Australia vs New Zealand approach to suspending an 'AOC'

Part 3: Need for Legislative reform of NZ suspension powers

In the last two editions of *The Legal Lounge* I outlined the legal powers of the Australian and New Zealand civil aviation regulators to suspend an Air Operator Certificate (AOC), and how these powers have been interpreted and applied by the Courts in two recent cases, *CASA v Alligator Airways* and *Air National Corporate v Director of Civil Aviation.* In this article I compare and discuss why I believe the Director's powers of suspension in New Zealand should be reformed to align more closely to the Australian statutory regime, with some modification. It should be noted that the following article applies generally to the suspension of "aviation documents" in New Zealand and "authorisations" in Australia, not just to AOCs.

How the statutory suspension powers compare

	New Zealand - Director (s17 CA Act 1990)	Australia - CASA (Part 3A CA Act 1998)
Initial suspension power	Up to 10 working days	Up to 5 working days
Power to further suspend Maximum time limit on further suspension action	Director may suspend for further 'specified period' (not defined) None; no limit on number of times suspension may be extended	CASA must apply to Federal Court for 'prohibition order' to extend suspension beyond initial 5 days Court order only for as long as is necessary, up to 40 days
Time limit to complete regulatory investigation while suspended	None	If Court order is granted, must complete investigation before the order expires
Time limit to decide on further proposed adverse action (if any) while suspended	No timeframe required for issue of 'proposed adverse decision'	Must issue 'show cause' notice within five days of court ordered suspension expiring
Timeframe to make final decision	S 11 imposes timeframes for submissions and comments on proposed adverse decision, and for a final decision to be made Suspension continues by operation of law until final decision made	Part 3A imposes timeframes for submissions and comments on show cause notice, and for a final decision to be made Suspension continues by operation of law until final decision made
Legal Rights of Review against suspension action	Appeal to District Court against initial or further suspension action within 30 days Judicial Review/High Court interim injunction may also be pursued (however injunction unlikely to be successful, refer *Air National* case)	No right of appeal against initial five day suspension **BUT** CASA must apply to Federal Court for order extending suspension beyond five working days; CASA must satisfy Court order necessary

What's wrong with New Zealand's suspension powers?

There are three fundamental problems with the New Zealand s17 suspension powers which in my view require urgent attention:

1. The lack of any clear statutory criteria, or maximum time limits, applicable to the continuing suspension of an aviation document beyond the initial 10 working days

2. The lack of any timeframes or maximum time periods within which a regulatory investigation must be completed while a document remains suspended

3. The "backwards" looking approach required of the Courts to assess whether suspension action taken "was justified" at the time of the decision, rather than a forward looking approach to determine whether suspension action continues to be necessary

With respect to the first and second points, this means that an aviation document holder can be subject to lengthy investigations over a considerable period of time, before any (if applicable) proposed adverse decision is made and the s11 process is invoked, all the while remaining suspended. Certainly, it has not been uncommon in the past for s15A investigations to span out over twelve months or even longer, while the participant's aviation document remained suspended. For a commercial operator, this length of delay would, in most cases, be fatal to the chances of the business surviving. This may in turn effectively pre-determine the outcome, and render the right of appeal against any final decision ineffective or academic.

Whatever the merits of the Director's safety concerns, in my view this is unacceptable and offends against the very purpose of a summary power of suspension – to enable immediate and short term preventive action to be taken where an imminent and serious safety risk is considered to be present. While it also facilitates a process for a fully considered decision of a more permanent nature to be made, it should not be used as a means of indefinitely removing a participant's ability to operate in the system over a lengthy period of time while the regulator "dots its I's and crosses its T's".

The third point above was in my view aptly demonstrated in the *Air National* case. The Judge in the High Court ruled the initial ten day suspension was not justified and granted an interim injunction preventing further suspension action pending full hearings on the matters in dispute. In doing so, the Judge stated that the threshold to exercise the suspension power must be viewed as high, notwithstanding any deference required to the Director's expertise in safety matters. While acknowledging the Director's concerns, based on the evidence before the Court the Judge was satisfied that the alleged breaches leading to the suspension decision were not in fact as serious as first appeared and did not meet the threshold for suspension action.

On appeal however, the Court of Appeal reinstated the suspension and stated that as the operator conceded it had failed to meet some of its statutory obligations, the Director need only be satisfied that it was *"necessary in the interests of safety*" to suspend. It also stated that this test was not subject to any higher threshold. While acknowledging the view of the High Court Judge about the evidence, the Court of Appeal stated that the Director was entitled to take a precautionary approach based on the information available to him at the time when the decision was made to suspend. On that basis the Court was not satisfied that the decision to suspend on the information available at the time was not reasonably open to the Director.

This is in stark contrast to the Australian approach. While the Federal Court would still have regard to and consider the reasonableness of the original suspension decision, ultimately it must itself decide whether there are grounds to make an order to *continue* with the suspension. In doing so, the decision will necessarily be forward focused, and can legitimately take into account all information made available to the Court at the time of hearing, rather than at the time when the initial suspension decision was first made. Had this been the required approach in New Zealand, it would have been clearly open to the High Court Judge in *Air National* to find that, whatever the merits of the original suspension decision, an order extending the suspension was not necessary in light of the additional information before the Court. In my view, this would almost certainly have been the outcome. The result would have been that Air National's air operations would have been able to immediately resume operating, and if the safety issues had been resolved, may well still be operating today.

Suggested legislative change

I favour a shift to the Australian legislative approach of adopting a non-reviewable initial suspension power of up to five days, with the ability of the regulator to apply for a High Court order to further extend the suspension, up to a maximum of forty days. Imposing time limits on the completion of investigations and (if applicable) to progress to the proposed adverse decision stage while a document remains suspended should also be adopted.

However, I also believe that some flexibility should be retained regarding any statutory time frames imposed and/or the need to obtain court orders to extend a suspension. This may be appropriate, for example, if the CAA and an affected document holder agree to a specified period of suspension while certain safety actions are completed. For example, an operator might well accept in some cases that certain events or changes have occurred in its organisation that necessitate ceasing operations for an agreed period of time, so that the problem can be resolved. While this could be achieved in most cases through voluntary cessation by the operator, the CAA may have good reason in other cases for requiring a formal suspension to take effect, to ensure that prompt corrective action is taken and that it is satisfied that all required actions have been completed before the operation can resume. Retaining some flexibility in the legislation would therefore in my view still be desirable to accommodate this, without the need for either party to engage in Court proceedings.

This legislative approach would ensure that, while the CAA can take immediate suspension action on safety grounds, any further proposed suspension action must be subject to swift consideration by the Courts, unless the parties have otherwise agreed to a different course of action. Placing the onus on the regulator to apply to the Court to extend an initial suspension also ensures that, aside from probably reducing the cost to the participant of having the matter reviewed by the Court, the CAA must carefully assess whether its case for an extended order is likely to be robust enough to be granted. In some cases the CAA may decide that seeking an order is not necessary and that the immediate safety concern has been addressed or resolved since the initial suspension was issued. I have no doubt that this would improve the decision making process, and the transparency of any decisions made, to suspend or seek further extension of the suspension of an aviation document. Consideration may be needed as to whether this process should apply to the suspension of all aviation documents, or only to ones affecting commercial operations or privileges. Suspension of some documents such as airworthiness certificates may also be better dealt with under a different statutory process to an AOC.

Changes to current CAA practices

While I view some form of legislative change as ultimately necessary and desirable, changes to CAA practices in the interim could go a long way to addressing some of the problems with recent practice where aviation documents, in particular involving commercial operations, are suspended.

I understand that the CAA now has a dedicated resource for s15A investigations, and that should hopefully go some way to ensuring more timely progression of those investigations. The CAA should also have a clear and transparent commitment to expediting and completing s15A investigations as quickly as possible, and be prepared to commit to expected timeframes for completion of its investigations and any final decisions in each case, with a view to concluding the process as soon as possible.

If the CAA proposes to further extend a suspension in a specific case, it should also be prepared to engage in proactive and early dialogue with the affected document holder or its advisers to discuss any alternatives available to suspension, and if suspension is still considered necessary, to agree on the further time frames involved wherever possible.

As the *Air National* case illustrates, any decision to suspend an aviation document can have significant and far reaching consequences. After more than twenty years in operation, it is time that this and other powers in the Act were reviewed to ensure that the appropriate checks and balances are in place, and to prevent unintended abuse of these important statutory powers.

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