



Australian Government
Civil Aviation Safety Authority

OFFICE OF THE CHIEF EXECUTIVE OFFICER

CASA Ref: SE19/3

11 April 2019

Dr Jane Thomson
Secretary
Senate Rural and Regional Affairs and Transport
Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: rrat.sen@aph.gov.au

Dear Dr Thomson

Budget Estimates Hearing 4 April 2019

I refer to the above hearing where Senator Patrick requested a copy of the judgement of the Federal Court dismissing Angel Flight's application for a stay of the Civil Aviation Safety Authority's imposition of conditions on the flight crew licences of pilots conducting community service flights (*Angel Flight Australia v Civil Aviation Safety Authority* [2019] FCA 456).

As requested by Senator Patrick, I attach a copy of the judgement, which can also be found online http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/456.html?context=1;query=Angel_Flight;mask_path=au/cases/cth/FCA.

Yours sincerely

Graeme M. Crawford
Acting Chief Executive Officer and
Director of Aviation Safety

FEDERAL COURT OF AUSTRALIA

Angel Flight Australia v Civil Aviation Safety Authority [2019] FCA 456

File number: VID 222 of 2019

Judge: **ANASTASSIOU J**

Date of judgment: 18 March 2019

Catchwords: **ADMINISTRATIVE LAW** – judicial review of the creation of an instrument empowered under the *Civil Aviation Act 1988* (Cth) – application for stay of coming into effect of the instrument

Legislation: *Civil Aviation Act 1988* (Cth)
Civil Aviation Safety Regulations 1998
Judiciary Act 1903 (Cth)
Administrative Decisions (Judicial Review Act) 1977 (Cth)

Cases cited: *Azaria Family Day Care Pty Ltd v Secretary, Department of Education and Training* [2018] FCA 1640
Faingold v Zammit (1984) 1 FCR 87
Galaxy Day Care Pty Ltd v Secretary, Department of Education and Training [2018] FCA 1549
Nyangatjatjara Aboriginal Corporation v Registrar of Aboriginal Corporations (No 2) [2006] FCA 675
Perkins v Cuthill (1981) 52 FLR 236
Snow v Deputy Commissioner of Taxation (1987) 14 FCR 119

Date of hearing: 15 and 18 March 2019

Date of last submissions: 18 March 2019

Registry: Victoria

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 44

Counsel for the Applicant: Ms S. Maharaj QC with Ms C. Dowsett

Counsel for the Respondent: MR P.J. Hanks QC

Solicitor for the Applicant: Sparke Helmore Lawyers

Solicitor for the Respondent: MinterEllison

ORDERS

VID 222 of 2019

BETWEEN: **ANGEL FLIGHT AUSTRALIA ACN 103 477 069**
Applicant

AND: **CIVIL AVIATION SAFETY AUTHORITY**
Defendant

JUDGE: **ANASTASSIOU J**

DATE OF ORDER: **18 MARCH 2019**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs of and incidental to this application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

Delivered *Ex Tempore*

ANASTASSIOU J:

- 1 On 12 February 2019, the respondent, the Civil Aviation Safety Authority (CASA), made an **instrument** titled "CASA- 09/19 - Civil Aviation (Community Service Flights - Conditions on Flight Crew Licences) Instrument 2019" under regulation 11.068 of the *Civil Aviation Safety Regulations 1998* as empowered under s 98 of the *Civil Aviation Act 1988* (Cth). The instrument contains additional requirements for holders of private pilot's licences who are engaged in 'community service flights' as defined. The applicant, **Angel Flight** Australia Pty Ltd, is a not-for-profit charity which co-ordinates non-emergency community service flights for transportation of persons in need in various ways, in particular, the transportation of patients requiring medical treatment to and from destinations where other forms of transport are not readily available. Angel Flight contends, as set out more fully below, that the instrument will discourage pilots from volunteering for community service flights and thus adversely affect its operations.
- 2 The instrument is to come into effect on 19 March 2019. Angel Flight commenced this proceeding by originating motion dated 13 March 2019 for judicial review of the making of the instrument under section 11 of the *Administrative Decisions (Judicial Review Act) 1977* (Cth) (the **ADJR Act**) and section 39B of the *Judiciary Act 1903* (Cth). Angel Flight advances four grounds, under the first three of which it contends that the instrument was not authorised by regulation 11.068 or is otherwise beyond power.
- 3 By the fourth ground, it contends that the consultation processes engaged in by CASA in promulgating the instrument breached the rules of natural justice by not including terms in the draft instrument which appeared in the final instrument.
- 4 Angel Flight seeks final and interlocutory relief. The application for interlocutory relief was listed for urgent hearing on 15 March 2019 and adjourned part heard for further hearing on 18 March 2019. The adjournment was to allow Angel Flight to serve further affidavit material going to the question of the apprehended impact of the instrument upon the volunteer arrangements it co-ordinates.

The interlocutory application

5 Angel Flight's interlocutory application seeks an order that the coming into force of the instrument be stayed pending further order of the Court. The principles applicable to the grant of interlocutory relief in the context of an order suspending the operation of an administrative decision were recently considered by Wheelahan J in *Azaria Family Day Care Pty Ltd v Secretary, Department of Education and Training* [2018] FCA 1640 at [6] to [8]:

6. The application for an order suspending the operation of the decision was put on two broad grounds: first, that the applicant enjoyed sufficient prospects of success such that there is a serious question to be tried; and second, that the balance of convenience favours the grant of a stay of the decision. In making these submissions, the applicant relied upon the decision of Thawley J in *Galaxy Day Care Pty Ltd v Secretary, Department of Education and Training* [2018] FCA 1549 as capturing the relevant principles which should inform a consideration of the application for a stay under s 15 of the *ADJR Act*. In *Galaxy*, Thawley J records at [20] that the parties proceeded on the basis that it was appropriate to approach consideration of whether interlocutory relief should be granted on the basis of the test applied on an application for an interlocutory injunction. However, Thawley J referred to the decision of French J in *Snow v Deputy Commissioner of Taxation* (1987) 14 FCR 119, which considered a number of cases concerning guidance relating to the exercise of the discretionary power in s 15 of the *ADJR Act* to suspend the operation of a decision. In *Snow* French J stated at 131 –

The discretion is broad and its scope best expressed by the kind of broad terminology used in *Perkins v Cuthill* even though in many cases the practical application of that formulation may be little distinguishable from the application of principles governing the grant of interlocutory injunctions.

7. In *Perkins v Cuthill* (1981) 52 FLR 236, to which French J referred, Keely J accepted a submission that he should not apply the principles relevant to the grant of interlocutory injunctions, and stated at 238 –

In my opinion s 15(1)(a) requires an applicant to satisfy the Court that reasons or circumstances exist which make it just that the Court should make the orders sought, but it is not necessary for the applicant to show that those reasons are in any sense special or exceptional.

8. I shall consider this application by reference to whether the circumstances make it just to make the orders sought by the applicant, but in the circumstances of this application there is no practical difference in the application of that broad formulation, and the principles that would be applicable in relation to an application for an interlocutory injunction: see *Faingold v Zammit* (1984) 1 FCR 87 at 92 (Sweeney, Lockhart and Sheppard JJ); *Nyangatjatjara Aboriginal Corporation v Registrar of Aboriginal Corporations (No 2)* [2006] FCA 675 at [38] (Besanko J).

6 In the circumstances of this application, in my view, there is no practical difference between the principle expressed by the broad formulation of what is said to be just and the principles

applicable to an application for an interlocutory injunction. I shall consider this application guided by the well-established principles applicable to the grant of an interlocutory injunction.

7 Senior Counsel for CASA conceded, for the purposes of this application only, that there is a triable issue in relation to the fourth ground of review, namely, the ground relating to procedural fairness or natural justice in connection with the consultation process which preceded the making of the instrument. CASA's limited concession has enabled the Court to focus on the real and immediate issue of where the balance of convenience lies.

8 Before turning to the balance of convenience, it is necessary to briefly describe Angel Flight's role in the provision of air travel in the community services sector.

Angel Flight's operations

9 The history and operation of Angel Flight is described in detail in the first affidavit of Ms Marjorie Elizabeth Pagani, Chief Executive Officer of Angel Flight, sworn 12 March 2019. Angel Flight was established in 2003 and is registered as a large charity with the Australian Charities and Not-for-profits Commission. Angel Flight co-ordinates non-emergency flights for transportation to destinations – and back, if need be, of patients of all ages needing medical treatment at destinations where other forms of transportation are not available or are physically or emotionally taxing or unaffordable. Angel Flight also transports blood and blood products and medical drugs.

10 The flights are provided free of charge to the user, including companions or carers travelling with a patient. In addition, Angel Flight arranges, free of charge, transportation by motor vehicles between airports and medical facilities or nearby accommodation. The ground transport is provided by volunteer drivers. Angel Flight currently has approximately 3,300 volunteer pilots and 4,500 volunteer drivers registered with it. The volunteer pilots not only volunteer their time, but also their aircraft.

11 Angel Flight also regularly provides compassionate flights, for example, for terminally ill patients wishing to return home or to attend city hospitals. The compassionate flights also include the transportation of family members where a premature baby or very young child has died. Without the service provided by Angel Flight, in many cases the family would have to undertake a long and distressing journey with the child's body in their car or make arrangements to fly on regular commercial flights if such flights were available.

12 Angel Flight does not carry medical staff or medical equipment and is not an alternative to the Royal Flying Doctor Service or any air ambulance service. The passengers are transported to attend medical appointments or for compassionate reasons, as I have described.

13 The contribution made by Angel Flight and, through it, its many pilots and volunteer drivers is very substantial. Ms Pagani estimates that the economic value to the community based on average commercial rates for light aircraft hire, not including jet or turboprop aircraft, has exceeded \$69 million over the last 16 years of operation, and the value of ground transport at average taxi rates is more than \$5 million. In 2018, there were approximately 3,226 flights co-ordinated by Angel Flight, with an approximate value of about \$4,839,000.

14 The charitable endeavours of Angel Flight are entirely dependent on the willingness of volunteer pilots to donate their time, skill and aircraft. The contribution of pilots through the co-ordination of Angel Flight cannot be overstated. The pilots must either own or hire their aircraft, and meet all of the operational and maintenance costs associated with the aircraft. The only financial assistance given to the volunteer pilots is to defray the cost of fuel. That contribution is capped and may not entirely meet the cost of fuel for any particular flight.

15 Angel Flight's own operations from an overhead and staffing perspective is lean. In addition to Ms Pagani, there are only five full-time flight co-ordinators and a part-time bookkeeper.

16 Angel Flight relies upon unsolicited donations to support its charitable work. It is supported by individuals and community groups across Australia, including service organisations such as Lions, Rotary, Country Women's Association and Probus. No money is spent on advertising, however, all Australian television networks broadcast a free television advertisement for Angel Flight. Approximately 85% of donations are spent directly on flight co-ordination and fuel. Volunteer drivers receive a fuel gift card of between 25 and 50 dollars, depending upon the distance involved. These contributions may not cover entirely the costs incurred by the volunteer driver, including the cost of tolls in major cities, where the drivers pay those tolls. Angel Flight is not funded by any government agency or directly by any state government or the Commonwealth Government.

17 It is apparent from what I have described above that Angel Flight is a charitable organisation worthy of high praise and gratitude. Needless to say, any praise for the work of Angel Flight necessarily also lauds each of the 3,300 individuals who volunteer their time and aircraft, largely at their own expense, as well as the 5,000 volunteer drivers. In my view, it is difficult

to conceive of a better example of unvarnished volunteerism organised and deployed on such a significant scale. It is against this background, and in particular the demonstrable public interest served by Angel Flight and its volunteers that the balance of convenience falls to be determined.

Balance of Convenience

- 18 In my opinion, there are two issues to be considered in weighing the balance of convenience. The first concerns the immediate apprehended impact of the changes to be effected by the instrument upon the operations of Angel Flight, more precisely, upon the volunteer pilots and their preparedness to continue to volunteer their services once the instrument comes into effect. Second is the question of the impact that any stay of the coming into effect of the instrument might have on the safety of air travel.

Impact of the instrument on Angel Flight

- 19 On the question of the apprehended impact of the instrument, the principal change to be introduced under it about which Angel Flight complains, and about which it contends is likely to have an adverse impact on the preparedness of volunteer pilots to continue donating their time, is the provision of the instrument concerning the scheduling of maintenance inspections. Under the present regime applicable to private pilots, aircraft must be inspected every 12 months, however, under clause 11 of the instrument, private pilots engaged in community service flights will be required to comply with a maintenance inspection regime to be carried out at the *earlier* of 100 flight hours or 12 months, being the same maintenance regime as required for aircraft engaged in commercial aerial work. The instrument, in paragraph 11, relevantly provides that:

11 Aeroplane maintenance requirements

...

- (2) It is a condition on a flight crew licence that its holder must not pilot the aeroplane for a community service flight unless:
- (a) the aeroplane has undergone a periodic inspection:
 - (i) within the last 100 hours of service of the aeroplane; or
 - (ii) if the aeroplane has been in service for less than 100 hours in the immediately preceding 12 months – within the 12 months;

...

20 There are some other changes concerning who may accompany the pilot on a community service flight about which Angel Flight complains, but for present purposes the significant and immediate impact stems from the potential for the increased frequency of maintenance inspection and the consequent higher costs that may be incurred by volunteer pilots in order to comply with the new inspection regime.

21 On the face of paragraph 11 of the instrument it is clear that for some pilots, being those that fly more than 100 hours per maintenance-year, the instrument would increase their costs to the extent of the additional cost of more frequent inspections, assuming they are prepared to continue to fly in the community services sector. However, despite the applicant's attempts, there was little cogent evidence before me of the number of pilots who would fall into this category, nor was there evidence of the extent to which they would exceed 100 hours in a given year.

22 Ms Pagani filed four affidavits in support of Angel Flight's application. In her first affidavit, Ms Pagani explains that approximately 70% of pilots who undertake flights co-ordinated by Angel Flight operate their aircraft for more than 100 hours in a 12-month period. She further explains that for 80% of aircraft used by the volunteers, the change proposed will effectively move them from the private maintenance category to the commercial aerial work category. These numbers are somewhat difficult to reconcile. Ms Pagani states that the cost of annual periodic inspection (without rectifications) is approximately \$5,000 for a single-engine aircraft and \$9,000 for a twin-engine aircraft and significantly higher for turbine aircraft. Of the impact on Angel Flight's ability to find suitable pilots and aircraft, Ms Pagani opines that:

The financial impact upon pilots is likely to lead to a substantial reduction in the number of pilots who volunteer to undertake flights coordinated by Angel Flight or who are available to undertake flights (pilots who are not able or willing to incur the additional expense will be required to cease flying for Angel Flight once their personal or hired aircraft reach 100 hours in any one year).

23 In her second affidavit, sworn 15 March 2019, Ms Pagani says that a survey conducted by Angel Flight indicated that approximately 70% of volunteer pilots will be unable to fly for Angel Flight once they reach 100 hours in any 12-month period as they will be unwilling to incur the increased cost of the higher maintenance requirements. However, for reasons that follow below, I do not consider the survey to be a reliable source to justify those conclusions.

24 Ms Pagani acknowledged that she was unable to say when each particular pilot would need to cease flying, as each pilot will reach 100 hours at different times. Specifically for the period

19 March 2019 to 26 March 2019, Ms Pagani explains that Angel Flight has provided flight requests for 38 missions, equating to 76 flight legs or sectors, but has been unable to secure volunteers for eight of the missions, equating to 16 sectors. Ms Pagani also says that the survey indicated that in South Australia in particular, Angel Flight will lose approximately 50% of its volunteer pilot base from 20 March 2019 due to aeroplane maintenance requirements under the instrument. She estimates that this percentage will increase at various stages throughout the year as 70% of affected pilots will reach 100 hours.

25 During the hearing of the application on 15 March, I indicated to senior counsel for Angel Flight that I regarded the second affidavit of Ms Pagani as expressed in conclusory and assertive terms and that an explanation of the survey, or the facts upon which the conclusions drawn by Ms Pagani were based should be provided. Accordingly, I gave Angel Flight the opportunity to file further evidence concerning the apprehended adverse impact of the instrument. On 17 March 2019, Angel Flight served an unsworn affidavit of Ms Pagani, subsequently sworn on 18 March 2019, being Ms Pagani's fourth affidavit. In her fourth affidavit, Ms Pagani addresses the apprehended adverse impact of the instrument on the preparedness of pilots to continue volunteering for flights arranged through Angel Flight. Ms Pagani explains that the survey referred to in her second affidavit was carried out by means of two emails. The first was sent on 5 March 2019 and was directed to a total number of 273 pilots. Ms Pagani explains that the email was confined to pilots who had volunteered in the last three years. The email, omitting introductory parts, asked the following questions:

1. Does your aircraft log more than 100 hours per year?
2. Is your aircraft subject to an approved schedule of maintenance, including PVT category maintenance?
3. What are the maximum cycle/hours allowable under your maintenance regime/schedule (e.g., PC12s are permitted a 300 hour cycle, and Cirrus are maintained according to the manufacturers' schedules)?

26 Ms Pagani explains in her affidavit that:

My Senior Flight Coordinator had been doing running estimates as she received responses and told me throughout this process that the responses were running at about 70-80% for those answering that they would be affected by the changes.

27 It is not clear what is meant to be conveyed by this statement. The questions referred to above do not in terms ask a question directed to whether the pilot concerned would be affected by the instrument. The report, apparently given by Ms Pagani's senior flight co-ordinator, quoted above, is in a generalised and conclusory form. In my view, it does not

assist in an understanding of the likely immediate or short term impact, if any, of the instrument. In her fourth affidavit, Ms Pagani explains that a second email was sent on 7 March 2019, presumably to the same cohort, which asked the following question:

Is your aircraft currently maintained under CASR schedule 5 in the private category?
YES/NO.

28 The senior flight co-ordinator reported to Ms Pagani that about 70% of the pilot cohort responded affirmatively to this question. The CASR schedule 5 maintenance category is the schedule that currently applies to the holders of private pilot licences (requiring 12-monthly maintenance inspections only). This would not be affected by the instrument, save insofar as the pilot was to be engaged in the community flight service sector and thus engaged paragraph 11 of the instrument set out above.

29 It would appear that no direct question was asked of the pilot cohort about their preparedness to accelerate the inspection regime applicable to their aircraft if required in order to continue to volunteer their services through Angel Flight. However, Ms Pagani explains that she had received a number of calls from pilots expressing concerns to her about the impact of the 100-hour requirement to be introduced under the instrument. Further, Ms Pagani also explained that the impact in South Australia of the introduction of the 100-hour requirement would be particularly significant. In South Australia, only four of the 14 active pilots had confirmed they would be compliant once the new rules were introduced.

30 On 18 March 2019, Mr Agnew, the solicitor for CASA filed a second affidavit in response to Ms Pagani's fourth affidavit. Mr Agnew says that further survey questions beyond those asked would need to be answered to understand the impact of the instrument, for example, the following:

- (a) How many flight hours do you accrue on your aircraft in a 12-month period? (This will be informative in understanding the extent to which pilots exceed 100 flight hours per 12-month period.)
- (b) If your aircraft exceeds 100 flight hours in a 12-month period, would you bring forward your annual inspection in order to continue flying CSF [community service flights], or cease flying CSF until the aircraft reaches 12 months from its last inspection? (This would have been useful in gaining an understanding of how many pilots were prepared to bring forward scheduled maintenance in order to continue flying CSF once the aircraft exceeded 100 flight hours.)

31 I agree that further questions of the kind identified by Mr Agnew would be required in order to draw meaningful conclusions concerning the apprehended adverse impact of the instrument.

32 Senior counsel for Angel Flight submitted that if I were not satisfied with the evidence about the likely impact of the instrument generally, there was sufficient evidence of the likely adverse impact upon the operations of Angel Flight and its volunteers in South Australia to warrant granting a stay.

33 I do not agree. Although there is evidence that a particularly active pilot in South Australia will be unable to continue to donate his time after 19 March 2019 and the coming into effect of the instrument, that alone is not sufficient for me to conclude that there are no other reasonable alternative measures that might be taken to alleviate the difficulty presented by the withdrawal of one pilot's services. Assuming that one pilot is critical to the operations in South Australia, it seems to me there are a range of measures that are open to Angel Flight, including but not limited to paying or assisting in defraying the costs that may be incurred in meeting the accelerated inspection regime that will be required under the terms of the instrument. These costs are between five and nine thousand dollars. For these reasons, I am not persuaded that the instrument coming into effect will create a significant negative impact on Angel Flight's operations immediately or in the short term.

Safety of air travel

34 I turn now to a further matter which self-evidently is of utmost significance to the balance of convenience, namely the safety risk associated with any stay of the instrument. CASA is charged with the responsibility of regulating air safety in Australia, stating its purpose generally. Its objectives are set out in section 3A of the Act. That section provides:

3A Main object of this Act

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

35 In section 9A, CASA's function is described as follows:

9A Performance of functions

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

...

36 The terms of the instrument recite CASA's purpose as one directed to enhancing safety of air travel. In the explanatory statement to the instrument, CASA states as follows, under the heading Purpose:

[CASA] has assessed that community service flight operations have a higher risk of an accident or incident due to the existence of risk factors that are not usually present in baseline private operations. The purpose of the instrument is to mitigate this risk by placing conditions on flight crew licence holders conducting such operations that relate to requirements on the pilot (licence requirements, aeronautical experience, recency and medical fitness), operational and notification requirements and aircraft maintenance requirements.

37 The stated purpose of the instrument is repeated in the first affidavit of Mr Agnew in which he deposes that he was informed by Mr Shane Patrick Carmody, the Chief Executive Officer of CASA, that the instrument was a culmination of an initiative to raise safety standards in the community service flight sector following fatal accidents in 2011 and 2017.

38 In her first affidavit, Ms Pagani confirmed these accidents had occurred, though states that there is no statistically significant difference between the safety of Angel Flight co-ordinated flights and private flights:

Systems are in place to ensure that all aspects of Angel Flight operations comply with applicable CASA requirements. Angel Flight coordinated flights have been involved in 2 accidents in approximately 46,000 flights over 16 years. Expert statistician analysis carried out on behalf of Angel Flight concludes that there is no statistical difference in the rate of serious accidents between flights coordinated by Angel Flight and those of private flight, [sic] when data between 2005 and 2017 is analysed. There was no digital data available for the period 2003-2005. However, there were no coordinated volunteer flight accidents known to Angel Flight in those two years.

39 During the hearing on 15 March, I asked senior counsel for Angel Flight whether there was any report from the expert statistician referred to in the extract above. As a result, after the luncheon adjournment, a third affidavit was provided by Ms Pagani, sworn 15 March, in which she explains the expert was Ms Miranda Mortlock, an accredited statistician, and states further that:

I nominated Dr Owen Crees, PhD in Chemistry, including analytics, and long-serving volunteer pilot with Angel Flight, volunteering in excess of 400 flights, to be the point of contact with the expert in order to assist in preparation of the report. For that purpose, he has collated accident data from publicly available sources, including the Australian Transport Safety Bureau. Dr Crees regularly updates me on the progress of the report. On or about 9 March 2019, Dr Crees called me to advise that he had received the following information from Ms Mortlock:

- (a) The report would conclude that there is no indication that Angel Flight is more unsafe compared with other flights in the private category.

- (b) On a per-flight basis, there was no statistically significant difference between Angel Flight flights and other flights in the private category.
- (c) The report is not yet finalised because there is ongoing research being undertaken in relation to minor incidences or occurrences and a comparison of Angel Flight statistics in that regard with other flights in the private category.

We expect to receive the written report when all the relevant data has been obtained and analysed and the above matters have been attended to. I am expecting to receive the written report within a month.

40 This evidence is in stark contrast to the evidence of CASA concerning the incidence of accidents involved in the community service flight sector. In his first affidavit, Mr Agnew says that he is informed by Mr Carmody that:

As Australia's aviation safety regulator, CASA has conducted its own safety analysis into safety trends within the community service flight sector. CASA drew on data from Australia's multi-modal accident investigation organisation, the Australian Transport Safety Bureau and the Bureau of Infrastructure, Transport and Regional Economics for the period 2008 to 2017. CASA compared data from private/business/sport aviation (excluding gliding) with the accident and fatal accident rates for community service flights.

Before signing the instrument, [Mr Carmody] was satisfied that the incident and accident rates within the community service flight sector were significantly higher than the private flying sector. CASA's analysis of the data reveals the following accident and fatal accident rates:

- (a) the fatal accident rate per 10,000 hours is approximately five times higher for community service sector flights than it is for private/business/sport flights.
- (b) the annual average [Australian Transport Safety Bureau] fatal accident rate per million hours is 112.7 for community service flights and 20.86 for private/business/sport flights.

41 It is not feasible in the context of an urgent interlocutory application, brought only a few days before the instrument comes into effect, to resolve in any meaningful way the contest on the evidence concerning the relative incidence of accidents involving aircraft engaged in the community service flight sector, on the one hand, and the private/business/sport sector, on the other. As I understand it, the community service flight sector is a subset of what might be described as the broader private sector. Having regard to CASA's evidence concerning the incidence of serious or fatal accidents involving aircraft engaged in the community service sector, as well as the stated impetus for CASA's introduction of the instrument, and that CASA is the body charged with responsibility for supervising and regulating the safety of air travel in Australia, in my opinion, the court cannot in the context of this application prefer the evidence of Angel Flight to that of CASA in respect of this important issue.

42 It is plain when reading Ms Pagani's response to Mr Agnew's first affidavit that there is a significant contest as to the statistics identified by CASA, on the one hand, and Angel Flight, on the other, concerning the relative incidence of serious accidents involving the private sector, compared with the community services sector. In response to the fourth affidavit of Ms Pagani, Mr Agnew said in his second affidavit:

CASA is confident that the analysis which it has performed of accident rates and fatal accident rates in the CSF sector is robust and based on data which have been made available to CASA.

43 Given the scope of controversy on this issue, which, as I have said, the court is not in a position to resolve in the context of this application, I express no view on the subject. In any event, it is unnecessary for me to do so, as I have formed the view that Angel Flight has not established sufficient urgency relating to the apprehended impact of the instrument upon the preparedness of volunteers to continue to volunteer to make it necessary for me to grapple further with the dispute about what data reveals concerning the incidence of accidents involving the community flight sector relative to the private sector.

Disposition

44 For these reasons, I have concluded that the application for a stay of the instrument should be refused.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Anastassiou.

Associate:

Dated: 2 April 2019