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REVIEW AND APPEAL IN CIVIL AVIATION DE-LICENSING REGIMES: A COMPARATIVE STUDY OF NEW ZEALAND, AUSTRALIA AND CANADA

*John Parnell**

This article looks at the civil aviation law for New Zealand, Australia and Canada in regards to the "de-licensing" of participants in the aviation system. The author draws on the experience in comparator jurisdictions to determine what, if any, improvements could be made to the New Zealand system. The article concludes that the New Zealand system could be improved by providing for a more streamlined appeal or review process; a unified transport tribunal dealing with land transport, maritime and civil cases; and an ability, in limited circumstances, for the Director's decision to be stayed pending a full hearing.

I INTRODUCTION

This article conducts a comparative study of New Zealand, Australian and Canadian civil aviation law in respect of the suspension, revocation or termination of "aviation documents" in relation to the de-licensing of aviation participants. It is interesting to compare how each of these countries have reflected their international obligations in domestic law and balanced the public interest in aviation safety with the rights of aviation document holders. The goal of this article is to learn from these overseas experiences and evaluate what, if any, reform might be desirable in New Zealand in order to improve the New Zealand system. This analysis is particularly timely given that the Ministry of Transport is currently reviewing the Civil Aviation Act 1990 (the Civil Aviation Act (NZ)).

This article will demonstrate that the New Zealand civil aviation "de-licensing" regime could be improved by providing a more streamlined appeal or review process and/or a possibility, in limited circumstances, for the Director of Civil Aviation's decision to be stayed pending a full appeal.

* The author is a solicitor at the Civil Aviation Authority. The views expressed in this article are his personal views only.

A Legal Framework for Aviation Regulation

The 1944 Convention on International Civil Aviation (the Chicago Convention) provides the basis for the unification and standardisation of safety-related civil aviation law.¹ Australia, New Zealand and Canada are all signatories to the Chicago Convention. The Convention established the International Civil Aviation Organization, which has as one of its functions the development of international standards and practices in relation to (among other things) air navigation, registration of aircraft and the certification of personnel such as flight crew and maintenance personnel. Once adopted, these standards and practices are designated as annexes to the Convention.

Where a contracting state does not adhere to these standards, it must notify the International Civil Aviation Organization of the differences to enable the Council of the Civil Aviation Organization to notify all member states. However, under art 37 of the Chicago Convention each state undertakes to secure a high degree of uniformity in their aviation safety standards.

Annex 1 to the Convention specifies International Standards and Recommended Practices covering the regulation of personnel participating in the aviation sector. For example, Annex 1 requires a contracting state to ensure that the privileges of an aviation licence are not exercised unless the holder maintains competency and has met the requirements for recent experience established by the state.²

Neither Annex 1 nor the Chicago Convention itself specify how each state is required to implement its obligations in regard to personnel licensing. However, fundamental to the operation of the regulatory regime in New Zealand, Australia and Canada is the use of "aviation documents" as the primary means of controlling entry into, participation in, and exit from participation in the civil aviation system.³

The International Civil Aviation Organization has noted that, in order to achieve the objectives of the Chicago Convention, the basic aviation law of a contracting state should provide for the national state civil aviation authority to have:⁴

1 Chicago Convention on International Civil Aviation (1944) 15 UNTS 295 (opened for signature on 7 December 1944, entered into force 4 April 1947).

2 At [1.2.5.1].

3 There are many types of aviation documents in each of these countries (including aircraft maintenance engineers' licences, pilots' licences, air operator certificates and aircraft maintenance organisation certificates) that the law requires civil aviation participants to hold as a precondition to undertaking certain aviation-related activities. For the purposes of this paper, the term "aviation participant" will be used to encompass the many persons and organisations involved in the aviation sector.

4 International Civil Aviation Organization *Safety Oversight Manual Part A – The Establishment and Management of a State's Safety Oversight System* AN/959 (2006) at [3.8.4].

The authority and responsibility to conduct inspections, analyse operations, identify safety deficiencies, make recommendations, impose operating restrictions, as well as grant, suspend, revoke or terminate licences, certificates or other approvals and, in the case of operator certificates, amend the corresponding operating specifications.

Accordingly, each of the states analysed in this article has available to it a range of regulatory tools for use in carrying out its safety function in regulating civil aviation. These include the power to refuse to issue, to suspend, to cancel or to revoke an aviation document for reasons of aviation safety. However, the regulatory tools available in each jurisdiction vary, as do the procedural and substantive requirements associated with use of the particular regulatory tool. This article sets out and compares important aspects of the regulatory tool of de-licensing in three jurisdictions, and thereby considers how New Zealand may improve its system.

The focus of this article is the means by which the basic civil aviation laws of New Zealand, Australia and Canada provide a system that mitigates risks to aviation safety for the general public, pilots and stakeholders. In all three jurisdictions, the public interest in aviation safety takes precedence over the private interests of aviation participants. However, private interests are generally given some consideration in that there are mechanisms in all three jurisdictions by which aviation participants can appeal or review the decisions of regulators. This article is thus concerned with how, through legislation and decisions of the courts and tribunals, each state balances the public interest in aviation safety with the private interests of aviation participants in the "de-licensing" context.

The statutory criteria for the suspension, revocation or cancellation of an aviation document will be examined for each state, including the substantive and procedural requirements for taking such action. The article will also examine the appeal or review processes of each state and the ability of an aviation participant to receive urgent relief from a decision of a regulator, usually referred to as a stay of the decision. The leading cases in this area in New Zealand, Australia and Canada are summarised and discussed.

New Zealand's legislation gives the regulator a wider discretion to make decisions affecting aviation documents in the interests of aviation safety than the existing legislation in Australia and, to a lesser degree, Canada. In New Zealand, judicial review and a merits-based appeals process to the District Court are available. However, unlike in Australia and Canada, the District Court has no discretion to grant a stay of a decision until the matter is heard in the context of a full appeal. Further, another key difference is that in both Australia and Canada the appeal or review of the civil aviation regulator's decision is to a tribunal, rather than a court. Tribunals are generally more accessible to lay persons and less costly than full court proceedings. However, the Australian system

has a major weakness, in that the ability to take immediate action in the interests of aviation safety is constrained by judicial oversight of an investigative process.⁵

B Structure of the Article

This article begins with a description and analysis of the current position in New Zealand (Part II). After summarising the New Zealand position, the article goes on to examine the position in Australian law (Part III). Australia is an important and influential geographical neighbour of New Zealand and there are a number of aviation participants who operate in both countries. Furthermore, the Australian and New Zealand governments have entered into a mutual recognition agreement on the basis of the Australia–New Zealand Aviation (ANZA) mutual recognition principle.⁶ This means that under both New Zealand and Australian law the holder of either an Australian or New Zealand air operator certificate⁷ with ANZA privileges may, subject to some limitations, conduct air operations to, from or within each country.⁸ The granting of an air operator certificate is the way each state regulates air operations and ensures consistency both between countries and over international airspace, involving airlines, charter operations and air agricultural operations.⁹

The third state examined by this article is Canada (Part IV), which has similarities to New Zealand and Australia due to its common law legal system and provides a useful comparison because of a shared colonial heritage. Part V of the article then provides the comparative analysis of the three civil aviation systems. Part VI considers possible New Zealand reforms.

Part VII posits potential amendments to the New Zealand system in order to provide a more balanced de-licensing system that better facilitates both the contemporaneous protection of privacy interests of aviation document holders and effective administrative action in the interests of aviation safety (two interests that are often regarded as being at odds). In this regard, the article recommends:

- (a) restructuring of the adjudicative mechanisms that hear civil aviation appeals for the purposes of securing better access to justice for all parties to such proceedings and an adjudicator that possesses the requisite knowledge to ensure good quality decision-making; and

5 See Division 3A of the Civil Aviation Act 1988 (Cth).

6 Arrangement between the Australian and New Zealand Governments on Mutual Recognition of Aviation-Related Certification, Australia–New Zealand (signed 13 February 2007).

7 This is a certificate that allows an operator to conduct air operations, for example, involving the carriage of passengers for hire or reward.

8 For New Zealand, see Civil Aviation Act 1990, s 11B [Civil Aviation Act (NZ)]; and for Australia, see Civil Aviation Act (Cth), Subdivision F.

9 See Ronald I C Bartsch *Aviation Law in Australia* (3rd ed, Thomson Reuters, Sydney, 2010).

- (b) procedural changes that allow for earlier challenges to adverse decisions made by the Director of Civil Aviation and/or a stay of such decisions to take effect pending the substantive hearing.

II THE NEW ZEALAND POSITION

The New Zealand civil aviation system is governed by the Civil Aviation Act (NZ) and the Civil Aviation Rules. The Civil Aviation Authority is the entity responsible for promoting civil aviation safety in New Zealand,¹⁰ but the Director of Civil Aviation (the Director), who is also the chief executive of the Civil Aviation Authority, exercises control over entry into the civil aviation system through the granting of aviation documents¹¹ and is responsible for enforcing the Civil Aviation Act (NZ) and the Civil Aviation Rules.¹² The Director is required to act independently of the Minister of Transport and the Civil Aviation Authority when exercising his functions or powers, including when issuing, renewing, suspending or revoking an aviation document in any particular case.¹³

A Civil Aviation Act (NZ)

The title to the Civil Aviation Act (NZ) sets out its purposes, which include establishing "rules of operation within the New Zealand civil aviation system in order to promote aviation safety". Before issuing or renewing an aviation document the Director must be satisfied that the applicant meets prescribed requirements and criteria including qualifications and experience.¹⁴ The Director must also be satisfied that the person is a fit and proper person to hold the aviation document.¹⁵ It is a requirement that the holder of an aviation document, or persons who have control over the exercise of the privileges under the document, continue to satisfy the fit and proper person test.¹⁶

The concept of being "fit and proper" to exercise the privileges of an aviation document is an important element of civil aviation regulation in the New Zealand and Australian civil aviation systems. This requirement is not sourced from International Civil Aviation Organization requirements and there is no equivalent in Canadian legislation, which instead focuses on the

10 Civil Aviation Act (NZ), s 72B.

11 Civil Aviation Act (NZ), s 72I(3)(a).

12 Section 72I(3)(b).

13 Section 72I(4).

14 Section 9.

15 Section 9(1)(b)(ii).

16 Section 9(4). See also *New Zealand Airline Pilots' Association Industrial Union of Workers Inc v Civil Aviation Authority of New Zealand* HC Wellington CIV-2011-485-954, 13 July 2011 in which the Court held that it was unlikely that Parliament intended a distinct intermediate assessment of fitness after the initial application.

concept of "competency".¹⁷ Determining the meaning of and applying this important concept will therefore proceed according to ordinary principles of statutory interpretation.

1 "Without notice" suspension of an aviation document

Section 17 of the Civil Aviation Act (NZ) allows the Director to suspend, or impose conditions on, an aviation document without any notice to the aviation document holder. There are two criteria for suspending or imposing conditions under s 17. Firstly, the Director must consider that it is "necessary" in the interests of safety to take such action.¹⁸ Secondly, the Director must be satisfied that one of the five grounds specified in s 17(1)(a) to 17(1)(e) is met.¹⁹

Section 19 provides additional criteria for taking action under s 17 (and s 18). The Director may have regard to the following matters set out in s 19(2)(a) to 19(2)(c):

- (a) the person's compliance history with transport safety regulatory requirements;
- (b) any conviction for any transport safety offence, whether or not—
 - (i) the conviction was in a New Zealand Court; or
 - (ii) the offence was committed before the commencement of this Act;
- (c) any evidence that the person has committed a transport safety offence or has contravened or failed to comply with any rule made under this Act.

The Director's consideration is not confined to the matters set out in s 19(2) and may take into account other relevant matters and evidence.²⁰

¹⁷ Aeronautics Act RSC 1985 c A-2, ss 6.7(1)(a) and 7(1)(a).

¹⁸ Section 17(1).

¹⁹ Section 17(1) of the Civil Aviation Act requires that one of the following grounds are met:

- (a) the Director considers such action necessary to ensure compliance with the Civil Aviation Act (NZ) or rules made under the Act;
- (b) the Director is satisfied that the holder has failed to comply with any conditions of an aviation document or with the requirements of s 12;
- (c) the Director is satisfied the holder has contravened or failed to comply with s 49;
- (d) the Director considers that the privileges or duties for which the document has been granted are being carried out by the holder in a careless or incompetent manner; or
- (e) in the case of "a holder of a New Zealand AOC with ANZA privileges", the Director has received from the Director of the Australian Civil Aviation Safety Authority a copy of an Australian temporary stop notice given to the holder.

²⁰ Section 19(3).

Following a suspension or imposition of conditions under s 17(1), the Director is required to undertake an investigation under s 17(3) to determine what action is to be taken. This investigation is to be done within 10 working days from the time of suspension or imposition of conditions. The suspension or imposition of conditions under s 17(1) expires after 10 working days, ensuring a prompt and expedient investigation is undertaken.²¹ However, the Director may direct that a further specified period is necessary for the purpose of the investigation and the suspension or imposition of conditions can be extended under s 17(3).

Once the investigation is concluded, the Director must determine what actions to take under section 17(4). These actions may be one or more of the following:

- (a) impose conditions for a specified period:
- (b) withdraw any conditions:
- (c) suspend any aviation document for a specified period:
- (d) revoke or partially revoke any aviation document under section 18:
- (e) impose permanent conditions under section 18.

2 *"On notice revocation" of an aviation document*

Section 18 gives the Director the power to permanently revoke an aviation document or impose conditions "if he or she considers it necessary in the interests of aviation safety after an inspection, monitoring, or investigation carried out under this Act".²² As in the case of "without notice" action under s 17, the s 19 criteria are relevant.

The "inspection, monitoring, or investigation" carried out would be under ss 15 or 15A. Section 15A in particular provides the Director with a range of specific investigative powers that would normally be used prior to the Director taking action under s 18.²³

If the Director proposes to take action under s 18, he or she must give notice in accordance with the s 11 proposed adverse decision procedure.²⁴ The Director must give the person affected written notice of the matters set out in s 11.²⁵

Once the Director has issued a notice of proposed adverse decision, he or she must consider any submissions received and then make a final decision concerning whether to proceed to make an

21 Section 17(3).

22 Section 18(1).

23 See *Aviation Law* (Brookers, Wellington, 1996) at [CV15.01].

24 Civil Aviation Act (NZ), s 18(3).

25 See *Laws of New Zealand Aviation* (online ed) at [48] which summarises the requirements in s 11.

adverse decision. After making the determination, the Director must, as soon as practicable, notify the affected person of the decision, the grounds for it, the date on which it will take effect and, in the case of an adverse decision, the consequences of the decision and any applicable right of appeal.²⁶

B Appeal or Review Rights

Section 66 provides a right of appeal to the District Court for "specified decisions".²⁷ A decision under s 17(1) to suspend, or impose conditions on, an aviation document is a specified decision, as is a decision under s 18(1) to permanently revoke an aviation document or to impose permanent conditions.

Appeals to the District Court are by way of rehearing, enabling a hearing de novo rather than a simple rehearing of the original decision.²⁸ Section 66(3) provides that the decision of the Director continues in force pending the determination of the appeal. Therefore, in contrast to the powers of the Australian Administrative Appeals Tribunal discussed below, and to a more limited extent those of the Canadian Transport Appeals Tribunal, there is no ability for the New Zealand District Court to stay the Director's decision pending an appeal. The only avenue available in New Zealand for "urgent" relief from a decision of the Director is to apply to the High Court for interim relief under s 8 of the Judicature Amendment Act 1972 when bringing judicial review proceedings. However, this procedure is an inadequate remedy given the reluctance of the courts to assess the merits of the affected document holder's case on judicial review.²⁹

C Case Law

Some of the more important civil aviation decisions in New Zealand relate to decisions in respect of applications for interim relief under s 8 of the Judicature Amendment Act.³⁰ An application for interim relief under s 8 must be made in the context of a substantive application for judicial review under s 4.³¹

26 See *Laws of New Zealand Aviation*, above n 25 at [48].

27 Civil Aviation Act (NZ), s 66(5).

28 District Court Rules 2009, r 14.17. See also *Aviation Law*, above n 23, at [CV66.04].

29 See *Director of Civil Aviation v Air National Corporate Ltd* [2011] NZCA 3, [2011] NZAR 152, discussed below.

30 There are a number of helpful District Court decisions, but the primary focus here is on decisions in the superior courts.

31 Section 4(1) of the Judicature Amendment Act 1972 provides for an application for review to:

... the High Court in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any 1 or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.

1 Director of Civil Aviation v Air National Corporate Ltd³²

This 2011 Court of Appeal decision overturned a High Court decision to grant interim relief under s 8 of the Judicature Amendment Act in respect of the Director's decision to suspend Air National's air operator certificate under s 17 of the Civil Aviation Act (NZ). The Director's decision to suspend the certificate arose out of several matters of concern including alleged falsified training records and substandard operational competency assessments of Air National pilots.³³ The Director's "principal concern was that Air National's internal systems were defective and that this posed a threat to aviation safety".³⁴ The basis of Air National's judicial review claim was that the Director had failed to take into account relevant matters, breached procedural fairness and had made an irrational or unreasonable decision.³⁵

Under s 8 of the Judicature Amendment Act, interim relief may be granted if the applicant can demonstrate that relief is necessary in order to preserve his or her position.³⁶ Applying the leading case of *Carlton & United Breweries Ltd v Minister of Customs*,³⁷ the High Court accepted that the order was necessary to preserve Air National's commercial position and exercised its discretion in favour of Air National having regard to the circumstances of the case including the strength of Air National's case.³⁸

Air National had contemporaneously filed an appeal against the Director's decision to the District Court under s 66 of the Civil Aviation Act (NZ). The High Court rejected the Director's submission that the strengths of Air National's case for interim relief should be determined solely by reference to the judicial review proceedings. The High Court accepted that the strength of Air National's case in relation to its substantive appeal on the merits to the District Court was relevant and "assessed the strength of its case in that context".³⁹ However, the Court of Appeal doubted whether this was the correct approach in the light of s 66(3) of the Civil Aviation Act (NZ), which prohibits the granting of a stay of the Director's decision pending the substantive appeal.⁴⁰ The Court clearly indicated that applications under s 8 of the Judicature Amendment Act for interim

32 *Director of Civil Aviation v Air National Corporate Ltd*, above n 29.

33 *Director of Civil Aviation v Air National Corporate Ltd*, above n 29, at [15].

34 *Director of Civil Aviation v Air National Corporate Ltd*, above n 29, at [17].

35 *Director of Civil Aviation v Air National Corporate Ltd*, above n 29, at [19].

36 Judicature Amendment Act, s 8(1).

37 *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA).

38 *Air National Corporate Ltd v Director of Civil Aviation* HC Wellington CIV-2011-485-135, 2 February 2011 at [45].

39 At [45].

40 *Director of Civil Aviation v Air National Corporate Ltd*, above n 29, at [28].

relief are not to be used to undermine the prohibition in s 66(3) of the Civil Aviation Act (NZ), noting that:⁴¹

Too ready a resort to s 8 runs the risk of undermining such prohibitions and creating an incentive for appellants to launch judicial review proceedings simply to access the High Court's s 8 jurisdiction. At the very least, this will be a relevant consideration to the exercise of the discretion. As we have noted, however, this is a preliminary view.

The Court upheld the appeal on the basis that Air National had not demonstrated, on traditional judicial review grounds, a strong case that "the decision to suspend was not reasonably open to the Director or was irrational".⁴²

2 Halliwell v Director of Civil Aviation⁴³

This is a District Court decision which dealt with a decision of the Director revoking the appellant's private pilot licence in the helicopter category, after finding that the appellant was not a fit and proper person to hold such a licence. This case provides an example of a conventional merits-based appeal under s 66 of the Judicature Amendment Act. This judgment is of importance because it considers the type and level of risk needed before it is "necessary in the interests of aviation safety" to revoke an aviation document under s 18 of the Civil Aviation Act (NZ).

Judge Broadmore did not consider, as had been argued by the appellant, that the Director was required to show that Mr Halliwell posed a threat, danger or risk to aviation safety. The Judge's view was that the Director was required to show that Mr Halliwell's removal from the system was necessary to maintain aviation safety in the interests of the community at large, and the aviation community in particular.⁴⁴

3 Helicopters (NZ) Ltd v Director of Civil Aviation⁴⁵

In this case the High Court dismissed an application for interim relief under s 8 of the Judicature Amendment Act in respect of the Director's decision not to renew Helicopters (NZ)'s air operator certificate with the same condition allowing overseas operations in Laos and Cambodia. In alignment with the Court of Appeal decision in *Director of Civil Aviation v Air National Corporate Ltd*,⁴⁶ the High Court in this case expressed doubt as to whether s 8 of the Judicature Amendment

41 At [30].

42 At [42].

43 *Halliwell v Director of Civil Aviation* DC Wellington CIV-2009-085-1454, 11 March 2011.

44 At [127].

45 *Helicopters (NZ) Ltd v Director of Civil Aviation* HC Wellington CIV-2010-485-002454, 20 December 2010.

46 *Director of Civil Aviation v Air National Corporate Ltd*, above n 29.

Act could be used to obtain a benefit (a stay of the Director's decision) not otherwise available to a plaintiff under s 66(3) of the Civil Aviation Act (NZ).⁴⁷ Helicopters (NZ)'s application was dismissed because its air operator certificate had expired so there was no position to be preserved in terms of s 8.

4 International Heliparts NZ Ltd v Director of Civil Aviation⁴⁸

This was another High Court decision rejecting an application for interim relief under s 8 of the Judicature Amendment Act. In this case, the decision related to revocation of the plaintiff's certificate of approval to supply aircraft components. The decision is important because of the High Court's discussion of the public interest consideration when dealing with issues of aviation safety. In deciding the case, Justice Gendall stated that "the safety interests of the public weigh heavily on my mind" and that "where public safety is an issue the Court simply cannot take any risk."⁴⁹

5 Oceania Aviation Ltd v Director of Civil Aviation⁵⁰

This Court of Appeal decision arose out the previous case – *International Heliparts NZ Ltd v Director of Civil Aviation*.⁵¹ The plaintiff brought a claim for private law damages in respect of the Director's decisions on the basis of negligence and misfeasance in public office. This is an important case because the Court rejected the argument that the Director owed a duty of care to the plaintiff when the Director suspended and later revoked its licence to certify helicopter parts. The Court was concerned, amongst other things, that imposing a duty of care could promote undue caution or reticence on the part of the Director and so impede the Director's role as a protector of public safety.⁵²

6 Summary of the case law

The above cases highlight that, in respect of de-licensing decisions, there are very few legal remedies outside of the ordinary appeal process found in the Civil Aviation Act (NZ). It is very difficult to get any kind of interim relief pending a hearing of a full appeal. Similarly, it is difficult to successfully argue any private law damages claim against the Director or the Civil Aviation Authority. Also, the New Zealand courts give the regulator a reasonable amount of latitude and allow it to take a precautionary approach in order to maintain aviation safety.

47 At [54]. See also *Aviation Law*, above n 23, at [CV66.03].

48 *International Heliparts NZ Ltd v Director of Civil Aviation* [1997] 1 NZLR 230 (HC).

49 At 237.

50 *Oceania Aviation Ltd v Director of Civil Aviation* CA163/00, 13 March 2001.

51 *International Heliparts NZ Ltd v Director of Civil Aviation*, above n 48.

52 *Oceania Aviation Ltd v Director of Civil Aviation*, above n 50, at [67].

III THE AUSTRALIAN POSITION

The Australian civil aviation system is governed by the Civil Aviation Act 1988 (Cth), the Civil Aviation Regulations 1988 and the Civil Aviation Safety Regulations 1998. The majority of the relevant detailed licensing requirements are set out in the two sets of Regulations. The Civil Aviation Safety Authority is responsible for the regulation of civil aviation in Australia.⁵³ In performing its functions, the Authority must regard the safety of air navigation as the most important consideration.⁵⁴ It must also perform its functions consistently with Australia's obligations under the Chicago Convention.⁵⁵

A Civil Aviation Act (Cth) and Regulations

The main object of the Civil Aviation Act (Cth) "is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents".⁵⁶

It is a requirement in Australia to be a fit and proper person to exercise various aviation-related privileges. This is set out in various parts of the two sets of Regulations.⁵⁷ The expression "fit and proper person" is not defined; therefore its meaning is derived from the decisions of the courts.⁵⁸

1 "Without notice" suspension

Division 3A (div 3A) of the Civil Aviation Act (Cth) contains detailed provisions allowing for the immediate suspension of a "civil aviation authorisation",⁵⁹ where the Civil Aviation Safety Authority has reason to believe that the holder "has engaged, is engaging in, or is likely to engage in, conduct that constitutes, contributes to or results in a serious and imminent risk to aviation safety".⁶⁰

53 For a full list of the Civil Aviation Safety Authority's functions, see Civil Aviation Act (Cth), s 9.

54 Section 9A.

55 Section 11.

56 Section 3A.

57 Contrast New Zealand, which has an overarching requirement of being a fit and proper person under the Civil Aviation Act (NZ), s 9.

58 See Bartsch, above n 9, at [8.60]. This is the same in New Zealand.

59 A "civil aviation authorisation" is an authorisation under the Civil Aviation Act (Cth) or the Regulations to undertake a particular activity (whether the authorisation is called an air operator certificate, permission, authority, licence, certificate, rating or endorsement or is known by some other name): see s 3 of the Civil Aviation Act (Cth).

60 Section 30DC(1).

Unlike other administrative action, the Civil Aviation Safety Authority is not required to give the holder an opportunity to show cause before taking suspension action under section 30DC.⁶¹ However, the legislation sets out a detailed procedure whereby the Authority must apply to the Federal Court for an order to continue the suspension. This application must be made within five business days.⁶² The affected aviation document holder is not required to apply for a Federal Court order.

The Federal Court can make an order for up to 40 days to allow the Authority to complete its investigation into the circumstances that gave rise to the suspension.⁶³ The Authority can apply once to extend the order, but for no more than 28 days.⁶⁴ The Authority must then complete its investigation before the expiry of the Federal Court order.⁶⁵

At the end of the investigation, if the Civil Aviation Safety Authority considers that there would be a "serious and imminent risk" to air safety if the civil aviation authorisation were not varied, suspended or cancelled, it may issue a "show cause" notice proposing one of these actions. The Authority is required to give a show cause notice in all cases where it proposes to take administrative action. A show cause notice is a written notice to the holder of a civil aviation authorisation setting out the reason why the Authority is considering making its decision and stating a period in which the holder may show cause as to why the Civil Aviation Safety Authority should not suspend or cancel the authorisation as the case may be.⁶⁶

At the end of the show cause period, the Authority may vary, suspend or cancel the civil aviation authorisation.⁶⁷ This decision is then subject to review by the Administrative Appeals Tribunal as happened in the 2011 case of *Avtex Air Services Pty Ltd v Civil Aviation Safety Authority*, in which Avtex Air Services appealed the decision to revoke its air operator certificate.⁶⁸

2 "On notice" suspension or cancellation

There are a number of provisions in the Civil Aviation Act (Cth) and the Regulations which allow the Civil Aviation Safety Authority to take administrative action to cancel or suspend aviation

61 Note also s 30DC(1).

62 Sections 30DE(1) and 30DE(2).

63 Section 30DE(4).

64 Section 30DF.

65 Section 30DG.

66 Section 3.

67 Sections 30DH and 30DI.

68 *Avtex Air Services Pty Ltd v Civil Aviation Safety Authority* [2011] AATA 61.

licences, certificates, permissions or other authorisations "where the breach is considered sufficiently serious or a threat to the safety of air navigation".⁶⁹

(a) Civil Aviation Act (Cth), s 28BA

The Civil Aviation Safety Authority can suspend or cancel an air operator certificate if a condition of the certificate has been breached. The Authority must first issue a show cause notice before taking any action.⁷⁰ The conditions of an air operator certificate include a requirement to comply with civil aviation law⁷¹ and do everything in connection with the air operator certificate activity with a reasonable degree of care and diligence.⁷²

(b) Civil Aviation Regulations 1988, reg 269

Under reg 269 of the Civil Aviation Regulations 1988, the Civil Aviation Safety Authority may vary, suspend or cancel a licence, certificate or authority if one or more of the grounds listed in reg 269(1) exist. Before doing so, the Authority must issue a show cause notice.

B Appeal or Review Rights

A decision by the Civil Aviation Safety Authority to refuse to grant, issue, vary, suspend or cancel any of a certificate, permission, permit or licence under the Civil Aviation Act (Cth) or the Regulations is considered to be a reviewable decision under s 31 of the Civil Aviation Act (Cth).⁷³ A decision under div 3A to suspend without notice for contravening the serious and imminent risk prohibition is not a reviewable decision; however, a decision not to reinstate a civil aviation authorisation that has been suspended or cancelled under div 3A will be subject to review.⁷⁴

All reviewable decisions are subject to review before the Administrative Appeals Tribunal and the review is on a merits basis. The facts considered may be reheard in their entirety, that is, the material which was considered by the original decision-maker is reviewed.⁷⁵

Certain decisions of the Civil Aviation Safety Authority are automatically stayed for five business days to allow a person the opportunity to apply for a review to the Administrative Appeals Tribunal.⁷⁶ The holder of a civil aviation authorisation will have the benefit of a continuing stay if

69 See Bartsch, above n 9, at [8.80].

70 Sections 28BA(4)(a) and 28BA(4)(b).

71 Section 28BD.

72 Section 28BE. The other conditions are listed in s 28BA(1).

73 "Reviewable decision" is defined in s 31(1).

74 Sections 31(d) and 31(e).

75 See Bartsch, above n 9, at [8.155].

76 Civil Aviation Act (Cth), s 31A.

an application for a review and a stay is lodged within those five business days. The stay will then continue until the Administrative Appeals Tribunal determines the stay application. The Administrative Appeals Tribunal has broad powers to stay a decision "for the purpose of securing the effectiveness of the hearing and determination of the application for review".⁷⁷ The test consistently adopted by the Administrative Appeals Tribunal is whether:⁷⁸

... the grant of a stay will create a real, as distinct from fanciful, risk that the safety of air navigation will be compromised and passengers, staff or other persons put at risk.

There is no power to stay a decision:⁷⁹

... under the regulations to cancel a licence, certificate or authority on the ground that the holder of that licence, certificate or authority has contravened a provision of this Act or the regulations.

There is no power to stay a decision to suspend without notice under div 3A, underlining the importance of that provision for the Civil Aviation Safety Authority in cases of serious and imminent risk to safety.

The Administrative Appeals Tribunal has all the powers and discretions of the decision-maker for the purposes of the review.⁸⁰ This gives the Tribunal full power to affirm, vary and set aside the decision under review.⁸¹

The only appeal from a decision of the Administrative Appeals Tribunal to the Federal Court is on a question of law and not on the merits or the facts.⁸² The Federal Court takes a strict approach to prevent merit-based appeals being presented as questions of law and will not consider merits-based appeals disguised as a review of the law.⁸³

C Case Law

There are a number of reported Administrative Appeals Tribunal decisions. These decisions focus on the merits of the decisions under review and do not take an overly legalistic approach.

77 Administrative Appeals Tribunal Act 1975 (Cth), s 41.

78 See *Re McKenzie v Civil Aviation Safety Authority* [2008] AATA 651; and *Merridew and Civil Aviation Safety Authority* [2010] AATA 951.

79 Civil Aviation Act (Cth), s 31A(2).

80 Administrative Appeals Tribunal Act 1975 (Cth), s 43.

81 Administrative Appeals Tribunal Act 1975 (Cth), s 44.

82 Administrative Appeals Tribunal Act 1975 (Cth), s 44.

83 See *Byers v Civil Aviation Safety Authority* [2005] FCA 1751.

1 *Avtex v Civil Aviation Safety Authority*⁸⁴

In this case, the Administrative Appeals Tribunal dealt with the review of a decision to cancel Avtex's air operator certificate under s 30DI of the Civil Aviation Act (Cth) following a suspension under div 3A (on the grounds that its operations posed a serious and imminent risk) and the order of the Federal Court upholding the suspension. The Tribunal held that it could also consider whether cancellation would have been justified under s 28BA.

This case is mentioned because it illustrates the Administrative Appeals Tribunal's flexibility and discretion on appeal. It is also noteworthy that the case occupied 16 sitting days and a large amount of evidence that was heard from expert witnesses and former pilots of Avtex. The Tribunal ultimately upheld the Civil Aviation Safety Authority's decision to cancel Avtex's Air Operator Certificate.

2 *Federal court decisions*

There are far fewer Federal Court decisions relating to decisions of the Civil Aviation Safety Authority to cancel an aviation document because appeals to the Federal Court are restricted to appeals on a question of law. There have, however, been some recent and noteworthy cases on the meaning of "serious and imminent risk" under s 30DE of the Civil Aviation Act (Cth).

(a) *Civil Aviation Safety Authority v Boatman*⁸⁵

In this case, inclement weather led to a decision by the respondents, operating two separate aircraft, to use a road instead of the local airport to depart. After becoming aware of this and making preliminary enquiries, the Civil Aviation Safety Authority suspended without notice the pilot licences of the two respondents under s 30DC of the Civil Aviation Act (Cth).

In accordance with the procedure in div 3A, the Authority then applied to the Federal Court under s 30DE for orders continuing the suspension. After a protracted delay including a collateral legal challenge to the validity of s 30DE itself, the matter was the subject of a full hearing.

The Court considered that the key issue was whether the respondents had engaged in conduct "that constituted, contributed to or resulted in a serious or imminent risk to air safety".⁸⁶ The Court considered that it was clear that "Div 3A was intended only for cases where a responsible attitude to air safety demands immediate action protective of the public" and asked if "there was a really significant prospect that such risks of serious harm as actually existed, in relation to the conduct complained of, would materialise?"⁸⁷ After examining all of the incidents at issue, the Court

⁸⁴ *Avtex v Civil Aviation Safety Authority*, above n 68.

⁸⁵ *Civil Aviation Safety Authority v Boatman* [2006] FCA 460.

⁸⁶ At [15].

⁸⁷ At [53] and [55].

answered the issue in the negative, holding that there was no "reason to believe that either respondent engaged in conduct that constituted, contributed to or resulted in a serious and imminent risk to air safety."⁸⁸

The Court likened the div 3A procedure to an interim disqualification and described the subsequent application to the Court as being "analogous to the grant of an interlocutory application prior to the expiration of an interim disqualification".⁸⁹ This case therefore illustrates the high standard of safety risk that the Federal Court expects the Civil Aviation Safety Authority to show in order to uphold a suspension under div 3A.⁹⁰

(b) *Civil Aviation Safety Authority v Alligator Airways Pty Limited*⁹¹

In this case the Civil Aviation Safety Authority issued a suspension notice against the respondent's air operator certificate. The Authority applied under s 30DE of the Civil Aviation Act (Cth) for orders continuing the suspension within five working days in accordance with the div 3A procedure. The matter was the subject of a full hearing heard over three days. The Federal Court issued a prohibition order, which is understood by the writer to be the first time such an order was granted.

The respondent in this case was a small general aviation business in Western Australia which operated 16 light aircraft. A number of incidents gave rise to the Civil Aviation Safety Authority's concerns and these were accepted by the Court as establishing a "serious and imminent risk". These included a number of forced and emergency landings.

The Court analysed in detail the meaning of "serious and imminent risk". Referring to *Civil Aviation Safety Authority v Boatman*,⁹² the Court noted that the seriousness of risk is related to the probability of that risk eventuating as well as the significance of the consequences of that risk eventuating.⁹³ In contrast with the Court in *Civil Aviation Safety Authority v Boatman*, Murphy J did not consider that it was enough that there was merely a significant risk, rather than a "really significant" prospect that a risk of considerable harm or damage would actually materialise.⁹⁴

88 At [152].

89 At [10].

90 See also *Byers v Civil Aviation Safety Authority*, above n 83.

91 *Civil Aviation Safety Authority v Alligator Airways Pty Limited* [2012] FCA 601.

92 *Civil Aviation Safety Authority v Boatman*, above n 85.

93 *Civil Aviation Safety Authority v Alligator Airways Pty Limited*, above n 91, at [41].

94 At [44].

(c) *Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority*⁹⁵

In this case, the plaintiff claimed private law damages against the Civil Aviation Safety Authority for negligence and breach of statutory duty in relation to the exercise of the Authority's powers under the Regulations. The Federal Court struck out the claim, finding that there was no duty of care on the facts as pleaded, because the duty as pleaded would have run directly counter to the Authority's statutory obligations.⁹⁶ However the Court rejected a submission that there could never be a duty of care, so – at least hypothetically – private law damages are available in Australia in relation to administrative action by the Civil Aviation Safety Authority.

3 *Summary of the case law*

The above case law shows that the Civil Aviation Safety Authority must demonstrate a high level of risk before suspension action can be taken. In respect of ordinary appeals, the Administrative Appeals Tribunal will engage in a far reaching review of the Authority's decisions. While private law damages are theoretically available, the courts are cautious that any such action not derogate from the Authority's important aviation safety regulatory function.

IV THE CANADIAN POSITION

The Canadian aviation system is governed by the Aeronautics Act RSC 1985 c A-2, the Civil Aviation Regulations 1988 and the Civil Aviation Regulations 1996. The Minister of Transport, through Transport Canada, is responsible for the regulation of civil aviation in Canada. Transport Canada's responsibilities are set out in s 4.2 of the Aeronautics Act and include being responsible "for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics".⁹⁷

A The Aeronautics Act RSC 1985 c A-2

In terms of de-licensing, the key provisions are found in ss 6.6 to 7.21 of the Aeronautics Act, within the sub-part entitled "Measures in relation to Canadian Aviation Documents".

1 "Without notice" suspension or cancellation of an aviation document

There are two provisions in the Aeronautics Act that allow Transport Canada to take action in respect of an aviation document on a "without notice" basis.

⁹⁵ *Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority* [2013] FCA 576.

⁹⁶ At [57].

⁹⁷ Aeronautics Act, s 4.2.

(a) Section 7

Section 7 provides for the suspension of an aviation document because of an immediate threat to aviation safety. Under s 7 the Minister may suspend an aviation document on the grounds that:⁹⁸

... an immediate threat to aviation safety or security exists or is likely to occur as a result of an act or thing that was or is being done under the authority of the document or that is proposed to be done under the authority of the document.

This provision is similar to s 17 of the Civil Aviation Act (NZ), which allows for immediate suspension without notice on specified grounds; in the same way that the Australian provisions in div 3A of the Civil Aviation Act (Cth) allow for immediate suspension if there is a serious and imminent risk to aviation safety.

If the Minister suspends an aviation document under s 7 of the Aeronautics Act, the Minister shall without delay notify the holder, owner or operator of the suspension and give notice in accordance with s 7(2)(a) and (b). Such a suspension takes effect on the date of receipt of the notice "unless the notice indicates that the decision is to take effect on a later date".⁹⁹

The affected document holder may apply to the Transportation Appeal Tribunal for a review of the Minister's decision within 30 days of the notice.¹⁰⁰ There is no ability to apply for and be granted a stay in respect of the Minister's decision to suspend an aviation document under s 7.¹⁰¹ The Transportation Appeal Tribunal is a quasi-judicial body set up to provide for an independent process of review of administrative and enforcement actions including the suspension, cancellation, refusal to renew, refusal to issue or refusal to amend aviation documents.¹⁰² The Transportation Appeal Tribunal has jurisdiction in respect of reviews and appeals as expressly provided for under the Aeronautics Act.¹⁰³

98 Section 7(1).

99 Section 7(2).

100 Section 7(3).

101 Section 7(4).

102 See Transportation Appeal Tribunal of Canada *Guide for Applicants – Aviation Mode* <www.tatc.gc.ca>.

103 The Transportation Appeal Tribunal also has jurisdiction under other Acts such as the Canada Shipping Act SC 2001 c 26, the Marine Transportation Security Act SC 1994 c 40, the Railway Safety Act RSC 1985 c 32 and any other federal Act regarding transportation.

(b) Section 7.1

Under s 7.1, the Minister may suspend, cancel or refuse to renew a Canadian aviation document on the grounds listed in s 7.1, which include "incompetence", failing to meet the necessary qualifications or that the public interest warrants it.¹⁰⁴

The Minister must send a notice containing the matters specified in ss 7.1(2)(a)(i) and 7.1(2)(a)(ii). Although a notice must be sent to the aviation document holder, the Minister's decision takes effect on receipt of the notice "unless the notice indicates that the decision is to take effect on a later date".¹⁰⁵

A person who receives a notice may lodge an application for review within 30 days of receiving the notice.¹⁰⁶ As with a decision under s 7, there is no stay available in respect of a decision under s 7.1.¹⁰⁷ However, if, following a review by the Transportation Appeal Tribunal, the matter is sent back to the Minister for reconsideration, a stay may be granted by the Tribunal if the Tribunal is satisfied that granting a stay would not constitute a threat to aviation safety.¹⁰⁸

2 *"On notice" suspension or cancellation of an aviation document*

Under s 6.9 the Minister may suspend or cancel a Canadian aviation document on the grounds:¹⁰⁹

That its holder or the owner or operator of any aircraft, airport or other facility in respect of which it was issued has contravened any provision of this Part or of any regulation, notice, order, security measure or emergency direction made under this Part.

Before doing so, the Minister must notify the holder, owner or operator of the aviation document of the effective date of the suspension or cancellation.

A person who receives a notice may lodge an application for review within the 30 day notice period before which the suspension or cancellation takes effect.¹¹⁰ If they do so, the application does not operate as an automatic stay of the Minister's decision. However, they can apply in writing to the Transportation Appeal Tribunal for a stay of the decision.¹¹¹ A stay may be granted if the

104 Sections 7.1(1)(a)–7.1(1)(c).

105 Section 7.1(2.1).

106 Section 7.1(2.1).

107 Section 7.1(4).

108 Section 7.1(8).

109 Section 6.9(1).

110 Section 6.9(3).

111 Section 6.9(4).

member of the Tribunal "considering the matter is of the opinion that the stay would not result in a threat to aviation safety or security".¹¹²

B Appeal or Review Rights

Under the Aeronautics Act, there is a two-step review and appeal process in the Transportation Appeal Tribunal. A person affected by any of the decisions under the sections described above may apply for a review by the Tribunal; the review itself is conducted by a single Tribunal member. The member of the Tribunal assigned to conduct the review shall provide both the Minister and the requester with an opportunity consistent with procedural fairness and natural justice, in order to present evidence, make representations and be heard.¹¹³ The second level of hearing, usually by a designated chairperson and two other Tribunal members, is thus an appeal against the initial determination rendered by the Tribunal member at the first level.¹¹⁴ A decision of an appeal panel of the Tribunal is final and binding on the parties to the appeal.¹¹⁵

C Case Law

There is no provision for a judicial appeal from decisions of the Transportation Appeal Tribunal, meaning that there are few decisions in the Canadian courts. However, there are some judicial review decisions that provide important guidance.

1 Judicial review

(a) Bancarz v Canada (Minister of Transport)¹¹⁶

In this Federal Court (trial division) case, the plaintiff brought judicial review proceedings in respect of the Minister's decision not to renew his aircraft maintenance engineer's licence on public interest grounds. Following a review in the Transportation Appeal Tribunal, the matter had been sent back to the Minister for reconsideration. However, the Minister ultimately accepted a recommendation not to renew the plaintiff's licence. The Court confirmed that the Minister has an overriding obligation to public safety; "personal interests must give way, to some extent, to the regulatory environment particularly in respect of safety."¹¹⁷

112 Section 6.9(5).

113 Sections 6.72(1), 6.9(3), 7(3) and 7.1(3).

114 Transportation Appeal Tribunal of Canada, above n 102.

115 Transportation Appeal Tribunal of Canada Act SC 2001 c 29, s 21.

116 *Bancarz v Canada (Minister of Transport)* 2007 FC 451, [2007] 312 FTR 113.

117 At [7].

(b) *Sierra Fox Inc v Canada (Federal Minister of Transport)*¹¹⁸

This is a Federal Court (trial division) decision upholding an application for a judicial review in respect of the Minister's determination. The Minister had suspended the certificate of airworthiness for one of the plaintiff's aircraft under s 7.1 of the Aeronautics Act. The plaintiff appealed this decision to the Transportation Appeal Tribunal, which then sent the matter back to the Minister for reconsideration. The Court noted that:¹¹⁹

In the event a matter is referred back to the minister for reconsideration, the Act currently provides that the decision of the Minister remains in effect until the reconsideration is concluded, subject to the granting of a stay by the Tribunal. Nothing further is provided in the Act with respect to the process and particular manner the Minister will reconsider a former decision.

The Court in this case held that the Minister had relied on "uncorroborated hearsay" in reconsidering the matter and that there had been a breach of procedural fairness. Consequently, the matter was sent back to the Minister for reconsideration. The Court noted the tension between aviation safety and the rights of business owners.¹²⁰

2 *Cases claiming private law damages*

Important civil aviation cases in Canada have arisen in the context of claims for private law damages against Transport Canada in both the provincial courts and federal court jurisdiction.

(a) *Chadwick v Canada (Attorney General)*¹²¹

Chadwick v Canada (Attorney General) is a decision of the British Columbia Supreme Court relating to a claim by the widows of passengers that were killed in a helicopter crash. The claim was against various defendants including Transport Canada and A & L Aircraft Maintenance (A & L), a maintenance company responsible for maintaining the helicopter. The cause of the accident was alleged to be a faulty fuel pump. The A & L person responsible for maintenance had convictions for making false maintenance entries and A & L was therefore not eligible under the Canadian civil aviation rules to be certified as an aircraft maintenance organisation.

The claim against Transport Canada was essentially that it had failed to take effective measures to ensure compliance by A & L with maintenance standards or to remove its aircraft maintenance organisation certification.

118 *Sierra Fox Inc v Canada (Federal Minister of Transport)* 2007 FC 129, 308 FTR 219.

119 At [13].

120 At [71].

121 *Chadwick v Canada (Attorney General)* 2010 BCSC 1744, [2011] BCWLD 1872.

This decision was in respect of an application by the plaintiffs to amend their claim to specify the alleged duties of care owed by Transport Canada. The Court considered the proposed amendments and held that the alleged duties did disclose a cause of action holding that there was the necessary proximity.¹²²

The Court held that policy considerations did not negate the regulator's duty of care. In doing so the Court observed that it is difficult "to conceive how the regulator's duty of care to designate only those [Aircraft Maintenance Engineers], Persons Responsible for Maintenance and Aircraft Maintenance Organisations, who are competent and who have not been convicted of offences under the Act, can possibly result in inconsistent obligations".¹²³ The Court further rejected any possibility of indeterminate liability for Transport Canada on the basis of this duty of care.¹²⁴

(b) *Swanson v Canada (Minister of Transport)*¹²⁵

This 1992 decision of the Federal Court (appeal division) dismissed the Minister's appeal against a finding that Transport Canada owed a duty of care in respect of the widows of passengers that were killed in an aircraft crash. This case confirmed that Transport Canada owed a civil duty to the passengers and was not immune from liability in negligence. The Court made a strong statement that officials charged with the duty of maintaining safety "must be encouraged, just like other professionals, to perform their duties carefully. They must learn that negligence, like crime, does not pay".¹²⁶ *Swanson* has been applied in subsequent cases, including *Chadwick v Canada (Attorney General)*.¹²⁷

V COMPARATIVE ANALYSIS

While New Zealand, Australia and Canada all provide for "on notice" and "without notice" administrative action against aviation document holders, there are some important differences. This section analyses those differences with a view to later assessing what reform could be made to the New Zealand system.

A Without Notice Administrative Action

In New Zealand, Canada and Australia the civil aviation regulator has the power to take immediate without notice action on aviation safety grounds. Taking action without notice against an

122 At [58].

123 At [64].

124 At [65].

125 *Swanson v Canada (Minister of Transport)* [1992] 1 FC 408.

126 At [31].

127 *Chadwick v Canada (Attorney General)*, above n 121.

aviation document holder is probably the most powerful tool at the disposal of a civil aviation regulator. This is because the aviation document holder has no opportunity to respond to the allegations before their aviation document is suspended. Such action could have a highly detrimental effect on the document holder's commercial position and reputation.

As set out above, in New Zealand, the Director of Civil Aviation has the power to suspend or impose conditions on an aviation document for up to 10 working days. This period can be extended by the Director for a further specified period.¹²⁸ In Canada, the Minister may suspend an aviation document under s 7 of the Aeronautics Act and suspend, refuse to renew or cancel a licence under s 7.1 of that Act. In Australia, the Civil Aviation Safety Authority may take immediate suspension action under the div 3A procedure in the Civil Aviation Act (Cth), which involves judicial oversight by the Federal Court.

A summary of the grounds for taking "without notice" administrative action in each country is set out in the table on the opposite page.

Australia has the highest threshold for the immediate suspension of an aviation document. The requirement that there be a "serious and imminent threat" to aviation safety appears more rigorous than being "necessary in the interests of aviation safety" or that the "public interest" warrants the suspension.

In a recent New Zealand decision, the Court of Appeal suggests that "imminent danger" is required before suspension action under s 17 of the Civil Aviation Act (NZ) is justified.¹²⁹ However, the Court subsequently held that:¹³⁰

[Section] 17 was intended to confer a wide discretion on the Director to impose a suspension where he is satisfied that safety requires it. The Director's concerns must be *serious and immediate*, but he is entitled to take a precautionary approach.

As the Director's discretion conferred under s 17 is not expressly stated in as being contingent on his/her concern being "serious and immediate", it appears the Court is of the view that this qualification is implicit in the section. This constraint on the Director's discretion under s 17 is obviously similar to the "serious and imminent" qualification expressly provided for in relation to the equivalent decision-making discretion found in the Australian legislation.

128 Civil Aviation Act (NZ), s 17(3).

129 See *Director of Civil Aviation v Air National Corporate Ltd*, above n 29.

130 At [38] (emphasis added).

Country	Grounds for taking "without notice" action in respect of an aviation document	Stay of decision?
New Zealand	<p>1. It is necessary on the grounds of aviation safety and one of the following grounds exists (s 17(1)):</p> <ul style="list-style-type: none"> a. the action is necessary to ensure compliance with the Act or Rules; or b. the holder failed to comply with conditions of the aviation document or with the requirements of s 12; or c. the holder has contravened or failed to comply with s 49; or d. the privileges or duties of the document are being carried out carelessly or incompetently; or e. in the case of a holder of a New Zealand air operator certificate with ANZA privileges, the Civil Aviation Safety Authority has served an Australian temporary stop notice. <p>OR</p> <p>2. There is reasonable doubt as to the airworthiness of the aircraft or as to the quality or safety of the aeronautical product or service to which the document relates (s 17(2)).</p>	No.
Australia	The holder of a civil aviation authorisation has engaged, is engaging in, or is likely to engage in, conduct that constitutes, contributes to or results in serious and imminent risk to aviation safety (s 30DC(1)).	No, but court can refuse order.
Canada	<p>1. That an immediate threat to aviation safety or security exists or is likely to occur as a result of an act or thing that was or is being done under the authority of the document or that is proposed to be done under the authority of the document (s 7(1)).</p> <p>OR</p> <p>2. One of the following (s 7(1)):</p> <ul style="list-style-type: none"> a. the holder of the aviation document is incompetent; or b. the holder of the aviation document does not meet the qualifications or fulfil the conditions necessary for the document; or c. the public interest and, in particular, the aviation record of the holder of the aviation document as defined in regulations, warrant the suspension. in particular, the aviation record of the holder of the aviation document as defined in regulations, warrant the suspension. 	No.

It is questionable whether the Director's discretion under s 17 was in fact intended to be limited in this way as it appears that the Australian legislation intends to set the bar higher for the (Australian) Civil Aviation Safety Authority when making such adverse decisions. Unlike Australia, in New Zealand and Canada there is no need for the regulator to obtain a judicial warrant or authorisation prior to, or during, the suspension action. The key difference with the Australian position is the requirement that the (Australian) Civil Aviation Safety Authority must obtain a federal court order within five business days to allow the suspension to continue,¹³¹ a procedural requirement typically reserved for instances where swift judicial action is necessary to address an imminent concern. The Australian procedure thus ensures that there is some judicial oversight of the suspension action. However, this might not be desirable, as it may be that courts (unlike the Director) do not possess the requisite competence to judge whether a particular state of affairs is a "serious and immediate threat" to aviation safety; this question may well be more suited to the civil aviation regulator in possession of the expertise necessary to judge the situation. Accordingly, it is argued that:

- (a) Australia has consciously elected to insert the "serious and imminent" qualification for the purpose of imposing a higher standard than that found in the Civil Aviation Act (NZ); and
- (b) by not including this qualification, the New Zealand legislature intended that the courts give deference to the Civil Aviation Authority on the basis that it is a specialist body presiding over subject matter of a specialised, complex and technical nature and, accordingly, such decisions fall within the Director's area of competence.

1 Stay of a "without notice" decision

Neither New Zealand, Australia nor Canada allow for a "without notice" suspension to be stayed (although in Australia the Federal Court could refuse to issue an order under div 3A of the Civil Aviation Act (Cth), immediately bringing the suspension to an end). A suspension decision is made in these circumstances because there is a need to take immediate action in the interests of aviation safety and staying that decision would be inconsistent with that.

In New Zealand it is possible to get interim relief under s 8 of the Judicature Amendment Act if an applicant can establish that the order sought is reasonably necessary to preserve the position of the applicant for interim relief.¹³²

The court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

¹³¹ Civil Aviation Act (Cth), ss 30DE(1) and 30DE(2).

¹³² See *Director of Civil Aviation v Air National Corporate Ltd*, above n 29, at [25] referring to *Carlton & United Breweries Ltd v Minister of Customs*, above n 37.

However, given the comments in *Director of Civil Aviation v Air National Corporate Ltd*, that s 66 of the Civil Aviation Act (NZ) is inconsistent with the granting of interim relief, it is doubtful that s 8 of the Judicature Amendment Act will be of much assistance to aviation document holders faced with immediate suspension or revocation action.¹³³ The exception would be if the decision is clearly unlawful or irrational, or if irrelevant considerations have been taken into account.

As there is no stay available for a decision to immediately suspend an aviation document "without notice", the length of time it can take for an affected person to have their appeal or review heard is important.¹³⁴

B "On Notice" Administrative Action

In less "imminent" cases, New Zealand, Australia and Canada all provide for taking "on notice" action against an aviation document holder. It should be noted that there are other actions available to regulators such as, in the case of New Zealand, inspection and monitoring under s 15 of the Civil Aviation Act (NZ) or a formal investigation under s 15A.

Before taking any "on notice" administrative action, the New Zealand and Australia regulators must give the holder an opportunity to provide a response to the regulator's allegations, which the regulator must then consider. In New Zealand, the Director must issue a "notice of proposed adverse decision".¹³⁵ While the onus is still on the Director to show that it is "necessary" to take this action, in practical terms, once a notice of proposed adverse decision is issued the document holder would probably be required to point to some evidence in order for the Director not to proceed with the adverse decision. This is because in order to have proposed the decision in the first place, the Director must have been satisfied that it was necessary to revoke or impose permanent conditions on the aviation document – as the High Court has previously noted is implicit in s 11.¹³⁶

In Australia, under a variety of provisions, the Civil Aviation Safety Authority must issue a show cause notice before taking administrative action.¹³⁷ Once the show cause notice is issued, the onus is on the document holder to show why this action should not be taken. In that sense the onus more explicitly shifts to the document holder in Australia than it does in New Zealand.

133 *Director of Civil Aviation v Air National Corporate Ltd*, above n 29.

134 *Aviation Law*, above n 23, at [CV66.03].

135 Civil Aviation Act (NZ), s 11.

136 *O'Malley v Jones* HC Christchurch CP64/02, 8 November 2002 at [25].

137 For example, under reg 269 of Civil Aviation Regulations 1988 a show cause notice must be issued to the holder of a civil aviation authorisation and the holder given reasonable time to show cause why the authorisation should not be varied, suspended or cancelled.

There is also a broad discretion for the Administrative Appeals Tribunal to grant a stay of the decision, except if it is a decision under:¹³⁸

... the regulations to cancel a licence, certificate or authority on the ground that the holder of that licence, certificate or authority has contravened a provision of this Act or the regulations.

An example of this is reg 269(1)(a) of the Civil Aviation Regulations 1988.

In Canada, if the Minister takes action under s 6.9 of the Aeronautics Act, he or she must first give notice to the document holder, who may then lodge an application for review with the Transportation Appeal Tribunal. In this circumstance, the Tribunal may also grant a stay of the Minister's decision until the review is heard, but only if the member of the Tribunal "considering the matter is of the opinion that the stay would not result in a threat to aviation safety or security".¹³⁹

Australia and New Zealand have a similar procedure in that the aviation document holder has an opportunity to make submissions to the regulator before a final decision is confirmed. The proposed decision may be revisited or even discontinued as a result of the submissions provided. The Canadian system is different in that the Minister does not receive submissions, or a show cause notice, from the affected document holder prior to making his or her decision. However, the affected document holder has access to a speedy review through the Transportation Appeal Tribunal and potentially may have the decision stayed until a substantive hearing. New Zealand is different in not providing for a decision to be stayed until it is heard by a review court or tribunal.

The procedure for taking "on notice" action and the ability for a decision to be stayed pending review is summarised in the table on the opposite page.

138 Section 31A(2).

139 Aeronautics Act, s 6.9(5).

Country	"On Notice" Procedure for Permanently Revoking or Imposing Permanent Conditions on an Aviation Document	Stay of decision available?
New Zealand	Director issues a proposed adverse decision giving affected document holder an opportunity to make submissions. Director must consider these before making final decision.	No.
Australia	A show cause notice is issued, giving affected document holder an opportunity to show cause as to why the decision should not take effect. The Civil Aviation Safety Authority must consider before making final decision.	Yes, for all decisions in which a show cause notice is issued except if it is a decision to cancel a licence, certificate or authority on the ground that the holder has contravened a provision of the Act or the regulations (s 31A(2)).
Canada	Notice is sent to the document holder and must specify a date at least 30 days before the decision takes effect. During this time period the affected document holder may apply for a review.	Yes, for all decisions on notice, on application the Transportation Appeal Tribunal may grant a stay if it is of the opinion that the stay would not result in a threat to aviation safety or security (s 6.9(5)).

C Length of Time for Appeal or Review to Be Heard

The length of time that it can take for an appeal to be heard is of major importance for an affected document holder. In New Zealand, a challenge to the Director's decision is an appeal by way of a rehearing through the normal courts. Typically it can take up to a year for the appeal to be heard.¹⁴⁰ Although the Director is not making a judicial or quasi-judicial decision, the New Zealand court rules require that a record of the Director's decision be filed.¹⁴¹ The District Court Rules 2009 provide the Court with the discretion to extend or shorten the time "for doing any act or taking any proceeding or any step in a proceeding, on such terms (if any) as the court thinks fit in the interests of justice".¹⁴² However, much could depend on the local region where the appeal is heard and court resources.

In Australia, it is unclear how long it takes for the Federal Court to hear the Civil Aviation Safety Authority's application. The scheme of div 3A anticipates a prompt hearing of the matter, however this may not always be the case. The author of *Aviation Law in Australia* has suggested the

¹⁴⁰ See *Halliwell v Director of Civil Aviation*, above n 43, at [1].

¹⁴¹ See District Court Rules, r 14.13.

¹⁴² Rule 1.18.

hearing "may not be for several days after the Civil Aviation Safety Authority lodges its application".¹⁴³ In *Civil Aviation Safety Authority v Boatman*, the Federal Court referred to the need for an early hearing of the application.¹⁴⁴ In terms of a general appeal to the Administrative Appeals Tribunal, recent cases suggest these are heard in a timely manner.¹⁴⁵

In Canada, a review of recent Transportation Appeal Tribunal cases suggests that it can be up to a year before an application for review is heard.¹⁴⁶ However, in an urgent case involving the cancellation of an air operator certificate and a flight training unit operator certificate, the Transportation Appeal Tribunal heard the matter within three weeks.¹⁴⁷

VI NEW ZEALAND REFORM

Having regard to the comparative analysis of New Zealand, Australia and Canadian civil aviation systems, this section considers what, if any, reform could usefully be made to the New Zealand system.

A Specialist Civil Aviation Tribunal or Panel

Civil aviation is a highly specialised area and the subject matter is narrow and technical, requiring expertise and knowledge of the industry. Judges from regular courts, unfamiliar with civil aviation, may struggle with aviation cases and come to an unjust outcome. The advantage of the Canadian Transportation Appeal Tribunal is that its members are made up of a mixture of lawyers, doctor, engineers and pilots providing it with a mix of aviation-related expertise that is unlikely to be available through the normal courts.¹⁴⁸ The Australian Administrative Appeals Tribunal also has access to specialist civil aviation members.¹⁴⁹

A potential advantage of a tribunal is that it would provide quicker and more informal access to dispute resolution. One of the difficulties with appeals to the New Zealand District Court is the

143 See Bartsch, above n 9, at [8.70].

144 *Civil Aviation Safety Authority v Boatman*, above n 85, at [9].

145 See *Randazzo v Civil Aviation Safety Authority* [2011] AATA 375; *Caper Pty Ltd T/a Direct Air Charter v Civil Aviation Safety Authority* [2011] AATA 181; and *Avtex v Civil Aviation Safety Authority*, above n 68, in which the appeals were all heard within six months.

146 See *Olaru v Canada (Minister of Transport)* 2010 TATCE 19; *102643 Aviation Ltd v Canada (Minister of Transport)* 2010 TATCE 15; *Jensen v Canada (Minister of Transport)* 2010 TATCE 16; and *Marina District Development Company v Canadian Transportation Agency* 2010 TATCE 14.

147 See *2431-9154 Québec Inc v Canada (Minister of Transport)* 2007 TATCE 19.

148 See John Baird, Minister of Transport, Infrastructure and Communities Transport Canada *Transport Appeal Tribunal Annual Report 2009–2010* (Ontario, 2010) at 7–13.

149 See *Avtex v Civil Aviation Safety Authority*, above n 68. But compare comments of Bartsch, above n 9, at [8.155] that it is not normal to have access to an aviation expert in the Administrative Appeals Tribunal.

unclear application of pt 14 of the District Court Rules to appeals from a decision of the Director. Part 14 was designed to catch a multitude of general appeals, particularly appeals from tribunals. The application of these "catch all" court rules to an appeal from the Director creates a number of difficulties. For example, r 14.13 requires that two copies of the decision appealed from be lodged with the court registrar. Further, on a strict literal reading of r 14.21, the Director is only entitled to be heard in an appeal with the leave of the Court and on the matters set out in r 14.21.1. This restrictive approach may be appropriate when the decision-maker being appealed from is a tribunal, but is clearly inappropriate when the decision-maker is a regulatory decision-maker such as the Director. In practice the courts do expect the Director to play an active role in an appeal and this generally involves the filing of extensive affidavits from both the Director and other Civil Aviation Authority staff involved, and the appellant and his or her witnesses.¹⁵⁰ Witnesses can then be cross-examined on the evidence. This is a time consuming and expensive process for both parties.

It is not clear that the Australian and Canadian tribunals always provide speedier or more efficient access to justice,¹⁵¹ but there is clearly room for improvement in the New Zealand District Court appeal process through amendments to the Civil Aviation Act (NZ) and District Court Rules, or through the establishment of a tribunal to deal with civil aviation cases.

1 Unified transport tribunal

The New Zealand Law Commission has previously examined the role of tribunals in New Zealand. The Commission concluded that the purpose of tribunals included improving public access to dispute settlement mechanisms and providing for simple, cheap and accessible justice.¹⁵² Specialisation was another important factor identified by the Commission.¹⁵³ The New Zealand Law Commission identified 65 tribunals with an adjudicative function over various subjects, bodies and industries.¹⁵⁴ It proposed a unified tribunal structure with types of tribunals clustered by type of subject matter.¹⁵⁵ In 2008 the then New Zealand Government accepted the need for a unified tribunal and released a

150 See District Court Rules, r 14.18.3. See also *Halliwell v Director of Civil Aviation*, above n 43; and *Andrews v Civil Aviation Authority* DC Wellington CIV-207-085-802, 9 April 2009.

151 In *Avtex v Civil Aviation Safety Authority*, above n 68, the Administrative Appeals Tribunal sat for 16 days and a large amount of evidence was heard from expert witnesses and former pilots.

152 New Zealand Law Commission *Tribunal Reform* (NZLC SP20) at [2.19] to [2.20].

153 At [2.20].

154 At [2.15].

155 Chapter 6.

public consultation document, however there do not appear to have been any further steps taken by the current Government to implement these reforms.¹⁵⁶

Given the small number of civil aviation appeals in New Zealand, a separate specialist civil aviation tribunal would be unjustified. Since 1997, there have been fewer than 20 District Court decisions in respect of appeals from decisions by the Director. However, a unified tribunal structure with a division or section dealing with transport appeals from licensing decisions of the Civil Aviation Authority, New Zealand Transport Agency and Maritime New Zealand decisions may be cost effective, providing speedier, more efficient hearings and better access to transport expertise. All three above organisations operate under legislation with similar provisions regarding the suspension or revocation of licences/documents. Further, all three impose fit and proper person requirements.

Holders of "transport services licences" or "maritime documents" must, amongst other things, meet the requirements of any regulations or prescribed requirements and be fit and proper persons to hold a "transport service licence" or "maritime document".¹⁵⁷ The New Zealand Transport Agency may revoke a holder's transport services licence if it considers that the holder, or person having control over the licence, is not fit and proper.¹⁵⁸ Similarly, the Director of Maritime New Zealand may suspend, revoke or impose conditions on a maritime document.¹⁵⁹ Before revocation of the licence is undertaken, an adverse decision must be proposed. Accordingly, the basic law and procedure for suspension, revocation or imposition of conditions is very similar to the Director's powers in ss 17 and 18 of the Civil Aviation Act (NZ), as well as to the adverse decision procedure in s 18 of that Act.¹⁶⁰ There is also a general right of appeal in respect of decisions by the New Zealand Transport Agency and the Director of Maritime New Zealand to the District Court.¹⁶¹

2 *Aviation panel review*

An alternative to the creation of a unified transport tribunal might be to provide for a review, in certain circumstances, by a panel of aviation experts. Such a panel would have to be on-call and competent to make specialist recommendations on matters of aviation safety. The composition of the panel could potentially involve a mixture of aviation, medical and legal experts.

156 See Robin Creyke *Tribunals in the Common Law World* (Federation Press, Annandale, 2008) at [194]; and Ministry of Justice *Tribunals in New Zealand: the Government's Preferred Approach to Reform* (Wellington, 2008).

157 See Land Transport Act 1998, s 30L and Maritime Transport Act 1994, s 41.

158 Land Transport Act, s 30S.

159 See Maritime Transport Act, ss 43–44.

160 Land Transport Act, s 30W; and Maritime Transport Act, s 51.

161 Land Transport Act, s 106; and Maritime Transport Act, s 424.

A review by an aviation panel might provide an urgent merits-based review of a "without notice" decision by the Director to, for example, suspend the air operator certificate of an airline as well as decisions taken "on notice" such as a decision to revoke an aviation document. The benefit of this is a specialist, low cost and independent review of a decision that may be causing significant detriment to the business interests of the aviation document holder.

Given the central and important role of the Director in regulating civil aviation in New Zealand, there would necessarily be a requirement to limit the role of the aviation panel to making recommendations, or giving advice, to the Director. If not, the important function of the Director in regulating civil aviation would be undermined.

A review by an aviation panel in urgent or without notice cases would provide an alternative remedy to the current unsatisfactory situation (from an aviation document holder's perspective) in New Zealand law, where there is no procedure to have a civil aviation decision urgently reviewed on its merits.

Providing for an urgent review by a judge or an independent body is common in New Zealand law. For example, if an application is made under s 180 of the Electoral Act 1993 for a recount of electorate or party votes, the recount must begin within three working days.¹⁶² A review of a patient's condition by a Review Tribunal under the Mental Health (Compulsory Assessment and Treatment) Act 1992 must take place within 21 days.¹⁶³ An application for a writ of habeas corpus, to challenge the legality of someone's detention, must be heard in the High Court within three working days.¹⁶⁴

An aviation panel could take as its model the convenor review process in ss 27L and 27M of the Civil Aviation Act (NZ). These provisions provide for a review by a medical convenor of decisions regarding medical certificates or applications. The medical convenor must be assisted by at least one medical expert and have regard to the purpose and scheme of the Civil Aviation Act (NZ).¹⁶⁵ Both the applicant and the Director can participate in the review.¹⁶⁶ The Director does not have to accept the Convenor's decision but if the decision is not accepted the Director must give reasons for this.¹⁶⁷ The Director's decision stays in force during the convenor review process.¹⁶⁸ A person affected by a

162 Electoral Act 1993, s 180(5).

163 See Mental Health (Compulsory Assessment and Treatment) Act 1992, s 79.

164 See Habeas Corpus Act 2001, s 9.

165 Civil Aviation Act (NZ), ss 27L(3)(a) and 27L(3)(b).

166 Section 27L(6).

167 Section 27L(5).

168 Section 27L(8).

decision regarding a medical certificate retains full District Court appeal rights, in that the medical convenor process is complementary to their normal appeal rights.

It should be noted that until 1992, New Zealand civil aviation law provided for appeals to the Minister of Transport, rather than to the District Court.¹⁶⁹ For the purposes of the appeal, the Minister could set up a "board of inquiry" to report to him or her on the circumstances giving rise to the decision.¹⁷⁰ However, there is no record of this process being used and when appeals to the Minister were replaced with appeals to the District Court, this process became redundant.

B Amendment to New Zealand Law to Provide for a Power to Stay

Given the potential delays in having an appeal heard in the District Court and the effect that administrative action may have on an affected document holder, it is perhaps surprising that there is no ability to stay a decision of the Director pending a full hearing. There is a clear policy rationale behind the prohibition on a stay in s 66 of the Civil Aviation Act (NZ). Any decision by the Director that is appealable to the District Court is made on the basis of an aviation safety concern.

In some circumstances a stay could be granted pending a full rehearing without compromising safety, particularly if a court or tribunal has the ability to grant a stay subject to conditions. In this regard, the Canadian model would appear to have merit in that "on notice" decisions under s 6.9 of the Aeronautics Act can be stayed by the Transportation Appeal Tribunal on an interim application if the member "considering the matter is of the opinion that the stay would not result in a threat to aviation safety or security".¹⁷¹ In a situation where the regulator has proceeded on an "on notice" basis it is reasonable to assume that the safety concern, while serious, is not imminent. Accordingly, in some cases it may be reasonable, having regard to the interests of the document holder, for the regulator's decision to be stayed pending a full hearing when there is no pressing safety concern. This is particularly so where the commercial interests of the document holder are great and the safety breaches are at the lower end of seriousness.

In order to determine whether to grant a stay, an assessment would be needed by the court or tribunal in order to determine whether a stay "would not result in a threat to aviation safety or security". This of course shifts the "burden" of making a safety decision to the court or tribunal. In Canada, the Transportation Appeal Tribunal, with its access to civil aviation specialists, is more competent to exercise a safety discretion on an interim basis. In New Zealand the courts are reluctant to assume the "safety burden" of decisions made on an interim basis. This is evidenced by the lack of any successful applications for interim relief under s 8 of the Judicature Amendment Act.

¹⁶⁹ See Civil Aviation Regulations 1953 (revoked), reg 12.

¹⁷⁰ Regulation 12(7).

¹⁷¹ Aeronautics Act, s 6.9(5).

C Reform – "Without Notice" Action

In serious and imminent cases, all three jurisdictions provide for suspension on a "without notice" basis. This article does not consider that the div 3A procedure in Australia should be adopted in New Zealand. This procedure could impede the taking of fast and necessary regulatory action when the safety situation is serious and imminent. It also involves the judiciary making a judgment about safety matters in the most serious of cases when this is more appropriately an executive decision. The Australian system requires the regulator to apply to the Federal Court in all cases, including cases where the threat to safety is blatant and suspension action is obviously needed. There should not be an onus on the Civil Aviation Safety Authority in these sorts of cases; the affected aviation document holder should be required to make their own application for review.

Aviation document holders do need to have the ability to challenge a suspension decision. This is especially so given the action is taken on a "without notice" basis, where they have not had the opportunity to be heard. One of the weaknesses of the New Zealand system is the difficulty for an aviation participant to challenge the merits of a suspension decision. The length of time before a suspension decision can be reviewed effectively renders the appeal right redundant.

For this reason the Civil Aviation Act (NZ) should be amended to allow for urgent hearings in appropriate cases or an urgent review by an aviation panel with powers of recommendation. A tribunal system may assist in providing access to urgent hearings, but it would need to be given the appropriate resources and access to expertise. Otherwise it would not provide any greater benefit than the current system.

The advantage of an aviation panel is that it is potentially more flexible and could allow for on-call independent review by aviation experts. If it was limited to a recommendatory role, similar to the medical convener review process, it would complement the current court system by allowing for quick access to an independent review but still preserve the rights of the aviation document holder to have a full merits-based appeal, whether this is to a unified transport tribunal or through the current District Court appeal process.¹⁷²

Although there are difficulties in New Zealand with an aviation document holder having a suspension decision reviewed, the Court of Appeal's approach in *Director of Civil Aviation v Air National Corporate Ltd* was appropriate.¹⁷³ Section 66 of the Civil Aviation Act (NZ) provides an absolute prohibition on the Director's decision being stayed and it is inappropriate for the interim relief remedy under s 8 of the Judicature Amendment Act to be used to circumvent this prohibition.

172 The aviation panel envisaged by the author is different to the "board of inquiry" that used to advise the Minister in that it is complementary to the appeal process.

173 *Director of Civil Aviation v Air National Corporate Ltd*, above n 29.

Consistent with the law in Australia and Canada, New Zealand should not provide for a stay of the Director's decision to suspend or impose conditions on an aviation document under s 17. The appropriate mechanism would provide for quick and speedy access to a substantive review of the merits of the Director's decision or review by an aviation panel. For that reason the option of a unified transport tribunal or aviation panel should be investigated to determine if it could improve access to a review of the merits of a decision taken "without notice" under s 17 of the Civil Aviation Act (NZ).

D Reform – "On Notice" Administrative Action

There are also some areas of "on notice" administrative action that could be improved.

1 Stay of "on notice" decisions

The New Zealand system is deficient in that there is no ability for an aviation document holder to have a decision stayed pending the substantive hearing of his or her appeal. Having regard to the private interests of the document holder, which could include substantial business interests, New Zealand civil aviation law should be amended to provide for a stay to be granted for decisions taken under s 18 of the Civil Aviation Act (NZ) pending a substantive decision of a court. In this regard, the Canadian model, which allows a stay to be imposed if the Transportation Appeal Tribunal member "considering the matter is of the opinion that the stay would not result in a threat to aviation safety or security",¹⁷⁴ has merit. In contrast, the Australian stay provisions have the potential to unduly favour the private interests of aviation document holders at the expense of aviation safety and should not be replicated in New Zealand.

If the Canadian model in respect of a stay of an "on notice" decision was adopted in New Zealand, it would be preferable for a unified tribunal with transport expertise and access to civil aviation specialists to be formed to ensure that the discretion is exercised by those with the expertise to assume the safety burden of decisions on an interim basis. It would be inappropriate to expect the general courts, which are relatively unfamiliar with civil aviation issues, to assume this safety burden.

It is not considered that an aviation panel with only recommendatory powers should have a role in granting a stay of an "on notice" decision as this is inconsistent with its proposed recommendatory role.

In order to be effective, a unified transport tribunal should be empowered to grant a stay subject to whatever conditions it considered necessary to ensure safety or security. This would allow temporary safety measures to be imposed to ensure aviation safety until a substantive appeal is heard.

¹⁷⁴ Aeronautics Act, s 6.9(5).

2 *Substantive decision-making*

Currently, the courts' procedures for dealing with civil aviation appeals, as set out in the District Court Rules, are complicated and cumbersome. The Civil Aviation Act (NZ) could usefully be amended to streamline this process and clarify the role of the Director in an appeal. This would be a relatively easy reform measure to implement. A better long term option would be to provide for a unified transport tribunal to hear appeals under the Civil Aviation Act (NZ). The quality of decisions would be improved if the appeal was heard by a tribunal with specialist transport or aviation expertise. There might also be speedier access to a substantive hearing of the appeal but, again, a lot would depend on the tribunal's resources and access to expertise.

An aviation panel could also be useful as an independent review process in respect of decisions such as whether an aviation participant continues to meet the fit and proper person test in s 9 of the Civil Aviation Act (NZ) and/or whether their aviation document should be revoked. As with a review of a without notice decision, their role should be limited to providing recommendations, similar to the medical convener review process. Even if only a recommendatory role, it would still provide a useful, complementary and independent review at no cost to the applicant, while preserving the rights of the aviation document holder to have a full merits-based appeal.

VII CONCLUSION

The New Zealand civil aviation law dealing with the "de-licensing" of aviation documents or document holders has many similarities with the systems that exist in Australia and Canada. All three countries allow for the regulator to revoke, suspend, cancel or impose conditions on an aviation document. All three countries specify a statutory procedure that the regulator must follow if it wants to take regulatory action. In general terms, the comparative analysis has shown that the New Zealand system allows the regulator the most latitude to take action in the interests of aviation safety. This may be a reflection of the lack of tort liability in New Zealand for personal injury.¹⁷⁵ In Canada and Australia, aviation document holders, and the regulators themselves, are subject to potential tort liability if they exercise their privileges negligently and cause personal injury. This potential liability provides additional deterrence in Australia and Canada against unsafe conduct by aviation participants.

The reforms recommended in this article would provide for a more balanced de-licensing system in New Zealand which would better protect the private interests of aviation document holders, while allowing effective administrative action in the interests of aviation safety.

¹⁷⁵ In New Zealand, s 317(1) of the Accident Compensation Act 2001 provides that: "No person may bring proceedings in any court in New Zealand for damages arising directly or indirectly out of personal injury covered by that Act or its previous equivalents."

