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From: Guy Clapshaw [redacted]
Sent: Thursday, 25 July 2019 5:49 PM
To: Civil Aviation Bill
Subject: Draft CAA Bill.

[redacted]

[redacted]

[redacted]

22 July 2019

Ministry of Transport PO Box 3175 Wellington 6140

Email to: ca.bill@transport.govt.nz

Dear Sir/Madam,

Submission on the exposure draft of the Civil Aviation Bill

Thank you for the opportunity to comment on the exposure draft and for providing copies of the policy decisions made thus far, the various Regulatory Impact Statements associated with the policy decisions, and the Cabinet Minutes/Papers.

It has also been useful to understand the submissions of a number of submitters made when this process began in 2014, however it would have been useful if a summary of the submissions made in 2014 could have also been developed as it's a very time consuming process understanding the multiple perspectives of various submitters.

In saying that, I am pleased there is recognition that it is necessary and essential for the Civil Aviation Act and Airport Authorities Act to be modernised. I however have an overall concern that the modernisation has not gone far enough. Many of the issues raised by the submitters in 2014, which are equally valid today, have simply not been addressed. We also note that other legislation which forms an integral part of the aviation safety system, such as the Transport Accident Investigation Act, is not being modernised in unison.

In developing this submission, I have taken the following approach:

Part One Comments on the matters raised in the exposure draft.
Part Two Raises other matters which need to be addressed if we are to future proof this

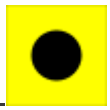
Act for the next 30 years.

From the perspective of this submitter, it is important to understand and acknowledge the history of the existing Civil Aviation Act which was developed against a backdrop of the best advice then available in 1988 to future proof our regulatory system. This advice has essentially remained untampered with for 30 years. In drafting the next generation of changes I believe a similar approach is desirable.

Although the exposure draft does address many of the current issues in aviation it does not provide me with comfort that in fact all of the issues have been addressed in a forward thinking and globally "leading edge" manner. For this reason I would prefer the exposure draft is put on hold while a number of other critical issues are addressed. These issues will be addressed in Part 2 of this submission.

Yours faithfully,

E.W.CLAPSHAW.



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PART ONE

1. 1.1 Overall we think the redraft of the Act as proposed in the exposure draft is more sensible than the existing legislation however we think there should be a clear division between safety regulation and economic regulation. Accordingly the following is suggested;
    - Proposed Part 10 become new Part 7
    - Proposed Part 9 become new Part 8
    - Proposed Part 7 become new Part 9
    - Proposed Part 8 become new Part 10
2. 1.2 In our view there is a logic to placing international and domestic carriage by air matters after aviation security, then economic regulation of air services, then economic regulation of aerodromes. These matters in general do not relate to investigation, intervention, compliance and enforcement which are included in exposure draft Part 10.
3. 1.3 Exposure draft Part 11 is a mix of safety and economic regulation and we agree should sit as placed at the end.
4. 1.4 Section 44 to Section 52 of the exposure draft all refer to the nature and characteristics of Rules that can be made. It must be possible to rationalise these Sections into one as it simply lists all of the rules required relating to aviation security and safety. The language used to head up the various sections is quite old and reflects today's aviation terminology. It may be more appropriate to say 'there will be Rules and these will operationalise the intent of the legislation'. This of course would require a lot more thought being given to the purpose and intent of this piece of legislation.
5. 1.5 We understand the objective of the Just Culture provisions is firstly to encourage occurrence reporting to the CAA; secondly to encourage increased accuracy of said reporting through some but not absolute protection from prosecution or administrative action, and thirdly to build trust between the regulator and the regulated.
6. 1.6 Given that the inclusion of Just Culture is intended to provide some guidance to the Director as to when he should or shouldn't take prosecution or administrative action, it is entirely appropriate that "Just Culture" is captured in the Act.
7. 1.7 The protection afforded by proposed Sections 263 and 264 and 373 is too restrictive. There are a multiplicity of concepts bundled up into proposed Sections 264, 255, 266 and 373 which need to be unpicked. There are many incidents which are not reportable to the CAA under existing Rule Part 12, if these incidents are not required to be reported but may in fact be an inadvertent breach of the Rules do the proposed Just Culture provisions afford any protections for these?
8. 1.8 In our reading of the exposure draft, it is only accidents and incidents that are reported that are afforded any protection. We believe that Just Culture principles should be afforded to occurrences that are not reported but which CAA subsequently become aware of and are deemed an offence under the Rules. An example of this is a breach of a Rule where no reportable incident or accident occurs.
9. 1.9 Many companies operate voluntary reporting systems and intensively collect data. It is understood that in certain circumstances the CAA may call for this information to be provided during an investigation or an audit or surveillance (Section 254 (5)

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refers). Is the information which is required to be disclosed going to be afforded any protection? If not then there is a very real risk of unintended consequences and the data and rich sources of information companies have may dry up.

10. 1.10 The terms “public interest” and “interest” used in Sections 265 and 266 are not defined and they depart from ICAO and internationally recognised practice. Public interest is not a well understood concept and can have very different meanings to different people. To have any comfort that the protections are meaningful, the concepts of “public interest” and “ interest” need to be clearly defined as these ensure the Director takes the appropriate action i.e. to prosecute or to issue an infringement notice.
11. 1.11 We do not think the proposed test of a “major departure from the standard of care expected of a reasonable person in the circumstances” is appropriate – it is a much lower test than “Gross”, “Deliberate” or “Wilful” which are the three circumstances ICAO consistently articulates in which enforcement or administrative action may be appropriate in terms of Just Culture.
12. 1.12 Given the importance of Subsection 2 in Sections 265 and 266, we suggest that there needs to be much closer alignment with, or adoption of, the words used by ICAO to describe actions which could result in the Director taking action.
13. 1.13 Use of the word “recklessly” in Section 265 (2) (b) does not adequately capture the concept of a deliberately unsafe act or action. Furthermore, we are concerned that the word “recklessly” is linked to the concept of “unnecessary risk of harm to life or risk of damage to property (or both)”. There are many examples of actions giving rise to unnecessary risk, which upon investigation are found to be the result of poor instruction, poor or inadequate assessment of the risks prior to a job being undertaken, or simply a situation where the risk was not actually identified as a risk at all.
14. 1.14 There is no protection for information disclosed pursuant to a safety investigation, or voluntarily disclosed during a safety investigation. It is too simplistic to assume that an occurrence report will capture all aspects of an accident or incident. Quite often critical information comes to light during the subsequent safety investigation. We would not want the proposed provisions to close down or undermine rich sources of information that come out during some investigations. The same considerations as proposed under the Just Culture provisions should apply to information gained from these sources.
15. 1.15 Without a confidential occurrence reporting system we do not believe that the full benefits of introducing Just Culture as envisaged in the Bill will be achieved. New Zealand’s accident and incident reporting system differs from many other comparable jurisdictions in that there is no confidential system underpinning the mandatory reporting system. The mandatory system does not require reports except where there was an actual accident or incident however there are many situations where there is no accident or incident yet there would be a net positive gain to New Zealand’s overall aviation safety system if they were reported and could be analysed. Presently those companies with SMS in place are likely to be receiving many reports but only a fraction of those filter through to the CAA. A confidential reporting system would work in synergy with the introduction of Just Culture to improve aviation safety.
16. 1.16 Incorporating Just Culture into the Act is an important step to enhancing aviation safety. We strongly recommend that, prior to this matter proceeding to final Bill form, there should be a meeting of all relevant parties to workshop this matter through to

ensure that the aviation community understands the proposal and supports it. Without widespread support, and a clear understanding of how this piece of the Act will work, there is a very real potential for a critical aspect of aviation safety (namely confidence to report in an open and frank manner) to step backwards.

17. 1.17 The proposed new Section 373 should be examined at the same time to ensure alignment.
18. 1.18 A summary of our position of Drug and Alcohol Management Programme and offences is as follows:
    - Support the introduction of random testing by the Director – Sections 108-109.
    - Support mandatory testing post an accident resulting in the death or serious harm

      to persons on board or on the ground impacted by the accident.

    - Recommend alignment with Australia in terms of definition of safety sensitive,

      bodily sample and a number of other definitions.

    - Reject introduction of DAMP rules in the Act, rules can be made under rule

making provisions if necessary.

19. 1.19 In supporting random testing by the Director we recommend that clear guidance material be developed. This is particularly important in terms of who can anticipate/expect to be tested by the CAA exercising powers under the Act, how the tests will be analysed, the issue of false positives, the level of tolerance or intolerance of drugs, and what action the Director may take. We naturally remain concerned that this is essentially an employment issue and in our view the whole issue of drugs and alcohol is best dealt with via the Health and Safety at Work Act as opposed to the Civil Aviation Act.
20. 1.20 We see a major problem reconciling the introduction of highly prescriptive DAMP provisions alongside the performance based Health and Safety at Work Act which ensures a duty of care and the adoption of a reasonable practicable test when ensuring safety at work. Would for example the adoption of a DAMP programme be considered to fulfil the "reasonably practicable" test? If not then why prescribe a DAMP programme at all knowing that it would set operators up to fail the HSW test should an accident occur.
21. 1.21 It is significant that the recommendations by TAIC to implement changes in the maritime and aviation sectors alcohol and drug management plans pre-date the introduction of the Health and Safety at Work Act. And, that the Director of Civil Aviation has now taken the stance that the Health and Safety at Work Act is the preeminent piece of legislation when prosecuting operators who have an accidents resulting in death or serious injury.
22. 1.22 We support mandatory testing post an accident resulting in death or serious harm and suggest that the NZ Police conduct such testing as they have the equipment already available to them to conduct the test and are geographically disperse.
23. 1.23 The table below sets out comparisons between Australian definitions and those in the exposure draft, refer to the comments column for suggested improvements;

Australia	**Exposure Draft**	**Comments**
"body sample" means any of the following: (a) any human biological fluid; (b) any human biological tissue	bodily sample means any of the following: (a) biological fluid: (b) biological tissue (whether living or not): (c)	Australian definition clarifies that it is only human fluid and human biological tissue that can be tested.

(whether alive or not); (c) any human breath.	breath.	Australian definition is more precise.
"drug or alcohol test" means: (a) a test of a body sample of a person to determine the presence (if any), but not the level, of alcohol or a testable drug in the sample; or (b) a test of a body sample of a person to determine the presence (if any), and the level, of alcohol or a testable drug in the sample.	drug or alcohol test means: (a) a test of a person's bodily sample to determine the presence, but not the level, of alcohol or a testable drug (or both) in the sample; or (b) a test of a person's bodily sample to determine the presence and the level of alcohol or a testable drug (or both) in the sample.	Aligned
"positive test result", in relation to a drug or alcohol test of a body sample, means a finding by the person or body who was authorised under the regulations to conduct the test that the test reveals: (a) the presence of alcohol or a testable drug in the sample; and (b) if the test determined the level of alcohol or testable drug in the sample and a permitted level for alcohol or that drug is specified in the regulations--that permitted level has been exceeded. the	negative result, in relation to a drug or alcohol test, means that the test reveals— (a) that alcohol or a testable drug (or both) is not present in the bodily sample; or (b) if the DAMP specifies a level of alcohol or a testable drug in relation to a test, that alcohol or a testable drug (or both) is not present in the body at the specified level	New Zealand and Australian definitions are aligned. Both definitions could be improved by inclusion of a definition of false positive.

"safety-sensitive aviation activities" means activities that impact directly or indirectly on the safety of: (a) civil air operations in Australian territory; or (b) the operation of Australian aircraft outside Australian territory.	safety-sensitive activity— (a) means an activity that— (i) could significantly affect the health or safety of any person on board an aircraft, including the person performing the activity; or (ii) if not performed safely could cause or contribute to an accident or incident involving an aircraft (b) includes an activity prescribed by the rules.	NZ exposure draft highly prescriptive. Not limited to aviation activities. Doesn't rule in or out private operators but rather leaves this up to the Minister – this should be a role of the legislature to determine who will and who won't be covered.
"testable drug" means a drug specified in an instrument under subsection (2). (2) The Minister may, by legislative instrument, specify a drug for the purposes of the definition of	No equivalent National Standard – to be determined in an individual operators DAMP programme	Exposure draft places excessive cost on operators many of whom don't have access to the best or latest advice in respect of testing for drugs. Far more preferable for the State to determine what is and isn't

testable drug in subsection (1).	acceptable.

24. 1.24 The DAMP provisions in the exposure draft are highly prescriptive, our strong preference is for no DAMP rules within the legislation given the performance based nature of the HSW Act. However, should the Ministry wish to proceed our suggestions would be as follows:
    - To apply mandatory DAMP requirements only to those operations involving the carriage of fare paying passengers, or providers of support services thereto.
    - Enable CAA to develop a DAMP template which can be used by operators at their discretion. i.e. they can opt into a common programme to reduce cost on smaller operators.
    - Allow like-minded organisations to come together and develop a DAMP which is appropriate for their organisations members.
    - That there be no certification or recertification charges imposed by CAA on any operator required to amend their exposition to include DAMP.
25. 1.25 We oppose the changes to Section 102. At the present time a pilot or air traffic controller can inadvertently or unwittingly provide the wrong information and not commit an offence. It was always intended there be a high threshold test and that there would be some intent behind the individual's decision to provide incorrect information. The change seems to be inconsistent with the concept of Just Culture – "to err is human".
26. 1.26 Section 300 regarding the time for filing charging documents is partially supported, however we would prefer that it align with the provisions of the Health and Safety at Work Act. We agree with the list of offences for inclusion in this Section. A comparison of the HSWA and exposure draft wording is included below, refer to the comments column for suggested improvements;

HSWA	Exposure Draft	Comments
146. Limitation period for prosecutions brought by regulator: (1) Despite section 25 of the Criminal Procedure Act 2011, proceedings for an offence under this Act may be brought by the regulator within the latest of the following periods to occur:	Despite anything to the contrary in section 25 of the Criminal Procedure Act 2011— (a) the limitation period in respect of an offence against any of the following sections ends on the date that is 12 months after the date on which the matter giving rise to the charge first became known to the CAA: (i) section 95 (acting without necessary aviation document): (ii) section 98 (failing to disclose information relevant to granting or holding of aviation document): (iii) section 101 (acting	The exposure draft should be aligned with the HSW Act S146 (1) (a) and (b). The words "or ought reasonably to have become known, to the regulator" place some constraint upon the Regulator otherwise it could be argued by the CAA that a prosecution could live on in perpetuity because the Regulator claims he simply did not know of the offence.

(a) within 12 months after the date on which the incident, situation, or set of circumstances to which the offence relates first became known, or ought reasonably to have become known, to the regulator: (b) within 6 months after the date on which a coroner completes and	without required medical certificate): (iv) section 102 (fraudulent,	We support the inclusion of a Coroners finding and this be limited to 6 months.

signs a certificate of findings under section 94 of the Coroners Act 2006 if it appears from the certificate of findings (or the proceedings of an inquiry) that an offence has been committed under this Act: (c) if an enforceable undertaking has been given in relation to the offence, within 6 months after— (i) the enforceable undertaking contravened; or (ii) it comes to the notice of the regulator that the enforceable undertaking has been contravened; or (iii) the regulator has agreed under section 128 to the withdrawal of the enforceable undertaking. is	misleading, or false statements to obtain medical certificate): (v) section 105 (failure to notify accident or incident): (vi) section 262 (failure to notify accident or incident): (vii) section 285 (communicating false information); and (b) the limitation period in respect of any other offence against this Act ends on the date that is 12 months after the date on which the offence was committed. (2) Nothing in this section affects the limitation period that applies under section 25 of the Criminal Procedure Act 2011 in respect of the offences in— (a) section 313 (strict liability for acts endangering safety); and (b) section (intentional with crew performance of crew member's duties). 314(1)(d) interference member's	
1. 147. Extension of time if regulator needs longer to decide whether to bring prosecution (1) This section applies if the regulator considers that it will not be able to file a charging document by the end of the 12-month period specified in section 146(1)(a). (2) The District Court may, on application by the regulator made before the end of the 12-month period specified in section 146(1)(a), extend the time available for filing a charging document for a further period not exceeding 12 months from the date of expiry of the 12-month period specified in section 146(1)(a).		Support the inclusion of Section 147 of the HSW Act if the Civil Aviation Act is amended by the inclusion of new Section 300.

(3) The court must not grant an extension under subsection (2) unless it is satisfied that—(a) the regulator reasonably requires longer than the 12-month period to decide whether to file a charging document; and 2. (b)the reason for requiring the longer period is that the investigation of the events and issues surrounding the alleged offence is complex or time consuming; and(c)it is in the public interest in the circumstances that a charging document is able to be filed after the 12-month period expires; and

3. (d)filing the charging document after the 12-month period expires will not unfairly prejudice the proposed defendant in defending the charge.

(4) The court must give the following persons an opportunity to be heard:

4. (a)the regulator:
5. (b)the proposed

defendant:
6. (c)any other person who has an interest in whether or not a charging document should be filed, being a person described in section 142(1).

27. 1.27 There is significant further work required on the exposure draft relating to offences and penalties and we recommend, given the Ministry has not yet finished considering this section, that when it has rather than surprising the aviation community at Select Committee that the aviation community is advised of the changes and comment sought.
28. 1.28 Changes to Section 73 relating to the fit and proper person test are supported, however we seek additional changes relating to this subject which are covered in Part Two Paragraph 2.6.

29. 1.29 Alignment of the meaning of accident with ICAO in Section 6 to make provision for UAV's is supported, as is amending the Director's powers per option 2 of the commentary document.
30. 1.30 We largely agree with the Section 184 proposals relating to airline cooperative agreements however we think the provisions should not bind carriage of air freight and this should be a stated exclusion at the start of the Section. Airfreight provisions are in the vast majority of bilateral agreements "Open skies". Globally airline cooperative agreements are generally only applied to operators whose primary purpose is the carriage of passengers. Sections 185 to 194 of the exposure draft are relevant almost exclusively to passenger operations. The normal provisions of the Commerce Act should apply to any freight application should this ever be forthcoming.
31. 1.31 We support the integration of the Airports Act into the Civil Aviation Act. We support the modernisation of the Airports Act in full. We support removal of Section 4A of the Airports Act but consider provisions under the Commerce Act re disclosure of information are a significant cost to the industry and we would support a more efficient disputes resolution mechanism.
32. 1.32 Proposed amendments to airline liability provisions in Section 327 are supported.
33. 1.33 Introduction of the Disputes Tribunal mechanism to assist with passenger rights matters is supported in respect of damage to property as it would make would make it easier for passengers to understand their rights.
34. 1.34 We do not support the changes in respect of delays to service unless this is extended to all transport service providers, not just airlines. Singling airlines out for special treatment is inappropriate, extending the provision to all service delays on all modes of transport would be fair and equitable. We understand in many jurisdictions these types of provisions do not discriminate by mode. The effect of a delay on the Cook Strait ferry can have an equally significant economic impact on a consumer as a delay/disrupt by an airline. Why should aviation be singled out for special treatment?
35. 1.35 Unless otherwise stated below, we support the proposed changes to Part 6;
    - Section 126 - Requirements for aviation document for provision of aviation

      security services.

    - Section 127 - Minister may specify only Aviation Security Service to provide

      security at an aerodrome or installation.

- Section 129 - Requirements for Aviation Security Service to meet prescribed

  requirements for provision of aviation security services.

  We understand that the effect of these changes is to enable a full blown merger of the existing Aviation Security Services into CAA. We note that such a merger is inconsistent with international practice which provides for arms-length or devolution of services. There is repeated evidence that the services provided by these services providers is adequate to meet border security in an environments far more at risk than New Zealand. A full blown merger should only occur after an independent and transparent risk assessment has been undertaken. We are particularly concerned about the impacts of the security workload upon the role of the Director, and the potential for this to dilute his focus from the role of arbiter of aviation safety.

36. 1.36 The review procedures for adverse security check determinations contained in Section 120 should provide an appeal mechanism against an adverse security check.

37. 1.37 The proposed inclusion of national security provisions is not supported. We do not think it is appropriate or necessary to have such a provision. Should such a provision ever be required we are absolutely certain it could be quickly affected via a very separate instrument or alternatively introduced in much the same way as the recent gun laws.
38. 1.38 We do not support the proposed changes to Sections 349-351 regarding Transport Instruments. They are an attempt to circumvent the existing provisions/obligations for consultation that exist for rulemaking. The Section enables Transport Instruments to be issued prior to an empowering rule being developed. Effectively this is reverting to a "closed door closed shop" process of drafting critical documents which are then issued much to the surprise of the sector. We do not want to go back to this process again.
39. 1.39 We do not support the change proposed to Section 3 regarding the main purpose of the Act. The proposed change is nothing more that adopting the existing vision statement of the Civil Aviation Authority. Furthermore, the additional purposes at Section 4 are nothing more than a shift of the existing Functions on the Minister (S.14A) and existing Functions of the Authority (S.72A) with the replacement of a couple of words. Hardly a demonstration of future focus for a piece of legislation expected to guide the aviation sector through the next 30 years.
40. 1.40 It is also proposed to remove critical words from the existing Short Title of the Act namely;
    1. (a) to establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety; and
    2. (b) to ensure that New Zealand's obligations under international aviation agreements are implemented; and
    3. (c) to consolidate and amend the law relating to civil aviation in New Zealand.

    We cannot see any justification for removing the short title from the Bill.

41. 1.41 By contrast the recently passed Health and Safety at Work Act states the following;

Purpose
(1) The main purpose of this Act is to provide for a balanced framework to secure

the health and safety of workers and workplaces by –

1. (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
2. (b) providing for fair and effective workplace representation, consultation, co- operation, and resolution of issues in relation to work health and safety; and
3. (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and

4. (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
5. (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
6. (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
7. (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

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(2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

We would expect to see a statement along similar lines for the Civil Aviation Act and are disappointed that it would appear so little consideration has been given to drafting an explicit Purpose statement for the Act.

42. 1.42 We do not support the proposed changes to the fees and levies charging regime. The changes do not reflect the recently released policy for setting fees and charges in the public sector. The provisions remove all protections that CAA customers had against the imposition of unfair and monopolistic charging practices. The changes solely address matters that the official's consider as impairments but do nothing to protect users.
43. 1.43 We would support a completely redrafted provision which accepts and acknowledges

the following;

- Prior to setting new fees and charges there is to be agreement as to how much money the Authority requires to discharge its functions. The users of services will not unreasonably withhold agreement.
- Fees are to be set first based upon an appropriate benchmark for comparable services – for example the Ministry of Transport has produced benchmarking data across central and local government hourly rate comparable services.
- Where there is no comparable service in New Zealand, CAA shall look to rates charged by other international regulators.
- There is to be consultation with the appropriate persons or groups within the aviation community to set these benchmarks and rates.
- The government shall pay the same hourly rate for services consumed as that paid by non-government consumers.
- The remainder of funding required shall come from the imposition of a levy or levies on all sectors of the industry based upon first risk rankings and then secondly the ability to pay.
- Any money over recovered at the end of a prescribed period shall be paid back on a pro rata basis.
- The quantum of reserves held by CAA shall as a consequence be at an agreed level.
- The right to appeal to the Commerce Commission for full information disclosure.
- The right to dispute any individual charge or invoice and be heard by the

  Disputes Tribunal.

44. 1.44 Part 10 Subpart 5 contains entirely new provisions and there is no explanation as to their intent or what the problem they are trying to solve. We would appreciate an explanation as whilst we can potentially see some merit we also have reservations.
45. 1.45 We understand that Part 11 Subpart 5 largely encompasses Section 66 of the existing Act. There should be a new sub clause inserted pertaining to rights of appeal to the Supreme Court. The existing Act was passed prior to establishment of the Supreme Court so there is no reason why all appeal rights should not now extend to Supreme Court. Sub clauses (2) and (3) should be rewritten and restricted, and subject to the ability to injunct the Director from acting contrary to the outcome of an appeal if it is clear there is no real new grounds or evidence to do so. (2)(b) in particular is far too low a threshold.

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PART TWO

1. 2.1 The exposure draft does not fundamentally address the issues associated with the modernisation of aviation safety but rather takes the approach that change will be affected through existing structures, processes and procedures. This is despite the Transport Accident Investigation Commission, the Productivity Commission and the Audit Office repeatedly have said we must do better. This is the opportunity to do better, and we are deeply saddened that scant attention appears to have to be given to addressing a number of issues which have been repeatedly raised. In saying this we do acknowledge that the Ministry has made an effort to address one of the failings of the present legislation around reporting by attempting to introduce "Just Culture" in the limited context of reporting accidents and incidents to the Regulator.
2. 2.2 One of the most significant issues that has recently arisen is the difficulty of ensuring continuous compliance and conformance with very prescriptive rules and manuals when workplace safety is now largely being driven by performance based regulation under the Health and Safety at Work Act. By way of example, in a recent District Court case, the industry and public has been advised that there were eight practicable steps the operator should have taken to avoid an accident. The industry has asked the CAA what those 8 practicable steps are in order to ensure similar failures are not occurring elsewhere. An investigation under the CAA Act would have highlighted the failures and this information would have been disseminated. No such dissemination of information has occurred and the lessons have not been passed on. This is a failure on the part of the Regulator but importantly a failure to ensure the Civil Aviation Act addresses appropriately continuous improvement – hence our recommendation in Part One that the Purpose statement of the Act be more comprehensive and look at some of the objectives of the HSW Act.
3. 2.3 **Definition of acceptable level of safety** - CAA are using extensively as a proxy for "an acceptable level of safety" the HSW term "reasonably practicable". In part because the definition of an acceptable level of safety was removed from the Act in the early 2000's and in part because CAA take the view that the generalist legislation (HSW) over rides the specialist legislation (CA Act). We suggest aligning the CA Act with HSW and adopting the "reasonably practicable" test. All participants would benefit from understanding the test for acceptable level of safety and the expectations placed upon them.

We therefore suggest adopting the following words as the test for determining an acceptable level of safety: "means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including –

1. (a) the likelihood of the hazard or the risk concerned occurring; and
2. (b) the degree of harm that might result from the hazard or risk; and
3. (c) what the person concerned knows, or ought reasonably to know, about-

(i) the hazard or risk; and
(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."

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The alternative is to accept the definition of the acceptable level of safety from ICAO as being "the state in which the possibility of harm to persons or property damage is reduced to, and maintained at or below, an acceptable level through a continuing process of hazard identification and risk management".

2.4 **The Role of the Minister** - the exposure draft limits the powers of the Minister in respect of aviation safety matters to simply rule making. We do not support such a restriction, in our view the Minister should have a role in:

- Directing the Board as to the performance of its functions and the exercising of

powers.

- Directions should be of a general nature and transparent for all to see.
- Writing to the Board conveying the governments views in respect of:

o Strategicdirection.
o The manner in which the government expects the CAA should perform its

functions.
o How consultation and continuous disclosure of financial performance will

operate.
o The creation of advisory panels to assist dispute resolution in matters of

interpretation of rules.
o Theconsistencyofapplicationofstandards.
o Therequirementtoregularlysurveytheviewsandattitudesofthesector. o The expectations the Minister has in terms of timely delivery of

information critical to continuous improvement.

5. 2.5 **The Role of the Board** – this needs to be far more specific. Our perception at the present time is that the Board has shifted away from holding the Director accountable for the performance of the organisation. This is most noticeable in respect of timely delivery of changes impacting on safety, the assurance of quality in service delivery, and oversight of complaints. We have a service charter, but there is no indication that the Board is in fact monitoring the level, content and number of complaints.

   We accept the Board cannot instruct the Director as to the content of any decision, and that the Director's decision cannot be reversed or overturned by the Minister or the Board, however we firmly consider there must be a role for the Board in ensuring systemic failure is not a re-occurring feature of the performance of the organisation.

   As a minimum, the role of the CAA Board should include;

   - Setting the direction of the CAA and overseeing the entity's regulatory powers.
   - Setting, reviewing and reporting on plans and targets for services and financial

     performance.

   - Managing strategic risks and mitigations.
   - Holding the agencies executive to account for its performance.
   - Providing quality assurance of key operational policies, systems and processes.
6. 2.6 **Fit and Proper Person Test** – this test is an important safety tool for CAA when determining entry and exit from the system but adds little benefit, but imposes substantial costs, when applied to those already in the system.

   Currently those in the system, when seeking any change to their role, are subject to the fit and proper person test. CAA already recognises that if this occurs within five

Ensuring that, where appropriate, consultation occurs with government,

commercial, industrial, consumer and other relevant bodies and organisations

(including ICAO and bodies representing the aviation industry).

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years a declaration that nothing has changed is acceptable however if the change is at greater than five years then the individual is subjected to the test as though they are a new entrant.

Given the multiple checks and balances in the aviation system as to competency and on-job performance, we submit that industry participants should not be subjected to this test again and there should be no requirement to resubmit information with a role change. This change would remove a significant amount of red tape which is at best of minimal incremental safety benefit. This change while implemented through a change in the Act would negate the continuing need for a number of rules.

7. 2.7 A wide number of issues in Part 4 Subpart 3 of the exposure draft require addressing, these include;
    - The timeliness of the actions taken. The term "as soon as practicable" is used at one point. This needs to be replaced with a maximum time period. We think five working days would be appropriate.
    - The information provided or sought should be more specific as to the issue the Director is interested in.
    - The section should not be used as a proxy to achieve change of rules or administrative interpretations of the rules.
    - It should be explicit if the Director fails to extend the suspension then the document, the subject of the extension is automatically restored.
8. 2.8 **Independent mechanism to advise the Board and Director on the performance of the system or any other matter which is not working in a fair and transparent manner**. We note that Section 25 (1) (d) provides that such a person can be appointed, however it would appear that this is entirely at the discretion of the Director. This should not be the only channel for initiating such a process. Rather, the Board should also be able to trigger an investigation if it is satisfied there is substance to a complaint as should an individual or an organisation on behalf of its members or a complainant representing a group of complaints. Complainants should have protections from any other form of action by the CAA. The terms of reference of the complaint should be agreed between the parties. Where the parties are unable to agree then the independent person would set the terms of reference after consultation with the parties.
9. 2.9 **Civil Aviation Rules to be recognised as Safe Work Instruments, or alternatively a statement as to the relationship between the specialist legislation (Civil Aviation Act) and the general legislation (HSW) on safety at work is needed**. This is an essential change to the Act in order to remove confusion and potentially simplify the compliance regime.
10. 2.10 **Rulemaking** - despite repeated best endeavours the time taken to develop rules has not really improved, although we note that if it is a matter that the Minister has identified as high priority the process does proceed much quicker. The question is what can be done?
    - Identification of issues – this largely appears to be by the operational units of the CAA. The problem appears to be no real sense check as to the relative importance of the issues. There appears to be no cost benefit analysis which results in insignificant issues consuming time and resources.
    - Front end policy making can be of variable quality – this is possibly because of an absence of overall policy direction – refer bullet point below. Should New Zealand for example simply adopt the FAA rules?

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- There appears to be much more discipline needed in developing performance based rules. There is much talk about risk based/performance based regulation but the rules developed under this philosophy are just as prescriptive as many of the other rules.
- Should consultation be required at the point rules are made or is it more important to get the policy setting right?
- Should CAA have the resource to draft the final rule and send this directly to the Minister?
- Does there need to be reference to ACAG in the Act?

- Should the Act make reference to the development of advisory circulars and the

  role these can play in assisting technology uptake?

  We do not profess to know all the answers, but without a thorough review of the proposed rule making section there is little hope of improving timely performance. In saying that, few "administrative" problems appear to arise from implemented rules themselves, it is normally the application and interpretation of the rule that causes problems.

11. 2.11 **A Red tape reduction programme** – many of the Civil Aviation Rules are now 20 plus years old and have never been refreshed. A programme should be put in place of regular rule refresh with a view to eliminating unnecessary red tape. For example one the most expensive examples of red tape is the requirement to re-certificate organisations every five years. This recertification is enormously expensive costing a small to medium size operator anywhere upwards of $50,000 plus in direct and indirect costs. The recertification does not drive improvements in aviation safety and was initially inserted into the rules because it was thought rules would be refreshed every five years and there would be a need to ensure compliance. CAA data shows quite conclusively that compliance with the rules is not in general an issue so why impose a recertification period. Additionally, CAA themselves have adopted a risk based approach. If CAA are adequately identifying and managing the risks it should not be necessary to put an entity through a recertification process.

    There are a number of other rules where New Zealand is simply not aligned with the rest of the world for example (1) radio requirements for over water operations, (2) certification of non-air transport operations, (3) definition of crew member, and (4) enabling installation of new technology safety enhancing equipment.

    To our knowledge, there has never been an emphasis on reducing red tape in the aviation sector. Instead the tendency has been to place one new rule on top of another old rule. The exposure draft will for example create the need for more new rules if the prescriptive approach to DAMP is incorporated in the Act.

12. 2.12 **Recognition of foreign medical certificates and on-going acceptance of medical certificates issued by foreign jurisdictions** - New Zealand does not recognise medical certificates issued by other competent authorities. This is not logical given the human body is the same and doesn't recognise geographical boundaries. There is no reason why we could not accept medical certificates issued by those jurisdictions considered to have a comparable standard such as Australia, the US, EASA countries, the UK and Canada.
13. 2.13 **Acceptance of ISO 3100 risk management-guidelines** – There is no good reason why this standard has not been accepted by the CAA and used as the fundamental methodology for the granting of exemptions and the analysis of risk when considering rule issues or rule making.

14. 2.14 **Transparent disclosure of policy and a more transparent process for making policy** – Presently CAA's aviation safety policy is made behind closed doors. The first the sector may hear about matters is when we are told 'this is the policy'. We do not believe that CAA should be able to make policy in this area without first articulating to the Minister and sector what the issue is that the policy is trying to address. For example engine life escalation – the aviation engineering community are being advised that the discontinuation of long standing accepted practice is CAA policy. This policy is made without discussion, without sanction by the Minister, and without consideration of its impact on the sector.
15. 2.15 **The role of the Director to be re designated as the Director of Aviation Safety** – Notwithstanding our objections to the merging of the Aviation Security Service into the Civil Aviation Authority, should this occur we would like to see the re-designation of the role of Director to that of Director of Aviation Safety in order to ensure that the primary focus of the said role is very clearly reflected in the title.

    The integration of the back-of-house administrative functions of CAA and Aviation Security a number of years ago has, as one would expect, resulted in the Chief Executive's time being spread more thinly. This has been to the detriment of the focus on aviation safety and this clear articulation of pinnacle role will go some way towards encouraging rectification of the present imbalance.

16. 2.16 **Development of an Aviation Policy statement as the overarching document setting the direction for aviation going forward**. Without an overarching policy statement as what New Zealand is trying to achieve in the aviation sector, the same old problems will keep re-occurring.

    We recommend that the Government undertake a comprehensive review of the aviation regulatory framework as a first step in informing its aviation policy. The direction determined from this review should then be encompassed in both the Act and various policy directions to agencies. The review should cover the MOT, TAIC and CAA.

Thank you for the opportunity to make a submission on the Civil Aviation Bill. My firm recommendation is that this exposure draft does not proceed until there is a thorough and comprehensive review of all aspects of the aviation system.

Yours faithfully,

E.W.CLAPSHAW.