Mr Carmody as director of Aviation Safety – the DAS, you will see throughout the documents – is to describe it as “conditions on flight crew licences”. And one of the points at which the parties come directly into collision is whether that is both an accurate and effective description, that is, conditions on flight crew licences, so as to satisfy the requirements for the making of this kind of instrument. The application ostensibly is stipulated in section 4.

20

HIS HONOUR: Yes.

25

MR WALKER: However, for the reasons that I will briefly come to and won't need to elaborate much any more, that is an utterly incomplete description of its application, that is, application as opposed to content of standards, because, first of all, there is, in 5, the purported satisfaction of a very important provision in this case, which is regulation 11.068 of the regulation to which I'm going to come very soon. And one sees that the formulation is repeated from the title of the instrument, namely, it is said that:

30

This instrument imposes conditions on flight crew licences.

35

HIS HONOUR: So existing flight crew licences?

MR WALKER: Your Honour anticipates me. Yes. Existing and, as it happens, in a manner that I will come to a bit later, it can also apply to classes caught by this description “flight crew licences” that come into existence thereafter. That's a dead letter, bearing in mind that flight crew licences exist.

40

HIS HONOUR: Yes.

MR WALKER: So your Honour is right.

45

HIS HONOUR: Yes.

MR WALKER: I suppose the important point for later purposes of argument between the parties concerning what I've said in answer to your Honour's remark, is that this is not an instrument that creates classes, it's an instrument of a kind intended to affect classes by the imposition of conditions that attract sanctions for - - -

5

HIS HONOUR: That's the primary thrust of your whole submission, isn't it?

MR WALKER: That's a very important part of it, yes. Yes. There's no, if I may use the idiom, there's no boot-straps operation. And I will come to the constitutive requirements that can't be found in, alas, just one sentence of the legislation and delegated legislation. In section 6 of the instrument there is an elaborate but relatively straightforward description of a "community service flight". One hasn't yet been told, of course, by 4, 5 or 6, what's the relevance of that for the application of this instrument, but, as your Honour knows, that comes up in 7 where the what might be called operative provision is expressed thus:

15

It is a condition on a flight crew licence that its holder must not operate an aircraft for a community service flight unless –

20

etcetera, etcetera, etcetera.

HIS HONOUR: Yes.

MR WALKER: And so it's quite plain that this applies to holders of a flight crew licence operating an aircraft for a community service flight. There are provisions, for example, in 8 that look to application, but then one comes to the requirements which picks up, by slightly different phrasing, exactly that specific application which, in truth, this instrument has; see 9:

25

30

It is a condition on a flight crew licence –

pause there – that sounds as if it's generally speaking, but, no –

35

that its holder must not pilot an aeroplane operated for a community service flight unless –

40

etcetera. And one sees that as a formula repeated in 9(2), in 10 and 11(2). Now, the next step in the analysis of the way in which the ultra vires argument is presented and, respectfully, how we submit it should be determined is to look to the regulation which is proclaimed as the source of power to have made this instrument. In the authorities lodged with the court, could I take your Honour, please, to the regulation. Alas, this is not a paginated bundle, your Honour.

45

HIS HONOUR: I have it - - -

MR WALKER: Thank you.

HIS HONOUR: - - - Mr Walker.

MR WALKER: It's not that I want more numbers, but, I'm sorry, I can't take you
straight to it. I want to take you, if I may, to regulation 11.068, which, as your
5 Honour knows, is at the heart of our argument.

HIS HONOUR: Yes.

MR WALKER: Now, adopting a vogueish kind of language, it starts in its sub-
10 regulation (1):

For subsection 98(5A) of the Act –

and you could be forgiven for thinking, on reflection, that that is what used to be
15 expressed as “pursuant to subsection 98(5A) of the Act”. I won't go to 98(5A) of the
Act, but your Honour appreciates that one is going to find there, too, some of the
restrictions on power or definitions of power which are at the heart of our first
argument.

20 HIS HONOUR: Yes.

MR WALKER: This is – 11.068 is an empowering provision. You can see that
from the language, the syntax:

25 *...CASA may issue a legislative instrument –*

and my word “empowering” picks up the provisions to which I will be coming very
soon. So that 11.068 is the immediate, that is, the next, in compulsory hierarchy to
the instrument. So its terms are a primary and principal source of understanding of
30 the limits of power to make the instrument in order to evaluate our argument that
those limits have been transgressed. The first element, obviously is, as your Honour
appreciates from the exchanged submissions, that the power is limited to the issue of
a legislative instrument. If it had stood just in that position, linguistically, even
without a definition in a statute of legislative instrument – and we don't lack for
35 certain definitions – that might have been a relatively straightforward proposition. It
may have called up, perhaps, an evaluative assessment of whether the instrument was
legislative in the sense that administrative law uses that as the promulgation of a
general rule as opposed to the affixing of a particular status. But all of that falls
away for reasons I'm going to come to when I come to the statute. But suffice is to
40 say that once there is an understanding of what the legislative instrument is, that will,
as that expression is used in 11.068(1), that will provide one of the tests to know
whether or not this instrument passes muster.

The next element which operates independently, that is, even if it were a legislative
45 instrument is still necessary for the instrument to pass muster, is that it:

...imposes a condition –

it does that; that won't trouble your Honour any further –

relating to a matter mentioned in that subsection –

- 5 I will come back to that; that may not be a critical question, but your Honour has seen the argument about it. And then comes one that is critical –

on a specified class of authorisations.

- 10 And sub-regulation (2) and (3) and (4) show that the class of authorisations upon which there may be imposed a condition by such an instrument, that is, an 11.068 instrument, is not only a class of authorisations existing before the imposition of the condition, but also that it may be an authorisation granted after the instrument comes into force. Again, a very clear stipulation that these instruments imposing conditions
15 do so on a species which exists either before or may exist after but extraneously to the instrument itself, that is, the authorisation is the object of the condition-imposing exercise. The authorisation is not created by the condition-imposing exercise.

- Could I then take your Honour to 98(5A) of the Act, being the provision explicitly
20 called up at the beginning of 11.068. Section 98 blandly titled Regulations etc is an example of extremely broad but also, in certain respects, very detailed grant of power to make regulations. The detail, as one can see from the opening words of subsection (3) from the evidently comprehensive generality of the subject matters of regulations under subsection (1). And we may, in this case, probably have no need to go beyond
25 paragraph (a) of subsection (1) for present purposes. And so I may leap immediately to the particular provision of section 98, which is subsection (5A), and there one sees:

- 30 *The regulations may empower CASA to issue instruments in relation to the following –*

matters – it:

- 35 *...must not prescribe a penalty.*

- I will come back to what I will call the scheme for sanctions. One needs to read the two following subsections in order to grasp the nature of the regulations that may empower CASA to issue such instruments. It's a legislative instrument under subsection (5A)(a) if it's:

- 40 *...expressed to apply in relation to ... a class of persons ... or a class of aircraft ... or a class of aeronautical product.*

- And subsection (5AB), in what is probably a false dichotomy, but that doesn't
45 matter, says that:

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 ... a particular aircraft or ... a particular aeronautical product.

5 And so one sees that (5AA) and (5AB) represents, in this particular context, an attempt to capture what would be, as a matter of general law for the purposes of administrative law at least, an understanding of the difference between legislative and non-legislative. However, it cannot possibly be exhaustive, as a moment's thought concerning both the syntax and logic of those two subsections will reveal. It does not mean, logically, that an instrument expressed as (5AB) lists – I'm sorry. I will start again. It does not mean that an instrument that does not fall within (5AB) is thereby within (5AA).

15 HIS HONOUR: Yes.

MR WALKER: And that then leaves the question of can you fall between the stools; the answer is yes. And this is a – that's not a defect of the scheme at all, because (5AA) serves, in the present form of the regulatory scheme, simply to be the way in which Parliament has stipulated the character of a legislative instrument may be achieved.

HIS HONOUR: Just say that again, Mr Walker, I missed that.

25 MR WALKER: (5AA) is part of the Parliamentary stipulation for how the character of a legislative instrument may be achieved.

HIS HONOUR: Yes.

30 MR WALKER: To put it another way, it cannot be a legislative instrument even if, by general law, it would be but for this provision, unless (5AA) applies. That is, that is an argument which separates the parties.

HIS HONOUR: Yes.

35 MR WALKER: And we accept that the language presents a choice for your Honour, but that the language is of a relatively familiar kind. It prescribes an outcome on a condition which is expressed. The outcome is it is a legislative instrument; the condition is if it's expressed to apply, etcetera. Now, one can – there is a choice for you as to whether that leaves open silently a rider to that provision, but it may also be a legislative instrument even if it's not expressed to apply in relation to etcetera, that would be absurd. I fear that's a bit of a straw man argument by me, my friend's not going to argue that.

45 But, equally, it doesn't say, "But this does not restrict the other ways in which other than by expressions concerning application in relation to classes an instrument may be a legislative instrument". All of that, in our submission, is far too shadowy, non-prescriptive and speculative to be an admissible interpretation of this rather careful, if

somewhat detailed, prescription of the way in which a particular character can be achieved. Now, the importance of that character is not so much for statutory reasons as because the instrument in this case is said to have been made pursuant to a power that was expressed in 11.068 in the manner I drew to your attention earlier, namely,
5 it's limited to the issue of a legislative instrument.

HIS HONOUR: Yes.

MR WALKER: And so almost certainly with more words than needed for this
10 purpose, the provisions I've touched – I've taken you to so far amount to this: in order to impose this instrument lawfully it had to be a legislative instrument and we submit that the “requirements”, as we call them, in subsection (5AA) of section 98 are prerequisites to achieve that character. I stress that's not a prerequisite imposed by subsection (5A) of section 98, that's a general power to issue instruments. It is,
15 by the combination of 11.068 itself, purportedly authorised by (5A) and (5AA), the means by which it has proceeded in this case.

Now, we then come to the notion of a specified class of authorisations which, your Honour will recall, was the second discrete independent way in which we say the
20 stole of power in 11.068, with its limitations, has been infringed by the making of this purported instrument. It has to be the imposition of a condition relating to a matter mentioned in 98(5A) on a specified class of authorisations. And 98(5A), as I should have pointed a bit earlier, in paragraph (a), which is the one that subsection (5AA) applies to, names those matters as being:

25 *Matters affecting the safe navigation and operation, or the maintenance, of aircraft.*

And that's why your Honour will see that as a rubric under which both parties have
30 put arguments, particularly on the second part of the case concerning rational justification:

...safe navigation and operation, or the maintenance, of aircraft.

35 Now, that was a general subject matter, but in order to be the – an instrument answering the description in (5AA) it had to be:

*...expressed to apply in relation to a class of persons, a class of aircraft, a
40 class of aeronautical product.*

And it's for those reasons that one then looks at 11.068 and there has to be a specified class of authorisations, and that, in the manner that your Honour has seen we have written, necessarily drives one to understand what a civil – what an authorisation may be. We draw to attention that in the Civil Aviation Act the
45 relevant authorisations are, not at all oddly, civil aviation authorisations. There are none other in question. There's no sensible suggestion by which, textually or purposively, the expression “authorisations” in the phrase “specified class of

authorisations” is different from, let alone wholly non-congruent with, civil aviation authorisations.

5 Not surprisingly, because when one goes to section 3 of the Act the term “civil aviation authorisation” is defined, and one sees that that’s:

...an authorisation under this Act or the regulations –

10 so that it embraces the delegated legislation –

to undertake a particular activity –

15 by whatever name it is known. At that point – and one sees the puzzle approach here, you’ve got to go to different places – can I take you to 30DU of the Act. That requires the regulations to prescribe something, and it requires the regulations to:

...prescribe classes to which particular –

20 but your Honour may later think that is a bit like the word “specified”:

...must prescribe classes –

or identified –

25 *to which particular civil aviation authorisations belong –*

and, for good measure, it requires that prescription of classes to have:

30 *...regard to the activities covered by the civil aviation authorisations.*

A bit ponderous, but one sees, in other words, that there are a whole – there’s a large number of matters thereby rendered extraneous and illegitimate for the prescription of classes. Such as the colour of hair, I think, is the traditional example to use in such an argument. Well, now, under 30DU, then, something has to happen, and one
35 sees that 30DU appears in division 3D of part III, which is concerned with the regulation of civil aviation, division 3D being concerned particularly with sanctions by way of what I will call “the demerit system”.

40 HIS HONOUR: Yes.

MR WALKER: Which ultimately lead to offences, and I need say this only once, I suppose, your Honour has already it, immanent in all of the argument – on both sides, probably – is a lively awareness of the fact that depending upon matters of statutory interpretation may depend upon the creation and commission of an offence.
45 So there’s a penal flavour calling for the kind of precision and making of choices in accordance with what the Americans might call the rule of lenity throughout. That doesn’t seem to divide the parties. However, we are divided as to the significance of

the placement of 30DU. And if I could just put it boldly in this fashion, it makes no sense, we submit, and we will arguing in conclusion, to confine 30DU in some way to an intellectual ghetto of subdivision A, let alone – or even the whole of division 3D in part III of the Act.

5

That's because these are machinery provisions for the creation of demerits and, ultimately, offences by reason, as your Honour knows, for example, of the infringement of conditions imposed on classes of authorisations, and thus it can be seen to be central not peripheral to the regulation of civil aviation. For 30DU, as its words make quite clear, is not confined in some unexplained way to the demerit points scheme, rather, the demerits points scheme is part of the sanctioning machinery by which the overall regulation is achieved. And one can readily understand when not only demerits, so called, but offences are in the train of the working out of the application of such provisions, 30DU has a general importance. And thus we come to the compliance with that requirement in 30DU, which is regulation 13.375, in division 3.K.2 the demerits points scheme in the regulation:

10

15

For the purposes of section 30DU of the Act, a civil aviation authorisation - - -

20 HIS HONOUR: Sorry to interrupt you, Mr Walker, just give me that regulation again, please, the - - -

MR WALKER: I'm sorry, your Honour?

25 HIS HONOUR: 13 – I just missed the - - -

MR WALKER: It's 13.375.

HIS HONOUR: Thank you. I have that now, thank you.

30

MR WALKER: And, your Honour, the points we want to make in opening is this: first of all, we submit this is where you find the obedience to 30DU of the Act.

HIS HONOUR: Yes.

35

MR WALKER: Second, the expression “a civil aviation authorisation” found in 30DU, defined in 3, repeated in 13.375 of the regulations, is describing, as one would expect, the authorisations which are referred to as one of the definitions of the power in 11.068 to issue an instrument imposing a condition relation to a matter mentioned in 98(5A), relevantly, safe operation, navigation, maintenance is, of course, civil aviation authorisations. And so one looks at the columns and, for present purposes – I won't dwell on them in any detail at the moment – we submit that you will not find the – either under column 2 or column 3 something which answers a description expressed – that's the word of power – expressed in the instrument.

40

45 HIS HONOUR: We're having some difficulty with Microsoft Teams today, Mr Walker.

MR WALKER: Less than I've encountered elsewhere and other times, your Honour. Should I just, as it were, - - -

HIS HONOUR: You just proceed.

5

MR WALKER: - - - plough on?

HIS HONOUR: You just proceed if it's convenient to you.

10 MR WALKER: Yes. Your Honour, Mr Boncardo has already been asked to correct me, and I invite him to do so throughout. I think that completes what I want to say in opening about this constructed puzzle by which one understands is this instrument within power.

15 HIS HONOUR: Yes.

MR WALKER: And what I wish to emphasise is it must be a legislative instrument, which is 98(5AA), that involves expressed to apply in relation to class of authorisation.

20

HIS HONOUR: Yes.

MR WALKER: Class of authorisation is a concept to which – which does not lend itself – bearing in mind that the creation of offences at the end of all of this – does
25 not lend itself to a speculative or hazy qualitatively arguable definition. It has been defined, it has to be stipulated says 98DU, and 13.375 did that, and one – we say, you cannot find match ups. Unless you find match ups it cannot be falling within the requirement that it be expressed in those terms.

30 HIS HONOUR: So let me just understand that last point. So, on your submission, Mr Walker, we need to find an express authorisation there in either columns 2 or 3 here?

MR WALKER: Yes.

35

HIS HONOUR: And we don't, on your submission?

MR WALKER: In the instrument.

40 HIS HONOUR: In the instrument.

MR WALKER: In the instrument.

HIS HONOUR: Yes.

45

MR WALKER: So there are – how shall I put this? When one is practicing taxonomy, the grouping of things into classes, the immediate question, which

remained – pervades the whole exercise from start to finish, is at what level of generality or specificity am I proceeding? So we're mammals, but we're also something more specific and something more general. There are other ways in which classes can be, obviously, divided other than simply by what I will call a hierarchy, ascending or descending levels of specificity of generality, and so I'm not suggesting it's only, as it were, in the footsteps of Linnaeus that your Honour can understand the notion of class.

HIS HONOUR: Yes.

MR WALKER: Although, obviously, he and his successors have a lot to teach in terms of what one would regard as a class. And all of that, for example, is caught up with what I will call the general law, not applicable in this case, about whether something is legislative or not, for example, as an act of administration. But what we have here, as you might expect, is a prescriptive explicit system calling for the ready identification from table 13.375 of provisions in this instrument in order that it pass muster as made pursuant to the power in question, and that's all I want to say. Your Honour, I am, of course, in your Honour's hands. I'm now turning to the question of what I will call in shorthand "the rational justification" - - -

HIS HONOUR: Yes.

MR WALKER: - - - for the instrument. And at bottom, of course, that is an argument that your Honour must assess for its merits against a purposive reading of all of these provisions. If our argument appears to disserve a purpose it's probably wrong.

HIS HONOUR: Yes.

MR WALKER: We would respectfully suggest that the purposes of advancing the causes of the safety of the relevant aviation operations will be an appropriate level of generality for which your Honour should see the purpose of this here. There are means to serve the purpose which are in question in this case and the most obvious one is the one to which we've drawn attention in the first part of my opening, namely, this mechanism of the imposition of conditions which is picked up, of course, in the sanctions regime that we've written out, I don't need to open on, which ultimately leads, through an accumulation of demerits to an offence, etcetera, etcetera.

So we accept that the onus we have in the second part of the case involves looking at the instrument and the way it was made – and I stress "the way it was made"; it's an inquiry as to the reasons for which it was made – and to persuade your Honour in relation to each of the matters you've now seen set out in the two written submissions that address this point – I suppose there's really three, because they're returned to in reply – that they fall short of the standard. Now, I accept – I doubt whether there will be any argument between my friend and me as to the jurisprudence on the point.

HIS HONOUR: Yes.

MR WALKER: My words are I accept that your Honour is not to become an
aviation regulator. You are not to be a judicial review exercising the power that
5 Parliament gave to someone else.

HIS HONOUR: Yes.

MR WALKER: Easily stated, but it provides a challenge for me in my position
10 today to distinguish that from what we complain about. And yet the authorities are
plain, the jurisprudence is clear: there is the capacity, without infringing any of those
constitutionally significant distinctions, for a court which it may be presumed will
never accept by a kind of accident have expertise resembling the expertise of the
15 multifarious kinds of administrative decision-makers whose work comes before the
court. Nonetheless, to observe that the law imposes, jurisdictionally, certain
requirements of rationality.

HIS HONOUR: Yes.

20 MR WALKER: They have been variously expressed.

HIS HONOUR: It's a high bar though, isn't it.

MR WALKER: And I was about to put the converse, agreeing with your Honour.
25

HIS HONOUR: Yes.

MR WALKER: We have the job ahead of us, because the requirement of what I'm
going to call again, in shorthand, rational justification is not particularly demanding.
30

HIS HONOUR: Yes.

MR WALKER: We're not examining the decision-maker viva voce for a doctorate
where he, she or it may fail for not exhibiting the highest levels of empirical
35 demonstration, for example, to pick one which is at the heart of our case – and, of
course, your Honour would expect my very next word will be “but” – but in this case
it will be important to bear in mind professed, that is, at the time; professed, that is,
in retrospect, explanations or justifications for the making of the instrument in the
terms it has been made – perhaps at all, but certainly in the terms it has been made –
40 because, in our submission, if it can be seen as a matter of non-expert, non-specialist
reasoning, that there are involved assumptions where assumptions could not
rationally operate; where there is involved speculation, where speculation would be
either dangerous or no justification for the imposition of conditions that may
culminate in an offence, then, in our submission, there is more than the beginning of
45 the successful argument for us; we're well on the way.

HIS HONOUR: Yes.

MR WALKER: Now, in opening, bearing in mind that I wish to cross-examine Mr Monahan.

HIS HONOUR: Yes.

5

MR WALKER: I wonder if your Honour, having been able to read our written submissions, would dispense me from going into any further detail. I don't wish to provide, in advance - - -

10 HIS HONOUR: No.

MR WALKER: - - - a roadmap.

15 HIS HONOUR: No, certainly, Mr Walker. I don't require you to open any further. But there's one matter, before you sit down, I did want to clarify. I just want to be clear. You are no longer running a ground of review of a breach of an obligation of procedural fairness.

20 MR WALKER: We are not.

HIS HONOUR: Thank you for that.

MR WALKER: Definitively, no qualifications.

25 HIS HONOUR: Thank you. That's been most helpful. Thank you. Mr Hanks.

30 MR HANKS: Thanks, your Honour. Well, it's always a relief to hear that one's basic assumptions have been correct. In fact, there's another ground that our friend's not running, but I will come to that in a moment; it's a very small one. Now, we know what the focus of the hearing is, your Honour.

HIS HONOUR: Yes.

35 MR HANKS: It's the validity of the instrument made on 12 February 2019. It's helpfully produced in the court book - - -

HIS HONOUR: Yes.

40 MR HANKS: - - - at tab 2.

HIS HONOUR: Yes.

45 MR HANKS: I intended to open by going into a little bit of a history, your Honour, partly to settle some dust. Not that my friend has created the dust, but there is some potential dust round.

HIS HONOUR: Yes.

MR HANKS: There's evidence that there was a fatal crash of an aircraft engaged in a community service flight in August 2011. And there's evidence that will be given that our client began to explore options - - -

5 HIS HONOUR: Just before you go on, Mr Hanks – I'm sorry to interrupt you, Mr Hanks.

MR HANKS: Yes, your Honour.

10 HIS HONOUR: There was something I omitted – and I apologise that I omitted to mention as I should have at the outset. It only became apparent to me this morning when I read further into the affidavit material there's – I don't think it's an issue, but I regret I should have raised it before you started your opening, Mr Walker. My
15 brother is a stood-down Qantas A380 captain at present and, because he's stood down, he's occupying himself by doing some charity work with – I've just forgotten the name – Little Wings.

MR WALKER: Yes.

20 HIS HONOUR: Little Wings. I rang him this morning. He tells me that he would probably fly one flight a week, every 10 days. He has no management involvement. He has no other involvement other than he's a volunteer pilot. I don't think it's – I mention it because, well, you can make what you make of it, gentlemen. I should have mentioned it beforehand. I apologise.

25 MR WALKER: There is no problem. Thank you very much, your Honour. It's not – it doesn't raise the slightest concern for us.

30 HIS HONOUR: Thank you. I'm sorry I didn't raise it earlier. I apologise to you, Mr Hanks.

MR HANKS: Thank you, your Honour. And certainly not for the respondent.

35 HIS HONOUR: Thank you.

MR HANKS: Just a little bit of background again, going to the history behind the making of the instrument.

40 HIS HONOUR: Yes.

MR HANKS: There was that fatal crash in August of 2011; a flight organised by the applicant. And the evidence will show that after that incident – and, your Honour, I will withdraw the word "incident", because that has a technical meaning in this universe.

45 HIS HONOUR: Yes.

MR HANKS: After that fatal accident, the respondent began to explore options for possibly regulating community service flights. There was a second fatal crash in June of 2017. So that's effectively six years later. And the evidence will be that that fatal crash caused the respondent to renew its inquiry as to whether it was
5 appropriate to introduce some form of regulation.

HIS HONOUR: Yes.

MR HANKS: There was public consultation. There were discussions with the
10 operators of these community service flights. There were discussion papers put out. And the evidence will be that Mr Monahan was asked by the director of air safety – he's also the CEO of CASA - - -

HIS HONOUR: This is Mr Carmody?
15

MR HANKS: - - - to lead the inquiry.

HIS HONOUR: Yes.

MR HANKS: And Mr Monahan had conversations with representatives of the
20 applicant, he sought access to certain data that was in the possession of the applicant, but he was unable to obtain the access that he required. Nevertheless, the applicant – I'm sorry, your Honour. Nevertheless, CASA did some calculations using data from a body called the Bureau of Infrastructure and Regional Economics, it has the not
25 particularly natural acronym of BITRE, and data from the Australian Transport Safety Bureau, ATSB, and other data which was available to the applicant – I've used that word again – available to the respondent, CASA, because of its functions as a regulator. And what CASA looked at were incident rates, accident rates and fatal
30 accident rates, and those terms are explained in one of the affidavits made by Mr Monahan at page 589 of the court book. But, in simple terms, it's a rising scale of seriousness.

HIS HONOUR: Yes.

MR HANKS: Incident rates refers to the rate of things happening which involve
35 some potential breach of safety, but no actual physical contact. Accident rates refers to the rates of things happening where there's some physical contact or damage to an aircraft. And fatal accident rates refers to the rates of incidents that result in death.

HIS HONOUR: Yes.
40

MR HANKS: And the calculations that were carried out on behalf of CASA showed an elevated rate for each of those three categories for CSF flights compared to standard private flights.
45

HIS HONOUR: So when you say CSF flights - - -

MR HANKS: Community - - -

HIS HONOUR: CSF flights are community service flights?

5 MR HANKS: Yes.

HIS HONOUR: That's across that sector, if I - - -

10 MR HANKS: That's right, for the sector as a whole.

HIS HONOUR: Yes, yes.

MR HANKS: Yes. Now, obviously the applicant is one of the large participants
15 - - -

HIS HONOUR: Yes.

MR HANKS: - - - in that sector. And those calculations were the stimulus for
20 further inquiries. They were not the reason, the evidence will show that they were
not the reason for the making of the instrument, but they were the stimulus for
further inquiries. And in the course of those inquiries those advising Mr Monahan
and, in due course, advising Mr Carmody, who was the director of air safety, who
has the power to make the instrument, identified what it called "human factor
25 challenges" which were not normally present in the standard private operating
environment. So these were matters that were identified by those charged with the
task of advising the director whether some regulatory intervention should be
effected. Now, at this level, of course, in the context of this proceeding, it's not a
relevant question whether those human factor challenges objectively existed.

30 HIS HONOUR: Could you give me an example of one of these human factor
challenges?

MR HANKS: Well, I certainly will, your Honour. One example would be self-
35 induced pressure to complete a mission. That is, pressure on the person operating the
flight, the pilot.

HIS HONOUR: Yes.

MR HANKS: The second one would be pressure from passengers.
40

HIS HONOUR: Because of the anxiety of the circumstance perhaps?

MR HANKS: That the flight be completed. An example, your Honour, a flight is
45 scheduled from a regional aerodrome in Victoria to Melbourne.

HIS HONOUR: Yes.

MR HANKS: It's scheduled to carry a person who's seeking medical treatment. The aircraft is a single engine aircraft. It may be that at the time when the aircraft is due to fly the weather is unfavourable. Now, in some circumstances a prudent pilot might say, "Well, we will have to put the mission off today. We will see if we can fly tomorrow".

HIS HONOUR: Yes.

MR HANKS: But if there's pressure from the passengers, who might naturally be committed to getting to their destination so that medical treatment can be received, that's what those advising the director of air safety identified as human factor challenges.

HIS HONOUR: Yes. Not otherwise present in private aviation.

MR HANKS: Yes. Possibly exacerbated by the absence of operational support systems generally available in commercial aviation. I might just stop there for a moment. The community service flight sector would share some of these human factor challenges with those who operate commercially, who run charter flights and receive payment from passengers in order to transport them from A to B. But they, that is, those who operate in the charter flight sector, will have operational support systems that may not be available in the CSF sector.

HIS HONOUR: Yes.

MR HANKS: Now, after reviewing the data that was available, looking at international studies because – I might mention that the community service flight sector is, in substance, replicated in North America, both in Canada and in the United States. The name of the applicant, Angel Flight, is derived from organisations that are found throughout North America. There is also an active community service flight sector in New Zealand, and there have been studies in those jurisdictions as to the particular regulatory issues presented by the sector. Always going back to – if I put it this way, always going back to safety.

HIS HONOUR: Yes.

MR HANKS: So Mr Monahan will give evidence that he decided that there was a need to address the additional risks to safety that were faced by the CSF operations, and did so by reference to five areas of regulation, and one can see that those are mirrored in the instrument. He will say that passenger caps were important, that is, a cap on the number of persons who could be carried in an aircraft as passengers.

HIS HONOUR: Yes.

MR HANKS: And that's reflected in clause 7, subclause (1), paragraph (c). It's also reflected in clause 10, paragraph (a).

HIS HONOUR: Yes.

MR HANKS: And the evidence will be that putting a cap on the number of passengers that can be carried serves safety in two ways: (1) it reduces the number
5 of people who would be exposed to potential risk; and (2) it mitigates the pressure that might otherwise be placed on the person conducting the flight to complete the flight. The second area of risk that was sought to be mitigated in the instrument was the absence of pilot training and pilot experience. Clause 9 in the instrument deals with that. And your Honour can see, if your Honour looks at page 15 of the court
10 book, the particular conditions called “general requirements” that are imposed on the holders of flight crew licences who pilot an aeroplane operating a community service flight. The conditions that are imposed there go directly to their recent experience.

HIS HONOUR: Yes.
15

MR HANKS: Just if I could draw your Honour’s attention to page 16 of the court book, there’s a particular set of rules for a flight conducted under the VFR and for a flight conducted under the IFR. So the first of those two refers to visual flight rules.

20 HIS HONOUR: Yes.

MR HANKS: And the second to instrument flight rules.

HIS HONOUR: Yes.
25

MR HANKS: There’s at least - - -

HIS HONOUR: So different conditions for different qualified pilots.

30 MR HANKS: That’s right. There’s an assumption that they’re different.

HIS HONOUR: Yes.

MR HANKS: And your Honour will hear evidence from Mr Monahan as to how
35 different they are.

HIS HONOUR: Yes.

MR HANKS: At least how different they different they were perceived to be, which
40 is the critical thing here. There are also operational requirements imposed by the instrument. The evidence will be that they were designed to mitigate risk. And one of those can be found in clause 10, paragraph (b), which is that aeroplane not be operated under visual flight rules at night.

45 HIS HONOUR: Yes.

MR HANKS: I wanted to go, then, to the maintenance requirement, which is dealt with in clause 11. And your Honour can see that there are particular maintenance requirements imposed as a condition on a flight crew licence who might pilot an aircraft used, or an aeroplane used for a community service flight.

5

HIS HONOUR: Yes.

MR HANKS: The potential connection of that condition to enhancing safety is, we will submit, obvious. And the final requirement is found in clause 10, and it's a notification requirement, paragraph (c) and (d).

10

HIS HONOUR: Yes.

MR HANKS: And your Honour can see how the airport – the first is the way in which the flight must be identified when submitting a flight notification to Airservices Australia.

15

HIS HONOUR: Yes.

MR HANKS: And, secondly, the information to be recorded, by the pilot operating the flight, in a personal logbook.

20

HIS HONOUR: Yes, I see that.

MR HANKS: And the evidence will be that those conditions were added in order to enhance the information available to CASA so that CASA could determine whether this system of regulation was effective or needed intensification. Reminding your Honour that the instrument we're dealing with will be gone on 18 March next year. That appears in clause 2 of the instrument on court book 13.

25

30

HIS HONOUR: Yes. I see that.

MR HANKS: Now, as our friend Mr Walker has outlined to your Honour, the making of the instrument is attacked on three grounds. And ground 1 is that the instrument doesn't operate by reference to a class of civil aviation authorisation. I don't intend to go into that in detail, your Honour, other than to note that it depends on the disputed relationship between regulation 11.068, the empowering regulation, on the one hand, and the table in regulation 13.375. Now, your Honour, we've set out in our written submissions our argument that there is no relationship of the kind for which our friends contend. The table in regulation 13.375 is a table for an entirely different purpose. And in no way is it necessary for the specified class of authorisation referred to in 11.068 to find any recognition in the table in regulation 13.375.

35

40

HIS HONOUR: What about if you look at items – Mr Hanks, if you go to column 1, 4A, column 3, "maintenance authority" or 4, "Authorisation to perform maintenance certification"?

45

MR HANKS: Your Honour, we can select any item - - -

HIS HONOUR: Yes.

5 MR HANKS: - - - in the table and ask the same question.

HIS HONOUR: Yes.

10 MR HANKS: And the answer will be the same: those are classes of civil aviation authorisations for a particular purpose, and only that purpose. They are classes for the purposes of section 30DU of the Act. And that's precisely what regulation 13.375 says:

15 *For the purposes of section 30DU ... a civil aviation authorisation mentioned in column 2 of ... belongs to the class of civil aviation authorisation mentioned in column 3 –*

but that's only for the purposes of 30DU, and 30DU is aimed at a different form of regulation from that contemplated by 11.068 - - -

20

HIS HONOUR: Yes.

MR HANKS: - - - in the regulations. Now, we've - - -

25 HIS HONOUR: So on your submission, as I understand it, the work that's done by regulation 13.375 is for the purposes of section 30DU of the Act and for no other purpose?

30 MR HANKS: Correct. Certainly not for our purpose, your Honour.

HIS HONOUR: Not for the purpose for which - - -

MR HANKS: Yes, I - - -

35 HIS HONOUR: - - - this instrument was issued.

MR HANKS: I might make – so bold as to make – put the submission in the terms your Honour did initially, “for no other purpose”, but certainly not for the purpose of regulation 11.068.

40

HIS HONOUR: Yes.

MR HANKS: Your Honour will find what we have to say about that in paragraphs 30 to 39 of our written submissions. All right. The second ground of attack that our friends develop, ground 2, is that the instrument is not a legislative instrument. Reminding your Honour that the empowering provision, regulation 11.068, authorises CASA to issue a legislative instrument. Now, here's where your Honour

will find another departure between our friends and us, in that we say the function – now we’re going back to the Act – the function of section 98 subsection (5AA) – subsection (5AB) is not to state exhaustively the two categories.

5 HIS HONOUR: I see.

MR HANKS: To make it simple, your Honour, if I might, putting that at its simplest, from a linguistic point of view subsection (5AA) does not provide that an instrument issued under paragraph (5A) paragraph (a) is a legislative instrument only
10 if. It’s stated in positive terms and, in our submission, subsection (5AA) identifies one way in which an instrument can qualify as a legislative instrument. And subsection (5AB) also identifies one way in which the obverse applies.

HIS HONOUR: Can you just give me an example, Mr Hanks, either way, under
15 (5AA), what’s a way other than under (5AA) that an instrument could qualify as a legislative instrument?

MR HANKS: Through the application of the identifying principles referred to in a number of cases, your Honour, where the distinction between the legislative and - - -
20

HIS HONOUR: Yes.

MR HANKS: - - - the administrative, for example, - - -

25 HIS HONOUR: Yes.

MR HANKS: - - - has been relevant. And those are cases that have arisen, by and large, in the context of the AD(JR) Act.

30 HIS HONOUR: Yes.

MR HANKS: And your Honour will recall that, although resort to that Act has become increasingly rare, given some of these technical issues, but one of the things about the AD(JR) Act is that it allows application to be made to this court for the
35 review of a decision of an administrative character. And therefore, it requires and has required this court from time to time to decide whether a particular decision has that character or a different character.

HIS HONOUR: Yes. So hence your submission that this – under (5AA), that’s one
40 way - - -

MR HANKS: Yes.

HIS HONOUR: - - - in which it could have that legislative character.
45

MR HANKS: So both parties have had – paid some attention to a case called RG Capital Radio, a Full Court judgment.

HIS HONOUR: Yes.

MR HANKS: Where that was an issue. This is an area of active inquiry which has become increasingly rare, as your Honour would know, because generally those who
5 have challenged the validity of administrative decisions nowadays have got another option, 39B of the Judiciary Act.

HIS HONOUR: Yes.

10 MR HANKS: An option that is not complicated by technical distinctions.

HIS HONOUR: No.

MR HANKS: But the AD(JR) Act is complicated by technical distinctions, but
15 that's another way in which one could characterise an instrument issued under paragraph (5AA) as a legislative instrument, by resort to those - - -

HIS HONOUR: Yes.

20 MR HANKS: - - - principles. So we deal with that issue in paragraphs 40 to 48 of our written submissions. And I should retrace briefly to make a concession which may not have been apparent. Plainly, if an instrument falls within subsection (5AB), because it's expressed to apply in relation to a particular person, take that as an
25 example.

HIS HONOUR: Yes.

MR HANKS: The effect of that subsection is that it cannot be a legislative
30 instrument.

HIS HONOUR: Yes.

MR HANKS: But there will be other circumstances – may I put it this way, there will be other circumstances in which the instrument, even if not expressed to apply in
35 relation to a particular person, will not be a legislative instrument. And that will be because of the application of the accepted principles for which the judgment in RG Capital Radio is a good starting point. The third ground that we need to deal with, your Honour, in this proceeding is ground 5, which is that the exercise of power given by regulation 11.068 in making the instrument was unreasonable or not
40 reasonably proportionate. The question, in our submission, will be whether, on the evidence that your Honour will hear, your Honour is satisfied that the applicant has shown that there's no reasonable relationship between the content of the instrument and the power given by 11.068.

45 HIS HONOUR: Yes.

MR HANKS: I'm sorry, your Honour, I just wanted to turn up – yes. So the question will distil to this, we suggest, is your Honour persuaded that there's no reasonable relationship between the instrument and a matter mentioned in section 98 subsection (5A)? Because that's where your Honour is pointed by regulation 11.068.

5 CASA may issue a legislative instrument that imposes a condition relating to a matter mentioned in that subsection, that's subsection 98(5A).

HIS HONOUR: Yes.

10 MR HANKS: On a specified class of authorisation. And when you go back to subsection (5A) the matters that are listed are:

Matters affecting the safe navigation and operation, or the maintenance, of aircraft –

15 and matters affecting:

...the airworthiness of, or design standards for, aircraft.

20 But in our debate it's the first of those categories of matter.

HIS HONOUR: Yes.

25 MR HANKS: So your Honour will need to – if I might say this respectfully – your Honour will need to bear in mind that it will be incumbent on the applicant to show that there is no reasonable relationship between the content of the instrument and;

Matters affecting the safe navigation and operation, or the maintenance, of aircraft.

30 And we've dealt with that in our written submissions, your Honour, at paragraphs 74 to 88.

HIS HONOUR: Yes.

35 MR HANKS: Now, we've not only lost, as it were – in a piece of housekeeping on the part of the applicant, we've not only lost ground 4, the denial of procedural fairness, but we've also lost the former ground 3, which was that the instrument imposed a condition on a class of operation rather than a class of authorisation.

40 Now, we're not too worried about that, because it has gone. Your Honour knows that there are affidavits that will be read.

HIS HONOUR: Yes.

45 MR HANKS: By and large we've – again, another admirable piece of housekeeping by both parties – we've disposed of any objections.

HIS HONOUR: Yes.

MR HANKS: And your Honour has made some rulings.

5 HIS HONOUR: Yes.

MR HANKS: Talking of rulings, your Honour, I wanted to ask one question.

10 HIS HONOUR: Yes. You want to argue the toss, do you, Mr Hanks?

MR HANKS: Well, that would be a useful way of wasting time, your Honour.

HIS HONOUR: Yes, it would be.

15 MR HANKS: No. If your Honour has the rulings relating to the affidavit of Mr Crees.

HIS HONOUR: Yes.

20 MR HANKS: I think I've got the right one.

HIS HONOUR: I have it.

25 MR HANKS: Unfortunately, my pages are not numbered; this is going to afflict us more than once.

HIS HONOUR: It's item 5, Mr Hanks.

30 MR HANKS: It's not in the court book. There are two paragraphs, paragraphs 15 and 16 in Mr Crees' affidavit.

HIS HONOUR: Yes.

35 MR HANKS: Now, your Honour will see that we objected to the second sentence of paragraph 15.

HIS HONOUR: I saw.

40 MR HANKS: And the applicant's response was "not pressed". And your Honour's ruling was "admitted".

HIS HONOUR: Yes.

45 MR HANKS: I think your Honour might have thought that the objection was not pressed.

HIS HONOUR: Yes, - - -

MR HANKS: And because that's replicated with paragraph 16 as a whole.

HIS HONOUR: I see.

5 MR HANKS: And the way in which the parties, effectively, negotiated their position on the objections can be seen in the court book at page 819.

HIS HONOUR: Yes.

10 MR HANKS: But the table that your Honour has created definitely reproduces the party's position, and it's true that the respondent had no reply to the position adopted by the applicant, which was not to press the relevant part of the evidence.

HIS HONOUR: Yes.

15 MR HANKS: We had anticipated that might mean that the relevant part of the evidence would not be admitted.

HIS HONOUR: I see.

20 MR HANKS: I think my learned friend is congratulating me on pedantry.

HIS HONOUR: What are to do with that Mr Walker?

25 MR WALKER: Your Honour, we're not taking any advantage of – it should be as my friend points out.

HIS HONOUR: Very well.

30 MR HANKS: Thank you, your Honour.

HIS HONOUR: Thank you, Mr Hanks.

MR HANKS: Thank you. That's our opening.

35 HIS HONOUR: Mr Walker, do your written submissions identify each of the affidavits you rely upon, or that you read? Or are you going to tell me now which
- - -

40 MR WALKER: I'm going to tell you now.

HIS HONOUR: Thank you.

MR WALKER: There is a document for that very purpose contained at - - -

45 HIS HONOUR: I've seen something.

MR WALKER: - - - court book 24. And it needs to be read in – it's item 4A - - -

HIS HONOUR: Sorry, I didn't quite hear you then with the noise.

5 MR WALKER: It's item 4A.

HIS HONOUR: Yes.

10 MR WALKER: Which refers to Mr Crees' affidavit.

HIS HONOUR: Yes, yes.

MR WALKER: Should not read at the end "8 to 17" but, rather, "8 to 14 and 17".

15 HIS HONOUR: Yes. That seems to be correct, does it not, Mr Hanks?

MR HANKS: I'm sorry, your Honour, I've noted that correction.

20 HIS HONOUR: Reading 8 to 14 rather than 8 to 17 would deal with the issue that you just raised with me.

MR WALKER: And I should say, it's not as if that document is wrong, this was put in before objections.

25 HIS HONOUR: Yes, yes, of course.

MR WALKER: But I draw it to attention, I don't wish the listing of those paragraphs to excite my friend's - - -

30 MR HANKS: You know - - -

MR WALKER: - - - concern that there's a bear trap.

35 MR HANKS: You know how easily I am excited.

HIS HONOUR: Yes. All right. Well - - -

40 MR WALKER: And so, your Honour, that is, subject to the rulings on objections, that is the material that we read. And - - -

HIS HONOUR: Yes. Well, just it's clear, the affidavit – the affidavit evidence that is read by the applicant will be those affidavits that are listed in the correspondence – I just can't see – dated 26 February 2021 with the amendment that in paragraph item 4A the reference will be – to Mr Owen Cress' affidavit sworn 15 June 2020, that
45 paragraphs 1 to 2, 4, 6, 8 to 14 - - -

MR WALKER: And 17.

HIS HONOUR: - - - with that amendment - - -

MR WALKER: And 17.

5 HIS HONOUR: And 17, thank you. That is the affidavits evidence relied upon by the applicants, thank you.

MR WALKER: That's correct, and we've - - -

10 HIS HONOUR: Is it convenient that - - -

MR WALKER: - - - received notice that Mr Crees is required for a cross-examination.

15 HIS HONOUR: Yes. I might just mark that, Mr Walker, for convenience, collectively as exhibit A1.

20 **EXHIBIT #A1 THOSE AFFIDAVITS THAT ARE LISTED IN THE
CORRESPONDENCE WITH THE AMENDMENT IN PARAGRAPH ITEM
4A DATED 26/02/2021**

MR WALKER: Please the court.
25

HIS HONOUR: Thank you. Now, Mr Cress, is Mr Crees in court? Just outside. The court attendant, could you ask Mr Crees to come in, please. Take a seat, Mr Crees. If you feel more comfortable, please be – feel free to take your mask off.

30 DR CREES: Thank you.

HIS HONOUR: Thank you.

35 **<OWEN LLOYD CREES, SWORN** [11.25 am]

<EXAMINATION-IN-CHIEF BY MR WALKER

40 HIS HONOUR: Thank you, Mr Crees. Mr Walker.

MR WALKER: Your name is Owen Crees. Your address is 6 Devonshire Road, Heathfield, South Australia. And you swore an affidavit on 15 June 2020; is that
45 correct?---That's correct.

HIS HONOUR: Mr Hanks.

<CROSS-EXAMINATION BY MR HANKS

[11.25 am]

MR HANKS: Good morning, Mr Crees?---Good morning.

5

Now, as I understand it, you used paragraph 1 of your affidavit – do you have a copy of your affidavit with you?---No, I don't.

You don't. Okay. That's inconvenient.

10

HIS HONOUR: Is there a copy?

MR HANKS: We will remedy that.

15 HIS HONOUR: Yes. Thank you, Mr Walker.

MR HANKS: Mr Crees, you will be responsible for not shuffling the pages. So you use paragraph 1 of that affidavit to set out your qualifications; that's correct?---That's correct.

20

All right. Qualifications that are relevantly evidence you're giving to the court?---Yes.

All right. You've held a private pilot's licence since 1978?---Yes.

25

You've been a volunteer with Angel Flight since 2004?---Yes.

And you've been a director of Angel Flight since December 2019?---Yes.

30 That's correct. You don't claim any independence from Angel Flight, do you, as an independent expert?---No.

Thank you. In fact, you've advocated on behalf of Angel Flight in opposition to the instrument?---Yes.

35

Thank you. At several points in your affidavit – I will give you one example: paragraph 4 – you say you've used the internal records of Angel Flight; you see that?---Yes, yes.

40 You say it again in paragraph 6, the first line?---Yes.

And paragraph 11, middle of the paragraph:

I have analysed the - - -

45

?---Yes.

Continuing:

- - - *accident briefs.*

5 All right. And, again, paragraph 16:

...using data from the Angel Flight database.

?---Yes.

10

Thank you. Now, am I right that you have not attached any of that internal data to your affidavit?---Yes.

Correct?---Correct.

15

Thank you. I think you've read – at least my understanding is you have read Mr Monahan's affidavits?---Yes.

20

All right. And do you understand Mr Monahan to have said that he and CASA did not have access to the internal data from Angel Flight?---Yes.

All right. Is it right that when you carried out your calculations, you did not have access to data from other community service flight operators?---That's correct.

25

Thank you. What I'm going to suggest is that you've carried out some calculations based on a particular data set?---Yes.

The data set being data derived from Angel Flight?---That's part of the data set I used.

30

I beg your pardon?---That's – that's a part of the data set.

Right. What other part did you use?---Well, the – the calculations I carried out were to analyse both the Angel Flight data and data on other general aviation accident rates. So there are two sets of data which I used, and the Angel Flight data set was one.

35

Okay. So the data that you had access to on community service flights was from Angel Flight; correct?---Correct.

40

Thank you. And you came up with results which, as I understand your evidence, differed from the results at which CASA arrived?---Yes.

Thank you. Do you accept that the results that you arrived at were based on different data from the data used by CASA?---Yes.

45

Thank you. One final question: do you accept that a single fatal accident involving an activity is a prompt for an inquiry to look for causes and ongoing risks to safety?---I accept that any accident is a cause for an investigation of the cause of that accident.

5

I put it to you that that would be consistent with a precautionary approach?---I wouldn't necessarily agree with that.

10

Do you understand the precautionary principle?---I do.

All right. Do you accept, nevertheless, that one incident or one accident could be a basis for inquiring as to what its potential cause was?---Well, every accident is subject to inquiry. So I wouldn't dispute that at all. Every accident is investigated.

15

Okay. I have no other questions, your Honour.

HIS HONOUR: Thank you for that, Mr Hanks. Mr Walker, any re-examination?

20

<RE-EXAMINATION BY MR WALKER

[11.32 am]

25

MR WALKER: In those last questions, my friend asked you about a precautionary principle operating, to put it generally, upon there occurring one death in the aviation activity in question. Do you recall those questions?---Yes.

30

In the course of preparing the report, which is MP24 to Ms Pagani's affidavit of 14 February 2020 and preparing your affidavit, did you yourself see any material that you understood to be an analysis of any death said to have been caused on a CSF?

HIS HONOUR: Sorry. Could you - - -

35

MR WALKER: Did you see any route cause analysis of any of - in relation to any death caused or ensuing in a CSF?---The only one was the ATSB investigation of the accident that occurred at - near Horsham - - -

Yes?--- - - - in 2011.

40

Yes. That's the only material that you've seen of that kind; is that right?---Yes.

Thank you.

HIS HONOUR: Thank you for that.

45

Mr Crees, thank you for your attendance. You're excused.

<THE WITNESS WITHDREW

[11.34 am]

HIS HONOUR: Mr Walker, does that conclude your evidence?

5

MR WALKER: It does.

HIS HONOUR: Excellent. Mr Hanks.

10 MR HANKS: Thank you, your Honour. Now, I'm going to call Mr Monahan in a moment. Before I do that I just need to – there are some corrections to be made to Mr Monahan's affidavit. Court book 318, your Honour - - -

HIS HONOUR: Yes.

15

MR HANKS: - - - is a letter which we wrote to the applicant's solicitors on 22 February setting out a list of corrections.

HIS HONOUR: Yes.

20

MR HANKS: I can put each of those to Mr Monahan.

MR WALKER: That's not necessary, your Honour. It would be convenient and with our consent for that to be tendered by way of accepted correction.

25

MR HANKS: Thank you. I thank my friend.

HIS HONOUR: Thank you for that, Mr Walker. That's appreciated. Just so I don't forget it, Mr Hanks, I might mark - - -

30

MR HANKS: Please do, yes.

HIS HONOUR: - - - provisionally, Mr Monahan's affidavit, which was the only affidavit your - - -

35

MR HANKS: There are two.

HIS HONOUR: There are two, are there?

40

MR HANKS: Yes.

HIS HONOUR: Yes, you're quite right. I will mark provisionally Mr Monahan's affidavits – both affidavits – what dates are they, Mr Hanks?

45

MR HANKS: Well, I will make sure I don't make an error here, your Honour. 19 March 2020 is the first one.

HIS HONOUR: Yes.

MR HANKS: And the second one is - - -

5 HIS HONOUR: 13 November.

MR HANKS: 13 November 2020.

10 HIS HONOUR: Yes. Well, I will mark as R1 the affidavit of Christopher Paul Monahan sworn 19 March 2020, the affidavit of Christopher Monahan sworn 13 November 2020, together with the letter from the respondent's solicitors to the applicant's solicitors with the corrections identified for Mr Monahan's first and second affidavits and dated 22 February 2021, collectively, as R1.

15

**EXHIBIT #R1 AFFIDAVIT OF CHRISTOPHER PAUL MONAGHAN
DATED 19/03/2020, AFFIDAVIT OF CHRISTOPHER PAUL MONAGHAN
DATED 13/11/2020, & LETTER OF CORRECTIONS TO AFFIDAVITS
DATED 22/02/2021**

20

MR HANKS: Thank you, your Honour. So I now call Mr Monahan.

25 HIS HONOUR: Thank you for that. Is Mr Monahan in court?

25

MR HANKS: He's just outside, your Honour.

HIS HONOUR: Thank you.

30 MR HANKS: Discreetly.

<CHRISTOPHER PAUL MONAHAN, SWORN

[11.38 am]

35

<EXAMINATION-IN-CHIEF BY MR HANKS

40 HIS HONOUR: Take a seat, Mr Monahan.

40

MR HANKS: Mr Monahan, your full name is Christopher Paul Monahan and your business address is 16 Furzer, F-u-r-z-e-r, Street, Phillip, in the Australian Capital Territory?---Correct.

45 Thank you. Your occupation is public servant?---Correct.

Thank you. You have affirmed two affidavits, the first of those on 19 March 2020; is that correct?---Correct.

5 Something I should have mentioned earlier, Mr Monahan: you will need to answer yes or no, rather than nodding?---Sorry.

Thank you. The other affidavit was affirmed on 13 November 2020?---Yes.

10 Thank you. Thank you, your Honour.

HIS HONOUR: Thank you. Does that conclude your evidence-in-chief?

MR HANKS: It does. Perhaps your Honour will permit me to mention to Mr Monahan that the corrections to his affidavit have been accepted.

15 HIS HONOUR: Yes.

MR HANKS: Thank you. So I don't need to go through those with Mr Monahan?---Thank you.

20 HIS HONOUR: Thank you for that, Mr Hanks. Mr Walker.

25 <CROSS-EXAMINATION BY MR WALKER [11.39 am]

MR WALKER: Can I ask whether the witness has access to – perhaps it might be easier – the court book version of his affidavits?

30 HIS HONOUR: Yes. Does someone have a copy of the court book?

THE WITNESS: I have - - -

35 HIS HONOUR: Yes, you have it - - -?---I have affidavit - - -

Excellent, Mr Monahan?--- - - - I have affidavit 1 and 2 here, mine, but if you need some other book – some other version.

40 MR WALKER: We will see whether it works with page numbers. Does that – do they have large page numbers preceded by the letters CB on them?---No, they do not. They have page numbers, but not with a CB.

45 That's unfortunate. Does it have – do they have pages? Just playing Battleship. Do they have smaller page numbers in the bottom right-hand corner? For example, if I asked you to turn to 85 of your second affidavit. First affidavit, then?---Yeah, I'm trying to – I don't believe they align, based off of that.

HIS HONOUR: Mr Walker, may I suggest this: I will ask my associate to go and assist the witness. Mr Associate, could you go and assist the witness and see if we can identify reference points to assist Mr Walker.

5 MR WALKER: I'm much obliged to your Honour. If it helps - - -

HIS HONOUR: I think once we get started - - -

10 MR WALKER: Yes, quite. Quite.

HIS HONOUR: - - - we will be fine.

MR WALKER: Quite. It's court book 405 - - -

15 HIS HONOUR: Yes.

MR WALKER: - - - that I want to refer the witness to. I think that might be page 85 of his second affidavit – first, second – first affidavit, is it? First affidavit?---The affidavit - - -

20 Yes?---So this appears to be first affidavit, 85.

ASSOCIATE: Yes. Yes, that's right?---Okay.

25 MR WALKER: I'm hoping the witness will have a page 85 at the bottom?---Correct.

Is that - - -?---Yes.

30 HIS HONOUR: Okay. We're off and running, Mr Walker.

MR WALKER: With some trepidation, I then ask, is that part of a standard form of recommendation within CASA?---That is – yes, that is one of many. Yes.

35 Yes. And is it, in particular, a reference to or contents of an ATSB Transport Safety Report AO-2011-100 of 3 December 2013?---Yes, it does reference that.

40 Thank you. And should his Honour take it that that is where one will find, and the only place one will find, ATSB material concerning the August 2011 fatal accident of VHPOJ? This is the only place you will find it in the material in your affidavits; is that right?---Based off this, I – I don't know that there's any other place, but there's a great deal of information here that reference it.

45 So if his Honour were looking for information and conclusions about that fatal accident, as to implications for the safe operations of certain kinds of flights, this is the only place it will be found; is that right?---I believe it is supporting in terms of details of it, yes.

No. No. Please - - -?---I'm sorry. I'm trying to - - -

- - - just attend to the question: is this the only place such material will be found or not?---I – I can't be 100 per cent confident of everything, but I believe that's the only
5 place with that specificity, yes.

I'm sorry, you were speaking too quickly for me. You - - -?---I – I believe that that is the only place with that specificity, yes.

10 This is, you think, the most detailed description of that fatal accident; is that correct?---Yes.

HIS HONOUR: Just pausing there, Mr Walker. When you say that, you're not confining yourself just to the reference of the heading that you took the witness to.
15

MR WALKER: No.

HIS HONOUR: You're referring to what appears on the page – on that page.

20 MR WALKER: All and any part of the document - - -

HIS HONOUR: Of the whole document.

MR WALKER: - - - that he understands. Yes.
25

HIS HONOUR: Yes. Did you understand that, Mr Monahan?---I – I do. I – I reference the two accidents often, so that's why I say it is referenced, but the specificity there, I believe that's the only place like that.

30 Yes. Thank you.

MR WALKER: But it was the ATSB which, as you understood it, conducted investigations into that August 2011 fatal accident; is that correct?---Correct.

35 And you would agree, would you not, that under the heading What the ATSB Found, in the next two paragraphs contains in the first paragraph, conclusions concerning that accident and in the second paragraph, facts concerning the manner in which flights were permitted under the visual flight rules at night; correct?---That – that is what the ATSB found, yes.
40

Is what I've said correct?---I believe it is correct.

Thank you. So there's one paragraph concerning what the bureau found about this fatal accident; is that right?---I'm sorry, say it again, please.
45

There is just the one paragraph setting out what the bureau found about this fatal accident; is that correct?---In this document, yes.

I'm sorry, what did you say again?---In this document. They have a longer, more expansive in their own reports but this is a summary of it, yes.

Have you just referred to material not in your affidavits?---I don't believe I have.

5

When you wave your hands and say "there's a longer document", could you show me where that is?---I don't -- I -- this is a summary -- correct, this is a summary of what I have.

10 This is material which you and your colleagues paid regard to informing a recommendation that, ultimately produced the instrument in question; is that right?---Yes.

15 Insofar as that fatal accident was concerned, there was nothing more detailed, nor was there anything different from that one paragraph as to what they had found that you took into account; is that right?---I'm trying to understand the question, that the ---

20 That's the sum total of what you had for the purposes of working on a recommendation for those deciding on whether to make the instrument concerning this fatal accident; is that correct?---I apologise. This is isn't the only thing I considered as part of it but in terms of this accident, this is a summary of what I considered for that accident.

25 Mr Monahan, concerning this accident, this is the sum total; is that right?---For this accident, yes.

30 Can you point to anything in those five and a half lines comprising that paragraph that finds reflection by way of a rational response in the instrument that was promulgated supposedly in the interests of safety?---In terms of that visual flight rules at night operations?

I'm not going to answer your question?---I'm sorry.

35 Let's take it sentence by sentence. The first sentence:

Landing at Bendigo, accessing a weather forecast before continuing towards Nhill --

40 that doesn't find any reflection, does it, in the conditions imposed by the instrument; correct?---Correct.

Continuing:

45 *After recommencing the flight, the pilot probably encountered reduced visibility conditions approaching Nhill due to low cloud, rain and diminishing daylight --*

that half sentence is reflected, is it, in the conditions that we have seen concerning the visual flight rules at night; is that right?---That's -- that goes to low cloud, weather and diminishing daylight. It's not night yet.

5 It's not night yet?---Correct.

All right. Thank you. Is there any reflection in the conditions imposed by the instrument of that half sentence?---No.

10 Continuing:

...leading to disorientation, loss of control and impact with terrain.

15 It's fair to say, isn't it, that those are not matters which find reflection in the conditions imposed by the instrument; correct?---There would be influence by the direction but in terms of directly, no.

20 When you say "influence by", there's nothing in the instrument that could be sensibly regarded as a response to the inferred disorientation, loss of control and impact with terrain; correct?---Yes.

And that leaves the last sentence:

25 *One of the passengers was probably not wearing seatbelt at the time of the accident.*

That's certainly not reflected in the instrument, is it?---Correct.

30 And so by deduction, you accept, don't you, that the one and only paragraph containing the most detailed reference to that accident in August 2011 finds no reflection in the instrument; correct?---For the first paragraph, correct.

35 It's the only paragraph, isn't it, about that accident?---Well, the second paragraph as well.

The second paragraph is not about that accident at all, is it. Mr Monahan, you've been at some pains to say it wasn't night?---That's so.

40 That second paragraph has nothing to do with that accident, does it?---Okay. All right. Correct.

45 Are you perhaps a bit anxious about trying to put in other material about this accident apart from the one and only detailed paragraph?---No, I'm just trying to provide accurate answers, is all.

Thank you. Is anything else contained in what you swore in your affidavits, or you have annexed, having sworn that this was material, to which you and your colleagues

had regard before the instrument was made which sets out details of either of the two fatal accidents for the purposes of informing the content of a proposed instrument?---Nothing additional.

5 You are very familiar with the expression “root cause analysis”, aren’t you?---Yes.

And that is a term much used in aviation in order to derive some benefit from what are often tragedies; correct?---Correct.

10 Called root case because it simply won’t do to say that the people died because the aeroplane had an uncontrolled impact with terrain. That is a description of the tragedy rather than an allocation of cause sufficiently sensibly deep in an understanding of the occasion to draw lessons for the future, correct?---Correct.

15 None of that has occurred with respect to these two fatal accidents upon which the whole of the instrument was stimulated; is that correct? No root cause analysis ever taken into account by you and your colleagues about those two accidents; correct?---No, I think I – I disagree with that.

20 Where do I see any reference to a root cause analysis for either of those fatal accidents as part of the considerations that led to the making of this instrument – where do I see it in your affidavit or its annexures?---I don’t have it annotated in the annexes or the affidavit.

25 You’re not suggesting you left it out by accident, are you?---No, please.

It’s not there because it was not part of your pre-instrument consideration; correct?---All facts and incidents that occurred were part of the consideration but not sole considerations.

30 Perhaps you could attend to my questions. There is no reference to any root cause analysis leading to any recommended content of the instrument because there was no such consideration by you and your colleagues to the best of your knowledge, correct?---Correct.

35 Do you, yourself, regard as accurate a description of the two fatal accidents as having provided a stimulus for further inquiries by CASA but not as reasons for the making of the instrument about which these proceedings are concerned?--- I understand that they stimulated our looking at community service flights based off of these two
40 accidents started the process. Yes.

But do you agree with the second part of what I’m repeating, namely, that the accidents did not provide reasons for making the instrument. If you understand that?---Yes, now I understand. Yes, related to the causes. Yes.

45 I’m sorry, yes, what?---Yes. Yes, related to what you described. Yes. I would agree.

As you recall the making of the instrument, were the accidents part of the reasons for making the instrument or not?---They precipitated the discussion but they weren't the reason that the instrument was eventually made.

- 5 Do you mean but for the accidents, the instrument probably wouldn't have been made?---No, I can't -- I wouldn't necessarily, but the accidents drew our attention to community service flights.

- 10 I'm talking about two fatal accidents, not just the -- not all the accidents. Do you understand?---Right. I am talking about the two fatal accidents. Correct.

- In your affidavits, it's fair to say, isn't it, that the two fatal accidents are advanced by you as an explanation in the administrative history of how special attention to the CSFs was placed on the agenda; is that right?---Correct.

- 15 The first of them was in 2011?---Correct.

- 20 Did it stimulate consideration of the imposition of conditions specifically on CSFs?---That predates my time in CASA, but the historical information is that it generated a discussion that resulted in a discussion paper in 2014, I believe.

And was that a discussion paper which decided nothing had needed to change?---At that time, that was the determination at CASA.

- 25 Now, when you say this precedes your time, I take it that, from the content of both your affidavits, that you familiarised yourself with existing files when you started to work on them, and as you continue to work on them; is that right?---Correct.

- 30 Yes. So one thing is clear from the history with which you became familiar, was that the 2011 fatal accident did not, in itself, lead to the suggestion to promulgate any instrument imposing conditions specifically on CSFs; is that correct?---That's correct.

- 35 And it need hardly be said, but, perhaps, bears in this forum -- explicit statement, one can put to one side entirely the idea that one accident causing death is something that can legitimately be overlooked. All fatal accidents are important; correct?---Correct.

- 40 It is correct, isn't it, that when you started to work on this topic, you appreciated that those who had preceded you in relation to the 2011 fatal accident had evidently not regarded whatever they understood concerning its circumstances as suggesting the need to impose conditions specifically on CSFs; correct?---CASA did not pursue it, yes.

- 45 Because of a consideration that whatever it was that they appreciated concerning that accident, it did not justify the imposition of conditions specifically on CSFs; correct?---At the time, yes.

And you are not able, are you, to point to any material up to the making of the instrument where that 2011 accident was returned to so as to produce upon consideration of that accident a justification for the imposition of conditions on CSFs, can you?---Correct.

5

So when you said two answers ago, “At that time, yes,” his Honour should understand that it means, “At that time and thereafter until the making of the instrument, that accident provided no justification in the eyes of CASA for imposing conditions on CSFs”; correct?---I don’t believe I would characterise it that way, that it provides - - -

10

But it is – you may not characterise that way - - -?---But - - -

- - - but it’s true, isn’t it?---That had no justification. It is part of the consideration that goes to the overall consideration that CASA makes that ends up with the justification. Whether it has a direct line to something with a cause that is attributed in one of the conditions is different. But it’s not as if we disregarded the fact that an accident happened.

15

I’m not suggesting that for a moment. That would be inhumane and unprofessional. I’m not going to suggest that at all?---No, I wasn’t.

20

Please. But having taking them into account, I suggest, those who looked at the 2011 accident before you and you looking at it after you took over this topic did not consider that it provided that accident, its root causes, had you known them, that it provided justification for any particular condition to be imposed on CSFs specifically. Do you agree?---By itself, correct.

25

Thank you. And, perhaps, this can be done a bit more rapidly with the second accident. All of this is also true of the second accident, that it provided, as to any root causes, had you ever come to know of any of them, no justification for any particular condition to be imposed on CSFs specifically; correct?---Not to a specific provision, correct.

30

So that what we’re left with so far as the two fatal accidents are concerned is that it is nothing about their circumstances. There’s nothing about root causes, had they ever become known to you and your colleagues, but, rather, the fact of them having occurred in operations which you tried to measure by reference to flying hours. That’s the only significance they had; is that right?---No, I don’t believe so. I - - -

35

40

What other significance did they have apart from the fact that they could be counted in relation to operations which you thought you could also count flying hours for?---The conditions by which they were conducted - - -

The - - -?--- - - - are different.

45

The what, sorry?---The conditions – the operational environment for both these are different than a normal private flight. While there was – are addressed in this not sure I can reference that, sorry. The – in terms of a direct cause, the – but it is part of the considerations. Does that make sense?

5

Probably not, but that's not for me to say?---Sorry.

I will address on that later?---Okay.

10 What I want to ask you about is this: do you agree that there is nothing concerning the circumstances of either of the fatal accidents as to root cause, as to training experience of the pilots, as to conduct of passengers, as to particular routes or mission that informed to any degree the making of the instrument. Do you agree with that?---Correct.

15

It is right, isn't it – it's – the fact that you can count, one, two, and you think you can count flight hours, and you think you can do comparisons with other kinds of flying. That's the only way in which they came to be taken into account; isn't that right?---These two accident? No.

20

Yes?---The fact that they're – they are community service flights, both of them, and they both had fatal accidents on them bore consideration.

25

Now, both being community service flights involves, according to your affidavits, some generalisations about conditions supposedly peculiar to CSF flights as opposed to what you've just called other ordinary private flights; is that right?---Correct.

30

But you had no information as to whether any of those supposedly generalised differences operated in either of those fatal accidents. Do you agree?---Correct.

35

On any view of then, then, you would almost have understood that there was no empirical support of any kind supplied by those two accidents for the idea that there are conditions peculiar to CSFs justifying the imposition of conditions specifically on CSFs. Do you agree?---Apologise. Can you – can I – you're asking me to reference an accident report or what was available to me. I want to make sure - - -

All of the - - -?--- - - - I don't do that

40

- - - material that you had available, none of it informed you about the operation in those two fatal accidents of any of the conditions which you have generalised as being supposedly peculiar to CSFs compared to ordinary private flights, correct?---Correct.

45

From which it follows that nothing in the instruments by way of any imposition of condition specifically on CSF's has any support in what you knew about those two fatal accidents, do you agree?---

And you had no empirical data whatever about any other accidents or incidents not fatal said to be attributed to or experienced in CSF in Australia to support making of the do you agree?---I believe we had an accident – an incident data.

5 You had numbers, didn't you? And no information about any – one or more of them to understand whether anything supposedly generalised as peculiar to CSF had anything to do with the occurrence of any of those incidents or accidents, correct?--- incident and accident data provided by BITRE, as we discussed and the ETSB.

10 Please answer my question?---It's - - -

Please answer my question?---Sorry.

15 You knew nothing about any of the accidents or incidents non-fatal - - -?---The yes.

- - - so as to attribute to their occurrence anything supposedly generalised as peculiar to CSF, correct? You had no information at all?---Correct on that.

20 And that means that your lack of any empirical support for the making of the instrument extends to what could be learned from the more numerous non-fatal accidents and incidents that you had seen in the statistical data, correct? No empirical support whatever from any of that information for the imposition of a
25 condition to meet something supposedly peculiar to CSF?---I would – I think I disagree in that empirical – data that tells me something is occurring in a particular sector, they have – generally aviation and you sectorise it down and then there is – there are statistics and information that we have numbers about what's occurring in the community service flights and those are different. I would argue
30 that – that - - -

But you understand the difference – sorry, I've interrupted you. I do apologise. I thought you had finished?---No, it's fine. Go ahead.

35 You understand the difference between generating an hypothesis and testing it, don't you?---Correct.

And what you've just referred to are figures which raw and without any detail as to particular accidents might excite in a precautionary and professional regulator an
40 interest to know whether there was something here special to CSF that might explain the raw statistics, is that right?---Correct.

And the empirical approach would be to set about finding out information to test the hypothesis. You would probably to proceed carefully construct the null hypothesis
45 that is no difference between CSF and a positive class of ordinary private flights, correct? You're nodding. That means - - -?---Correct. Sorry.

And - - -?---I apologise.

And then you would set out about collecting whatever might be called evidence to inform whether or not there was a difference to be seen between those two positive
5 classes?---Correct. And then you would conduct standard statistical tests to see whether such differences as arose were unacceptably possible to be explained by mere chance that is, there's no causal inference, correct?---Correct.

And that's what's sometimes called, in short hand, testing for statistical significance,
10 is that right?---Correct.

And throughout your affidavits you have, I suggest to you, by various remarks you've written, revealed that you're well aware that with what I call low numbers, it can be difficult to demonstrate at conventional levels of confidence, statistical
15 significance?---Correct.

Which you thought was worth drawing to the court's attention in your sworn evidence as highly likely to be operating in this case?---Correct.

Now, you appreciate, don't you, that there's more than one way of testing for statistical significance?---Correct.

And I've used the word "convention", because there's no magical or natural science to this?---Mmm.
25

It's a convention in disciplines like yours, aviation safety, to test possibly causal inferences from statistical differences by reference to what are sometimes caused confidence limits - - -?---Mmm.

- - - or confidence intervals; correct?---Correct.
30

Other people call the P-values?---Mmm.

And so you get, conventionally, no doubt because we have five fingers on each hand
35 - - -?---Mmm.

- - - P as 0.05 as a very conventional - - -?---Mmm.

- - - measure used in your discipline to detect whether there is a difference that matters, because the role of chance has been sufficiently eliminated so as to render reasonable causal inference; correct?---Correct.
40

And that, in another form of speech, is a 95 per cent confidence interval or limit; is that right?---Correct.
45

Now, to those of us who aren't mathematicians and happier with simple arithmetic, that can sometimes be translated to a plus or minus idea, isn't it: a point estimate with a plus or minus?---Yes. Sorry.

5 That's all right. And you're, therefore, familiar with the idea that when you've got these confidence intervals, the plus or minus – and they're really quite broad given the scale of the magnitude being measured – and they overlap with the one that you are comparing with, then that is a very stark demonstration of no statistical significance in the difference; is that right?---I apologise. I'm - - -

10 If the confidence intervals overlap between the two groups being compared, then you would never be satisfied of saying, "There's something causal going on here. We will need to get more data"?---Are you speaking within one data set or comparing data sets?

15 Comparing data sets?---It's – I would have to look at the data sets, whether they are using the same data sources and effective methodologies, then, yes, then you start to look at whether they overlap sufficiently and they come out with the same result, if that's what you're asking.

20 Correct me if I'm wrong – and I apologise if I am wrong - - -?---Yes.

- - - but what I suggest to you is there is no trace in either of your affidavits or in the annexed material of you having done that ever in this case; is that right?---The – I
25 relied on the statistics provided by our – out strategic analysis team, but - - -

So taking it one at a time?---Okay.

30 You never did that; is that right?---No, I didn't. I didn't do the math.

I gather from your CV that you do have pretty considerable mathematics fluency?---It's obvious.

35 That would be right, wouldn't it?---Yes.

And so you would be able to at least tell his Honour what, if anything, you had contributed to examination of statistical significance; is that right?---Yes.

40 And nothing in the affidavits has you telling the court anything concerning your consideration of statistical significance, except for the fact that it was probably not present; is that right?---If you're asking if I reviewed the statistical data?

Not at the moment, no?---Sorry.

45 In your affidavits, what you've taken the pains to tell the court - - -?---Mmm.

- - - all you've really said about your position about statistical significance is that you doubt that it was achieved in relation to the differences in question between CSFs and ordinary private flights; is that correct?---I can't – I'm not trying to be difficult – I doubt what's achieved?

5

Statistical significance?---Well – no, I don't – I don't believe that's – and I'm trying to – I don't believe that's – that's accurate. I – I believe that, based off of the initial data shown to me and the calculations that there was more review that needed to be done.

10

And it was – it has not been done, by looking at the information concerning accidents, incidents or fatal accidents, has it?---The statistical – the data we had, we conducted statistical analysis of that to produce what we believe, if you're talking about the mishap rate, you're talking of something else.

15

Yes. Almost certainly?---Yes.

All right. Statistical analysis can include simply counting events, can't it?---Correct.

20

I'm talking about statistical significance, which is - - -?---You're talking about the confidence for that. Yes.

- - - an attempt which is conventional and accepted in your discipline - - -?---Mmm.

25

- - - to take account of the well-known operation of chance; correct? Correct
- - -?---Yes, yes, yes.

- - - as opposed to causality; correct?---Correct. Okay.

30

Because his Honour knows, from what you've told him, that as to root cause analysis, that is, looking at incidents, accidents and fatal accidents one-by-one, a narrative and a reflection, you never had any material to ascribe causality to anything supposedly peculiar to CSFs to these two fatal accidents or to any of the accidents or incidents; correct? You had nothing about any of those accidents or incidents, did

35

you?---Until we had an opportunity to review the second accident, and that provided insight into potential root causes, but that - - -

Can you show me in your - - -?---No, I don't reference that, correct.

40

Just show me in the affidavit - - -?---No.

- - - where you do that?---I - - -

I'm sorry?---It's - - -

45

What are you saying?---I don't attribute it. I don't know that I've attributed to the second accident specifically the human factor test.

Please take your time?---I want to make sure I understand, that's all.

And I want to make sure that you have fairly answered the question?---Yes. Okay.

5 Can you find – please take whatever time you need - - -?---Mmm.

- - - in your affidavits, any reference to a consideration of causality with respect to the second fatal accident upon which was based any view about factors operating which were peculiar to CSFs?---I guess I had pointed in my first affidavit and from
10 point 15 on - - -

Sorry. Hang on, hang on?---I'm sorry. I think that is page 5 on the top if that's - - -

HIS HONOUR: What paragraph was that, Mr Monahan?---15 under the heading of
15 Community Service Flight Organisations in Australia. It starts a longer narrative that discusses - - -

MR WALKER: Thank you.

20 THE WITNESS: - - - a reference to - - -

MR WALKER: No. Thank you?---Okay.

I'm asking about the second accident, and that is referred to in paragraphs 32 and 33,
25 is that right, on page 7?---Correct.

And there's reference in paragraph 33 to the findings of an ATSB investigation; do you see that?---Correct.

30 Are those findings referred to anywhere else in your affidavit or attached material?---No, they won't be.

In other words, consistently with what you told his Honour earlier this morning, nothing concerned the facts or root cause analysis of the second fatal accident played
35 any part in justifying the imposition of conditions specifically on CSFs; is that right?---Mmm.

Because you can't point to it. You didn't look at it?---In terms of the report?

40 The particular root cause analysis and explanation of that second fatal accident as it relates to matters supposedly peculiar to these flights?---And the actual root cause of that; correct. You're – you're correct.

You have been able to read and study the report of Dr Crees which was annexure
45 MP24 to Ms Pagani's affidavit of 14 February 2020, haven't you?---I reviewed it.

And you have had the opportunity to review and study the affidavit of Dr Crees himself sworn on 15 June 2020?---I reviewed it.

5 I take it, given the seriousness of the issue, that you studied both of them, is that right?---I – sorry, I reviewed the – yes, I - - -

Carefully?---Yes.

10 Yes?---Well, yes, I reviewed them.

And do you agree that you have not taken issue with the observations he has advanced concerning the unreliability of data concerning flight hours for the various organisations under consideration?---That data came to – came well after either one of these, I – I don't have a – I haven't studies that in relation to pre-existing work
15 I've done.

So, first of all, upon study of his material you understood that he was raising serious points - - -?---Correct.

20 - - - concerning the reliability of basic data, it might be called the denominator
- - -?---Yes.

- - - datum - - -?---Correct.

25 Namely, millions of flight hours; is that correct?---Correct.

And you have not thought it appropriate to draw to his Honour's attention by any affidavit any disagreement by you with that, have you?---My affidavit went to what I thought were the germane points of the case - - -
30

Well, probably easier - - -?--- - - - and at that time I didn't think - - -

- - - just to answer my question?---I - - -

35 You haven't thought it necessary to draw to attention any disagreement you have with any of that, have you?---I have not – I have not lodged a disagreement, correct.

Thank you. Is it fair to say that informing your approach to the justification for the instrument before it was made in imposing conditions specifically on CSFs that a comparator was other private flights?---Correct.
40

Is that correct? Yes. And I think you've used the epithet "other ordinary private flights"; is that correct?---Correct.

45 Now, people who are tired of life can take private flights in some fairly hair-raising craft, and you've left some of them out of the category; is that right?---We have eliminated people that aren't similar type operations.

Right?---That – that incur risk in a very different way.

Could you just explain to his Honour, - - -?---Sure.

5 - - - then, what has been excluded to produce what you thought was an appropriate comparator group and why you've excluded them. I think gliders always come out, is that right?---Gliders one of them.

10 And why is that?---Because they're – the nature of their operations are single, no power, no engine, and they fly in a very different confined environment. Things like crop dusting - - -

15 So does that make them inherently safer or not as safe?---It – it doesn't – it – they're just different enough that we didn't want to include operations that didn't have passenger-carrying potential. Now, in terms of the similar type activity, or the size and the complexity of the aircraft.

20 So – I – happily I've never done any of this, but is it mostly with gliding that you try to return to where you came from?---I - - -

You - - -?--- - - - I'm – I don't understand the question, sorry.

With gliding do you mostly try and land - - -?---Yes, I'm sorry, yes.

25 - - - from the same field that you were towed off from?---Yes, it's a – it's a – yes, I apologise.

HIS HONOUR: Does that mean land, Mr Walker?

30 MR WALKER: Sorry?---Yes, I thought you meant theoretically, rather than physically return. Yes, the goal is to always have as many landings as you do take-offs.

35 And going, in effect, in a loop?---Going out and coming back.

Yes?---Or going out to another destination, yes.

40 And that's one of the reasons why that kind of aircraft and their use is taken out, to produce a better comparator group for CFSs, is that right?---Because they went out and back is a - - -

Yes?--- - - - close proximity. That – that wasn't the strict rationale, no.

45 So why were gliders taken out if not for that reason?---Gliders were taken out because they don't have an engine, they don't have a passenger carrying charter-like operation, and because it's demonstrably different we did want to skew the results. Much like if we used crop dusters, who have a – arguably get close to their

work and, while they fall on roughly the same category, we wanted to make sure that because they are – we accept more risk in that area that we don't impact - - -

5 So crop dusters are taken out why?---Because the – we accept more risk as CASA and they have – they have more accidents because – but they're not doing the same type operation.

But it's not doing the same - - -?---So – but it's dissimilar operation.

10 In what sense is it not a similar kind of operation?---They're not carrying passengers in a – in a crop duster.

But they have a mission urgent to be completed?---They have a commercial imperative, yes.

15 So is that missionitis?---Like – it's a commercial – where they – it's up to the individual. It's – if they feel compelled to finish a job, absolutely, like anybody else. But they also have restrictions, considerations that are over and above what a private pilot would have to be able to conduct that commercial operation.

20 So glider, crop dusters, what else comes out?---Balloons.

Good. What else? Gyrocopters?---We believe that anybody in an experimental category, anybody with a – that's in a recreational aircraft, which are not able to fly
25 in that category, carry passengers in the same way, they have an inherent restriction. Experimental aircraft can't carry passengers, because of the nature of their unreliability. So we tried to – we tried to put only aircraft that did similar type operations as a basis of comparison.

30 Now, when you say “similar type operations”, more is needed to be known than that an aeroplane takes off and lands; correct?---Correct.

And even more – you could go further and say more is needed to be known than it takes off with one or more passengers and lands; correct?---Yes, ideally.

35 It is not the same kind of operation so as to render it an appropriate comparison if it's a country aerodrome joy flight, is it?---I'm not sure that – just – the sole discriminator wouldn't be having to go from A to B versus A to A, if that's what you're - - -

40 Is that - - -?--- - - - you're asking.

The half hour joy flight from an aerodrome, say, two passengers - - -?---Right.

45 - - - up in a – in an aeroplane. They're going to take off, they're going to land, and they really just go round in a glorified loop, don't they?---Still conducting the same - - -

Let me - - -?--- - - - operations.

Do you agree?---That it's - - -

- 5 A glorified loop?---No, it's not a glorified loop, it's somebody taking off, conducting a flight operation and then just happen to land back at the same place that he started.

So - - -?---So - - -

- 10 So his Honour can be in no doubt about it, there was no attempt to eliminate those country aerodrome joy flights from the comparator group for the CSFs, is that right?---For people doing similar type operations, correct. We did – we tried not to eliminate anybody doing something similar.

- 15 And you've understood from the affidavit material of Ms Pagani and Dr Crees that a question, at least, has been raised about the fair comparability of such pairs of flights; correct?---Correct.

- 20 Am I right in saying that nowhere do we find in your affidavits any justification for that inclusion of those kind of flights in the comparison group?---Not detailed in my affidavit.

Not at all, isn't that right?---In my affidavit, correct.

- 25 There is no material in your affidavits or the annexed documents showing any analysis in the CSF group, or the comparator group or subgroups of accidents in either of them concerning numbers of passengers; correct?---Correct. The fidelity of that data wasn't available.

- 30 - - -?---Sorry, correct.

- - - my hearing?---You're correct.

- 35 Yes. And you would agree, wouldn't you, that a straightforward justification for the imposition of conditions concerning passenger numbers could derive empirical support only if there had been some data obtained concerning passenger numbers in CSFs, on the one hand, in so-called ordinary private flights on the other, and almost certainly in the sub-groups in both of those larger groups where there have been accidents; correct?---Trying to make sure I understand the question.

40

There would be no empirical support - - -?---That shows - - -

- - - for a condition about passengers unless you had those pieces of information; correct?---Unless there was some additional operational issue related to having passengers onboard these – these different kind of flights.
- 45

Without the data concerning the number of passengers that are to be attributed to CSFs and private flights with which they're being compared, and probably to be attributed to the unfortunate sub-groups where there has been accidents in either of those categories – without those data, there can be no empirical support?---In terms
5 of relation to the passenger count, no, there's no.

HIS HONOUR: Just repeat that again, Mr Monahan. I didn't hear you?---I believe the number of – the number count of passengers, just that raw number, doesn't drive the impetus for this condition. It's not just two or five or seven. It's the fact that
10 they're there and the difference in what those people present versus somebody doing a private flight, where I'm taking you to lunch, versus an operational difference of somebody who is under medical stress, and perhaps there's different things, and perhaps I'm going to a different location that I might have in the past. So do I have exact numbers on the number of passengers and have – whether they have material
15 impact on one versus two versus three: no, I don't. What I'm saying is that the mere presence of this type of passenger creates a different condition in that aircraft that warranted attention.

Thank you.
20

MR WALKER: But you don't you know whether it's different unless you have, first of all, detected that there is a difference concerning number of passengers?---The – the – we – the number of – your – if your question is, is the
25 number of passengers necessarily – let me back up. Maybe the – will you ask the question again, please?

Unless you know the number of passengers, you've got no idea whether you are looking at a group that carries passengers – or more passengers – more often than the other group; correct?---I – with the limited data we have, correct. I – yes.
30

You had no data on that, did you?---That's because it's – it's currently not reported, until now.

I'm not criticising you for the absence of data?---No.
35

I'm saying you had no data; correct?---I – I did not have the number of passengers on each one of those flights, correct.

And now, let me make it clear, I am criticising?---Okay.
40

I suggest to you that the desirable support of empirical justification for the imposition of conditions concerning passengers on CSFs positively required you to obtain such data or to accept that you had no empirical support for such a condition; correct?---Correct.
45

Now, there were also no data enabling you and your colleagues, in working towards the making of this instrument, to understand how a pilot's short-term previous

history of landing particular kind of aircraft explained any supposed difference between the groups; correct?---If your question is is there any data supporting the
- - -

5 You had nothing concerning how recently a pilot had landed an aircraft of the type in question as being any part of any supposed exploration of any supposed difference between CSFs and other ordinary private flights, did you?---There was – I think in my affidavit, I – I mention several studies that go to address recency and currency as being imperative, along with qualification and competency.

10 Now, Mr Monahan, you heard my question and you know that it was about data of CSF flight and the ordinary private flights, producing the raw statistic on accidents, incidents and fatal accidents upon which you based the - - -?---From the – the - - -

15 - - - instrument; is that right?--- - - - the BITRE data, you – that would be correct.

Yes. And what you referred to in your first attempt at answering that question as material from other places and other times; correct?---Correct.

20 Not Australian and not these CSF flights; correct?---Correct.

Not people who are going to be affected by this instrument; correct?---Correct.

25 The same, I suggest to you, namely, a complete absence of data differentiating between CSFs and other so-called ordinary private flights, applies with respect to a requirement to have completed a minimum amount of flight time; correct?---There was - - -

30 You had no data differentiating between the groups?---Data provided by, again, the – the studies we reviewed and other comparative nations.

Please - - -?---Are you talking about - - -

35 When I'm - - -?--- - - - BITRE data specifically?

- - - talking about data, I'm talking about information concerning the CSFs in Australia which were in contemplation as the objects of a new instrument; correct?---If we look just domestically – internally – there's nothing in the data that – that addresses that specifically.

40 Well, if domestically and internally means Australia, that's what - - -?---Yes.

- - - I'm asking you about?---Yep.

45 For this Australian instrument, you had no data differentiating with respect to flight time of pilots as between CSF and other ordinary private flights; correct?---No - - -

You didn't know whether the one was body of relatively more junior or relatively more experienced or relatively more vigorous or relatively more senile people; you had nothing?---We – no, we didn't have nothing. We had – there's data. The data isn't exclusive to Australia.

5

I'm asking you only about Australian - - -?---Okay.

- - - data at the moment?---Well, leave out Australia, then, the data did not show any discriminators there.

10

Right. You didn't even have such information concerning the pilots involved in the two fatal accidents, did you?---Data – only what I reviewed in the – in the reports.

Recency of landing experience or flying hours; you didn't have them, did you?---That was in the – the accident reports.

15

But you did not use them at all in producing the recommendation for an instrument, did you?---Those two actions did not influence those, correct.

The requirements in the instrument concerning record keeping, those are over and above records which would otherwise be required; is that right?---Correct.

20

So they're special to CSFs?---For the – yes.

What information, if any, did you have about experience in Australia to justify the imposition of more requirements with respect to CSFs than ordinary private flights concerning record keeping?---The lack of data, which you've discussed earlier, this provisions allow us to understand data that says how many people have flown, where they've flown, how many passengers are carrying, to see in the future if that data tells us anything. It provides us, then, some credible material, then, to pull together in the future.

30

That would be just as useful for ordinary, private flights, would it not?---It would be, yes. If - - -

35

So is there any reason to – in what you've just said to justify an imposition on CSF and not on ordinary, private flights?---Yes.

What?---Because CSFs conduct operationally different type of flight that has a higher accident rate, that warns attention, and by having more data, we can then look to see if we can understand more effectively with more data going forward.

40

When you say a higher accident rate, you mean subject to the important question of statistical significance in any difference; correct?---As assessed by us, yes.

45

You never assessed the difference to have statistical significance yourself, did you?---I did not myself.

No. And you've not, in your affidavits, chosen to put before the court anything in the nature of description, let alone calculation, of statistic significance by any of the unnamed statisticians; correct? Nothing in your affidavits that would allow the court to understand what test has been applied, if any, to produce, for example, confidence
5 intervals. Correct?---Other than the one submission I made, which was the summary of the calculation, that's it.

So the record-keeping requirement in the instrument is one, I suggest to you, is designed to produce data in light of which future analysis may show, in the future,
10 that there is either no difference or there is a difference justifying special treatment of CSFs. Correct?---We would hope it would provide greater fidelity so we would know more in the future with more accuracy.

That's a reason why you would want equivalent quality data for the comparator
15 group, as well, isn't it?---Ideally, if that information was available, we would use it.

Well, it will only be available if you compel it; correct?---Correct.

Sitting here now, can you think of any reason to justify getting information from one
20 side of the comparison pair and not from the other side of the comparison pair if you are interested in evaluating, in the future, any possible safety differential?---Our – at the time, I believe we had enough sufficient information about the general pool toward finding the differences between that and the - - -

25 If that were true, then you wouldn't need to impose a further information requirement of CSFs, would you?---Well, the information on the CSF is to provide data that would – we think is unique them, rather than compel 5000-plus people, if possible, and the management of that data, but the idea is to gain information about what factually they're doing to understand that.

30 But if you're going to compare them with another group, you would need to know factually what the other group is doing, as well, wouldn't you?---And I believe - - -

35 Wouldn't you?---I – we do, and I believe at the time we had enough information based off of our – the BITRE data, the – the Australian data, that gave us a baseline by which to compare something we didn't know much about, which is CSF operations in terms of what they're doing to find out what the difference is.

40 If I've understood your affidavits correctly, the sources of information were roughly similar as between the CSF group and the comparator group; is that right?---The - - -

The sources of information?---Yes, yes. Sorry.

45 So if more information were desirable in order to evaluate, for example, whether certain expedients were enhancing or making no difference to safety experience, you would necessarily have to have the same kind and quality of information on both sides, wouldn't you?---At – at the time, we felt that the information available and

historical data for the baseline group was sufficient and we were looking for the – to get specific detail about what was different.

5 That doesn't contain the kind of information that you now require as a condition on CSFs only. Isn't that right?---Correct, and in the future, we may – we may end up expanding that to learn more, to have a better source of comparison.

10 I suggest to you that that is an irrational approach to the desirable aim of obtaining information from which there can be empirical understanding of differential safety experience. Do you agree?---No. I note it.

Why is it - - -?---I note it. I don't agree, but - - -

15 How is it rational?---I – I discount the notion that it's irrational.

How is it rational - - -?---In that I have - - -

- - - not to require - - -?---I felt it - - -

20 - - - the same kind of information from the two groups being compared?---I felt at the time we had sufficient data from that to warrant not going out and requesting specific – compelling people to provide in a – in that group that we wanted to find more about specificity of the smaller group that we really knew very little about.

25 Unless you got ongoing information from the comparison group, you would have no idea whether you were detecting a difference or a similarity, would you?---Without – I – I didn't pull the exact same number of private pilots doing non-CSF flights, correct.

30 it really comes down to this: you thought it would bother fewer people if you confined it to CSF rather than generally to private flights; correct?---Yes.

Your Honour, is that a convenient time?

35 HIS HONOUR: It is, Mr Walker. Thank you. We will adjourn to 2.15.

ADJOURNED

[12.46 pm]

40

RESUMED

[2.14 pm]

45 HIS HONOUR: Mr Walker.

MR WALKER: Thank you, your Honour. The instrument purports to impose conditions on holders of a flight crew licence during a CSF in relation to aircraft

maintenance, doesn't it?---Not maintenance for a – for a pilot, but for someone who owns and operates and aircraft, and the pilot needs to ensure that the aircraft they fly complies.

5 Well, just - - -?---In case you borrow an aircraft from somebody else.

Just to make it clear – have you got a copy of the instrument before you?---Yep.

Section 11 of the instrument – I'm so sorry, court book – it's – all right.

10

THE WITNESS: I'm trying to find the reference to it, but – thank you.

MR HANKS: Your Honour, we're giving the witness a copy of the court book.

15 HIS HONOUR: You don't - - -

MR WALKER: I'm much obliged.

THE WITNESS: And under instrument, in - - -

20

MR WALKER: The numbering is at the bottom: CB16, please?---CB16? Got it.

Section 11 relates to maintenance of aircraft, doesn't it, and it imposes a condition on a flight crew licence - - -?---Correct.

25

- - - supposedly, namely, that its holder not pilot the aeroplane for a community service flight unless certain things are true with respect to maintenance; is that correct?---That's correct.

30 Now, the maintenance of aircraft is a matter obviously germane to safety, regardless of the kind of flight being undertaken; is that right?---Correct.

But it is imaginable, if only in theory, that certain different kinds of flight may impose different stresses and strains on aircraft so as to differentiate the desirable
35 level of maintenance; is that correct?---Yes.

Nothing like that was true according to investigation and consideration for the making of the instrument for CSFs, was it?---In that the - - -

40 Nothing special about the flights imposed differential stresses and strains justifying differential maintenance requirements; is that correct?---Correct.

Indeed, nothing was ever collected by way of data or analysed during consideration for the making of this instrument suggesting that there was anything about CSFs that
45 informed a particular need – a peculiar need – for aeroplane maintenance requirements such as in clause 11 for CSFs; that's correct, isn't it?---Correct.

Do you go so far as to say that conditions like clause 11 would desirably apply more generally than only to CSFs?---In this circumstance, they apply for CSF for the additional risk attributed to these flights.

- 5 When you say the additional risk, that risk has nothing to do with aircraft maintenance, does it?---Risk exposure; how often you're exposed to the opportunity for something to happen with maintenance is part of the equation.

- 10 Are you, there, talking about frequency of flights?---I'm talking about how often someone is exposed to a risk; in this case, then that would occur to how many times you're on the flight.

- 15 So you would need to be comparing numbers between this and some other group that you didn't think needed further conditions, is that right, the ordinary private flights?---Or the difference of – yes, that would be correct.

- 20 You've got no data that permits you to talk about intensity or frequency of use so as to talk about an increased exposure to risk, have you?---No. We have data that talks to the – from the, true again, private pilot and from the ATSB in terms of private operations, how often something, perhaps maintenance related incident accident occurs and then to compare that to the risk exposure potential for - - -

- 25 Well, it may be the abstract nouns are defeating me. By "risk exposure", do you mean fatal accidents?---That means how many times you get on a flight and there's an opportunity for something to go poorly on that flight and then to – then to bump into that statistical opportunity as well.

- 30 And in this case are you talking about – a phrase new to me – statistical opportunity - - -?---Well - - -

- - - to encounter fatal accident?---In that - - -

Is that what you're talking about?---Yes.

- 35 Right. So the two fatal accidents in question?---That help form part of the understanding. Yes.

- 40 There is no single datum and there are no – there is no body of data upon which there was performed any analysis or consideration in producing this instrument concerning aircraft maintenance and these two fatal accidents; is that right?---These two fatal accidents; correct.

That's right?---Yes.

- 45 And you would need to have numbers and an understanding of the kind of flight involved in order to posit that there was a need to increase a burden of aircraft maintenance for CSFs in order to ameliorate their worst safety experience than

ordinary private flights. Wouldn't that be right? You would need to know what the figures showed?---And we have the figures available for general private flying to compare against, in this case - - -

5 Is this still the same two fatal accidents?---The – but it is the - - -

Is it?---Yes. It is the - - -

Thank you?--- - - - two fatal, yes.

10

And are they still the two - - -?---Okay. All right.

- - - same fatal accidents producing a difference on a supposed count between ordinary private flights and CSFs, the statistical significance of which does not appear; is that right?---Correct, in the - - -

15

It's the same difference, is it?---It's not attributed to the – just these two, but just these two accidents; correct.

20 When you say it's not attributed just to these two accidents, there are no other accidents, non-fatal or incidents upon which there has been based any of the conditions of these instrument; correct?---I would disagree with that. And I believe that there was another accident.

25 Show me in the affidavit, please - - -?---It is not annotated in my affidavit.

I'm not inviting you to talk about considerations after the making of the instrument; do you understand?---Okay. Yes.

30 And you understood, when you made your affidavits, that you were giving an account to his Honour of the way in which the instrument was made; correct?---Okay. Yes.

35 And you advanced in your affidavits, the two of them combined, the reasons as you are able to reconstruct them for his Honour - - -?---Okay.

- - - from records and recollection as to considerations that you are your colleagues undertook; correct?---Correct.

40 And you haven't referred to any other fatal accidents, have you?---Not in my affidavit.

45 Thank you. In your affidavits and in some of your answers to his Honour before the adjournment, you've referred, variously, to other studies and to the experience of you and your colleagues as pilots and regulators and as people with responsibility – managerial responsibility – for aviation safety. Do you recall that in general terms?---Yes.

MR: On the face of the yes.

HIS HONOUR: I'm at a loss, the same as you, Mr Walker.

5 MR WALKER: A disembodied voice, yes.

That material is not confined to material that has studied possible differences between CSF-style flights in, say, the United States or other places and so-called ordinary private flights in those other places; correct?---None with specificity;
10 correct.

Among the group about whom you speak in your affidavits, including yourself, there was, if I can tempt you out of your modesty, a formidable array of personal professional experience; correct?---Yes, the team has got a broad breadth and depth.
15

And yet your affidavits show that none of you was able to point to any response by way of regulation in other jurisdictions that differentiated by imposing greater burdens on CSF flights than ordinary private flights, can you?---In the affidavit, I thought I - - -
20

Yes. It's not there, is it?---The FAA.

They're not greater burdens on CSF-style flights at all, are they?---Greater burdens than this instrument?
25

No, no?---I'm sorry. I apologise.

Than on ordinary private flights. It is more the FAA does impose more than normal private flights to conduct those operations under their exemption process.
30

Are you sure you're not – are you sure you're not having in mind here commercial services?---I believe I – it is the FAA rulings that people – provides exemptions to non-commercial entities to conduct CSF-like operations.

35 So there's a system of exemptions which have their own conditions; correct?---The FAA, yes.

But there's no differentiation between private organisations at all, is there?---I'm sorry. I don't - - -
40

The CSFs here are being undertaken privately, aren't they?---Correct.

Not commercially?---Correct.

45 In the United States, for example, there is no differentiation between ordinary private flights and private flights providing charities; correct?---The – there is a distinction,

I believe, in that to conduct those type of operations, they would need to get an exemption from the FAA to do it, which is it can do it.

5 Yes. But that is an exemption which does not result in the imposition on them of any further burden; correct?---No. To my understanding, it does have a significant additional burden that actually exceeds ours on the FAA exemptions.

10 Could you point me in the material attached to your – in or attached to your affidavit – - -?---I would have to - - -

- - - where that appears. And what I'm asking about, to remind you - - -?---Yes.

15 - - - is a greater burden on private operations flying these charity flights than on other private operations?---I would have to find the example of the FAA exemption.

Is it – and don't be restricted by my suggestion – is the document at CB783 relevant here or is that the one or are there others; 786 perhaps?---It would be an example – and I would like to try and find the reference so we can align – is, in my book, in my second affidavit page 201, which is, I believe, CM44.

20

It's court book 783, your Honour.

HIS HONOUR: Thank you.

25 THE WITNESS: Apologies.

MR WALKER: No? 786.

30 THE WITNESS: And that - - -

MR WALKER: I'm sorry. Are you referring to your affidavit page 201?---Yes.

It's court book 786.

35 HIS HONOUR: Thank you.

MR WALKER: Could you just show his Honour, please, where there - - -

40 HIS HONOUR: Mr Walker, is this the letter of 8 October 2010?

MR WALKER: Yes.

HIS HONOUR: Thank you.

45 MR WALKER: Could you just show the court, please, where there is there imposed a more onerous condition of operation compared to private flights?---Private flights here or in the - - -

In this document?---Okay.

Starting at 201?---The – the – they have to have, at – on-file – on 1(b), the on-file documentation, which we don't currently require. Filing system in 1(d), but that's, in
5 many ways, the housekeeping. On 3(a), in particular, instrument rating or privilege: you must hold a requirement where you can record a VFR, which is significantly easy to obtain with less hours, and – and appropriate - - -

Are you saying that with a private operator, there was not a need to hold an
10 instrument rating or privilege appropriate to the aircraft being flown?---So the – you have to – I apologise. The – I didn't phrase that right. I didn't finish – I didn't read the – the table under that. My error. Pilots should have a minimum total time of 500 hours, no less than 400 hundred; that is slightly higher. Operation of multi-engine aircraft: 1000 hours pilot-in-command, which is higher than our current instrument.
15 For DE: 1000 hours pilot-in-command, minimum 100,000 hours as well. And 50 hours in the preceding 12 months to currency; we don't require that. A minimum of 12 hours flown and logged on preceding three months; we don't require that.

Well, now, perhaps I can pull all this together: is there anything here that you say
20 provided justification for anything that was required in the instrument in question?---In terms of use this as the singular justification, no. This was meant as a comparator to see what another NAA who has faced a similar problem has done to address the – the risk and what mitigators they've introduced to try to deal with it.

25 So what - - -?---But is a singular thing – no.

Sorry, I do apologise?---Yep.

Have you finished?---Yes.

30 So would it be correct to say that the foreign approaches provided, so far as you were concerned, a cue to consider what the position in Australia might justify?---It was one of the elements we considered, yes.

35 Okay. And in order for that to be followed through, without going back over matter I've already asked you about, there would be a need, empirically, to understand the position in Australia; correct?---Yes.

40 Yes. Because you would certainly refute the idea that it would ever be reasonably simply to take off the shelf what other regulators at other times and other places operating on other empirical data had decided they would try; correct? That would never be - - -?---Correct.

- - - reasonable. Yes. Thank you, your Honour.

45 HIS HONOUR: Thank you. Mr Monahan, you're excused. Thank you for your attendance?---Thank you.

Sorry, Mr Hanks.

MR HANKS: Not yet.

5 MR WALKER: He's about to be led with a re-examination.

HIS HONOUR: I didn't see you move quick enough there, Mr Hanks. I'm sorry.

10 MR HANKS: I was beguiled by my friend, and he's seeking to beguile me even further.

<RE-EXAMINATION BY MR HANKS

[2.34 pm]

15 MR HANKS: My first question relates to something that you said to my friend, Mr Walker. When you were taken to page 406 in the court book – I will need to translate that for you – you were taken to the SFR. It's quite a long document. The most convenient way to deal with this, so that we – so I'm not handicapped in the way that my friend was, is to give you a copy of part 2 of the court book. And you will see it has got big, bold numbers, right-hand corner, at the bottom of the page; you see it, then?---Yes.

20 CB406, I believe. Yes – no? Was it 405? Thank you. CB405. And there's a heading, What the ATSB Found, in the middle of the page, and you will remember being asked questions about the first paragraph immediately underneath that?---Yes.

Now, I would ask you to turn back to CB326?---Yes.

30 Paragraph 23?---Yes.

You refer to the investigation conducted by the ATSB?---Correct.

35 At the bottom of that paragraph, there's a reference to section 27, subsection (1) of the Transport Safety Investigation Act; do you see that?---Correct. Yes.

And in particular, to what you understand to be the effect of 27(1); correct?---Yes.

40 Can you explain to his Honour whether that restriction had any effect on your – on the evidence that you give in this affidavit?---Yes, I – I believe it – it does. I think it gives an ability for me to provide context. And part of the reason the TSI Act and the restrictions there are to ensure or to encourage people to work with the ATSB, who conducts investigations on behalf of the Commonwealth and provides analysis and recommendations based off that. As I understand, on the TSI Act, I – I am and
45 CASA is limited or – or not permitted to discuss those things in relation to this that informed us, as part of our sharing agreement that we have with the ATSB.

MR WALKER: Your Honour, I do object to the witness, perhaps understandably, venturing into an area which is purely legal.

HIS HONOUR: Yes.

5

MR WALKER: And I also object in relation to this being re-examination. Those words in parentheses, upon which I didn't cross-examine at all, would have called for this explanation in-chief, if it is intended to say, "I know more, but I cannot tell it." Because my reading of section 27 certainly doesn't prevent this witness from saying everything he needed to say concerning what informed his considerations.

10

HIS HONOUR: Yes.

MR WALKER: And your Honour has heard how I cross-examined upon his evidence. This, in our submission, goes beyond re-examination. Now, your Honour may wish to grant leave, which I wouldn't oppose, because I think it's important that the matter be determined on the merits. But in our submission, first of all, the legal opinions should not be treated as evidentiary. I know your Honour won't, in any event. But in terms of an explanation as to why he hasn't given an explanation in-chief or, for that matter, in answering my questions in cross-examination, then in our submission, if this is to continue, by leave, I ought to be able to cross-examine further.

20

HIS HONOUR: Yes. What do you say, Mr Hanks? There's substance in that point.

25

MR HANKS: I think I heard your Honour.

HIS HONOUR: It's a matter for you.

30

MR HANKS: Sorry?

HIS HONOUR: It's a matter for you. I will hear you on it.

MR HANKS: Thank you, your Honour. The witness was asked whether that was the only place where the ATSB data about the incident was to be found.

35

HIS HONOUR: Yes.

MR HANKS: I'm now asking the witness to explain whether there was any inhibition to including other details from the ATSB report. That's my – that's the point of my question.

40

HIS HONOUR: Mr Hanks, to properly ventilate this, I will give you leave to lead evidence-in-chief on that point, because – I mean, because, otherwise, I don't think it arise out of cross-examination.

45

MR HANKS: I'm grateful to your Honour. Thank you.

HIS HONOUR: Yes. I will give you leave to lead evidence-in-chief on this discrete point and only this discrete point.

MR HANKS: Thank you, your Honour.

5 I will now go back to – pardon me – page 326 of the court book and to that paragraph in your affidavit, paragraph 23. In parentheses at the end of the paragraph you note a restriction from section 27(1) of the TSI Act, and my question to you is how did that restriction affect the detail included in your affidavit?---My understanding of the prohibition is that I – I couldn't recount details specifically from the ATSB report that more informed us going forward or didn't inform us, either way, just by the prohibition. So I couldn't discuss the nature of the comments the ATSB made in their report is the way I understood it.

15 Your Honour, that's the extent of the question I wanted to ask.

HIS HONOUR: Yes, very well.

MR WALKER: Should I cross-examine now?

20 HIS HONOUR: I think – if you wish to cross-examine - - -

MR WALKER: Yes.

25 MR HANKS: Yes, you only get one go.

HIS HONOUR: - - - I think it's better to do it now, Mr Walker.

30 <FURTHER CROSS-EXAMINATION BY MR WALKER [2.41 pm]

MR WALKER: Yes, that's right. What you just told his Honour was that you felt inhibited about giving evidence in this court concerning the contents of the report rendered inadmissible by section 27, is that right?---I believe that's correct, and then I felt I couldn't – I couldn't discuss it because it was considered inappropriate.

40 You never understood section 27 to have prevented you when considering advising on the making of this instrument from taking that report into account, did you?---We – internally we took the report into account in our internal deliberations - - -

Perhaps if you just answer my question, you never considered section 27 to stop you from taking it into account when doing your administrative work of thinking about the possible instrument; correct?---Correct.

45 Where does his Honour find in any narration of your considerations that led to the using of these two fatal accidents as a stimulus, or perhaps even reason for the

instrument, where would his Honour find any consideration beyond that single paragraph at CB405 about which I cross-examined?---So both of my affidavits we – I – I note that we considered both accidents in addition to other data and information, that these were part of that - - -

5

It remains true, doesn't it, that the paragraph in the middle of CB405 commencing:

The ATSB found...

10 was material in which the contents of a section 27 report were indirectly referred to; correct?---In - - -

That's not a criticism - - -?---Yes - - -

15 That's a fact, isn't it?---I – I believed at the time based on that that that was admissible, but that just is a short snippet, sorry.

There's no objection to the admissibility of that, - - -?---Okay.

20 - - - do you understand? You regarded it as a summary and the most detailed summary of the material considered by you in relation to that fatal accident as it may or may not justify the instrument; correct?---I believed that was the most detailed summary I could give in this document, having reviewed the full accident report, if that's - - -

25

Nowhere else in your narration of the steps towards the making of this instrument do you refer to taking into account any more detailed understanding you had, do you?---Correct.

30 And that's because this was the most detailed you ever took into account; correct?---No, this – that is not the most detailed that I took into account, that is what I – this is mentioned here, but there's – by reviewing the document, that's the summary of it.

35 Did you take into account any root cause analysis of that accident?---We took into account the ATSB work was root cause CASA does not do investigations.

40 Mr Monahan, I asked you before the adjournment about root cause analysis without even referring to the ATSB report and you said you didn't have one and you didn't take it into account?---CASA does not do investigations like the ATSB, if that's – if that's the connection on the root cause analysis.

It doesn't matter whether CASA did it or anyone else did, it would still be something to be taken into account; correct?---If that's - - -

45

And should his Honour proceed on the basis that you never had any root cause analysis of that fatal accident which informed the content of the eventual

instrument?---I would say that the – the information provided in that accident report did provide information to us and I would have to review the accident report again to see if they used the exact terms “root cause analysis”, but that was part of what informed us, if that’s what you mean.

5

So what does it mean to say that the fatal accident was one of the two that was a stimulus for an investigation but not a reason for the instrument? What does that mean?---The two accidents, which are unusual, and fatal accidents always get a review by CASA even before the ATSB reports come out in full and it drew our attention to say it’s unusual to have two fatal Accidents occur in one sector, or even one subsector, and that was – by saying the stimulus, that’s the start of the process that we used to gather data as much as we can, try to analyse that data, identify, if we can, risks that might be unique to that or those circumstances - - -

10

15 Now, you agree, don’t you, that before the adjournment you disavowed any facts about these accidents as to factors unique to CSFs - - -?---These - - -

- - - as having produced the form of the instrument - - -?---For these - - -

20 - - - is that correct?---For these two accidents, yes.

Thank you, your Honour.

HIS HONOUR: Thank you, Mr Walker. Mr Hanks.

25

<FURTHER RE-EXAMINATION BY MR HANKS

[2.46 pm]

30 MR HANKS: Thank you, your Honour. Mr Monahan, you were taken by my friend to various clauses in the instrument and my friend put to you the proposition that there was no empirical data derived from Australian sources that supported each of those clauses; do you recall that?---Yes.

35 Thank you. Do you have a copy of the instrument there?---I do.

Okay. Now, let me ask you before we go to the instrument. When developing a regulatory solution to a situation what sources do you rely on?

40 MR WALKER: Well, your Honour, that is beyond re-examination, that’s what his evidence-in-chief was and that’s what I was testing in cross-examination.

HIS HONOUR: Yes.

45 MR WALKER: That doesn’t open up, as it were, a new go in chief.

HIS HONOUR: Yes, I I won’t permit that, Mr Hanks.

MR HANKS: Can you tell his Honour whether you concluded that there was support for clause 7(1)(c) that justified its inclusion in the instrument?---Yes, I believe there was justification and the justification of the not carrying anybody on board other than the patient or the operating crew is to minimise the exposure to this
5 different kind of operation to people not involved and not required for the operation. It also was to minimise the number of people that the pilot would be exposed to when conducting an operation that looks more like a charter operation because of the unique differences between it. Our - - -

10 Let me ask you the same question about clause 9(1)(a), which is – well, which relates to experience?---Correct.

You see that? Did you conclude that that was – that there was support for the inclusion of that clause?

15 MR WALKER: Well, I object. Your Honour - - -

HIS HONOUR: It sounds like evidence-in-chief, Mr Walker.

20 MR WALKER: It certainly does. Now, the last one I didn't object to, but all it did was repeat in paraphrase what had been said in the affidavit in chief - - -

HIS HONOUR: Yes, it does.

25 MR WALKER: And that's not re-examination upon a concession about no empirical support.

HIS HONOUR: Yes, I'm afraid I agree with Mr Walker.

30 MR HANKS: Thank you, your Honour.

HIS HONOUR: Mr Hanks, I will not permit that cross – that re-examination.

MR HANKS: When you came to recommend the making of the instrument, did you
35 regard the presence of empirical data as essential for each of the clauses?---Not specific empirical data to justify each clause unto itself. There is additional context that the data set in Australia is limited in to provide that specificity, but the view based off of the data we have and the other information which I've discussed earlier, led us to the – I'm trying – to the point where we elected that there were mitigators,
40 which are the conditions, were necessary to help improve safety outcomes. So those – those conditions are based off of not only empirical data, but also other information we have, as I mentioned in some of the studies that are outside – internal and outside of Australia that inform CASA as to what could be happening. One of our obligations is to be preventative in nature going forward and to look at things where
45 things are likely to occur and where we, in this case, where we can take modest measures to improve safety through things that are within CASAs remit and in regulatory power.

Those are my questions, your Honour.

HIS HONOUR: Thank you, Mr Hanks.

5 Well, I'm pleased to say, Mr Monahan, you're now excused. Thank you for your attendance?---Thank you.

<THE WITNESS WITHDREW

[2.51 pm]

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HIS HONOUR: Mr Hanks, does that conclude the evidence?

MR HANKS: Yes, that concludes our evidence, your Honour.

15

HIS HONOUR: Very well. Well, then, Mr Walker, what course do you want to adopt?

20

MR WALKER: I would propose, subject to my friend suggesting something better and, in any event, your Honour determining it, that I should, as it were, resume so as to complete the elaboration of arguments upon which I've opened - - -

HIS HONOUR: Yes.

25

MR WALKER: - - - not fully for the reasons I explained with respect to the material to be cross-examined.

HIS HONOUR: Yes.

30

MR WALKER: And leaving me only with a short reply after my learned friend has addressed. Does that - - -

HIS HONOUR: Yes.

35

MR WALKER: - - - strike your Honour as an appropriate way to proceed?

HIS HONOUR: Yes. Subject to hearing from Mr Hanks. Mr Hanks?

40

MR HANKS: I can't oppose that, your Honour.

HIS HONOUR: Yes.

MR HANKS: I support that.

45

HIS HONOUR: Very good. Let's proceed in that fashion.

MR WALKER: Could I, because it's fresher in everyone's minds, proceed directly to that part of our case which seeks to persuade your Honour that the making of this instrument in the respects that we have raised lacks requisite justification so as to display a sufficiently intelligible connection with the - - -

5

HIS HONOUR: Yes.

MR WALKER: - - - object of the provision, which, in one word, could be summarised as "safety" and, for that reason, was beyond power, that is, the jurisdictional error that used to be neatly called Wednesbury.

10

HIS HONOUR: Yes. It's a pity it's still not called that.

MR WALKER: Indeed. Your Honour now knows what I'm referring to and I won't have to chance my hand with jurisprudential labels; that's the argument. Now, the first thing to be said is the exchange of written submissions that reveals no jurisprudential controversy between us.

15

HIS HONOUR: Yes. I'm grateful for that.

20

MR WALKER: This is not a case at the margins.

HIS HONOUR: No.

MR WALKER: And to adopt and adapt something that your Honour said to me at the time of the opening, of course we accept that it is a demanding hurdle that we have to clear to make out such a case, because it is not an accessibly demanding standard for decision-makers to achieve. In particular, if I can add my emphasis to the fact that I think there's common ground as to the doctrine, I accept, I can't simply address your Honour as to whether you think the instrument was reasonable. And if I can persuade your Honour to think it wasn't reasonable, that's the end of that part of the case; that would be wrong in every respect.

25

30

Now, it's true that, at the heel of the hunt in re-examination, a methodological justification is advanced in light of concessions made in cross-examination. The concessions being, of course, the repeated ones - I don't need to detail them now, because they're so recent - that there 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.

35

40

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,

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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
5 where your Honour should vindicate that minimal but critical requirement of rational justification in the exercise of serious administrative powers. When I use that epithet “administrative”, I am, of course, not venturing into the legislative administrative distinction about which my friend has already addressed in opening and to which I will briefly return on our other grounds, I mean administrative in the sense that it’s
10 neither parliamentary, legislative, nor is it judicial; that’s all I mean.

HIS HONOUR: Yes.

MR WALKER: Now, it is a drastic power because of the carrying in its train
15 demerits and offence. It’s also a drastic power, we would submit, because of a burden it imposes on charitable endeavour. But my last comment should not be mistaken: I do not call in aid in this part of the case the notion that the charitable endeavour requires an administrative decision-maker, on pain of otherwise being held to be acting contrary to the requirements of the Wednesbury law, to be easier on
20 the charitable endeavour – let me exclude that entirely – but, in 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
25 anything that could be learned from the incidents, accidents and fatal accidents about which you have heard.

Now, there were, if I can put it this way, some rocky moments in part of the circle of re-examination and further cross-examination of the witness in relation to that, but,
30 eventually, everything returned to the mainstream that had emerged in questions before the adjournment. But there 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
35 statistical, whatever one means by that word, about pilot experience, including recency of landings, etcetera; and one can continue the litany. He was invited to respond for all of them and with none of them could he point to anything.

Now, that raises a question. We don’t think our learned friends espouse this, but I
40 raise it, if only for completeness. Notions of precautionary principle or preventative regulation are not notions that I would dare try and persuade your Honour are alien to the purpose of the power in this question – in this case. That would be absurd. Rather, in our submission, one asks whether this was an instrument, the history of which – by which I mean the pre-history leading up to its being made – shows that
45 there was an avowedly experimental approach, that is, not knowing whether there was something about CSFs, that rendered them inherently and peculiarly less safe

than other so-called ordinary private flights; an experiment might be conducted to alter their regulatory conditions and to see what might happen.

5 Now, it is – that is a large question as to whether such an experimental approach would be reasonable in what I will call the Wednesbury sense. There's a lot to be said for the proposition that the exertion of power so as to impose conditions which may result in the commission of offences for the purpose of safety ought never be exercised in such a purely experimental fashion – a disinterestedly experimental fashion – we not being laboratory rats. But I don't have to embark on that course,
10 because you heard – you have read not a syllable, nor have you heard a word to suggest that this was an instrument made avowedly without knowing whether it was necessary, but in order, after an appropriate interval, to see whether it had some effect from which one might backwardly reason then there must have been something that some element of this set of imposed conditions has ameliorated so as
15 to bring about an improvement. There's none of that. Now, I'm not saying that CASA will not and ought not have some such constant review as one of its methods of proceeding. I – the statute bespeaks the need - - -

HIS HONOUR: Yes.
20

MR WALKER: - - - in order to service of safety, to have regard to facts, including facts as they occur in the future. And that is our very point: the Act is surely one which looks for a connection between purpose and exercise of compulsory state power, that is, the promulgation of this instrument, which has some basis other than a
25 speculation that there may be a difference not yet detected that may be ameliorated in a way not yet understood by the promulgation of this instrument and sufficient time to see how the experiment works.

HIS HONOUR: Do you accept, though, Mr Walker, that once you cross that
30 threshold of there being a basis - - -

MR WALKER: Yes, I do.

HIS HONOUR: - - - then it's all over for you, isn't it?
35

MR WALKER: Yes, it is.

HIS HONOUR: Yes. That's the mountain you climb.

40 MR WALKER: It's a knife edge and once I tip it, that's it.

HIS HONOUR: Yes.

45 MR WALKER: Yes. Now, that leads me, naturally, to the basis that one sees throughout the affidavit. It wouldn't be fair for me to say it's only the heel of the hunt in further re-examination, although it was the burden of that song as well – but throughout his affidavit - - -

HIS HONOUR: Yes.

MR WALKER: - - - as your Honour will have observed, there is – and let me make it clear, we accept entirely the good faith of all of this – there is called in aid what I
5 will call overseas experience, to use a very general expression that I’m going to unpack.

HIS HONOUR: Yes.

10 MR WALKER: Now, it would not be right for the court to promulgate, as if it were a tenet of the law, that it is axiomatically not right for Australian administrators to look abroad, and I - - -

HIS HONOUR: You disavow it.

15 MR WALKER: - - - disavow that utterly. That kind of intellectual or governmental chauvinism is completely wrong and we don’t put that. However, it is equally the case – as the witness, to his credit, gave affirmation, it is equally the case that the
20 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 not – never be reasonable. The witness accepts that. Now, those are two quite distant poles, one from the other, and I accept that if the case comes somewhere between those poles, I lose on this point for the reasons your Honour has said.

25 HIS HONOUR: Yes.

MR WALKER: To put it another way, we can score quite a few goals in terms of what I will call in shorthand irrationality, so long – and still lose – so long as there is
30 something that strikes your Honour as, on its own, a sufficient justification in the eyes of the law, I stress, without your Honour pretending to be an aviation regulation expert. And so what I hope to persuade your Honour 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
35 any event, that was an entirely unstable comparison for the reasons that we have, without any contest, established in Dr Crees’ report, starting at court book 222, and in his affidavit, starting at court book 314 – as I say, a totally unstable basis for a comparison which, in any event, produces a difference that cannot be said to be statistically significant; that, in the jargon, the confidence intervals overlap.

40 Then we come to the more pointed lack of any connection – a word that your Honour will recognise from the juris prudence on this point – any connection between what was available about the accidents – or for that matter, any of the accidents and incidents, and for that matter, in any of the groups: the CSF group or the private
45 aviation group. When you say there’s no connection – it really is abandoned by the witness – 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.

5

HIS HONOUR: Yes.

MR WALKER: But you won't find, either in his affidavits or in the annexed material, cases which compare flights that can be treated as proxies for CSFs and flights which could be treated as proxies for the admittedly defective comparator group that has been called "ordinary private flights". Can I just elaborate that last comment. Your Honour appreciates the criticism that our affidavits advance, and which are not rebutted, that the way in which the comparator group has been assembled by CASA is, in itself, unjustifiable, that is, all sorts of different kinds of flights privately being called in aid to present a comparison with the particular kinds of flights that are involved in my client's operations or, indeed, in any of the CSFs. That, in itself, we have relied upon, as you know, with respect to the defects in what I will call the Australian empirical lack.

20 But when it comes to calling in aid overseas experience, the dots are simply not joined. Indeed, the dots aren't even named. You won't find, with respect, a schema of reference to overseas experience by Mr Monahan which points out why certain experience, in what he calls studies should be regarded as casting any particular light let alone unfavourable light concerning the safety record of the Australian operations. And, indeed, whether one's talking about mission-itis or get-there-itis or passenger pressure or any of the other matters that Mr Monahan was eager to talk about, not always responsively to questions in cross-examination and which he has expounded in his affidavits, your 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.

HIS HONOUR: Do you say, Mr Walker, that, at best, it's just anecdotal material?

35 MR WALKER: No. Let me explain.

HIS HONOUR: Yes.

MR WALKER: That's because I'm going to be more critical than that.

40

HIS HONOUR: Yes.

MR WALKER: It's not even anecdotal.

45 HIS HONOUR: It doesn't even get to first base.

MR WALKER: I don't have an anecdote. There's not a single story you've been told.

HIS HONOUR: There's no comparator, so there's - - -

5 MR WALKER: I don't know why – I don't – and no one knows, and we have not been told, and we've had the best foot forward. This is how it came about. This is how it was produced. And no one would know whether a fatal accident by a family of three travelling to a golf tournament in California has anything to tell you about a
10 fatal accident of an airline pilot on his day off doing a charity run to get an appendicitis case to San Francisco, to pick the two paradigm cases of contrast.

HIS HONOUR: Yes.

15 MR WALKER: But you know nothing – you haven't got any stories. We've hardly got any stories in Australia. The two fatal accidents we – it's not much of a story and nothing that is anywhere near a justification for a differential treatment. And it's for those reasons that it doesn't even get to anecdotal. Now, in medicine, they avoid the word “anecdote”, but using the expression “case study”.

20 HIS HONOUR: They do.

MR WALKER: And in epidemiology departments, case studies don't get a lot of regard. But a case study or a case report is nonetheless a classic way in which
25 science advances and safety is improved.

HIS HONOUR: And we don't have that here.

MR WALKER: “I've had a patient. I did this. Something terrible happened,” and
30 – etcetera. We are not within cooee of that - - -

HIS HONOUR: Yes.

MR WALKER: - - - either for the Australian material or for the resort that was
35 made to overseas experience.

HIS HONOUR: Yes.

MR WALKER: And it's for those reasons, in our submission, that an obvious way,
40 one would have thought a laudable way, for an Australian regulator – safety regulator – to proceed, namely, to get ahead of the game and to learn lessons from overseas that could be translated here, we couldn't be heard against that as an approach, but it hasn't happened and, thus, we are left with what, in our submission, to use a slightly grandiose term for it, is nothing other than well-meaning intuition,
45 because I repeat: of course we don't traduce the motivations. So, well-meaning, unquestionably.

HIS HONOUR: Yes.

MR WALKER: But intuitions, at best, not based upon material, that is calculated by the requisite intelligible connection to serve the purpose of enhancing safety. That's
5 all I wanted to say by way of elaborating and pointing up, in light of the cross-examination, what we've otherwise written and upon which I rely concerning that point.

10 HIS HONOUR: Yes.

MR WALKER: Can I complete – I can be very short about this – what I want to say about the ultra vires point.

15 HIS HONOUR: Yes.

MR WALKER: And I'm going to start by responding to a couple of the argumentative markers that my learned friend usefully laid down in his opening in the hope that we can speed things up with some anticipation. In particular, there is an attempt, as your Honour knows, to fence off – corral off – what comes from
20 30DU of the Act. Can I take you back to that, please.

HIS HONOUR: Yes.

MR WALKER: The purposes of 30DU, an expression used by my friend in opening
25 as part of the argument for sidelining 30DU, are in fact very clear. It only has one purpose: it imposes an obligation on the executive to have regulations that carry out the prescription described in 30DU. The purposes of 30DU are nothing other than requiring the regulations to do something. Whatever else is chosen to be done, it must do that.

30 HIS HONOUR: Yes.

MR WALKER: Now, it may be, however, that that part of our friend's argument is directed at persuading your Honour that, found as it is in subdivision A of division
35 3D of Part III of the Civil Aviation Act, 30DU is somehow confined with respect to the responsive regulation made in obedience to 30DU as itself operating only for the purposes of – and I think the argument against is – the demerits point scheme.

40 HIS HONOUR: That's as I understand it.

MR WALKER: I think. Now, your Honour has already read the way in which we deal with this. I don't want to repeat it, but can I highlight this: the demerits points scheme itself is not a self-contained territory. It's part and parcel of a scheme which affects the continued privilege of licences authorisations, etcetera, and can even
45 culminate in offences. And it refers, of course, that is, the demerit points scheme, refers to conduct called for by these artificial categories in which this statute places people and activities – classes. And that's why 30DU is a pivotal expression that's

lawyers' lore, admittedly, but it is part of the mechanism by which one moves from human activities and physical items of property to the very elaborate and sophisticated regulation of how they are used and how people must conduct themselves within categories or classes, so that there may then be a holding of people to account – the exertion of the discipline that the statute represents – through the demerits points scheme and, ultimately, off to the loss of authorisations or offences and the like.

And it's for those reasons that it is anti-purposive for any attempt to be made to read 30DU, and more to the point, the regulations made in obedience to it, as somehow of no significance and having no application in an understanding of the way in which obligations are imposed by reference to classes of authorisation. So 30DU requiring classes to be promulgated and requiring them to have regard to the activities covered by them has been obeyed by the making of 13.375. And the Civil Aviation authorisation in the – in this draftsman's device of columns 1, 2 and 3 requires, ultimately, something in column 3, which is a label applied to something in column 2, which is given an item number in column 1 – it requires something in column 3 to – sorry – only those things in column 3 are classes of Civil Aviation authorisation.

HIS HONOUR: Yes.

MR WALKER: And they start with air operator's certificate. They have pilot licence. They have flying training; authorisation to pick things at random. The next step, as your Honour knows, is to go back to the - - -

HIS HONOUR: So just interrupting you, Mr Walker. You say nothing unorthodox there: just read the section for what it is, section 30DU. It shouldn't be confined in any particular way, limited to demerit. Read the text. Apply the text. When you do so, you go to regulation 13.375 - - -

MR WALKER: Yes.

HIS HONOUR: - - - being a regulation for the purposes of section 30DU of the Act, and there it is.

MR WALKER: There is.

HIS HONOUR: It is what it is.

MR WALKER: Yes. Now, in – and may I go further: and it is therefore not to the point that this might represent the better Procrustes – it's quite difficult to make everything fit to it – so there, they can change the table.

HIS HONOUR: Yes.

MR WALKER: Now, we then come to the nub of the matter on our ultra vires point, which, as you know, has two limbs.

HIS HONOUR: Yes.

MR WALKER: The first is always to go back to the provision that provides the power, which is, in this case, a two-stage exercise, because you start with section
5 98(5A) of the act. It authorises regulations that may empower. So that's the first one: the regulations may empower issue of instruments in relation to. And there's no doubt that this answers the description in paragraph (a) of that subsection, this instrument.

10 HIS HONOUR: Yes.

MR WALKER: However, one has to find a regulation to empower that – (5A) is not self-executing – and we find that regulation in 11.068, which is why it starts with that odd phrase:

15 *For subsection 98(5A) of the Act –*

meaning, presumably, pursuant to. And it says:

20 *...CASA may issue –*

so there's the empowering –

25 *a legislative instrument –*

there's the requirement that it be a legislative instrument, and it is a requirement, because there is no other power given. And then it has to be one:

30 *...that imposes a condition related to a matter mentioned in that subsection –*

and as your Honour understands, we don't really cavil with that.

HIS HONOUR: No.

35 MR WALKER: On – and here comes the important phrase:

...on a specified class of authorisations.

40 Now, it's a specified glass of authorisations. Significantly, the word class is used in the immediate context within the statute of section 98, subsection (5A), and that is the very next subsection: subsection (5AA). But you see, there, the word class is not referring to a class of authorisations, let alone to a specified class of authorisations. That's referring to a difference concept: class of persons, class of aircraft, class of aeronautical product.

45 HIS HONOUR: Yes.

MR WALKER: So it can be the issue of a legislative instrument. To be a legislative instrument, we submit, it has to satisfy (5AA). It applies in relation to one or other of the classes – (a), (b) or (c) – but it must be a condition imposed on a specified class of authorisations. So we know that a class of authorisations is
5 different from what is required by the anterior condition of it being a legislative instrument by (5AA), which is it applies in relation to a class of persons, class of aircraft or class of aeronautical product. And, I think, in the case of every single substantive provision of this instrument, your Honour, there will be satisfaction of (5AA), that is, it's class of persons.

10

HIS HONOUR: Yes.

MR WALKER: You recall the repeated collocation of words that has at its heart the word holder, which would be a person. But it has to be imposing a condition on a specified class of authorisations, and nowhere can that be seen, because for that
15 purpose, we go back to – not to (5AA) at all, but to 13.375, and one won't find that at all. It's a very straightforward proposition. And bearing in mind the important powers that you see in 11.068, namely, that this imposition of conditions will condition an already existing authorisation and it will be a condition applicable to
20 later-granted authorisations, we know it's therefore separate itself from an authorisation – it's external to an authorisation and has an effect on it. And obviously enough, it has to be done so as not to single out a particular person. That was the importance of (5AB), which, as my friend correctly points out, doesn't have any play in this case.

25

HIS HONOUR: Yes.

MR WALKER: I know I'm repeating myself, but for the purposes of emphasis, (5AB) does not mean that an instrument not expressed in any of the three ways
30 specified in (5AB) is thereby a legislative instrument.

HIS HONOUR: It's not exhaustive.

MR WALKER: That is absolutely critical. (5AB) may either be emphatic or
35 specific. It doesn't matter. The evident mischief being addressed it so to ensure that there is no ad hominem legislative instrument. (5AA) remains, in our submission, not an optional or redundant provision, but the only way in which, in this scheme, an instrument can be a legislative instrument. Now, of course, it doesn't have the words "but only if" in its second line, and that's why I said in opening there is a choice for
40 your Honour, but the choice ought to be clear. And bearing in mind the overall scheme of defaults/offences, etcetera, the requirement for promulgation in 11.068 of a legislative instrument to impose such conditions being an instrument that satisfies (5AA) is, with respect, clear. Now, it's quite difficult, in our submission, to avoid the conclusion, therefore, that unless one can see of each of the conditions in the
45 instrument that there is in the instrument a class or classes of authorisations to which the condition relates it's quite difficult to see how it could ever satisfy 11.068(1). Now, I've said "specified in the instrument" and that is because we are talking about

documents, that is, acts of government manifested by the use of words, and the – just as the – a condition can't be imposed between the lines neither can a class of authorisations be specified silently. I'm not urging some atavistic resistance to sensible implications, your Honour.

5

HIS HONOUR: No.

MR WALKER: Because they arise from words that have been used. But I am saying that these are, preternaturally, provisions about formality in the exercise of power of a kind that is important, not only as to what is imposed by way of the burden of compliance but also, of course, the sanction for non-compliance. And it's for those reasons that we submit it is as simple as us saying, I hope rhetorically – mind you, my friend is the one to answer it non-rhetorically – where does one find in this instrument the specification of any class or classes, it could be plural, of authorisations. Not by speculation as to what they may have had in mind. Not by way of finding a description of class of authorisations or – that is not set out in 13.375 but, in the terms of the instrument itself, coinciding with one of the column 3 descriptions in 13.375. If it please your Honour.

20 HIS HONOUR: Thank you for that, Mr Walker. Mr Hanks.

MR HANKS: Yes. Well, like my friend, I will start with ground 5.

HIS HONOUR: Yes.

25

MR HANKS: The core question, your Honour, is whether cannot be discovered some rational connection between the conditions and the matters identified in section 98 subsection (5A). That's the – how can I put it? It's – that's the gate through which the instrument must pass. It's an instrument made under regulation 11.068; it is made, as that regulation says, for subsection 98(5A). Where's the linkage, as our friend Mr Walker said? And the relevant pigeonhole in (5A) paragraph (a):

30

Matters affecting the safe navigation and operation, or the maintenance, of an aircraft.

35

So there must be – no, I mustn't assume too much of a burden here. Our friend must show that there is no rational connection between the instrument and the various conditions which it attaches on the holders of flight crew licences, on the one hand, and the matters affecting the safe navigation and operation, or the maintenance, of aircraft. Now, your Honour understands that we join with our friend in saying that he's undertaking a very substantial task. One where it will be an exceptional case for the court to find that there is no such connection. We have referred to what one might describe as the relevant authorities in paragraph 78 of our written submissions, and your Honour will be well familiar with these.

40

For example, your Honour's not concerned with whether the director of air Safety got it right, reached a conclusion as expressed in the instrument with which your

Honour agrees or which your Honour regards as fair and reasonable. Rather, the question is whether the conclusion as expressed in the instrument is reasonably open to the person who made the instrument. Of course, your Honour's familiar with cases such as the Minister for Immigration v Li – which is spelt L-i, for the transcript
5 – and your Honour's also familiar with a proposition from the case involving the South Australian Attorney-General v the Adelaide Corporation, which we have cited in our written submissions in footnote 125, that – and, again, I'm advancing uncontroversial propositions, that the test doesn't invite review by your Honour of the merits of delegated legislation.

10

This is to be approached, of course, within the framework set by the Act. And I've taken your Honour briefly to 98 subsection (5A), but I should also take your Honour to section 3A, which sets out the main object of the Act:

15 *...to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation –*

and then your Honour sees the following words –

20 *with particular emphasis on preventing aviation accidents and incidents.*

And I should refer your Honour to section 9A, which is headed Performance of Functions, and your Honour sees subsection (1):

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

So there's an emphasis on safety and a particular emphasis on prevention. Now, we come to the instrument as made by the director of air safety. I'm going to put on one
30 side – leave till later that is – the attack that the instrument has failed to impose a condition on a specified class of authorisation.

HIS HONOUR: Yes.

35 MR HANKS: And I will come back to that. But I think your Honour understands that we have a very short answer to the attack that is developed by reference to 13.375, and that is that so far as regulation 11.068 is concerned, it is for the instrument to specify and, by specification, identify a class of authorisation. The class of authorisation does not derive its legitimacy or its existence from regulation
40 13.375, but I will come back to that. We're now looking at the particular conditions found in the instrument. Can it be said that each of them or of any of them that there is no rational basis for connecting that condition with the requirement found in the statute, section 98, subsection (5A), that that condition relates to a matter:

45 *...affecting the safe navigation and operation, or the maintenance, of aircraft.*

Now, your Honour will have regard, in answering that question, whether there's an absence of a rational connection. Your Honour will have regard to two sources: one is the evidence of Mr Monahan and the other is the explanatory statement which accompanied the instrument. Now, the explanatory statement appears at tab 12 on
5 the court book, your Honour, and I think that's the second volume.

HIS HONOUR: Yes.

MR HANKS: I'm sorry. I withdraw that. It doesn't appear in the court book at all.
10 It's in the book of authorities, tab 12. I thought I had seen more than one copy of this in the evidence, but there it is.

HIS HONOUR: Yes.

MR HANKS: So the purpose is stated on the very first page. Perhaps, frustratingly, with pages – no, the pages are numbered. It's only the first page that's not
15 numbered.

HIS HONOUR: Yes.

20

MR HANKS: And it is said that:

*CASA has assessed community service flight operations have a the higher risk
25 of an accident or incident due to the existence of risk factors.*

25

And:

*The purpose of the instrument is to mitigate this risk by placing conditions on
30 flight crew licence holders conducting such operations.*

30

And further down the page, I will take your Honour to approximately 1.7 on the same page.

HIS HONOUR: Yes.

35

MR HANKS: There's a description of how the flights are conducted. Does your Honour see that?

HIS HONOUR: Yes, I have that.

40

MR HANKS: Thanks, your Honour. It's said that:

*Pilots can operate from a variety of unfamiliar locations in varying weather
45 conditions.*

45

So there's a reference to the operational circumstances under which these flights are conducted. Then there's a reference to the absence of:

...organisational oversight or safety support from a certificated air operator.

HIS HONOUR: Yes.

5 MR HANKS: So your Honour can see that what has been identified here is factors that might reasonably be thought to impinge on safety. In the following paragraph, it is said that certain factors that have already been identified result:

10 *...in an increased need for pilots in command to be experienced and operationally recent.*

Now, your Honour might conclude that a statement to that effect from the regulator of air safety to which experienced regulators have contributed – and that’s the evidence of Mr Monahan – is overtly rational and reasonable. There are risk factors and there are remedies that can mitigate those risk factors. And amongst those remedies is ensuring that pilots are experienced and they’ve had recent operational experience. The following two sentences of the last paragraph on the first page, we submit to your Honour, identify the persons who use community service flights, effectively, the passengers and their expectations, but proposes that those passengers are not – sorry – do not adequately understand “the specific risks posed by this kind of operation”.

The following page, there’s a reference to six fatalities since 2011. In our submission, your Honour, that is not the reason proposed even in the explanatory statement for supporting the instrument, but it’s a recognition of an historical fact. And when the statement refers to, in the following sentence, to “elevated risks”, it’s our submission that those are the risks identified earlier in the explanatory statement from about 1.7 on the first page onwards. There’s the broad justification for the instrument. Mr Monahan, in his second affidavit – and I will ask your Honour to go to court book 593, paragraph 24 – attested over the following two pages – and your Honour can see the lettered paragraphs (a) through to (e) – attested to the particular human factor risks that were faced by community service flights. Now, I don’t need and I won’t read those for your Honour.

35 HIS HONOUR: Yes.

MR HANKS: But that, we submit, is a catalogue of the risk factors as assessed by the experienced regulators. In our submission, it is not a condition of validity that each of those risk factors be assessed empirically and by reference to statistically sound analysis. It is sufficient if there’s a rational basis for the regulator to conclude that, for example, operating in an unfamiliar location, operating an aircraft in an unfamiliar location, operating an aircraft in varying weather conditions is itself a risk factor, particularly where the operation is carried out without safety support from what’s referred to as a certified air operator, such as would be found in a large scale commercial operation. And I appreciate that there’s possibly an element of individual liberty involved here, but the Act tells us that safety is the absolute priority, particularly by reference to prevention. And if that means that some

inhibition must be placed on the liberty of pilots who fly these aircraft, that cannot be described as lacking a rational basis.

HIS HONOUR: Yes.

5

MR HANKS: Your Honour will see on page 594 of the court book, in paragraph (b), where Mr Monahan gives evidence about the significant potential for pressure to be applied on pilots by passengers, and Mr Monahan elaborates that through the balance of the paragraph. And that concern is repeated in paragraph (c). And a variant of it is described in paragraph (d) by reference to an American organisation, the Aircraft Owners and Pilots Association, which has published guidance material and Mr Monahan exhibits that as CM38, which your Honour will find beginning at court book 645.

10

15 HIS HONOUR: Mr Hanks, what do you say to Mr Walker's submission that one would expect a regulator, drawing upon overseas experience, which Mr Walker accepts is an appropriate thing to do, would look at case studies and the like, something which is a bit more empirical than these broad generalisations here?

20

MR HANKS: Well, two things, your Honour. It's really at least a two stage process. The regulator looks at what the regulator knows about the conditions under which the community service sector operates, right?

HIS HONOUR: Yes.

25

MR HANKS: Are there potential problems?

HIS HONOUR: Yes.

30

MR HANKS: Are there potential risks? That's the first thing. What are the nature of those risks? What does overseas experience tell us by analogy with how those risks might be experienced in a similar operation in another country?

HIS HONOUR: Yes.

35

MR HANKS: Now, that material can be presented in a variety of ways, and what we – and we say in answer to your Honour's question and, indeed, in answer to our friend Mr Walker, case studies might be one way in which they are presented, but they can also be presented, as they were, in the publication which is CM38.

40

HIS HONOUR: Just pausing there, Mr Hanks. Putting to one side looking at overseas experience, on your submission, because Mr Monahan and his team are accepted as having relevant experience by Mr Walker in his submissions, and that wasn't challenged in cross-examination, that he and his team have relevant experience, would it be enough for them to have simply said, "We've looked into CFS flights. They have the following features and, in our view, that's a heightened risk which justifies the imposition of the instrument and the conditions"?

45

MR HANKS: Short answer, yes, it would be enough, your Honour. Because if one looks at the nature of the conditions that are then selected as a solution one can see a rational connection between the solution and the identified problem.

5 HIS HONOUR: Yes.

MR HANKS: It is not necessary for the identification of the problem to be scientifically supported, or statistically supported, it can be identified by an experienced regulator. Where the problem would arise, in our submission, would be if a solution was not connected to the problem.

HIS HONOUR: So if the condition was a ticketing mechanism?

MR HANKS: Well, I don't know whether that - - -

HIS HONOUR: That doesn't seem to have anything to do with - - -

MR HANKS: I don't know whether I'm giving a hostage to fortune here, your Honour, by accepting that that - - -

HIS HONOUR: I will let you give the example, then, Mr Hanks.

MR HANKS: Well, my friend gave the absurd example earlier about the colour of the hair of the pilot, you know, the red-headed pilot.

HIS HONOUR: Yes.

MR HANKS: But it would simply – it would be a condition that, on no reasonable argument, could advance the matters referred to in – and here we go back to the Act – subsection (5A) of section 98.

HIS HONOUR: Yes.

MR HANKS: Could not advance safety. I'm just making sure that I – I need to go back to subsection (5A) to make sure I have the right language:

...safe navigation and operation –

and that's one critical topic. So - - -

HIS HONOUR: So long as I was satisfied that these connection – that these conditions fall within that rubric - - -

MR HANKS: Yes.

HIS HONOUR: - - - then on your submission that's an end of it and it doesn't matter about the final points of case studies or how the quality of the other empirical data that was relied upon, whether it existed - - -

5 MR HANKS: Yes.

HIS HONOUR: - - - it didn't exist, whether it be connected between – to the conditions or not, long as a view was formed by Mr Monahan and his team, that there was an elevated risk, and that related to the safe navigation and operation of
10 maintenance of an aircraft, and the condition it could be connected back to the safe navigation and operation or maintenance of an aircraft, then that's enough.

MR HANKS: That's – that's one of putting it, your Honour. And it – that's sort of almost a colloquial summary. But - - -

15 HIS HONOUR: I accept that.

MR HANKS: Yes. The critical questions will be whether the applicant has persuaded your Honour that there is no such plausible, reasonable connection
20 between that condition and the safety objective, I will call it objective.

HIS HONOUR: Yes.

MR HANKS: In subsection (5)A of section 98. But there's no reasonably open
25 connection between, for example, the limiting the number of passenger carried on the aircraft and the promotion of safety. You heard from Mr Monahan about that. The simplest connection there is that you limit the number of it individuals who are exposed to any risk by limiting the number of passengers. That – that of itself - - -

30 HIS HONOUR: Would be sufficient

MR HANKS: Would be sufficient. And we would say, your Honour, that it's not possible for the applicant to persuade your Honour that there's no rational connection
35 between that limitation and – it's always better if I read precisely what the act is:

Matters affecting safe navigation and operation of aircraft.

HIS HONOUR: Yes.

40 MR HANKS: So we could go, and indeed, we should go, through the individual requirements of the instrument. I put the authorities away. And just carry out a little bit of archaeology on the bar table.

HIS HONOUR: Yes.
45

MR HANKS: So I refer there to the condition, condition on a flight crew licence.

HIS HONOUR: So this is clause 7.

MR HANKS: And you can see how it's put there, your Honour. It's an obligation on the holder of the flight crew licence not to do certain things. Not operate aircraft
5 for this type of flight unless. Now, there we have it in paragraph C, the limitation. One – one of the ways in which the limitation on the number of passengers – or the persons on the aircraft is expressed. But there's another way, which is expressed in clause 10(1)A. But they both work, in our submission, to impose a limit on the persons travelling on the aircraft, a numerical limit, and through that to serve the
10 purpose identified in subsection (5)A.

HIS HONOUR: Yes.

MR HANKS: If we go through to clause 8. As we understand it, there's no attack
15 on the conditions attached under clause 8, but your Honour can see how, entirely plausibly, those conditions are directed to questions of safety, safe operation. For example, you can't use what's called an excluded aeroplane. That's what subclause (1) says, and subclause (2) then defines what's meant by that.

20 HIS HONOUR: Yes.

MR HANKS: And your Honour can see the definition and, in our submission, each of those is plausibly related to safety, or, to put it more accurately, it cannot be said, if our friends were so minded, that there's no reasonable relationship between that
25 condition and the objective in subsection (5A).

HIS HONOUR: Yes.

MR HANKS: We then come to clause 9.

30 HIS HONOUR: Yes.

MR HANKS: Now, these are essentially the experience, as the heading says – experience requirements. And the person who pilots the aeroplane for a community
35 service flight must have experience that includes a landing within the previous 30 days.

HIS HONOUR: And you say that's directly referable to the requirements of - - -

40 MR HANKS: It is.

HIS HONOUR: - - - section 98(5A).

MR HANKS: There's evidence from Mr Monahan that the highest level of risk in
45 aircraft operation is at the time of take-off and landing.

HIS HONOUR: Yes.

MR HANKS: And it's also evidence from him that the regulator took into account that that risk could be mitigated with practice. I'm using my own language here, but that's effectively what he says.

5 HIS HONOUR: Yes, it is.

MR HANKS: Right. And that's what clause 9 requires. And your Honour can see that it descends into a degree of detail. Take your Honour, for example, to subclause (b). Effectively, the requirement is that the pilot, if I can use a short term, has
10 experience that includes, if the flight is going to be conducted under VFR, and that's a visual flight - - -

HIS HONOUR: Yes.

15 MR HANKS: - - - system, at least 10 hours of flight time is – in the same type of aeroplane as the aeroplane used for the community service flight. Again, we don't think it's seriously suggested that requiring a pilot to have that flight experience in an aeroplane of the same type – and if your Honour reads Mr Monahan's evidence, that's quite a broad category. It doesn't mean the same brand aircraft, but the same
20 type. Where the flight is to be conducted under IFR – that is, using the instruments – then the level of experience is longer. And again, there's a rational explanation for that. Mr Monahan's evidence is that conducting – flying an aircraft under IFR is more challenging. And your Honour can see, then, there's the third category in paragraph (d), third special category - - -

25 HIS HONOUR: Yes.

MR HANKS: - - - a multi-engine aeroplane. And again, Mr Monahan has given evidence about the justification for that, that that is a more complex piece of
30 machinery, and all of this is entirely, we submit – entirely plausible and reasonable. It can hardly be said to be unreasonable. There's an enhancement of the requirements found in clause 9(2). Now, clause 9(1) is addressed to any holder of a flight crew licence. Clause 9(2) is addressed to the holder of a private pilot licence. That is a person who has a flight crew licence, but that licence is not a commercial
35 pilot licence or an air transport pilot licence.

HIS HONOUR: Yes.

MR HANKS: And for those individuals, the – there are extra requirements. Mr
40 Monaghan's evidence is that those are individuals who do not, as a matter of regular occupation, fly aircraft. They don't hold a commercial pilot licence, nor do they hold an air transport pilot licence. His evidence is that the standards for the holding of those licences are higher than the standards for the holding of an ordinary private pilot licence. And that's why - - -

45 HIS HONOUR: And that's something that Mr Monaghan has the relevant experience to tell me about.

MR HANKS: He does and he has.

HIS HONOUR: He has.

5 MR HANKS: Yes, your Honour. Now, I will come back to clause 10 – well, I’ve already dealt with clause 10(a). Your Honour sees that that imposes a limit of five passengers, including the patient.

HIS HONOUR: Yes, it does.

10

MR HANKS: But the other – sorry, I will start again. Paragraph (b) proscribes the operation of an aeroplane for a community service flight under the visual flight system at night. And Mr Monaghan’s evidence is that there are particular difficulties in night-time flying – safety difficulties – and so what the instrument requires is that
15 if the aircraft is to be operated at night, it will be operated by reference to instruments, not by reference to visual sighting. And then there are the two information requirements, I think described by our friend this afternoon as possibly – if I can find the language that my friend used – possibly an experiment – a regulatory experiment.

20

HIS HONOUR: Yes.

MR HANKS: But the evidence of Mr Monaghan is that the purpose served here is to collect information about the operation of community service flights, information
25 that will be derived from the flight notification to Air Services Australia, and that will be also derived by inspection, from time to time, of pilot personal logbooks. And your Honour will recall that Mr Monaghan gave evidence this afternoon that that information could be compared against the general range of information in the possession of CASA about other aircraft operations. It’s designed to equip CASA
30 with intelligence – information that can be used to determine whether the conditions attached onto this instrument are effective or ineffective. The final clause is clause 11. And if your Honour pleases, I will just deal with clause 11, and then – I won’t stop talking, but perhaps your Honour might think it’s appropriate then to adjourn.

35 HIS HONOUR: Yes.

MR HANKS: Clause 11 – we will go directly to subclause (2), having passed through the gateway in subclause (1). What is required here is that before the plane can be piloted by the holder of a flight crew licence on a community service flight,
40 the aeroplane must have undergone a periodic inspection within the last 100 hours of service. And your Honour will see the further condition in (ii). So where the aeroplane has been in service for less than 100 hours in the immediately preceding 12 months – so one is talking here, we can reasonably say, a plane that has been somewhat inactive for 12 months – it must have undergone a periodic inspection
45 within that 12 months. Now, there’s an alternative in paragraph (b) – an alternative to (a). But all of these are directed to, can I put it to your Honour, ensuring that the plane has at least been inspected or has been given a certificate of airworthiness in

the not-too-distant past. Now, that is explained by Mr Monaghan by reference to the notorious fact that sometimes aircrafts stop working when they should be working
- - -

5 HIS HONOUR: Yes.

MR HANKS: - - - and maintenance is designed to forestall that risk. Now, our friends would need to persuade your Honour that there's no rational basis on which requiring - - -

10

HIS HONOUR: Maintenance for safety.

MR HANKS: - - - maintenance at those intervals could contribute to safety, and with respect to our friends, we think they cannot. Your Honour, I think I've finished
15 with ground 5, but I will just check that tomorrow - - -

HIS HONOUR: Yes.

MR HANKS: - - - and - - -
20

HIS HONOUR: You do that and you will continue tomorrow morning.

MR HANKS: Well, if you're here, I will be here, your Honour.

25 HIS HONOUR: Beg your pardon?

MR HANKS: Yes, I will, your Honour. I've - - -

MR WALKER: An actual promise, is it?
30

MR HANKS: Pardon?

MR WALKER: What time does your Honour wish to start tomorrow?

35 HIS HONOUR: 9.30 - - -

MR WALKER: Thank you.

HIS HONOUR: - - - would suit me, but - - -
40

MR HANKS: It suits me as well, as long as I know.

HIS HONOUR: Very well.

45 MR HANKS: I should say no more.

HIS HONOUR: We will adjourn the court to 9.30 tomorrow morning.

MR WALKER: Please the court.

MATTER ADJOURNED at 4.19 pm UNTIL WEDNESDAY, 17 MARCH 2021

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