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From: Kim Murray [redacted]
Sent: Sunday, 14 July 2019 5:50 PM
To: Civil Aviation Bill
Subject: RE: Civil Aviation Bill – Consultation on exposure draft

Hello Andrew,

I have not had much time to give detailed consideration to the draft Bill. My overall impression is that the Bill is a reactive approach to various issues that have arisen, resulting in mainly an exercise in consolidation of existing law. In other words it seems to be a 'bottom up' approach rather than a 'top down' approach from a more holistic and international law perspective.

I note that some of the points I made in my 22 September 2014 submission have been addressed. Other points have not been addressed however and some errors that I mentioned previously are brought forward into the draft Bill. I have just this weekend skimmed through the draft and in view of the impending deadline will just touch on a few issues based on some obvious points that I have noticed, as follows:

Part 2 – this needs serious reconsideration. The use of the word 'system' is derived from the Swedavia McGregor report but the term has lead to confusion. The whole Bill deals with the civil aviation system which encompasses safety, security, economic and liability aspects. Part 2 of the draft only includes a few aspects of the civil aviation **safety** system. The topics covered there are also an inappropriate confusion of issues. If the Swedavia approach is to be continued then it should be noted that Parts 2-5 inclusive of the Bill set out that system ie not the whole civil aviation system but only the civil aviation **safety** system.

CAA – I have recently made some comments to Ngaire Best about some of the reasons why we see recurring role confusion and systemic failure in the civil aviation safety system. It starts from the top in that the Minister tends to appoint a business person without safety or regulatory experience as the Chair and then a number of other members from the industry. Pretty soon the whole focus of the CAA and pressure on the Director is directed at keeping the industry happy. Then we have serious accidents like Air Adventures and Fox Glacier that remind us that the purpose of safety regulation is actually to protect the public and not the industry. This results in a temporary correction of the focus until role confusion creeps in again. The draft provisions still reflect the priority given to industry representation with the public interest being a secondary aspect only. Industry capture is a recognised risk of regulatory systems so I recommend that it be addressed in the Bill.

Accident Investigation – another big issue arises from clause 23 (1) (d) in the Bill. It will perpetuate a confusing situation in NZ where we have three principal aviation accident investigation bodies: the DCA; the CAA and TAIC. I touched on this in my earlier submission and I think it may be another reason why 'role confusion' occurs in the CAA ie the CAA conducts a mixture of 'blame' and 'non blame' investigations.

Avsec – there are quite a few issues here. This whole topic seems to need further review based on Annex 17 and all the aviation crime treaties. What is the Ministry's position on the 2014 Montreal Protocol amending the Tokyo Convention and also the two Beijing instruments? Do the proposed changes enable NZ to accept these instruments? Also the whole subject seems to have become so enormous that there is a good case for taking all the provisions out of the Bill, consolidating them with the Aviation Crimes Act and enacting an 'Aviation Security Act', which would set up Avsec as a separate Crown entity. Having Avsec as a 'service' within CAA has always been an uncomfortable fit to my knowledge and simply removing the certification aspect may not be sufficient.

SARPS – these are not 'adopted' by NZ and clauses 53 and 64 just carry forward the same error about this in the existing legislation. SARPs are adopted by the ICAO Council and they **automatically** apply to NZ under Article 37 of Chicago unless NZ files a difference to Standards under Article 38. I mentioned this in my earlier submission. The point is that the Minister can not have regard to something which NZ does not do!

Domestic carriage by air liability for delay – Subpart 3 of Part 9 should be deleted. It is just not appropriate to use all that wording from a 70 year old treaty to deal with only one aspect of air passenger rights in 2019. I recommend covering the topic with a suitable regulation empowering clause. I also recommend obtaining a copy of the new Canadian Air Passenger Protection Regulations as a possible model for NZ.

Transport Instruments – One of the reasons for revoking the old Civil Aviation Regulations 1953 was that they relied on a raft of documents called CASOs, Airworthiness Directives, CAICs etc etc. This resulted in multiple tiers of legislation, much of it drafted by non-lawyers to 'fix' perceived gaps in the Act or Regulations. The result was a confusing mish mash of repetitive and confusing law, much of which was ultra vires. These issues seem to be cyclical! I am losing count but I think we are heading towards the following: Act; Regulations; Rules; CAA notices; Director's Transport Instruments; Directors exemptions; Civil Aviation Circulars; and a vast body of incorporated material. I recommend a more fundamental look at the reasons for the 5 year delay in rule-making before heading back into the 1953 Regs situation.

'Just Culture' – this expression is a bit meaningless by itself. It is really an abbreviation for 'Just Safety Culture' and in my view it is important to capture both aspects of the concept by using that term.

District Court appeals – the DC Court has proved to be hopelessly inadequate for transport sector appeals. – too slow and lacking technical expertise to deal with merits-based appeals. I recommend a more proactive safety regulatory approach of suspending aviation document holders on a precautionary approach coupled with a more effective appeal procedure for document holders. The right of the DCA to take a precautionary approach was confirmed by the Court of Appeal in the Air National Corporate Case. This could be expressly confirmed in the new Act and the Australian Administrative Appeals Tribunal could be studied as a possible appeal model for NZ.

I hope the above brief points are useful as a pro bono contribution. I can expand a little more if you would like to have a meeting at some stage.

Kim

K I Murray, Barrister / Aviation Law Consultant
Lambton Chambers, Level 3 Legal House
101 Lambton Quay
P O Box 5516
Wellington 6011
New Zealand
[redacted]
Web: www.lambtonchambers.co.nz

[redacted]

[redacted]