Australia vs New Zealand approach to suspending an 'AOC'

Part 2: New Zealand

In the this edition of *The Legal Lounge* I review the New Zealand High Court and Court of Appeal decisions concerning the suspension of Air National's Air Operator Certificate (AOC) in 2011.

In the next edition of the Legal Lounge I will compare this case to the approach adopted in Australia (Part 1, August 2012 edition of *The Legal Lounge*), and comment on the need for legislative reform of the s17 suspension powers in New Zealand.

New Zealand statutory regime for suspending and taking other action against 'aviation document holders'

Section 17 of the Civil Aviation Act 1990 (the Act) provides the Director of Civil Aviation with the power to suspend or impose conditions against an aviation document if he or she *"considers such action necessary in the interests of aviation safety"*, and one or more of a list of other preconditions in s17 is met. These include that the document holder is failing to comply with the conditions of their aviation document, or with section 12 of the Act. Section 12 imposes fundamental obligations on all holders of aviation documents to ensure compliance with the Act and Civil Aviation Rules, and for certificated organisations, to ensure that they have adequate management processes and systems, provide sufficient training and supervision of their personnel, and have sufficient resources to carry out their operations, safely and in accordance with prescribed safety practices and laws.

The initial suspension lasts for up to ten working days. However, before that period expires, the Director may extend the suspension and/or take other action including the imposition of conditions or revocation of the document. If the Director proposes to take further adverse action, he or she must follow the proposed adverse decision process in s11 of the Act. In practice, the Director would usually extend any initial suspension for a further period, to enable further investigations to continue, until such time as a final decision is made. There are no statutory time limits on the maximum time period for suspension of an aviation document, or in respect of a s15A investigation carried out by the Director while a document remains suspended.

There is a right of appeal to the District Court within thirty days against any suspension or other adverse action taken by the Director. However, there is no provision in the Act for an urgent hearing of any such appeals, and the Act explicitly states that the Director's decision continues pending the hearing or determination of an appeal. This means that, although an appeal may be brought against any initial or further suspension action, the suspension will continue until such time as the Court hears and determines the appeal.

An aggrieved party in this position may also, or in the alternative, take judicial review action in the High Court against the Director. An advantage of doing so is that the party may then also file an application for an urgent injunction, attempting to overturn or prevent further suspension action being taken pending the outcome of the judicial review hearing. However, as the Air National case discussed below illustrates, this approach has its limitations and is unlikely in most or all cases to be successful under the current statutory regime.

***Air National Corporate Limited* v *The Director of Civil* Aviation: High Court, 2 February 2011**

Air National was the holder of an AOC, and conducted charter flights on medium and large aircraft, including on behalf of Air New Zealand. On 28 January 2011 the Director suspended the AOC of Air National pursuant to s17 of the Act. On 31 January 2011 Air National commenced judicial review proceedings, and sought an interim injunction to reverse the suspension decision pending the outcome of the judicial review. It also filed an appeal in the District Court.

In an oral decision delivered on 2 February 2011, interim orders reversing the suspension decision were made, subject to certain conditions suggested by Air National. That decision was however stayed pending lodgement of an appeal by the CAA.

In written reasons provided later that day, Justice Clifford stated that he was satisfied that the Director's safety concerns did not call for the exercise by the Director of the summary power to suspend, and that, balancing the strengths and weaknesses of the Director's public safety concerns against the private interests of Air National, he was persuaded that relief should be granted. In this respect, he adopted as a relevant test, *"the proposition that for the Director to act under s17 there needed to be matters which gave rise to a real or imminent risk to safety".*

The basis of the Director's safety concerns related to two key findings arising from Air National's latest audit:

- The CAA had discovered false training records relating to training carried out by two pilots in 2010; and
- The Director considered that Air National's training manager had been conducting competency checks on other pilots on a particular type of jet aircraft when not qualified to do so (purportedly because the training manager had not himself been checked by a flight examiner who was authorised to conduct that flight check)

The CAA argued that these matters were serious. They were also seen by the Director as part of wider systemic safety issues, relating to previous findings and investigations into the operator and its activities.

Air National submitted that in addition to the serious financial and reputational damage the suspension would cause, the safety concerns did not present any realistic or imminent threat to public safety, and that it had not been given the opportunity to be heard on the underlying allegations before suspension action was taken.

Justice Clifford accepted that deliberate or negligent preparation of false training records can raise serious safety issues and risks. However, after reviewing the affidavit evidence from Air National, Justice Clifford was satisfied that the circumstances giving rise to the false records were not as serious as may first have appeared. In essence, the flight training manager had pre-prepared part of the records for scheduled flight simulator training sessions for two pilots which was to be based on a flight route known as "NZAA Oceanic Departure NWV Auckland". Due to problems with the simulator the next day, another route had to be selected for the training session. On completing the flight training records, the flight training officer failed to correct the flight route references.

He had however advised CAA personnel in email correspondence that some of the simulator training routes had to be changed and undertook to provide details of that to the CAA. Air National argued the records formed part of a wider set of documents, and that this error would have been corrected in due course as the pilots training further progressed (at the time of the audit neither pilot had progressed to actual flying in the aircraft type as would be required to complete the training). Accordingly it argued this was in the nature of a clerical error and not a matter that either on its own, or as evidencing a wider systemic concern, justified the exercise of the s17 power.

With respect to the second matter, Air National claimed that it had engaged Flight Test (NZ) Ltd on the recommendation of the CAA, to carry out flight competency checks on its flight testing officers, and that it was an employee of that organisation who carried out the competency check on their flight training manager in the particular aircraft type. The judge noted that it was accepted in evidence that there was no suggestion that Flight Test (NZ) Ltd was not qualified to undertake this work but merely that it had not been recorded as such in Air National's exposition. Air National therefore argued that this was purely a documentation matter and once again, not evidence of an underlying safety issue which would justify the use of the s17 power.

With respect to the wider systemic concerns, the judge noted that the Director's suspension letter had referred to Air National's elevated risk profile due to a number of serious findings over previous years, including in relation to senior persons issues, and in relation to a 2009 incident which lead to the revocation of the ATPL of Air National's flight operations manager. Further, while acknowledging some corrective actions taken, the letter stated that the Director was concerned there was little evidence of a systemic and proactive approach by the operator to reduce risk.

In this context, the judge accepted that the Director viewed the falsification of the training records as the "straw that broke the camel's back".

However in balancing the Director's safety concerns against Air National's private interests, Justice Clifford adopted the view that there needed to be a reasonably high threshold, albeit respecting the Director's expertise in safety matters, before the s17 suspension power could be invoked.

Justice Clifford concluded on the available evidence that Air National had a strong prima facie case to argue that:

- The specific incidents relied on would not justify suspension action in their own right; and
- The evidence suggested that the CAA had up to that point been satisfied with Air National's response to previous incidents, findings and systemic issues raised; and
- In that context, the specific incidents could not be seen to represent wider on-going systemic concerns such that would justify summary action under s17.

In the circumstances, and in light of the harm that suspension would cause to Air National's operations, the Judge concluded that interim relief to reverse the suspension was necessary pending full hearings on the proceedings lodged, and made orders accordingly.

Court of Appeal decision

On 4 February 2011 the Court of Appeal quashed the High Court decision and reinstated the suspension. In doing so, it noted that the Director need only satisfy the statutory criteria in s17 (set out above) and was not subject to any higher obligation or threshold. As Air National conceded that the breaches identified amounted to failure to comply with its section 12 obligations, the Court stated that the only issue it could challenge was whether the decision to suspend was "necessary in the interests of safety".

While accepting that the Director's concerns must be serious and immediate, the Court of Appeal stated that he was entitled to take a precautionary approach under s17, based on the information known to him at the time of the decision.

The Court of Appeal stated that while the errors in the training records might transpire to be isolated incidents involving administrative oversight, the information available to the Director at the time suggested falsification of the records. In light of the information received and the operator's high risk profile, it found that this justified exercise of the suspension power "in the interests of safety".

The Court of Appeal also clarified that the Director was not obliged to investigate first to determine whether there was a systemic problem before exercising the power to suspend. It did not therefore accept that Air National had a strong case to argue that the decision to suspend (based on the information available at the time) was not reasonably open to the Director, or was irrational.

Moreover, the Court noted that while the High Court could in appropriate cases grant an interim injunction, Judges should be cautious in exercising their discretion to do so, in light of the statutory provisions preventing a stay being entered by the District Court pending the outcome of an appeal.

It is understood that, following this decision, Air National decided to voluntarily surrender its AOC.

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