

Dealing with the CAA: Statutory Powers, Rights & Obligations (Part 1)

This is the first of a three part series which will provide an overview of the regulatory structure and legal framework that the New Zealand civil aviation industry operates within, the powers and functions of the CAA and the Director of Civil Aviation, and the rights and obligations of participants when dealing with the CAA as part of the exercise of its statutory powers and functions.

1. Statutory framework and regulatory structure

The New Zealand Civil Aviation Act 1990 (CA Act) was enacted following a wide ranging “first principles” review of the civil aviation system, known as “Swedavia-McGregor”, which aimed to better define and provide a clearer demarcation between the respective roles of the government, the regulator, and the industry in achieving a safe aviation system. This resulted in the following statutory framework and regulatory structure:

The Minister of Transport

The Minister of Transport is the government Minister with responsibility for the aviation portfolio.

Section 14 states that the objectives of the Minister under the Act are:

- To ensure implementation of New Zealand’s obligations under international civil aviation agreements; and
- To undertake the Minister’s functions in a way that ‘contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system’.

The latter objective is not specific to aviation but encapsulates a whole of government transport policy formulated by the previous Labour government, across all modes of transport. Some within the industry question what value or meaning this objective adds to aviation, and prefer the original statutory objective as first enacted in the CA Act, of ‘achieving safety at reasonable cost’.

The Minister has the following statutory functions under s 14A:

- To promote safety in civil aviation
- To administer New Zealand’s participation in ICAO and other international conventions or agreements on civil aviation
- To administer any of the Crown’s interests in aerodromes
- To make the Civil Aviation Rules.

The Minister is supported in these tasks by officials from the Ministry of Transport, who advise and assist in the formulation of aviation policy, interact with other states and ICAO on behalf of the Minister, and act as an agent for the Minister in its dealings with the CAA and other agencies.

The Minister has statutory responsibility for establishing and maintaining New Zealand’s aviation and maritime search and rescue functions. The Minister can issue a statutory direction to the CAA or Maritime New Zealand to carry out this function on his behalf, and direct either agency to participate in any particular search and rescue operation. Maritime NZ is the primary agency currently directed to provide these search and rescue functions. The Minister also has an important role and relationship with the Board of the Authority (discussed below). The Minister may also delegate the performance of any of his functions and powers to the Authority.

The Civil Aviation Authority

The Civil Aviation Authority is a Crown entity pursuant to the Crown Entities Act 2004. A Crown entity is in theory operated at arms-length from the government, parliament and government departments or ministries, and is usually set up to deliver or administer specific services or regulatory functions. However, an entity with a “hands on” Minister, or that has been the subject of adverse political or public attention, could be more sensitive or vulnerable to greater political involvement or intervention in its day to day affairs. Some Crown entities can also be subject to mandatory “directions” from Ministers to implement certain government policies or carry out certain functions (such as the search and rescue function aforementioned).

Under s72A of the CA Act, the Minister appoints 5 “members” who comprise the Board of the Authority. At least two Board members are required to be appointed by the Minister after consulting with organisations with a substantial interest in the industry, and the balance are usually professional directors. That said, Ministers do have a great deal of discretion as to who they appoint to a Board, and the membership of Boards may therefore at times be driven by political interests or agendas, or at the very least, by a desire to “keep tabs” on a Crown entity. The primary statutory accountability mechanism of a Crown entity to its Minister is through the Board, and the Board may effectively be the “eyes and ears” of the Minister as to the inner workings of a Crown entity.

It should also be noted that “the Authority” is a distinct legal entity with its own responsibilities and functions under the CA Act, which are separate and differ from the statutory functions and powers of the Director of Civil Aviation.

The Authority is subject to the statutory objective of achieving its “safety, security and other functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system” (s 72AA).

Pursuant to s 72B of the Act, the Authority has the following specific functions and responsibilities:

- To promote civil aviation safety in New Zealand and internationally
- To foster and facilitate the provision of education programmes that promote its objective
- To maintain and preserve aviation records, including the NZ register of aircraft and civil aviation registry
- To investigate civil aviation accidents and incidents (subject to the prior jurisdiction of TAIC)
- To establish and publish the CAA Service Charter (this is discussed in the October 2011 *The Legal Lounge* article, “Unfair treatment by public officials – Options for Redress : Part 1)
- To enter into technical or operational arrangements with civil aviation authorities of other states
- To establish and continue the Aviation Security Service
- To provide such information and advice as the Minister from time to time requires
- To appoint the Director of Civil Aviation.

The Authority must also carry out any search and rescue functions as directed by the Minister. The Authority must also implement any civil aviation functions or duties that the Minister directs it to do, pursuant to the Crown Entities Act. I am not aware of the latter power being exercised to date.

The Director of Civil Aviation

The Director of Civil Aviation is appointed by the Board, and also fills the role of the Chief Executive of the Authority. The Director/CEO is not a member of the Authority, but works closely with the Board on financial management and reporting requirements, and high level strategic and operational issues. The Director is also acting in his or her capacity as the CEO when dealing with issues such as staff recruitment and employment relations. Complaints by industry participants about the conduct of specific staff members for example, would be dealt with under the “CEO” umbrella rather than pursuant to the Director’s statutory functions and powers in the CA Act.

The Director may, in addition to exercising his or her specific powers and functions under the CA Act, be delegated with such functions and powers of the Authority (or as delegated to the Authority by the Minister) that the Board is lawfully able to sub-delegate, pursuant to the Crown Entities Act. In practice therefore, the Director and his or her staff carry out or implement many of the Minister’s and Authority’s functions under the CA Act, in addition to the specific statutory powers and functions of the Director.

Overview of Director’s statutory powers and functions

The Director must, pursuant to s 72I, exercise the following functions and powers in the CA Act:

- Exercise control over entry into the civil aviation system through the granting of aviation documents (ss 6 – 9)
- Carry out inspections and monitoring of participants in the system (s 15)
- Take such action as is necessary to enforce the provisions of the Act and any regulations or rules made under it, including:
 - conducting investigations of aviation document holders under s 15A
 - taking law enforcement action for breach of the Act or Rules; and/or
 - taking administrative action against aviation documents or document holders (ss 17 – 20). This is referred to as the Director’s ‘exit powers’

The Director also has the power to detain or seize aircraft or aeronautical products if it may endanger persons or property (s 21), and to issue airworthiness directives in respect of an unsafe condition in an aircraft or aeronautical product (s72I (3A) – (3C)).

It is explicit in s72I(4) of the Act that, in enforcing the Act or rules, or exercising the Director’s exit powers in ss 17 – 20 of the Act, the Director “shall act independently and shall not be responsible to the Minister of the Authority for the performance or exercise of such functions or powers”. This is an important statutory provision which is intended to safeguard the exercise of these powers from undue political interference, and ensure the statutory independence and integrity of the Director and the role of the regulator is protected.

At times, criticism is made that this type of statutory provision enables Ministers to distance themselves too easily from the acts of officials and regulators. Equally, Ministers and undoubtedly Boards have on some occasions felt frustrated at not being able to intervene when they considered that things were being mishandled or dealt with inappropriately. While there may be some validity to these concerns, in my view the statutory balance is probably about right.

As I am sure the current and any previous Director would attest to, the existence of this statutory protection does not prevent the Director from being subject to at times intense scrutiny and, ultimately, if the Director loses the confidence of the Board or the Minister, his or her tenure is likely to come to an end.

Both the Board and the Minister also receive regular updates of any major decisions or possible 'risks' facing the organisation, and participants may at times be able to influence outcomes or gain traction on issues by raising concerns with the Board, the Minister or Members of Parliament. The ability of those parties to formally intervene will depend on the nature of the issue or concern raised, and whether the statutory protection in s 721(4) is invoked, but the extent to which those parties may be able to indirectly influence the process should not be ignored. In addition, there is no statutory restriction on the ability of the Minister or Board to intervene regarding complaints or concerns about the exercise or performance of powers and functions of the Minister or Authority that have been sub-delegated to the Director and other CAA personnel, although this would not be done lightly and without proper consideration of all issues.

In the next edition of *The Legal Lounge* I will provide a more in-depth discussion and review of the Director and Authority's inspection and monitoring and investigative powers and functions, how they are carried out in practice, and the rights and obligations of participants involved in these processes.

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