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Anderson and Civil Aviation Safety Authority [2013] AATA 613 (29 August 2013)

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Division **GENERAL ADMINISTRATIVE DIVISION**

File Number(s) **2007/6248**

Re **John Anderson**
 APPLICANT

And **Civil Aviation Safety** **Authority**
 RESPONDENT

DECISION

Tribunal **Senior Member A K Britton**
 Air Vice-Marshal Cox, Member

Date **29 August 2013**

Place **Sydney**

The decision under review is affirmed.

.....[SGD].....
Senior Member A K Britton

CATCHWORDS

AVIATION—Civil aviation—Cancellation of commercial pilot (helicopter) licence— Whether the Applicant is a fit and proper person to hold a commercial pilot’s licence—Whether the Applicant operated a helicopter in a reckless manner—Whether the Applicant failed to disclose medical conditions to the Respondent—Decision under review affirmed

LEGISLATION

[Civil Aviation Act 1988](#) (Cth) – [ss 9A\(1\)](#); [20A](#);

[Civil Aviation Regulations 1988](#) (Cth) – [regs 43B](#); [133\(1\)\(d\)](#); [215\(9\)](#); [233\(1\)](#); [269](#);

← [Civil Aviation Safety Regulations 1998](#) → (Cth) – regs 67.010; 67.015; 67.180; 67.265(3)

Criminal Code Act 1995(Cth) – Schedule cl 5.4

[Veterans' Entitlements Act 1986](#) (Cth)

CASES

Anderson and ← [Civil Aviation Safety](#) → Authority [2008] AATA 206

Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Firkins v Anderson and Anor [2011] WASC 51

R v John Robert Anderson & Anor (Unreported, Magistrates Court of Western Australia, 4 February 2010)

Rana v University of South Australia [2007] FCAFC 188

Repacholi Aviation Pty Ltd v ← [Civil Aviation Safety](#) → Authority [2009] FCA 1487

Re Quadrio and ← [Civil Aviation Safety](#) → Authority [2011] AATA 709

Re Taylor and Department of Transport (1978) 1 ALD 312

REASONS FOR DECISION

Senior Member A K Britton
Air Vice-Marshal Cox, Member

29 August 2013

1. Mr John Anderson is a commercial airline pilot with several thousand hours of flight experience. Apart from the matters discussed in these reasons he has an unblemished flying record. He seeks review by the Administrative Appeals Tribunal of a decision made in December 2007 by the ← [Civil Aviation Safety](#) → Authority (CASA) to cancel his commercial pilot licence and a number of other licences issued under the [Civil Aviation Act 1988](#) (Cth) (the Act) (collectively, the licence). That decision was stayed by the Tribunal (differently constituted) in March 2008. Since that time Mr Anderson has continued to fly, primarily in New Guinea, without incident.
2. The trigger for the cancellation decision was a complaint made about a flight piloted by Mr Anderson on 30 March 2007, ferrying a party of SCUBA divers between the Abrolhos Islands and Geraldton, Western Australia. The flight was made in a 40yearold helicopter, a Sikorsky S-62A.
3. Following investigation of the complaint, Mr Anderson was charged with, and convicted of, a number of offences under the [Civil Aviation Act 1988](#) (Cth) (the Act) and the regulations made under that Act.
4. CASA contends that while Mr Anderson was acquitted of the offence of “reckless operation of an aircraft” in contravention of [s 20A](#) of the Act, the elements of that offence are satisfied if the civil standard of proof is applied. CASA also contends that Mr Anderson is not a fit and proper

person to hold a licence under the Act because, among other things, he failed, as required by the [Civil Aviation Safety Regulations 1998](#) (Cth) (the Safety Regulations), to disclose a “medically significant condition”. CASA argues that taken together with the offences for which Mr Anderson has been convicted, the preferable decision would be to affirm the decision to cancel his licence.

5. Mr Anderson rejects the allegations that he failed to disclose a medically significant condition and that he operated an aircraft in a reckless manner. He argues that the power to cancel his licence should not be exercised because the offences for which he was convicted were not serious in nature, as reflected by the lenient sentences imposed, and furthermore, that in six years since the offending conduct occurred he has continued to fly without incident.
6. As a consequence of Mr Anderson’s convictions, the power conferred by the [Civil Aviation Regulations 1988](#) (Cth) (the Regulations) to vary, suspend or cancel Mr Anderson’s licence can be exercised. The issue in dispute is whether that power should be exercised. This requires determination of, among other things, whether Mr Anderson:

Operated a helicopter on 30 March 2007 in a manner that was reckless in contravention of s 20A of the Act

Failed to disclose a “medically significant condition”

Provided information to the Department of Veterans’ Affairs he knew to be false

Is a fit and proper person to hold a licence under the Act.

Statutory framework

7. CASA’s decision to cancel Mr Anderson’s licence was made under reg 269 of the Regulations, which provides:

Variation, suspension or cancellation of approval, authority, certificate or licence

(1) Subject to this regulation, CASA may, by notice in writing served on the holder of an approval, authority, certificate or licence (an authorisation), vary, suspend or cancel the authorisation if CASA is satisfied that one or more of the following grounds exists, namely:

(a) that the holder of the authorisation has contravened, a provision of the Act or these Regulations, including these regulations as in force by virtue of a law of a State;

...

(c) that the holder of the authorisation has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft;

(d) that the holder of the authorisation is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such an authorisation;

...

1A CASA must not cancel an authorisation under subregulation (1) because of a contravention mentioned in paragraph (1) (a) unless:

(a) the holder of the authorisation has been convicted by a court of an offence against a provision of the Act or these Regulations (including these Regulations as in force by virtue of a law of a State) in respect of the contravention; or

(b) the person was charged before a court with an offence against a provision of the Act or these Regulations (including these Regulations as in force by virtue of a law of a State) in respect of the contravention and was found by the court to have committed the offence, but the court did not proceed to convict the person of the offence.

8. In exercising its powers and performing its functions CASA, and the Tribunal, acting as substitute decision-maker is directed to “regard the safety of air navigation as the most important consideration” (s 9A(1) of the Act). In *Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority* [2009] FCA 1487 McKerracher J commented (at [33]) “there is little doubt ... that the safety of air navigation is the most important consideration under the [Act]”.

Decision to cancel Mr Anderson’s licence

9. In a letter dated 19 December 2007, a CASA delegate notified Mr Anderson of the decision to cancel his commercial pilot (aeroplane) licence, commercial pilot (helicopter) licence, private pilot (aeroplane) licence, private pilot (helicopter) licence and student pilot licence (collectively “the licence”). The delegate noted that it was no longer necessary to decide whether Mr Anderson’s chief pilot approval should be cancelled as he had resigned as chief pilot of Prestige Helicopters a month earlier.
10. The letter sets out a number of alleged shortcomings about the second of four flights made by Mr Anderson as chief pilot on 30 March 2007 between the Abrolhos Islands and Geraldton, Western Australia (the subject flight). The letter described the “attempted take off” in the following terms:

Two sets of video footage obtained by CASA show you, as pilot in command of the helicopter; make four or five attempts to take off from the sand cay. The two videos are taken at the same time but by different cameras from different positions. The Show Cause Notice stated that the footage showed:

- (a) four to five attempts to take off and the helicopter’s subsequent difficulty staying airborne;
- (b) the main rotor blades having excessive “coning angle”. Coning Angle, in this context, is the angle at which the blades flex up from the horizontal. This is clearly visible against the horizon. Whilst a degree of flexing is normal, the heavier the helicopter the greater the coning angle. Lift from the rotor blades is also a function of the angle of attack (pitch angle) that the blades make with the surrounding air and the speed of the blade through the air. The engine also drives the tail rotor which in turn provides directional stability;
- (c) in addition to the excessive coning angle, a high collective pitch setting would result in a high angle of attack on each main rotor blade. This places greater load on the engine with a resulting reduction in rotor RPM. This leads to less lift in the main and tail rotor systems. Reduction in the lift from the tail rotor ultimately leads to loss of directional control in the hover;
- (d) at about 1:08 minutes into the video footage, the right main wheel lifts clear of the ground but the tail wheel and the left main wheel are still in contact with the ground, whilst the rotor disc is tilted to the right. As the surface is relatively level this indicates that the lateral centre of gravity is to the left, whilst the longitudinal centre of gravity is towards the rear of the helicopter.
- (e) the helicopter’s tail wheel and left main wheel strike the ground on several occasions suggesting not only a lateral and longitudinal imbalance of the helicopter load, but also that that [sic] it is difficult to maintain a hover. The wallowing movements of the helicopter do not appear to be due to the erratic or poor control inputs by an inexperienced pilot but rather that [it] is being operated at the very limits of its controllability.
- (f) the helicopter was wallowing and lacks directional stability whilst the coning angle

remains high.

11. The delegate wrote that it appeared that in contravention of s 20A of the Act, Mr Anderson had operated the aircraft “being reckless as to whether the manner of operation could endanger the life of another person”.
12. The delegate stated that the helicopter was at least 228 kilograms above its maximum take-off weight and pointed out that this estimate did not include any allowance for cargo, despite evidence of tubs with fish and ice being on the helicopter. Among other things, the delegate asserted that Mr Anderson did not take such action as was necessary to ensure:

that the gross weight of the aircraft did not exceed the prescribed weight limits, in breach of reg 233(1) of the Regulations

compliance with any directions made by CASA with respect to the loading of the aircraft in breach of reg 233(1) of the Regulations.

13. The delegate also asserted that Mr Anderson failed to record the total time in service of the aircraft contrary to reg 43B of the Regulations.

Criminal proceedings

14. Following the cancellation decision Mr Anderson was charged with and convicted of two offences relating to the subject flight, namely:

operating the helicopter when maintenance was overdue in breach of reg 133(1)(d) of the Regulations, and

failing to record on the Maintenance Release the total time in service of the helicopter, in breach of reg 43B of the Regulations

15. He was however acquitted of the following charges relating to conduct on 7 April 2007:

commencing a flight as pilot-in-command, without taking action to ensure that the gross weight did not exceed the statutory limit in breach of reg 233(1)(b) of the Regulations; and

not complying with the relevant Operations Manual in breach of reg 215(9) of the Regulations

16. On appeal the acquittals were overturned and remitted for retrial (*Firkins v Anderson and Anor* [2011] WASC 51). Mr Anderson ultimately entered guilty pleas. The sentencing magistrate imposed a 12-month good behaviour bond of \$1000 and ordered that no conviction be recorded. In these proceedings Mr Anderson stated that at the time he felt unable to continue to defend the charges because he was suffering from “litigation fatigue”.
17. The magistrate also acquitted Mr Anderson of the offence of “reckless operation of an aircraft” (s 20A of the Act). That decision was not the subject of appeal.
18. In these proceedings Mr Anderson stated that while he did not seek to go behind the convictions, they must be placed in context. He pointed out that although the charge of operating the helicopter when maintenance was overdue (an offence of strict liability), was found proven, the magistrate accepted that a visual inspection had been carried out and a written request made to CASA for a short deferral, in order to undertake maintenance at the same time the gearbox truss was due to be replaced. Mr Anderson also pointed out that while the magistrate found that he had understated his time in flight by “at least a couple of hours”, the magistrate accepted that it was a mistake and not, as the prosecution alleged, a deliberate step taken to avoid detection that maintenance was overdue. (Transcript of proceedings, *R v John Robert Anderson & Anor* (Unreported, Magistrates Court of Western Australia, Magistrate Jones, 4 February 2010) pp 18, 20, 34).

Did Mr Anderson operate the helicopter in a reckless manner?

19. CASA contends that applying the civil standard of proof, the evidence indicates that Mr Anderson contravened s 20 A of the Act. Mr Anderson disagrees.
20. Section 20A states:

Reckless operation of aircraft

- (1) A person must not operate an aircraft being reckless as to whether the manner of operation could endanger the life of another person.
 - (2) A person must not operate an aircraft being reckless as to whether the manner of operation could endanger the person or property of another person.
21. The requirements for the element of recklessness for an offence under Commonwealth legislation is codified by cl 5.4 of the Schedule to the *Criminal Code Act 1995 (Cth)*:

Recklessness

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

 - (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

 - (3) The question whether taking a risk is unjustifiable is one of fact.
 - (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.
22. Tendered in these proceedings were two amateur hand held videos of the take-off of the subject flight on 30 March 2007, taken from different locations: the shore of the island, and the deck of a dive boat anchored nearby (collectively, “the video footage”). Each is of variable quality and incomplete.
23. The video footage shows the helicopter:
- lifting off the ground and returning to the ground on four consecutive occasions (stage one)
 - moving from a hover (after a passenger had disembarked) and taxiing forward; “stopping” and returning to the initial hover point (stage two)
 - taxiing forward to the take-off point (stage three)
 - moving from the take-off point and transitioning to forward flight (stage four).
24. In a statement tendered in the proceedings before the Magistrates Court of Western Australia, the passenger who had disembarked, a Qantas pilot, Mr Brian Meade, stated that after “four unsuccessful attempts to take-off” the co-pilot shouted “We’re overweight; someone will have to get off so the last on is the first off”. Mr Meade stated that being concerned for his safety he volunteered to take a later flight. (Documents produced under [s 37](#) of the [Administrative Appeals Tribunal Act 1975](#) at p18 [28].)

Expert opinion about the subject flight

25. Experienced pilots, Peter Rogers, David Lamb and Keith Engelsman gave evidence in these proceedings of their opinions about the operation of the subject flight. Each prepared written reports and gave oral evidence concurrently. Messrs Rogers and Engelsman had also given evidence in the criminal proceedings in the Magistrates Court.
26. CASA's decision to cancel Mr Anderson's licence was based largely on the findings of an investigation into the subject flight and other matters, conducted by CASA Inspector, Mr William Tucker. Messrs Rogers, Lamb and Engelsman did not agree with Mr Tucker's opinion that there were significant problems with *all* stages of the take-off. Nor did they agree with his opinion that:
 - the coning angle of the main rotor blades (the angle at which the blades flex up from the horizontal position during "lift") was excessive
 - Mr Anderson had difficulty maintaining control of the helicopter throughout stage one of the take-off.
27. Messrs Rogers, Lamb and Engelsman agreed that the operation of the helicopter during stage one was "perfectly safe" and during stage four, "not quite text book but close to". In the course of the proceedings the areas of disagreement between the experts narrowed and centred largely on whether:
 - There was adequate power available to safely execute the taxi (stage three), and
 - Mr Anderson's decision to continue with the taxi after off-loading Mr Meade could be characterised as reckless.

Power available to execute the taxi

28. Messrs Engelsman and Lamb were of the opinion that Mr Anderson did not have an adequate power margin to safely execute the taxi. Mr Rogers disagreed. Mr Engelsman described the taxi in these terms:

[T]he film shows an aircraft being flown in a clumsy and ... un-airman like manner in that it's touching the ground in unsuitable terrain. It is assuming excessive angles on the ground during some of those touchdowns. It has blown debris around over the ground... (Transcript of Proceedings *Re Anderson and*  **Civil Aviation Safety**  *Authority* (Administrative Appeals Tribunal, 2007/6248, Senior Member A K Britton and Air Vice-Marshal Cox, Member, 1 May 2013), p 77, ll 29-33).

29. Messrs Engelsman and Lamb observed that several times during the taxi the helicopter came into contact with the ground. Each considered that contact to be "significant". Mr Engelsman pointed to one occasion where not only did the helicopter's tail wheel drag along the ground but its left main wheel touched the ground causing "a right-wing-down attitude". In cross-examination each agreed that the video was of poor quality and "jumpy" but did not agree that as a consequence they were unable to make a reliable assessment about the position and movement of the helicopter throughout the taxi.
30. Messrs Engelsman and Lamb were of the opinion that the most likely explanation for the helicopter coming into contact with the ground and its inability to maintain a stable and consistent hover throughout the taxi was an inadequate power margin. In their opinion as a result there was a real risk that the helicopter could have become entangled with the ground and unable to call on additional power to extricate itself from difficulties, if necessary.
31. Mr Engelsman was of the opinion that given the deteriorating terrain over which the helicopter taxied, a hover height of about 10 feet should have been achieved throughout the taxi. In his opinion, Mr Anderson should have anticipated, as occurred, that the helicopter would lose the air cushion effect provided by the ground, causing it to descend, as the terrain deteriorated. Mr Lamb agreed.
32. Messrs Engelsman and Lamb were of the opinion that there were two possible explanations for the helicopter having an inadequate power margin: engine malfunction, of which Mr Anderson may not have been aware, or, the weight of the aircraft exceeding the manufacturer's specifications. Each considered the latter the most likely explanation.
33. Mr Rogers agreed that there was probably limited power available to Mr Anderson (Exhibit A3

at [6.2.29]) but not to the level that the taxi could not be *safely* executed. Pointing to an incident during the taxi where the helicopter touched the ground and almost immediately moved up to a higher hover, he argued that Mr Anderson would not have been able to “pull up” in those circumstances had there been insufficient power. (Transcript of Proceedings *Re Anderson and Civil Aviation Safety Authority* (Administrative Appeals Tribunal, 2007/6248, Senior Member A K Britton and Air Vice-Marshal Cox, Member, 1 May 2013), p 39, ll 41-44, p 66, l 40). Mr Engelsman disagreed and contended that the increase in hover height on that occasion was probably achieved by using “stored power”, which would have provided the helicopter additional power for a short period, probably five or six seconds.

34. Mr Rogers was of the opinion that the most probable explanation for the helicopter being flown low to the ground throughout the taxi was that Mr Anderson had made a deliberate decision to minimise rotor wash (air turbulence caused by a helicopter rotor which can blow dust, sand and loose items away from the helicopter). He explained that to minimise rotor wash it was necessary to hover at the lowest possible safe height. He argued that rotor wash posed significant risks including loose objects being caught up in the rotor causing damage to the helicopter itself, its passengers, the environment and bystanders. Mr Engelsman acknowledged the risks posed by rotor wash but argued that in this case, a significantly greater risk was posed by the helicopter hitting, or becoming entangled in, the ground as a result of flying low. Mr Lamb agreed.
35. Mr Rogers wrote in his report of June 2012 that the variation in the heading and pitch of the helicopter depicted in the video, could be interpreted by the “lay observer” as indicating that Mr Anderson was experiencing difficulties. In his opinion those movements did not indicate that Mr Anderson was experiencing such a level of difficulty as to raise concerns about the safe operation of the helicopter. In his opinion while the Sikorsky S-62A is a relatively stable aircraft it can be difficult to fly with precision in hot and gusty conditions. In his opinion during the taxi Mr Anderson was dealing with a strong head wind, probably around 10 to 15 knots. Messrs Lamb and Engelsman did not agree that the variation in heading and pitch of the helicopter was attributable to head winds. They were of the opinion that on the day the wind velocity was no more than 10 knots.
36. Mr Rogers stated that it was not possible to determine from the video footage, the level of power available to Mr Anderson throughout the taxi. He pointed out that as pilot Mr Anderson had the immeasurable advantage of being able to see the instruments and “feel” the aircraft and reasoned that he was therefore in the best position to determine whether there was sufficient power available to safely execute a take-off. Messrs Lamb and Engelsman disagreed that it was not possible to make a reliable assessment from the video footage about the power available throughout the taxi. Mr Lamb stated he had conducted a detailed review of the aircraft’s capacity and hover performance requirements prior to sighting the video footage. Messrs Engelsman and Lamb nonetheless agreed with the proposition that a pilot is in the best position to decide whether a take-off can be safely executed.
37. In cross-examination Mr Engelsman agreed with the proposition that when the helicopter ascended and moved into its final take-off position, there was adequate power to ascend and to make a safe departure. He agreed that the power available at that point was not transient power. He disagreed however with the proposition put by Counsel for Mr Anderson that this was strong evidence that there had been an adequate power margin throughout the taxi as “[power] doesn’t just come and go, it’s in the engine”. Mr Engelsman stated that power is also part of the environment, explaining that the engine provides power to the rotor, and the rotor interacts with the atmosphere. (Transcript of Proceedings *Re Anderson and Civil Aviation Safety Authority* (Administrative Appeals Tribunal, 2007/6248, Senior Member A K Britton and Air Vice-Marshal Cox, Member, 1 May 2013), pp 86, l 41).
38. Messrs Lamb and Engelsman contended that as an experienced pilot, Mr Anderson ought to have been aware of the attendant risks of attempting a take-off without an adequate power margin and his decision to do so was reckless. Each stated that during the taxi the passengers, and probably the bystanders, were placed in significant danger.
39. Mr Rogers pointed out that not only was Mr Anderson an experienced helicopter pilot with vast

experience in flying the S-62A and operating helicopters under limited power conditions, he had successfully flown the helicopter used in the subject flight from the Abrolhos Islands to Geraldton on numerous occasions and was familiar with the terrain. In those circumstances he contended the decision to proceed with the taxi could not be described as reckless but rather was a considered decision.

Weight of the aircraft

40. As required by the Act, an Operations Manual setting out the procedures and instructions for the conduct of flight operations was issued by the operator of the subject flight, Prestige Helicopters. As pilot, Mr Anderson was required to comply with those procedures and instructions (reg 215(9) of the Regulations). Among other things, the Operations Manual required that the name and weight (standard or actual) of each passenger be recorded on a Flight Passenger Manifest and that the pilot undertake a load calculation to ensure the aircraft was not overloaded.
41. According to Mr Anderson, prior to leaving Geraldton, he was given a copy of the Passenger Manifest completed by Mr Ron Shortis, a licenced aircraft engineer and head of aircraft airworthiness and maintenance control for Prestige. In preparing the Manifest, Mr Shortis had relied on information about passenger and cargo weight provided by the dive company that had engaged Prestige to fly the dive party to and from the island. According to Mr Anderson, the staff of the dive company were “CASA certified” and had received training in their responsibilities in relation to the loading of the helicopter. He stated that prior to take-off he was satisfied that the aircraft was not overloaded and based that opinion on the load calculations undertaken by Mr Shortis. He stated that it was not until after the flight that he learnt that the actual number of passengers did not accord with the information provided by Mr Shortis and tubs containing fish and ice had been loaded onto the aircraft and not taken into account in the estimate of the helicopter’s weight. He conceded that he had not conducted a passenger headcount, inspected what was loaded on to the helicopter or taken any other action to satisfy himself that the information contained in the Passenger Manifest corresponded with the number of passengers and amount of cargo that was actually loaded on to the helicopter.

Pilot power check

42. The Operations Manual requires the pilot to undertake a “power check” when in a one-foot hover prior to take-off (S-62A Flight Manual Part 1 Section II H (7)). In performing the check the pilot must take into account, among other things, pressure altitude, temperature and weight of the aircraft.
43. The experts agreed that the Operations Manual and the Regulations require the pilot to conduct a power check but differ over its relative importance as a safety measure. Mr Lamb described it as a “capture mechanism” designed to give the pilot an indication of whether the aircraft met the minimum power requirements for the prevailing conditions. He and Mr Engelsman are of the opinion that it was critical to assuring engine performance.
44. While accepting that the power check was required to be undertaken, according to Mr Rogers it was a “luxury” in most cases not available to the pilot. In his opinion it was more of “a health check” to be performed, at least, on a daily basis.
45. All experts agreed that it was not possible to properly perform a power check unless the weight of the aircraft was known. Mr Rogers pointed out that it was not uncommon for the pilot not to know the exact weight of the aircraft, for example when winching timber or performing medical evacuations. Mr Lamb agreed that the actual weight of the aircraft may sometimes be unknown, but stated that hover performance is never unknown and may be determined at any point by reference to the Manual. He explained that this enables the pilot to calculate whether the actual weight of the aircraft accords with the estimate used.
46. Mr Lamb stated that by failing to accurately estimate the helicopter’s weight there was a risk it was operating outside its “operational flight envelope” and as a consequence, passengers and crew were exposed to “adverse safety outcomes”. In his opinion it was evident from the video

footage, the Operations Manual and the prevailing conditions of the day that Mr Anderson had been unable to achieve a stable hover and expected hover performance. In his opinion after unloading Mr Meade and not being able to achieve a stable hover, Mr Anderson should have elected to abort the take-off, review the weight and balance calculations, or, consider engine performance. In his opinion his decision to continue with the flight at that stage placed the crew, passengers and aircraft at “high risk that could have resulted in a catastrophic outcome”.

Are the elements of s 20A satisfied?

47. We accept as submitted for Mr Anderson that in deciding whether there was a contravention of s 20A and the other matters alleged by CASA, the onus of proof to be applied is the balance of probabilities. Given the gravity of the matters alleged, “reasonable satisfaction” must be attained. (*Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-3; *Rana v University of South Australia* [2007] FCAFC 188, at [31]; see also s 140 of the *Evidence Act 1995* (Cth).). Evidence which meets the appropriate standard was identified in *Briginshaw* by exclusion that is not: “slender and exiguous proofs” (per Rich J at p 350), nor “inexact proofs, indefinite testimony, or indirect inferences” (per Dixon J at 362).
48. The elements of an offence under s 20A are:
 - o that a person operated an aircraft
 - o and while doing so was reckless
 - o as to whether manner of operation of the aircraft either
 - o could endanger the life of another person [subsection 1] or
 - o could endanger the person or the property of another person [subsection 2].
49. The issues that arise for determination therefore are:
 - o Whether Mr Anderson’s operation of the aircraft during the subject flight could have endangered another person, the life of another person and/or property?
 - o If so, whether he was aware that there was a substantial risk that another person, the life of another person or property, was endangered?
 - o If yes, having regard to the circumstances known to him, whether it was unjustifiable to take that risk.
50. Before examining these issues it is necessary to comment on an issue raised by Mr Anderson, namely, the reliability of the video footage.

Reliability of the video footage

51. Counsel for Mr Anderson argued that given its poor quality the footage is an unreliable indicator of the performance and movement of the helicopter during the subject flight. There can be no argument that the footage is of poor and uneven quality: it is “jumpy” in parts and there are breaks in the footage. We accept that as a consequence the movements of the helicopter might appear exaggerated and probably more uneven than they were in fact. We do not agree with the proposition that given these shortcomings it would be unsafe to place any reliance on the footage, however, we accept that care must be taken in the conclusions drawn from the video and we have adopted that approach.
52. Having viewed the video footage on numerous occasions both in the course of the hearing and in preparing these reasons for decision, we agree with the observations made by Messrs Engelsman and Lamb: that the helicopter came into contact with the ground on several occasions after Mr Meade was unloaded; that throughout the taxi its movements were uneven and that there was a significant variation in hover height.

Findings and conclusions

53. The fact that another court, applying the criminal standard of proof, has previously acquitted Mr Anderson of the criminal offence of reckless flying is irrelevant to our current considerations.
54. The parties agree that the question of whether Mr Anderson operated the subject flight in a manner contrary to s 20A turns largely on a discrete stage of the take-off, stage 3, which ran for

less than 60 seconds. No one was injured or killed, or any property damaged during this, or any other part of the take-off or flight.

55. Mr Anderson submits that there is no significant evidence that he flew the aircraft in a reckless manner and that the Tribunal should prefer the opinion of Mr Rogers, the only expert with significant flying time in the Sikorsky S-62A. For the reasons that follow, we do not accept that submission.
56. The experts agree that there was limited power available to Mr Anderson during the take-off, but disagree about the extent of that limitation and its cause. The video footage shows four apparent attempts to hover before Mr Meade was put off the aircraft. Tellingly, even after that occurred, the hover height achieved was so low as to cause the helicopter to come into contact with the ground on several occasions. We think it implausible that an experienced pilot would, as Mr Rogers implies, prefer to attempt to mitigate rotor wash by hovering at a height insufficient to prevent the aircraft hitting the ground, and its attendant dangers, rather than to lift off a few feet into the air.
57. As noted the video depicts the helicopter achieving an uneven hover throughout the taxi. Mr Rogers attributes this to, among other things, significant cross-winds. He was the only expert to conclude that the wind velocity during take-off exceeded 10 knots. His opinion that the aircraft was adversely affected by cross-winds was directly contradicted by Mr Anderson's prior statement made to CASA that during the take-off "it was both very hot with little or no wind" (Transcript of Show Cause Conference, 18/10/07, p 8, LL 10,11). In our view, Mr Anderson's statement to CASA, being an admission and made earlier in time, is far more likely to be reliable than Mr Roger's assumption about cross-winds.
58. We are not satisfied that Mr Anderson confronted significant cross-winds during the take-off and agree with the opinion expressed by Messrs Lamb and Engelsman that inadequate power was the most probable explanation for the low and uneven hover height achieved throughout the taxi.
59. Mr Anderson was aware prior to unloading Mr Meade that he was experiencing some power problems, however caused. This is the only rational inference to be drawn from the fact that his co-pilot made this observation and requested a volunteer to disembark and wait for the next flight. We agree with Mr Lamb's opinion that the safe execution of the take-off demanded at that point that the calculations used to perform the power check be reviewed. Even had Mr Anderson performed a further power check after Mr Meade was off loaded, given that he had taken no steps to satisfy himself that he had been given a reliable estimate of the aircraft's weight, any power check undertaken would have fallen well short of the requirements imposed by the Manual and the Regulations.
60. Mr Rogers is alone among the experts to hold the opinion that the pilot power check is something of an optional extra that need only be undertaken on a daily basis. Apart from the fact that it is legally required, the evidence makes plain that it is necessary not only to check engine power simpliciter, but to check engine power in the conditions in which the aircraft must take off. Those conditions may vary during a day. Variations in temperature, wind conditions and the weight of the aircraft may alter the aircraft's lifting capacity — for better or worse. Mr Rogers's approach appears to be based on the debatable assumptions that (a) the power check is just a "health check" for the engine and (b) that the conditions (or a pilot's assessment of the conditions) will not substantially alter during a day's flying.
61. We think the better view is that expressed by Messrs Lamb and Engelsman that the power check is not only a legal requirement but an essential step to satisfy the pilot that the take-off can be safely executed. While we accept that in making the decision to proceed to take-off the pilot has the advantage of being able to see the instruments and "feel the aircraft", we do not accept that reliance on these measures alone is sufficient. In circumstances where Mr Anderson was on notice that there were power problems, his decision not to re-evaluate the assumptions on which the power check was based, if indeed it was undertaken, and to put his faith in the instruments and the "feel" of the aircraft, in our opinion demonstrated poor judgement.
62. We are satisfied that the decision to persist with the take-off and conduct the taxi with an inadequate power margin put the passengers and crew of the aircraft (and Mr Anderson himself)

at substantial risk of harm.

63. In his response to the Show Cause notice, Mr Anderson admitted that he had been unable to obtain a satisfactory hover height on his first take-off attempt and had also experienced instability. Mr Anderson also admitted that he had assumed these problems were caused by the helicopter being too heavy for the ambient conditions, but emphasised that it was *not* in excess of its MAUW (maximum all up weight) (letter to CASA from Mr Anderson, 12 July 2007, p 8). In the Show Cause conference he conceded that the take-off had been “difficult” and “a very regrettable incident” although at the time he had not been scared and did not think that the aircraft was in danger.
64. Mr Anderson was not a novice pilot or new to the type of aircraft. His “feel” for the aircraft had been honed by experience. It is difficult to accept his account given in these proceedings that he had been unconcerned about any danger to the aircraft, his crew or his passengers. In hot conditions with only light winds prevailing, in terrain that was less than optimal for this kind of flying, a pilot whose fully-laden aircraft had difficulty generating sufficient power to gain a safe and even hover height throughout the taxi, ought to be concerned. In addition, if the aircraft, as Mr Rogers pointed out, had a tendency to wallow in ordinary conditions, those concerns ought to be heightened. As an experienced pilot Mr Anderson knew, or ought to have known, that in pressing on with the flight in these circumstances, he ran the real risk of losing control with all the potential consequences that might follow.
65. It was self-evident to Mr Anderson during stage one of the take-off that the aircraft had inadequate power. Nevertheless, presumably because he knew the aircraft so well and/or had a great deal of confidence in his own ability as a pilot, he persisted with those attempts until it was obvious that the weight had to be reduced. He sought to address the issue by putting Mr Meade off the aircraft.
66. The problem with this approach is its reliance on trial-and-error. Mr Anderson hoped that off-loading Mr Meade would give him sufficient power to take-off but he could not be sure until he tried again without Mr Meade, or, did what he ought to have done in the first place — verify the weight of his load and review the calculations necessary to conduct the power check and make any appropriate adjustments.
67. A reckless action is one taken with knowledge or foresight of a substantial potential risk and which is taken regardless of those risks. It is a kind of wager against fate.
68. Three of the four experts whose opinions are before us concluded that prior to stage three of the take-off, the aircraft lacked adequate power and that the most likely cause was because it was overweight. Despite the fact that the aircraft bumped the ground a number of times during the taxi stage, a very strong indication that the aircraft lacked an adequate power margin, Mr Anderson again persisted in taking off. In our opinion his decision to do so crossed the threshold of recklessness because by then he was fully aware of the fact that the aircraft had very little — if any — power in reserve, that he was having difficulty maintaining a steady hover, and those on board were at risk of injury or worse if he lost control.
69. Ultimately, the aircraft took off without harm to anyone or anything. This is not evidence of the absence of recklessness. It is evidence only of Mr Anderson’s ability as a pilot of this type of aircraft, of the fundamental strength of the aircraft design and, perhaps, of good luck. Although he won his bet against potential disaster, Mr Anderson left little or no margin for error in the way he performed the take-off. And that was reckless. In effect he acknowledged that this was so when he told the Show Cause conference, “It was a regrettable incident, we all know that, and ... in 12 years, it’s the first time it’s ever happened and it’s not going to happen again”.
70. As Mr Rogers points out there are circumstances where a pilot does not have “the luxury” of conducting a review, or power check before take-off. However that was not the situation confronting Mr Anderson. This was not an emergency situation. It was open to Mr Anderson to stop, review and reassess. He elected not to do so. We are satisfied that the risk taken by Mr Anderson was unjustifiable.
71. We are comfortably satisfied that Mr Anderson’s manner of operation of the subject flight was reckless in contravention of s 20A of the Act.

Did Mr Anderson provide untruthful information to the Department of Veterans’ Affairs?

72. CASA contends that in making a claim for an increase in his rate of pension in 2010 Mr Anderson provided information he knew to be untrue to the Department of Veterans' Affairs.
73. In an employment questionnaire completed at the request of the Department in April 2011, Mr Anderson wrote (answers in italics):

How many hours do you work?

Per day *Paid Nil \$*

Per week *Paid Nil \$*

...

If you are not currently working, when did you cease work and why?

full-time employment ceased 24 December 2005.

...

If you are currently unemployed, what do you think is preventing you from getting a job or being employed?

old age/lack of current qualifications. Live on pension/retirement benefits. Have lived on savings, army pension etc. for many years.

74. In statements prepared for these proceedings Mr Anderson stated that after leaving Prestige Helicopters in late 2007 he took up a position as a training manager and later chief pilot for Manalous Aviation in New Guinea, and, from 2011, was chief pilot of another company also based in New Guinea. He testifies that he currently works on a contract basis in New Guinea.
75. In cross-examination Mr Anderson claimed that any work undertaken in New Guinea was not paid to him but to Anderson Aviation Pty Ltd, of which he is the sole director. He stated that he has not drawn a wage, or money for personal expenses from Anderson Aviation and any fees paid to the company were used to pay his legal bills. He admitted that when he lodged a claim for an increase in pension he was working in New Guinea and claimed that he had omitted to mention this because the work was irregular and on a contract basis.
76. The information provided by Mr Anderson in the employment questionnaire was plainly false. The explanation he gave for omitting to mention that he had worked in New Guinea in our opinion is unpersuasive. The inescapable conclusion is that Mr Anderson provided the Department with information he knew to be untruthful for the purpose of personal gain.

Did Mr Anderson fail to disclose a "medically significant condition"?

77. CASA alleges that Mr Anderson failed as required by the Safety Regulations to disclose that he had been diagnosed as suffering from post-traumatic stress disorder (PTSD) and tested for sleep apnoea. Mr Anderson denies this allegation.
78. Mr Anderson has been the holder of a class 1 medical certificate since 1997. Regulation 67.265 of the Safety Regulation provides:

Obligation to tell CASA of changes in medical condition

...

(3) If:

- (a) the holder of a class 1 medical certificate and a licence:
 - i. knows that he or she has a medically significant condition; and
 - ii. is reckless as to whether the condition has been disclosed to CASA; and

- (b) the condition continues for longer than 7 days; and
- (c) the condition has the result that his or her ability to do an act authorised by the licence is impaired;

he or she must tell CASA or a DAME about the condition as soon as practicable after the end of the 7 days.

Note: If the holder of a medical certificate tells a DAME about a medically significant condition, and the condition is safety-relevant, the DAME must tell CASA in writing of that fact within 5 working days — see regulation 67.125.

...

79. A medically significant condition is defined to include any illness or injury and any mental infirmity, defect or incapacity (no matter how minor), (reg 67.010 of the Safety Regulations). A medically significant condition will be “safety-relevant” if it reduces, or is likely to reduce, the ability of a person to perform a duty imposed by a licence that he or she holds (reg 67.015 of the Safety Regulations).
80. Regulation 67.180 sets out the requirements for the issue of a class 1 medical certificate. These include that the applicant has undergone any relevant examinations, and, in each examination, answers every question asked by the examiner that the examiner considers necessary to help CASA to decide whether the applicant meets the relevant medical standard (reg 67.180(2)). CASA must not issue a medical certificate if satisfied that the applicant has knowingly or recklessly made a false or misleading statement in relation to the application for the medical certificate (reg 67.180(7)).

Post-traumatic stress disorder

81. In these proceedings Mr Anderson stated that he was diagnosed as suffering from PTSD in the 1970’s. He also stated that around the time of the diagnosis he came under the care of army psychiatrist, Dr Jim Taylor, for about 18 months. On his account apart from an unsuccessful trial of medication he received no further treatment for the condition.
82. In April 1999 Dr Taylor wrote to the Department of Veterans’ Affairs and advised that Mr Anderson had been under his care since 1994 and satisfied the criteria for a diagnosis of PTSD. He described Mr Anderson’s condition as “one of the most severe examples” he had ever seen and given the severity of his symptoms the prognosis was poor. He wrote:

Since his Vietnam experience he has experienced regular middle insomnia with associated nightmares and nightsweats. He also described problems with voice changes, tremor and impotence. He experiences intrusive thoughts about Vietnam most days and actively tries to distract himself from these. Flashbacks occur regularly e.g. when he smells incense burning, hears helicopters or enters Chinese restaurants. Movies, newspaper articles or television programs cause major upset for him so that he avoids these where possible. He does not enjoy crowds and avoids crowded places where he can. When he is in a crowded place he sits with his back to the wall facing the door. Hypervigilance is present. His startle response is exaggerated.

83. Since 1999 Mr Anderson has received a pension paid under the [Veterans’ Entitlements Act 1986](#) (Cth) on account of a number of “war-caused” conditions, including PTSD. In a report prepared in July 1999 submitted in support of a claim for pension, Mr Anderson’s GP wrote:

Describe the level of distress that PTSD; Alcoholism causes Mr Anderson:

...

Daily symptoms severe — anxiety, flashbacks, intrusive thoughts, reduced concentration.

...

Comment on how the conditions affects [Mr Anderson's] capacity for work:

...

Unable to concentrate

Difficulties in personal interactions

84. Tendered in these proceedings were copies of the medical reports, completed by the Designated Aviation Medical Examiners (DAMEs) who assessed Mr Anderson throughout the period 1997 to 2011, Dr Graeme Maclarn (to 2009) and Dr Ian Marshall (2010 and 2011). All are in questionnaire form and there are some differences between them. Those completed before 2004 contain the following question:

Since the last aviation medical examination, or in the last two years, has the applicant ...

Been admitted to a hospital or suffered from any medical condition which may affect his/her ability to exercise the privileges of his/her licence?

Some completed after 2004 contain these questions:

Has the applicant:

Suffered any significant emotional or traumatic life event(s) that required psychiatric treatment?

Suffered anxiety, depression, nervous breakdown, or other psychiatric illness?

In all reports each question was answered "no".

85. The only reference to PTSD in the tendered reports is in the 2011 report prepared by Dr Marshall. In that report the question — "Has the applicant suffered anxiety, depression, nervous breakdown, or other psychiatric illness?" was answered "no". In hand, under the heading "additional information" was written: "1980's: PTSD".
86. Most of the reports contain a pro-forma declaration signed by Mr Anderson to the effect that he had reviewed the report and answered each question correctly and completely. In these proceedings Mr Anderson testified that he could not recall whether before signing that declaration he had sighted, or read, any of the reports.
87. Mr Anderson testified that he informed Drs Maclarn and Marshall that he been diagnosed as suffering from PTSD. In support he points to the reference to PTSD in Dr Marshall's 2011 report. According to Mr Anderson, Dr Maclarn told him the condition was not "safety relevant" and he received the same advice from the "Head CASA doctor", Dr T Sham.
88. In February 2008 Dr Sham wrote to Mr Anderson and advised that CASA had received information from the Department of Veterans' Affairs and, as a result, his fitness to fly would be reassessed. He requested that Mr Anderson authorise his doctors to disclose "all relevant information about your history of PTSD". After the conclusion of the hearing, Mr Anderson provided the Tribunal with a further letter he had received from Dr Sham dated 18 March 2013. We decided to take it into account, over the objections of CASA. The letter notified Mr Anderson that the information needed to assess his fitness to fly had been received and there would be no change to his current medical certificate.
89. In its reasons for staying the decision to cancel Mr Anderson's licence the Tribunal wrote (*Anderson and*  *Civil Aviation Safety*  *Authority* [\[2008\] AATA 206](#) at 17):

When asked whether he had disclosed any such conditions [accepted war-caused conditions] to CASA, Mr Anderson replied that he underwent regular medicals as required, and that none of the

conditions had affected his ability to hold a pilot's licence. *In relation to the PTSD, he said that he could not recall if he had ever disclosed to CASA that he had been so diagnosed, but that it was 15 – 17 years ago, and he did not take medication for the condition.* [Emphasis added]

Sleep apnoea

90. In December 2010 Mr Anderson lodged a claim with the Department of Veterans' Affairs for an increase in his rate of pension on the ground that he was suffering from an additional condition, namely sleep apnoea, a chronic condition characterised by pauses in breathing or instances of shallow or infrequent breathing during sleep. The claim was refused, on Mr Anderson's account because the Department concluded that he was suffering from insomnia, not sleep apnoea.
91. In support of that claim Mr Anderson provided a letter dated 16 June 2000 from sleep medicine specialist, Dr Leon Laks, to his GP. Dr Laks wrote that Mr Anderson presented with "a long history of snoring and witnessed apnoea and daytime tiredness". He advised that Mr Anderson might be suffering from sleep apnoea and recommended a sleep study be conducted. That study was conducted in November 2000. Mr Anderson testified that he was told after the study that he did not suffer from sleep apnoea.
92. Mr Anderson explained that he decided to lodge a claim for sleep apnoea despite being told that ten years earlier that he did not suffer from the condition, because while in the Army he had been advised to report any condition to the Department as a precautionary measure in case it became a problem in the future.
93. None of the reports prepared by the DAMEs after June 2000 mention sleep apnoea or the sleep study. Mr Anderson testified he could not recall if he told the DAMEs that he had been referred for testing for sleep apnoea. He claimed that he understood he was only obliged to disclose a condition if it resulted in hospitalisation for more than six days.

Findings and conclusions

94. The issue we must decide is not whether Mr Anderson is, or was, fit to fly. The issue is whether he disclosed to CASA, and/or the DAMEs who assessed him, that he had been diagnosed as suffering from PTSD and/or sent for testing for sleep apnoea.
95. The weight of evidence indicates that Mr Anderson did not tell either CASA or the DAMEs that he had been tested for possible sleep apnoea. That finding is consistent with Mr Anderson's stated understanding that the obligation to disclose only arose if the condition resulted in hospitalisation for more than six days.
96. As CASA points out, Dr Sham's letter of March 2008 does not establish that Mr Anderson volunteered that he had been diagnosed as suffering from PTSD. Instead it reveals that when notified that CASA had received information to that effect, he agreed to authorise disclosure of his medical records. It was only after receiving Dr Sham's letter that Mr Anderson took steps to be re-assessed by Dr Taylor and to provide CASA with his revised opinion.
97. The answer to the question given by Dr Maclarn in the pre-2004 reports, namely whether in the last two years or since the last assessment, Mr Anderson suffered from any medical condition *which may affect his ability to exercise the privileges of his/her licence* is not necessarily inconsistent with Mr Anderson's claim that he told Dr Maclarn that he had been diagnosed with PTSD, assuming Dr Maclarn had, as claimed by Mr Anderson, concluded that the condition did not affect his fitness to fly.
98. More difficult to reconcile, is Dr Maclarn's action in answering "no" to the questions contained in the questionnaires completed after 2004, which for convenience we set out again below:

Has the applicant ...

suffered any significant emotional or traumatic life event (s) that required psychiatric treatment?

suffered anxiety, depression, nervous breakdown, or other psychiatric illness?

99. In contrast to those contained in the earlier questionnaires, the above questions did not require

Dr Maclarn to form an opinion about whether the subject condition affected Mr Anderson's ability to fly but simply whether he has suffered a psychiatric illness or has experienced a traumatic life event that required psychiatric treatment.

100. There are a number of possible explanations for the answers given by Dr Maclarn:
 - First, that he had been told of the diagnosis of PTSD but read the question as a reference to a current and/or "safety relevant" condition and concluded that Mr Anderson no longer suffered from PTSD or that it was not safety relevant
 - Second, that he was told of the diagnosis, but decided not to include that information in the report
 - Third, that he was not told of the diagnosis or was given an incomplete history.
101. The flavour of Mr Anderson's testimony was that throughout the period covered by the reports, his PTSD was neither current nor severe. He stated that the diagnosis was made sometime in the 1970s and apart from regular consultations around that time with Dr Taylor for about 18 months, and a short unsuccessful drug trial, he received no other treatment. That account is inconsistent with the reports before us prepared by Dr Taylor, which reveal that Mr Anderson had been under his care between at least, 1994 to 1999; in 1999 he held the opinion that Mr Anderson was suffering from "one of the most severe examples" of PTSD he had ever seen; and, it was not until 2008 that he concluded Mr Anderson's symptoms were in remission. Mr Anderson's recollection is also inconsistent with his GP's report of July 1999, which recorded that he reported experiencing on a daily basis severe anxiety, reduced concentration and an inability to concentrate in a work environment.
102. We are not in a position to form an opinion about the manner in which Dr Maclarn approached his duties as a DAME. It seems however improbable that armed with the above information and without further enquiry he could have concluded that Mr Anderson's condition did not affect his capacity to fly. It is to be recalled that when Dr Maclarn first assessed Mr Anderson the condition was not something in Mr Anderson's distant past but one for which he was receiving regular psychiatric care and experiencing severe symptoms. Even less probable in our opinion is that had he been provided with a full history Dr Maclarn would have answered "no" to the questions – "Has the applicant suffered ... [a] psychiatric illness? ... any significant emotional or traumatic life event(s) that required psychiatric treatment?"
103. It is possible that the DAMEs were given a copy of, or advised of the contents of, Dr Sham's letter of March 2008 and on that basis concluded that the PTSD issue was resolved to CASA's satisfaction. However the irresistible inference is that prior to March 2008, Mr Anderson failed to disclose or fully disclose, to either Dr Maclarn or CASA, that he had been diagnosed as suffering from PTSD and been under the care of a psychiatrist for a large part of the 1990's. That finding is consistent with Mr Anderson's stated understanding that the obligation to disclose only arose if the condition resulted in hospitalisation for at least six days. It is also consistent with the evidence of him not telling Dr Maclarn he had been sent for testing for sleep apnoea. Taken together with the evidence of Mr Anderson providing the Department of Veterans' Affairs with information he knew to be untrue and the evidence he gave in the stay proceedings of being unable to recall whether he had disclosed the diagnosis of PTSD to CASA, we are comfortably satisfied that prior to March 2008, Mr Anderson failed to disclose to CASA and Dr Maclarn that in the late 1990's he had been diagnosed with, and treated for, PTSD.

Did Mr Anderson issue a "false" certificate of completion of a course?

104. Tendered in these proceedings was a copy of a certificate issued to Garry Lake by Anderson Aviation Pty Ltd and signed by Mr Anderson for completion of a dangerous goods course. In a statement provided to CASA, Mr Lake stated that he discovered the certificate on leaving his position with Heavylift Cargo Airlines and was disturbed because he had not undertaken the course and furthermore held a higher qualification than awarded by the certificate.
105. Mr Anderson explained that through Anderson Aviation he had provided training to hundreds of people including employees of Heavylift Cargo Airlines. He said he could not recall Mr Lake having attended a course. He said that after speaking with Mr Lake he had formed the impression that he was a disgruntled employee.

106. Mr Anderson denied ever having issued a blank certificate or a certificate to a person who had not attended a course he had conducted.
107. Counsel for CASA conceded that the evidence is at best inconclusive on whether Mr Anderson had issued a certificate to Mr Lake and that it would be unsafe for the Tribunal to find, as originally submitted, that the certificate represents further evidence of Mr Anderson not being a proper person to hold a licence. We agree.

Is Mr Anderson a fit and proper person to hold a licence under the Act?

108. The phrase “fit and proper person” carries no precise meaning and takes its meaning from its context, from the activities in which the person is engaged and the ends to be served by those activities: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 380 per Toohey and Gaudron JJ. Whether a pilot is a fit and proper person is not to be measured by simply a consideration of whether they are competent to fly an aircraft but also requires consideration of their conduct “measured against the responsibilities, functions and duties of the holder of the [relevant] pilot licence” (*Re Taylor and Department of Transport* (1978) 1 ALD 312; *Re Quadrio and Civil Aviation Safety Authority* [2011] AATA 709 at [67]).
109. In deciding whether Mr Anderson is a “fit and proper person ...” the question of whether the community would have confidence that any improper conduct will not reoccur is a relevant factor (*Bond* at 380 per Toohey and Gaudron JJ).
110. In our view, by failing to make full disclosure of his history of PTSD, in flying on at least one occasion in a reckless manner and as a consequence of his convictions, Mr Anderson forfeited his right to be regarded as a fit and proper person, and perform the functions and duties of a holder of a licence, within the meaning of reg 269(1)(d) of the Regulations.

Should the power to vary, suspend or cancel Mr Anderson’s licence be exercised?

111. The power to vary, suspend or cancel Mr Anderson’s licence can be exercised because he has been convicted of an offence under the Act and found not to be a fit and proper person. The issue to be decided is whether in the circumstances of this case, the preferable decision is to exercise that power, and, if so, whether the appropriate decision is to vary, suspend or cancel his licence.
112. Apart from the subject flight, Mr Anderson’s flying record is a good one. Nevertheless, the manner in which he operated the helicopter during that flight was risky and he placed himself, his crew, his passengers, and the aircraft in jeopardy. This was not a case of momentary inattention or inadvertence to a hidden or latent risk. Nor was the risk imposed on Mr Anderson from an external source. Nor was he forced to deal with a risk or an emergency that came out of the blue. He had sufficient time to assess the performance of the aircraft, identify the cause of the problem and address it appropriately. To deal with it, he took what was, at best, a half measure – putting a passenger off.
113. That approach, when taken together with the conduct which led to his convictions, greatly concerns us. Although Mr Anderson is a highly experienced pilot and is evidently a skilful one, as a commercial pilot he is entrusted with the lives of others.
114. Air passengers ought to be able to place the highest confidence in Australian commercial aviation. That confidence can only be maintained if the highest standards of flying operations and propriety are required of commercial pilots and are enforced rigorously. It is a question of trust as well as skill. The flying public must be able to rely on commercial aviation companies and their staff to conduct safe operations and comply with all relevant aviation rules.
115. Standing in Mr Anderson’s favour in this matter is his flying record and importantly since the incidents in 2007 he has not come under notice again for aviation misconduct. The latter may indicate that the experience of being investigated for, and convicted of, contravening aviation regulations has had the hoped-for deterrent effect. It may mean in the future Mr Anderson will not take unjustifiable risks in operating an aircraft and comply with all relevant aviation rules. The more difficult question is whether there is a sound basis to be confident that in his future dealings with CASA and/or DAMEs, Mr Anderson will disclose all relevant information

especially where he perceives that to do so might be contrary to his interests. The regulation of aviation in Australia rests heavily on a system of self-reporting by those conferred with the privilege of holding a licence under the Act. The need for candour in such a system is self-evident. While possible that the criminal proceedings coupled with his concern that his licence might be placed in jeopardy will be sufficient to ensure that in the future Mr Anderson will comply with the stringent rules and regulations of commercial aviation and, in all dealings with CASA and/or DAMEs, act with candour and make all necessary disclosures, we cannot be confident that this will occur. We have therefore decided that the preferable decision is to affirm the cancellation decision.

I certify that the preceding 115 (one hundred and fifteen) paragraphs are a true copy of the reasons for the decision herein of Senior Member A K Britton and Air Vice-Marshal Cox, Member.

.....[SGD].....
Associate

Dated 29 August 2013

Date(s) of hearing	29 and 30 April, and 1 May 2013
Date final submissions received	2 August 2013
Counsel for the Applicant	Peter Lithgow
Solicitors for the Applicant	Maitland Lawyers
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