



Australian Government
Civil Aviation Safety Authority

Regulatory Policy – CEO-PN007-2009

**Classification and Regulation of
'Closed-Charter' Operations
under CAR 206(1)(b)(ii)**

Sponsor:	Executive Manager, CASA Operations
Policy Issue No:	One
Policy Issue Date:	July 2009
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Regulatory Provision:	CAR 206 (1)(b)(ii)

Reason for the Policy

1. It is anticipated that the current distinction between charter and regular public transport (RPT) operations will disappear and be replaced by one category, 'Passenger Transport', with operational standards specified under proposed Parts 121 or 135 of the *Civil Aviation Safety Regulations 1998* (CASR). Until these proposed new regulations are enacted, however, critical safety-related and legal distinctions between charter and RPT operations remain, and are governed by the provisions of regulation 206 of the *Civil Aviation Regulations 1988* (CAR).
2. Having particular regard to the distinction between what is popularly referred to as 'closed charter' operations under CAR 206(1)(b)(ii) and RPT operations under CAR 206(1)(c), the purpose of this Policy is to provide clear guidance on:



- 2.1 whether particular operations are properly classified as 'closed charter' or RPT operations; and
- 2.2 the conditions and limitations that may necessarily be imposed on certain kinds of 'closed charter' operations, pending the introduction of interim amendments to CAR 206 and/or Parts 82.0 and 82.1 of the Civil Aviation Orders (CAOs), and the anticipated introduction of the new classification scheme referred to in paragraph 1 above.

Policy

The Relevant Legislation

3. CAR 206 relevantly prescribes the purposes for which an Air Operator's Certificate (AOC) is required for the conduct of:
 - 3.1 charter operations involving 'the carriage, in accordance with fixed schedules to and from fixed terminals, or cargo or passengers and cargo in circumstances in which the *accommodation in the aircraft is not available for use by persons generally*', i.e., 'closed charter' operations, under CAR 206(1)(b)(ii) [emphasis provided]; and
 - 3.2 RPT operations involving '*transporting persons generally, or transporting cargo for persons generally*, for hire or reward, in accordance with fixed schedules to and from fixed terminals over specific routes with or without intermediate stopping places between terminals', under CAR 206(1)(c) [emphasis provided].
4. To be classified as 'closed charter' operation under CAR 206(1)(b)(ii), the operations in question must satisfy the following elements:
 - passengers and/or cargo are carried on the aircraft;
 - the operations are conducted in accordance with fixed schedules to and from fixed terminals; and
 - accommodation in the aircraft is not available for use by persons generally.

Of these elements, it is the last point above—*whether accommodation in the aircraft is or is, in fact, not available for use by persons generally*—which has proven to be particularly problematic, and it is toward the clarification of that element that this policy is directed.



The Conundrum of the 'Interposed Entity'

5. As it is used in CAR 206(1)(b)(ii), the expression '*the accommodation in the aircraft is not available for use by persons generally*', has been the subject of consideration in a variety of forums (see Attachment).
6. A persistent problem in the interpretation and application of the 'closed charter' provisions of CAR 206 has involved the existence and implications of an 'interposed entity'. In the context of passenger carrying operations, an entity (commonly in the form of travel or booking agencies) may sometimes be interposed between a charter operator and the passengers who actually travel on the aircraft. In such cases, it is this *interposed entity* that is said actually to have chartered the aircraft and which then, on its own accord, sells individual portions of its accommodation (i.e., seats) on the aircraft to passengers.
7. Where the interposed entity is unconnected in any way to the operator, it may be said that it is the entity *only* that has secured exclusive accommodation on the aircraft, not the individual passengers to whom the entity sells a portion of that exclusive accommodation. In such cases, each individual passenger will be seen to have made a contractual arrangement *only* with the entity, not with the operator.
8. On this basis, it may also be said that the operator has not made accommodation on the aircraft available to persons generally, since it has made accommodation available only to the entity. For its part, the entity may claim that it is not conducting an RPT operation, but has merely chartered an aircraft from an AOC holder authorised to conduct charter operations and provided accommodation in that aircraft exclusively to those with whom the entity has contracted or otherwise arranged to do so.
9. Where there is a personal, corporate or some other kind of relationship between the interposed entity and the operator, however, questions may arise as to whether the entity is interposed on a genuinely independent basis, or if it is merely an extension or agent of the operator itself. In such cases, especially where the entity is a travel or booking agency that advertises and sells seats on the aircraft it has chartered to anyone who is prepared to pay the cost for a seat, it is CASA's view that the operator and interposed entity are part of a single enterprise, effectively offering accommodation on the aircraft for use by persons generally.
10. In many cases, of course, a person or corporate entity may charter an aircraft from an operator authorised to conduct charter operations under CAR 206(1)(b)(ii), determine how and when flights will be operated (as a charterer is expected to do), and provide accommodation in the aircraft *exclusively* for persons directly and closely affiliated with the charterer, (with whom those passengers will normally will have a prior relationship involving elements other than air travel). For example, a church may organise regular trips for its congregants to a particular location, for the purpose of attending religious retreats. The church charters the aircraft, and the cost of travel is included either in the fee for the retreat or as an additional charge imposed on congregants who take advantage of the charter flight. Attendance at the



retreats, and *accommodation in the aircraft transporting attendants to the retreats, is limited to church members exclusively.*

11. Closed charter operations of the kind described in paragraph 10 above clearly fall within the ambit of CAR 206(1)(b)(ii), in that accommodation on the aircraft is *not* available to persons generally. Common characteristics shared by such operations can include the following:
 - the offer of accommodation on the aircraft may only be accepted by members of a select groups of people;
 - membership of such groups tends to be relatively small in number; and
 - membership of such groups is determined by some enduring and normally pre-existing common characteristic (e.g., employment by a particular employer, membership of a club or association, personal relations, religious association or affiliation, etc.).

12. Examples of situations in which passenger groups have failed to meet the criteria set out in 11 above, and in respect of which CASA has considered accommodation in the aircraft *is* available to persons generally, include situations in which the passenger group consists of:
 - persons answering an advertisement directed to the public or a cross-section of the public;
 - persons living within a defined geographical area where the group is large (e.g., residents of the Torres Strait Islands, Norfolk Island or Lord Howe Island);
 - persons for whom accommodation is made available on the basis of non-discriminatory membership in a larger group, entry into which is not governed by considerations other than an ability to pay the cost of that accommodation (e.g., anyone with business in a remote Aboriginal community; any family member or friend of a person working at a remote mine site).

A rational approach to the interpretation of 'accommodation available to persons generally' — Obviating 'interposed entity' issues

13. 'Interposed entity' models often involve potentially complex and convoluted interpersonal and inter-corporate arrangements, the details of which can be difficult to ascertain with clarity and accuracy. Aspects of such arrangements pertinent to the judgements CASA needs to make for the purposes of determining whether certain operations are properly classified as charter operations under CAR 206(1)(b)(ii) or RPT operations can be obscure—and sometimes deliberately obscured. Indeed, it is not unusual to find purportedly 'closed' groups that have been created solely for the



purpose of providing a conduit through which members of the public (i.e., persons generally) might be funneled onto an aircraft.

14. Even in otherwise straight-forward situations, problematic questions relating to the characterisation of the passenger group can arise. It is conceivable that a legitimately 'closed' group may consist of a large number of members. Conversely, a very small passenger group may well have a general and unrestricted membership. Demonstrably discrete, special and enduring characteristics shared by members of a group (e.g., hair colour) may have no real bearing on the propriety of characterising such a group as 'closed' for the purposes of classifying an aerial service operation. Characterisations based on arguably legitimate social or economic purposes—for example, ensuring that members of remote communities are able to obtain the services of tradesmen on a regular and predictable basis; or facilitating visits of family and friends to miners located at a great distance from their homes for extended periods of time—may involve conflicting values. For example, while it is surely a 'good thing' to facilitate air travel to and from remote Aboriginal communities, it may not be such a good thing to allow what amounts to RPT services for members of those communities to be conducted at a reduced level of safety
15. Although rational policy-orientated considerations might well allow for the identification of 'closed' groups of actual and potential passengers with a view to the achievement of legitimate political, social and economic benefits, these are not the kinds of considerations CASA can or should be expected to take into account in determining whether, for safety-related purposes, a particular aerial service operation is properly characterised as charter or RPT.
16. Neither should CASA be put to the task of unpacking subtle contractual arrangements or the nuances of complex relationships amongst and between persons (natural and corporate) for the purpose of classifying an operation and identifying the appropriate level of safety at which those operations are required by law to be conducted. This is a dauntingly difficult task in the best of circumstances, and all the more so where there may well be a calculated effort to distort or obscure the true nature of such relationships.
17. For CASA, the distinction between 'closed charter' and RPT operations should reflect relevant safety-related considerations, not pre-eminently political judgements about the social utility of the provision of air services in particular circumstances, or the inevitably contestable results of a forensic 'shell game'. To that end, CASA will focus on the concrete, practical determination of whether, in fact, accommodation in an aircraft is available to persons generally—regardless of the means by which, or the agency through which, such accommodation is made available.



Classifying and Regulating 'Closed Charter' Operations

18. In determining whether an existing or proposed operation is properly classified as 'closed charter' or RPT, and having determined that the operations in question constitute 'closed charter' operations, CASA's regulatory approach should be governed by the overarching object of the civil aviation legislation, as specified in section 3A of the Civil Aviation Act, and in keeping with CASA's duty to regard safety as the most important consideration when exercising its powers and performing its functions, as specified in subsection 9A(1) of the Civil Aviation Act.
19. Therefore, pending the adoption of contemplated interim amendments to CAR 206 and/or CAO Parts 82.0 and 82.1:
- 19.1 where CASA considers that an 'interposed entity' arrangement constitutes an artificial device intended to conduce to the classification of what would otherwise be properly characterised as an RPT operation under CAR 206(1)(c) as a "closed charter" operation under CAR 206(1)(b)(ii), *CASA will inform the operator that the operation or flight is properly characterised as RPT, and that the operation must cease unless and until the operator obtains an RPT authorisation; and*
- 19.2 in any situation in which 'closed charter' operations are being conducted or proposed in circumstances involving an interposed entity *of any kind*—irrespective of the existence, the nature or the intimacy of a relationship between that entity and the AOC holder—*CASA will review the situation on its merits, imposing such additional conditions on the operator as may be necessary and appropriate in the interests of safety, and with a view to affording highest practicable level of safety to the persons to be accommodated in the aircraft consistent with the risks associated with those operations.*
- Note:—Operations clearly conducted as 'closed charter' operations within the meaning of CAR 206(1)(b)(ii), in the absence of a confounding 'interposed entity' and consistent with the features described in paragraphs 10 and 11 above, may continue to operate lawfully on that basis.*
20. With respect to situations of the kind contemplated by paragraph 19.2 above, the sort of conditions CASA may impose, pursuant to section 28BB of the Civil Aviation Act, would be designed to bring aspects of those operations *closer* to the requirements that would apply, were those operations to be conducted as RPT operations. In determining whether such additional conditions should be imposed, and if so what those conditions should be, CASA will consider *amongst other things*, the following aspects of the operations in question:



- aircraft maintenance related requirements
- aerodrome requirements
- aircraft certification requirements
- requirements to carry and use specified radio, navigation and other instrument and equipment
- carriage of specified life saving and other emergency equipment
- number of pilots
- flight crew qualifications and experience (including route qualifications)
- enroute obstacles
- factoring of landing distances
- use and carriage of check lists and load sheets
- training and checking requirements
- authorisation to conduct VFR by night

Summary

21. Having regard to the interests of safety, to the extent 'closed charter' operations involving an interposed entity of any kind may reasonably be seen to have any practical characteristics of an RPT operation, CASA will take such steps as may be necessary to ensure that those operations are conducted only as authorised RPT operations.
22. Where there is a reasonable basis on which such operations are properly classified as 'closed charter' operations CASA may impose such conditions on the operator and the operations as CASA considers to be necessary to ensure that the safety requirements governing those operations equate with or approach the requirements that would apply to those operations if they were to be conducted as RPT operations.



23. Pending the amendment of CAR 206 and/or the introduction of corresponding amendments to CAO 82.0 and 82.1, CASA will consider the imposition of conditions of the kind contemplated by this policy in connection with:

- any application for an AOC authorising the conduct of charter operations in accordance with CAR 206(1)(b)(ii); and
- any current AOC authorising the conduct of charter operations in accordance with CAR 206(1)(b)(ii)

where an *interposed entity of any kind* is involved or associated with, or may become involved or associated with, the conduct of the operations in question.

Signed

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ATTACHMENT

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In *Coral Sea Airlines Pty Ltd and Civil Aviation Safety Authority* [1999] AATA 329 the Administrative Appeals Tribunal said:

It is clear from the evidence in the hearing that the applicant ran the business of transporting persons and cargo. However, the touchstone between RPT and charter purposes rests on the word "generally". This is because under CAR 206(1)(b)(ii) there can be an operation classified as charter that satisfies all the elements of RPT excepting the availability for use by persons generally. This is commonly known as a closed charter

In *Southern Cross Airlines P/L v McNamara* (1989) 97 FCR 72, Justice Bollen observed that the Magistrate whose decision had been appealed from in *Chegwidden v White* (1985) 38 SASR 440 at 444, said that for a flight not to be available to members of the public envisages:

. . . definitive contractual arrangements for the carriage of passengers and cargo on a regular basis, but which did not allow use of aircraft by persons outside the immediate contracting parties. The aircraft is simply not available to the public at large. Examples of this type of arrangement spring to mind. For instance, the regular air transportation of employees to an offshore drilling platform . . . [or] a private contract providing for the regular transportation of workmen to the Moomba gas fields. The persons on board that aircraft are there by virtue of this specific contractual arrangement.

In the *Commission of Inquiry into the Relations between the CAA and Seaview Air, (Seaview Report)* Commissioner Staunton considered a contention by Seaview that accommodation was not available to the public as the offer of travel

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was only available to "persons who lived on Lord Howe Island." At paragraph 19.30 of his report, the Commissioner said:

Singling out a geographic area as the basis for delimiting an offer (whether it is Chicago, or San Francisco, or Bexley or Lord Howe Island) does not destroy the public nature of the offer. It may be otherwise where the island had a very small number of inhabitants, and where they were all related. But that is not Lord Howe Island. The inhabitants capable of accepting the standing offer of Seaview Air certainly numbered in the hundreds, and by no means all were related to Mr Green. To make accommodation available to such a group is to make it available to persons generally.

At paragraph 19.67 of his report, the Commissioner indicated there must be a characteristic which set the members of a group of persons apart from ordinary members of the public, and persons generally. At paragraph 19.95 of his report, the Commissioner also concluded that the charterer must have total control of all the space on at least a small capacity aircraft, so that the operator could not, for example, use available space to place cargo or other persons on the aircraft.

Acknowledging the particular interpretive difficulties posed by CAR 206(1)(b)(ii), the Commissioner observed, at paragraph 19.22 of the Seaview Report: 'One can readily understand that confusion may arise where regularity has been introduced into the area of charter.' He went on to make the following salient point at paragraph 19.35:

The Civil Aviation Regulations are concerned with air safety. Certain operations are classified as Regular Public Transport; others as Charter. Once classified as Regular Public Transport, the operator is obliged to follow a more rigorous safety regime. In *Chegwidden v White Cox* J said this . . . :

'If there is any ambiguity about it, the court should bear in mind that the evident purpose of the regulations in this respect is to promote safety—higher qualifications are needed [in that case] for a commercial pilot licence—and should give the regulations a liberal and remedial construction' [citations omitted]

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