

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA489/2011  
[2011] NZCA 520**

BETWEEN                      THE CIVIL AVIATION AUTHORITY OF  
   NEW ZEALAND  
   First Appellant

AND                              THE DIRECTOR OF CIVIL AVIATION  
   Second Appellant

AND                              THE NEW ZEALAND AIRLINE PILOTS'  
   ASSOCIATION INDUSTRIAL UNION  
   OF WORKERS INCORPORATED  
   Respondent

Hearing:            15 September 2011

Court:                Ellen France, Harrison and Stevens JJ

Counsel:            K I Murray and M J Andrews for Appellants  
                                 R E Harrison QC and R R McCabe for Respondent

Judgment:        7 October 2011 at 10:00 AM

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**JUDGMENT OF THE COURT**

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**A        The appeal is dismissed.**

**B        The appellants must pay the respondent costs for a standard appeal on a  
          band A basis and usual disbursements. We certify for second counsel.**

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**REASONS OF THE COURT**

(Given by Ellen France J)

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### Introduction

[1] In February 2011, the Civil Aviation Authority of New Zealand (the Authority) entered into an agreement with the Ministry of Justice under which the Ministry agreed to provide the Authority and the Director of Civil Aviation (the Director) with information as to the criminal records for a sample set of pilots selected at random. In entering into the agreement, the Authority and the Ministry relied on s 10(3) of the Civil Aviation Act 1990 (the Act). Section 10(3) provides that the Director may:

for the purpose of determining whether or not a person is a fit and proper person for any purpose under [the] Act, ... seek and receive such information (including medical reports) as the Director thinks fit; and ... consider information obtained from any source.

[2] The New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated (the Union) challenged the lawfulness of the random sampling exercise undertaken pursuant to the agreement. After the Authority and the Director indicated an intention to continue with the random sampling, the Union brought judicial review proceedings challenging the lawfulness of the sampling.

[3] Kós J found in favour of the Union and made a declaration that the random sampling was unlawful. The Authority and the Director were prohibited from continuing to engage in the random sampling of pilots' criminal record information

pursuant to the agreement between the Authority and the Ministry.<sup>1</sup> The Authority and the Director appeal against this decision. The appeal raises issues about the scope of s 10(3) of the Act and, in particular, whether s 10(3) authorises random sampling in terms of the agreement with the Ministry.

## **Background**

[4] We adopt the description of the factual background set out by Kós J.<sup>2</sup> As the Judge notes, the random sampling procedure has its genesis in the prosecution in 2008 of a commercial airline pilot for making a misleading statement in a medical examination form. The form required the pilot to declare any convictions for alcohol or drug related offences. The pilot declared he had no such convictions. In fact he had convictions for driving with excess breath alcohol. This case received considerable media attention in February 2010. The Associate Minister of Transport sought information from the Director about monitoring pilots with alcohol and drug issues. The Director informed the Associate Minister:

The [Authority] is satisfied that the present regulatory system has worked well at ensuring that only people who do not use recreational drugs and who use alcohol safely and in moderation have been able to exercise the privileges of a pilot licence. The system is, however, heavily dependent on individuals acting responsibly and “self disclosing” information relating to their drug and alcohol use, and on their employers voluntarily putting in place robust systems for monitoring and addressing alcohol and drug abuse issues.

[5] Attention then turned to considering options for improved monitoring of pilots about alcohol and drug related issues. Mr Christopher Ford, the Authority’s acting general manager, in his affidavit explained the problems that were seen to arise in terms of access to conviction information. For example, he said that some pilots had completed an authorisation dealing with access to conviction information but the requirement to complete this was recent so would not encompass all pilots. Mr Ford also referred to practical time and cost difficulties in accessing the information in reliance on an individual request.

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<sup>1</sup> *The New Zealand Airline Pilots’ Association Industrial Union of Workers Inc v The Civil Aviation Authority of New Zealand* HC Wellington CIV-2011-485-954, 13 July 2011.

<sup>2</sup> At [18]–[23].

[6] Kós J records that, fairly early on in the process, the Authority identified s 10(3) as a mechanism enabling a wider range of criminal record information to be sampled on a random basis.<sup>3</sup> The Director informed the Associate Minister, “it is important to note that the use of s 10(3) entails a case by case approach”. The Director continued:

Having direct access to relevant information about a pilot’s criminal convictions and driving offences would be the simplest way of ensuring the [Authority] could obtain the information it needs to discharge its obligations under the Civil Aviation Act. As advised ... the Privacy Act provides for designated agencies to have access to information held on the Ministry of Justice’s database about particular individuals, including criminal convictions and driving offences. Schedule 5 of the Privacy Act lists the agencies and the information they are entitled to access. The [New Zealand Transport Authority] is listed; the [Authority] is not. The [Authority] has previously argued for inclusion in the Schedule but was unsuccessful.

[7] The scheme that was eventually adopted, and outlined in the agreement with the Ministry of Justice is that the Authority seeks full criminal record information from the Ministry up to five times per annum in relation to 100 pilots chosen at random. The pilots are drawn from among the approximately 10,000 airline transport and commercial pilot licence holders. A memorandum of understanding (MOU) between the Authority and the Ministry governs the access to this information. The MOU records that the purposes for obtaining the information are:

2.4.1 Identifying any criminal convictions which might warrant further investigation as to the safe exercise of privileges to which an individual’s medical certificate relates, or affect an individual’s “fit and proper person” status within the meaning of section 10 of the [Act]; and

2.4.2 Verifying the accuracy of information previously provided by a certificate/licence applicant and/or holder; and

2.4.3 Identifying any trends indicating information gaps within the [Authority’s] medical certification and licensing system; and

2.4.4 Informing [the Authority’s] assessment as to the need or otherwise for changes to the medical certification and licensing system, particularly in respect of sampled or routine verification of information disclosed by applicants on the medical certificate application form or aviation document application forms.

[8] The Union was consulted by the Authority about the proposal. As we have indicated, the Union was and remains opposed to it.

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<sup>3</sup> At [20].

[9] The random sampling procedure has been used once, in February 2011. It disclosed one new criminal conviction but the pilot concerned had already disclosed that to the Authority. Further sampling was suspended pending the resolution of these proceedings.

### **The High Court decision**

[10] Kós J concluded that the fit and proper person determination contemplated in s 10(3) occurs only when there is an application under Part 1 of the Act for the grant or renewal of an aviation document (effectively, the pilot's licence). The Judge found that the fit and proper person determination does not occur when a decision under Part 2 of the Act is made. Part 2 includes provision for suspension and revocation of aviation documents. Accordingly, the Judge decided, the fit and proper person determination does not occur again after the initial application except on an application for renewal of the licence. It followed from this conclusion that s 10(3) did not authorise random sampling under the MOU.

[11] The formal orders made by the Court were, first, a declaration that the random sampling of pilots' criminal record information undertaken in accordance with the MOU is unlawful and, secondly, an order prohibiting the Authority and the Director from continuing to engage in random sampling of pilots' criminal record information in accordance with the MOU.

### **Issues on appeal**

[12] The appeal can be dealt with by considering the first two of a number of issues identified by the parties, namely:

- (a) Does s 10(3) of the Act empower the Director to obtain from time to time personal information relating to an individual aviation document holder's "fit and proper person" status and if so, for what purpose or purposes?
- (b) Can the Director rely on s 10(3) of the Act to obtain personal

information about aviation document holders by way of random sampling in accordance with the agreement with the Ministry of Justice?

### **The statutory scheme**

[13] One of the purposes of the Act is to establish rules of operation within the New Zealand civil aviation system in order to promote aviation safety.<sup>4</sup>

[14] Participants in the New Zealand civil aviation system are required to hold valid documentation. As pertinent to this case, in accordance with rules made under the Act, all pilots are required to hold a licence which is described in the Act as an aviation document.<sup>5</sup>

[15] Entry into the civil aviation system is dealt with in Part 1 of the Act. Section 8, which is in this Part, provides for the grant or renewal of an aviation document. Applications are made in the prescribed form to the Director. We interpolate here that the Director is the chief executive of the Authority.<sup>6</sup> The Director relevantly has and may exercise the functions and powers conferred or imposed on the Director by the Act, or regulations or rules made under the Act.<sup>7</sup> We come back later to discuss the Director's functions but for present purposes we note that they include monitoring adherence, within the civil aviation system, to regulatory requirements relating to safety and security.<sup>8</sup>

[16] Once an application for an aviation document, here, the pilot's licence, has been considered by the Director, the Director shall grant the licence if satisfied that the various statutory requirements are met. Those requirements include that the applicant and any person who is to have or is likely to have control over the exercise

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<sup>4</sup> Civil Aviation Act 1990, Long Title.

<sup>5</sup> Civil Aviation Act 1990, s 7(1)(b). An "aviation document" is a defined term: s 2. Relevantly, it includes a licence.

<sup>6</sup> Civil Aviation Act 1990, s 72I(1).

<sup>7</sup> Civil Aviation Act 1990, s 72I(2).

<sup>8</sup> Civil Aviation Act 1990, s 72I(3)(c)(i).

of the privileges under the document “is a fit and proper person to have such control or hold the document”.<sup>9</sup>

[17] Importantly for this case, s 9(3) states that it is a condition of every current aviation document that the holder and any person who has or is likely to have control over the exercise of the privileges under the aviation document “continue to satisfy the fit and proper test” set out in s 9(1)(b)(ii).

[18] Section 10 is headed “[c]riteria for the fit and proper person test”. Section 10(1) sets out a number of factors to which the Director is to have regard “[f]or the purpose of determining whether or not a person is a fit and proper person for any purpose under [the] Act”. Those factors include convictions for any transport safety offence and any evidence the person has committed a transport safety offence.<sup>10</sup> The Director is not, however, confined to consideration of the matters specified in s 10(1), but expressly “may take into account such other matters and evidence as may be relevant”.<sup>11</sup>

[19] The critical provision for the purposes of this appeal is s 10(3). That subsection reads as follows:

The Director may, for the purpose of determining whether or not a person is a fit and proper person for any purpose under [the] Act, –

- (a) seek and receive such information (including medical reports) as the Director thinks fit; and
- (b) consider information obtained from any source.

[20] If the Director proposes to take into account any information that is or may be prejudicial to a person, the Director is obliged to disclose that information to the person and, in accordance with s 11, give that person a reasonable opportunity to refute or comment on it.<sup>12</sup>

[21] In terms of s 11, persons affected by a proposed adverse decision have certain rights, for example, to be notified of the proposed decision. An “adverse decision”

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<sup>9</sup> Civil Aviation Act 1990, s 9(1)(b)(ii).

<sup>10</sup> Civil Aviation Act 1990, s 10(1)(e) and (f).

<sup>11</sup> Civil Aviation Act 1990, s 10(2).

<sup>12</sup> Civil Aviation Act 1990, s 10(5).

means “a decision of the Director to the effect that a person is not a fit and proper person for any purpose under [the] Act”.<sup>13</sup>

[22] Part 2 of the Act then sets out the functions, powers and duties of participants in the aviation system.<sup>14</sup> Relevantly, s 15 is headed “[d]irector may require or carry out safety and security inspections and monitoring”. Section 15(1) provides the Director may in writing require any person who holds an aviation document to undergo or carry out such inspections and such monitoring “as the Director considers necessary in the interests of civil aviation safety and security”. For the purposes of such inspection or monitoring carried out in respect of any person under subs (2), the Director may in writing require from that person such information as the Director considers relevant.<sup>15</sup>

[23] Section 15A(1) provides that the Director may require any holder of an aviation document to undergo an investigation conducted by the Director if the Director believes, on reasonable grounds, that it is necessary in the interests of civil aviation safety and security. The other preconditions include that the Director has reasonable grounds to believe that the holder has failed to comply with any conditions of the aviation document or with the requirements of s 12.<sup>16</sup> In terms of s 12(2), every participant in the civil aviation system is required to comply with the Act, the relevant rules or regulations made under the Act, and the conditions attached to the relevant aviation document.

[24] The Director may suspend or revoke an aviation document in various circumstances if the Director considers it necessary in the interests of aviation safety. The power to suspend an aviation document is dealt with in s 17. Section 18 provides the power to revoke the document.

[25] The criteria for action under ss 17 or 18 are dealt with in s 19. Under that section, the Director may have regard to various factors but is not confined to consideration of those enumerated factors. Except for the omission of any reference

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<sup>13</sup> Civil Aviation Act 1990, s 11(1).

<sup>14</sup> The provisions in Part 2 are discussed by this Court in *Director of Civil Aviation v Air National Corporate Ltd* [2011] NZCA 3, [2011] NZAR 152 at [5]–[12].

<sup>15</sup> Civil Aviation Act 1990, s 15(3).

<sup>16</sup> Civil Aviation Act 1990, s 15A(1)(a).



to medical records, s 19(4) essentially mirrors s 10(3).<sup>17</sup> Section 19(4) provides that the Director may:

- (a) seek and receive such information as the Director thinks fit; or
- (b) consider information obtained from any source.

[26] Again, the holder of the licence has various rights if the Director proposes to take into account information that is or may be prejudicial to that person.<sup>18</sup>

[27] In terms of s 20 there is power to amend or revoke aviation documents.

[28] Medical certification of licence holders, is dealt with in Part 2A. The medical certificate is different from the pilot's licence. A medical certificate is not an aviation document.<sup>19</sup> Further, medical certificates for commercial airline pilots have a specified term. For example, for pilots under 40 years of age, the medical certificate lasts for a maximum of a year.<sup>20</sup> By contrast, a pilot's licence continues in force once issued until suspended, revoked, replaced (by a different pilot's licence) or surrendered.<sup>21</sup> Licence holders are required to advise the Director of any material change in their medical condition.<sup>22</sup> A commercial airline pilot must have both a licence and a medical certificate.

[29] For present purposes, it is important to note that s 27H(3)(a)(i) expressly contemplates that the Director will monitor licence holders "on the basis of random selection" from the register of current medical certificates maintained under s 27B(7).

[30] Brief reference should also be made to two of the offence provisions. First, it is an offence to fail to comply with any requirement of the Director under s 15(1) or

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<sup>17</sup> Section 19(4) also uses "or" rather than "and" between the options (a) and (b).

<sup>18</sup> Civil Aviation Act 1990, s 19(5).

<sup>19</sup> Civil Aviation Act 1990, s 27A(2).

<sup>20</sup> Civil Aviation Rules 2008, part 67.61(a)(1).

<sup>21</sup> Civil Aviation Rules 2008, part 61.15.

<sup>22</sup> Civil Aviation Act 1990, s 27C.

(3) without reasonable excuse.<sup>23</sup> In addition, every person commits an offence who:<sup>24</sup>

being the holder of an aviation document, fails, without reasonable excuse, to provide to the Authority or the Director information known to that person which is relevant to the condition specified in section 9(3).

[31] Finally, there is a right of appeal to the District Court against a specified decision made under the Act by the Director.<sup>25</sup> A “specified decision” includes a decision concerning the grant, issue, revocation or suspension of an aviation document, or to impose conditions on the aviation document.<sup>26</sup>

[32] Against the above statutory context, we next deal with the two issues on appeal.

### **The scope of s 10(3)**

[33] Three possible approaches to the interpretation of the scope of s 10(3) were advanced.

#### *The three options*

[34] The first approach is that s 10(3) is applicable only to applications for a grant or renewal of licence. As we have noted, this is the view taken by Kós J. In reaching this view, the Judge relied on the fact that s 10(3) is within Part 1 of the Act which is headed “[e]ntry into the aviation system”. Kós J also placed some reliance on the words “for any purpose” which he saw as relating to the applicant’s fitness to be a pilot. As pilots make a single application for a licence, the Judge said, there is a single fit and proper person assessment under ss 9 and 10. The Judge contrasted this with the medical certification process, which provides for regular assessments. In his view, there was no intermediate fit and proper person assessment, for example, in relation to a suspension or revocation.

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<sup>23</sup> Civil Aviation Act 1990, s 44A.

<sup>24</sup> Civil Aviation Act 1990, s 49(1)(c).

<sup>25</sup> Civil Aviation Act 1990, s 66(1).

<sup>26</sup> Civil Aviation Act 1990, s 66(5).

[35] Dr Harrison QC for the Union was content to support the Judge’s approach but acknowledged that this had not been the Union’s position before the High Court. His alternative argument reflects the second possible approach to s 10(3) advanced to us, namely, that s 10(3) encompasses two aspects. The first aspect comprises an initial power exercisable when the Director has to make a fit and proper person assessment in the context of considering applications for the grant or renewal of an aviation document. The second aspect entails an ongoing power exercisable when, in an individual case, the Director has to assess an aviation document holder’s continuing fit and proper person status. The Union’s stance is that neither of these aspects extend to empowering random sampling.

[36] Dr Harrison accepts that the fact there is an ongoing condition that the licence holder continues to be a fit and proper person (s 9(3)) supports the Union’s alternative position.

[37] The third possible approach to s 10(3) is that advanced by the appellants. On their approach, the Director can make a fit and proper person assessment at any time and rely on s 10(3) to do so. The appellants say this extends to random sampling. In terms of the ability to make an assessment at any time, the appellants emphasise that, provided the Director’s purpose is determining whether a document holder is a fit and proper person, s 10(3) can be utilised regardless of the number of pilots that are being considered.

### *Discussion*

[38] We agree with the Judge (and the Union) that the focus of s 10(3) is on fitness in the context of an individual determination. That determination may be the initial application for a pilot’s licence, or an application for renewal or a change in status.<sup>27</sup> The fact that s 10(3) is dealing with an individual determination is apparent from the wording of the subsection. Section 10(3) says it applies “for the purpose of determining” whether or not a person is a fit proper person for any purpose under the Act. The appellants’ approach does not take account of the fact that the section does

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<sup>27</sup> Part 61.11 of the Civil Aviation Rules 2008 provides that pilots must comply with all eligibility requirements specified for the type of licence applied for. For instance, a private pilot licence-holder wishing to become a commercial pilot would need to apply for a new licence.

not authorise the inquiry for any other purpose. That view is also supported by the reference in s 10(1) to the person's "proposed involvement" in the civil aviation system which suggests some link to a particular case.

[39] Where we part company from the Judge is as to the ongoing relevance of the fit and proper person assessment. In our view the latter part of the phrase, "for the purpose of determining whether or not a person is a fit or proper person for any purpose under [the] Act", means s 10(3) applies whenever fitness for purpose becomes relevant under the Act. The Judge's approach requires reading the phrase "any purpose under [the] Act" as if it referred to any purpose under "this Part" of the Act. We consider that "fitness" becomes a relevant purpose at stages other than the initial application or on renewal. This is the Union's alternative position.

[40] The key in this respect is s 9(3). In terms of that section, it is an ongoing condition of the licence that the licence holder continues to be a fit and proper person. There must be some potential, at least, for the Director to have to reconsider fitness, for example, where it becomes apparent that a pilot is no longer a fit and proper person and so is not meeting this condition of the licence. Illustrations of ways in which a further "fitness" determination could arise are seen in ss 15A, 17 and 18.

[41] In terms of ss 15A, if the Director has the requisite belief in terms of s 15A that the licence holder has failed to comply with any conditions of an aviation document or with the requirements of s 12, the section provides that the Director may require the licence holder to undergo an investigation.

[42] There is a similar provision in s 17(1)(b) dealing with suspension. The relevance of the link back to s 12 is that, as we have noted, s 12(2) states that every participant in the system shall comply with the conditions of their licence. A consideration of compliance with s 12 may therefore entail a further determination of whether the licence holder continues to be a fit and proper person. That is because maintaining the status of a fit and proper person is a condition in terms of s 9(3). In addition, s 17(1)(c) provides for suspension where the Director is satisfied that the licence holder has contravened s 49. As we have seen, s 49(1)(c) relates to the

failure to provide information relevant to the s 9(3) condition of continuing to be a fit and proper person.

[43] In terms of revocation under s 18, there is a link back to s 11 and the notice provisions applicable where an adverse decision is to be made. Again, the definition of an adverse decision leads back to the determination of whether the fit and proper person test is met.

[44] The view that fitness has an ongoing relevance is supported also by subs 11(3) and (6)(b)(iii). Section 11 deals with decisions of the Director to the effect that a person is not a fit and proper person for any purpose under the Act. The wording of s 11(3) suggests that it applies more generally than the initial entry into the aviation system or to renewal of a licence because it envisages that the document holder will have already been operating and so the proposed adverse decision may affect a broader range of persons (such as an employer). Section 11(3) provides that where the Director gives a notice under s 11(2) that he or she proposes to make an adverse decision, the Director:

- (a) shall also supply a copy of the notice to –
  - (i) any person on the basis of whose character the adverse decision arises, where that person is not the person directly affected by the proposed decision; and
  - (ii) any affected document holder, where the Director considers that the proposed decision is likely to have a significant impact on the operations of the document holder; ... .

[45] In terms of s 11(6), which deals with the decision making process, the Director is required to notify in writing the person directly affected of, amongst other matters, the consequences of that decision and any applicable right of appeal. The rights of appeal are those specified in s 9(4), s 17(7) or s 18[(5)]. Those appeal rights are, in turn, the right of appeal to the District Court in s 66 and relate not only to the grant of a licence but also to its revocation or suspension.<sup>28</sup>

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<sup>28</sup> The appellants note there is extensive case law generated by way of appeals to the District Court against the intermediate fit and proper person determinations that the Judge did not recognise. They refer to three recent examples: *Halliwel v Director of Civil Aviation* DC Wellington CIV-2009-085-1451, 11 March 2011; *Sinclair v Director of Maritime Safety* [1999] DCR 282; and *Ledingham v New Zealand Transport Agency* DC Dunedin CIV-2010-013-533, 20 December 2010.

[46] Accordingly, we consider that s 10(3) applies to determinations that the Director makes under the Act where the Director has to consider the fit and proper person test. The position is not as limited as the High Court Judge considered it was. The limitations that are relevant for this case are, first, that the Director must be dealing with an individual case or specific determination. Secondly, the determination must be for the purpose of assessing fitness.

[47] There may be further limitations. For example, the terms of the power to reconsider fitness may be constrained. Under s 15A for instance, the Director may require any holder of an aviation document to undergo an investigation where the Director believes certain matters on reasonable grounds. In a particular case there may be issues about, for example, whether the Director has the requisite belief. However, we do not need to explore the detail of the situations in which a redetermination will be possible.

### **Lawfulness of the random sampling**

[48] We turn then to consider the second aspect, namely, whether s 10(3) extends to encompass the random sampling under the MOU.

#### *Submissions*

[49] In developing the submission that s 10(3) authorises random sampling, Mr Murray on behalf of the appellants emphasises that s 10 refers to the Director considering both conviction information and medical information. This confirms that conviction information is relevant to fitness considerations. Further, Mr Murray says that the power in s 10(3) is broadly expressed. In addition, the appellants rely on the statutory scheme more generally.

[50] In terms of the statutory scheme, Mr Murray points to the monitoring function under s 15. Mr Murray's argument is that monitoring includes random sampling in three ways:

- (a) reviewing information already held by the Director in relation to the

sample group;

- (b) requesting further information from the relevant document holders;  
and
- (c) requesting further information from third parties.

[51] The submission is that, if the Director can monitor fitness in terms of one aviation document, the Director can monitor all aviation documents for that purpose. Hence, the Director can monitor by requesting further information from third parties on a random basis ((c) above) as occurs under the MOU.

[52] Mr Murray also emphasises the inspection and monitoring functions conferred on the Director in s 72I of the Act. His proposition is that, given there are inspection and monitoring functions, there must be corresponding powers to enable the Director to undertake those functions.

[53] The Union emphasises that s 10(3) deals with an individual assessment of a person's fitness, not a process which hopes randomly to locate an individual case to investigate and possibly determine in terms of fitness.

### *Discussion*

[54] In our view the Judge was correct that the Director cannot rely on s 10(3) to conduct the random sampling process. Our earlier conclusion, that s 10(3) applies to individual fitness determinations, suggests that s 10(3) does not encompass what Dr Harrison described as the "trawling" exercise envisaged by MOU. Nor does the range of purposes identified in the MOU sit well with the fit and proper person test of s 10(3).

[55] In any event, the wording and context of s 10(3) make it plain that the section is permissive. It permits the Director, in making the fitness determination, to look at whatever information he or she thinks fit. In other words, it removes a limit that might otherwise be found to apply on administrative law principles as to the sources and consideration of information the Director may lawfully take into account. The

permissive nature of the section is apparent from the context. Section 10(3) follows s 10(2) which says that the Director is not confined to the criteria in s 10(1) and then s 10(5) says that if the Director is going to look at prejudicial information, the Director has to disclose that information.

[56] The same wording is used in other statutes where the decision maker might otherwise face an argument about the ability to consult or obtain information.<sup>29</sup> For example, s 50 of the Immigration Act 1987 dealt with the procedure in appeals to the Removal Review Authority. Section 50(4)(a) provided that in determining an appeal, the Authority “may seek and receive such information as it thinks fit, and consider information from any source”.<sup>30</sup> There was then a limit on the Authority’s ability to consider information relating to matters post-dating the filing of the appeal. This example is instructive because the section is plainly addressing what is permissible in the context of an individual appeal.<sup>31</sup>

[57] The high point of the argument for the appellants is that s 10(3) should be read more expansively in light of the power to monitor in s 15. We consider the wording of s 10 as a whole does not support any broader reading of s 10(3) as contended for by the appellants. In addition, there is the obvious contrast with the specific recognition of the ability to sample randomly elsewhere in the Act in relation to the medical certification process.<sup>32</sup> That point on its own may not be determinative but privacy considerations as reflected in the Privacy Act 1993 would also militate against reading in a random sampling power.

[58] Another possibility is that the power to undertake the random sampling could be read into s 15. In this context, “monitoring” appears to bear its ordinary meaning, that is, “to watch, observe, or check ... to keep track of, regulate, or control”.<sup>33</sup>

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<sup>29</sup> For example, the same provision appears in the New Zealand Horticulture Export Authority Act 1987, s 41A(2)(b) dealing with the reconsideration of a refusal to grant or to revoke an exemption under ss 40 and 41 of that Act. As the appellants note, the same provision is found in the Maritime Transport Act 1994, ss 49(4), 50(3) and 276(4).

<sup>30</sup> Similar wording is used for the Immigration and Protection Tribunal in considering appeals under s 228 of the Immigration Act 2009.

<sup>31</sup> The Supreme Court in *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 notes that in terms of s 50(4)(a), the Authority has power to seek or receive further information after the time for filing information has passed.

<sup>32</sup> Civil Aviation Act 1990, s 27H(3)(a)(i).

<sup>33</sup> *Webster’s Third New International Dictionary of the English Language* (G & C Merriam Co, Springfield, 1976) at 759.



Those activities, as Mr Murray suggests, may as a matter of practice be undertaken via random sampling. However, the two considerations discussed immediately above would tell against that approach. More importantly, though, the appellants have never relied on s 15 as the source of the power for the MOU and the case has proceeded on the basis that s 10(3) provides the power. In those circumstances, we do not consider it would be appropriate to decide this issue.

[59] Finally, in relation to the submission made about the Director's functions under s 72I and any correlative power, for the reasons just discussed in the context of the inter-relationship between s 10(3) and s 15, we do not consider the existence of the functions leads to a more expansive reading of s 10. Further, s 72I is in fairly general, descriptive, terms. Finally, as Kós J said, there are other means of achieving the result the Director seeks to achieve via the random sampling. There may well be force in the Director's view that those means are not as efficient as the MOU. But that is an argument for legislative change not for a more expansive reading of the plain words.

[60] For these reasons, we conclude that s 10(3) does not authorise the random sampling under the MOU.

### **Other issues**

[61] The approach taken in the appellants' notice of appeal, and in the Union's notice supporting the decision on other grounds, would raise further issues. Those issues relate, first, to the relationship between s 10(3) and s 7 of the Privacy Act 1993. Section 7 preserves the effect of provisions in other statutes that authorise or require personal information to be made available. A second subsidiary issue concerns s 21 of the New Zealand Bill of Rights Act 1990 (the prohibition on unreasonable search and seizure) and its application to the random sampling. The final issue in this category is the reasonableness in an administrative law sense of the appellants' actions by way of random sampling.

[62] Our conclusions on the scope of s 10(3) mean that these issues do not require determination and we do not deal with them.

## **Result**

[63] For these reasons, the appeal is dismissed.

[64] The appellants submitted that given the importance of the issue, this may be a case where it is appropriate for costs to lie where they fall. We see no basis for departing from the usual principle that costs follow the event. The respondent is entitled to costs for a standard appeal on a band A basis together with usual disbursements. We order accordingly and we certify for second counsel.

Solicitors:  
Crown Law Office, Wellington for Appellants  
NZALPA, Auckland for Respondent