

## **Civil Aviation Act and Airports Authorities Act: Consultation Document open for submissions**

On 1 August 2014 the Ministry of Transport (MOT) released a consultation document as part of its review of the Civil Aviation Act 1990 (CA Act) and the Airports Authorities Act 1966 (AA Act). This has been foreshadowed for some time, and Ministry officials have already engaged with industry, the CAA, and policy officials during the pre-consultation phase to identify from the outset any key areas of concern or where legislative reform is most considered to be needed. This has formed the basis of the proposals and options put forward in the consultation document.

### **Consultation time frame**

Formal consultation runs until 31 October 2014. Regional meetings have now been scheduled where participants can learn more about the proposals and options raised, or discuss other issues not covered in the consultation document. I encourage participants to attend those meetings if you can. Written submissions must be received by MOT by 31 October 2014. Recommendations will then be made to cabinet for consideration of the adoption of new Acts to replace the existing legislation.

### **Structure of consultation document**

The Consultation document considers both Acts together, and issues for discussion are grouped under the following sections:

- Part A: Statutory framework
- Part B: Safety and Security
- Parts C & D: International air carrier liability and licensing provisions
- Part E: Airports
- Part F: Other matters including ICAO convention obligations, and the powers to set fees and charges by Regulation

I briefly outline below some of the key proposals and options discussed under Parts A and B of the consultation document, which participants may wish to consider submitting on.

### **Part A: Statutory framework**

Part A of the consultation document reviews the broad statutory framework across the two Acts, and the current allocation of statutory powers and responsibilities between the Minister of Transport, the Secretary for Transport, the Civil Aviation Authority (as represented by the Board), and the Director of Civil Aviation. The Minister has overall responsibility for the transport portfolio, and the Minister and Secretary share responsibility for economic responsibilities, primarily relating to airport authorities and international air carrier licensing matters. The Director of Civil Aviation has primary statutory responsibility for oversight and enforcement of civil aviation safety regulation. The Authority has primary responsibility for oversight of aviation security matters, and some overlapping responsibilities in relation to specific safety regulatory functions.

It is largely proposed to maintain the status quo, with some clarification of the duties and responsibilities of each actor, and a requirement that all actors must exercise their powers “efficiently and effectively”. Given this, there may not appear to be much cause for excitement from the proposed changes in this part of the consultation document.

However, I suggest that participants should consider the nature of the respective powers and responsibilities granted to the Authority and the Director of Civil Aviation, and whether some of the Authority functions should be statutorily exclusive, as indeed some of the Director’s powers currently are. For example, while the Authority is charged with responsibility for investigating air incidents and accidents, in practice this is delegated to the Director of Civil Aviation and from there to CAA safety investigation personnel. This means that the reporting lines are to the Director, who is also responsible for regulatory oversight of participants, including taking law enforcement action for breaches of civil aviation rules. There has long been concern within industry about the Director wearing both hats, and in my view, this goes hand in hand with the acknowledgement in the consultation document that under reporting of incidents and accidents is still considered to be a major problem in New Zealand. In my view there is an opportunity to amend the investigation functions granted to the Authority, to require that these functions are exclusive to the Authority and are not delegable to the Director. While they would in practice be carried out by the same CAA safety investigation personnel, the reporting lines would be to the Board and not the Director, and the employment relationships could reflect this as well.

In my view this would provide some separation between the Director’s regulatory oversight and enforcement duties and powers, and the Authority’s safety investigation functions, and would assist in the general aim of encouraging increased voluntary reporting and disclosure of incidents and accidents to the CAA. There may well be other functions granted to the Authority that should also be statutorily exclusive and not delegable to the Director. For this reason I would encourage participants to think about making submissions on this aspect of Part A of the discussion document.

## **Part B: Safety and Security**

Part B of the consultation document focuses on the key statutory duties, responsibilities and functions of participants, and the duties, powers and responsibilities of the Director of Civil Aviation, over entry and exit into the system; and on aviation security matters. It is too detailed to cover all key proposals in this article, so I encourage participants to read this Part carefully and make submissions on any areas of interest. The two particular aspects that I will highlight concern medical certification, and safeguards against the exercise of the Director’s entry and exit powers.

### *Medical certification*

- Certification via ‘standard’ route, and through the Accredited Medical Conclusion (‘AMC’) route: The consultation document notes that in the 2012/13 financial year, around 750 medical certificates were issued via the ‘AMC’ route. This is where an applicant has a medical condition that precludes issuance of a medical certificate under the standard pathway, but may allow issue of a medical certificate with or without conditions using defined statutory flexibility criteria.

The CAA acknowledges that around one third of cases dealt with under the AMC process are straight forward and/or relate to a stable ongoing medical condition. It is therefore proposed to allow for a third certification pathway, which would enable an abbreviated form of AMC process to be followed for issue of those medical certificates, unless there is a change in medical condition that warrants a full review. This proposal is sensible and should prevent unnecessary costs and delay for applicants and the CAA.

- Recognition of foreign medical certificates: While there is already some capacity to recognise foreign medical certificates, the consultation documents asks whether this recognition should be further extended and if so, what oversight there should be of foreign issued medical certificates by the NZ CAA. This is something that aviation organisations that employ or are considering employing foreign pilots should give thought to, and is discussed at page 50 of the consultation document
- Medical convener and appeal rights: The discussion document reviews the existing rights of appeal to the District Court and medical convener. It notes that appeals are rare, and the number of convener reviews is also relatively small. Moreover, the convener rarely ever disagrees with the CAA medical decisions and conclusions. It attributes this as a sign that the system is working and that the public can have confidence in the decisions being made by the Director. It then canvasses the option of retaining the convener function, with or without a direct charge for this process, or scrapping it altogether.

I have misgivings about the conclusion in the consultation document that the lack of appeals and low number of convener reviews, and absence of disagreement between the convener and the CAA medical unit, is a sign that the system is working well and the decision makers are getting it right all of the time. It could equally be a sign that existing appeal and review rights are not truly effective in achieving their statutory objectives.

In my view, the District Court appeal process is too expensive, slow and ill-suited to deal with CAA medical matters, and I have never encouraged anyone to go down that route. I similarly have misgivings about the effectiveness of the convener review function in its current form. When comparable cases are considered from overseas tribunal decisions, it is apparent that from time to time, expert tribunals have seen fit to disagree with and depart from the regulatory authority's medical judgement and decision making. Equally, foreign regulatory medical authorities have in many cases permitted pilots to fly, who have been denied medical certification or given more restrictive medical certification in New Zealand. The fact that the medical convener rarely disagrees with the CAA medical unit is in my view a sign that the medical convener may in practice be too susceptible to capture by the CAA, and/or simply unable or not sufficiently resourced to provide a meaningful independent review and critique of the CAA's decision making.

Having said this, for reasons discussed below, I share some of the MOT's concerns that a newly constituted tribunal would have many policy hurdles and cost implications to overcome and would be unlikely to be pursued by government at this time. There is not therefore any immediately apparent or easy answer to address this issue. A possible option could be to retain the convener review process, but provide a statutory mechanism for additional experts to be co-opted onto a panel in specific cases, probably on a user pays basis. Whatever is to be done, in my view the status quo is not the best answer and the analysis supporting that position is somewhat superficial.

## Safeguards against the exercise of the Director's statutory powers

- The consultation document notes efforts made by the CAA in recent years to develop policies regarding the use of regulatory tools, for example regarding the exercise of the Director's powers to suspend or revoke aviation documents, and asks whether the CA Act should be amended to provide legislative authority for the CAA's regulatory approach (refer pp43-44). Participants should familiarise themselves with the CAA policy documents and consider making submissions on this aspect. Some sort of statutory guidance on the use of such powers may add some safeguards for participants, although I am weary of such powers being subject to overly prescriptive or defined criteria, as this can be a double-edged sword. The merits of any decision made under these powers should be demonstrably reasonable, and should not be overshadowed by a 'tick the box' exercise against pre-defined statutory criteria
- The consultation document discusses the fit and proper person criteria, and explores whether the Director should have greater and more express powers to demand personal information from other government agencies that it may have difficulty accessing at present. It also canvasses options as to whether the criteria should expressly require the Director to consider specific non-transport related convictions, and even the fact that a person has been charged with offences. Any moves in this direction obviously have important privacy implications as well as natural justice implications, in terms of what information is able to be sourced and what weight is placed on it. I encourage all participants to give thought to and make submissions on this issue.
- The consultation document also reviews the existing appeal rights (pp59-61). As with my comments above under medical certification, I do find some of the analysis as to the lack of current appeals being taken, and the reasons for this, to be a little bit thin. However, I agree with the reservations expressed by MOT about the likelihood of a specialist tribunal being constituted to deal with aviation matters any time soon. There would more than likely need to be a ground swell of support for a general transport, or even broader public administration, decision making appeals body. In the current climate, it seems unlikely that this would be high on any government's agenda for the foreseeable future. While I think it is commendable that the consultation document seeks feedback on options for a specialist tribunal, and encourage participants to share their feedback and ideas on what this might look like and how it might operate, I would also suggest that participants and MOT should be thinking about other alternatives to improve the current appeals rights.

In my view, MOT would do well to have closer regard to legislative reforms adopted in Australia in recent years, which provide specific and timely safeguards for participants where the regulator takes adverse regulatory action against a participant. In Australia, any decision to suspend an air operator certificate is immediately reviewable by the Courts, and the onus is on the regulator to apply to the Court to extend an initial suspension further while investigations continue. I have written articles comparing the Australian vs New Zealand approach to suspending air operator certificates which can be viewed on my website under [www.amclegal.co.nz/Articles/Air Operator Issues](http://www.amclegal.co.nz/Articles/Air Operator Issues). In the absence of any real prospect of a specialist tribunal being constituted, I urge policy officials and participants to consider adopting similar safeguards, and across all aspects of the Director's powers.

This would put some real teeth and meaning into existing appeal rights, and enable efficient and more cost effective review of decisions by the Courts than is capable of happening at the present time.

### **Comment**

All participants, and particularly those with commercial interests or involvement in the system, should review and consider making submissions on these and other issues raised in Parts A and B of the consultation document. This may be the only opportunity for another 25 years or more, to influence the extent of any reform of the statutory powers and functions of the Civil Aviation Authority and the Director of Civil Aviation, and to improve the statutory safeguards that exist to protect the rights of participants subject to adverse action by the regulator. Don't miss this opportunity.

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