Responsibility for Rule-making

The Civil Aviation Act 1990 is inappropriately drafted, with the rule-making capability of the Director severely restricted in favour of rules being made by the Minister.

Part 3, Rules, §31 limits the power of the Director to making only emergency rules. It explicitly prohibits the Director from making emergency rules when it is practical for the Minister to make ordinary rules.

Under §14A of the Act, the "Functions of Minister", are:

a. to promote safety in civil aviation
b. to administer New Zealand's participation in the Convention and any other international aviation convention, agreement, or understanding to which the Government of New Zealand is a party:
c. to administer the Crown's interest in the aerodromes
d. to make rules under this Act

The goals of the first two items above are better discharged by the Director having the power to make rules. When the Director of the CAA NZ is tasked with safety, why should the political process have any place in the execution of his duties?

Under the current system, rule-making is extremely slow, to the point that CAA staff have commonly recommended that industry should not bother asking for a rule change.

Evidence of this is the extremely slow pace of rule-making in response to the 2006 ICAO universal safety oversight audit program. The Rule programme for 2014[1] shows that CAA NZ is still making Rules to address the gaps identified by that audit – 8 years later! If this is the case for Rules required to conform to inter-governmental international conventions, what hope is there for participants in the system to achieve change?

Without a trace of irony, given these delays, New Zealand's commitment to ICAO is a centrepiece of the document "New Zealand Aviation State Safety Programme" (July 2014).

[1] As detailed in Civil Aviation Rules Register Information Leaflet, Edition 2014-03, dated 06 March 2014

Such delays result in the risk that industry perceives the CAA to be inert and not worth the effort of engaging with. Such disengagement would run contrary to the assumptions which underpin the successful operation of the regulator. The New Zealand Productivity Commission's report[2] "Regulatory institutions and practices" notes that:

"Responsive regulation tends to assume a binary relationship between the regulator and the regulated party.
But the regulated party will have information about how the operating strategy of the regulator has been applied to other parties and this can influence the behaviour of the regulated party towards the regulator".
If there is a lack of engagement between industry and the CAA, then this undermines the ability of the CAA to make decisions based on knowledge of what is happening in the industry. As noted, again in the Productivity Commission's report (page 63)

"Who uses a risk-based approach?

The Commission looked at the published enforcement strategies of a sample of national regulators.

- The CAA – risk reduction is the main enforcement goal of the CAA – every industry participant is rated according to the level of aviation safety risk they pose, and CAA resources are allocated towards activities where the consequences of failure are highest (CAA, 2014)".

Submitter's recommendation:

Given this history of a very slow Rule-making process and the detrimental effect on the relationship between the regulator and the regulated party, a practical solution would be for New Zealand to adopt the European approach, whereby the European Aviation Safety Agency (EASA) is given the authority[3] to make Rules. EASA has 28 member states, spanning practically the entire alphabet (from Austria to the United Kingdom). If this range of countries, which includes some of the world's largest aircraft manufacturers, can agree on such a process, why cannot New Zealand?

[2] http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-report.pdf

[3] Refer EASA Management Board Decision 01-2012

Quality of Rules made

Rules may sometimes be drafted to an excessive level of detail, which would be better covered in an Advisory Circular which is, after all, intended to communicate an acceptable means of compliance with the Rule and may be more easily amended than a Rule.

An example of this is Rule Part 121. 417 "EDTO Quarterly Report", which defines – in twelve numbered paragraphs – specific conditions which should be reported. Not only are these overly numerous, for the reasons above, but some of them are already covered by existing reporting requirements (121.405).

Equally, another Rule for EDTO, 121.407 "Maintenance elements for EDTO", runs to two and a half pages of prescriptive maintenance actions. Again, this could be better contained in an Advisory Circular.

A longer Rule is not necessarily a better Rule.

The Ministry of Transport, with its small policy team, could be more involved as a check and balance on the quality of CAA NZ rule-making proposals. Noted in the Performance Improvement Framework Review of the Ministry of Transport[4] section "What will success look like?" is the goal:

"The relationships with the transport Crown entities will be less about routine monitoring and more about alignment with overarching transport goals, efficiency and effectiveness in the policies they implement according to standards of classical policy analysis and regulatory impact statements"

Submitter's recommendation:

There should be an independent review of rules by the Ministry of Transport: essentially a "reality check".

[4] The Performance Improvement Framework Review of the Ministry of Transport, August 2013 (http://www.ssc.govt.nz/sites/all/files/pif-mot-review-august2013.PDF)