

Dealing with the CAA: Statutory Powers, Rights & Obligations (Part 2)

In the first part of this series I provided an overview of the New Zealand civil aviation regulatory structure, including the statutory powers and functions of the Minister of Transport, the Civil Aviation Authority (as represented by the Board), and the Director of Civil Aviation.

In the second part of this series, I focus on the Director's statutory powers to carry out inspections, monitoring and regulatory investigations of civil aviation participants, and how this is done in practice.

1. Statutory authority of Director to delegate powers and functions

A point which I find is often not fully understood within industry, is that the Director of Civil Aviation may, and routinely does, delegate most of his or her statutory powers under the Civil Aviation Act 1990 (CA Act) to CAA personnel, and in some cases, to external delegates. This includes the Director's power to carry out inspections, monitoring and regulatory investigations of participants, and even to make decisions to suspend an aviation document. The power to revoke an aviation document is in most circumstances reserved only to the Director and cannot be delegated.

Participants should therefore bear in mind that a decision made or a power exercised by a CAA staff member or appropriately authorised external delegate will generally be binding on a participant and, as a matter of law, will be treated as the actions of the Director, as though he or she had exercised the power directly. As a general rule, the Courts will also usually presume that a CAA official is acting pursuant to a valid and lawful delegation unless evidence is produced to the contrary.

A further point that sometimes causes confusion among participants is that this power of delegation does not derogate from or abrogate the right of the Director to exercise any of his or her statutory powers at any time. The Director may therefore exercise his or her powers to affect a different outcome from an earlier decision or action taken on his or her behalf, provided the subsequent decision or exercise of the statutory power is lawful, and objectively reasonable. The Courts have also held that a statutory decision maker may change his or her mind even on the same information, provided there is a lawful and objectively reasonable basis to do so.

2. Section 15 inspection and monitoring powers

Section 15(1) provides the Director with the power to require participants, in writing, to carry out or undergo such inspections and monitoring as is considered necessary in the interests of aviation safety and security. Section 15(2) provides a specific power to the Director to conduct inspection and monitoring activities against participants (note there is no requirement under s 15(2) for prior written notice). These powers extend to persons holding aviation documents, or persons who otherwise operate or provide "aviation related services" (refer to s 15(1)(b) for more detail).

The CAA "*Use of Regulatory Tools Policy*", May 2012 version (*The Regulatory Tools Policy*), available on the CAA website under Policies, states that such inspections and monitoring activity may include audits, inspections, no-notice checks, and focused special purpose audits or inspections.

It is stated that these activities may result in formal findings, corrective actions, follow up action to support risk reduction through a willing return to compliance, or assessment of the need or otherwise for further interventions (such as law enforcement action or further investigations or administrative action).

Section 15(3) authorises the Director to require, in writing, from any person subject to inspections or monitoring activity carried out under s 15(2), “such information as the Director considers relevant to the inspection or the monitoring”. For this reason inspections carried out on notice under s 15(1) will also usually refer to and rely on the inspection power under s 15(2).

It is important that participants comply with any lawful request from the Director or his or her delegates under s 15(1) or s 15(3), as failure to do so “without reasonable excuse” is an offence under s 44A of the CA Act. If participants have any doubts as to whether information requested under s 15(3) is relevant, I would suggest erring on the side of disclosure, or if you have serious concerns, seek legal advice. You should also be aware of the CAA’s powers under s 24 of the CA Act (discussed below) to access facilities and seek records, when deciding how to respond to any request under s 15.

3. Section 15A investigation powers

Section 15A is a specific power of investigation of aviation document holders, and is linked to the Director’s “administrative” or “regulatory” powers to suspend, revoke, or impose conditions on aviation document holders under ss 17 – 19 of the CA Act.

The Director may, in writing, require an aviation document holder to undergo an investigation under this section if the Director –

- considers that the privileges or duties for which the document has been granted are being carried out carelessly or incompetently; or
- has reasonable grounds to believe that the holder has failed to comply with any conditions of an aviation document or with the requirements of section 12 of the Act.

Section 12 of the CA Act sets out the fundamental requirements for all participants, including the requirement to hold an appropriate aviation document; to comply with the relevant rules, regulations and the CA Act, and any conditions on the aviation document; and to ensure all activities and functions to which the aviation document relates, are carried out safely and in accordance with prescribed safety standards and practices.

Pursuant to s 9(3) of the CA Act, it is a condition of every aviation document that the holder is and remains a fit and proper person to exercise the privileges of that document. The fit and proper person criteria are specified in section 10 of the CA Act. In practice therefore, the focus of most or all section 15A investigations will be on compliance with Sections 12 and 10 of the CA Act.

The process will usually involve an investigation carried out by a panel comprising of two or more investigators, who will obtain information and investigate the aviation document holder’s affairs, with a review to reporting to the CAA management and Director on their findings. The subject will usually be invited to attend an interview with the investigation panel to discuss the issues under investigation.

Current practice is for the investigation panel to simply set out their investigation and findings, without making any formal recommendations. The subject of the investigation will be given an opportunity to comment on a draft s15A report from the panel, before this is finalised and elevated to the Management to consider. The relevant Manager will review and provide any further comments and recommendations to the Director on any action or proposed action to be taken. The applicable General Manager will then review the report of the Manager to ensure compliance with *The Regulatory Tools Policy* in the conclusions reached and recommendations made by the Manager. The report and recommendations will then be forwarded to the Director for a final decision.

If the Director proposes to make an adverse decision to suspend, revoke or impose conditions on an aviation document, this must first be notified to the participant under s 11 of the CA Act, and there will then be a further opportunity to make submissions before a final determination can be made by the Director.

This is a complex and often daunting process to go through, and I strongly recommend legal advice be obtained by any person subject to a s 15A investigation or s 11 process at the earliest opportunity. For more information, review *The Regulatory Tools Policy* on the CAA website. The s 10 fit and proper person criteria and s 11 process are also discussed in previous issues of the *Legal Lounge*, which can be viewed at www.amclegal.co.nz/Articles, under Fit and Proper Persons issues.

4. Section 24 rights of access and entry

Section 24(1) of the CA Act permits any person duly authorised by the Director to have a right of access at any reasonable time to any –

- aircraft, aerodrome, building or place (except a private dwellinghouse or marae); and
- document or record concerning any aircraft, aeronautical product or aviation related service

- for the purposes of carrying out his or her functions, duties or powers under the CA Act, Rules or Regulations.

Section 24(2) permits duly authorised persons to enter at any reasonable time any aircraft, aerodrome, building or place, to carry out an inspection, if the person has reasonable grounds to believe that –

- a breach of the CA Act, Rules or Regulations is being or is about to be committed; or
- a condition of an aviation document is not being complied with; or
- a situation exists or is about to exist that constitutes a danger to persons or property.

What amounts to a reasonable time under s 24(1) and 24(2) will depend on the circumstances and facts of each case. As a general rule of thumb, you should consider yourself to have a duty reasonably to assist in any request for access or entry under these powers. Obstruction of a person lawfully exercising these powers could lead to prosecution under s 50 of the CA Act, and attracts a maximum term of 3 months imprisonment.

Any person exercising the powers to access or enter any aircraft, aerodrome or building may, pursuant to s24(3), require any person in possession of any document that is required to be kept under the CA Act to produce or surrender it. Failure of a participant to comply with lawful requests to produce or surrender documents under s 24(3) is an offence under s 50A of the Act, and attracts a fine of up to \$1,000.

These powers do not apply and cannot be used to gain a right of access, inspection, or to require surrender of, any record that is subject to an investigation by the Transport Accident Investigation Commission. A judicial warrant must also be obtained in order to gain access or entry to a private dwellinghouse or marae.

Personnel must also have a valid warrant of authority issued by the Director and must carry it with them when exercising any of these powers. If exercising a power of entry under s 24(2), they must produce and show the warrant of authority, and proof of identity, if practicable before first entering, and whenever subsequently reasonably required to do so. In any other case, although it is not explicitly stated in the CA Act, they should generally be able to produce it when reasonably asked to do so. Failure to produce a valid warrant of authority may not necessarily invalidate a subsequent decision or action taken by or on behalf of the Director, but could lead to issues of admissibility of evidence, or give rise to a separate cause of action if the proper process was not followed during the initial exercise of the s 24 statutory powers.

If you have any concern about the exercise or proposed exercise of any of these powers by a CAA official or external delegate, seek legal advice at the earliest opportunity. If that is not immediately practicable at the time when a power is sought to be exercised, it would probably be wise to err on the side of co-operating and complying, and seeking legal advice later if you have any concerns.

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