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

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Contents

Abstract

This paper looks at the civil aviation law for New Zealand, Australia, the USA and Canada in regards to the 'de-licensing' of participants in the aviation system. The comparative analysis is on each country's ability to take administrative action against an aviation participant on an 'on notice' basis and, in cases where there is an imminent threat to aviation safety, on a 'without notice' basis. Issues looked at include:

(a) The process the regulator must adhere to in bringing administrative action.
(b) The appeal or review rights available to the aviation participant.
(c) The availability of a stay to the aviation participant while he or she waits a full hearing.
(d) The availability of a specialist tribunal with aviation expertise to hear an appeal.

The issues are examined in order to determine what, if any, improvements could be made to the New Zealand system. The paper 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.

Word length

The word length of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises 11,857 words.

I Introduction

This paper conducts a comparative study of New Zealand, Australia 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. The goal of this paper is, following a comparative analysis, to evaluate what, if any, reform might be desirable in New Zealand in order to improve the New Zealand system.

The 1944 Convention on International Civil Aviation ("Chicago Convention") provides the basis for the unification and standardisation of safety-related civil aviation law. Australia, New Zealand and Canada are all signatories to the Chicago Convention.[1] The Chicago Convention established the International Civil Aviation Organisation ("ICAO"), which has as one of its functions the development of international standards and practices e.g. 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 Chicago Convention.

Where a contracting state does not adhere to these standards, it must notify ICAO of the differences to enable the Council to notify all ICAO Member States. However, under Art 37 of the Chicago Convention each state undertakes to secure a high degree of uniformity.[2]

Annex 1 to the Convention specifies International Standards and Recommended Practices covering the regulation of personnel participating in the aviation sector.[3] Amongst other specifications, as an example, Annex 1 requires a contracting state to ensure that the privileges of a licence are not exercised unless the holder maintains competency and has met the requirements for recent experience established by the state.[4]

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

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1 Convention on International Civil Aviation (opened for signature on 7 December 1944, entered into force 4 April 1947), ICAO Doc 7300/9. Available at <http://www.unhcr.org/refworld/docid/3ddca0dd4.html> [last accessed 6 September 2011].

2 Ibid, art 37.

3 Ibid, Annex 1.

4 Ibid, Annex 1 at para 1.2.5.1.

'aviation documents' as the primary means of controlling entry into, participation in and exit from the civil aviation system. [5]

Each of the states analysed in this paper 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.[6] The regulatory tools available in each jurisdiction vary as do the procedural and substantive requirements associated with use of the particular regulatory tool. ICAO 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 ("CAA") to have:[7]

> [t]he 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.

This paper begins with a description and analysis of the current position in New Zealand (Part II). For the purposes of this paper and the comparative analysis, the New Zealand position is referred to as the 'control' position. After summarising the New Zealand 'control' position, the paper goes on to examine Australian law and the position in that State (Part III). Australia is an important and influential geographical neighbour of New Zealand, but more relevantly, there are a number of aviation participants who operate in both countries. The Australian and New Zealand governments have entered into a mutual recognition agreement on the basis of the ANZA mutual recognition principle.[8] This means that under both New Zealand and Australian law, the holder of either an Australian or New Zealand Air Operator Certificate[9] ("AOC") with ANZA privileges may, subject to some limitations, conduct air operations to,

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5 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.

6 De-licensing for medical reasons is not examined in this research paper. There is a high degree of uniformity amongst ICAO member states in this regard.

7 International Civil Aviation Organisation, *Safety Oversight Manual Part A – The Establishment and Management of a State's Safety Oversight System* (Second Edition, Doc 9734, AN/959, 2006), available at http://www.icao.int/afiran08/docs/9734_parta_cons_en.pdf [last accessed 6 September 2011], para [3.8.4].

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

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

from or within each country.[10] The granting of an AOC 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.[11] The third state examined by the paper is Canada (Part IV), which has similarities to New Zealand and Australia in the fact that it has a common law legal system and provides a useful comparison because of a shared colonial heritage. Part V of the thesis provides the comparative analysis of the three civil aviation systems. Part VI looks at New Zealand reform; while in conclusion Part VII offers some ideas, considerations and observations around how the New Zealand system might be improved.

The basic civil aviation laws of New Zealand, Australia and Canada all 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 paper 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 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 paper 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 for New Zealand, Australia and Canada are summarised and discussed in each of the relevant Parts.

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 the judiciary is available in terms of administrative judicial review and the merits based appeals process also exists. However, unlike Australia and Canada, there is 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

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10 For New Zealand see Civil Aviation Act 1990, s 11B; and for Australia, see Civil Aviation Act 1988(Cth), Subdivision F.

11 See Ronald I C Bartsch *Aviation Law in Australia* (3rd Ed, Thomson Reuters, NSW, 2010).

tribunal, rather than a court. Tribunals are generally more accessible for 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.[12]

The hypothesis of this paper 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 an ability, in limited circumstances, for the Director's decision to be stayed.

II New Zealand Position

The New Zealand civil aviation system is governed by the Civil Aviation Act 1990 ("the CA Act") and the Civil Aviation Rules ("CARS").[13] The CAA is the entity responsible for promoting civil aviation safety in New Zealand,[14] but the Director of Civil Aviation ("the Director"), who is also the chief executive of the CAA, exercises control over entry into the civil aviation system through the granting of aviation documents[15] and is responsible for enforcing the CA Act and the CARS.[16].

A Civil Aviation Act 1990

The title to the CA Act sets out its purposes, which include establishing "rules of operation within the New Zealand civil aviation system in order to promote aviation safety".[17] Before issuing or renewing an aviation document the Director must be satisfied that the applicant meets prescribed requirements and criteria including qualifications and experience.[18] The Director must also be satisfied that the person is a fit and proper person to hold the aviation document.[19] It is a requirement that the holder of an aviation document, or persons who have

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12 See Division 3A of the Civil Aviation Act 1988 (Aust).

13 Civil Aviation Act 1990 (NZ); Civil Aviation Rules, available at <http://www.caa.govt.nz/rules/rules.htm> [accessed 6 September 2011].

14 Civil Aviation Act 1990 (NZ), s 72B.

15 Ibid, s 72I(3)(a).

16 Ibid, s 72I(3)(b).

17 Ibid, Title.

18 Ibid, s 9.

19 Ibid, s 9(1)(b)(ii).

control over the exercise of the privileges under the document, continues to satisfy the fit and proper person test.[20]

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 ICAO requirements and there is no equivalent in Canadian legislation, which instead focuses on the concept of "competency".[21]

The Director in New Zealand is required to act independently of the Minister of Transport and the CAA when exercising his functions or powers; including when issuing, renewing, suspending or revoking an aviation document in any particular case.[22]

1 'Without notice' suspension of an aviation document

Section 17 of the CA Act 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 it is 'necessary' in the interests of safety to take such action.[23] Secondly, the Director must be satisfied that one of the four grounds specified in s 17(1)(a), (b), (c), (d) or (e) is met.[24]

Section 19 of the CA Act 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 (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)(a) to (c) and may take into account other relevant matters and evidence.[25]

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20 Ibid, s 9(4). Note 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 was unlikely Parliament intended a distinct intermediate assessment of fitness after the initial application.

21 Aeronautics Act 1985 (Can), ss 6.7(1)(a) and 7(1)(a).

22 Civil Aviation Act 1990 (NZ), s 72I(4).

23 Ibid, s 17(1).

24 Ibid, s17(1)(a) to (e).

25 Ibid, s 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 ten working days from the time of suspension or imposition of conditions. The suspension or imposition of condition imposed under s 17(1) expires after ten working days, ensuring a prompt and expedient investigation is undertaken.[26] 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: [27]

> (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".[28] 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 s 15 or 15A of the CA Act. 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.[29]

(a) Adverse decision procedure

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.[30] The Director must give the person affected written notice of the matters set out in s 11.[31]

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26 Ibid, s17(3).
27 Ibid, s17(4)(a) to (d).
28 Ibid, s 18(1).
29 *Aviation Law* (Wellington, Brookers, 1996) at [CV15.01].
30 Ibid, s 18(3).
31 See *Laws of New Zealand* Aviation (online ed) at [48] which summarises the Civil Aviation Act 1990, s 11 requirements.

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 whether to proceed to make an 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 upon which it will take effect, and, in the case of an adverse decision, the consequences of the decision and any applicable right of appeal.[32]

B Appeal or Review Rights

Section 66 of the CA Act provides a right of appeal to the District Court for "specified decisions".[33] 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.[34] 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 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 (the "JAA 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.[35]

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 JAA 1972.[36] An application for

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32 Ibid.

33 Civil Aviation Act 1990, s 66(5).

34 District Court Rules 2009, r 14.17. See also *Aviation Law*, n 29, at [CV66.04].

35 See *Director of Civil Aviation v Air National Corporate Ltd* [2011] NZAR 152 discussed below.

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

interim relief under s 8 must be made in the context of an application for substantive judicial review under s 4.[37]

1 Director of Civil Aviation v Air National Corporate Ltd [38]

This 2011 Court of Appeal decision overturned a High Court decision to grant interim relief under s 8 of the JAA 1972 in respect of the Director's decision to suspend Air National's AOC under s 17 of the CA Act. The Director's decision to suspend arose out of several matters of concern including alleged falsified training records and substandard operational competency assessments of Air National pilots.[39] The Director's "principal concern was that Air National's internal systems were defective and that this posed a threat to aviation safety".[40] 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.[41]

The law regarding applications for interim relief under s 8 of the JAA 1972 is settled. The Court of Appeal applied the leading case of *Carlton & United Breweries Ltd v Minister of Customs,*[42] as did the High Court. 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.[43]

Air National had contemporaneously filed an appeal against the Director's decision, with its application for judicial review, to the District Court under s 66 of the CA Act. 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

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37 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".

38 *Director of Civil Aviation v Air National Corporate Ltd*, above n35.

39 Ibid, at [15].

40 Ibid, [17].

41 Above n35, p 160.

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

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

context".[44] However, the Court of Appeal doubted whether this was the correct approach; having regard to s 66(3) of the CA Act, which prohibits the granting of a stay of the Director's decision pending the substantive appeal.[45] The Court clearly indicated that applications under s 8 of the JAA 1972 for interim relief are not to be used to undermine the prohibition in s 66(3) of the CA Act, noting that:[46]

> 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".[47]

2 Helicopters (NZ) Ltd v Director of Civil Aviation[48]

In this case the High Court dismissed an application for interim relief under s 8 of the JAA 1972 in respect of the Director's decision not to renew HNZ's AOC with the same condition allowing overseas operations in Laos and Cambodia. In alignment with *Director of Civil Aviation v Air National Corporate Ltd*,[49] the High Court in this case expressed doubt as to whether s 8 of the JAA 1972 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 CA Act.[50] HNZ's application was dismissed because their AOC had expired so there was no position to be preserved in terms of s 8.

3 Roger Maurice Halliwell v Director of Civil Aviation [51]

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

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44 Ibid.

45 *Director of Civil Aviation v Air National Corporate Ltd*, above n 35, at [28].

46 Ibid, at [30].

47 Ibid, at [42].

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

49 *Director of Civil Aviation v Air National Corporate Ltd*, above n 35.

50 *Helicopters (NZ) Ltd v Director of Civil Aviation*, above n 46, at [54]. See also *Aviation Law*, above n 29, [CV66.03].

51 *Roger Maurice Halliwell v Director of Civil Aviation* (DC Wellington, CIV-2009-085-1454, 11 March 2011).

conventional merits based appeal under s 66 of the JAA. 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 CA Act.[52]

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.[53]

4 International Heliparts NZ Ltd v Director of Civil Aviation [54]

This was another High Court decision rejecting an application for interim relief under s 8 of the JAA 1972. 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 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".[55]

5 Oceania Aviation Ltd v Director of Civil Aviation [56]

This Court of Appeal decision arose out of *International Heliparts NZ Ltd v Director of Civil Aviation.*[57] 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.[58]

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52 Ibid.
53 Ibid, at [127].
54 *International Heliparts NZ Ltd v Director of Civil Aviation* [1997] 1 NZLR 230 (HC).
55 Ibid, at p 237.
56 *Oceania Aviation Ltd v Director of Civil Aviation* (Court of Appeal, CA163/00, 13 March 2001).
57 *International Heliparts NZ Ltd v Director of Civil Aviation*, above n 54.
58 *Oceania Aviation Ltd v Director of Civil Aviation*, above n 56 at [67].

III Australian position

The Australian civil aviation system is governed by the Civil Aviation Act 1988 ("the CA Act 1988 (Aust)"), the Civil Aviation Regulations 1988 and the Civil Aviation Safety Regulations 1998 ("the Regulations"). The majority of the relevant detailed licensing requirements are set out in the Regulations. The Civil Aviation Safety Authority ("CASA") is responsible for the regulation of civil aviation in Australia.[59] In performing its functions, the CASA must regard the safety of air navigation as the most important consideration.[60] It must also perform its functions consistent with Australia's obligations under the Chicago Convention.[61]

A Civil Aviation Act 1988 (Cth) and Regulations

The main object of the CA Act 1988 (Aust) "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".[62]

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 Regulations.[63] The expression "fit and proper person" is not defined; therefore its meaning is derived from the decisions of the courts.[64]

1 'Without notice' suspension

Division 3A ("Div 3A") of the CA Act 1988 (Aust) contains detailed provisions allowing for the immediate suspension of a "civil aviation authorisation", [65] where CASA 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".[66]

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59 See Civil Aviation Act 1988, s 9 for a full list of CASA's functions.

60 Ibid, s 9A.

61 Ibid, s 11.

62 Ibid, s 3A.

63 Contrast New Zealand, which has an overarching requirement of being a fit and proper person under the CA Act, s 9.

64 See Bartsch, above n 11, at [8.60]. This is the same in New Zealand.

65 A "civil aviation authorisation" is an authorisation under the Act or the Regulations to undertake a particular activity (whether the authorisation is called an AOC, permission, authority, licence, certificate, rating or endorsement or is known by some other name). See s 3 of the Civil Aviation Act 1988 (Aust).

66 Civil Aviation Act 1988 (Aust), s 30DC(1).

Unlike other administrative action, CASA is not required to give the holder an opportunity to show cause before taking suspension action under section 30DC.[67] However, the legislation sets out a detailed procedure whereby CASA must apply to the Federal Court for an order to continue the suspension. This application must be made within 5 business days.[68] 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 CASA to complete its investigation into the circumstances that gave rise to the suspension.[69] CASA can apply once to extend the order, but for no more than 28 days.[70] CASA must then complete its investigation before the expiry of the Federal Court order.[71]

At the end of the investigation, if CASA 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 ("SCN") proposing one of these actions. CASA is required to give a SCN in all cases where it proposes to take administrative action. A SCN is a written notice to the holder of a civil aviation authorisation setting out the reason why CASA is considering making its decision and stating a period in which the holder may show cause as to why CASA should not suspend or cancel the authorisation as the case may be.[72]

At the end of the show cause period, CASA may vary, suspend or cancel the civil aviation authorisation.[73] 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 ("Avtex v CASA")*, in which Avtex Air Services appealed the decision to revoke its air operator certificate.[74]

2 'On notice' suspension or cancellation

There are a number of provisions in the CA Act 1988 (Aust) and the Regulations which allow CASA to take administrative action to cancel or suspend aviation licenses, certificates,

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67 Ibid, note to s 30DC(1).
68 Ibid, ss 30DE(1) and (2).
69 Ibid, s 30DE(4).
70 Ibid, s 30DF.
71 Ibid, s 30DG.
72 Ibid, s 3.
73 Ibid, ss 30DH and 30DI.
74 *Avtex Air Services Pty Ltd v Civil Aviation Safety Authority* [2011] AATA 61.

permissions or other authorisations "where the breach is considered sufficiently serious or a threat to the safety of air navigation".[75]

(a) Civil Aviation Act 1988, s 28BA

CASA can suspend or cancel an AOC if a condition of the AOC has been breached. CASA must first issue a SCN before taking any action.[76] The conditions of an AOC include a requirement to comply with civil aviation law[77] and do everything in connection with the AOC activity with a reasonable degree of care and diligence.[78]

(b) Civil Aviation Regulations 1988, reg 269

Under reg 269 of the Civil Aviation Regulations 1988, CASA 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, CASA must issue a SCN.

B Appeal or Review Rights

A decision by CASA to refuse to grant, issue, vary, suspend or cancel any of a certificate, permission, permit or licence under the CA Act 1988 (Aust) or the Regulations is considered to be a "reviewable decision" under s 31 of the CA Act 1988 (Aust).[79] 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.[80]

All reviewable decisions are subject to review before the Administrative Appeals Tribunal ("AAT") 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.[81]

Certain decisions of CASA are automatically stayed for five business days to allow a person the opportunity to apply for a review in the AAT.[82] The holder of a civil aviation

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75 See Bartsch, above n 11, at [8.80].
76 Civil Aviation Act 1988 (Aust), ss 28BA(4)(a) and (b).
77 Ibid, s 28BD
78 Ibid, s 28BE. The other conditions are listed in s 28BA(1).
79 Defined in s 31(1) of the Civil Aviation Act 1988 (Aust).
80 See Civil Aviation Act 1988 (Aust), above n 58, s 31(d) and (e).
81 See Bartsch, above n 11, at [8.155].
82 Civil Aviation Act 1988 (Aust), s 31A.

authorisation will have the benefit of a continuing stay if an application for a review and a stay is lodged within those five business days. The stay will then continue until the AAT determines the stay application. The AAT has broad powers to stay a decision "for the purpose of securing the effectiveness of the hearing and determination of the application for review".[83] The test consistently adopted by the AAT is whether: [84]

> [T]he 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 "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."[85] There is no power to stay a decision to suspend without notice under Div 3A; underlining the importance of that provision for CASA in cases of serious and imminent risk to safety.

The AAT has all the powers and discretions of the decision maker for the purposes of the review.[86] This gives the AAT full power to affirm, vary and set aside the decision under review.[87]

The only appeal from a decision of the AAT to the Federal Court is on a question of law and not on the merits or the facts.[88] 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.[89]

C Case Law

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

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83 Administrative Appeals Tribunal Act 1975 (Aust), s 41.

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

85 Civil Aviation 1988 (Aust), s 31A(2).

86 Administrative Appeals Tribunal Act 1975 (Aust), s 43.

87 Ibid, s 44.

88 Ibid, s 44.

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

1 Avtex v CASA [90]

In this case, the AAT dealt with the review of a decision to cancel Avtex's AOC under s 30DI of the CA Act 1988 (Aust) following a suspension under Div 3A (on the grounds their operations posed a serious and imminent risk) and the order of the Federal Court upholding the suspension. The AAT held that it could also consider whether cancellation would have been justified under s 28BA.

This case is mentioned because it a good illustration of the AAT'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 AAT ultimately upheld CASA's decision to cancel Avtex's AOC.

2 Federal Court decisions

There are far fewer Federal Court decisions relating to decisions of CASA to cancel an aviation document because appeals to the Federal Court are restricted to appeals on a question of law.

(a) *Civil Aviation Safety Authority v Graeme Boatman*[91]

This Federal Court decision considered the meaning of "serious and imminent risk". The Federal Court refused CASA's application under s 30DE of the CA Act 1988 (Aust) for orders prohibiting the respondents from doing anything under their AOC. The Court considered that the key issue was whether it:[92]

> was satisfied that there were reasonable grounds to believe that either respondent had engaged in conduct that contravened s 30DB – that is conduct that constituted, contributed to or resulted in a 'serious or imminent risk to air safety'.

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 was if "there a really significant prospect that such risks of serious harm as actually existed, in relation to the conduct complained of, would materialise?".[93] After examining all of the incidents at issue, the court answered the issue in the negative holding that there was no

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90 *Avtex v CASA*, above n 74.

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

92 Ibid, [15].

93 Ibid, [53] and [55].

"reason to believe that either respondent engaged in conduct that constituted, contributed to or resulted in a serious and imminent risk to air safety".[94]

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".[95] This case therefore illustrates the high standard of safety risk that the Federal Court expects CASA to show in order to uphold a suspension under Div 3A.[96]

(b) *Reapocholi Aviation Pty Ltd v Civil Aviation Safety Authority*[97]

In this case the plaintiff claimed private law damages against CASA for negligence, breach of statutory duty and misfeasance in public office in relation to the exercise by CASA of its powers under the Regulations. The Federal Court refused to strike out the claim , meaning that, hypothetically at least, private law damages are available in Australia in relation to administrative action by CASA.

IV Canadian Position

The Canadian aviation system is governed by the Aeronautics Act 1985 (Can) ("AA Act"), 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 AA Act and include being responsible "for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics".[98]

A Aeronautics Act 1985 (Can)

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

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94 Ibid, [152].
95 Ibid, [10].
96 [2005] FCA 1751.
97 *Reapocholi Aviation Pty Ltd v Civil Aviation Safety Authority* [2009] FCA 1487.
98 Aeronautics Act 1985 (Can), s 4.2.

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

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

(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:[99]

> 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.

This provision is similar to s 17 of the CA 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 CA Act 1988 (Aust) also allow for immediate suspension if there is a serious and imminent risk to aviation safety.

If the Minister suspends under s 7 of the AA 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).

A suspension under s 7 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".[100]

The affected document holder may apply to the Transportation Appeal Tribunal ("the TAT") for a review of the Minister's decision within 30 days of the notice.[101] There is no ability to apply for and be granted a stay in respect of the Minister's decision to suspend under s 7.[102]

The TAT 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

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[99] Ibid, s 7(1).
[100] Ibid, s 7(2).
[101] Ibid, s 7(3).
[102] Ibid, s 7(4).

renew, refusal to issue or refusal to amend aviation documents.[103] The TAT has jurisdiction in respect of reviews and appeals as expressly provided for under the Aeronautics Act.[104]

(b) Section 7.1

Under section 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.[105]

The Minister must send a notice containing the matters specified in s 7.1(2)(a)(i) and (ii).[106] 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".[107]

A person who receives a notice may lodge an application for review within 30 days of receiving the notice.[108] As with a decision under s 7, there is no stay available in respect of a decision under s 7.1.[109] However, if following a review by the TAT, the matter is sent back to the Minister for reconsideration, a stay may be granted by the TAT if the TAT is satisfied that granting a stay would not constitute a threat to aviation safety.[110]

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:[111]

> 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.

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103 Transportation Appeal Tribunal of Canada Guide for Applicants - Aviation Mode <http://www.tatc.gc.ca/doc.php?sid=31&lang=eng> [last accessed 23 April 2011].

104 The TAT also has jurisdiction over other Acts such the Canada Shipping Act 2001, the Marine Transportation Security Act 1994, Railway Safety Act 1985 and any other Federal Act regarding transportation.

105 Aeronautics Act 1985 (Can), s 7.1(1)(a) to (c).

106 Ibid, s 7.1(2)(a)(i) and (ii).

107 Ibid, s 7.1(2.1)

108 Ibid, s 7.1(2.1)

109 Ibid, s 7.1(4).

110 Ibid, s 7.1(8).

111 Ibid, s 6.9(1).

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.[112] 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 TAT for a stay of the decision.[113] A stay may be granted if the member of the TAT "considering the matter is of the opinion that the stay would not result in a threat to aviation safety or security".[114]

B Appeal or Review Rights

Under the AA Act, there is a two step review and appeal process in the TAT. A person affected by any of the decisions under the sections described above may apply for a review by the TAT; the review itself is conducted by a single TAT member. The member of the TAT assigned to conduct the review shall provide both the Minister and the requestee with an opportunity consistent with procedural fairness and natural justice, in order to present evidence, make representations and be heard.[115] The second level of hearing, usually by a designated chairperson and two other TAT members is thus an appeal against the initial determination rendered by the TAT member at the first level.[116] A decision of an appeal panel of the Tribunal is final and binding on the parties to the appeal.[117]

C Case Law

There is no provision for a court appeal from decisions of the TAT, 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)* [118]

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 License on public interest grounds. Following a review in the TAT, the matter had been sent back to the Minister for reconsideration. However, the Minister ultimately accepted a

112 Ibid, s 6.9(3).
113 Ibid, s 6.9(4).
114 Ibid, s 6.9(5).
115 Ibid, s 6.72 (1), 6.9(3), 7(3) and 7.1(3).
116 Transportation Appeal Tribunal of Canada Guide for Applicants - Aviation Mode, see above n 104.
117 Transportation Appeal Tribunal of Canada Act 2001, s 21.
118 *Bancarz v Canada (Minister of Transport)* [2007] F.C.J. No. 599; Fed.C.C. LEXIS 566; 2007 F.C. 451.

recommendation to not renew the plaintiff's Aircraft Maintenance Engineer Licence. The Court confirmed that the Minister has a serious overriding obligation to public safety; "personal interests must give way, to some extent, to the regulatory environment particularly in respect of safety." [119]

(b) *Sierra Fox In v Canada (Federal Minister of Transport)* [120]

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 7.1 of the Aeronautical Act 1985. The plaintiff appealed the decision to suspend the certificate of airworthiness to the TAT, which then sent the matter back to the Minister for reconsideration. The Court noted that:[121]

> 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.[122]

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)* [123]

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 A & L Aircraft Maintenance ("A & L"), a maintenance company responsible for maintaining the helicopter and Transport Canada. The cause of the accident was alleged to be a faulty fuel pump. The A & L person responsible for

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119 Ibid, at 7.

120 *Sierra Fox In v Canada (Federal Minister of Transport)* 2007 CarswellNat 249, 2007 FC 129, 308 FTR. 219 (Eng).

121 Ibid, at [13].

122 Ibid, at [71].

123 *Chadwick v Canada (Attorney General)* 2010 BCSC 1744.

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 ("AMO").

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 AMO certification.

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.[124]

The court held that policy consideration should not negate a duty of care. The Court found it "hard to conceive how a duty of care to designate AMEs, PRMs and AMOs who are competent and who have not been convicted of offences under the Act can result in inconsistent obligations".[125] The Court further rejected any possibility of indeterminate liability for Transport Canada on the basis of this duty of care.[126]

(b) *Swanson v Canada (Minister of Transport)* [127]

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".[128] *Swanson v Canada (Minister of Transport)*[129] has been applied in subsequent cases, including *Chadwick v Canada (Attorney General*).[130]

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124 Ibid, at [58].
125 Ibid, at [64].
126 Ibid, at [65].
127 *Swanson v Canada (Minister of Transport)* [1992] 1 F.C. 408.
128 Ibid, at [31].
129 Above n 127.
130 *Chadwick v Canada (Attorney General*), above n 123.

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 New Zealand 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 aviation document is probably the most powerful tool at the disposal of a civil aviation regulator. In New Zealand, the Director of Civil Aviation has the power to suspend or impose conditions on, an aviation document for up to ten working days. This period can be extended by the Director for a further specified period.[131] In Canada, the TAA may suspend an aviation document under s 7 of the AA Act (Canada) and suspend, refuse to renew a licence or cancel under s 7.1 of that Act. In Australia, CASA may take immediate suspension action under the Div 3A procedure in the CA Act 1988 (Aust), which involves judicial oversight by the Federal Court.

Set out in the table below, under the heading of each country, is a summary of the grounds for taking "without notice" administrative action in each country.

131 Civil Aviation Act 1990, s17(3).

Country	Grounds for taking "without notice" action in respect of an aviation document	Stay of decision?
New Zealand	1. It is necessary on the grounds of aviation safety and one of the following grounds exists:[132] 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 AOC with ANZA privileges, CASA has served an Australian temporary stop notice. OR 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.[133]	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.[134]	No, but Court can refuse order.
Canada	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. [135] OR 2. One of the following:[136] 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.	No.

[132] Ibid, s17(1).

[133] Ibid, s17(2).

[134] CA Act 1988 (Aust), s 30DC(1).

[135] AA Act, s 7(1).

[136] Aeronautics Act 1985 (Can), s 7.1(1)(a) to (c).

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 that the "public interest" warrants the suspension.

In a recent New Zealand decision, the Court of Appeal suggested that there needs to be an 'imminent danger' before suspension action under s 17 of the CA Act could be justified.[137] However, the Court ultimately held that: [138]

> [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.

'Serious and immediate' is obviously very similar to 'serious and imminent', but could be seen as inserting an unjustified gloss on the words of s 17 of the CA Act (NZ). It is hoped that future judicial decisions will provide clarity on this issue and provide a definitive test.

In New Zealand and Canada there is no need for the regulator to get any sort of judicial warrant or authorisation prior to, or during, the suspension action. The key difference with the Australian position is the requirement that CASA get a Federal Court order within five business days to allow the suspension to continue.[139] The Australian procedure thus ensures that there is some judicial oversight of the suspension action. Unfortunately it may be that the Courts are not best placed 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.

1 Stay of a 'Without Notice' Decision

Neither New Zealand, Australia or 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 CA Act 1988 (Aust) which means the suspension immediately ends. A decision made in these circumstances is done because there is a need to take immediate action in the interests of aviation safety and staying that decision would be inconsistent with that.

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137 See *Director of Civil Aviation v Air National Corporate Ltd*, above n 35.
138 Ibid, at [38].
139 Civil Aviation Act 1988 (Aust), ss 30DE(1) and (2).

In New Zealand it is possible to get interim relief under s 8 of the JAA 1972 if an applicant can establish that the order sought is reasonablynecessary to preserve the position of the applicant for interim relief: [140]

> [t]he 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.

However, given the comments in *Director of Civil Aviation v Air National Corporate Ltd* [141] that s 66 of the CA Act 1990 is inconsistent with the granting of interim relief, it is doubtful that s 8 of the JAA 1972 will be of much assistance to aviation document holders faced with immediate suspension or revocation action. The exception would be if the decision is clearly unlawful, irrational or 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.[142]

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 CA Act or a formal investigation under s 15A.

Before taking any 'on notice' administrative action, the New Zealand and Australia regulator must give the holder an opportunity to respond to the regulator's allegations, which the regulator must then consider. In New Zealand, the Director must issue a "notice of proposed adverse decision.[143] 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 to not 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

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140 See *Director of Civil Aviation v Air National Corporate Ltd*, above n 35, at [25] referring to *Carlton & United Breweries Ltd v Minister of Customs*, above n 40.

141 *Director of Civil Aviation v Air National Corporate Ltd*, above n 35.

142 *Aviation Law*, above n 29, at [CV66.03].

143 See s 11 of the Civil Aviation Act 1990

revoke or impose permanent conditions on the aviation document. The High Court has previously noted that this is implicit in s 11.[144]

In Australia, under a variety of provisions, CASA must issue a SCN before taking administrative action.[145] Once the SCN 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.

There is also a broad discretion for the AAT to grant a stay of the decision, except if it is a decision 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".[146] An example of this is reg 269(1)(a) of CAR 1988.

In Canada, if the Minister takes action under s 6.9 of the AA Act, it must first give notice to the document holder, who may then lodge an application for review with the TAT. In this circumstance, the TAT may also grant a stay of the Minister's decision until the review is heard but only if the member of the TAT "considering the matter is of the opinion that the stay would not result in a threat to aviation safety or security".[147] The Canadian system is different in that the Minister does not receive submissions, or a SCN, from the affected document holder prior to making its decision.

For on notice administrative action, New Zealand is comparatively 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 below.

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144 *Bruce Edward O'Malley V John Jones, Director Of The Civil Aviation Authority And Anor* HC CHCH CP64/02 [8 November 2002] at [25]

145 For example, under reg 269 of CAR 1988 a SCN 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.

146 Ibid, s 31A(2).

147 Aeronautics Act 1985 (Can), 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.	None available.
Australia	A SCN is issued, giving affected document holder an opportunity to show cause as to why the decision should not take effect. CASA must consider before making final decision.	Yes, for all decisions in which a SCN 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.[148]
Canada	Notice is sent to the document holder and must specify a date at least 30 days before decision takes effect. During this time period the affected document holder may apply for a review.	Yes, for all without notice decisions, on application the TAT may grant a stay if is of the opinion that the stay would not result in a threat to aviation safety or security.[149]

C Length of time for Appeal or Review to be heard

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.[150] 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.[151] 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

148 Civil Aviation Act 1988 (Aust), s 31A(2).
149 Aeronautics Act 1985 (Can), s 6.9(5).
150 See *Roger Maurice Halliwell v Director of Civil Aviation*, above n 51.
151 See District Court Rules 2009, r 14.13.

fit in the interests of justice".[152] 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 CASA's application but 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 it "may not be for several days after CASA lodges its application".[153] In *Civil Aviation Safety Authority v Graeme Boatman*,[154] the Federal Court referred to the need for an early hearing of the application.[155] In terms of a general appeal to the AAT, recent cases suggest these are heard in a timely manner.[156]

In Canada, a review of recent TAT cases, suggests it can be up to a year before an application for review is heard.[157] However, in a case involving the cancelation of an AOC and a flight training unit operator certificate, the TAT heard the matter within three weeks.[158]

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 TAT 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 unlikely to be

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152 Ibid, r 1.18.

153 See Bartsch, above n 11, at [8.70].

154 *Civil Aviation Safety Authority v Graeme Boatman*, above n 95.

155 Ibid, at [9].

156 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 CASA* [2011]AATA 61 in which the appeals were all heard within six months.

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

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

available through the normal courts.[159] The Australian AAT has access to specialist civil aviation members.[160]

A potential advantage of a tribunal is that it provides quicker and more informal access to dispute resolution. One of the difficulties with appeals to the New Zealand District Court is the unclear application of Part 14 of the District Court Rules 2009 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 rule 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 rule 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 CAA staff involved and the appellant and his or her witnesses.[161] 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 efficient access to justice,[162] however there is clearly room for improvement in New Zealand with the current District Court appeal process through amendments to the CA Act and District Court Rules 2009, 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

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159 See Transport Appeal Tribunal Annual Report 2009 – 2010 (John Baird, Minister of Transport, Infrastructure and Communities Transport Canada, Ontario, 28 June 2010), p 7 - 13.

160 See *Avtex Air Services Pty Ltd v Civil Aviation Safety Authority*, above n 75. But compare comments of Bartsch, above n 11 at para [8.155] that it is not normal to have access to an aviation expert in the AAT.

161 See District Court Rules 2009, r 14.18.3 and see *Roger Maurice Halliwell v Director of Civil Aviation*, above n 51 and *Andrews v Civil Aviation Authority* (DC Wellington, CIV-207-085-802, 9 April 2009).

162 In *Avtex Air Services Pty Ltd v Civil Aviation Safety Authority*, above n 75, the AAT sat for 16 days and a large amount of evidence was heard from expert witnesses and former pilots.

justice.[163] Specialisation was another important factor identified by the Commission.[164] The New Zealand Law Commission identified 65 tribunals with an adjudicative function over various subjects, bodies and industries.[165] The Law Commission proposed a unified tribunal structure with types of tribunals clustered by type of subject matter.[166] In 2008 the then New Zealand government accepted the need for a unified tribunal and released a public consultation document, however there do not appear to have been any further steps taken by the government to implement these reforms.[167]

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 CAA, New Zealand Transport Agency ("NZTA") and Maritime New Zealand ("MNZ") decisions may be cost effective; provide speedier, more efficient hearings and better access to transport expertise. All three organisations operate under legislation with similar provisions regarding the suspension or revocation of licenses/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".[168] The NZTA may revoke a holder's transport services licence if it considers the holder, or person having control over the licence, is not fit and proper.[169] Similarly, the Director of MNZ may suspend, revoke or impose conditions on a maritime document.[170] 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 CA Act, as well as to the adverse decision procedure in s 18 of the CA

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163 NZLC SP 20 *Tribunal Reform.* At [2.19] to [2.20].

164 Ibid, at 2.20.

165 See NZLC SP 20 *Tribunal Reform*, above n 161, at [2.15].

166 Ibid, chapter 6.

167 See Robin Creyke *Tribunals in the common law world* Annandale, NSW: Federation Press, 2008 at [194] and Ministry of Justice *Tribunals in New Zealand: the Governments Preferred Approach to reform* (Wellington, 2008).

168 See Land Transport Act 1988, s 30L and Maritime Transport Act 1994, s 41.

169 Land Transport Act, s 30S.

170 See Maritime Transport Act, ss 43 to 44.

Act.[171] There is also a general right of appeal in respect of decisions by the NZTA and the Director of MNZ to the District Court.[172]

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.

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 decision taken 'on notice' such as a decision to revoke an aviation document. The benefits of this are 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 section 180 of the Electoral Act 1993 for a recount of electorate or party votes, the recount must begin within 3 working days.[173] A review of patient's condition by a Review Tribunal under the Mental Health (Compulsory Assessment and Treatment) Act 1992 must take place within 21 days.[174] An

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171 Land Transport Act, above n 185, s 30W and Maritime Transport Act, s 51.
172 Ibid, s 106 and Maritime Transport Act, s 424.
173 Electoral Act 1993, s 180(5).
174 See Mental Health (Compulsory Assessment and Treatment) Act 1992, s 79.

application for a writ of habbeas corpus, to challenge the legality of someone's detention, must be heard in the High Court within 3 working days.[175]

An aviation panel could take as its model the convenor review process in sections 27L and 27M of the CA Act. This provision provides 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 CA Act.[176] Both the applicant and the Director can participate in the review.[177] The Director does not have to accept the Convener's decision but if the decision is not accepted the Director must give reasons for this.[178] The Director's decision stays in force during the convenor review process.[179] A person affected by a 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 ("the Minister"), rather than to the District Court.[180] 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.[181] 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 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 CA Act. Any decision by the Director that is appealable to the District Court is made on the basis of an aviation safety concern.

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175 See Habeas Corpus Act 2001, s 9.
176 Civil Aviation Act 1990, s 27L(3)(a) and (b).
177 Ibid, s 27L(6).
178 Ibid, s 27L(5).
179 Ibid, s 27L(8).
180 See Civil Aviation Regulations 1953 (revoked), reg 12.
181 Ibid, reg 12(7).

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 ss 6.9 of the AA Act can be stayed by the TAT on 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".[182] 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 TAT, 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 JAA 1972, s 8.

VII Conclusion

The New Zealand civil aviation law dealing with the 'de-licensing' of aviation documents or document holders has many similarities with 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.[183] 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

182 AA Act 1985, above n 58, s 6.9(5).

183 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.

personal injury. This potential liability provides additional deterrence in Australia and Canada against unsafe conduct by aviation participants.

A 'Without Notice' Action - Serious and Imminent Threats to Aviation Safety

In serious and imminent cases, all three jurisdictions provide for the suspension on a "without notice" basis. This paper 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 CASA 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 challenge the decision. One of the weaknesses of the New Zealand system is the difficulty for an aviation participant to have the merits of a suspension decision challenged. The length of time before which a suspension decision can be reviewed effectively renders the appeal right redundant.

For this reason the author suggests an amendment to the CA Act to allow for urgent hearings in appropriate cases or an urgent review by an aviation panel with recommender powers. 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 "recommender" 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.[184]

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* [185] was appropriate. Section 66 of the CA Act 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 JAA to be used to circumvent this prohibition.

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 aviation panel. For that reason 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 CA Act.

B 'On Notice' Administrative action

This paper has identified some areas that could be improved in regards to 'on notice' administrative action.

1 Stay of 'on notice' decision

The New Zealand system is deficient in that there is no ability in New Zealand for an aviation document holder to have a decision stayed pending the substantive hearing of their 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 CA Act pending a substantive decision of a court. In this regard, the Canadian model, which allows a stay to be imposed if the TAT member "considering the matter is of the opinion that the stay would not result in a threat to aviation safety or security"[186], has merit. The Australian stay provisions have the potential to unduly favour the private interests of aviation document holders at the expense of aviation safety and are not favoured by the author.

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184 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.

185 *Director of Civil Aviation v Air National Corporate Ltd*, above n 35.

186 Aeronautics Act 1985 (Can), s 6.9(5).

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, unfamiliar with civil aviation issues, to assume this safety burden.

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

2 Substantive decision-making

Currently, the court’s procedures for dealing with civil aviation appeals, as set out in the District Court Rules 2009, are complicated and cumbersome. The CA Act 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 CA Act. 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 CA Act 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 recommender role, it would still provide a useful complementary and independent review at no cost to the applicant, while still preserving the rights of the aviation document holder to have a full merits based appeal.

It is considered that the above steps would provide for a more balanced de-licensing system in New Zealand which better protects the private interests of aviation document holders, while allowing effective administrative action in the interests of aviation safety.

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