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22 September 2014

Martin Matthews
Secretary for Transport
Ministry of Transport
P O Box 3175
WELLINGTON

Attention: Nick Brown/Bev Driscoll

Dear Mr Matthews

REVIEW OF CIVIL AVIATION ACT AND AIRPORT AUTHORITIES ACT 1966

1. Thank you for your letter of 1 August 2014 inviting me to participate in the consultation relating to the review. In view of the limited time I have had available to study all the detail I now provide only relatively brief responses and only on some of the issues. The views expressed are my own and not necessarily those of any of the organisations I act for.

Part A – Statutory Framework

Separate Acts

2. I agree with option 2 that the opportunity should be taken to subdivide the current Civil Aviation Act. At present the enormous size of the statute makes it confusing for the uninitiated. In particular, the contents of the Act have their origins in many different treaties and many readers of the Act would not be aware of this background. This can lead to incorrect interpretations of the Act. For example, there can be confusion about the New Zealand civil aviation system as a whole, compared to the civil aviation safety and security **regulatory** system dealt with in Parts 1-8 of the Act.

3. The option of subdividing into three separate Acts does raise issues about demarcation. Clearly one advantage of subdivision is that safety and security is of primary concern and implementing the Chicago system (Convention and Annexes) in one Act is highly desirable.

4. With regard to a possible separate statute dealing with economic matters, it would be rather unusual to include in the one Act both international air service licensing for economic purposes as well as air carrier liability and the Cape Town Convention provisions. However these are all economic aspects of civil aviation. The immediate problem might be to decide upon a suitable title for the Act. There is actually a case

for subdividing further into an International Air Services Licencing Act; a Carriage by Air Liability Act; and a Financial Interests in Aviation Equipment Act. Each Act would reflect a distinct and separate treaty background.

5. I agree that the competition law provisions should be removed into the Commerce Act.

Airport Authorities Act

6. With regard to a new Airport Authorities Act, this is desirable given that the current Act has become almost incomprehensible. One issue for consideration is whether it should be an Airport and Air Navigation Services Act. Section 99 of the existing Act may, for instance, more neatly fit into such a new statute. Given there are so few statutory provisions relating to air navigation services however (apart from safety provisions) finding a home for section 99 of the existing Act is probably not a major issue. However New Zealand's obligation to have internationally compliant airports and air navigation services derives principally from Article 28 of the Chicago Convention and thus there is certainly a case for covering both airport and air navigation services subject matter in the one Act.

Purpose statements

7. Given that I strongly support the subdivision of the existing Act into at least three separate Acts, it is logical to support the inclusion of purpose statements. This is now common practice for modern statutory drafting, and anything that can be done to improve clarity and assist statutory interpretation is worthwhile. In my view, the opportunity should also be taken here to expressly establish the link between the relevant treaty background and the particular statute. This greatly assists with statutory interpretation and facilitates more effective treaty implementation.

Statutory functions

8. With regard to statutory functions, drafting improvements in this area would be welcome. A key aspect of the current Civil Aviation Act is, as stated in the Long Title, to establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety. Thus, it would be useful to expressly identify the role of the Secretary for Transport in whatever new statutes involve that role. In this regard, it is not ideal that in the current Act the functions of the Minister are referred to near the beginning but one has to go much later into the Act to find the functions of the Civil Aviation Authority and the Director set out. These type of provisions could be usefully redrafted into a distinct part of a new Act.

Accident investigation

9. I note with regard to the statutory functions of the Civil Aviation Authority a minor amendment only is proposed to confer on the Authority an express discretion about whether or not to investigate any particular accident or incident. An issue not raised by the Ministry, however, is the unsatisfactory situation in New Zealand at present

whereby both TAIC and the CAA carry out no-blame (Annex 13) accident investigations. It seems highly problematical that TAIC has been established for the purpose of conducting no-blame accident investigations and, in particular, to implement Article 26 of the Chicago Convention while actually TAIC investigates very few aviation accidents. The bulk of no-blame accident investigation is actually carried out by the CAA which, of course, is not compatible with the Director's regulatory and enforcement functions and powers. This means New Zealand is non-compliant with Annex 13 in this regard and has had to file a difference with ICAO.

10. In order to correct this situation it would be necessary to reallocate the CAA's accident investigation resources to TAIC and create very clear statutory provisions so that accident investigation carried out by CAA officers is only for the purposes of the Director's regulatory and enforcement powers. This should be coupled with clear statutory direction for the CAA to review all TAIC accident reports for the purpose of giving effect to the purpose of accident investigation, namely the avoidance of similar occurrences in the future.

11. I acknowledge this is a difficult issue to tackle but as a matter of law and logic it is very hard to justify the current arrangements. Possibly the only excuse for not tackling this subject now is that the combination of the CAA's "Chinese Wall" and a just safety culture approach to prosecution action means that it is not at present a contentious issue. This could, however, change in the future if a particular accident brings the issue into sharp focus.

The Director as regulator

12. Moving then to the issue of whether the safety regulator should continue to be the Director of Civil Aviation to exercise individual and independent statutory power or whether that function should move to the CAA Board. I strongly submit that the latter would be very undesirable. Current Authority members are appointed primarily for their governance skills. Many more additional skills would be required if the Board was to exercise safety regulatory powers. Boards are not good decision-makers in relation to sharp and individual operational decisions. They are unlikely to be able to be assembled quickly in emergency situations in relation to particular aviation document holders. More seriously, individual members of the Authority are likely to be lobbied by interest groups and the safety regulatory system could rapidly become seriously undermined and compromised. It is no answer to say that the Board can simply delegate its powers to the Director as the statutory powers should be properly allocated to the right place regardless of delegation issues.

13. An incidental point in this regard is that there is substantial case law now that clarifies the role of the Director of Civil Aviation as the safety regulator. Most of this case law is favourable to the Director and the public interest in safety has been advanced by useful decisions upholding the Director's powers (see in particular the most recent decision of *Air National Corporate Ltd v Director of Civil Aviation*[1] in which the Court of Appeal upheld the Director's decision to summarily suspend an air operator's

[1] [2011] NZAR 152

certificate, referring to the Director's entitlement to take a precautionary approach when exercising power before the full factual circumstances are known). It would seem undesirable to risk upsetting this established case law which is mostly applicable across the three transport modes.

CAA and the Director

14. One point that could be usefully clarified in new legislation is the distinction between the Civil Aviation Authority as the body that administers civil aviation and the Director of Civil Aviation as the safety regulator. There is widespread industry and legal confusion about this, both in terms of terminology and substantively. In fact, many of the cases in the Courts relating to the Director's powers actually intitule the case with reference to the Civil Aviation Authority even though the CAA as a Crown entity had no statutory role in relation to the case before the Court at all. My suggestion is that more clear legal drafting, coupled with more careful official use of terminology, would be useful.

Just safety culture

15. Last but not least in relation to statutory functions, I note that there is a proposal to make a minor amendment to section 72(3)(b) in relation to the Director's enforcement powers. In this regard I raise for consideration whether it would be timely to include the concept of "just culture" in the legislation. To be more precise, I recommend use of the term "just safety culture" as that more correctly embodies the balance that needs to be struck between justice and safety.

Part B: Safety and Security

Fit and Proper Person

16. With regard to entry into the civil aviation system, I agree with the Ministry's proposal that the fit and proper person criteria should be aligned across all three transport modes. I also draw to the Ministry's attention the case of *Civil Aviation Authority v NZALPA*[2] in which the Director of Civil Aviation was unsuccessful in his attempts to access information about pilot convictions from the Ministry of Justice in order to verify by sample testing the reliability of pilot self-disclosure in this regard.

Appeals

17. The current appeals process to the District Court is problematical. At present the District Court is "swamped" with its huge criminal law case load. The result is that it is very difficult to get a civil appeal dealt with expeditiously. The Court struggles to find a Judge with the time and expertise required for these cases. It can take a year or more to get a fixture allocated. This is completely unsatisfactory from an appellant's standpoint. In the *Air National* case for example, the company filed a District Court appeal and a judicial review proceeding simultaneously and requested an urgent fixture for the appeal in the District Court. However, the judicial review

[2] [2012] NZAR 66

proceeding was heard in the High Court and the Court of Appeal and judgments delivered by both Courts before the District Court was able to even acknowledge filing of the appeal in that Court, let alone respond to the request for an urgent hearing on the merits. After *Air National* was unsuccessful in its judicial review proceeding, it simply discontinued its District Court appeal and handed in its air operator's certificate.

18. However, there are probably not enough appeals to warrant the establishment of a specialist Aviation Appeals Tribunal. The existence of such a Tribunal, of course, may result in more frequent challenges to the Director's regulatory decisions. That point aside, the question that could be usefully addressed is whether the case exists for establishing a Transport Appeals Tribunal. Given substantially common legislative provisions across the three transport modes and the total number of appeals that could be expected across all three modes, the case for such a Tribunal could be made out. If so, the first port of call would be the Ministry of Justice and the Chief District Court Judge to see if a small number of particularly well-qualified District Court Judges could chair such a Tribunal on the basis that the Judge would sit with at least one, and possibly two, subject matter specialists. To be successful, it would have to be understood that these Judges would be immediately available to hear urgent regulatory appeals. The advantage of the appeal hearing being chaired by a District Court Judge is that a Judge can deal with both the law and the merits of an appeal and the existing rights of appeal on questions of law to the High Court and Court of Appeal could be preserved. An alternative would be for such a transport tribunal to be chaired by an experienced lawyer. This, however, probably means that the focus of such a tribunal would only be merits and then the issue arises of appeal levels. An example that could be looked at in this regard, however, is the Health Practitioners Disciplinary Tribunal which is Chaired by an experienced lawyer, but the Tribunal always sits with experienced medical practitioners.

19. In summary, therefore, the current District Court appeal procedure is not working, the case for an Aviation Appeals Tribunal is not strong but the case for establishing a Transport Appeals Tribunal does seem to warrant much more detailed consideration.[3]

Rule-making

20. The current rule-making system is highly problematical. The quality of the Civil Aviation Rules is high but timeliness is very poor. New Zealand now seems to lack the machinery necessary to expeditiously implement Annex amendments with a consequent loss of credibility for the aviation industry, e.g. the inability to timely implement a regulatory SMS system. There is considerable irony in the Ministry's reform options in this regard. The whole point of moving to Ministerial rule-making was to speed up the process in order to implement international technical standards without having to go to Cabinet. In fact, bureaucratic processes have been added layer-upon-layer so that now it is more expeditious to make regulations than

[3] See further John Parnell, "Review and Appeal in Civil Aviation De-Licensing Regimes: A Comparative Study of New Zealand, Australia and Canada, 11 *NZJ Pub and Intn'l Law* 623 (2013).

Ministerial rules. Indeed, this was officially recognised by the Civil Aviation Amendment Act in 2010 which restored the power for the Governor-Geenral to make regulations! In 2010 therefore the wheel came around full circle. The essential requirement therefore is for a clear decision about whether to revert to Civil Aviation Regulations made by the Governor-General, or to persist with Civil Aviation Rules made by a single Minister without the involvement of Cabinet (or the Regulations Review Committee).

21. If the decision is made to revert to Civil Aviation Regulations made by the Governor-General then the focus will need to be on expediting Rules development within in the CAA, possibly with direct instructions to Parliamentary Counsel and copied only to the Ministry of Transport. Once final draft regulations emerge, the Ministry would then progress them through Cabinet and the Executive Council.

22. Alternatively, if the current Rule system is to continue then the current bureaucratic processes have to be substantially dismantled and the timelines tightened up, including deletion of Cabinet approval steps (this is the fundamental distinction between Regulations and Rules). In summary, therefore, option 1 – the *status quo* is not tenable. Option 2 is not ideal in that it probably downgrades the status of the Rules. Option 3 could be considered further but only in relation to Ministerial delegation to the Authority but not to the Director. The case for doing this is quite strong in fact because the Ministerial delegation could relate very specifically to implementing ICAO Annex provisions (which generally should closely follow the actual wording of the relevant standard or recommended practice). In this regard the Government could increase its representation in ICAO as part of an expert in-house ICAO capacity so that planning for domestic implementation of new Annex provisions is inaugurated at the same time that the Annex provisions are being developed in Montreal. Option 4 – creation of a new tertiary level of legislation – should avoided at all costs. This would be a reversion to the very unsatisfactory situation that existed prior to 1990 involving the Civil Aviation Act 1964, the Civil Aviation Regulations 1953 and a whole plethora of Civil Aviation Safety Orders and Airworthiness Requirements at the lowest and third tertiary level. The result was an overlapping jumble with much of the lower level legislation being *ultra vires*, or incomprehensible, or unenforceable, or otherwise legally defective.[4]

Section 33

23. With regard to possible amendments to Part 3, I draw attention to an error in section 33 of the existing Act. In both subsections (1) and (2), there is reference to the Minister having regard to the standards and recommended practices of ICAO *"to the extent adopted by New Zealand"*. This means the section is ineffective because standards and recommended practices are not adopted by New Zealand. They are adopted by the ICAO Council and come into force automatically in terms of the relevant provisions in the Chicago Convention. Once these standards and recommended practices come into force then the obligation falls upon the New Zealand Government in terms of Articles 12, 28 and 37 to implement them so far as

[4] I have direct experience of this situation as a solicitor in the Ministry of Transport from 1975 to 1981.

practicable. In the case of "standards" these apply automatically to New Zealand unless a "difference" is filed with ICAO. Thus, the words *"to the extent adopted by New Zealand"* need to be repealed for the section to have proper effect.

24. Otherwise, with regard to the possibility of referring to good regulatory practice being set out in section 33, I suggest this would not be appropriate and is best left for attention outside the Act.

Accident and incident reporting

25. With regard to accident and incident reporting the New Zealand system seems rather informal. I have not yet seen the ICAO consultation proposals relating to Annexes 13 and 19 arising out of the working group on safety related information.

26. As a starting point, it would seem that Annex 13 investigations need to be moved from the CAA to TAIC as noted above. Once that is done, then the respective roles of the CAA and the Director of Civil Aviation become more clearly defined. Then some "just safety culture" concepts could be gradually introduced into the Act, as noted at paragraph 220 of the Ministry's consultation document. However, it is probably a step too far to water down the strict liability offence provisions. In part, this is because strict liability for transport related offences is common across all the modes because of the high public interest factor. Secondly, once the strict liability concept is departed from then being able to secure convictions can become problematical. For instance, once a just safety culture approach is entrenched, prosecutions for deliberate and reckless conduct will still be necessary and any reduction in the possibility of being able to secure convictions for such behaviour would not seem to be in the public interest. Indeed, it is because of the nature of such conduct that the prosecution is not able to prove the "guilty mind" component and thus the public interest decision falls down in favour of strict liability based upon only the act that occurred.

Fit and proper person assessments

27. The Ministry is considering an amendment to section 10(3) to actually require other agencies to make information available to the Director of Civil Aviation in addition to the "seek and receive requirement" already in section 10(3). As noted in paragraph 16 above above, attention is drawn to the case of *Civil Aviation Authority v New Zealand Airline Pilots' Association* in which the Court of Appeal held that section 10(3) is not wide enough to authorise random sampling of conviction information held by the Ministry of Justice as a way of monitoring the self-disclosure obligations of airline pilots.

28. This case indicates that the Director's powers under section 10 must relate to a specific individual and it is implicit in the Court of Appeal's judgment that a seek and receive power does not actually authorise the third party to make a disclosure given that party's obligations under the Privacy Act. Indeed, the background to the case involved the Civil Aviation Authority having an MOU with the Ministry of Justice for random sampling purposes. However, my understanding is that the Ministry of

Justice was reluctant to enter into such an MOU as the Ministry doubted its authority to release the information sought by the Director. Given the huge responsibilities that go with the holder of an Airline Transport Pilot's Licence, it would seem that section 10 should be amended to ensure the Director is able to effectively exercise the fit and proper person provisions in the Act and have a back-up to pilots' self-disclosure obligations. This is particularly the case given that pilots have an incentive not to disclose relevant information if they run the risk of it leading to a loss of their aviation document and therefore livelihood.

Security

29. The Ministry proposes several amendments that do not seem very controversial. However, overall the security provisions in Part A of the Act seem to require a top-down review. This is not easy territory. Aviation security spans prevention (Annex 17) and deterrence (the aviation crime treaties).

30. At present Annex 17 provisions are not implemented in a very transparent or structured manner. To complicate matters, implementation of the aviation crime treaties is done partly in the Civil Aviation Act but also partly in the Crimes Act 1961 and the Aviation Crimes Act 1972. In addition, it is now timely to consider what domestic legislation is required in order for New Zealand to become party to the 2010 Beijing Convention and Protocol and also the Montreal Convention of 2014 amending the Tokyo Convention.

31. I suggest that once a revised structure and the proposed content of a redrafted Part 8 is decided up, the Ministry of Justice should be invited to carry out a complementary review of the Aviation Crimes Act 1972. The redrafted provisions should also not prevent statutory obstacles for airports that wish to implement common departure terminals. Consideration could also be given to reviewing the status of AVSEC as a "service". This is an ambiguous legal concept, i.e. not a legal person but only an administrative unit within the CAA. This has been confusing in the past and produced power struggles and complicated CAA funding issues.

Part C: Carriage by Air – airline liability

32. I suggest Part 9B of the Act could be repealed. It seems rather bizarre to have so many statutory provisions implementing a modified Warsaw system only for delay in the domestic context. There are numerous consumer rights issues in relation to air travel and singling out only delay for such extensive legislative treatment seems highly anomalous. I am not aware of any claims or decided cases under Part 9B. While the reverse burden of proof favours passengers, the limitation of liability does not. My recommendation is that at the present stage in New Zealand it is sufficient to leave "delay" to general consumer law. Developments in other jurisdictions, however, indicate that at some stage New Zealand may have to contemplate a new Part in the Act dealing with a range of aviation consumer rights. The repeal of Part 9B could however be accompanied by the development of an airline "charter of rights" and an airline customer advocate as resort to formal legal procedures under

consumer legislation is seldom efficient and cost effective for consumers or airlines and is best regarded as a backstop to influence behaviour and for hard cases.

Part D: Airline licensing and competition

33. All the Ministry's preferred options in this Part seem appropriate.

Part E: Airports

34. I make no comment on the proposed amendments as I expect more specialised submissions will be received from the New Zealand Airports Association and BARNZ. However, the numerous amendments made to the Act and the overlapping statutory definitions in the current Act are in desperate need of rewriting.

Part F: Other matters

35. I agree with the proposed retention of Airways' statutory monopoly in terms of the existing section 99. It seems improbable that in the near future those specified services could be provided on a competitive basis. That would be undesirable while New Zealand is currently in the process of transition to a full satellite based air navigation system.

36. I note that no action is proposed in relation to the 2009 Montreal Conventions relating to damage caused by aircraft to third parties (the general convention and the unlawful interference convention). The statement is made by the Ministry that as New Zealand has a suitable regime for compensating affected parties through the ACC system, New Zealand is unlikely to implement the Conventions. However, this is based on a misconception. These Conventions proceed on the basis of the presumed but limited liability of the operator in a similar way to the Montreal Convention on air carriers' liability. If, for example, an A380 crashed over a developed area of Auckland City the Convention regime would sheet home liability to the foreign aircraft operator (and the private aviation insurance market) rather than the New Zealand accident compensation scheme having to pick up the huge compensation costs for death and personal injury arising out of such an event.

37. New Zealand is, of course, a party to the 1999 Montreal Convention on air carriers' liability even though New Zealand has an accident compensation scheme. Thus under Montreal 1999 claims for personal injury or death arising out of international carriage by air can be brought in the New Zealand courts as an express exception to the bar against such claims – see section 317(5) of the Accident Compensation Act 2001.

38. Given all the international work that was done in order to develop the two Montreal 2009 Conventions on third party liability, it would see that New Zealand should not lightly discard the possibility of accepting one or both Conventions.

39. It is, of course, at present an open question as to how many other States will accept the Conventions and whether they will come into force. If the Conventions do

become widely accepted then the huge advantage is that there is uniformity of law. This means the operators of New Zealand aircraft in foreign jurisdictions could expect to be subject to the law of the Conventions. Therefore reciprocally the operators of foreign airlines should expect to be subject to the same law within New Zealand.

40. My recommendation is that the Ministry should continue to monitor the degree to which both 2009 Montreal Conventions receive international acceptance and if the Conventions are likely to come into force, New Zealand should seriously consider acceptance.