

TERM OF REFERENCE ONE: OBLIGATIONS ON CAA IN THE MAKING OF ORDINARY RULES

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| <ol style="list-style-type: none">1. Review and summarise the statutory, contractual and other requirements placed on CAA for the making of ordinary civil aviation rules. |
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Executive Summary:

Under this term of reference the “hierarchy” of requirements for the CAA when developing the rules for the Minister are set out. The substantial primary legal obligations are found in the Act. Secondary legal obligations are set out in Rule Part 11. There are significant contractual or negotiated obligations under the Annual Rules Development Agreement between the CAA and Secretary for Transport. These have implications for the current process. Finally, the “assumed” requirements under the CIRAG Charter are outlined. Some of these, and the general tenor of the Charter, sit uncomfortably with the earlier obligations on CAA. These obligations are essentially hierarchical. For example, anything in the Charter that conflicts with the Act, Rules or (arguably at least) Annual Rules Agreement, would be ineffective.

Introduction

1. The requirements, or obligations, on the CAA in relation to the making of ordinary rules are essentially come from four sources. Two of these sources **impose** obligations on the CAA (or on the Minister but carried out by the CAA), and two sources contain **negotiated** obligations, or obligations **assumed** by the CAA.
 - 1.1 the Civil Aviation Act 1990 (primary legal obligations);
 - 1.2 Civil Aviation Rule Part 11 (secondary legal obligations);

- 1.3 the annual Agreement for Rules Development services between the Crown and the CAA (contractual or negotiated obligations);
 - 1.4 the CIRAG Management Charter (“assumed” obligations).
2. First, the Act authorises the making of rules. However the Act itself does not impose any obligations or responsibilities on the CAA or DCA directly in relation to the making or development of **ordinary** rules. The rules are the responsibility of the Minister. An ordinary rule is made by the Minister signing the proposed rule [s 32(1)(a)] and notifying it in the *New Zealand Gazette*. It comes into effect, usually, 28 days later or on a date specified [s 34(4)]. The Minister’s power to make ordinary rules is non-delegable which means the Minister cannot delegate that final ability to make rules to anyone else (except to other Ministers in accordance with the Constitution Act 1986). The rules are the Minister’s direct responsibility and he or she is accountable for them (to Parliament and to the Courts).
3. It is, of course, not anticipated that the Minister will personally attend to the rule development process and to the various requirements imposed on the Minister under the Act when making rules. This role is given to the CAA under two instruments: Rule Part 11 and the annual Agreement for Rule Development Services between the Crown and the CAA. Under the annual agreement the CAA is allocated a lump sum and is obliged to attend to the major task of rule development in accordance with the priorities specified in that agreement. The obligations upon the Minister under the Act consequently apply to the CAA. The CAA must ensure each proposed rule meets the requirements of the Act that bind the Minister.
4. There are also special rules governing the rule making process: Rule Part 11. This rule expressly imposes a critical role on the CAA in rule development reporting and supplementing the requirements of the Act in some cases, but also imposing additional obligations beyond the Act, including a petition process with reasonably onerous procedural requirements.
5. Finally, there is a Charter agreed between the CAA and AIA whereby the CAA undertakes to follow certain processes and AIA undertakes to participate on behalf of

the industry in those processes with a view to the development of sound rules achieved, to the extent possible, through co-operation.

The Civil Aviation Act 1990

6. The Civil Aviation Act 1990 (the “Act”) provides for two principal tiers of the legislation; first the Act itself and secondly the Civil Aviation Rules made under it.
7. Rules are made under Part 3 of the Act (the primary legislation). The rules themselves are “secondary” legislation, like regulations. In fact the Act deems every ordinary rule to be a regulation for the purposes of the Regulations (Disallowance) Act 1989. This gives a role to the Regulations Review Committee, a Select Committee of Parliament to scrutinise the rules and, if appropriate, recommend to Parliament they be disallowed.
8. Rules must be **authorised** by the Act; that is they must come within the boundaries or scope of the empowering provisions which may, for example, specify the purposes for which rules can be made. Rules must also be made in accordance with any procedures set out in the Act and any other relevant legal obligations either in other legislation or common law rules such as relevant obligations of natural justice. If the rules fail to meet any of these requirements, the High Court may, in its discretion, declare them to be invalid following a successful application for Judicial Review by any affected person. Rule Part 11.1(e) provides for an exception to that in relation to requirements for ordinary rules and exemptions imposed by that Rule.
9. The Minister is authorised by Parliament to make ordinary rules for a wide range of purposes set out, first, in s 28(1) of the Act. These are:
 - 9.1 to implement New Zealand’s obligations under the 1944 Chicago Convention on International Civil Aviation;
 - 9.2 to provide aviation meteorological services, search and rescue services, and civil aviation security programmes and services;
 - 9.3 to provide for any matter related or reasonably incidental to the functions of the CAA (under s 72B), the Director (under s 72I) and/or the Minister (s 14);
 - 9.4 to provide for any other matter contemplated by any provision of the Act.

10. The reference to the functions of the CAA, Director and/or Minister refers to function provisions in the Act, which are very similar to each other. The principal function of the CAA, for example, is to “undertake activities which promote safety in civil aviation at a reasonable cost”: s 72B(1). All its other functions are expressly “in furtherance of its principal function”: (s 72B(2)). Section 72B(4) provides that a cost is a reasonable cost “where the value of the cost to the nation is exceeded by the value of the resulting benefit to the nation”. Similarly, the principal functions of the Minister under the Act “shall be to promote safety in civil aviation at a reasonable cost, and to ensure that New Zealand’s obligations under international civil aviation agreements are implemented”: (s 14(1)). Again, “a cost is a reasonable cost where the value of the cost to the nation is exceeded by the value of the resulting benefit to the nation”.
11. These functions, including the power to make rules, are to be read in light of the overall purpose of the Act. A primary indicator of that is its long title, i.e.
 - “(a) to establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety; and
 - (b) to ensure that New Zealand’s obligations under international aviation agreements are implemented; and
 - (c) to consolidate and amend the law relating to civil aviation in New Zealand.”
12. Rules can also be made for purposes expressly relating to safety and security (s 29), airspace (s 29A) and noise abatement purposes (s 29B). A further and lengthy list of general matters which are within the Minister’s ability to regulate by rules are set out in s 30 of the Act.
13. The Act also sets out procedures for making ordinary rules. These are primarily found in ss 32-34 and 36.
14. Pursuant to s 34(1), before making any ordinary rule, the Minister is required to:

- 14.1 publish a notice of intention to make the rule in the daily newspapers published in Auckland, Hamilton, Wellington, Christchurch and Dunedin, and publish a notice in *The Gazette* (known as a Notice of Proposed Rule-Making, or NPRM); and
 - 14.2 give interested persons a reasonable time (specified in the notice) to make submissions on the proposed ordinary rule; and
 - 14.3 consult with such persons, representative groups within the aviation industry or elsewhere, Government departments, and Crown agencies as the Minister in each case considers appropriate. The extent of the Minister's legal obligation to consult will depend on the content of the particular rule and the nature of the affected parties.
15. In making any rule the Minister (through the CAA) must give appropriate consideration to the following matters specified in s 33(2):
- (a) the recommended practises of ICAO relating to aviation safety and security, to the extent adopted by New Zealand:
 - (b) the level of risk existing to aviation safety in each proposed activity or service:
 - (c) the nature of the particular activity or service for which the rule is being established:
 - (d) the level of risk existing to aviation safety and security in New Zealand in general:
 - (e) the need to maintain aviation safety and security:
 - (f) the costs of implementing aviation safety and security measures:
 - (g) the international circumstances in respect of aviation safety and security and
 - (h) such other matters as the Minister ... considers appropriate in the circumstances."

16. Failure to take into account any of those relevant matters risks rendering a rule invalid on an application for judicial review. The weight to be given to each of those matters, however, is for the CAA and ultimately the Minister to decide.
17. Section 32(1) provides that every ordinary rule shall
 - (a) be signed by the Minister; and
 - (b) contain a statement specifying the objective of the rule and the extent of any consultation under section 34; and
 - (c) set out fully the requirements of the rule, except whereby reason of size or length certain information is incorporated in the rule by reference under section 36...
18. Section 36 enables the Minister to incorporate by reference (as opposed to fully setting them out) certain standards, requirements, rules or recommended practises of international aviation organisations, contracting states of ICAO, or any aviation sport or recreational organisation. This has the additional effect of ensuring that the rules can change with changes to the incorporated material, subject to the Director giving notice of the change (s 36(2) and (2A)).
19. Finally, the rules made by the Minister are not to be inconsistent with ICAO standards relating to safety and security, to the extent adopted by New Zealand, nor within New Zealand's international obligations relating to aviation safety and security.
20. For completeness, I note that the Director has the power to exempt any person, aircraft, aeronautical product, aerodrome or aviation service from any specified requirement in any rule where specified criteria can be met: s 37(1). This power is constrained by Rule Part 11; Subpart E.

Civil Aviation Rule Part 11 – procedures for making ordinary rules and granting exemptions

21. Rule Part 11 is a rule made by the Minister in 1993 that prescribes procedures for making ordinary rules and granting exemptions. It sets out a prescribed procedure to be followed in relation to all proposals to create, amend or revoke ordinary rules or grant exemptions. It states that the procedure shall not apply where the CAA finds it to be “impractical, unnecessary or contrary to the public interest”, although there are other requirements on the CAA in that case if petitions for rule making proceed at all: 11.1(b), (c) and (d). The CAA must be able to reasonably explain why the procedure is “impractical, unnecessary or contrary to the public interest” in any particular case and must do so when the proposed rule is notified and/or the final rule is made. The CAA cannot recall using this provision.

22. Sub-Part B governs most ordinary rules. Any interested person may petition the Minister to make a rule: 11.23(a). Petitions are to be in a certain form: 11.23(b). The CAA is required to publish in the CARRIL a summary of the petition after it is received and, before taking any action on it, must consider all comments received within the time specified: 11.25(b) and (c). The CAA must then, within 120 days of publication and every 120 days after that while the matter remains outstanding, advise the petitioner in writing of the status of the petition: 11.25(d). If satisfied there is sufficient reason for instituting rule making procedures the CAA notifies the petitioner of that and of the period within which it expects to institute rule making procedures: 11.25(e). Alternatively, where there are not sufficient reasons for instituting rule making procedures, the petitioner is notified of that: 11.25(f). A summary of the CAA’s determination of the petition is to be published in CARRIL: 11.25(g).

23. This appears to be a very cumbersome process. However it is noted that there is no timeframe within which the CAA is to publish the petition in the first place, and, in any event, the CAA might find the procedure to be “impractical, unnecessary or contrary to the public interest” when in fact it is simply difficult to attend to. I emphasise the CAA cannot recall intentionally using this provision, although it accepts there may have been circumstances where, as an oversight, a petition has been taken into a rule-making project without having gone through the rule 11.25 procedures. Any failure to comply with Rule Part 11 has no impact on the validity of any rule or exemption: Rule 11.1(e).

The Agreement for Rules Development Services

24. Over the last three years, the Secretary of Transport on behalf of the Crown has contracted with the CAA to purchase certain draft rules from the CAA for the Minister. The contract recognises that the CAA has the appropriate experience and expertise to best determine the technical rules and requirements which will achieve safety at a reasonable cost as part of its overall function, it is the CAA's responsibility to ensure that those civil aviation rules necessary to achieve the desired level of aviation safety are established and maintained.
25. There will be areas of judgement and dispute and, to the extent different views can be legitimately held, the Minister may elect the appropriate approach.
26. The CAA is required to provide the "rules development services" set out in Schedule 1 to the Contract: clause 3. The services are the subject of annual negotiation between the CAA and the Secretary of Transport. Quality requirements are set out in Schedule 2. The Agreement recognises the CAA will employ appropriately qualified and skilled staff and the Ministry will provide the CAA with all information it has that will assist, in particular any change in the Minister's requirements for rules, or in Government policy which may affect a draft rule: clause 6. Schedule 1 also outlines target dates for the provision of the services by the CAA, and Appendices 1 and 2 indicate rule stages and timings, and the indicative process and timeframes once the draft rule is provided to the Ministry (requiring a minimum of 20 weeks from receipt of the final draft rule to its implementation). The CAA and the Ministry must agree an outline timetable for the progress of each rule, taking these matters into account: clause 9. There are stages envisaged to be followed before the final draft rule is ready for submission to the Ministry in Appendix 1.
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| Stage A | - | MOT is asked to obtain Ministerial/Cabinet approval for inclusion of rule in programme |
| B | - | MOT and CAA negotiate the inclusion of the rule in annual programme in contract |

- C - MOT is asked for comment on initial policy proposal
- D - MOT provides comment on policy proposal
- E - MOT receives a pre-NPRM draft for consideration (plus any consequential changes to regulations?)
- F - MOT agrees to release of draft for statutory consultation
- G - Revised final draft rule and accompanying papers to MOT

These requirements are further expanded in Schedule 1 Part 2 of the annual agreement.

27. The requirements reflect the changes required by Cabinet in 1999 for all Transport rules following a report from the Regulations Review Committee into deemed regulations.. The Minister now consults with Cabinet to determine a multi-year programme for the development of all regulations and rules across the transport sector. Cabinet considers the programme before each annual agreement for rules development between the Secretary for Transport and the various transport authorities is finalised.
28. The Minister also approves the draft NPRM before it is published, and the Ministry approves a “consultation plan” provided by the CAA.
29. Monthly meetings are held between the Rules Development Manager at the CAA and the Principal Advisor Rules at the Ministry to monitor and discuss progress on the performance of the services. They also meet to conduct a post-project review. There are significant reporting requirements from the CAA to the Ministry: clause 13.
30. The Contract itself contains some inconsistencies with rule Part 11 and does not expressly recognise rule Part 11. There are difficulties reading the two together.

The CIRAG Management Charter

31. There are also considerable difficulties fitting the process envisaged by the CIRAG Management Charter into this framework. It should be seen as a tool by which the CAA elects to carry out the consultation obligations of the Minister and manages its need for

- input from the aviation community in developing rules. In particular the Charter assumes that a significant level of consultation and, if possible, agreement with the aviation community prior to the formal notification and consultation process required by the Act is desirable in almost all cases.
32. Furthermore, as is recognised by the CAA in its Preliminary Report No. 1 (para 5.1.1), the processes contained in the Charter may be (and are substantially) different from the current practise described in that paper and summarised in the Introduction to this report.
33. The CIRAG Charter is a reasonably substantial document in two parts. These are headed “Part A: Management Charter” and “Part B: Procedures”. It is a collection of largely descriptive provisions, which are spread through both Parts, with limited structure or pattern. The Charter also has an Appendix 1, which sets out the expectations of the content of a TSG recommendation report.
34. In terms of obligations on the CAA, the Charter can be described as a record of procedures which the CAA have agreed to follow, given the undertakings by the AIA also recorded in the Charter, as to the process to be followed for those matters governed by the Charter.
35. The Charter records the establishment of the CIRAG Executive (CAA/Industry Rules Advisory Group) from 11 February 1999. It is to be chaired by the Manager Standards Development of the CAA and consist of two CAA members and two AIA members. Its objective is to assess and recommend potential regulatory changes through co-operative rule making activities: clause 1. The emphasis throughout the Charter is on co-operation and a striving for consensus, while seeking to preserve the responsibilities of the Director (on behalf of the Minister) to ultimately decide these matters.
36. The Charter itself provides, in summary, for a structure and process along the following lines:
- 36.1 CIRAG is to prioritise all regulatory issues and consider recommendations for rule making action and advise the Director in relation to these: clauses 1 and 2.

- 36.2 CIRAG forms technical study groups (TSGs). These are specialists groups reporting to the CAA and the industry. Their task is to develop proposals and recommendations for assigned tasks, and to “act on” those that are approved for regulatory implementation: clause 2. Although the emphasis in the Charter appears to be on technical expertise (see also clause 4), there is an ability to nominate organisations for membership and for the organisations to designate alternatives: clause 3. Clause 5 indicates that the TSG will usually be not more than six individuals with specialised technical knowledge and that “a reasonable effort shall also be made to ensure that the membership of the TSGs is fairly balanced in points of view”.
- 36.3 The leader of the TSG is nominated by the CIRAG Executive on the basis of expertise in the particular area: clause 5. At least one member of the CAA is appointed to provide liaison and “representation of the regulatory function of the CAA” and to provide timely feedback from the CAA’s point of view: clause 5.
- 36.4 Importantly, the TSG’s responsibilities include fostering “full and complete discussion and resolution of all technical, legal and policy issues” and consultation with affected industry participants: clause 5.
- 36.5 The two CAA and two AIA members of CIRAG are to be “appointed by the respective organisations to ensure that the foundations of any regulatory change are sound and fully discussed with all the parties”: clause 3. It is intended to be a system of “full partnership between the CAA and industry” although the CAA “maintains control as to the group’s direction”: clause 3.
- 36.6 Clause 5 provides that “the task of the CIRAG Executive is to provide advice, recommendations and, if required, draft rules with respect to regulatory issues under the direction provided by the Director”. The Manager, Standards Development at the CAA is the Chair of CIRAG – he must “assess CIRAG policies pertaining to membership and its work programme and, as necessary, propose changes for consideration by the Director”: Part B clause 4.

- 36.7 It is envisaged that CIRAG will form TSGs only where necessary: clause 6. Costs will usually be borne by the organisations and individuals but the CAA will provide meeting facilities, secretarial functions and specialised support in the form of cost benefit or risk analysis resources: clause 9.
37. Procedures are then set out in nine clauses under Part B of the Charter (although CIRAG can amend them) in summary:
- 37.1 CIRAG can only accept or assign a task with the Director's approval. The Director sets the terms of reference for a project forwarded to the CIRAG Executive including the objective, definition of what the final product is expected to be, timeframes etc: Part B clause 3. CIRAG can, however, modify the task given them, but the Director must approve any significant changes. CIRAG can also reject a task with reasons: clause 4. CIRAG gives the various TSGs a definition of what the final product is expected to be also.
- 37.2 CIRAG is to "aim for consensus" and provide a statement of dissenting positions where consensus cannot be achieved: Part B clause 4. It meets as often as necessary and, and to the extent to which its meetings are open and the public participate, this is to be recorded: Part B clause 4.
- 37.3 Each TSG is also to strive towards consensus and, if that is not achievable, the leader is to ensure that all dissenting views are well recorded for future consideration of CIRAG. TSG meetings need not be open to the public and the primary reporting mechanism, apart from the final report, are progress reports to CIRAG: Part B clause 7.
38. The final TSG recommendation report is to be in the form set out in Appendix 1. This is a very detailed form. While the TSG is encouraged to find rule solutions as a last resort (Part B clause 2) it is nevertheless encouraged to provide recommendations to CIRAG in the form of complete packages:

"The more complete these packages are at the time of their submission [to CIRAG], the greater the time savings within the regulatory process. A

complete package would include the recommendation, the proposed rule or amendment, and the Regulatory Impact Analysis Statement (RIAS)”

[Part B clause 8 and Appendix 1.]

39. The inference that this outcome of the TSG process will result in the smooth movement of the proposal through the rule-making process is also found in Part B clause 9:

“[Following recommendations by CIRAG and approval of the Director] the recommendation will be forwarded to the Manager Aviation Rules for final rule drafting and inclusion into the formal rule making (NPRM) process. If the recommendation includes a draft rule, supporting documentation, and a RIAS then the package is easily submitted into the NPRM process. The NPRM will be published on the CAA website for comment and mailed to interested parties, including the TSG.”

40. The significance of the TSG’s work is further emphasised in Part B clause 8:

“The TSG recommendation paper forms the basis for any change to the New Zealand aviation regulation boundary. In particular it forms the core information used to construct the NPRM in the formal rule making process. The paper needs therefore to be clear, complete, and constructed to support the proposal.”

In expanding on this point, Appendix 1 sets out in detail the anticipated contents of the TSG report. Appendix 1 discusses the RIAS and the various questions to be considered when assessing risks, benefits and costs including the competitive impact of the proposal, its environmental impact (if any) and impact on industry innovation. The paper is also to consider “implementability”, user-friendliness, equitability, alternatives and why they have been rejected or reserved for further consideration, and an explanation and summary of consultation with the wider industry. This will include who was consulted, what mechanisms were used, what were the results of consultation and how was the standard or rule changed as a result, and note groups still opposed to the standard/rule. The paper is also to consider compliance, alternative means and enforcement, and advisory circular material maybe included where appropriate.

41. In summary, the Charter anticipates a very significant process and an outcome, which essentially has a rule ready for the NPRM process. The Charter requires that the TSG recommendations are made available to members of the public prior to their discussion at the relevant CIRAG Executive meeting. The Charter envisages that any interested

member of the public or aviation community may attend and participate in the CIRAG Executive's consideration of the TSG recommendations: Part B clause 9.

42. The recommendations of CIRAG are also to be made available to the public by notice and on the website: Part B clause 9.
43. The CIRAG recommendations then go to the Director who, it assumes, will approve (or otherwise) those recommendations and they will then be submitted to the Manager Aviation Rules for final drafting and inclusion into the NPRM process.
44. Part B clause 10 notes:

“The CIRAG activities will not displace the public rule making procedures now in place within New Zealand.”

This appears to be a reference to the NPRM process. Clause 10 goes on to say:

“If the TSG development and consultation process works as it should there should be no significant comments from the formal consultation process. Once the review of any comments is completed this review is forwarded to the Director to confirm that any issues raised have been dealt with appropriately. If an otherwise undocumented significant issue is raised the issue may be referred back to the CIRAG Executive, and possibly the TSG, for examination.”

This implies that any issues arising during the formal consultation process which have already been dealt with (and properly documented) then all that is required is confirmation that this is so.

45. Part B clause 10 goes on to repeat that:

“After the proper consultation process of the CIRAG no significant issues should be raised the Director can confirm their acceptance of the final rules. The CAA's Manager Aviation Rules will produce those rules for the Director to forward to the Minister of Transport for signature. The Manager Aviation Rules will be responsible for liaison with the operational units of the CAA to ensure that the new or amended rules are understood and implemented as envisaged by the CIRAG Executive.”

This paragraph does not recognise the Minister's role in determining the ultimate nature of the rule and appears to presume that rules will be implemented as envisaged by CIRAG. Nor does it take into account the involvement of the Ministry at various stages as required by the Agreement for Rule Development Services, as noted earlier.

Conclusion

46. There is a morass of prescriptive and conflicting obligations on the CAA in relation to rule making.
47. Realistically, the Act and the annual agreement can sit comfortably together. Rule Part 11 and, in particular the CIRAG Charter as drafted, create unhelpful complexities. At the very least, the obligations on the CAA must be clarified and simplified.

TERM OF REFERENCE TWO: ROLES/RESPONSIBILITIES/NEEDS: MINISTER, CAA, AVIATION COMMUNITY AND THE PUBLIC

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| <p>2. Identify and summarise the needs of the main stakeholders – Minister, CAA, industry and the public – and their respective roles/responsibilities in the rule making (consultative process).</p> |
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Executive Summary:

This term of reference considers the roles, responsibilities and needs of the various participants, including the consumers, in the aviation system. The common goal is a safe and efficient aviation system in which the public enjoys confidence. Each has important roles and responsibilities. Each has significant needs. A system in which the roles and needs of each participant are recognised and respected has the best chance of achieving the common goal.

The Minister

1. The Minister's primary role for the purposes of this review is that of the responsible rule maker. He or she has the statutory obligations referred to in Term of Reference One. The Minister relies primarily on the CAA to ensure the Minister's legal obligations in respect of rule making are met. The Ministry performs a check on this on behalf of the Minister.
2. It is also the Minister's role to set policy and priorities – "to establish goals and objectives for the civil aviation system"¹. In this he or she is assisted by the Ministry.
The Minister needs

¹ Swedavia-McGregor Report; "Review of Civil Aviation Safety Regulations and the Resources, Structure and Functions of the NZ Ministry of Transport Civil Aviation Division", April 1988, p 237.

- 2.1 confidence in the CAA;
 - 2.2 the support of the aviation community;
 - 2.3 an even quality in the rules;
 - 2.4 sustainable rules;
 - 2.5 planned rule-making processes.
3. The primary requirement of the Minister will be an assurance that the proposed rules maintain or improve aviation safety in a way that the benefits to the nation outweigh the associated costs. This is the ultimate objective of the legislation.
 4. The Minister is politically, as well as legally, accountable for the rules. Therefore the extent to which the aviation community has confidence in, and understanding of, the proposed rule or rule change will be important. As a minimum the Minister is likely to expect that an outcome of the process will have been that those affected by the proposed rule will have been able to put their perspectives forward and have them taken into account. They should understand what has been made of their views.
 5. The Minister and his or her Cabinet colleagues will also expect that the regulatory impact/compliance cost issues have been fully identified and worked through with those directly affected so as to be minimised to the extent practicable.
 6. The Minister will also want to be assured that New Zealand is complying with its international obligations in a timely way.
 7. Finally, but probably most importantly, the Minister will be concerned that the public have confidence in aviation safety within New Zealand and that, in fact, the flying public enjoy safe air travel.

Ministry of Transport

8. The Ministry is the Government's principal transport policy advisor. It is responsible for managing the interface between the Minister and the various transport Crown entities.

This includes negotiating an annual performance agreement with the CAA and monitoring its performance against that agreement.

9. The Ministry will generally be concerned to ensure the rule development system allows for and provides advice on regulatory reform planning and simplifying of rules. It will want to see consistency in the interpretation and enforcement of rules. It wants a process which encourages and facilitates industry to take up its safety responsibilities, and that effectively promotes safety. It is interested in the efficient delivery of regulatory services, transparency in costs and keeping within budget. It will be mindful of the Government's requirement to reduce regulatory and compliance costs to business.²
10. With respect to the transport rule-making process it has the following functions:
 - 10.1 it receives bids from the various agencies for the rules programme each year;
 - 10.2 it advises the Minister on rule priorities;
 - 10.3 it prepares the rules programme for the Minister to take to Cabinet;
 - 10.4 it negotiates, is a party to and administers, the annual agreement for rules development services between the Crown and the CAA;
 - 10.5 it advises the Minister on whether a rule meets the statutory criteria before it is finalised;
 - 10.6 it prepares briefing papers for Cabinet;
 - 10.7 it prepares drafting instructions for any consequential changes to regulations;
and
 - 10.8 it prepares information for the Regulations Review Committee on each rule before it is made.

11. In the context of this role it plainly has a need for on-going communication with and sufficient information from the CAA to ensure it understands the CAA's priorities for rule development over the next three year period; the policy behind each rule proposal (the problem it seeks to remedy and the nature of the remedy) and the relative priorities of the rule proposals.
12. The Ministry is also likely to want to be aware of the aviation community's views and priorities in respect of rules in order, for example, to manage any tensions between the CAA and the aviation community which may come to the Minister's attention.
13. The Ministry will require good information from the CAA to enable it to meet its obligations to advise the Minister on the policy behind and lawfulness of the proposed rule, and to prepare briefing papers for Cabinet, Parliament Counsel (if necessary) and the Regulations Review Committee.
14. On-going communication with the CAA as to progress and timing is likely to be important to the Ministry as it must co-ordinate rule proposals from the three transport Authorities and it has set itself clear timeframes for its own processes following receipt of final draft rules.

Civil Aviation Authority

15. As noted, the primary role and responsibility of the Minister and those that advise him or her in the rule making process is to regulate in a manner that promotes safety in civil aviation at a reasonable cost. The CAA has functional responsibility for the development of the rules in accordance with the annual agreement for rule development services with the Crown.
16. The process of developing rules that ensure that the benefits to the nation outweigh the cost to the nation is complex. It benefits from a constant flow and analysis of good information (the provision of information being a key role and responsibility of aviation participants). The analysis of that information is a key role and responsibility of the

² Cabinet Office Circular CO(01)2 12 March 2001.

- CAA. Analysis of information requires expertise. It is the responsibility of the CAA to seek out and provide this, but it is acknowledged that the aviation community will have particular, current expertise in many areas, which the CAA cannot maintain. The aviation community also has primary expertise when it comes to the application of proposed rules to the particular businesses, tasks and activities of the various participants in the aviation system.
17. The process also requires the application of judgement to the relevant information. That is the primary responsibility of the CAA which is the repository of the strategic overview of the industry and all the relevant information, including experience with the application and enforcement of existing rules.
 18. The function was described in the May 2001 performance review of the CAA as being “to ensure regular reviews of the civil aviation system to promote the improvement and development of its safety and security”.³ This also reflects the Swedavia McGregor report, in particular para 13.6 which emphasised the importance of the safety authority’s role of analysing change and accessing the implications for rule making and supervision:

“This analysis function should maintain an overview of safety trends in New Zealand aviation on the basis of accident and incident rates and statistics, compiled in a way that makes it possible to compare and exchange information with other countries. The analysis function must be interdisciplinary.”

Thus an important role of the CAA is to analyse the changing commercial, technical and social environments to assist the Minister in maintaining appropriate rules and other means of assuring safety at reasonable cost. It is this expertise that makes the CAA the appropriate agency for developing rules, in conjunction with seeking and implementing other ways of ensuring a safe aviation system at reasonable cost.
 19. In practical terms the CAA is responsible for identifying and confirming with the Minister, though the Ministry, the requirement for and priority of particular rules, carrying out full and proper consultation on rule proposals and drafting the rules.

³ Para 1.2.6 Ministerial Review, 2001, PWC, Spruston, O’Day and Davey (the 2001 Ministerial Review).

20. The needs of the CAA in carrying out these responsibilities include:
 - 20.1 access to good information;
 - 20.2 access to relevant expertise and experience;
 - 20.3 participation of affected persons, organisations and groups;
 - 20.4 to be able to engage with and debate its views with the aviation community;
 - 20.5 assistance to co-ordinate the various technical, legal and operational inputs;
 - 20.6 an ability to respond to technological and operational developments in a timely manner;
 - 20.7 clear direction from the Minister on matters of policy;
 - 20.8 to maintain the confidence and respect of the general public, the aviation community, the Ministry of Transport and the Minister, and
 - 20.9 to keep within its budget.

The aviation community

21. The aviation community comprises the participants in the aviation system. They must comply with the rules. This is not a simply task of knowing the rules which govern a particular business and following them. Sections 12 of the Act imposes a number of broader responsibilities or obligations on participants in the system.
22. First, s 12(1) provides that every person who does anything for which an aviation document is required shall ensure that that person holds the appropriate aviation documents and all the necessary qualifications and other documents.

23. Secondly, every participant must comply with the Act, the relevant rules and the conditions attached to the relevant aviation documents: s 12(2).
24. Thirdly, every participant shall ensure that the activities or functions covered by the aviation document are carried out by the participant, and by anyone for whom the participant is responsible, safely (as well as in accordance with the relevant prescribed safety standards and practices). This is an important obligation. The requirement to ensure activities are carried out safely is squarely the responsibility of the document holder: s 12(3). Furthermore, every document holder must establish and follow a management system that will ensure compliance with the relevant safety standards and conditions, if that is a requirement of the rules: s 12(4)(a). They are also obliged to provide training and supervision to employees so as to maintain compliance: s 12(4)(b). They are also responsible for providing sufficient resources to ensure compliance: s 12(4)(c).
25. Section 13 sets out the duties of a pilot in command of an aircraft. He or she is responsible for the safe operation of the aircraft in flight and has final authority to control the aircraft while in command and, subject to s 13A, which applies during emergencies, is responsible for compliance under the Act. Section 13A enables a pilot in command to breach the provisions of the Act, regulations or rules in certain emergency circumstances arising in flight. Those circumstances are set out in sub-sections (2) to (6) of s 13A.
26. As the 2001 Ministerial Review of the CAA noted, the Act thus allocates responsibility for safety management to both the CAA and the aviation sector.⁴ Participants are expected to understand fully and comply with their obligations under the Act. As the Review team noted:

“The intent of the Swedavia McGregor recommendation was for the participants to accept responsibility and commit towards aviation safety. The design of the regulatory framework builds on this concept of shared responsibility as the community is expected to accept a self monitoring role. The CAA was intended to set the

⁴ Ministerial Review para 3.2.2.5.

framework and then step back and let the participants manage. Without commitment by the community, the concept will not work well.”⁵

27. The Review team noted they had spoken to many participants who were generally unaware of their accountability under the Act and expressed real concern at the attitude of the general aviation sector in New Zealand which neither appeared to understand its obligations nor readily accept the need for regulation. Nor did this sector seem to accept there was often a very poor safety record in the sectors in which they operated. The review team found poor attitudes giving rise to a very unhealthy situation.⁶
28. In its report to the incoming Minister following the 2002 election the CAA described its regulatory philosophy as:
- “... based on the premise that organisations exercising privileges in the aviation system are responsible for the management of the safety of their operation. This includes, in particular, ensuring that their standards and procedures are adequate to ensure compliance with appropriate safety standards and that all staff are complying with them.”
29. The aviation community also has a clear role to play in the rule making process. The rules should be of much higher quality for the constructive input of those with relevant information, expertise and experience.
30. In order to effectively participate the community has a number of needs including:
- 30.1 A clear understanding of what is happening and why. This will include:
- the rule purpose with particular explanation of the problem being addressed and the solution proposed;
 - the anticipated timeframes for various steps, particularly where community input is required or accepted;
 - the reasons for any delays and changes in the CAA’s expressed positions.

⁵ Para 4.2.4.3.

- 30.2 Adequate information to provide relevant input.
- 30.3 Adequate time to provide input.
- 30.4 Consideration of the particular needs of those who are invited to or wish to participate, (for example scarcity of resources, fulltime businesses, long term rosters) and some flexibility around those needs.
- 30.5 An end product which makes sense and which the aviation community can support.

General public

- 31. Without the support of the general flying public there would be no demand for commercial aviation services. Their primary role is as consumers. They are dependent on the competence and professionalism of all the participants in the system for their safety. Thus their primary need is for confidence in aviation safety or, as Swedavia McGregor put it, a “feeling of complete security in the air”.
- 32. They also wish to utilise aviation services to their best advantage. Like any consumer, they are interested in cost, efficiency and service. There will also be special need groups such as disabled persons who may have, for example, particular access needs.
- 33. Effective use of the taxpayer funds that are invested in rule making can also be seen as a need of the general public. Civil aviation regulation is a public good: once the service is produced, it benefits all travellers, irrespective of the preparedness of individuals to pay for it. The Minister, Ministry and other “control” areas of the public service have an oversight role on behalf of the community in this respect.
- 34. The travelling public also have a responsibility to comply with any rules that apply to them, for example those relating to the carriage of dangerous goods, baggage weight

⁶ Heading 5.6.

limits/cabin baggage limits, use of electronic equipment and other behaviour on board flights etc.

35. As the consumers and beneficiaries of a safe aviation system, the general public have significant interest in rule making. However there is no public consumer group or specific public consumer interested aviation group with which the CAA can directly liaise when developing rules. Any member of the general public does, of course, have an opportunity to comment on a proposed rule in the course of statutory consultation. It is well recognised that persons who wish to contribute have a responsibility to take the proper opportunities afforded them to engage in the process. The fact that there is little interest from consumer groups and individuals in the process should not be cause for significant concern – the opportunity is there should anyone wish to take it up.

TERM OF REFERENCE THREE: EXTERNAL INPUTS REQUIRED IN RULE-MAKING – STAGES, NATURE AND HOW BEST OBTAINED?

3. Identify
 - (a) The stages of the rule making where external input are required; and
 - (b) The nature of the input required by CAA at each stage in developing ordinary rules and how the appropriate input can be obtained.

Executive Summary:

This term of reference considers the rule making process broken down into nine stages where external inputs are required, as identified by the CAA. It considers the type of input required and how it can be obtained.

Introduction

1. The Preliminary Report No. 3 prepared by the CAA identified nine stages where external inputs were currently required in the rule-making process. These were described under the following headings:
 - 1.1 Initial triggers for a rule change
 - 1.2 Feedback on the content of the initial triggers
 - 1.3 Assessment of strategic content and implications of rule-making proposal
 - 1.4 Informal technical input in a rule development
 - 1.5 Overview of progress being made on a rule development
 - 1.6 Ministry of Transport review of the draft NPRM
 - 1.7 Formal consultation on NPRM

- 1.8 Redrafting of rule content where inadequacies have been identified
 - 1.9 Ministry review of draft final rule
2. Each is considered below.

Stage 1: Initial triggers for rule change

3. The CAA identified the need for input from various external agencies as to when a rule change might be appropriate. Triggers for rule changes include -
- 3.1 Changes to ICAO standards and recommended practises;
 - 3.2 Recommendations from a coroner or the Transport Accident Investigation Commission as a result of an investigation or an inquiry;
 - 3.3 Analysis of information being gathered by the CAA, for example as a result of pro-active or reactive safety analysis of operators, incidents and accidents;
 - 3.4 A requirement to harmonise with another safety regulator;
 - 3.5 A desire of the government to implement some aspect of its transport policy;
 - 3.6 A petition under Rule Part 11.
4. The nature of these inputs is very broad. They come from a wide variety of sources and in a number of different ways. The CAA welcomes them. It must be kept abreast of issues that arise in a rapidly changing industry. How best to receive and channel these triggers is a matter considered further under Term of Reference 4.

Stage 2: Feedback on initial triggers

5. The second stage identified in Preliminary Report No. 3 is feedback on the content of the initial triggers. The Manager Rules Development receives all triggers and makes an initial assessment to determine the nature of the proposed rule change. Where the trigger is a petition that identifies the areas where rules should be amended or when new provisions are sought, a summary of the petition is published in the CARRIL for wider aviation community comment. The nature of the external input required by the CAA is some assistance from the industry as to whether the proposed rule petition is a matter that should be progressed; in other words, is it a real problem?

6. As well as identifying the exact nature of the problem, the CAA also needs to be able to identify:

6.1 The effect on safety if it is not addressed (the risk)

6.2 What are the options to produce the desired safety outcome?

In answering these, the question will arise as to the effectiveness of different options in isolating or reducing or controlling the risk. The options for control, the compliance costs associated with those options, and the likely benefits and costs to the community as a whole are all likely to be relevant to the selection of a solution.

7. This requires input from aviation community in the form of information, experience and also co-operation and understanding. A process is required that gives the aviation community an opportunity to clearly understand, test and challenge where the CAA is coming from on the issue. There is an opportunity too for the aviation community to achieve (so far as possible) a common understanding of the problem. To the extent the CAA is still developing its thinking, this is an opportunity to discuss and consider various options and approaches.

Stage 3: Assessment of strategic content and implications of rule-making proposal

8. The third stage identified in Preliminary Report No. 3 is the assessment of the strategic content and implications of the rule-making proposal. This stage appears to me to be critical, and essentially includes the identification of the problem, the decision as to the appropriate solution (a rule) and the priority to be given to that rule proposal. It appears to occur variously both within the CAA and within the CIRAG executive.
9. I am advised that submissions resulting from the CARRIL publication of a petition are collated into a scoping paper that is presented to the CIRAG Executive. The Executive then prioritises the proposal and assesses whether a TSG is required. The CAA is, at this stage, seeking to take into account the current needs of the aviation community and obtain their experience, expertise and co-operation in developing rules, while seeking also to educate the community on the issues underlying the need for the rule.
10. The search to meet the community's need and priorities, while also seeking common understanding of problems and appropriate responses, is something that, in my view, should occur for all real issues, and with regard to the full range of (realistic) potential solutions, not just rules. I see it as a process that should occur after, and separate from, the problem identification process, so that the problem identification process is not diverted into details about the impact of potential solutions on individuals and/or their operations. This appears to be a current problem and is discussed further under Term of Reference 4.
11. The process of prioritising rule projects also comes within this stage as described in Preliminary Report No. 3. Both the CAA and the Ministry consider it important to know the aviation community's priorities for rules. It would also be helpful to the process for the wider community to be involved in the debate on priorities so members can see the competing calls on legislative time and resources, and gain some insight into each other's needs and concerns. This input could best be obtained in a forum representative of the wider aviation community where the CAA's priorities and the basis for them could be explained and debated, prior to the CAA negotiating the annual rules development agreement with the Ministry.

12. The prioritising process must plainly be preliminary to the negotiation and agreement with the Secretary for Transport of the rule programme for the following year. It is important that the aviation community is able to feed its perceived priorities into the process and, to the extent possible, glean an understanding of how priorities are determined. For the rules to have credibility the CAA must understand the aviation community's sense of priorities and similarly the community must understand and adapt to the process with its restrictions and timeframes.

Stage 4: Informal technical input

13. The fourth stage identified in Preliminary Report No. 3 where external inputs are required is "informal technical input" into development of the rule. The assistance of expert, experienced people working in the industry is highly valued by the CAA. Likewise the aviation community, especially as articulated through the AIA and its members, welcomes the opportunity to ensure that the regulator is well informed and up to date. All appear to recognise that the quality of the ultimate rule will be enhanced by an open and co-operative exchange of information and views.
14. This process of obtaining technical input from the aviation community is currently facilitated through the Technical Study Groups (TSGs) set up by CIRAG. However, the TSG's functions are considerably broader. According to the CIRAG Charter, TSGs are established to:
 - 14.1 Develop and evaluate options and formulate the rule proposal;
 - 14.2 Identify issues that need attention or resolution;
 - 14.3 Identify the impact of a proposal;
 - 14.4 Conduct studies relating to the rule proposal;
 - 14.5 Foster full and complete discussion, and resolve all technical, legal and policy issues;

- 14.6 Complete as full as consultation process with affected industry participants as is necessary to confirm a group's proposal; and
- 14.7 Keep key individuals within their respective organisations fully and completely advised and informed of decisions reached, unresolved issues, and planned action to resolve issues.
15. I have already touched on processes necessary to obtain external inputs on identifying the real problem, evaluating feasible options and choosing the solution. In my view these need to be completed before the rule proposal is formulated and accepted into the rules development programme and certainly well before it comes before a focussed Technical Group.
16. Given constraints on the time of aviation community members, much of the work involved in the TSG is carried out by the CAA. That work is then written up into discussion papers, which are evaluated and debated among the TSG members. Through this process the CAA seeks to ensure that the major issues that surround a rule proposal are identified and accounted for prior to the proposal going to formal public consultation. The CAA sees this as a benefit also because it has the effect of reducing the formal consultation period by identifying and responding to as many industry questions early in the consultation process as possible.
17. This stage of the rule development process suffers, in my view, from having too broad a range of objectives, and from disaffection among members of the aviation community who feel excluded from this process. It also leads to very high expectations among participants, which conflict to an extent with the CAA's proper role and responsibilities as regulator.
18. The input required by the CAA will vary according to the rule that is under development. Many rules will require expert or technical assistance from the industry. Many will require information (much confidential), for example for the purposes of a cost and benefit analysis. Some will require the debate of a cross-section of views given the significance of the proposed rule. Under the present process, this occurs almost

exclusively within a TSG, the composition of which is determined by the CIRAG executive.

Stage 5: Monitoring rule development

19. The fifth stage identified in Preliminary Report No. 3 by the CAA is the process of monitoring and oversight of progress being made on rule development. It is largely an information exchanging and monitoring stage rather than one where CAA requires further input. However, its inclusion in the CAA's list is recognition of the importance of close liaison with the aviation community throughout the process. The CAA seeks to ensure the aviation community have appropriate and adequate involvement in, an understanding of, the rule development process. At present the CIRAG Executive has a monitoring role with a purpose of ensuring all relevant issues are identified and worked through. Here again, sections of the aviation community feel disenfranchised from this process.
20. Monitoring also occurs by the MINISTRY under the rules development agreement. There is also reporting to the industry and the public through information on the CAA website, such as CARRIL and minutes of the CIRAGE executive meetings.

Stage 6: Ministry of Transport review of the draft NPRM

21. The sixth stage identified in the Preliminary Report No. 3 is the review of the draft NPRM and rule by the Ministry of Transport. Once the CAA has prepared a draft rule and it is ready for the formal consultative process, the CAA must obtain the approval of the Ministry of Transport who consider the draft rule in terms of its legal and policy robustness. This is a requirement of the Ministry rather than external input required by the CAA. It is a check on the process to date to enable the Ministry to satisfy itself that the proposal is not contrary to or in conflict with other Government strategies or policies and to ensure that adequate consideration is being given to the various legal requirements.

Stage 7: Formal consultation following NPRM

22. The seventh stage identified in Preliminary Report No. 3 is the formal consultation process that follows publication of the NPRM. Here, the CAA seeks to fulfil the Minister's statutory obligation to notify and consider submissions on the draft rule. This has a number of objectives. First, obviously the CAA wants to ensure the quality of the final rule. Matters that may have been overlooked in developing the rule should be brought to the CAA's attention. Secondly, the formal consultation process has an educating role – interested persons receive notice of what is likely to happen and why, and can make provision for change.
23. One must also not lose sight of the third function of consultation; that of ensuring those affected by a proposal can voice their concerns with confidence that they will be listened to and their points taken into account. Of course, at the end of the day their views may not be accepted, may be outweighed by other relevant matters, or simply may be inconsistent with the informed judgement of the regulator. Nevertheless, there must be a way of enabling and ensuring participation, with the assurance that the regulator still has an open mind and that its views might change as a result of its consideration of the representations it receives.
24. Comments are received either in writing or, under rule 11.29, they can be made orally to the CAA by way of an informal meeting with an employee. The CAA may also hold public hearings or any other procedure it considers appropriate. Neither the CAA nor the Ministry is aware of public hearings ever being held for this purpose.

Stage 8: Final redraft

25. The eighth stage identified in Preliminary Report No. 3 is where potential inadequacies in the rule have been identified in the course of the formal consultative process. Here, the CAA may seek to clarify submissions received or obtain further technical advice and/or information. It does this through informal contacts and through the TSGs which are reconvened where the technical content of the draft final rule might vary significantly from that proposed in the NPRM.

26. This final need for external inputs relates to circumstances where the CAA may need technical assistance to analyse submissions received before the rule can be finalised. It may need to revert to the expert or consultative group or it might simply wish to speak to certain knowledgeable or affected persons or groups. Its concern is to ensure it has responded appropriately to new information received.

Stage 9: MOT, Government and Parliamentary review of final proposed rule

27. Finally, Preliminary Report No. 3 identifies the Ministry of Transport review of the final proposed rule as the ninth and last stage where external inputs are required. In this case it is the Ministry that requires external inputs, being the comments of other Government organisations, the recommendations, if any, of the Regulations Review Committee, the approval of Cabinet and finally the agreement of the Minister.