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The Ministry of Transport
P O Box 3175
WELLINGTON 6140

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E: ca.bill@transport.govt.nz

Dear Sir/Madam

Submission on the Draft Civil Aviation Bill

- 1.1 The opportunity to comment on the draft Civil Aviation Bill is appreciated. The Bill has been in gestation now for over five years with various points of consultation with industry over this time. Multiple perspectives have been put forward and due to the duration of this consultation some may have been lost along the way.
- 1.2 This draft Civil Aviation Bill will set the legislative structure for our aviation industry for a considerable number of years in the future, getting the Bill right should be a priority as aviation delivers significantly to New Zealand infrastructure, transportation industry and the New Zealand economy, both domestically in in the international export market.
- 1.3 The Civil Aviation Act 1991 was an output of the Swedavia McGregor Report of 1988. It was a welcome refresh and set the New Zealand aviation industry up for the following generation of aviation activity. Latterly new international aviation policy and strategies have been formulated that were not envisaged and not incorporated into the 1991 Act. This Civil Aviation Act should enable a further generation of New Zealand aviation safety and support the nation's economic development.
- 1.4 It is sensible to combine the Civil Aviation Act and the Airport Authority Act into one statute. However, the structure of the draft Civil Aviation Act should be modified slightly to better align with the overall aviation system. To achieve this the Main Purpose of the Act should better reflect the aviation system, rather than simply the vision of the CAANZ.

Proposal: Main Purpose of the Act - CAANZ is responsible for the regulation of aviation safety in New Zealand. It maintains, enhances and promotes the safety of civil aviation. Through policy and regulation CAANZ shall consider economic and cost impacts on our aviation system.

- 1.5 Further additional commentary should be included in the Additional Purpose section to incorporate this wider purpose of the CAANZ.
- 1.6 The proposed Bill should then reflect the following sections: Aviation Safety, Aviation Security, economic regulation of air services and economic regulation of aerodromes.
- 1.7 Much of the language in the Draft Bill reflects old or historical aviation terminology. Rather than be prescriptive in aviation terminology, the Draft Bill should be able to accommodate new aviation activity in the aviation system, without too much legislative amendments

needed. Therefore, wording should reflect that Rules operationalise the intent of the legislation.

1.8 Just Culture is common policy and supported through legislation in a number of similar aviation system jurisdictions to New Zealand. Just Culture is aligned with Safety Management Systems policy and regulation in the aviation system. Just Culture promotes occurrence reporting to ensure accurate knowledge of activity, risks and risk management, in the aviation system. Inclusion of Just Culture in the Draft Bill provides guidance to the Director, and transparency for aviation participants, as to when The Director should, or should not, take prosecution or administrative action.

1.9 However, the Just Culture protection, as envisaged, is too restrictive and does not reflect the Just Culture policy and regulation similar jurisdictions have implemented. There is a departure from ICAO and other similar jurisdictions in terminology, definitions and practical implementation.

Proposal: Just Culture – More detail needs to be incorporated to better reflect the intent of Just Culture and ensure reporting in a non-punitive manner to ultimately enhance aviation safety in New Zealand aviation system.

1.10 The outcomes of Just Culture would also be enhanced through introduction of an Aviation Appeal Tribunal. Similar Jurisdictions to New Zealand have an appeal system. This Tribunal provides a sense check, prior to any further action the Director may take through the judicial system. The Tribunal system provides a process for review of administrative and enforcement action. The structure of a Tribunal, their scope of responsibility and the matters they consider should be incorporated into the Civil Aviation Bill.

1.11 Further consultation and consideration is needed, however, where similar jurisdictions have implemented this process, New Zealand should be able to rapidly incorporate an appropriate section within the Draft Bill.

Proposal: Aviation Appeal Tribunal – Incorporate into the Draft Bill a section incorporating an Aviation Appeal Tribunal.

1.12 International Carriage through scheduled services, should not include carriage of air freight. Most air freight provisions in bilateral agreements are “Open Skies” and therefore need not be included in this regime. The provisions of the Commerce Act should apply to air freight operations.

Proposal: Exclude air freight from International Carriage by Air provisions.

1.13 It is restrictive and inappropriate to include prescriptive liability in the Draft Bill for aviation services delays and identify airlines as the sole responsible party. Airlines are a part of an overall transportation system, that includes other service suppliers, including ground transportation infrastructure, airports and air traffic control. Airlines do not have influence over these other services suppliers, yet these suppliers may have a significant impact on delays.

Proposal: Modify the prescriptive delay airline liability to better reflect the travel system and acknowledge other service suppliers that may impact services and delays.

1.14 I 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 without appropriate industry consultation.

- 1.15 I 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 CAANZ customers had against the imposition of unfair and monopolistic charging practices. The changes solely address matters that the officials consider as impairments but do nothing to protect users.

Other Matters

- 1.16 **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) overrides 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.

- 1.17 I therefore I 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:

- (a) the likelihood of the hazard or the risk concerned occurring; and
- (b) the degree of harm that might result from the hazard or risk; and
- (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.”

- 1.18 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”.

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

- Directing the Board as to the performance of its functions and the exercising of powers. For example, the Minister should, if the Minister deem it appropriate, be able to require the Board to consult with appropriate persons.
- Directions should be of a general nature and transparent for all to see.
- Writing to the Board conveying the governments views in respect of:
 - Strategic direction.
 - The manner in which the government expects the CAA should perform its functions.

- How consultation and continuous disclosure of financial performance will operate.
- The creation of advisory panels to assist dispute resolution in matters of interpretation of rules.
- The consistency of application of standards.
- The requirement to regularly survey the views and attitudes of the sector.
- The expectations the Minister has in terms of timely delivery of information critical to continuous improvement.

1.20 The Role of the Board – this needs to be more specific for an industry sector that has such importance to the aviation safety and the New Zealand economy. There is a CAANZ service charter, but there is no indication that the Board is in fact monitoring the level, content and number of complaints in relation to this Charter.

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 I consider there must be a role for the Board in ensuring systemic failure is not a recurring 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.

1.21 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. I note that Section 25 (1) (d) provides that such a person can be appointed, however it would appear that this is 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 initiate 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 CAANZ. 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.

1.22 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.

1.23 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?
- 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 CAANZ have the resource to draft the final rule and send this directly to the Minister?
- Should the Act make reference to the development of advisory circulars and the role these can play in assisting technology uptake?

A thorough review of the proposed rulemaking section is needed due to the poor timely performance of rules changes.

1.24 A Red tape reduction programme – many of the Civil Aviation Rules 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-certify 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. CAANZ data shows quite conclusively that compliance with the rules is not in general an issue. Additionally, CAANZ themselves have adopted a risk-based approach and performance-based regulation operating model. If CAANZ are adequately identifying and managing the risks, it should not be necessary to put an entity through a recertification process.

1.25 Safety Management Systems implementation in New Zealand and the introduction of this risk management-based approach to aviation activity, in particular with Aviation Certificate holders, should provide the CAANZ with confidence in the aviation system. Removal of the five-year re-certification requirement removes an economic and fiscal cost to the aviation system that does not improve aviation safety in New Zealand.

Proposal: Remove the five-year re-certification process for aviation entities in the New Zealand aviation system.

1.26 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.

1.27 The tendency to place one new rule on top of another old rule increases red tape.

1.28 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. There is no reason why we could not accept medical certificates issued by those similar jurisdictions considered to have a comparable standard such as Australia, the US, EASA countries, the UK and Canada.

1.29 **Acceptance of ISO 3100 risk management-guidelines** – There is no good reason why this standard has not been accepted by the CAANZ and used as the fundamental methodology for the granting of exemptions and the analysis of risk when considering rule issues or rule making.

Proposal: I 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.

The opportunity to comment and respond to the Draft Civil Aviation Bill is appreciated. There is, in my view, additional work needed to bring the Draft Bill into the twenty first century and provide the framework for the next generation of safe aviation practice and economic contribution to the New Zealand aviation system. I recommend a pause while these matters are considered and introduced to the Draft Bill prior to submission to the Select Committee process.

Your sincerely



Brian Whelan