

## **Proposed Part 139 Rule update (aerodromes) – how it may affect you**

In this edition of *The Legal Lounge* I provide a brief overview of the proposed rule changes to NZ Civil Aviation Rules Part 139, and my observations on some of the issues aerodrome operators and users ought to be aware of, and may wish to consider submitting on. The Notice of Proposed Rule Making (NPRM) was published on 15 March 2012 and is open for submissions until 18 May 2012.

### **Proposed key changes to Part 139**

#### ***Certification of aerodromes***

At present, only aerodromes that facilitate aircraft engaged in ‘regular’ air transport operations that are certified for more than thirty passenger seats are required to be Part 139 certificated, although some aerodromes below this threshold are voluntarily certificated. Under the proposed new Rule Part, three levels of required certification of aerodromes will be introduced:

*Level 1* – aerodromes facilitating international scheduled air transport operations

*Level 2* – aerodromes facilitating domestic scheduled air transport operations for aircraft certified for more than nine passenger seats

*Level 3* – aerodromes not caught by Level 1 or 2 that have more than 40,000 aircraft movements or more than 7,500 IFR aircraft movements per annum, for three consecutive years

The new Rule Part distinguishes between rules applicable to all certified aerodromes, and those that only apply to Level 1, or Level 1 and 2 aerodromes. There are also changes relating to fire fighting, and emergency and rescue plans at certified aerodromes. This article does not discuss those aspects of the rule changes and affected aerodrome operators should review the draft rules for more details.

#### ***Provision of Air Traffic Services at aerodromes***

Proposed new rule 139.109 states that “when an ATS is required to be provided at the aerodrome”, the certificated aerodrome operator must establish a written agreement with a Part 172 certified organisation to provide the ATS service.

Draft Appendix B stipulates the criteria for the provision of ATS at an aerodrome, as follows:

*Aerodrome flight information service* – where there is no aerodrome control service and the aerodrome services aircraft movements exceeding 40,000 per annum or IFR movements exceeding 7,500 per annum for more than three consecutive years

*Aerodrome control service* – where the aerodrome facilitates international scheduled air transport operations; where aircraft movements exceed 60,000 per annum, of which more than 9,000 are IFR movements, or exceed 100,000 aircraft movements per annum, for three consecutive years.

#### ***Aeronautical studies***

The Director may also require any aerodrome, whether certified or not, to conduct an aeronautical study to determine whether ATS is required, or where ATS is currently provided, to determine whether that level of ATS is still appropriate.

Certified aerodromes must also conduct an aeronautical study when a “significant change’ in aerodrome operations occurs that may affect the safety of aircraft operations. A significant change is stated to include a change in aerodrome aircraft traffic, aircraft operations type, aerodrome physical characteristics, an increase in aerodrome incidents/accidents, or a change in airspace designation.

### ***Other requirements affecting all aerodromes***

All aerodromes published in the AIP, whether certified or not, will be required to:

- Meet certain minimum standards for aerodrome design, limitations and public protection; and
- Provide aircraft movement data to the CAA and meet certain requirements for the publication of aerodrome information

The requirement to provide movement data and conduct aeronautical studies may also be extended by the Director of Civil Aviation to other unpublished aerodromes if deemed necessary “in the interests of aviation safety”.

### **Comment on proposed key changes to Part 139**

#### ***Certification of aerodromes***

The adoption of multi “levels” of certification within one Rule Part is unprecedented. The introduction of Level 1 and 2 certification, and some of the draft new rules applicable to those aerodromes, are purportedly in response to a number of recommendations made by ICAO during its last audit of the NZ civil aviation system.

The third level of certification is not however directed to addressing any ICAO standards or recommended practices. The statement in page 11 of the NPRM that the three levels of certification are commensurate with the rule parts for air operations is also not correct. The proposed third level of certification does not capture aerodromes facilitating aircraft conducting scheduled air transport operations by aircraft certified for nine or less passenger seats, and indeed it is proposed that aerodromes facilitating such air traffic that wish to voluntarily certify, must apply for a Level 2 certificate.

Level 3 certification is based on aircraft movement numbers alone, and it is acknowledged in the NPRM that this would presently only apply to one aerodrome (Ardmore). What is also clear is that this proposal is not driven by aerodrome safety or design concerns (refer to the proposed rules above that will apply to all aerodromes), but rather the desired policy intent of the CAA to require ATS services to be provided at aerodromes with aircraft movements exceeding the same threshold that applies to Level 3 certification. This raises the immediate prospect for Ardmore airport and its users, that the CAA may require the aerodrome to ditch its current UNICOM service and provide ATS services. If that is not the CAA’s intent, the third level of certification serves no present purpose and should arguably be scrapped from the draft rule.

### ***Provision of Air Traffic Services at aerodromes***

The policy rationale for requiring ATS to be provided at aerodromes based on aircraft movement numbers alone also does not appear to be strong. This is acknowledged in the commentary in ICAO Annex 11, Chapter 2.4 “*Determination of the need for air traffic services*”. No doubt the nine aerodromes potentially affected by the proposed ATS changes will have plenty to say on this.

So too should all affected air operators and aircraft users, who will potentially have to bear increased landing or other user charges as a result of the introduction of ATS services at other aerodromes. There is a limit to how much the larger airlines can absorb in our highly competitive domestic market, and it is inevitable that smaller operators and individual aircraft users will also bear any increase in costs from the introduction of ATS at other aerodromes.

The drafting of the rules introducing these changes is also problematic. It is unclear, in my view, what status the ATS criteria in draft Appendix B are intended to have. The policy intent appears to be that introduction of ATS based on the stated thresholds in the Appendix is not necessarily mandatory, and that an aerodrome operator could conduct an aeronautical study or otherwise demonstrate to the Director that another mechanism may appropriately manage air traffic at an aerodrome. This is not clear from the drafting of the rules however, and the legal status of the ATS criteria needs to be clarified. If not, this could result in aerodrome operators who the CAA agrees do not need to provide ATS in accordance with Appendix B having to apply for exemptions, which is not good legislative drafting.

The inter-relationship between the ATS criteria and the ability to conduct an aeronautical study to consider other options to manage air traffic at an aerodrome is also not addressed in the draft rules, and nor is it specified who makes the final decision as to what form of air traffic management is ultimately acceptable. In my view, UNICOM should also be explicitly recognised in Appendix B as a potential option to manage air traffic at aerodromes.

### ***Aeronautical studies***

The rules as drafted give significant powers to the Director to require aerodromes to conduct aeronautical studies. However, there is no statutory direction or protection provided in the draft legislation as to what weight or regard the Director must have to an aeronautical study. I am aware of a fairly recent example where independent aeronautical studies did not support the need for ATS services at an aerodrome, but the Director none the less directed the aerodrome to introduce an aerodrome flight information service, in apparent reliance on internal advice.

In my view, the rules should require the Director to have regard to the conclusions and any recommendations made in an aeronautical study, and to have clear grounds to depart from any conclusion that ATS is not necessary at an aerodrome.

The rules should also stipulate that there is no requirement for a presumption when conducting an aeronautical study, that any form of ATS is necessary at an aerodrome. In the absence of this, the statutory thresholds for ATS in Appendix B may unnecessarily influence aeronautical studies and skew conclusions and recommendations in favour of ATS when it otherwise, on objective evidence and empirical analysis, would not be supported.

The requirement for certified operators to conduct aeronautical studies in the event that there is “significant change” is also stated in very broad terms. While it may be the CAA’s intention to address this further in an AC, in my view the rules need further refining or clarification as to when a change is “significant” enough to warrant an aeronautical study, and should not be dependent on CAA policy, which could change at any time.

### ***Other requirements affecting all aerodromes***

As noted above, there are also a number of other changes that will affect uncertified aerodromes published in the AIP, and some requirements may also be applied to unpublished aerodromes. All aerodrome operators should therefore review any changes that may potentially apply to them, and consider making submissions.

### **Comment on SMS Part 1 Rule Project and its overlap with Part 139 changes**

The SMS Part 1 Rule project includes Part 139 certified aerodromes, and is due out by the middle of the year. In my view, the changes to Part 139 should not proceed past the NPRM stage until the SMS Part 1 NPRM is published, so that all changes affecting certificated aerodromes can be implemented and considered together. In this respect, I would encourage the CAA and Ministry of Transport to consider extending the submission period for this NPRM to enable certified aerodromes to consider the proposed changes to Part 139 together with the proposed SMS changes, once that NPRM is released. This will enable more efficient and accurate input by those affected aerodrome operators as to the total cost, compliance and policy implications of these changes.

In the next edition of *The Legal Lounge*, I will return to my two part series on the legal obligations of aircraft engineers and maintenance providers.

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