

The FPP test – last words

In the March edition of *Aviation News*, a reader's letter questioned the virtues of the FPP test in the aviation context, and why the Director of Civil Aviation should have the power to determine who is or is not fit and proper to participate in the civil aviation system. This raises some interesting policy issues and would no doubt make for a lively debate in another forum.

However, while I can't enter that debate here, the reader raised some general questions about the genesis and purpose of the FPP test, and how it came to apply to aviation participants, that are worthy of at least a brief explanation. As promised in my last column, I will also provide a few tips on some "do's" and "don'ts" when responding to a proposed adverse decision.

What is the genesis of the FPP test and what purpose does it serve?

The FPP test as a legal concept has evolved and developed since at least the nineteenth century and now applies in varying ways and degrees to a wide range of people such as lawyers, accountants, doctors, commercial transport operators and persons who hold gun licences and liquor licences, to name but a few. In general terms, it is intended to protect the public interest by ensuring that persons carrying out certain professions or occupations, or engaging in certain activities, meet a standard of character and behaviour that the public might generally expect of those persons. There is no one universal test; rather the FPP concept is adapted and applied depending on the nature and purpose of the occupation or activities being carried out and the public interest being served.

In principle, application of an FPP test or standard to such occupations is intended to not only protect the public at large but also those engaged in the occupation concerned, by ensuring that each person entrusted to engage in those activities meets and continues to meet the relevant standards. For this reason, sanctions for those falling below the required standards are considered to be important in maintaining the integrity and reputation of an occupational group as a whole. Sanctions may range from a warning or censure in more minor cases, to a fine or temporary suspension or, in the most serious of cases, removal of the right to participate in the profession or activity.

Why does the FPP test apply to aviation participants?

The public interest being served in the aviation context is, quite simply, safety. While practical and theory tests may demonstrate a person's competency and skills, for example the ability to fly an aircraft, the FPP test is directed to ensuring that the participant has demonstrated an *appropriate attitude to aviation safety*. The statutory test is intended to provide a mechanism to assess whether each participant may reasonably be expected to comply with all applicable aviation safety regulatory requirements, and to exercise the privileges of their aviation documents in a safe manner.

How broadly does the FPP test apply in the aviation industry?

The FPP test applies to all civil aviation participants who wish to hold an aviation document, not just pilots. CAA approved senior persons in certificated aviation organisations must also satisfy the FPP test.

Participants must also establish that they satisfy the FPP test each time they apply for a new document or privilege. The rationale for this is that each document or privilege is distinct and participants must establish that they are fit and proper to exercise each of those distinct privileges. In addition, all participants must continue to satisfy the FPP test at all times, and a wide range of sanctions may be available to the Director if persons are considered to fall below the required standards for any purpose for which they have been approved as fit and proper. The FPP test is therefore as relevant to a veteran participant as a new entrant.

What are the FPP criteria and how are they applied to aviation participants?

The FPP criteria applied to aviation participants are specified in section 10 of the Civil Aviation Act 1990, a copy of which can be viewed on www.amclegal.co.nz under *Legislation*. The CAA website has some general guidance on the FPP test (search under “F” on the A to Z topics – as for the reader’s question as to whether the information provided by the CAA is adequate, that is perhaps best judged by readers). In the February edition of *The Legal Lounge*, I also provided some specific comments as to the possible implications of a traffic infringement or criminal conviction on a person’s FPP status.

Responding to a proposed adverse decision – some *do’s* and *don’ts*

In the March edition of *The Legal Lounge*, I outlined the legal process and commented on some issues to be aware of if the Director proposes to make an adverse decision that a person is not fit and proper to participate in the civil aviation system for any purpose. I’ll now offer some general tips on what to do (or what not to do) when responding to a proposed adverse decision. Although this is generally directed towards a proposed adverse FPP decision, these comments may equally apply to any other proposed adverse decision of the Director, including against an organisation.

Don’t:

- Respond to a Notice of Proposed Adverse Decision by faxing back a letter attacking the attributes of the Director, or claiming that he or she is biased and has it in for you (unless you have very credible evidence which you can articulate to support this)
- If you have been subject to a s15A investigation, write derogatory comments all over the investigation report about the investigators, and/or why the entire report is nonsense, and send that back as your submission
- Deny every adverse allegation or incident that is considered to have been established against you, especially when there is clear evidence supporting it
- Claim that any negative feedback about you from others, whether in CAA or in industry, is due to a “conspiracy” or vendetta (unless you have very credible evidence of this)

Do:

- Avoid knee jerk responses - take a deep breath and put your first draft response aside for a couple of days
- Ensure you address and respond to all of the key issues and allegations made against you
- Make appropriate concessions and acknowledgments when your behaviour has slipped below required standards or been found wanting

- If you do disagree with a particular allegation or any specific feedback given, provide a clear and concise explanation supporting your denial of the allegation, or reasons for rejecting specific feedback as inaccurate or unfair
- Address why the proposed adverse outcome should not eventuate and, if applicable, what you suggest should happen instead
- Know when to seek help with your submissions from friends or colleagues, or professionals

While the timeframe for submissions is tight, it's better to take a couple of days out if necessary before attempting to respond. A well-thought-out and fully considered submission may well reverse, or lessen the severity of, a proposed adverse decision. An ill-considered submission may very well have the opposite effect and seal your fate.

The "don't" examples listed above are based on actual responses that I have seen in the past. While it is natural to feel under attack, emotive or defensive responses and claims of bias usually lack substance and credibility, and do not serve to convince the Director his or her initial assessment is wrong. Moreover, it risks overlooking the key issues and allegations, which are left unanswered and unchallenged.

The credibility of a submission may also be undermined if there are obvious failures to accept involvement or responsibility for adverse incidents, even when there is clear evidence. In such cases, it is far better to acknowledge what occurred and to try and demonstrate either that the person's behaviour was out of character or that the person has learned from it, than to deny or minimise what occurred or shift blame to others. The same applies when there is consistent negative feedback about a person's attitude from others.

Finally, don't be afraid to ask someone not directly involved or related to you, to provide some objective input, and if necessary to help with your submissions. After all, this is a serious process, and your future in the industry may be at stake. This is not the time for knee jerk reactions, and the quality of your response may well determine the final outcome!

This edition of *The Legal Lounge* concludes my three part series on the FPP test, although I'm happy to answer any questions or discuss any of the issues raised in this series further with participants.

In the next edition of *The Legal Lounge*, I will address CAA medical certification issues.

Angela Beazer is a lawyer and Director of AMC Legal Services Ltd, a law firm specialising in aviation and public law matters. Previous articles from *The Legal Lounge* series may be viewed at www.amclegal.co.nz

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