REVIEW OF PARTICIPATION OF INTERESTED PERSONS IN THE DEVELOPMENT OF ORDINARY CIVIL AVIATION RULES

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December 2002

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EXECUTIVE SUMMARY

1. The Minister of Transport is both responsible and accountable for the ordinary rules under the Civil Aviation Act 1990 (the Act). The Civil Aviation Authority (CAA) develops these rules on the Minister's behalf under an agreement with the Secretary for Transport. The aviation community is vitally interested in the rule development process and must be involved. The CAA relies on the aviation community to assist it to make informed and relevant decisions, including in relation to proposed rules, which promote a safe and efficient aviation system that has the confidence of the public.

2. However, rule making under the Act is not a negotiated process. The CAA must make the ultimate, informed and reasoned decisions. In doing so it must ensure the aviation community (in particular) has had a real opportunity to be involved in answering the key questions, and has access to clear explanations of:

   2.1 What – is the problem?

   2.2 Why – are we fixing this way?

   2.3 When – can we expect the various phases to be achieved?

   2.4 How – will the process be carried through/points of participation?

3. This review of participation of interested persons in the development of ordinary civil aviation rules takes place in a time of unprecedented change and challenge for the aviation industry. The very concept of safety at reasonable cost is challenged in this environment. The existing process, largely as described by the CAA, is set out in an introduction to this report and summarised by the CAA in a flow chart, reproduced as **Appendix 4** to this report.

4. The Terms of Reference are **Appendix 1** to this report. **Appendix 2** sets out the process followed. **Appendix 3** is a list of persons or groups who made submissions and/or were interviewed in the course of this review.

5. As discussed under Term of Reference 1, some of the "assumed" obligations on the CAA under the CIRAG Charter (which governs the existing process), and its general tenor of the need for agreement if possible, sit uncomfortably with the CAA's primary legal obligations and responsibilities. There are also significant contractual or negotiated obligations under the Annual Rules Development Agreement between the CAA and Secretary for Transport. These too have implications for the current process.

6. Under Term of Reference Four, a number of deficiencies in current CAA processes are identified.

6.1 The processing of rule or issue "triggers" is identified as requiring change. First, different "inputs" are obtained and dealt with in different ways and this limits their effectiveness. Secondly, the trigger processes prematurely funnel issues into an unsustainable rule development process, which is neither designed nor resourced to deal with the inflow. This leads to unrealistic expectations, pressure on people and other resources, frustration at the level of output and regulatory questions surrounding those issues that are not being effectively dealt with.

6.2 The preliminary stages of obtaining feedback and strategically assessing the rule proposal which is the subject of the trigger could be better focused and structured-

6.2.1 to ensure the true, underlying problems are clearly identified and articulated at an early stage;

6.2.2 to enable a range of realistic solutions to be proposed and considered;

6.2.3 to ensure only those issues that require a rule-based solution are channelled into the rule development process;

6.2.4 to ensure the rule proposals are appropriately prioritised; and

6.2.5 to enable and facilitate the aviation community to participate in each part of this process.

6.3 The focus on the CIRAG/informal consultative process, and the efforts that have gone into that process, may have had the unintended effect of undermining the formal consultative process that follows publication of an NPRM. There is an understandable desire to have those issues that have been "put to bed" in the informal process, especially after much debate and possibly compromise, remain in that comfortable state. However, legal obligations based on principles of fairness require a process where the CAA remains open to persuasion on all issues. If it is in fact persuaded to a different approach, the nature of the current CIRAG process can create difficulties where others involved in that process may feel that deals have been done contrary to earlier agreed positions, or changes made by the CAA "unilaterally" and without further consultation.

6.4 The aviation community sees the process that currently follows the provision of the final draft rule to the Ministry generally as having very little value. However, much of it is simply a reflection of good government. Two risks may arise;

6.4.1 The risk that the constitutional checks are perceived to undermine the authority of the CAA; and

6.4.2 An opportunity for those who have not achieved the outcome they sought from the regulatory process to derail or divert the process, and considerable regulatory resources, through effective lobbying of officials and politicians.

6.5 Rule Part 11 is discussed. The Ministry submits it should be revoked and the reasons promoted are compelling. However, the aviation community did not support the substitution of a clear policy for the Rule. It may be best to build the confidence of the community in the processes before considering any changes to Rule 11. Procedures followed under the Rule could be adapted in the meantime to lawfully accommodate the changes proposed in this review.

7. Under Term of Reference 5 the original purposes of CIRAG are considered against today's environment. It is concluded that these purposes remain valid and important.

At its set up in 1998 the CIRAG process was intended to create a body which represented a partnership between the regulator and the aviation community and which functioned co-operatively to-

7.1 Enable the CAA, as the body responsible for developing rules, to obtain necessary aviation community input into that rule development process, in a timely way; and

7.2 Enable the aviation community to secure and institutionalise a high level of influence in the regulatory development process, including through receiving information, assisting in prioritising, advising on the appropriate expert or affected persons to contribute to the process, monitoring that contribution and facilitating industry understanding of, and "buy in" to, the rules.

8. As discussed under Term of Reference 6, the CIRAG process is seen by most of the industry as generally very successful. The airline and commercial sector in particular were very keen not to revert to earlier, CAA-dominated processes. Most submitters accepted, however, that CIRAG should be more representative of the broader industry. On the other hand, the CAA and the Ministry see the process as subject to an inappropriate and unanticipated level of influence or control by the industry.

9. This Review identifies four essential deficiencies or problems with the existing CIRAG processes under Term of Reference 6 -

9.1 CIRAG and/or the TSGs appear to have the task of identifying the real underlying problem, identifying and assessing the various possible solutions, finding the preferred solution and, if it is a rule, what the rule ought to be. This strategic analysis seems to occur when an issue is already in a process that at the least favours, and more likely is committed to, a rule-based solution. The jurisdiction is too broad.

9.2 The CIRAG Executive is small and unrepresentative. It lacks the confidence of the wider aviation community outside of AIA membership and is not seen as sufficiently inclusive by the Ministry or the CAA.

9.3 The CAA does not exercise sufficient control over the process and the focus on agreement results in a number of difficulties. While consensus can be desirable, at times it may be an unrealistic goal. This is particularly so when wider aviation community interests have a stronger voice, or when proposals have diverse implications (particularly economic) for various interests across the aviation community. A more realistic objective is that the affected community has a proper opportunity to participate in a constructive problem solving process which enables it to -

9.3.1 contribute its information, experience and expertise;

9.3.2 challenge and debate various ideas and approaches;

9.3.3 gain an understanding of the bigger picture;

9.3.4 advance its interests where appropriate; and, if feasible,

9.3.5 work towards a possible agreed position with the regulator.

9.4 The dual role of some TSGs as technical and representative is unhelpful. They are sometimes seen as unrepresentative when they are fulfilling a representative function. They can get bogged down in detail and the emphasis on agreement can produce unwarranted delay and unrealistic expectations of the outcome of the rules development process.

10. In 2001 a performance review of the CAA for the Ministry of Transport made a number of recommendations relating to the rule making processes of the CAA. These are considered under Term of Reference 7 and largely affirmed, although the processes recommended in this Review are more explicit than those referred to by the Ministerial Review, in accordance with the Terms of Reference for this Review.

11. Under Term of Reference 8, various characteristics of a desired consultative process for rule making are identified and discussed. The (formal) process of “informal”

consultation between the aviation community and the regulator must be open, transparent, structured and disciplined. Relationships must be courteous and professional. The process must be predictable and informative, but flexible. The CAA must manage and control the process and take responsibility for decisions based on informed and reasoned judgements. The aviation community must take up the reasonable opportunities to engage with the regulator. All work to the same objective of promoting a safe and efficient aviation system.

12. At the same time these formal processes for "informal" consultation are considered, one must not lose sight of the fact that the regulator and the aviation community should be communicating with each other on a day-to-day basis about various issues. Nothing in this report should be taken as discouraging continued open dialogue as part of that necessary relationship.

13. Under Term of Reference 9 a range of recommendations are made and summarised. The suggested process is in three stages;

13.1 First, the processing of issues that may require a rule change. This is likely to be the most significant process and is depicted in a flow chart at **Appendix 6**. It involves identifying the underlying problem for all triggers, considering various options to resolve the problem (rule-based and other) and choosing a solution or solutions following a standardised Risk Management process. Where a rule-based solution is proposed, a priority-setting process follows. This involves the aviation community before priorities are negotiated between the CAA and the Ministry. The "formal" input from the aviation community is by way of a group referred to in the flow chart as ACAG (Aviation Community Advisory Group). However, the nature of this group or forum needs further consideration and may change depending on the input required at the different stages, or the objective of the consultation.

13.2 Secondly, once a rule proposal has leapt all the hurdles and is accepted into the rule development programme, the process proposed is one that is controlled by the CAA. ACAG has primarily a monitoring and advisory role, with broader

consultation proposed at the stage a draft rule and NPRM has been prepared. This stage of the process is depicted in the flow chart at **Appendix 7.**

13.3 The existing process that occurs once the final draft rule is provided to the Ministry, described in table form at **Appendix 5**, is depicted in a flow chart at **Appendix 8**.

INTRODUCTION: THE CURRENT CIVIL AVIATION ORDINARY RULE-MAKING PROCESS

Executive Summary:

This introduction sets out the existing Civil Aviation rule-making process for ordinary rules, including both the CAA and Ministry-governed parts to the process.

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1. The CAA provided a report on the existing Civil Aviation rule-making process for ordinary rules (Preliminary Report 4). A flowchart depicting the process, Figure 1 in that report, is reproduced as **Appendix 4** to this report.

2. The rule-making process is triggered by a perceived need to either create a new rule, or amend an existing rule. That need may be identified by the CAA, a member of the public, a participant in the aviation community, a Crown agency or the Minister. Initiating triggers from outside the CAA were identified in the report as including:

    2.1 TAIC investigation recommendations;

    2.2 Coroner recommendations;

    2.3 Petitions under Rule Part 11;

    2.4 Industry agreements;

    2.5 Ministerial instruction;

    2.6 Government transport policy; and

    2.7 International obligations, conventions and agreements.

3. Within the CAA internal processes that may lead to identifying the need for rule-making include:

   3.1 Proactive safety monitoring such as auditing and inspection;

   3.2 Reactive safety monitoring such as accident, incident and statistical information;

   3.3 Internal proposals;

   3.4 The CAA safety policy; and

   3.5 Monitoring of international standards such as ICAO, FAA and JAA.

4. The procedure for petitioning the Minister of Transport for a rule-making action is set out in Rule Part 11. A petition is submitted to the Rules Docket Clerk at the CAA. If it does not provide sufficient information, or if the proposal is already provided for in a rule, the petitioner is notified and, where appropriate, invited to clarify their proposal.

5. A summary of the proposal contained in the petition is published in the monthly Civil Aviation Rules Register Information Leaflet (CARRIL) and comments are sought from any interested person on the proposal.

6. Preliminary research is carried out by the CAA to determine the appropriateness of the proposed rule-making action. This occurs whatever the trigger for the proposal. Research may include consideration of the following:

   6.1 The technical content of the petition or rule proposal;

   6.2 The public comments resulting from the CARRIL;

   6.3 Harmonisation with other authorities;

   6.4 ICAO standards and recommended practices;

6.5 Views within relevant areas of the CAA;

6.6 International obligations; and

6.7 Safety and risk assessments.

7. The Manager of the Rules Development Division within the CAA collates the background research material on the petition including strategic content, rationale and implications. He then consults with members of the CIRAG Executive to determine the level of priority the industry representatives believes the proposal should be given.

8. At a meeting with the Technical Policy Group of the CAA the Manager of the Rules Development Division presents other CAA technical managers with a schedule of potential rules projects identified in the previous 12 months. These projects include those petitions the CIRAG Executive have considered. For the first time this year, in light of the impact of the annual Rules Development Services Agreement between the Secretary for Transport and the Director for Civil Aviation, CIRAG was provided with a list of potential rules and asked to prioritise them by ranking them 1 (high), 2 (medium) or 3 (low or no priority). The CAA accepted that this process was unsatisfactory. Given other pressures it was delayed, and little information was provided. Industry representatives on CIRAG were particularly critical of this process.

9. A schedule of proposed rule-making projects is ultimately drawn up and provided to the Secretary of Transport for negotiation over whether the Minister will agree to purchase the particular rule projects.

10. The schedule of agreed rules projects that will be carried out during a financial year is then included in the annual Rules Development Services Agreement (see Schedule 1). The agreement for 2002-3 provides for 13 rules to be progressed to implementation in the year under contract. Most are behind their anticipated target dates. Six further rule proposals are to be progressed with a view to implementation in the latter part of 2003. The Schedule also notes 11 other proposals which are “undergoing policy development” in the current year. This includes work to identify problems and issues and to ensure that all non-regulatory measures are considered before the commencement and

development of rule proposals. Some of these 11 proposals have already been the subject of CIRAG consideration in the rule development context.

11. Once the Minister has agreed to purchase the rules, the Manager Rules Development, presents the proposals to the CIRAG Executive to decide whether a Technical Study Group (TSG) should be set up to provide advice, recommendations, risk and economic analysis.

12. Where a TSG is considered to be necessary, the project is allocated to a Rules Project Specialist, or Technical Specialist from within the CAA to co-ordinate the establishment of the TSG, and convene the initial meeting where a TSG leader is nominated.

13. The CAA develops discussion documents dealing with specific aspects, for example identifying the safety issues, options, and cost implications of a rule project and provides these to TSG members for their consideration and discussion.

14. The intention is that TSG meetings involve a group of ideally around 5-6 members who are selected because of their expertise in the field being considered. Numbers can vary depending on the nature of the project. Recent TSGs have involved larger numbers who initially meet face to face, but develop much of the proposed rule through email debate.

15. The members are to represent the views of their sector of the industry, but are also asked to put aside personal or commercial self interest in order to arrive at a rule proposal which best suits the needs of the aviation community and the public.

16. An essential part of this process is the TSG member's role to disseminate the concepts being developed within the TSG to other participants of the sector the member is representing. This process draws in a wider pool of industry ideas that serves to guide the progress of the rule development at the conceptual stage.

17. Rule development progress is updated regularly through:

    17.1 The CARRIL which is published monthly and available to all interested persons;

17.2 Progress reports to the CIRAG Executive; and

17.3 Monthly reports to the Director and, presumably, the Ministry pursuant to the annual agreement.

18. The Rules Development Unit usually draft the rules and the Notice of Proposed Rule-making (NPRM). The NPRM contains a summary of the issues considered by the TSG, a Regulatory Impact Analysis Statement (as required by Cabinet), a legal analysis statement and the proposed draft rule. Sign off from the TSG is sought on the technical content of the draft NPRM. This involves the members endorsing the proposal in part or in whole, or expressing a view where support is not given. In that case, the members differing views are incorporated into the draft NPRM preamble. The TSG reports to the CIRAG executive, which then recommends the proposed rule to the Director.

19. Sign off on the draft NPRM is also sought from those CAA Group Managers whose units will be required to administer the rule. Sign off on the proposal affirms the technical content of the rule proposal as being satisfactory for progression to the formal public consultation phrase.

20. A briefing on the rule proposal is given to the Ministry of Transport staff who then review the draft rule to confirm compliance with wider Government policy and that the rule conforms to the Government's transport strategy.

21. The NPRM is published in accordance with the Act and interested persons are given a reasonable time to make submissions on the proposed rule. The NPRM is published in the Auckland, Hamilton, Wellington, Christchurch and Dunedin daily newspapers and in the *Gazette*. Notices are also placed in the CARRIL and on the CAA website. Copies of the NPRM are sent to known interested parties to encourage submissions, and to any other person who requests a copy.

22. The period for receiving submissions varies and is determined on a case-by-case basis. Typically between two to four weeks is allowed, which may be extended by application

of an interested person where there is good cause and the extension is in the public interest.

23. Submissions that oppose a particular aspect of the proposed rule are not uncommon, especially where the issues are contentious. The CAA considers these submissions, first to determine if there remains a significant omission in the content of the proposal. If so, the TSG may need to be reconvened to consider this issue and where necessary a follow-up NPRM may be published.

24. The submissions are considered in the round, when necessary appropriate changes are made to the proposed rule, and a draft final rule is developed within the Rules Development Unit.

25. The draft final rule receives a second sign-off from CAA Group Managers and from the Director. The Director then writes to the Minister setting out the rule objective and detailing how the project has complied with the statutory requirements in the Act that apply to the Minister and the rule-making process. This draft of the rule is known as the "white" draft.

Ministry of Transport part of rule-making process

26. The Ministry of Transport on behalf of the Minister then becomes responsible for the remaining part of the process. A table providing the "indicative rule progress in the Ministry of Transport following receipt of white (final) draft of rule" is attached to Preliminary Report 3 (**Appendix 5** to this report). This table outlines the actions within the Ministry and central Government, including the Executive and the Regulations Review Select Committee of Parliament from the time the rule is received from the CAA to its coming into force.

27. The Ministry has provided an indicative 20-week timetable, which explains each step. The steps include:

    27.1 Ministry checking of the rule and clarification of any issues.

27.2 If a regulation change is also required, the Ministry prepare a paper to the Minister seeking authority to instruct the Parliamentary Counsel Office (Parliaments' law draftsmen) to draft the necessary change.

27.3 The rule is sent to the Regulations Review Committee for consideration under Standing Order 381(2) of the House of Representatives. The Ministry drafts a paper explaining the Rule to the Minister and Cabinet for the Cabinet Finance Infrastructure and Environment Committee to consider.

27.4 Draft Cabinet papers are sent to the appropriate Government departments for comment in accordance with the requirement of the Cabinet Office Manual, and any drafting instructions to Parliamentary Counsel are provided. The Ministry also receives any comment from the Regulations Review Committee and various Government agencies, considers those comments and consults with the Minister and the agency as appropriate.

27.5 The papers to the Minister and Cabinet may be revised as a result. They are finalised and forwarded to the Minister.

27.6 The Minister considers the papers and consults as necessary with any Coalition Minister or partner.

27.7 The Cabinet paper is lodged with the Cabinet Office and considered by the Committee and by Cabinet the following week. The Minister signs the rule after the Cabinet meeting.

27.8 Notification of the rule is placed in the *Gazette* and any regulations are signed by the Governor General and *Gazetted*. After 28 days, the rule is able to come into force.

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

1. Review and summarise the statutory, contractual and other requirements placed on CAA for the making of ordinary civil aviation rules.

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.

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

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).

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.

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[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 liase 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. It 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.

TERM OF REFERENCE FOUR: EFFECTIVENESS OF EXISTING SYSTEMS

4. Review the effectiveness of existing CAA systems for rule making, including the setting of rules development programmes and priorities, with particular regard to the management of external inputs.

Executive Summary:

The processing of rule or issue "triggers" is identified as requiring change. First, there are several different process which mean different "inputs" are obtained and dealt with in different ways and this limits their effectiveness. Secondly, the trigger processes prematurely funnel issues into an unsustainable rule development process, which is neither designed nor resourced to deal with the inflow. This leads to unrealistic expectations, pressure on people and other resources, frustration at the level of output and regulatory questions surrounding those issues that are not being effectively dealt with.

The preliminary stages of obtaining feedback and strategically assessing the rule proposal which is the subject of the trigger could be better focused and structured-

- to ensure the true, underlying problems are clearly identified and articulated at an early stage;
- to enable a range of realistic solutions to be proposed and considered;
- to ensure only those issues that require a rule-based solution are channelled into the rule development process;
- to ensure the rule proposals are appropriately prioritised; and
- to enable and facilitate the aviation community to participate in each part of this process.

The focus on the CIRAG/informal consultative process, and the efforts that have gone into that process, may have had the unintended effect of undermining the formal consultative process

that follows publication of an NPRM to a degree. There is an understandable desire to have those issues that have been "put to bed" in the informal process, especially after much debate and possibly compromise, remain in that comfortable state. However, legal obligations based on principles of fairness require a process where the CAA remains open to persuasion on all issues. If it is in fact persuaded to a different approach, the nature of the current CIRAG process can create difficulties where others involved in that process, may feel that deals have been done contrary to earlier agreed positions, or changes made by the CAA "unilaterally" and without further consultation.

Those making submissions have a need and a right to have what they say considered. An optimal process will see all submissions subject to a written summary by the CAA, together with the CAA's response to the submissions. The objective is that submitters are in fact listened to, and that this is communicated to them. Where the CAA rejects a submission, the reasons for this will be clearly explained. While the submitter is unlikely to agree with the regulator, the submitter will at least know they have been listened to and received reasons for the contrary view.

The aviation community sees the process that currently follows the provision of the final draft rule to the Ministry generally as having very little value. However, much of it is simply a reflection of good government. Two risks may arise, of which the Ministry is mindful:

- The risk that the constitutional checks are perceived to undermine the authority of the CAA; and

- An opportunity for those who have not achieved the outcome they sought from the regulatory process to derail or divert the process, and considerable regulatory resources, through effective lobbying of officials and politicians.

Rule Part 11 is discussed. The Ministry submits it should be revoked and the reasons promoted are compelling. However, the aviation community did not support the substitution of a clear policy for the Rule. It may be best to build the confidence of the community in the processes before considering any changes to Rule 11. Procedures followed under the Rule could be adapted in the meantime to lawfully accommodate the changes proposed in this review.

Introduction and summary

1. Under this term of reference I consider first the effectiveness of the setting of the rules development programme and priorities, focusing on the issues of

   1.1 Initial triggers for rule change;

   1.2 Feedback and strategic analysis including-

   - Identifying the problem
   - Choosing the best solution, and
   - Prioritising the rule-based solutions.

2. I then consider the NPRM consultative process, including dealing with the submissions received, and then at the Ministry/Government/Parliamentary processes which follow the completion of the CAA's rule development.

3. Finally, the effectiveness of the Rule Part 11 process is discussed.

Effectiveness of the setting of the rules development programme and priorities

Effectiveness - What is working and what is not?

4. A matter of real concern to many submitters was the question of which proposed rules are given priority for action. In many cases, the aviation community did not understand why particular rule proposals had priority, or what was happening to the matters that had significance for them. If they knew what was happening, they did not necessarily accept the explanations. In some cases, people and organisations had spent considerable time, energy and money contributing to the development of a rule, only to find it shelved or (it seemed to them) simply ignored instead of progressed through the regulatory process as anticipated. A very large part of the aviation community advised it

felt it had no influence in the priority setting process, which was seen as CIRAG or CAA driven.

5. A second, related theme in submissions was a lack of understanding or clarity about what the problem was that a proposed rule was aiming to address.

6. These are significant concerns. Nevertheless, they were not universally expressed. Many of those participating in the CIRAG/TSG processes well understood the issues for addressing, the relative priorities of the rule proposals and the difficulties arising with certain proposals warranting their delay, deferment or even deletion from the agenda. These submitters were generally participants in the process at a high level who put considerable time and resources into the process and made real efforts to keep up to date with information and reports from CIRAG and the CAA.

7. While CIRAG appears to have some influence over rule prioritising and the work programme for development, the Minister of Transport, following negotiations between the CAA and the Ministry, makes the primary decisions. The CAA accepts that this process requires better-structured participation from the aviation community.

Stage One: Initial triggers for rule change

8. A primary concern is with the way rule "triggers" are currently received or obtained and fed into the rule process.

9. The Rule Part 11 process seems an ineffective way of achieving the necessary input for four reasons;

9.1 The process is restricted to petitions and does not apply to other rule proposals or issues;

9.2 It can be unfocussed and *ad hoc*; there may no rigorous analysis of the recommended petition for interested persons to respond to;

9.3 It is an isolating “notice-and-comment” process which does not best promote industry debate on the nature of the problem nor facilitate any common understanding of the concern that arises;

9.4 The issue is immediately placed for consideration within the context of the rules process, which detracts from a close analysis of alternative means of addressing or mitigating any risk that arises as a result, and can direct any response towards the direct implications of a rule change to the responders interests.

10. This last point is a primary concern; issues are fed into the rule making system, and often allocated a rule “solution”, before an assessment is made of the problem or the range of potential solutions considered. The “triggers” generate activity and develop a life of their own (including, for petitions, publication of a proposal in CARRIL, submissions from the aviation community, preliminary research within the CAA to determine the appropriateness of a proposed rule-making action, for example). The proposals tend to become part of the rule development process without a clearly informed and widely debated positive decision to include them. A rule is a “default” solution.

11. Examples where issues have probably inappropriately been included in the rule making process, provided by the CAA, will no doubt be controversial. They include:

11.1 Part 137.63 – the defence to the low flying rule. A petition for a rule change in this case was in the system for two years before the CAA concluded that no rule change was required – that it was an interpretation problem.

11.2 Following a commercial flight crash at Franz Josef Glacier the Transport Accident Investigation Commission recommended a rule change so that all pilots have mountain flying training as part of their licensing. However, the rules for commercial pilots already covered this.

11.3 Proposed Rule 102 for ex-military aircraft is an example of detailed rules having been written (and considerable resources expended by the aviation community)

before the strategic policy was agreed and its place in the rules framework determined.

11.4 A rule proposal for a bird hazard management programme, which would bring certain airports up to the same standard as others, raised the question - was this a problem requiring a rule based solution?

11.5 A petition for “one level of safety” throughout the rules system was received. CAA saw this as amounting to a request for investigation and analysis to see if a problem existed, rather than notice of a problem.

11.6 Undoubtedly those that promoted the proposals will (and do) disagree with their categorisation as inappropriate for the rule process. This emphasises the need for a broader debate within the aviation community.

12. In summary I see the deficiencies in the rule “trigger” process as follows:

12.1 First, triggers come from different sources and are subject to different processes as a result. Petitions under Rule Part 11 are treated in one fashion, and other triggers in different ways. The CAA has difficulty on occasions keeping on top of the complexities of the Rule Part 11 process requirement. The outcome of “filing” petitions until an opportunity to deal with them arises is unsatisfactory. Petitioners have expressed frustration about this.

12.2 Secondly, not all the triggers should necessarily result in rule-making activity. One of the key issues apparent in the course of my review, and one which the CAA is particularly conscious of, is that too many issues become incorporated into the rule-making process without first critically identifying the problem which the rule seeks to solve and whether a rule is in fact the best solution for that problem.

12.3 Thirdly, the current process is unsustainable; not all the triggers **can** result in rule-making activity. It is apparent that too many proposals are being fed into the already choked rule development process. The aviation community cannot

continue to lob proposals into the hopper in the expectation they will gradually grind their way through and out the narrow funnel at the base. Before an issue "triggers" the development of a rule based solution, there needs to be a reasonable consensus of the exact nature of the problem and the **need** for a rule based solution when considered against all other issues, priorities and resources. Rule based solutions should be treated as last resort methods of resolving issues and solving problems.

13. I suggest Stage 1 be referred to as "issue triggers" to move away from the inherent presumption that a rule is the necessary solution and to encourage the careful analysis of issues raised before they are labelled a problem requiring a rule based solution. Nevertheless there needs to be process whereby all the various issues are collected together in one place and, out of necessity, subject to a basic filtering process by the CAA to ensure there is an issue to be attended to in one form or another. A body representative of the wider aviation community should then consider them collectively, with a focus on identifying the real problem. This leads to the next stage.

Stages two and three: feedback and strategic analysis

(i) Identifying the problem

14. The CAA considers it critical that before a "trigger" is fed into the rule development process, a more robust problem identification and assessment of various alternative solutions must occur. Many submitters agreed this was a current deficiency in the process.

15. It is important to identify the essential problem at a preliminary stage for reasons which include:

15.1 The sustainability of the rule-making system depends on a limited number of proposals for rule development;

15.2 The importance of a common understanding of an issue, especially where safety related, given the limits of regulating for safe practise;

15.3 The need to identify from a range of options the most appropriate, cost effective solution to the particular problem; and

15.4 To provide a clear focus and objective for the rule development process.

16. There needs to be a separate process, in my view, for the aviation community to be closely involved in a debate about the nature of the problem which the trigger or issue raises. This is fundamental. Such a debate will be influential in setting the agenda and priorities for rule making and obtaining the appropriate input of the aviation community at the policy level. A rule-based solution or control may not be the best or the most preferred/cost effective solution or control method. If it is, then it is nevertheless essential to properly define the problem, as this will in turn provide the focus and boundaries for the rule-making process.

17. The identification of the problem stage is not, in my view, the time to focus on the solutions. The potential solutions are likely to be controversial. Various interests will naturally be considering the implications for their businesses and activities of different solutions. It is important not to jump to this stage until the problem is clearly identified and articulated.

(ii) Choosing the best solution

18. Once the problem has been clearly identified and articulated, the next and separate stage is what, if anything, should be done about it. As identified under Term of Reference 3, there needs to be at least a basic assessment that a rule is the best option given the objective of safety at reasonable cost. There needs to be a barrier to be overcome before a rule solution is agreed on. The current process does not readily provide for that.

19. As previous noted, the CAA needs to be able to identify:

19.1 The effect on safety if the problem is not addressed (the risk)

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

19.3 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.

20. 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 the CAA 's approach and to discuss and consider various options and their implications. There is a further opportunity too for the aviation community to achieve (so far as possible) a common understanding of the problem so that solutions will emerge. To the extent this currently occurs, it seems to be part of the CIRAG process. The key questions seem to be asked of the TSGs at a stage where the rule development process is well underway. This process has a number of deficiencies including a perceived or actual lack of inclusiveness. This is discussed further under Term of Reference 6.

21. There is a high level of support among the aviation community for the use of a risk management process at this stage. This would provide systematic and transparent criteria for evaluating risk, which does not currently seem to exist. While the use of different criteria will be debatable, it is nevertheless a clear process and, applied across a range of options, enables comparisons to be made. Most favoured a risk management approach tailored along the lines of the Australian/New Zealand standard for Risk Management (AS/NZS4360:1999). I agree with this. The CAA and the aviation community will need to consider how this process will work in practice and the CAA will need to define the governing principles. Importantly, as the standard recognises, communication and consultation are an important consideration at each step of the risk management process:

> "It is important to develop a communication plan for both internal and external stakeholders at the earliest stage of the process. This plan should address issues relating to both the risk itself and the process to manage it.
>
> Communication and consultation involve a two way dialogue between stakeholders with efforts focused on consultation rather than a one way flow of information from the decision maker to the other stakeholders.
>
> Effective internal and external communication is important to ensure that those responsible for implementing risk management, and those with a vested interest understand the basis on which decisions are made and why particular actions are required.
>
> Perceptions of risk can vary due to difference in assumptions and concepts and the needs, issues and concerns of stakeholders as they relate to the risk or the issues under discussion. Stakeholders are likely to make judgements of the acceptability of a risk based on their perception of risk. Since stakeholders can have a significant impact on the decisions made, it is important that their perceptions of risk, as well as their perceptions of benefits, be identified and documented and the underlying reasons for them understood and addressed." [1]

22. It is also important for the aviation community to understand that the rule-making process is necessarily a slow and resource intensive one. The rule solution itself has a cost to the nation, and the potential for delay in providing a solution. Legislating a solution to what is essentially a safety issue has obvious limits. The reality of the limits of the process must be acknowledged. There is pressure on the process at many points – limited resources (experience, time, expertise and money) within the CAA, the aviation community, the Ministry and other Government departments, which must be consulted. The full agendas of the Regulations Review Committee of Parliament and Cabinet are all realities that are not likely to change. As already observed, there is no point putting rule development proposals into the top of a hopper that cannot process them out the bottom at the same rate. Where that happens the problems become solutionless.

23. In the course of this review, it was suggested to me that a moratorium (subject to urgent safety related matters) was desirable to clear the backlog. I found limited support for this suggestion. In my view, a broader and more systematic approach to problem solving is necessary to address this problem in the longer term. In the meantime, difficult as it will be for those who have invested so much time, energy and funds into

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[1] AS/NZS 4360:1999, para.4.7

particular projects, some matters that have found their way into the hopper will simply have to come back out again.

(iii) Prioritising the rule-based solutions

24. The current ad hoc process of taking rule proposals to CIRAG as they arise suffers from a lack of planning and the general problem of a lack of broad representation. This process also conflicts with the rules development agreement process that has been in place for the last three years.

25. This year, as noted in the Introduction, the CAA did attempt to seek, through CIRAG, the views of the aviation community on the priority to be given to particular initiatives. The CAA accepts that this process was not a good one. First, it involved priority setting within the CAA on a basis that had few guidelines and no objective criteria set out in advance. The proposals were put to the CIRAG Executive with an unrealistic timeframe for CIRAG to consult effectively with the aviation community and without appropriate information on which to base decisions on priorities or inform the community of the CAA's views on priorities.

26. Consultation with and input from the aviation community on rule priorities is critical to addressing the existing levels of frustration and misunderstanding of the rule development process. Some of the problems that arise appear to be directly because of various groups understandably focussing on their own interests without reference to the broader picture. Managed, structured opportunities to understand and influence the wider strategic picture should assist in reducing these tensions.

27. The process must work around the requirements of the Minister. There appeared to be a surprising misunderstanding of the significance of the agreement to the rules process in the submissions. Many saw it as simply a funding arrangement between the CAA and the Ministry, with few practical implications for the rule-making process. In fact, the Minister controls the content, timing and resourcing of rule development. The Minister requires bids for rules from all Transport agencies at an early stage, which he or she can then take to Cabinet for approval. The agreement between the Secretary for Transport to purchase those agreed rules then follows. The Ministry submitted that the

ideal system involves Government considering the wishes and priorities of the commercial industry, those who work in the industry, recreational aviators and the public.

28. The agreement relates to the year 1 July to 30 June. It also signals the prospective agenda for the next two years. The Ministry advised it could deal with five to seven rules a year. The CAA submitted that a realistic process allowed for the development of three to seven rules a year. Somewhat surprisingly, then, the current annual rules agreement provides for 13 rules to be progressed to implementation in the year to 30 June 2003 (and a further 6 are signalled for implementation in the following 6 months).[2] Most of these are behind their anticipated target dates.

29. To meet Ministry requirements, the CAA must be in a position to negotiate with the Ministry of Transport in February of that year. A decision is required by March so that Cabinet can consider the matter in May. Accordingly, consultation with the aviation community needs to occur well ahead of that – perhaps November/December of the previous year.

The NPRM consultative process

30. The current process for formal statutory consultation is summarised in the Introduction. In summary:

30.1 Sign off on the draft rule is obtained from TSG and CAA group managers.

30.2 Ministry review and agree on draft NPRM.

30.3 Publication of the NPRM in accordance with Act.

30.4 Submissions are received and considered by the CAA.

30.5 Some possible changes are put to the TSG/affected persons.

30.6 Final draft rule is provided to the Ministry.

Sign off from TSG

31. The requirement for 'sign off' by the TSG is to ensure, if possible, a degree of industry/community comfort with the product of the process to date. However, this can lead to expectations about the continuing process and final product, which are inappropriate. It can also give the CAA a basis for declining to consider "repeat" submissions during the formal consultative process, which also may be inappropriate. This is discussed further under Term of Reference 6

MOT review of draft NPRM

32. There were a number of concerns raised about the value of the Ministry's involvement at this stage. There was a perception that the Ministry was primarily concerned with minor drafting matters, many of which could be dealt with during the course of the consultation. From the Ministry's perspective, this is its opportunity to ensure the draft rule complies with wider Government policy and conforms with Government's transport strategy. It also has an eye still on the broader rule-making legislative process including, for example, the Legislation Advisory Committee Guidelines.

33. One perceives that this is essentially an issue of confidence and that, the higher the level of confidence the Ministry has with the CAA processes to this point, the quicker the turnaround is likely to be. Drafting issues should be dealt with by the CAA, which now has the appropriate expertise. If the Ministry is to do a quality check on the rule drafting, this should be made plain.

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[2] Refer Schedule 1, Rules Development Services Agreement 2002-3

Dealing with submissions received

34. The current process attempts to limit the extent of consultation required by the work done during the informal consultation phase (CIRAG/TSG process – considered under Term of Reference 6). The Ministry queried whether the balance is right. The Court of Appeal recently considered similar requirements of consultation in *McInnes v Ministry of Transport*[3] in relation to the lifetime drivers license rule developed by the Land Transport Safety Authority. The Court noted that if, as a result of submissions received, the nature of the rule is **fundamentally** changed, then a further NPRM and fresh round of consultation is likely to be appropriate. Obviously, the CAA would prefer to have sufficient understanding of industry views and concerns so that radical change to the draft rule at this stage is unlikely. Nevertheless, I heard significant criticism of the CAA's practise of dismissing any matters that had been previously raised during the informal consultative process. While it may be clear that the CAA has in fact already heard and considered everything that can be said on one particular point or by one particular group or interest, and formed a clear view, it should be careful before dismissing matters in the course of formal consultation. This ought to be the opportunity of the aviation community and the public to clearly articulate their position on the proposal in the knowledge that the CAA will consider the matter with an open mind. Despite what has gone before, this is what the law requires.

35. It is important, then, for the CAA to carefully record the nature of the submissions and CAA's response to those submissions so that those people who have bothered to participate in the process can see what has been made of their points. In dealing with submissions, the CAA should bear in mind that the process works best where those who have participated can see the logic of the ultimate position taken on the matters raised, even if they cannot agree with it.

36. Careful documenting should also provide confidence to the Ministry and Minister that a proper process has been followed. It will also provide a basis for a short response to disaffected persons or groups which may continue to advocate their position, as they are entitled, to officials and politicians.

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[3] [2001] 3 NZLR 11

37. Finally, there was some criticism that the CAA would propose changes as a result of submissions made, but omit to test the appropriateness of those changes on adversely affected persons and, as a result, are not informed of all the implications of the late change. The CAA readily accepted that this is something it must pay close attention to. However, it is difficult to design a process that ensures such problems, an example of which was provided by Gliding New Zealand in its submission, do not occasionally occur.

Ministry of Transport and Government/Parliamentary processes

38. The processes undertaken or managed by the Ministry of Transport are summarised in the table at **Appendix 5.** While these are not part of the CAA's systems for rule making, they are nevertheless an important stage in the rule-making process, and were the subject of a large number of submissions.

39. In very general terms, the aviation community expressed concerns on two fronts:

    39.1 Whether the delays to the rule-making process were warranted given the value added to that process; and

    39.2 The implications for accountabilities for the rules.

40. AIA in particular saw no reason for the Ministry's involvement. It referred to the fundamental principle of delegation of responsibility to appropriate persons, and the separation of accountabilities away from a centralised agency to an individual safety agency responsible for specific industry regulations. It noted that this was a fundamental principle of the Swedavia McGregor Report. It was achieved by the establishment of a stand-alone Civil Aviation Authority and the appointment of a Minister for Civil Aviation. The CAA has a Board, its own rules development team, its own specialist solicitor who supports the rules team and its own fully staffed corporate legal team. AIA submitted that, if the issue was one of providing regulatory assurance to the Minister, then AIA failed to see how a solicitor domiciled in the Ministry, generally unfamiliar with civil aviation safety systems, could do that. In any event, it asked why

the process should duplicate what already exists within the CAA? AIA saw this as an unwarranted erosion of accountability to the point now that, it submitted, accountability for rule development is so mixed that when the process is delayed or derailed there is much finger pointing but no precise responsibility.

41. A similar submission was made by Helicopter Services (BOP) Ltd. It considered that the increasing involvement and intervention by the Ministry of Transport would result in the unsatisfactory framework, which the Swedavia McGregor Report (and the legislation which followed) sought to remedy. It submitted that the Ministry's involvement in the process ought to be revisited. The CAA should, it suggested, deal directly with the Minister. The increasing intervention and involvement by the Ministry only denigrated the standing and authority of the CAA. "The question will be sooner or later asked, what is the purpose of the CAA if it basically has to obtain approval and sign off from the Ministry of Transport?"

42. Air New Zealand also saw the rules as being in a special category, frequently highly specialist technical rules that have been through a very transparent and extensive consultative process. Air New Zealand indicated that it "failed to understand how the scrutiny of non-specialist lawyers, draftsmen and parliamentarians can add to this process".

43. All submitters saw the length of time involved as disappointing. The Ministry, on the other hand, made the valid point that at least it had indicative timeframes around its processes and audited its performance against those indications. This allowed for more effective planning, and provided an objective performance measure. This is certainly something which the remaining part of the rule development processes would benefit from. The setting of a realistic rule development timeframe for each stage of each project may provide expectations that are more realistic for the aviation community. I was told that the LTSA does this. Reporting against those timeframes would then ensure the community was informed as to progress and the reasons for any delays.

44. The Ministry explained its role in its submission to me. Because of the numbers of rules being produced in the transport sector, in about 1999 the Ministry had to formalise arrangements in order to manage them more effectively. Furthermore, existing

arrangements at the time were considered not to give the Minister sufficient ownership of his or her rules. In many instances Government wished to consider the policy behind a rule well after the rule had been developed. This reactive approach created an inconsistency and uncertainty in the process. In the long term, this was likely to affect the sustainability and quality of the rules process. It also ran a risk of constitutional problems as rules, as deemed regulations, are subject to the Regulations (Disallowance) Act 1989.

45. This, together with some concerns about the unevenness of the quality of the rules the Ministry were receiving from the transport agencies, led to a new approach to setting rule priorities. The Minister now puts those priorities to Government before rules are purchased and rule development is undertaken. The model for developing the annual agreements is based on the central government system where departments bid for legislative resource. The quality components are based on standard criteria such as the Legislation Advisory Committee Guidelines (March 2001).

46. The Ministry disagrees with the view that the rules are industry operating rules. Despite their often technical nature, they are nevertheless part of the law of this country promoted for the benefit of its citizens and paid for by them. The legislation provides considerable legal requirements that the Ministry is concerned to ensure are met. These include proper consultation in respect of proposed rules.

47. The Ministry made the important point that responsibility and accountability for the rules is in fact with the Minister. The Minister carries the legal and political risk and this has led to a review of the Minister's procedures over the past three years.

48. Some submitters expressed concern about the opportunity for, and the risk of, "political influence" on the rules.

49. The AIA emphasised the concern that this process might result in inappropriate changes of a technical kind, or changes to what might be a consensus CAA/industry view of the best way forward.

50. The process also risks taking one back to the beginning, where "trigger issues" and arguments are relitigated. It seems apparent that lobbying of parliamentarians and officials could have the effect of undermining the CAA's authority, and the rule-development process generally, if the CAA's assessment of where the relevant public interest or safety at a reasonable cost balance lies, is too readily permitted to be challenged. I believe the Ministry appreciates that the more opportunity the Minister permits for lobbying or consulting outside of the CAA rule development process, the greater the risk of undermining and distorting the process. If aviation interests are unable to secure the position they seek as part of the rule development process, but find a more effective platform is to take the matter up with the Minister, other Government bodies or with the Regulations Review Select Committee, then that is what they will do. The earlier process is undermined and the CAA's resources will be diverted to explaining or defending its assessment of the safety case and proposed solution.

51. On the last aspect, the Ministry is certainly mindful of this risk. However it emphasises that the legislation kept the rule-making power with the Minister, contrary to Swedavia McGregor's recommendations. As a result, there may be relevant political considerations for the rules. The objective, however, is to identify them before the rule-making process is embarked upon, or during the process, rather than after it is all but completed.

Effectiveness of Rule Part 11 petition process

52. I am asked by Term of Reference 4 to consider the effectiveness of existing CAA systems for rule making. Rule Part 11 is in fact a legislated system, and one that the CAA is obliged to follow. Its strength lies in its perceived mandatory nature – the aviation community have a process that they agree does not work very well, but at least the CAA cannot change it. It has, in my view, many weaknesses.

53. The Ministry of Transport expressed the view that rule Part 11 should be revoked. Because it is the only rule that imposes legal obligations on the CAA in relation to external proposals for rule making, I sought further submissions and comments on the suggestion.

54. Reasons why the Ministry considered the rule ought to be revoked, in summary, were:

54.1 Inconsistency with other procedures: Some provisions of rule Part 11 are inconsistent with the procedures that now apply to rule making. That provides a problem because if the rule is valid (and there is some dispute about this), it overrides those procedures – whether they are procedures set out in the CIRAG Charter or procedures required in the agreement between the CAA and the Crown for rule development services. A valid rule always takes precedence over such agreed procedures.

For example, the Ministry points to sub-part B relating to petitions as being rigid, the process not facilitating broad involvement or reflecting the annual rules development agreement. It notes the process envisages the CAA will decide whether a rule is made, when that is the role of the Minister.

54.2 Inconsistent application of the rule: the Ministry notes submissions (particularly that from NZALPA) that rule Part 11 is applied inconsistently in practise

54.3 Ad hoc approach: the petition process encourages an ad hoc approach and the consideration of proposals in isolation, whereas planning and prioritising of proposals is critical.

55. The Ministry also considers the exemption process in sub-part E to be unnecessarily constraining on the Director. The legislation does not require a formal consultation process for petitions for exemption, yet the rule does. The Ministry suggests the Director ought to retain a discretion here. He or she can of course publish the approach to be taken to exemptions without having that approach legislated for in a rule.

56. The Ministry did not consider a replacement or amended rule for rule Part 11 to be necessary. It submitted any such rule would not meet the current Legislation Advisory Committee guidelines. Instead, it observes that the CAA could publish its approach to rule making.

57. I note some apparent misunderstanding of the Ministry's submission among those that responded to the submission. Some appear to have taken the Ministry's submission as advice of what the Ministry intends to do. Some have said it is an inappropriate or pre-emptive position to take, given this review process. That cannot be so. The Ministry was simply and properly putting a submission to me on the effectiveness of the current process for my consideration. There is no suggestion that the Ministry proposes to proceed to revoke rule Part 11 unilaterally and without consultation. I understand it will be interested to learn the response of the industry, and my assessment of the position, as part of this review of the effectiveness of existing processes. Any change to rule Part 11 would be subject to specific consultation.

CAA submission

58. The CAA notes that many of the requirements of rule Part 11 have been "overtaken by events", especially those changes made to the process over the last few years. It is due for review.

59. The CAA also notes that rule Part 11 may be *ultra vires* the Act anyway. However it considers the availability for any interested person to petition the Minister to make a rule as important and submits there should be an alternative mechanism.

60. Similarly, the ability to petition for an exemption and a detailed mechanism in detail is useful. Section 37 does not specifically indicate that a person can do so, or give any indication as to how that might be done. These concerns of the CAA are repeated in all the submissions received from the aviation community.

AIA submission

61. The AIA submit that it is "logical and sensible for there to be known procedures and certainty as to the rule-making process". This summarises a principle that is accepted by everyone. Detail is required as the Act is not sufficiently specific on a number of procedural matters. For example, the Act does not expressly provide for any person to

petition the Minister to make a rule; this legal right is solely found in rule Part 11. This reiterates the point that the CAA makes in its submission.

62. AIA support rule Part 11 as following international best practise, providing certainty and a step-by-step process for becoming involved in the rule-making process. It also notes petitions are not common – proposals are usually made through other channels. I note the Ministry's valid point that other channels may not be permitted given the rule appears to require the application of the petition process to all rule-making proposals.

63. Again, the advantage of certainty is emphasised with respect to the exemption process. A rule, AIA submits, prevents the process and requirements being altered unilaterally by the regulatory authority "at the stroke of a pen".

64. AIA's primary concern is for certainty, consistency and maintaining credibility in the CAA as the appropriate and authoritative regulatory body. The increasing involvement of the Ministry in matters such as determining whether rule proposals should proceed and their priorities is seen as introducing unnecessary delays, uncertainty and frustration.

Air New Zealand submission

65. Air New Zealand's submission disagrees that the rules are *ultra vires*. It does not see advantages in "administrative procedures" over rules. It submits that administrative procedures "tend to be very generic and as a consequence are unenforceable should there be a requirement to accelerate the rule-making process to attend to a specific area of concern". Air New Zealand would prefer to see the problems of ad hoc administration of rules and rule deficiencies dealt with in some other way, rather than by abolishing the rule altogether.

66. The submission is supportive of the standard, transparent format for the exemption process. No exemption is granted without the right of other affected parties to view the request, comment on it and its rationale.

67. In summary, Air New Zealand is concerned that abolition of rule Part 11 would result in less transparency in the process and could create quite serious back-logs of petitions for exemptions.

NZALPA submission

68. NZALPA is the major petitioner under the rule 11 processes. It sees rule Part 11 as the only way of accessing the system and therefore it is very important to them. Their primary submission highlighted incidents of non-compliance by the CAA with the Rule 11 procedures. The CAA in response accepted that there had been oversight on some occasions due to the volume of work involved in the rule development activities and petitions being placed in a "holding file". In other cases, petitions were included in rule development projects but may not have been notified in accordance with the requirements of Part 11.

69. NZALPA wants a process that is comparatively immune from later challenge or one subject to arbitrary change. It fears under a purely administrative process "petitioners would become mere 'suggestors' of change, with our safety concerns able to be dismissed or sidelined".

70. It noted that in the past they have had to appeal to the Ombudsman to have their petitions processed at times. As a result, they do not have much assurance that a non-legislated process would have adequate rights of appeal.

General Aviation Association of New Zealand/Royal New Zealand Aero Club Inc/Gliding New Zealand/Aircraft Owners' and Pilots' Association (New Zealand) Inc

71. These submitters were also concerned to ensure a robust process that preserved for the aviation community a secure, formal route for bringing their rule requirements to the Minister's attention. Again, the comment was made that a formal process in the rules provided stability and predictability, whereas an administrative process would not provide the same rigour or validity.

What is the real problem?

72. The Ministry identified three concerns:

72.1 Inconsistency between the rule and other procedures, in particular the annual agreement and the CIRAG Charter. This is only a problem to the extent that the rule is valid and that those procedures are more appropriate solutions to the rule development process than the inconsistent rule. In my view the CIRAG charter is not, so there is no difficulty there. I consider the annual agreement could be adjusted to avoid inconsistency with the Rule. However, the Rule would continue to place burdens on the CAA that, in my view, do not represent an ideal process.

72.2 Inconsistent application of the rule. The CAA putting in place more disciplined processes can overcome this issue. I understand this is under action.

72.3 The petition process encourages an ad hoc approach to issues for rule change/development and the consideration of proposals in isolation. This, in my view, is the main problem.

Options for resolving?

73. I can think of four options for dealing with the problem that the petition process encourages an ad hoc approach to issues for rule change/development;

73.1 Ignore Rule 11, treating it either as ultra vires or the procedures required as “largely impractical”;

73.2 Voluntarily deal with all other proposals in accordance with Rule 11 too;

73.3 Amend the Rule to reflect a more desirable process;

73.4 Revoke or disallow the Rule and put a more desirable process in place by way of a policy statement.

74. Very briefly, the first option is not attractive. The CAA must apply the same standards to itself as it applies to the community. As the regulator, respect for and compliance with, the law is of critical importance. A rule such as Rule Part 11 is legally valid until a court, or Parliament, says otherwise.

75. The second option would have integrity but would potentially involve the process in a mire of detailed processes that would not necessarily be useful. However it should be possible to find a practical way to treat all "issue triggers" and petitions the same way, using the framework of Rule 11 but taking advantage of the ability to make changes to the procedures where it is considered "impracticable, unnecessary or contrary to the public interest", in accordance with Rule 11.1 (b). I imagine this would be more cost-effective than the option of amending the Rule.

76. The third option would achieve the result sought, but not for some time, and presumably at a high cost. An interim solution would be required.

77. The fourth option would achieve the same outcome as a rule change. However the aviation community are concerned that a policy or administrative process would lack certainty and security. The question then is whether a rule change would be necessary to achieve certainty and security for the aviation community.

Is a Rule change necessary?

78. Is rule Part 11 or some variation of it "necessary"? The suggestion is made that there ought to be a legislated mechanism and detail for applying for petitions and exemptions, and clear rules for channelling proposals from interested persons into the rule-making process.

79. In my view, there is no reason why both those objectives could not be met by clear administrative procedures. Those procedures could, if it were appropriate, simply mirror

rule Part 11. However that would not be my recommendation as that would not deal with the ad hoc approach issue.

80. Are legislated processes preferable? This is the clear view of all submitters save the Ministry. However the submissions proceed on the basis that an administrative process could be unilaterally altered by the CAA, or could be inflexible, or may not provide adequate rights of appeal or protection from unilateral bureaucratic acts. There is a fear that petitions will be sidelined.

81. Alternative administrative processes will, in my view, just as adequately meet these concerns. Administrative policies that the decision-maker is obliged to follow are legion in Government and well known to administrative law. A published procedure cannot be unilaterally varied or departed from without first clearly signalling the intended change and properly consulting affected persons on it: *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 and *CCSU v Minister for Civil Service* [1985] 1 AC 374 – both cases well recognised in New Zealand administrative law. This provides much the same safeguard as a rule change only without the difficulties associated with progressing matters through a rule-making agenda already overburdened with necessary measures. The important point is that the administrative processes themselves should be clear, meet the requirements of natural justice, and be the subject of appropriate consultation prior to their publication and implementation.

82. Any failure to follow the published procedures might give rise to more adequate and effective remedies against the CAA than currently exist under rule Part 11. The rule itself is not directly enforceable; the rights it serves to protect can only be raised in Court pursuant to an application for judicial review and the primary remedy in any such proceeding; a declaration of invalidity; is not open: rule 11.1(e). Furthermore the CAA is able to circumvent the procedure if it is considered to be "impractical, unnecessary or contrary to the public interest" (in certain circumstances only).

83. On the other hand if clear administrative procedures were not followed and persons were adversely affected, a successful claim for breach of natural justice under the New Zealand Bill of Rights Act 1990 might exist. In some (limited) circumstances this can result in compensation where the person has suffered irrecoverable costs or losses as a

direct result of a breach of natural justice: e.g. *Binsted v The Northern Region Domestic Violence Review Panel*, M1629-PLO1, High Court Auckland, 5 June 2002, Williams J.

84. The concern that the rules might become bound up in a very bureaucratic procedure without the necessary flexibility to, for example, accelerate the rule-making process to attend to a specific area of concern would seem to depend solely on the nature of the agreed administrative processes. It is plain that the CAA should have the required flexibility. Part of the difficulty with the current processes is their complex and prescriptive nature.

85. Similarly with the exemption process the published procedures can, if it is considered appropriate, require the Director to publish the application, receive submissions, and consider the position of any affected party. Of course, where persons may be adversely affected by any exemption, the requirements of natural justice would mean that the Director would consult with them whether or not that requirement is contained in rules or procedures. The Ministry's main point was to question whether such a requirement was appropriate to engraft upon the legislation given:

85.1 It may well not always be appropriate and may unnecessarily delay the process or inefficiently employ scarce resources in dealing with that consultative process; and

85.2 Whether in fact it is appropriate for the Minister in rules to direct the Director as to the process to be followed when the Director is exercising his independent powers.

86. Finally there may have been a suggestion that the Ombudsman would not have jurisdiction to consider a complaint if the CAA was simply failing to follow its prescribed procedures. In this regard, there would be no change; the Ombudsman would have the same jurisdiction and the same ability to raise concerns.

87. For these reasons I consider a Rule to be neither necessary nor preferable to a clearly articulated policy. I also agree with the Ministry's submission that the Rule would not

meet the requirements of the Legislations Advisory Committee's guidelines for legislation, which means it would not be made today. The Guidelines will similarly constrain any amendments to the rule.

Conclusion on Rule Part 11

88. In summary-

88.1 Rule Part 11 imposes binding obligations on the CAA governing its rule development processes. Unless the Rule is declared invalid, dissolved, revoked or amended it could inhibit those processes in an unhelpful way.

88.2 Any recommendation to change or revoke Rule 11 would require triggering the already overloaded rule development process, would take some considerable time and may not meet the Legislation Advisory Committee's Guidelines.

88.3 A clear administrative policy could be put in place to govern rule making and this should be just as effective as the current Rule, if not more effective, in protecting the rights and interests of the aviation community and public;

89. As I have said, I consider a Rule neither necessary nor preferable to a clearly articulated policy. However, I am persuaded that a recommendation to revoke Rule 11 at this time, given the other recommendations of this review, may be counterproductive. Change to the existing CIRAG process that increases the perceived level of control by the CAA may require time to build trust between the aviation community and the CAA. I am concerned that if revocation if Rule 11 is on the agenda at this stage, this may cause unnecessary concern among the aviation community. I accept there is an issue of consistency with international processes that I have not considered. In any event, given I consider it to be possible to work around the petition process, my approach is to recommend the status quo remain, at least until the new processes have bedded in.

90. Whether through a Rule or a policy, there must be a clear, consistent, certain and accessible process for any interested party to propose rules or, more appropriately, to draw attention to issues which may prove to be matters requiring rule-based solutions.

TERM OF REFERENCE FIVE: CAA/INDUSTRY RULES ADVISORY GROUP (CIRAG) – ORIGINAL PURPOSE AND CURRENT VALIDITY

5. Review the original purpose of the CAA/Industry Rules Advisory Group (CIRAG) and assess the extent to which this remains valid in light of the current arrangements and regulatory environment for making ordinary rules.

Executive Summary:

The original purposes of CIRAG at its set up in 1998 was to create a body which represented a partnership between the regulator and the aviation community and that functioned co-operatively to-

- Enable the CAA, as the body responsible for developing rules, to obtain necessary aviation community input into that rule development process, in a timely way; and

- Enable the aviation community to secure and institutionalise a high level of influence in the regulatory development process, including through receiving information, assisting in prioritising, advising on the appropriate expert or affected persons to contribute to the process, monitoring that contribution and facilitating industry understanding of, and "buy in" to, the rules.

These purposes remain valid and important today.

Introduction

1. I deal with this term of reference under two headings:

1.1 Original purpose of, and background to, CIRAG; and

1.2 Extent to which this purpose remains valid in the current environment

Original purpose of CIRAG

2. In Preliminary Report No. 5, the CAA sets out its perspective of the background to, and original purpose of, CIRAG.

3. In its submission, the CAA refers to the early consultative mechanism of the Joint Consultative Group comprising seven top-level industry representatives and the Air Transport Division Rules Manager. This body provided an interface between the Air Transport Division and the industry for the rules rewrite project. The JCG was the mechanism for the Air Transport Division to keep industry informed on the policy issues and overall activity/project with the rules rewrite project, and for industry to provide advice and comment to the Air Transport Division on these matters.

4. The CAA notes that, at the time of the demise of the JCG, there was a fundamental change in the type of rule-making taking place. In the later period, rule parts had a higher level of interrelationship with other rule parts, often affected in the majority of the aviation industry and generally took more time to consult on and develop (e.g. Part 43 – General Maintenance, Part 91 – General Operating and Flight Rules and Part 119 – Air Operator Certification). Rules were developed in an order that did not necessarily reflect their overall priority within the programme. Smaller less complex rules were developed initially. As time went on and the greater involvement of the industry was required and issues that are more complex had to be resolved, time was also running out for the completion of the rule rewriting under legislation. There was therefore insufficient time in a number of cases for all the outstanding issues to be adequately resolved with industry. The CAA advises that this caused a number of industry participants to feel that the CAA was not heeding their views and input to the rule development process. As a consequence and, the CAA accepts, with some justification, industry complained about the number of new rules that were being thrust upon them in this period which appeared to lack their input.

5. In the end, the CAA advised that the JCG became unrepresentative of the wider aviation community with only AIA remaining as a participant. Ultimately, discontent led to the demise of the JCG.

6. Nevertheless, the CAA advised that the use of industry technical specialists continued in providing feedback on rule development issues. Identified as an area that could improve on the JCG process was the need for industry to be able to monitor the progress of rules development into draft final rules at an executive body level. The AIA suggested the adoption of a similar process to transport Canada's CARAC process and this resulted in the establishment of the CIRAG process.

7. In its submission, AIA observes that CIRAG was created as a direct result of concerns the AIA had expressed to the CAA over a number of matters. These included:

   7.1 Inefficiencies in the rule-making process which relied almost exclusively on the CAA drafting the rule to the NPRM stage;

   7.2 A lack of industry involvement at the most crucial point of rule writing being the initial draft;

   7.3 Quality control issues such as rules being developed which were illogical or did not fit the New Zealand environment;

   7.4 The significant amount of time industry was spending on researching and advocating change at the draft NPRM stage; and

   7.5 The limited level of ownership and "buy in" by the industry given its concern about the quality of the rules.

   Air New Zealand added to that list of concerns:

   7.6 The need for exemptions arising from the inadequacies of the rules;

   7.7 Conflicting interpretations between the CAA and industry; and

7.8 Increasing non-compliance.

8. One of the original members of CIRAG refers to the influence of the industry's experience over the development of Rule Part 135. She submitted that this rule was written without the necessary industry view and because of no participation the rule had to be completely reviewed and many parts rewritten before it was considered usable by the industry. She commented that the lack of participation could not be entirely attributed to the CAA but rather that industry at that stage did not understand the process (not that CAA did not want participation). Nevertheless, it was her observation that CAA staff did not necessarily understand some of the issues inherent in the rules and therefore were not able to adequately develop solutions independently.

9. AIA advise that they investigated how other jurisdictions operated their rule-making processes and noted that the Canadian model stood out as developing a large number of new rules in an efficient and effective manner in an environment where industry, at large, was supportive of the regulator. Nevertheless, AIA noted it was a complex model and that, through discussion and eventually consensus the AIA and CAA developed the simpler CIRAG Charter, which was implemented in late 1998.

10. In Preliminary Report No. 5, the CAA advises that CIRAG is an adaptation of Transport Canada's Canadian Aviation Regulation Advisory Council (CARAC) system, and was adopted by the CAA in 1998. Prior to this, it notes, the Joint Consultative Group had operated since 1989 and it had proven the value in having consultation with industry over a rule project development prior to publication for public consultation. The CAA advises that:

> "CIRAG was created to assess and recommend potential regulatory changes through co-operative rule making activities." (Preliminary Report para 1.5)

11. It was originally tasked with identifying standards development and rule making needs as well as establishing rule-making priorities.

12. The current CIRAG industry members say that prioritising is not one of CIRAG's functions (although they agree that it ought to be involved). The Minister in fact has the final say in prioritising rule-making activities through the annual rules development agreement with CAA.

13. CAA says the desired purpose of the CIRAG process was "to help the CAA in carrying out effective and meaningful consultation in order to write technically correct rules, in a timely fashion, using plain English". It recognised that the development of a rule project with technical input from the appropriately experienced aviation community participants helps to ensure the NPRM has identified and addressed most of the factors relevant to the particular rule proposal.

14. The CAA also saw the CIRAG process as intended to produce rules in a timely fashion. It sees as important the fact that the formal consultation process is shortened by publishing an NPRM which has had input from appropriately experienced aviation community participants.

15. However, it emphasises that the CIRAG process is not a forum for proposed rules to be "negotiated" with the wider aviation community. It is not intended that a rule proposal would fail to be implemented because it lacked total support from the wider aviation community. There can be occasions when the Director must decide on a safety issue, and recommend rules accordingly to the Minister of Transport to ensure aviation safety and security is preserved, even though the CIRAG Executive may not fully agree with the rule proposal. This approach by the CAA perhaps sits uncomfortably with the emphasis of the CIRAG Management Charter, but is consistent with the Act.

16. CIRAG's purpose is stated in Part A of the Charter:

> "CIRAG is established to enhance the aviation rule-making process by using more industry input. The CIRAG is not invoked to comment on CAA internal procedures but its prime objective is to assess and recommend potential regulatory changes through co-operative rule-making activities. As an integral part of the CIRAG system regulatory issues will be prioritised and recommendations considered by the CIRAG Executive for subsequent rule-making action."

17. The Charter also states:

> "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." (clause 5, p 5)

18. A person instrumental in the initial development of CIRAG, Hugh Barclay, submitted on behalf of Helicopter Services (BOP) Ltd that the original, and current, purpose of CIRAG is to ensure advice and recommendation is provided to assist in the development of better rules. He observes that, to achieve an acceptable and workable balance between the various competing interests, the persons most directly affected by the regulation must be involved in the regulation making framework. He sees CIRAG as essentially a formalisation of one aspect of the consultative process. He emphasises it is purely advisory, with no statutory foundation or legislative decision making powers; it does not vest "control" over the rule-making process in a small industry group and, at the end of the day exists only at the goodwill of the Director.

19. He observes that enforcement and adherence to civil aviation regulatory requirements is simplified to an enormous extent if there is industry "buy in" to the rules and requirements. This will only be achieved where there has been effective consultation.

20. Mr Barclay refers to CIRAG being mooted in a particularly difficult environment when CAA was bound by time limits to introduce the new rules and industry felt they were being bulldozed or railroaded into an unknown situation. At the same time Part 119 certification was being implemented – something which was to a large extent an unknown to a number in the industry. The fundamental change required by Part 119 certification was forbidding to many persons and organisations in the industry.

21. The current industry representatives on CIRAG refer to it as an entity, which is the product of a partnership between the CAA and the AIA, created because both parties were concerned about the absence of an effective consultative mechanism, post the demise of the JCG. They observed that the CIRAG process, while "informal" to the extent that it is not provided for in the Civil Aviation Act 1990, has become part of the fabric of the rule-making process in New Zealand. This was because of a recognition by

both the regulator and industry that sensible rules cannot be developed, even to draft form, without widespread consultation with the affected parties.

22. They refer to the historical background to CIRAG as including the fact that the consultative process largely commenced at the draft NPRM stage, and was extremely time consuming and concentrated. CAA rule writers whose knowledge of the New Zealand aviation environment was frequently limited or out of date, and did not take account of the many, varied and modern operating practises of New Zealand operators, generally developed the NPRM in-house. The agreement to establish an informal consultative procedure was with the objective of addressing many of these concerns. The Canadian model was seen as most appropriate, subject to "customisation" to the New Zealand environment. This submission emphasised that the New Zealand industry is less complex than Canada and more concentrated, and the legislative framework is less complicated. The ability of the industry to support an intensive consultative framework must also be taken into consideration. There are a limited number of companies who can spare personnel and resources to participate in the process.

Extent to which the original purpose for CIRAG remains valid

23. One can summarise the purposes of CIRAG at its set up in 1998 as a body which represented a partnership between the regulator and the aviation community and that functioned co-operatively in a process which:

23.1 Enabled CAA, as the body responsible for developing rules, to obtain necessary aviation community input into that rule development process, in a timely way; and

23.2 Enabled the aviation community to secure and institutionalise a high level of influence in the regulatory development process, including through receiving information, assisting in prioritising, advising on the appropriate expert or affected persons to contribute to the process, monitoring that contribution and facilitating industry understanding of, and "buy in" to, the rules.

24. These purposes remain valid and important today. The CAA is still responsible for developing rules, albeit the environment is somewhat different (as discussed below). It still requires timely input from the aviation community in order to produce relevant, quality rules that the aviation community can understand and apply. It wants the aviation community to understand the issues behind the rules, to encourage a safe environment.

25. The aviation community still quite properly seeks to influence the process. Its interests are broad and varied. They include ensuring safe operation, meeting the commercial imperatives of their businesses, securing a competitive advantage against others, enabling technological and other advances, reducing compliance costs and requirements, and facilitating various activities. They want the rules to be relevant, logical, timely and clear. It is a helpful and constructive step for groups, such as the new Confederation of Pilot Associations, to seek to resolve issues among themselves and speak to the CAA with essentially one voice for those interests.

26. Regulating any industry or activity will result in unpopular decisions. The CAA's role is to take all the various issues on board, recognising and allowing for vested interests, and determine where the appropriate balance of safety at a reasonable cost lies. This is no easy task. The importance of the aviation community's participation in the rules development process is heightened by the critical importance of compliance to safety. The heart of safe compliance is an understanding of, and commitment to, safe practises. Compliance with the letter of the law does not result in a safe operation. The law will never provide for all situations. Accordingly, systems which best facilitate the distribution of information, enable effective participation and debate, contribute to an understanding of the problems and issues and foster a "buy in" to the solutions are very necessary.

27. This was and remains CIRAG's very important purpose. The real issue is the extent to which it is currently achieving this objective.

28. On this, I heard a variety of views. I broadly summarise these below.

AIA/Commercial Operations

29. AIA and its members generally felt that the process was largely positive and working well. It was universally recognised as a significant improvement on what had gone before. These parties also recognised a need for greater communication with, and involvement of, the wider aviation community, and for more understanding of and clarity in CIRAG's role.

Wider aviation community

30. The wider general aviation community, including the recreational sector and pilot groups, were largely suspicious of CIRAG, which members saw as being a powerful agency, captured by the commercial sector/AIA, and/or inappropriately subject to a CAA "veto". They generally sought reforms to the process that are more significant. However, largely they saw the model of aviation community involvement on a partnership basis with the regulator as a positive concept.

Ministry of Transport

31. The Ministry emphasised its "non party observer" status where CIRAG was concerned. It noted with concern the limited representation of the aviation community provided by AIA, which left the perception that it would look after commercial interests only. It considered that the Government/CAA should take a stronger role. In particular it referred to the need for CAA to:

    31.1 Decide which rules are to be made;

    31.2 Retain authority for their preparation;

    31.3 Decide between competing views; and

    31.4 Ensure strong leadership of Technical Study Groups.

32. The Ministry also saw the CIRAG process as possibly going too far in seeking to complete much of the consultation that was more properly part of the formal NPRM process. It emphasised the need for a case-by-case decision on who to consult or communicate with, on what and at which stage. It appeared to see the CIRAG process as inappropriately prescriptive of the CAA's role and responsibility.

33. It also saw the Technical Study Group processes as more effective when truly technical areas were involved, but raised concerns about perceptions of bias.

34. The issue of rule priority setting and the lack of "fit" with the annual contract was raised, and the complexity of the Charter itself was the subject of some criticism.

Civil Aviation Authority

35. The CAA expressed increasing concerns about the CIRAG process, questioning whether the model was appropriate for guiding industry involvement in the rule development process.

36. Concerns included:

36.1 Slowness of the present system;

36.2 Lack of representation of the wider aviation community at the Executive level;

36.3 Poor quality of research provided by the industry to Technical Study Groups;

36.4 Ineffective communication between Technical Study Group members in the wider aviation community on various issues arising;

36.5 Conflicts of interest and a lack of process for dealing with these;

36.6 Issues surrounding the appropriateness of conducting a cost benefit analysis in any particular case.

Conclusion

37. There was little dispute that the purposes for establishing CIRAG remain important and valid objectives that ought to be pursued. To repeat, these are to create a body which represents a partnership between the regulator and the aviation community and that functions co-operatively -

    37.1 To enable the CAA, as the body responsible for developing rules, to obtain necessary aviation community input into the rule development process, in a timely way; and

    37.2 To enable the aviation community to secure and institutionalise a high level of influence in the regulatory development process, including through receiving information, assisting in prioritising, advising on the appropriate expert or affected persons to contribute to the process, monitoring that contribution and facilitating industry understanding of, and "buy in" to, the rules.

38. Nevertheless, it appears that the CIRAG process is falling short of achieving both purposes. First, CAA does not seem to be receiving the type of industry input it seeks. It has concerns about quality, conflicts and timeliness. Secondly, CIRAG is perceived as dominated by the CAA and AIA. A broader level of participation in the rule development process by the wider aviation community is required. The opportunity to influence must be open to all levels of the community through some sensible, workable structure.

39. Thirdly, there appear to be issues relating to the availability of information and communication of issues to the aviation community, which lead in some cases to a limited understanding of the rules and the problems they seek to address, and consequently a limited buy in. Of greater concern, I noted a degree of misunderstanding of the rule processes and associated frustration leading to a cynicism and treating of the rules as irrelevant or something to be circumvented. I see that as a significant issue as it defeats the purpose that all are agreed is important and jeopardizes safety.

40. It is important, nevertheless, not to throw the baby out with the bath water. A significant sector of the industry is largely happy with the existing process. Under Term of Reference 6, I examine the results of experience with the existing CIRAG processes.

TERM OF REFERENCE SIX: EXPERIENCE WITH EXISTING CIRAG PROCESSES

6. Review the results of experience with the existing CIRAG processes and identify deficiencies in their design and operation.

Executive Summary:

The CIRAG process is seen by the AIA as generally very successful. Most submitters accept, however, that it should be more representative of the broader industry, subject to an ability to work at a strategic level. There are four essential deficiencies or problems with the existing process-

- CIRAG and/or the TSGs appear to have the task of identifying the real underlying problem, identifying and assessing the various possible solutions, finding the preferred solution and, if it is a rule, what the rule ought to be. This strategic analysis seems to occur when an issue is already in a process that at the least favours, and more likely is committed to, a rule-based solution. The jurisdiction is too broad.

- The CIRAG Executive is small and unrepresentative. It lacks the confidence of the wider aviation community outside of AIA membership and is not seen as sufficiently inclusive by the Ministry or the CAA.

- The CAA does not exercise sufficient control over the process and the focus on agreement results in a number of difficulties.

- The dual role of some TSGs as both technical and representative is unhelpful. They are sometimes seen as unrepresentative when they are fulfilling a representative function. They can get bogged down in detail and the emphasis on agreement can produce unwarranted delay and unrealistic expectations of the outcome of the rules development process.

Introduction

1. The CIRAG process is essentially a partnership between the industry and the CAA which, I was told by AIA, is envied internationally.

2. In very broad summary, the overall effect of the submissions received was:

   2.1 The commercial industry in particular very much supports the CIRAG process, but favours better representation of the aviation community and more discipline on the CAA to reach consensus positions.

   2.2 The general aviation/sport and recreation/pilot community required a more representative body to function as the CIRAG Executive.

   2.3 The CAA and Ministry were very concerned at the (unanticipated) level of control of the rule-making process given to industry under the CIRAG Charter. They saw it as essential to take more control of the process.

3. The regulator and the aviation community hold contrary and, for some, irreconcilable positions.

4. I received strong submissions from the AIA and Air New Zealand to the effect that it would be a big mistake to return to a process like the previous system. Before CIRAG was set up, a Joint Consultative Group represented the aviation community at a general consultative advisory level, with technical and detailed input on the rules being managed by the CAA on a more “as required” basis. This, I was told, resulted in many difficulties for the industry surfacing for the first time only once a draft rule had been developed and formally published for submissions (through the NPRM). By this stage, the industry found it very difficult, as well as highly time and resource consuming, to persuade the CAA to rectify what it saw as major difficulties, flaws, impracticalities and /or errors in the draft rule. A process of earlier and detailed conferring, as occurs through CIRAG and the TSGs, was much preferred by the AIA and its members.

5. The widely held view that the CIRAG process could, and on occasion does, work well was very much in my mind as I considered these issues. I can well see why such a process might be envied internationally. I have also tested at some length with the CAA the difficulties it was described as experiencing. I have been mindful of my own emphasis on the importance of identifying the "real problem".

Deficiencies with existing CIRAG processes

6. Deficiencies identified in the design and operation of existing CIRAG processes are discussed under the following headings:

   6.1 CIRAG's jurisdiction;

   6.2 Representation and participation of wider aviation community;

   6.3 Roles of participants on CIRAG Executive;

   6.4 Role and operation of Technical Study Groups.

CIRAG's jurisdiction

7. The complex terms of the CIRAG Management Charter are summarised under Term of Reference One. In summary, CIRAG is intended to consider all regulatory issues and advise the Director on rule making action. It forms Technical Study Groups (TSGs) "where necessary" (clause 6) with a view to fostering "full and complete discussion and resolution of all technical, legal and policy issues" (clause 5). Both CIRAG and TSGs are to aim for consensus (Part B clauses 4 and 7). The TSG is encouraged to find rule solutions as a last resort (Part B clause 2) but also to provide recommendations in the form of complete packages (recommendation, proposed rule or amendment, Regulatory Impact Analysis Statement) (Part B clause 8 & Appendix 1). Appendix 1 notes the various questions the TSG will consider when assessing the risks, costs and benefits of

a proposal, including why alternatives have been rejected or reserved for further consideration.

8. The first difficulty with the existing process is to note is that, to the extent CIRAG engages in any priority setting, it does not formally link in with the Minister's processes. Driving the prioritisation process now is the fact that the CAA is required to negotiate an annual rules programme with the Ministry and have its rule programme considered by Cabinet and approved by the Minister. The policies behind each proposed rule (including compliance costs) and its relative priority need to be clearly articulated by this stage. The CAA is obliged to then develop rules in accordance with its annual agreement with the Secretary for Transport.

9. Secondly, CIRAG effectively determines how the rule-making process will proceed and who will be involved. This can sometimes occur before any clear process of problem identification, risk assessment and assessment of the various options open is made, including options that do not involve rules. Those questions are delegated to the TSG. Essentially the TSG takes over the management of the rule development process from the CAA for the period it has responsibility for the project. It can be responsible for defining the problem, the solution and the means.

10. As noted under Term of Reference 4, I agree with the many submissions that emphasised that a process of identifying the real problem must be undertaken at a very early stage. The most critical decisions should, in my view, be made well before a rule development proposal has been approved by the Minister. There needs to be a process, outside of and preceding the rule development process, whereby the aviation community is involved in identifying both the problem, the possible and preferred solutions and the priority to be recommended for different rule-based solutions. Unless the Minister is prepared to contract for a higher level of rule-development activity, or the process becomes considerably simpler, then rule-making must be treated as very much a last resort.

11. The question arises as to how the aviation community is to be involved in these 'policy' decisions at an earlier stage. A proposal is discussed under Terms of Reference 8 and 9. The implications for the present discussion of the operation of CIRAG should be

recognised, nevertheless. Were CIRAG to continue to 'govern' the rule making process, under the recommendations I propose it would have a more limited function, as many of the issues it currently deals with will have been determined before an issue becomes part of the rule development process.

Representation and participation of wider aviation community in the CIRAG process

12. Almost every submitter acknowledged that the current membership of the CIRAG Executive is actually, or perceived to be, insufficiently representative of the aviation community. Either way it was accepted as an issue that must be addressed. Many members of the aviation community who are not closely involved with those industry representatives on CIRAG feel disenfranchised by this process. For example, many general and recreational aviation organisations I heard from feel that their needs and requirements are frequently if not always overridden by the priorities of the larger commercial industry, and their voices are not represented in matters of interest to them. They perceive CIRAG to be very powerful in the rule development process. Consequently, their approach to the rule processes can be dominated by attitudes of frustration and cynicism.

13. The CAA expressed real concerns about the difficulties with current representation on CIRAG. Their experience showed the importance of having input from the wider aviation community at the appropriate stages. This includes the policy development stage when the need for the rule is identified. The CAA noted there has been consistent efforts by bodies not associated with AIA to have representation which have not to date materialised. The nature of a consultative executive body such as that recommended by the 2001 Ministerial Review would, it says by definition, lend itself to wider involvement by the aviation community than currently exists. The CAA's primary concern was with the principles that underpinned any structure rather than the structure itself.

14. The Ministry of Transport also expressed concerns about the breadth of representation and perception of industry capture issues. Whether or not these perceptions were correct, it was important that they were dispelled.

15. AIA and its members were also generally supportive of limited change. While they considered there was much misunderstanding of CIRAG within the wider aviation community, there was acceptance that broader representation was necessary if the process was to have integrity. However I did not perceive any support for a considerably larger body. Furthermore it was considered critical that AIA should retain administrative control of the process of recommending appointments to the CIRAG Executive. It would support nominations being drawn from all corners of the aviation community provided minimum appointment criteria based on skills and knowledge of all aspects of the industry was met. The key concern was that CIRAG "industry" representatives must have a wide appreciation of all key aspects of the industry, including governance issues, the strategic direction of aviation, and the regulatory environment.

16. Helicopter Services (BOP) Ltd recommended caution in changing CIRAG membership. It submitted a number of factors required consideration. In summary these are:

    16.1 The need for extensive commercial experience given the nature of the bulk of the rules and the importance of understanding the aviation environment;

    16.2 The significant responsibility and commitment involved – appointees must have the time and resources available;

    16.3 The need for consistency and continuity in representation. Ideally, appointments are for two to three years. Officers from voluntary organisations may change and a change of representation on CIRAG was not considered to be desirable;

    16.4 Representatives must be capable of approaching the task from a broad perspective of the aviation community, not a narrow sectorial perspective.

17. These issues highlight the tension between the current role of the CIRAG Executive and the need for broader involvement of the aviation community at particular stages in the rule identification and development process.

18. As I have noted, the concern about representation was a strong theme of submissions from the general aviation sector, sport, recreation and pilots groups and the Airways Corporation. AOPA did not consider there would be a difficulty in responding to a call for participation. Recently an umbrella group of pilot organisations, provisionally to be known as the Confederation of Pilot Associations (NZ) Inc, or the Pilots Forum, is in the process of being established. It has agreed in principle to funding and a Wellington based secretariat. I see this as a very constructive step. Obviously, groups such as this will have particular concerns and it may be that the particularity of the issues they raise is, of itself, a concern to the members of AIA. However a disciplined process should ensure that these issues are on the agenda and receive appropriate attention.

19. The current AIA representatives on CIRAG were not supportive of recreational, sporting or NZALPA having a "separate voice" on CIRAG. They were not persuaded that these bodies could represent industry as a whole. (Similarly, these bodies were not persuaded that the AIA representatives could or did represent their interests.) This catch-22 requires a resolution.

20. It was submitted that almost all the rules affect commercial operations. The bigger the commercial operation the more likely the rules are to impact on it. The majority of rules will only minimally affect the hang-glider operator in Eketahuna. I was told that the AIA has tried to select people who are not only representative of and respected in the industry but are also recreational flyers with a wide range of contacts. It is their role to represent these people as well. For example, I was told that the AIA representatives on CIRAG represented the interests of NZ Warbirds Association. Their case was put forward but realistically, as a matter of priority, the rules that affected Warbirds were well down the list. This was recorded in the Minutes and Warbirds were sent a letter to explain CIRAG's position. The perception of the process from Warbirds was, however, quite different. As for ALPA, the strong view of the current industry members of CIRAG was that, as they represent only pilot interests, they could not carry out the role of representing the industry as a whole.

21. At the end of the day, I define this problem as essentially one of a lack of confidence in the process outside of AIA membership. The process itself is probably not as

transparent as it was intended. The wider industry feels, and I believe is at times, left out.

22. I accept the rules apply primarily to the commercial sector. The range of interests that are "commercial" is, itself, extremely broad and diverse. It includes, for example, pilots, training organisations and many commercially focused tourist and recreational operators. I do not know but I can certainly accept that the bigger the operation the more likely the rules are to impact on it. However, I also heard that the major safety related concerns are at the smaller operator and pilot level. I am left asking two questions:

    22.1 Is it feasible to expect an industry as diverse as the aviation community to speak with one voice (or few voices) on a representative group such as CIRAG? and

    22.2 Is it advisable to do so given the issues currently facing the NZ aviation community?

23. The answer to the first question is no; wider representation is required. The second question I leave for those who are better placed to answer it. Hand in hand with wider representation will be a stronger role for the CAA than appears to be taken or at least to be accepted as appropriate by the AIA representatives on CIRAG under the current arrangements. This is discussed under the next heading.

Roles of participants on CIRAG Executive

24. Most submissions from industry participants in the CIRAG process raised the need to clarify the roles of participants. Most contended that the process would operate better if there were more emphasis on governance by consensus, with matters going to the Director if agreement cannot be reached. It was submitted that the CIRAG Charter required this and the CAA should follow more closely the requirements of the Charter.

25. It is correct that the process envisaged by the Charter is focussed on agreement where possible. However as noted earlier, such obligations on the CAA do not fit well with its

statutory functions and obligations, and to the extent they conflict, the CAA cannot be bound by the Charter. I do not want to discourage the genuine striving for consensus, but in the end I have concluded that emphasis on such an objective is unhelpful, and fails to properly recognise the statutory roles and responsibilities of the CAA and the Minister.

26. No-one would argue that the CAA is a mediation service searching for a consensus position which the various conflicting interests in the industry can live with. In the words of a famous USA case, adapted slightly for the New Zealand environment, its role "does not permit it to act as an umpire blandly calling runs and wickets for adversaries appearing before it; the right of the public must receive active and affirmative protection".[1] Neither is the CAA "for or against" any particular interest or group in the aviation community. It has the objective, in common with aviation participants, of safe and successful operations because that is in the public interest. However it comes at this objective from a much broader perspective than any one participant or group of participants.

27. As the regulator, the CAA (Minister) is engaged in "reasoned decision making in search of the public interest".[2] The CAA must be able to propose to the Minister those rules that it judges to best meet the public interest in safety at reasonable cost. The aviation community assists the CAA to find that balance. Its members provide information, point out issues, and assist in specialist and expert areas. Importantly, they also must be free to advocate for their own various interests. The CAA needs to understand the impact of proposals on various industry businesses and activities. It also must test the validity of that information and weigh it against other criteria. No aviation community interest that is also affected by the proposal can fulfil this role.

28. At the same time, it is recognised that responsible participants in the aviation system who understand and apply safe policies and practices will best serve the public interest in safe operation. There is a strong educative element to the regulatory process, particularly in identifying the problem and choosing the appropriate solution, which must

[1] *Scenic Hudson Preservation Conference v Federal Power Commission* 354 F.2d 608, 62 (2d Cir. 1965).
[2] Bargaining Toward the New Millennium: Regulatory negotiation and the subversion of the public interest: William Funk, 46 Duke LJ 1351 p 1385.

be recognised. One might expect that the higher the level of 'buy-in' that can be achieved from participants, the more effective will be the desired safety outcome.

29. There is a view that negotiated rule-making, or any process which places very high emphasis on consensus, runs two risks:

29.1 The risk of becoming captured by the more powerful interest groups, rather than having as its ultimate objective the interests of the whole community; and

29.2 The risk of frustrating the participants, who suffer the increased costs of participation only to be disappointed when consensus is not reached, or the positions reached (for example at TSG 'sign off' pre-NPRM) are not ultimately realised as the "agreement" secured changes for political or other reasons.

This latter outcome is not uncommon with the negotiated rule-making process that applies in the USA.[3]

30. There were signs of the second risk and perceptions of the first in the anecdotal information I received. Closer consideration of these would likely draw out some interesting lessons, but would take considerably longer that this current review should run.

31. What is required is a highly participative process that ensures both the CAA and affected persons are well informed, where the CAA (Minister) determines the ultimate balance of the public interest in safety at reasonable cost, and where solutions are at least understood but preferably accepted by the affected community.

Role and operation of Technical Study Groups

32. The Technical Study Group (TSG) is a vital element of the CIRAG process under the Charter. Each TSG is set up as required by the CIRAG Executive. Its leader is

[3] Regulatory negotiations and other rule-making processes: Strengths and weaknesses from an industry viewpoint: Ellen Siegler, 46 Duke LJ 1429 p 1434-5.

nominated by CIRAG. TSGs have a very broad range of potential tasks under the Charter, from developing proposals to drafting rules.

Submissions

33. Between them AIA and Air New Zealand described a successful TSG as one where:

33.1 The leader is a respected subject expert **and** a consensus builder (I note these are quite a special mix of skill);

33.2 There are well defined and understood Terms of References;

33.3 Effective use of international precedent, research and data;

33.4 Appropriate staff;

33.5 Where requested, a cost benefit analysis (CBA) is undertaken;

33.6 Expert members with strategic view;

33.7 Good consultation by members;

33.8 Not CAA controlled – follows Charter Annex B.

34. The submissions indicated the process was less successful where:

34.1 Disagreement was not reported to CIRAG;

34.2 Rule-making became prescriptive;

34.3 Resourcing issues arose;

34.4 Members were selected by a narrow 'who you know' process which lacked transparency;

34.5 There was insufficiently broad representation;

34.6 Issues became bogged down in detail/lack of consensus;

34.7 No CBA/cursory Regulatory Impact Statement only;

34.8 Limited or no prioritisation.

35. NZALPA raised concerns about the composition of TSGs – they were not seen as representative, neither were they always specialist groups, and the fact that petitions were not encompassed.

36. The Ministry had concerns about the role of the CAA within TSGs, was concerned that non-technical TSGs were less effective, and the risk of inappropriate delays to the NPRM stage. It did not see the public as sufficiently involved or engaged.

37. The CAA saw the industry as having too much involvement in the detail of rule drafting, a contributing factor being the majority participation of practitioners rather than safety strategists on the TSG. It experienced difficulties obtaining industry/community views and input through this process. It considered that members of TSGs did not always communicate well with their various constituencies. It found its own role on the TSG could raise difficult questions. Should it advocate for a position that it might hold, or try to neutrally guide a consultative process?

38. Issues of confidentiality sometimes arose, meaning the TSG was not an open process.

39. The quality of industry research was not high – the CAA did most of it. The issue of when a CBA is required is increasingly contentious, and the CBA itself becomes the focus of dispute and differences of opinion. Considerable delays are experienced resolving these "in a consultative manner" as required by CIRAG.

40. Aviation community concerns included lack of ability to participate, and lack of representativeness of TSGs particularly by general aviation, sport and recreation and pilot groups. Commercial and competition issues were clearly relevant for many submitters. The CAA also saw managing commercial conflicts on the industry's part as a difficulty.

41. There was concern that the TSGs were seen as a "free" resource to the CAA, but if the CAA did not agree with the information or research provided, it would dismiss it.

42. There was general agreement that more was being done and could be done to encourage or facilitate participation by the likes of small businesses/sporting and recreational groups. Methods included:

    42.1 Provision of preparatory papers in good time;

    42.2 Sensible use of electronic and telecommunications;

    42.3 Meeting outside usual hours of work;

    42.4 Meeting reasonable (or scheduled) expenses;

    42.5 Negotiating discounted air fares;

    42.6 Meeting where most members of group are;

    42.7 Avoiding Lower Hutt as a venue due to distance from Wellington airport.

Function: expert or representative?

43. Although the emphasis of the Charter appears to be on the need for **technical** expertise, there is also recognition that some balanced representation of the aviation community interested in the particular rule is appropriate. The TSG therefore fulfils not only a technical advisory role, but also a broader consultative function.

44. That reflects the TSG's responsibilities which include "full and complete discussion and resolution of all technical, legal and policy issues".[4] As noted, a TSG is also entreated to strive towards consensus.

45. The process is taken seriously; the final product of a TSG is to be "signed off" to indicate consensus or, where agreement has not been reached, the report to CIRAG is to reflect that. The CAA anticipates that, after a rule proposal has been "signed off" by a TSG and CIRAG, most of the industry issues should have been dealt with. The "formal consultation process" following the publication of the NRPM should consequently be quite limited. There is an expectation that the same issues will not be relitigated.

46. The task or objective of "resolving all technical, legal and policy issues" is inconsistent with the CAA's role and responsibility as regulator. The CAA may seek as far as possible some consensus, particularly on technical matters, but this ought not to involve compromise which leads to an expectation among members of the TSG or CIRAG that this is a 'deal' which may not change given the CAA's view of where the public interest lies. Legal and policy matters are similarly issues that the CAA wants input on, but at the end of the day must be free to (and must) resolve as it sees appropriate.

47. Likewise the task of ensuring the wider aviation community is informed of, and has input into, appropriate matters is a responsibility of the CAA. Forming a representative group to look at the issues can be one way of carrying out this responsibility.

48. However, the effectiveness of the TSG as a concept for achieving this is, in my view, unsatisfactory.

49. There is a high degree of dissatisfaction with this process. This is primarily a result of the following:

    49.1 Optimistic expectations of what a TSG can achieve;

[4] Chapter Part A clause 5.

49.2 Difficulties for the CAA in carrying out their proper functions within the TSG framework; and

49.3 Concern at the representation mix and ability to participate.

Leadership and accountability

50. The CAA and Ministry were both concerned at the level of control of the rule-making process given to industry under the CIRAG Charter.

51. Surprisingly, several submitters saw CAA's representation of equal voting with AIA reps as **too** powerful – giving CAA the ability to "control" the process or determine the course of the rule.

52. There were also several suggestions that CAA had a "conflict of interest" and ought not be involved in the rule making process. Two potential scenarios were:

52.1 It received fees from some compliance requirements; and

52.2 It was the policeman so it should not "make the rules".

53. Again, this misunderstands the CAA's role and functions. The Director has independent powers and responsibilities under the Act and the CAA supports the Director in their exercise. The CAA is contracted by the Minister to prepare the rules because the CAA has the relevant information and expertise: it analyses the safety environment and responds to it in different ways, including by promoting rules. It would be very difficult for a body entirely independent of the regulator to take over the rule-making part of the regulatory framework, which is intended as a whole to be responsive to the changing technological, commercial and safety environment. The Minister provides a check on the process, being responsible and accountable for the rules.

Use and relevance of CBAs

54. Almost all aviation interests considered the costs of rule measures were not sufficiently recognised by the CAA. The CAA, on the other hand, was concerned that safety benefits were not always recognised. This confirms the need for a more open, structured and transparent process to facilitate understanding of objectives, process and criteria.

55. The AIA is firmly of the view that the legislation requires a CBA to be undertaken for every rule change. It advised that, in some cases, industry has not insisted on this because the "safety" case is extremely clear-cut. However repeated requests to undertake a CBA are frequently ignored on the basis that the CAA does not accept that such analysis is required by the Act. Air New Zealand supports the need to reach a common understanding regarding when a CBA is or isn't required.

56. Helicopter Services (BOP) Ltd submits that the CAA's functions under the legislation can only be addressed and its duties discharged by the undertaking of a benefit analysis. The submission supports guidelines for the conducting of CBAs, cautioning that these would need to be very carefully worked out by all parties concerned, including the Minister, the CAA and the aviation community. It would not wish to see a situation where small, insignificant or technical changes required full CBAs. It is however essential where a significant burden is to be imposed on industry.

57. From the Ministry's perspective, the Minister is required to have particular regard to the costs of implementing particular measures pursuant to s 33(2)(f), and to regulate consistent with the overall statutory imperative of promoting safety at a reasonable cost. Cabinet also requires a Business Compliance Cost Statement as part of the mandatory Regulatory Impact Statement (RIS). This is to ensure that the regulatory proposal is cost effective and justified. Included in the RIS is a statement of the net benefit of the proposal, including the total regulatory cost (administrative, compliance and economic) and benefits (including non-quantifiable benefits), and other feasible options.

58. The Business Compliance Cost Statement is to identify:

58.1 The source of any compliance costs;

58.2 The parties likely to be affected, by sector and size of firm;

58.3 Quantitative (if possible) or qualitative estimates of compliance costs (both in aggregate and upon individual firms, persons);

58.4 The longer term implications of the compliance cost for business – are they one-off costs? Will they be reducing over time?

58.5 An assessment of the risks associated with any estimates and the level of confidence that can be placed on the compliance cost assessment;

58.6 The key issues relating to compliance costs identified in consultation;

58.7 Any overlapping compliance requirements with other agencies; and

58.8 The steps that were taken to ensure that compliance costs were minimised.[5]

59. I understand each NPRM now includes the RIS and BCCS.

60. The CAA submitted there is a need for determining the criteria for when it is appropriate for the CAA to carry out a CBA. It notes that they have been the cause of much debate in recent years and the question of when they are required is becoming an increasingly contentious issue. The CAA notes an increasingly frequent response by industry to a rule proposal is to demand a full CBA where additional costs are incurred rather than accepting a statement on the benefits to the nation resulting from the rule proposal.

61. Furthermore, the CAA submits that the completion of a CBA does not necessarily resolve the issue, as it then becomes the focus of dispute and differences of opinion. Time delays in resolving these issues in a consultative manner can be considerable.

[5] Cabinet Office Circular CO(01)2, 12 March 2001, para 10.

62. The CAA notes that there appears to be a disparity between the CAA having to justify a rule based on a clear safety case, and the Ministry's sensitivity to industry reaction when additional costs are incurred. It noted, I thought with some frustration, that increasingly detailed business case and regulatory impact statements are required.

63. The CAA does not carry out detailed CBAs where it does not consider it warranted. There is a clear need for some criteria for establishing when a CBA is appropriate.

64. At an early stage in the process, before a rule-based solution is chosen, I recommend that consideration be given to the **indicative** costs and benefits of various (feasible) options for dealing with the identified problem. This would be part of the Risk Management process recommended. What is required at this stage is likely to be considerably less detailed and robust than the type of CBA that might be required at a later stage where the costs of a favoured solution are very significant, or the choice of solutions to a problem which must be resolved are all potentially high cost but the most cost-effective one is controversial. The objective at the early stage is to take a consistent approach, enable some options to be discounted and draw out the issues for further consideration.

65. The level of detail required of subsequent CBAs should reflect the issues and costs involved, be subject of discussion with the affected aviation community but ultimately the decision of the CAA. In further discussion with the CAA I heard that identifying tangible costs was relatively straightforward as the information was uncontroversial and could be readily verified. Less tangible costs, such as downtime to fit equipment, were more controversial, but ultimately the CAA could form and justify a view. Much more difficult were concepts, for example, of costs associated with systemic change/alternative management systems. In relation to Rear End Safety Areas, for example, there were some clear costs and after that enormous variables or secondary effects, such as the impact on the market. There are conflicts between airports (impact of passing on costs to airlines), pilots (safety emphasis) and airlines (impact on bottom line of cost of solution). Then there are the interests of environmental groups, consumers, local businesses and residents. In all of this, the CAA seeks to achieve safety at reasonable cost.

66. Difficult and controversial as these issues are, the RESA TSG process strikes me as a good example of the limits of consulting with a view to seeking agreement. Many controversial issues arise and there is no 'right' answer to many questions. The process must involve the CAA gathering in all the cost information, debating this as is relevant or necessary, treating confidential information appropriately, and ultimately forming a reasoned judgement. The CAA must also determine the appropriate assumptions to apply in a cost benefit analysis but these too should be advised in advance and debated. That is important, as the assumptions will drive the outcome.

67. As with any commercially significant and controversial regulating, the CAA should expect the full resources of the industry to be applied to persuading it in favour of that interest. If that is unsuccessful, the CAA (the Minister in fact) should expect to face litigation to challenge the reasonableness of the CAA's approach. It is important that this does not distract the regulator; a fair process that results in the CAA making reasonable and reasoned judgements (and these matters usually involve a high level of discretion at the end of the day) should withstand judicial scrutiny. Repeated unsuccessful attempts to challenge a regulator usually have the effect of dissuading commercial interests from the litigation option, unless there are other benefits such as delaying the inevitable. This advantage can be minimised by fast tracking litigation; most easily done where the process is well documented and clear.

TERM OF REFERENCE SEVEN: RECOMMENDATIONS ON RULE-MAKING BY 2001 MINISTERIAL REVIEW OF CAA

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7. Consider the recommendations made by the 2001 Ministerial Review of CAA in the area of rule making and analyse the issues that gave rise to these recommendations.

Executive Summary:

In 2001 a performance review of the CAA for the Ministry of Transport made a number of recommendations relating to the rule making processes of the CAA. These are considered and largely confirmed, although the processes recommended in this Review are more explicit than those referred to by the Ministerial Review, in accordance with the Terms of Reference for this Review.

Introduction

1. In its report dated May 2001 to the Ministry of Transport, the Performance Review team of PriceWaterhouseCoopers, Don Spruston, Jerry O'Day and Peter Davey made a significant number of recommendations including eight relating particularly to rules: see paras 4.6.1.6-4.6.1.13 pp 107-108 of the Report.

2. Two earlier recommendations (4.6.1.3 and 4.6.1.4 relating to the origins of the regulatory framework) were also the subject of submissions and are briefly considered.

Recommendations 4.6.1.3 and 4.6.1.4 regarding origins of the regulatory framework

3. The Ministerial Review recommended that the Ministry of Transport develop, in conjunction with the CAA a broad Government policy respective to the civil aviation

safety framework. It also recommended that the CAA work together with aviation community representative organisations to ensure participants have a clear view of their shared responsibilities under the Act. These two recommendations are related.

4. The Ministerial Review observed that most of the conceptual thinking in the 1988 Swedavia McGregor Report forms the basis of today's regulatory framework.[1] However, it noted that not all the recommendations in that report were embraced. It says that, as a result of a lack of policy statement by Government in response to Swedavia McGregor, this has led to a situation where some members of the aviation community are unclear as to which principles have been adopted and which have not.

5. Although it found that the Act might well cover the point, the Review considered there was scope for a general policy statement from Government so that the basis for the current framework is transparent.

6. The CAA reinforced the desirability of a high-level policy statement in its submission on this Review. It believed it would increase the understanding of the aviation community of how the safety policy shapes the direction and content of rules, and defines the roles and responsibilities of various stakeholders. Essentially the CAA is looking for a link or a bridge between the Swedavia McGregor Report and the Act. It believes that would help clarify issues that arise in the debate between the CAA's role and the aviation community's role. The essence of that debate appears to be that the CAA has a focus on self-control and self-monitoring, whereas the "industry" focuses more on self-regulating. I presume this leads to pressure to negotiate rules and obtain industry sign off, and/or to a debate as to whether the CAA should be regulating particular activities.

7. Importantly, the CAA's role involves providing and maintaining a regulatory regime which receives the necessary strategic direction and input. It is much more than simply a contractor providing rule development services to the Minister. In its view it does not obtain direction in any formal or established sense from the Minister in relation to the strategic direction of the rules programme.

[1] Ministerial Review para 4.2.1.3.

8. A formal statement of the policy principles on which the rules are to be based would greatly assist the CAA in its strategic approach to the rules. It would increase understanding of how Swedavia McGregor principles have been incorporated into the Act and how those principles shape the direction and content of the rules. This knowledge would assist the CAA during consultation on individual rule projects, reducing the need to restate and gain acceptance of the high level objectives at each project, and ultimately serve as a check on the CAA's intentions when discussing new proposals with the industry.

9. The Ministerial Review then suggests that accountability under the contract should be measured at the level of the set of principles, and not solely at the level of counting rules as at present. This leads to the second recommendation under this heading. As the Ministerial Review pointed out, Swedavia McGregor recommended a clear-cut division of safety responsibilities in legislation between the State and participants.[2] The Act incorporates this in Part 2. The responsibilities of the CAA are set out in s 72. Importantly, the Minister makes ordinary rules. The responsibilities of document holders are set out in s 12, and those of the pilot-in-command in s 13. The intent of Swedavia McGregor was for the participants to accept responsibility for, and commitment towards, to 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 framework and then step back and let the participants manage. However, as the Ministerial Review pointed out, without the necessary commitment by the community, the concept will not work well. The Ministerial Review said that many participants it talked to were generally unaware of their accountability under the Act.[3]

10. The observation has been made that the legislation assumes a mature industry and systems. It assumes voluntary compliance. However, particularly at the general aviation end of the industry there is resistance to taking up responsibility. The regulator cannot simply assume a mature, voluntary complying industry. It requires more intervention and direct surveillance/policing. This is where the relationship is most ambiguous. A policy by the Minister would give CAA the confidence to proceed.

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[2] Para 4.2.4.1.

11. When asked about this, Ministry officials advised me that it was important to put the Swedavia McGregor "philosophy" to one side – it was a product of the late 1980s. There was greater emphasis on the considerable degree of responsibility on the operator then. That was fine for larger operations. However, experience has shown not all operators/ participants have the level of maturity necessary and the CAA has responded to that by, for example, putting more staff in the field etc.

12. If this indeed reflects the view of the Ministry then it is understandable that there is a sense of ambiguity. Helicopter Services (BOP) Limited supported the CAA's submission in this regard and agreed that a policy statement would be very helpful in the process of rule development.

13. The Ministry noted that any high-level policy statement would need to "hang off" the New Zealand Transport Strategy. This document operates at a very high level, emphasising broad principles of forward-looking, collaborative, accountable and evidence-based governance, management and administration of the system. The Minister of Transport is both responsible and accountable for the rules under the Civil Aviation Act. The CAA develops these rules on the Minister's behalf. It needs to understand the regulatory safety framework the Minister has in mind.

Conclusion

14. Whether or not the legislation is sufficiently clear, it seems that ambiguities have arisen from the change in the philosophy of central government towards 'devolution', and this is perceived as potentially having an impact on the strategic direction for the rules and safety philosophy of the CA Act. In light of the reality that not all aviation participants can be relied on to assume the responsibilities of a robust safety culture, some form of policy direction to the CAA or clarification of the Minister's strategic direction on rules might be of assistance.

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[3] Para 4.2.4.4.

Recommendation 4.6.1.6: priority setting for rules

15. The Review recommended the formation of an executive Regulatory Review, consisting of the most senior level in the CAA and the aviation community, with representation from the public, to assess mechanisms for improved priority setting for rule-making, prior to submission to the Ministry of Transport for final approval.

16. The Ministerial Review observed that priority setting for rule making is generally an internal reactive process – based on the pressures of the day. More recently, it noted the development of a work programme that prioritised all proposals into three levels based on the Annual Safety Plan. The Ministerial Review was concerned at a lack of senior level engagement from both industry and the CAA on rule priorities. It proposed a long-term strategy for establishing rules to help avoid ad hoc rule making and improve understanding by participants. It referred to a section 4 process. I presume that the process it refers to is Appendix 4 to its report: Model for Assessment of Organisational Effectiveness. It is, however, not clear to me how that model assists.

17. The CAA submitted that it has identified the need for an executive body that has, as one of its responsibilities, input into the setting of priorities. The CAA believes there is a need to balance the regulatory wishes of each sector of the wider aviation community, with those of the CAA where safety takes a higher priority than commercial considerations. The CAA submitted that if a realistic rules programme sees the creation of between three to seven rules in a 12 month period, there needs to be a consensus among the wider aviation community as to which rule gets priority over another. At this point, I note that while consensus is desirable, it may be an unrealistic goal. A more realistic objective is that the wider community have a proper opportunity to learn the reasoning behind different approaches to priorities, to challenge and debate those ideas and to reach a consensus if that is possible. I believe a consensus position will be highly persuasive to, if not determinative of, the outcome given the needs and objectives of all stakeholders, but again the CAA and the Ministry must make decisions in the wider public interest.

18. The CAA also noted that additional considerations affecting the annual production capacity of the Rules Development Unit are the wider needs of the Government's prior

obligations under existing international agreements, and recommendations received from time to time from the Coroner and Transport Accident Investigation Commission. They submitted there must be an acceptance by those whose rule-making requests do not attract sufficient priority that their worthwhile idea for a rule is not to be progressed simply because it lacks sufficient gravity of need to be included on the rules programme. I would express this differently. Any problem that requires a rule-based solution must either have that solution programmed, or another solution found, or a decision made to do nothing. A worthwhile idea that is not a serious problem or can be dealt with some other way ought not to be a candidate for a rule-based solution.

19. Air New Zealand and Helicopter Services (BOP) Ltd both strongly disagree with the need for a new group to consider more effective priority setting strategies. They considered the prioritisation of rule making, together with the evaluation and assessments of petitions and the monitoring of progress (the next two recommendations of the Ministerial Review) all to be the legitimate role of CIRAG and within the existing Charter. Neither wanted to see another layer of bureaucracy.

20. The AIA were not opposed to a strategic advisory group, but did not consider it should be linked in any way to CIRAG rules or the policy development process. They referred to the UK Board, which provided guidance to the regulatory authority from an operational perspective. However, I have difficulties identifying how this would fit with the recommendations on the prioritisation of rules and the monitoring of rule progress.

Conclusion

21. There is agreement that priority setting for rules needs to have greater structure and involvement by the aviation community, as recommended. The mechanism is the primary issue. This is something that should be further considered in light of my recommendations. I do not think the aviation community should be excluded from any key process by inappropriate structures. The objective of providing the wider community with an opportunity to learn the reasoning behind different approaches to priorities, to challenge and debate those ideas and to reach a consensus on priorities if possible, should direct the structure.

Recommendation 4.6.1.7: petitions on rules to the Minister

22. The 2001 Ministerial Review of CAA recommended that increased independence for rule-making and priority setting would be achieved through a requirement that petitions on rules go first to the Minister (via Ministry of Transport), rather than to the CAA, as is currently the case.

23. The first point to make is that the Review does not consider the effect of the agreement between the Secretary for Transport and the CAA relating to the rule-making process. The issues giving rise to this recommendation appear to be a concern for increased independence for rule-making and priority setting arising from the "considerable processing ... problems" observed by the review team.[4] These included difficulties identifying and tracking rule-making proposals both internal and external. Some industry representatives had advised that petitions received no response. Others expressed uncertainty about "the process, the status and the complexity".[5] At that stage, the Ministerial Review noted the process of priority setting for rule petitions rested with the Manager, Rules Development and petitions were either included in existing projects or formed a new project to be put in a holding file for further action.[6]

24. The CAA did not support this recommendation. It considers that it is in a better position to progress a petition for rule making than the Ministry of Transport. The CAA has a greater ability to comprehend the strategic and safety implications for the aviation industry of a petition. In addition, if a petition were given to the Ministry of Transport, the Ministry would inevitably require CAA input to explain the implications. This would only serve to delay the processing of the petition.

25. Submissions received from the industry (Air New Zealand and Helicopter Services (BOP) Ltd) also strongly opposed the recommendations. Air New Zealand considered involvement in the evaluation and assessment of petitions to be the legitimate role of the CIRAG Executive. It saw the real issue as being appropriate resourcing within CAA to deal with such matters. Helicopter Services (BOP) Ltd considered referral to the Ministry would undermine the purpose and function of the CAA and signal a lack of

[4] Para 4.3.7.3.
[5] Para 4.3.7.7.

confidence in it. It would result in greater delays and bureaucratic involvement at best, and at worse, a situation where the Minister through the Ministry would be working at cross-purposes with the CAA.

26. AOPA, which generally supported the recommendations in the Ministerial Review, emphasised the need for the expansion of CIRAG to include wider participation from the aviation community, and to participate in the preparation of all rules. AOPA did not specifically refer to this recommendation.

27. While the submission was not aimed directly at this recommendation, I note here that there is some (relatively minor) support for the whole rule-making process being shifted to the Ministry of Transport. Some members of the wider aviation community strongly advocated the Ministry taking full control of the rule-making process. This was generally in response to two matters:

    27.1 Dissatisfaction with the CAA and a more positive (albeit limited) experience with Ministry of Transport (largely in relation to the notorious medical licensing issue); and

    27.2 A concern that the CAA was "conflicted" because it both wrote the rules and "enforced" them or regulated in accordance with them.

28. The second point is referred to under Term of Reference 6 and is rejected. It is my view that the real issue here stems from the need to draw the wider aviation community into the process at the earliest points of problem identification, rule solution election and prioritisation. Irrespective of the "trigger", these matters require open and transparent consideration and debate between the CAA and the aviation community, with CAA as the final arbiter of what will be recommended for rule development, and the Minister the ultimate decision-maker of which proposals will proceed.

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[6] Para 4.3.7.9.

Conclusion

29. The problem of dealing with rule-making proposals whether they be by way of petition or otherwise is clearly recognised in the course of this Review. The solution proposed by the Ministerial Review, however, is limited to petitions and not generally supported. I see no merit in it.

Recommendation 4.6.1.8: monitoring consistency of rules

30. The 2001 Ministerial Review recommended that the executive level Regulatory Review body (recommended in 4.6.1.6) establish a framework for monitoring progress on rule making to ensure a consistent approach and to ensure that a valid need exists.

31. There appear to be a number of issues underlying this recommendation. The first is the fundamental concern that some rules are either unnecessary, the issues better dealt with by some other means, and/or the rules not providing "the best overall safety dividend for the CAA and the operations they address".[7]

32. The suggestion with respect to the examples given is that there are too many detailed rules in some areas and gaps in others. This comes back to the need to clearly identify the problems, analyse the potential options for solutions using a risk assessment approach, and prioritise the competing candidates for rule-based solutions.

33. I reiterate the need for this to occur **before** the proposals are fed into the rule development process/hopper.

34. A process which involves the aviation community will have consistency as an objective. However it will be necessary to take on board the lessons of the past and not be persuaded to adopt a rule-based solution just because that has been the approach to date. This may lead to further inconsistencies in the short term, but ultimately there should be a strategy in place that will result in a consistent approach.

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[7] Para 4.3.5.5.

35. It is perhaps relevant that the rules considered by the Ministerial Review were those governing the recreational sector, and the criticisms appear to apply to the regulation of the general aviation/recreational sector.[8] Air New Zealand emphasises this in its submission.

36. Air New Zealand supports the recommendation in principle but again emphasises that involvement with monitoring is the legitimate role of the CIRAG Executive.

37. The CAA supports the creation of a broad long term strategy which, it expects, will provide consistency between the rules that regulate the various activities and certification of aviation participants. The CAA submits that a greater consistency of approach to a possible rule project would also assist the decision of whether an industry activity justifies regulation, and what level of CAA intervention is required. It agrees "these decisions would occur at the policy development stage, where the key issues, safety analysis and focussed outcome statements are produced by the CAA operational unit responsible for the rule application as well as the relevant aviation community members".[9]

38. Helicopter Services (BOP) Ltd wholeheartedly supports some means of monitoring progress with rules and ensuring consistency. It also emphasises this should be done through the CIRAG Executive. It advised that a review of the Australian process highlighted one of the difficulties with rule-making was due to changing priorities as a result of policy changes, political requirements or intervention by senior management.

Conclusion

39. For New Zealand, the pressures arising from the limits of the rule-making process and the need to identify and prioritise a rule development agenda over a three year timeframe requires a strategic approach. The process recommended by this Review is a more strategic process than that which currently operates through CIRAG. There is a need for some flexibility for genuinely urgent matters, and a need to be responsive to policy changes. However, changes in direction that may impact on the operations of the

[8] Para 4.3.5.6.
[9] CAA submission para 6.9.

aviation community need to be properly communicated, debated and understood. A failure to do this compromises any safety outcome.

Recommendation 4.6.1.9: broader CIRAG membership

40. The 2001 Ministerial Review recommended that CIRAG be restructured to ensure a more open and transparent process, with all aviation sectors given the opportunity to be represented at the executive planning and priority setting level.

41. It is interesting that this matter, which was at the forefront of many of the submissions I received, was apparent to the Ministerial Review at a reasonably early stage in CIRAG's life.

42. The Ministerial Review identified two principal concerns, with the CIRAG process, being that it -

    42.1 Lacked "all-inclusiveness regarding potential new and revised rules"; and

    42.2 Lacked "all inclusiveness of the aviation community participation".[10]

43. The Ministerial Review considered that the system suffered because it was not integrated directly into the rule-making process and thereby permitted "selectivity".[11] By this it appeared to refer to a selective system for choosing potential rules to be considered by CIRAG, and then that only some matters are referred by CIRAG to a TSG. The Ministerial Review identified a "temptation to bypass the process for difficult issues" and resulting mistrust in CIRAG.[12]

44. The Ministerial Review saw advantages in an expanded executive with representation from all sectors, meeting on a regular schedule, to set priorities and ensure substantive issues could be addressed. The advantages it noted were:

[10] Para 4.3.7.18.
[11] Para 4.3.7.23.

44.1 It could often quickly make recommendations to the Director regarding a rule proposal, thus eliminating months of analysis; and

44.2 It could act as a forum for balancing competing interests and objectives of various aviation sectors, thereby enabling appropriate solutions to be found.[13]

45. It considered that having all aviation participants included in an open forum facilitates understanding and a mutual commitment to problem resolution.

46. It commented on concerns it had encountered in submissions that an all-inclusive consultation programme would delay rule making. On the contrary, the Ministerial Review considered that a disciplined and well-managed programme could accelerate rules development. It would:

46.1 Discuss perceived problems before the rules were drafted;

46.2 Avoid work on unnecessary rules;

46.3 Eliminate debate about which rules need to proceed to consultation (by which I presume it refers to the "informal" TSG process);

46.4 "Reduce the amount of two-way communication on hidden agendas"; and

46.5 Produce a more workmanlike environment between the CAA and industry.[14]

47. It referred to (without identifying) examples overseas which had demonstrated a capacity for more effective and timely rule making.

48. It also expressed concern regarding the ability of the aviation community in New Zealand to provide highly professional and consistent representation. It noted that a partnership approach, as envisaged by the CIRAG concept, requires a mature community capable of organising the respective sectors such that a clear and consistent

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[12] Para 4.3.7.21
[13] Para 4.3.7.20.
[14] Para 4.3.7.24.

message is given to the regulator. If the community is uncertain of what is necessary, the regulator is left to interpret. It observed that large disparities in thinking within specific aviation sectors existed. For CIRAG to work effectively, there must be appropriate representation from the aviation community and a willingness from the community to reach consensus on important rule issues. In turn, this requires professionalism and maturity from industry representation, coupled with an open and transparent consultation forum.[15]

Conclusion

49. It is difficult to see the shape of the ultimate body envisaged by the Ministerial Review. One assumes, however, that as it includes representation from all sectors it might be considerably larger, and different in concept, from the existing CIRAG Executive. The recommendation is supported and is incorporated into the recommendations of this Review.

Recommendation 4.6.1.10: consultation on all rules

50. The 2001 Ministerial Review recommended that the revised CIRAG process include all proposals for rule making, including an assessment of petitions, in a disciplined partnership between the regulator and the community.

51. This recommendation appears to arise out of the concern noted under the previous recommendation that not all rule proposals were referred to CIRAG or on to a TSG. This raised concerns about the tracking of rule-making proposals and relative priorities between rules as well as the wider aviation community's concerns about capture of the process by the commercial industry. It also reflects the apparent ad-hoc nature of the process whereby rule proposals or "triggers" are dealt with in different ways.

52. AIA and Air New Zealand supported this recommendation. Helicopter Services (BOP) Ltd firmly supported increased consultation in order to achieve a safe, efficient and effective aviation environment. It submitted that consultation should include rules,

[15] Paras 4.3.7.25 and 26.

petitions, advisory circulars, formulation of broad policy and proposed changes to the Act. It referred to the Australian model as a working example. It emphasised that the roles are clear – the CAA has the final authority and the aviation community can only provide information and advice and seek to persuade. But all parties have everything to gain from this.

53. The CAA submitted that the nature of the consultation should be on a case-by-case basis. It nevertheless undertook to ensure the wider aviation community was kept informed on all rule-making projects.

Conclusion

54. In my view the issue underlying the recommendation is primarily the need for the wider aviation community to be involved in the high level process of problem identification, solution election and prioritisation; i.e. what actually gets into the rule-making process. From that point, the diverse interests of various members of the aviation community, and more focussed requirements of the CAA rule development personnel will mean that consultation can fairly be more targeted.

55. As I have said, I favour broad consultation on all “issue triggers” at an early stage, with a clear structure and objectives for that process.

Recommendation 4.6.1.11: improved representation by the community

56. The 2001 Ministerial Review recommended that the CAA work with the community representative groups to help them improve their organisational strengths so that they can adequately represent their respective communities.

57. However the Review Committee may be referring more particularly to aviation community groups such as the various organisations representing sporting and recreational organisations. It refers to the fact that representation by the aviation community in the rule-making process is weak because consolidated industry positions

either do not exist or are not clear and consistent. This, it observes, weakens consultation on rule making.

58. If this is the underlying issue, then it is a difficult one for the CAA to address. It is in the interests of the aviation community to negotiate among its members compromise positions with which it can then seek to persuade the CAA. However, achieving agreement may not be an easy task and it is clear that different interests within the aviation community have different positions. There is no one "industry position" on most issues and the CAA must take this into account. The aviation community is to be complimented for the efforts it has made to establish representative voices, such as the AIA, which advance consolidated positions for significant sections of that community. This will also be the objective of the new Confederation of Pilot Associations. These united voices must be given due attention. At times this can look like 'capture' and the aviation community, as well as the regulator, must be mindful of the distinction.

59. The CAA's role is to ensure that mandated organisations are given appropriate recognition and drawn into the processes. The CAA also has an interest in the aviation community organising itself into representative groups with which the CAA can liase and consult. These groups not only support consultation but can provide appropriate structures or means for problem solving outside of the rule process and for increased self-monitoring/governance or, put another way, for increased responsibility and accountability for safe operations and practices within their sector of the community. I saw several excellent examples of this among the groups I spoke with.

60. Suggestions for improving representation of smaller groups in particular include more accommodating methods of consultation, as discussed under Term of Reference 6. Some incentives for organised representation could include the meeting of (scheduled) expenses for qualifying representative groups attendance at certain meetings.

61. Some of the submissions received on this particular recommendation were focussed on the general public. It is clear that full opportunity to comment on any proposed rule arises for any individual or organisation at the NPRM stage of the consultative process. This is likely to be a more appropriate time for general community input, when the

substance of the proposal, as developed with assistance of the aviation community, can be considered.

62. However the Ministry saw the difficulty in engaging the public interest as an "unsuccessful feature" of civil aviation rule making.[16] It considered rules such as those dealing with Runway End Safety Areas, pilot licensing, aviation security and passenger weights as being the type of rules where public input is important. It suggested forms of consultation which might be considered as including -[17]

62.1 Advisory bodies

62.2 Secondment of personnel from the private sector

62.3 Public discussion papers

62.4 Multi-stakeholder meetings

62.5 Focus (consultative) groups

62.6 Targeted briefings

62.7 Workshops

62.8 Questionnaires

62.9 Additional public notice and comment

The Ministry noted that the appropriateness of each approach would depend on the issues under consideration, the nature of the group being consulted, and the resources, including time, available for undertaking consultation. As part of the Rules Development Agreement the Ministry requires a consultation plan for each rule, and the means of gathering appropriate information for the development of a rule is a matter I recommend

[16] Ministry submission para 3.2.2
[17] A Guide to Preparing Regulatory Impact Statements, Ministry of Economic Development.

be discussed with the representative group which debates priorities and timeframes. The appropriateness of any of these suggested methods could be raised at that point.

63. Air New Zealand saw the recommendation as desirable, but noted that the community of interest in aviation in New Zealand was very small and New Zealand did not have active consumer rights or passenger protection groups. It did not think the CAA should expend resources attempting to create such groups. It noted that consultation with the Ministry of Consumer Affairs should address some of these concerns.

64. Neither did AIA consider it was the CAA's role to engender interest among the general public in the rule-making process. If anything, it suggested this was the Ministry's role, although it had reservations as to whether it would be possible to garner any public interest in highly specialised technical rules. Helicopter Services (BOP) Ltd essentially saw the recommendation as inoffensive but impractical.

65. The CAA considered it central to its role to represent the wider public interest in rule development. It accepted that there were situations where, in developing a rule that raises, for example, access considerations for disabled persons, it would not necessarily be able to reflect that interest without some input. Safety considerations for persons with a range of disabilities may raise issues that are not initially apparent. Given this, it might be sensible to confer with (for example) disability organisations.

66. I spoke with a disability issues consultant and the past president of the Disabled Persons Assembly (DPA). He advised that issues relating to airline travel and recreational aviation arose regularly across the very broad and diverse membership of that organisation. The small national secretariat with very limited resources was not in a position to respond to an offer of consultation or participation. He also expressed the view that most regulators very often do not recognise the potential implications of particular measures for persons with particular disabilities. Therefore they will not seek the views or perspectives of those groups.

67. Ideally for an organisation such as the DPA to participate in the process, the national secretariat would need to be contacted at an early stage in the process and advised of the particular rule proposal(s) for development. The secretariat could then identify

someone with relevant consumer group knowledge who could first identify any potential implications for those groups and, second, arrange for input. However I was advised that this could not happen without funding. Funding for input of this kind is unlikely to be significant.

Conclusion

68. The CAA should encourage the participation of representative groups in the process. Their involvement should assist two-way communication between the regulator and the community. It should facilitate a higher level of understanding and agreement, and help to minimise delays. A well-structured and timetabled process with information available well in advance to enable proper planning is important. Incentives such as payment of scheduled expenses for qualifying representative groups to attend certain meetings could be considered. Arrangements that enable small businesses and recreational interests to participate outside usual hours are encouraged where the issues are clearly relevant to them.

69. The Ministry's submissions were highly encouraging of the CAA actively seeking wider participation. This should be taken into account when the inputs likely required for the development of the particular rule are considered. In my opinion, the involvement of the disabled community in the way suggested would provide 'expert' input that can be obtained for relatively little cost if the CAA sees it as appropriate to do so. As New Zealand society and its legal processes move increasingly to protect groups from discrimination, I consider this would be a responsible step by the CAA. It may have the added advantage of ensuring at an early stage in the process that the rules do not potentially offend against human rights obligations.

Recommendation 4.6.1.12: over-emphasis on Technical Study Groups

70. The 2001 Ministerial Review recommended that the revised CIRAG apply executive level assessments and decision-making. Issues should be delegated to a TSG only when a complex technical problem is evident. The CIRAG Executive should handle significant policy issues.

71. The Ministerial Review found TSGs to be a very resource intensive and not the most appropriate way in dealing with essentially non-technical issues.[18] There was no specific opposition to this recommendation from any of the aviation community representatives. Nevertheless, there was significant submission on matters relating to TSGs, as outlined in Term of Reference 6.

72. With respect to this particular recommendation, the CAA submitted there was a balance to be achieved between meeting the wider aviation community's requirement for fuller consultation, and the idea that rules can be made "quickly". The CAA's experience, supported by the Legislation Advisory Committee Guidelines, is that an essential step in timely rules development is the policy development, identification of key factors and a definition of the rule requirement. Again, these are essentially matters that I recommend be resolved so far as possible prior to a rule proposal being approved for development.

Conclusion

73. I support this recommendation to the extent that I consider a technical group should deal with technical matters, and broader policy issues should be dealt with in a forum representative of relevant sectors, rather than particular 'expertise'.

Recommendation 4.6.1.13: Benefit/Cost Analysis

74. The 2001 Ministerial Review considered the matter of cost/benefit analyses (CBAs) under the heading of Safety at Reasonable Cost (Chpt 6 of its Review). It observed that the CAA adopts a pragmatic approach, conducting a CBA where it considers it to be appropriate, and at other times aiming to achieve safety at reasonable cost through the application of proven international best practise for safety standards and activities. However, the Review concluded that there is room for some improvement in the CAA's application of CBAs, particularly with regards to the conduct of CBAs during the development of rules. It notes that, where activities are mandatory, the issue becomes

[18] Para 4.3.7.19.

more one of cost-effectiveness, that is, the achievement of (the beneficial) outcomes at least cost.[19]

75. The Ministerial Review supported a pragmatic approach to the use of formal CBAs. Major rule changes that are expected to involve significant compliance costs should be subject to formal CBAs, to ensure that the requirements for benefits to exceed costs have been tested. However, minor changes may well not warrant a full analysis, particularly if the costs of undertaking the analysis would outweigh the benefits of the change, or if the benefits of the change are reasonably apparent.[20]

76. In other instances, if an ICAO standard leads to a rule change, the Ministerial Review said that under normal circumstances it would not be cost-effective to undertake a costly analysis given the provisions of the Act promoting harmonisation with ICAO. That said, however, it went on to say that it may be advisable for a CBA to be undertaken for specific projects that result from a rule change, in order to determine options for compliance. An example of this is Runway End Safety Area standards.[21]

77. In order to determine the extent of analysis, including formal CBAs, that is required to evaluate a proposed rule change, the Ministerial Review concluded that an open and transparent rule-making process is required that allows for discussion by interested parties. Recommendations can then be made to the Director who would decide the scope of any CBA required.[22] The Review also notes that cost estimates for a new or changed rule are generally much easier to quantify than safety benefits. Therefore it advises determining costs for all new rules. It notes that industry can generally determine implications for respective sectors, whereas the CAA can complete cost estimates for regulatory implications.[23]

78. Submissions in relation to CBAs are covered primarily under Term of Reference 6 in respect of the TSG process.

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[19] Paras 6.1.3.2 to 4.
[20] Para 6.1.4.6.
[21] Para 6.1.4.7.
[22] Para 6.1.4.8.

Conclusion

79. I agree with the approach taken by the Ministerial Review. At an early stage in the process, before a rule-based solution is chosen, I recommend that consideration be given to the **indicative** costs and benefits of various (feasible) options for dealing with the identified problem. This would be part of the recommended Risk Management process. What is required at this stage is likely to be considerably less detailed and robust than the type of CBA that might be required at a later stage where the costs of a favoured solution are very significant, or the choice of solutions to a problem which must be resolved are all potentially high cost but the most cost-effective one is controversial. The objective at the early stage is to take a consistent approach, enable some options to be discounted and draw out the issues for further consideration. Ultimately the analysis will have to meet the Cabinet requirements as a minimum and, in the event of a legal challenge, satisfy the High Court that the Minister has chosen a regulatory method which he or she is satisfied, on an observably reasonable basis, has the objective of promoting safety at reasonable cost.

[23] Para 6.1.4.9.

TERM OF REFERENCE EIGHT: CHARACTERISTICS OF AN EFFECTIVE CONSULTATION SYSTEM

8. Identify and analyse the characteristics of a desired system of external consultation that would meet the needs of stakeholders and address the known deficiencies.

Executive Summary:

Various characteristics are identified and discussed. The process of consultation, indeed communication generally, between the aviation community and the regulator must be open, transparent, structured and disciplined. Relationships must be courteous and professional. The process must be predictable and informative, but flexible. The CAA must manage and control the process and take responsibility for decisions based on informed and reasoned judgements. The aviation community must take up the reasonable opportunities to engage with the regulator. All work to the same objective of promoting a safe and efficient aviation system.

Objective

1. I agree in large part with the CAA's submission that an improved consultative process will:

   1.1 Collate initial triggers for rule-making, including petitions from the wider aviation community, and inform the authors of the outcome of those triggers;

   1.2 Involve the wider aviation community in determining at an early stage the need for rule-making arising from a trigger;

1.3 Involve expert advice from the wider aviation community in the development of the draft rule proposals;

1.4 Allow opportunity for public comment to an NPRM; and

1.5 Facilitate wider aviation community awareness of how a rule is developed from the NPRM stage to the final rule stage.

And I would include in this list:

1.6 Involve the wider aviation community in first, defining the problem and subsequently identifying and debating the different options for dealing with the problem; and

1.7 Involve the wider aviation community in considering the relative priorities of rule proposals together with timeframes involved.

Characteristics identified in submissions and Reviewer's response

2. Helicopter Services (BOP) Limited largely agrees with the characteristics outlined in the CAA submissions (referred to below). It further identifies the following characteristics in the context of rule-making under the Civil Aviation Act 1990, with which I also agree:

2.1 The respective duties and responsibilities of all involved must be clearly identified and understood. In particular the final responsibility resides with the Director (the Minister) under the Act;

2.2 Civil aviation safety must be the paramount consideration;

2.3 Non-regulatory (i.e. aviation community) participants must participate having full cognisance of these points. While participants can never completely disassociate themselves from their own vested interests, these interests must be left at the door and discussion and debate entered into with as little prejudice, pre-conception and pre-determination as possible;

2.4 There must be genuine commitment and understanding of the concept of consultation – it must be recognised that, while compromise and consensus is usually desirable, consultation will not necessarily result in agreement. At the end of the day, the regulator must regulate in the wider public interest;

2.5 Wider aviation representatives must be pro-active, positive and constructive; participants must actively seek input, advice and feedback from their peers. There will be a need for maturity to be shown by participants.

3. Helicopter Services (BOP) Ltd also submits that the vestiges of historical mistrust and acrimony must be discarded. An important characteristic of the desired system must be trust, understanding of the various positions/roles/responsibilities of the participants and professionalism. I absolutely endorse this. In the absence of any real sense of trust and confidence, the participants must at least act in a professional manner towards each other.

4. The company also submits that the system must be as simple as possible, robust and enable "buy in" by all participants. It must be structured, stable and internally consistent.

5. The Ministry of Transport set out in its submission the following "participation" principles, referring to the general principles endorsed by the Regulations Review Committee in 1999 relating to the design of primary legislation. The Ministry suggests the key principles in relation to the Minister's obligations under s 34 of the Act would be as follows:

5.1 Those with the legitimate interest in the proposed rule must be provided with:

- Proper notice of the proposal including a reasonable amount of information in relation to the proposal;

- A reasonable opportunity to state their views; and

5.2 If the proposal is changed so that it becomes a new proposal, fresh consultation should be undertaken;

5.3 The views of those responding must be considered with an open mind;

5.4 Key decisions in relation to the proposal should be taken by the Government/the CAA;

5.5 Not all participants may be satisfied with the rule that is developed, but all reasonable participants should, however, feel that the process has been fair, that they have been listened to and that their views taken into account; and

5.6 The process must be administratively workable, efficient and enable the timely making of rules.

6. This is a classic and accurate summary of a consultative process, which would certainly meet the relevant legal obligations. It applies here but, in my view, an effective process for ordinary CAA rules must go further. The context is very important. Consultation with those who are to implement largely technical rules designed to improve safety in aviation provides an opportunity to promote understanding of the underlying issues. There is a real benefit to be gained from a high level of discussion and information sharing. I consider that any process that does not involve a reasonably high level of interaction with the aviation community is unlikely to result in an improved safety environment for aviation.

7. Nevertheless, it is entirely within the requirements of the legislation for the CAA to adopt a more controlled process than that envisaged by the CIRAG Charter. However the overwhelming thrust of the submissions was that a process which involved the aviation community and gave them more opportunity to contribute to an understanding of the various issues was called for, not a step back into the past.

8. The Ministry is, of course, not suggesting that. It agrees that it is sensible to have a way in which problems can be ironed out at an early stage, and to obtain the advantage of the aviation community's expertise. They are in favour of the issuing of a discussion

paper at an early stage and having Technical Study Groups, although these should be limited to genuine technical input in the Ministry's submission. These should be chaired generally by CAA personnel; strong leadership being important. The CIRAG group should be advisory and with a wider composition than the current CIRAG.

9. The CAA submission as to the desired characteristics of the process, and my comment on these, follows.

9.1 A consultative process that can -

- respond to emerging aviation trends and issues in a timely fashion;
- enable effective review of existing rules to remove redundant provisions;
- be based on policy principles and safety outcomes rather than detail;

I agree with this. Eventually of course, when focussing on aspects of a particular rule and particular interests, the consultation process may be into the detail. However it is very important that the policy questions (problem? options? best solution? priority?) are answered first.

9.2 Each rule development project must be based on a robust analysis of the problems identified as needing to be addressed through a rules requirement, including determining the exact nature of the problem, the relevant safety issues, and any alternative solutions which do not involve rule-making.

I agree. This work should be done before any ultimately determined rule-based solution is approved for rule development (although the issues will remain under consideration during that latter process).

9.3 The process should include an executive body comprising representatives from the CAA and the aviation community, to meet on a regular basis. The executive body should reflect the diversity of interests in the aviation community.

Subject to a common understanding what 'executive' means, I agree. A representative body is essential and it should be truly representative. For some matters a wider 'forum' might be appropriate. The nature of the group might change depending on the issues or stage in the process. This is discussed under Term of Reference 9.

9.4 The executive body should be for the exchange of high level information between the CAA and the aviation community to enable -

- The CAA to keep the aviation community informed of safety policies and issues associated with actual or potential rule-making matters;

- The CAA to keep the aviation community informed of the overall rule-making activities;

- For the aviation community to provide information and advice to the CAA on rule-making matters including:

  - development of policy leading to rule-making;
  - identification of priorities for rule-making;
  - matters which may require rule-making action.

I see a somewhat broader role for what I would call the aviation community advisory group (ACAG in **Appendices 6 and 7**). It will be a forum for debating approaches and policies proposed by the CAA, for identifying, considering and debating various potential solutions to problems, for advising the CAA on persons with expertise and/or interest in particular matters, and for monitoring progress on rule development projects.

9.5 As part of the consultation process the CAA should be free to identify industry persons and organisations that can provide the CAA with information and expertise that is required to address the various issues and requirements associated with a rule project;

I agree, and the advisory group could assist in identifying people, but at the end of the day the CAA must be free to chose who it will deal with when seeking assistance to develop rules, as opposed to consulting with the aviation community.

9.6 The process should also allow individuals and organisations to identify themselves where they can provide information and expertise into a rule project;

I agree, again subject to what I said above.

9.7 The process needs to be able to deal with conflicts of interest that may arise, and requests from industry representatives for confidentiality in respect of commercially sensitive information;

I agree. There should not be a difficulty with confidential information; the industry could assist by recognising the CAA's responsibilities under the Official Information Act and identifying the particular commercially sensitive information, and reasons in support, so that the CAA can more readily deal with requests for information. It may be helpful if a copy of an acceptable 'public' version of information, masking the commercially confidential information, was provided to the CAA for the purposes of any necessary consultation or release under the Official Information Act.

9.8 The process must not conflict with the roles and responsibilities of the CAA in developing rules under the rules agreement with the Ministry.

I agree. Nor, of course, must it conflict with the roles and responsibilities of the CAA under the Act and rules.

10. NZALPA provided me with a copy of a draft paper by Don Spruston as Director General of the International Business Aviation Council on Responsible Rule-making in Aviation. It is dated 15 July 1999 and recommends New Zealand give the Canadian experience of "responsible rule-making" a try. This is, as I understand it, what CIRAG set out to achieve.

11. In my view, subject to one caveat, this document concisely summarises the characteristics of effective safety rules and the features of a desirable process. It advocates a system of consultative and co-operative rule making where both the CAA and aviation community are responsible and knowledgeable in the aviation disciplines. As with the legislation, a mature, safety conscious public holds both accountable. My caveat relates to the consensus objective and the related assumption that the aviation community is in fact responsible and knowledgeable and so will be persuaded to agree with reasonable measures. Clearly, that is so for a very large part of the aviation community, and the position is improving over time. However, it is not yet universal. Subject to that, the Spruston advice is still apposite.

12. Spruston sets out nine features of a process of responsible rule making. These are set out and discussed below because the desired characteristics of external consultation are closely aligned with the desired characteristics of responsible rule making.

A well documented, consistent and systematic process which is open and transparent (Spruston features 1 and 3)

13. This means that participants operate within a known framework. Systems ensure the necessary communication actually happens; information is made available regularly and is accessible, meetings are scheduled, issues are notified and agenda papers are received in advance so people are informed and can choose whether to participate.

14. Timeframes are established and progress is monitored systematically.

15. Documentation provides a source of information that can be made available to the aviation community and provides a check on the process, whether it be its lawfulness or simply its consistency and robustness.

16. An open and accessible process allows the regulator and participants to speak freely to each other and to informally exchange information and ideas, but within the constraints of ensuring an inclusive and robust, well-documented process of decision-making. “Side bars” run the risk of creating the impression of inside influence and deals. Far

better that the wider community understands the nature of the partnership and the need to confer on a day-to-day basis.

17. I have one important qualification to this feature and that is the concern that striving for the perfect process can be very resource intensive, time consuming and costly. It can also divert effort from the more difficult tasks of making the hard calls. The CAA may need to prioritise and set reasonable targets if there are resource issues. It is important to balance openness and transparency on the one hand with delivery on the other. The aviation community needs to understand and support the CAA in seeking to balance these characteristics.

Co-operative, in that the process is a joint venture between government and the community. (Spruston feature 2)

18. Co-operation is essential to an effective process. The CAA needs access to the information, expertise and experience of the aviation community in order best to achieve a safe environment. The aviation community needs the willingness of the CAA to listen carefully and take on board community concerns. The aviation community have issues that require the attention of the regulator. The Minister and Ministry have functions to perform which require the co-operation of the CAA and vice versa.

19. To state the obvious, co-operation works best in an environment where all parties behave in a professional manner. I have been troubled by some very determined positions on the competence, credibility, vested interests and difficult personalities that are rumoured to populate both the regulator and the aviation community. I have seen examples of unproductive communications and less than helpful observations. These are not the hallmarks of a mature participation. It is important to step out of the sandpit and apply the disciplines of mutual respect and professionalism. Where these are lacking all participants should, at the very least, demand common courtesy of each other. Without that, the best designed of processes will fail. This is critical; a safety culture requires discipline.

The process should ensure "problem identification" and resolution, with rule making being only one of the solutions (others being training, etc). Costs of all options should be calculated. Rules should not be drafted until the problem is fully assessed – (Spruston features 5 and 7)

20. As has been reiterated, problem identification is a very significant part of the process that would generally benefit from closer attention.

21. As I have said, in my view, it would be preferable to separate out the problem identification process from the consideration of solutions. I have in mind the natural tendency to propose solutions without identifying the real problem and, having been drawn to focus on solutions, jumping to the detail of potential or proposed solutions with their implications for the participant's activities or business. The focus needs to be squarely on identifying the problem that underlies the proposal and not to be driven by the proposal itself towards (or deep into the detail of) a particular solution.

22. Separating problem identification from considering solutions also ensures that the solutions ultimately proposed do address a clearly identified problem, and that rule making is only one potential solution. Rule-making itself is a costly solution. If the current resourcing is to remain a given, rule-making proposals must be reduced. Other options may well have, on the benefits side of the equation, the realistic prospect of actually achieving a solution, albeit not the preferred one. Whereas a rule-based solution may not have sufficient priority to get through the hopper.

23. As Spruston says, attention must be given to the cost effectiveness of various realistic options. A balance is needed. Consideration of a cost benefit analysis should be the norm. However, this need not be an absolute, as often such analysis can be resource intensive and take considerable time and money in itself. The question of "value of a life" is very emotive and will depend greatly on the society's level of advancement. Nevertheless, in all cases the full cost implications of the proposed solutions should be calculated and made accessible. Such costs must be considered in determining the final solution. It is a mandatory consideration for the Minister under the legislation.

24. A focus on risk assessment and cost effectiveness provides assurance that the rules ultimately adopted by the CAA serve the public interest; in New Zealand's case, the statutory purpose of promoting safety at reasonable cost.

Detailed discussion should be delegated to committees or workgroups, designed to parallel the regulation structure and makeup of the industry (Spruston feature 6)

25. The CAA would determine the use of technical groups under the optimal process. I envisage this would be subject to consulting with and monitoring by the aviation community advisory group.

The process must be all inclusive (no rule created without submission to the rigorous system) (Spruston feature 8)

26. This is agreed. An issue ought not to be identified as requiring a new rule or rule change unless it has been through the problem identification, options for resolving and solution choice processes. The process I envisage, however, would be sufficiently flexible to fast-track very minor, uncontroversial technical rule changes or critical matters. It would allow for sensible pragmatic decisions where warranted.

Consensus is the ultimate objective. The Government must retain decision-making authority, specifically when consensus is not achieved (Spruston features 4 and 9)

27. Consensus is not considered a realistic objective in the current New Zealand environment and is not mandated by the legislation. However the aviation community must be encouraged to search for and agree to solutions they can live with; it is their best chance of getting them.

TERM OF REFERENCE NINE: RECOMMENDATIONS

9. Make recommendations for action by CAA, the Ministry and industry stakeholders that will increase the efficiency and effectiveness of the rule-making process.

Executive Summary:

Recommendations are made which suggest a process in three stages;

- First, the processing of issues that may require a rule change. This is likely to be the most significant process and is depicted in a flow chart at **Appendix 6**. It involves identifying the underlying problem for all triggers, considering various options to resolve the problem (rule-based and other) and choosing a solution or solutions following a standardised Risk Management process. Where a rule-based solution is proposed, a priority-setting process follows. This involves the aviation community before priorities are negotiated between the CAA and the Ministry. The "formal" input from the aviation community is by way of a group referred to in the flow chart as ACAG (Aviation Community Advisory Group). However, the nature of this group or forum needs further consideration and may change depending on the input required at the different stages, or the objective of the consultation.

- Secondly, once a rule proposal has leapt all the hurdles and is accepted into the rule development programme, the process proposed is one that is controlled by the CAA. ACAG has primarily a monitoring and advisory role, with broader consultation proposed at the stage a draft rule and NPRM has been prepared. This stage of the process is depicted in the flow chart at **Appendix 7.**

- The existing process that occurs once the final draft rule is provided to the Ministry, described in table form at **Appendix 5**, is depicted in a flow chart at **Appendix 8**.

Recommendation 1: CAA and aviation community to establish a process for dealing with all potential rule triggers that involves the aviation community, and which effectively limits the proposals that ultimately require new rules or rule amendment

1. I recommend the CAA establish a documented, systematic but flexible process for advancing issues that may require a new rule or rule amendment. This proposed process is depicted in a flow chart at **Appendix 6** and is the subject of further recommendations below. In summary, it should involve identifying the underlying problem for all triggers, considering various options to resolve the problem (rule-based and other) and choosing a solution or solutions following a standardised Risk Management process. Where a rule-based solution is proposed, a priority-setting process follows.

Recommendation 2: Aviation community to establish an aviation community advisory group or forum to meet regularly with the CAA in accordance with this process

2. It is proposed that the "formal" input from the aviation community is by way of a group referred to in the flow chart as ACAG (Aviation Community Advisory Group). However, the nature of this group or forum needs further consideration and may change depending on the input required at the different stages, or the objective of the consultation.

Recommendation 3: While rule Part 11 remains in place, all "triggers" should broadly follow a revised petitions process in accordance with that rule

3. The review concludes that rule Part 11 is inappropriate in its content and unnecessary in its form (legislation). It is important that the CAA follow its own rules and to try to knit the petition process with the recommended process for dealing with all "issue triggers", I recommend careful consideration be given to a process for dealing with all "issue triggers" which can fit within the structure of Rule 11. By way of example, all issue triggers that pass the preliminary "filtering" test (see below) could be published in

CARRIL together with notice of when the aviation community advisory group or forum will meet to consider the issues, identify the true underlying problems and, as suggested, consider a preliminary risk assessment. The Rule Part 11 process could be adapted from there to tie in with the proposed process of dealing with issues that may require rule change. In the longer term, the preparation of a policy that could eventually replace Rule Part 11 is recommended.

Recommendation 4: The CAA apply a preliminary "filtering" process to "issue triggers" to ensure that those that are plainly unsuitable for the process, or can be simply dealt with are, and the promoter is given reasons for the action taken

4. This step is important to ensure that matters that can effectively be dealt with in other ways do not clog the issue consideration process. I recognise that this suggestion is likely to cause some concern in sectors of the aviation community and it is important that the CAA adopt a measured approach, and that the issue promoter is given clear reasons for the decision or action.

Recommendation 5: For all remaining issues a process of problem identification and preliminary risk assessment is recommended to test whether the issue qualifies for further attention

5. This process must involve the aviation community through either a representative group or a wider forum, depending on what is feasible and achieves the best outcome. An open, public process is envisaged.

6. I envisage the CAA would prepare a report in advance of the meeting of the group/forum for circulation. It would seek whatever input it considered appropriate in preparing that report, if any. I envisage meetings would be held on a regular, scheduled basis, the regularity dependent on the number of issues to be dealt with. I envisage the agenda for each meeting being set well in advance and notified in CARRIL so that those members of the community who are interested can plan to be represented. Where issues involve an element of public interest or specific interest groups may wish to be involved, the CAA should ensure they are identified and notified.

7. It would be preferable if as a result of the forum, all parties were able to agree and articulate the problems and whether they require addressing. However, at the end of the day the CAA must take responsibility for deciding these matters where reasonable agreement is not reached.

Recommendation 6: Risk management process and solution choice: After the problem is identified and articulated, it should be subject to a standardised risk management process and appropriate feasible solutions should be identified and evaluated before a solution is selected

8. This is likely to be the most significant stage in the process. It may take some time and may involve several steps. The process and timeframes should be flexible, depending on the nature of the problem. The CAA may seek to involve experts, consultants, and/or aviation community members in its preparatory work.

9. It is envisaged the CAA will take responsibility for the preparatory analysis. Some form of consultation or discussion document should be produced. I anticipate that analysis will attend to such matters as –

    9.1 confirming or advising the initial risk assessment of the problem;

    9.2 proposing realistic options to mitigate the risk;

    9.3 providing an indicative cost benefit analysis for each option;

    9.4 recommending solutions; and

    9.5 identifying the consequential impacts of any solution.

10. The risk management process will require standardised criteria. It should not be too inflexible but should be consistent, so that the risks associated with various problems and their management by various solutions can be compared.

11. An indicative cost benefit analysis will be necessary for each feasible option to assist with solution choice, but this is likely to be at a very high level of generality at this stage. A sensible approach to the extent of the analysis will be required. The objective at the early stage is to take a consistent approach, enable some options to be discounted and draw out the issues for further consideration. A rule-based solution will take into account the costs of the regulatory process.

12. Debate between the CAA and those participants in the aviation community and general public who are interested in the particular problem is then envisaged. Again, striving for an agreed appropriate solution and outcome is encouraged but not required.

13. In light of the pressures on the rule-making process and the limits of legislating for safety, the selection of a rule-based solution should be made only if satisfied such is necessary.

14. Once a solution is selected, the process from there on will depend on the choice. The recommendations that follow refer only to rule-based solutions.

Recommendation 7: Proposed rule-based solutions are prioritised following consultation with the aviation community

15. It is recommended that, for all proposed rule-based solutions, there be a priority setting process to guide the negotiation of the annual rule development services agreement. The process should involve conferring with the aviation community group or forum in about November/December of the year prior to the rule development programme year beginning 1 July. All rule-based proposals should be subject to this process unless there are special circumstances of urgency or simplicity, which permit the proposal to enter the process without being included as part of the agreed rules programme. I understand the Ministry and the CAA have some flexibility around this, and simple technical amendments could be accommodated reasonably quickly.

16. Again it is envisaged that the CAA will prepare and provide a report or discussion document to the aviation community advisory group/forum proposing priorities for the rule programme, with reasons in support. It is anticipated these would be based on the

outcome of the risk management process so that those rules that give the greatest safety dividend have the highest priority. Nevertheless the criteria should be disclosed and the subject of discussion. The CAA should also indicate the nature of the process it intends to follow for each rule (including use of technical or interest groups for technical, commercial or policy advice) and indicative timeframes. I note that, as part of the rules development agreement, the Ministry requires a consultation plan for each rule.

17. The aviation community advisory group or forum would endeavour to agree on priorities for recommending to the Minister, and consider and respond to the proposed process and timeframes.

Recommendation 8: At each stage the necessity or desirability for an interim or alternative solution, including the "do nothing" option, should remain under consideration

Recommendation 9: The CAA is wholly responsible for preparing the draft rule and NPRM.

18. The process to be followed once a rule proposal has been accepted into the rule development programme is controlled by the CAA as it sees fit, and monitored by the aviation community advisory group. This stage of the process is depicted in the flow chart at **Appendix 7.** It is envisaged that the process to be followed in relation to each particular rule development project will have been signalled by the CAA to the aviation community and the subject of discussion at an earlier stage. It is recommended that the rule process and progress be monitored throughout by monthly reports to the aviation community advisory group as well as to the Ministry in accordance with the current agreement. Those reports should be made available to the wider aviation community and public, through CARRIL or the CAA website. The primary focus of monitoring will be to keep the aviation community informed of progress and enable it to make suggestions as to source of particular expertise or information to assist the CAA. The CAA should use such resources etc as it requires. It should consider engaging expert

advice on any matters, including the implications for disabled persons, where that expertise is not within the CAA.

Recommendation 10: That the CAA confers with the aviation community advisory group on the draft NPRM and rule

19. I recommend that the draft NPRM and rule be provided to the aviation community advisory group or forum (as appropriate) before submission to the Ministry for approval. In appropriate cases where, for example, a rule is controversial or requires explanation, then a presentation may be warranted. The CAA should invite and take into account any feedback at this stage before the draft NPRM and rule is referred to the Ministry in accordance with the Ministry's requirements.

20. Following approval by the Ministry, the NPRM would then be published in accordance with the Act and submissions received.

Recommendation 11: The CAA prepare a careful "outcome" document in all cases which summarises the submissions received on the published NPRM and provides a clear statement of the CAA's response to those submissions, with reasons.

21. It is important that the CAA consider all submissions, whether they raise new or old matters, with an open mind. This document is important. It should ensure that the CAA's response to each submission (or category of submission, where appropriate) is apparent, and that any revisions to the draft rule as a result of submissions are clearly explained. There may be circumstances where the CAA would want to consult with affected persons before revising a draft rule and, of course, where the revision is substantial, then a fresh NPRM may be required.

Recommendation 12: The CAA then provides the revised draft rule and outcome document to the aviation community.

22. Again, this may require a presentation or a meeting or simply circulation, depending on the nature of the issues. The primary objective at this stage would be to inform the aviation community of the rule which is to be provided in draft to the Ministry. It is unlikely that changes of substance would be contemplated at this stage.

23. The final draft rule is then submitted to the Ministry with the necessary papers. The process

Recommendation 13: That the Ministry consider whether the 20 week minimum process can be abridged in any particular case

24. The existing process that occurs once the final draft rule is provided to the Ministry, is described in table form at **Appendix 5**, and depicted in a flow chart at **Appendix 8**. Parliament and the Executive require certain steps to occur, and there is a limit to the changes the Ministry can make to this process. However, I suggest that, if the Ministry is persuaded that a careful, robust and inclusive process occurs before a draft rule is provided to it then it is likely to have more confidence to advance through the steps.

Recommendation 14: That the Ministry, Regulations Review Committee and Minister treat post-process submissions on matters of expert judgement with caution

25. Here the thorough and inclusive nature of the process that has been undertaken by the CAA will likely be influential. Where the CAA has, on the basis of information, expertise and experience, made judgements which will inevitably have adverse impacts on some members of the aviation community, it is important that those participants are not then encouraged to undermine the process that has gone before by effective lobbying when unhappy with the outcome.

26. Obviously, there is a balance to be struck here. The CAA must be ready to deal effectively with lobbying activity by ensuring that its analyses, including its risk management and cost benefit analyses, are robust. Robust processes should ensure that last ditch lobbying is ineffective by giving those outside the process comfort that the process can be trusted.

Recommendation 15: That the Minister provide clarification to the CAA of the Government's aviation safety philosophy and/or the strategic direction for ordinary rules

27. It seems that ambiguities have arisen from the change in the philosophy of central government towards 'devolution', and this is perceived as potentially having an impact on the strategic direction for the rules and safety philosophy of the CA Act. This, together with the reality that not all aviation participants can be relied on to assume the responsibilities of a robust safety culture, some form of policy direction to the CAA or clarification of the Minister's strategic direction on rules might be of assistance.

Recommendation 16: The aviation community is to be encouraged to form representative groups and take up opportunities to participate in the process

27. The above process is not intended to limit or dilute the level of influence the aviation community can have on the process but rather to ensure the process is not dysfunctional. If the aviation community can formulate agreed positions on any issue, these will likely be persuasive.

28. It is recommended that, to encourage representation from a range of interests groups, the CAA consider providing scheduled expenses to qualifying groups, and take appropriate steps to facilitate the participation by small business people and recreational interests as suggested under Term of Reference 6.

Recommendation 17: That the Ministry recognises the implications of the process recommended by this review for funding, in particular the moving of much of the strategic consultation currently funded under the rule services development agreement out of that process

29. Currently the strategic consultation processes largely take place within the CIRAG/TSG processes in the course of rule development and are covered by the agreement. Under these recommendations, they would occur prior to the rule development services purchased. It is recommended that the funding arrangements take this into account.

Review of participation of interested persons in the development of ordinary civil aviation rules.

The Director of Civil Aviation engages the Independent Reviewer to conduct the review of the process for interested persons to participate in the development of ordinary civil aviation rules as follows;

Outcome desired: Report and recommendations for an effective and efficient process of public and industry participation in the development of ordinary civil aviation rules.

Terms of Reference

1. Review and summarise the statutory, contractual and other requirements placed on CAA for the making of ordinary civil aviation rules;
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;
3. Identify
    a. The stages of rule making where external inputs 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;
4. Review the effectiveness of existing CAA systems for rule making, including the setting of rules development programmes and priorities, with particular regard to the management of external inputs;
5. Review the original purpose of the CAA/Industry Rules Advisory Group (CIRAG) and assess the extent to which this remains valid in light of the current arrangements and regulatory environment for making ordinary rules;
6. Review the results of experience with the existing CIRAG processes and identify deficiencies in their design and operation;
7. Consider the recommendations made by the 2001 Ministerial Review of CAA in the area of rule making and analyse the issues that gave rise to these recommendations;
8. Identify and analyse the characteristics of a desired system of external consultation that would meet the needs of stakeholders and address the known deficiencies;
9. Make recommendations for action by CAA, the Ministry and industry stakeholders that will increase the efficiency and effectiveness of the rule making process.

John Jones

Director of Civil Aviation

10th May, 2002

APPENDIX 2

PROCESS FOLLOWED

The following process was followed in responding to the Terms of Reference of the Director of Civil Aviation dated 10 May 2002:

The Director advertised the Terms of Reference for this Review, and an introductory meeting to be held at Wellington on 13 June 2002, in various civil aviation publications and on the CAA website (www.caa.govt.nz).

At the introductory meeting on 13 June 2002 I summarised the proposed process I intended to follow and answered questions. Memorandum No. 1 was issued summarising those matters and published on the CAA website.

Submissions were sought from interested persons before 31 July. I received 26 written submissions, some well into August. A list of the persons and groups who made submissions appears at **Appendix 3**.

The CAA prepared background information by way of reports related to the first five Terms of Reference. These were published on the website.

I held interviews with submitters and several others who indicated a wish to speak to me on 15 August in Christchurch and 5 and 6 September in Auckland. I met with submitters in Wellington on 3, 4, 9, 12, 13, 17, 19 and 30 September, and on 2 October. I understand that all those who indicated a wish to speak to me were afforded that opportunity. Persons and groups interviewed are listed at **Appendix 3**.

I reviewed all the information received and requested further information from various persons and organisations including the Civil Aviation Authority and Ministry of Transport.

Following receipt of a submission from the Ministry that rule Part 11 should be revoked, I indicated an opportunity for anyone interested in making further submissions on that point to make these available before 8 November. I received a further nine submissions, including the Ministry's, specifically on rule Part 11.

This report is the product of my consideration of the various submissions received and a broad range of materials.

SUBMISSIONS RECEIVED

Submissions were received from the following:

Aviation Industry Association of NZ (Inc)
AALEDA
Aero Technology Ltd
Aircraft Owners' and Pilots' Association (NZ) Inc
Aviation Theory Centre (NZ) Ltd
Avkair Ltd
Civil Aviation Authority of New Zealand
GAANZ
Geoff Eban, Gregg Barrow, John Funnell, Industry Representatives on the CIRAG Executive
Gliding New Zealand
Helicopter Services (BOP) Ltd
Helicopters NZ Ltd
John Bushell, Chairman Part 43 Review
John Clements
Ken MacKenzie
M A Talbot & R Dawson
Ministry of Transport
NZ Aviation Federation
Peter G Beaumont & Peter Houghton, Royal NZ Aero Club Inc. and NZ Warbirds Assn
Robyn Reid
The Aviation Medical Society of Australia & New Zealand (NZ) Inc
The New Zealand Air Line Pilots' Association

PERSONS INTERVIEWED

Representatives from the following groups were interviewed:

Aero Technology Ltd
Air Fiordland & Southwest Helicopters
Air National
Air New Zealand Group
Airways Corporation of New Zealand Ltd
Alpine Fighter Collection
Ardmore Flying School
Aviation Industry Association of NZ (Inc)
Civil Aviation Authority of New Zealand
GAANZ
Gliding New Zealand
Industry Representatives on the CIRAG Executive
M A Talbot & R Dawson
Ministry of Transport
Ntech
Royal NZ Aero Club Inc. and NZ Warbirds Association
Sport Aircraft Assn NZ Inc
The New Zealand Air Line Pilots' Association
Paul Gibson, Consultant, Disability Issues

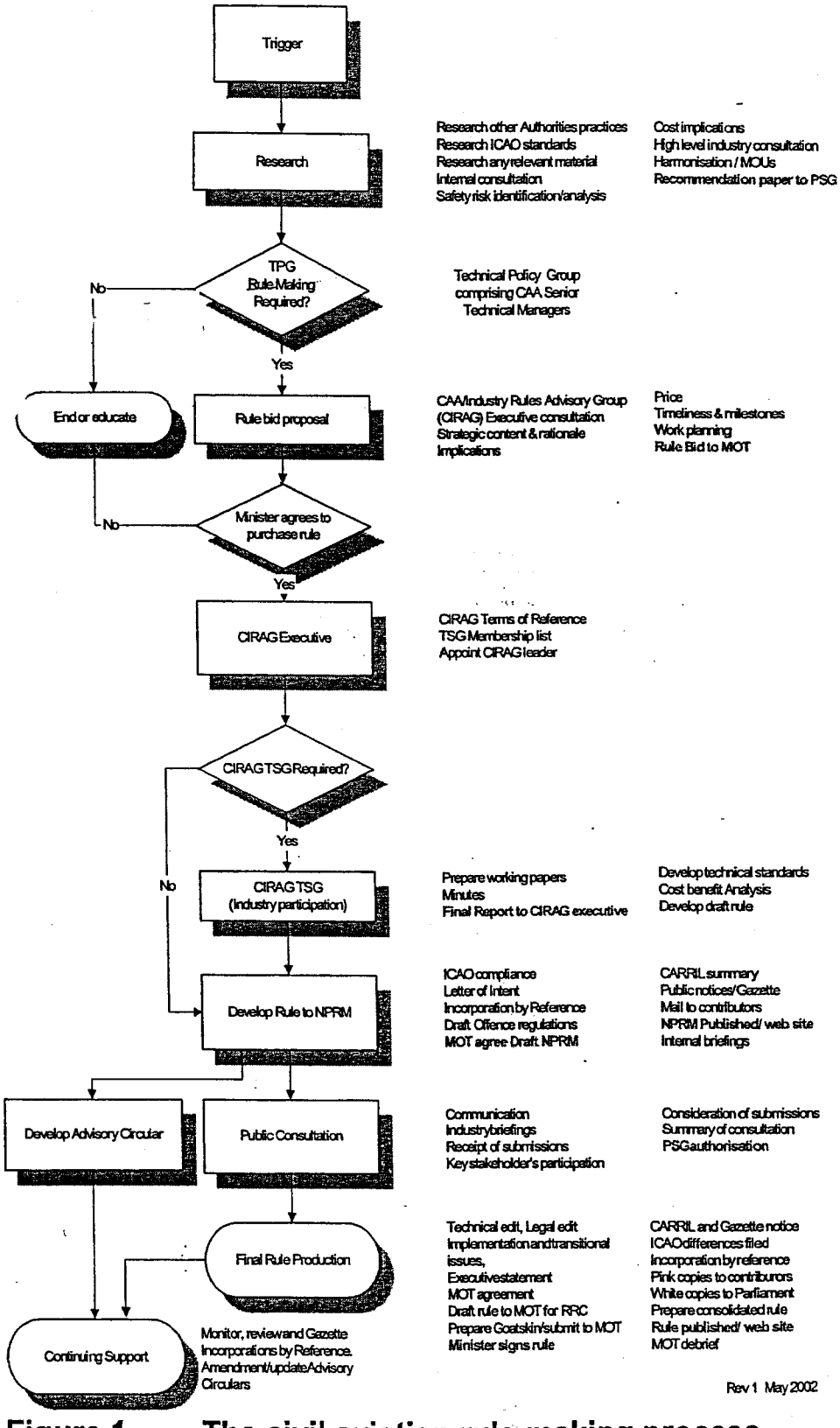


Figure 1. The civil aviation rule-making process

Table 1 Indicative Rule progress in the Ministry of Transport following receipt of white (final) draft of rule

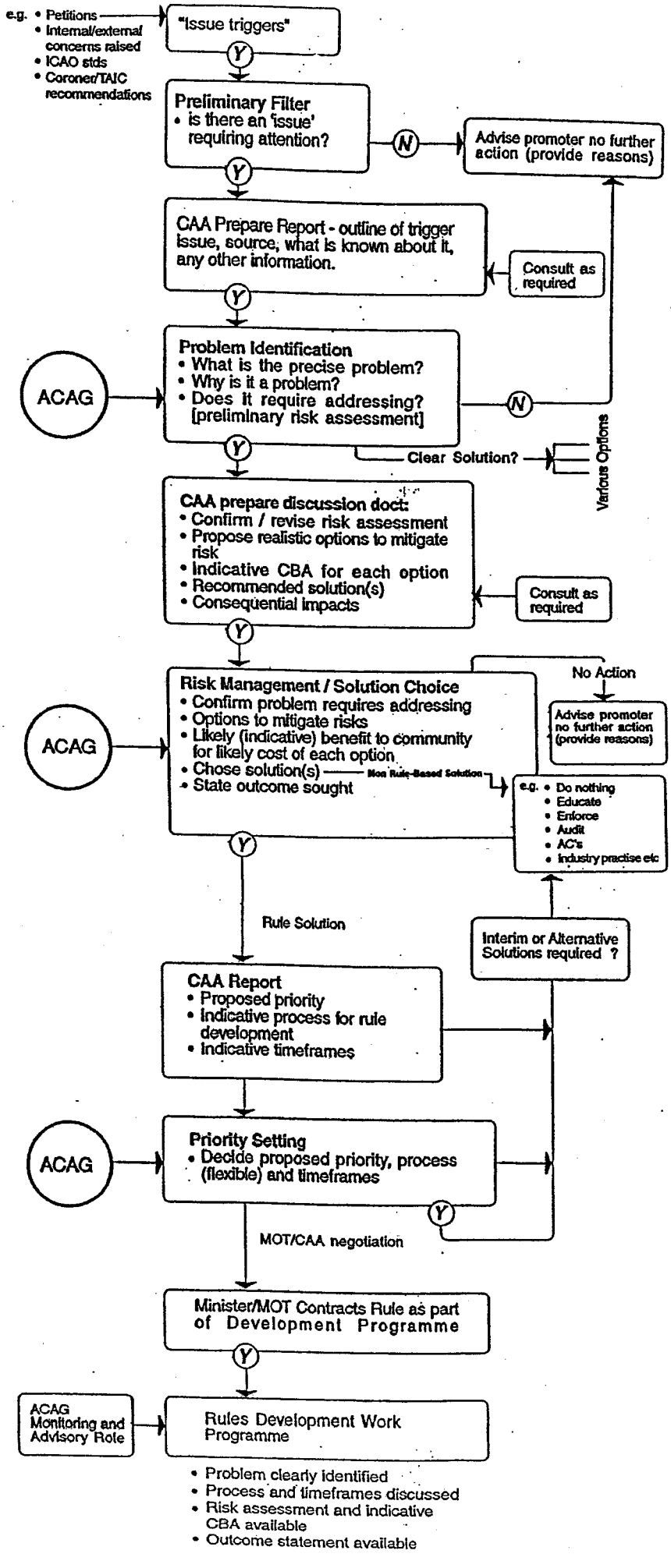
Note: Italics used to denote a regulation change

Time	Action	Notes
Week 1	• Rule received and checked by Ministry. Agency clarification obtained on any issues.	This assumes that the white draft is of appropriate quality to progress through the final process
Week 2	• Checking and clarification continues. • *Paper to Minister for authority to instruct Parliamentary Counsel (PCO) if Regulation change required.*	
Week 3	• Rule sent to Regulations Review Committee (RRC). • Ministry starts drafting paper to Minister and Cabinet Paper(s) for Cabinet Finance Infrastructure and Environment (FIN) Committee *(and Legislation (LEG) Committee for any regulations).* • *Drafting of PCO instructions starts where appropriate.*	
Week 4	• First RRC meeting • *Ministry drafting continues*	RRC require 3 weeks to consider a rule
Week 5	• Rule being considered by RRC • Ministry drafting continues.	
Week 6	• Final RRC meeting • *Instructions at Parliamentary Counsel (if applicable)*	Ministry to consult on paper to Minister and Cabinet Paper(s) with relevant transport agency
Week 7	• Draft Cabinet Paper(s) sent to appropriate Government Departments for comment	2 weeks allowed for departments to comment
Week 8	• Departments consider draft Cabinet Paper(s)	
Week 9	• RRC and Departmental comment received.	More time will be required to consult

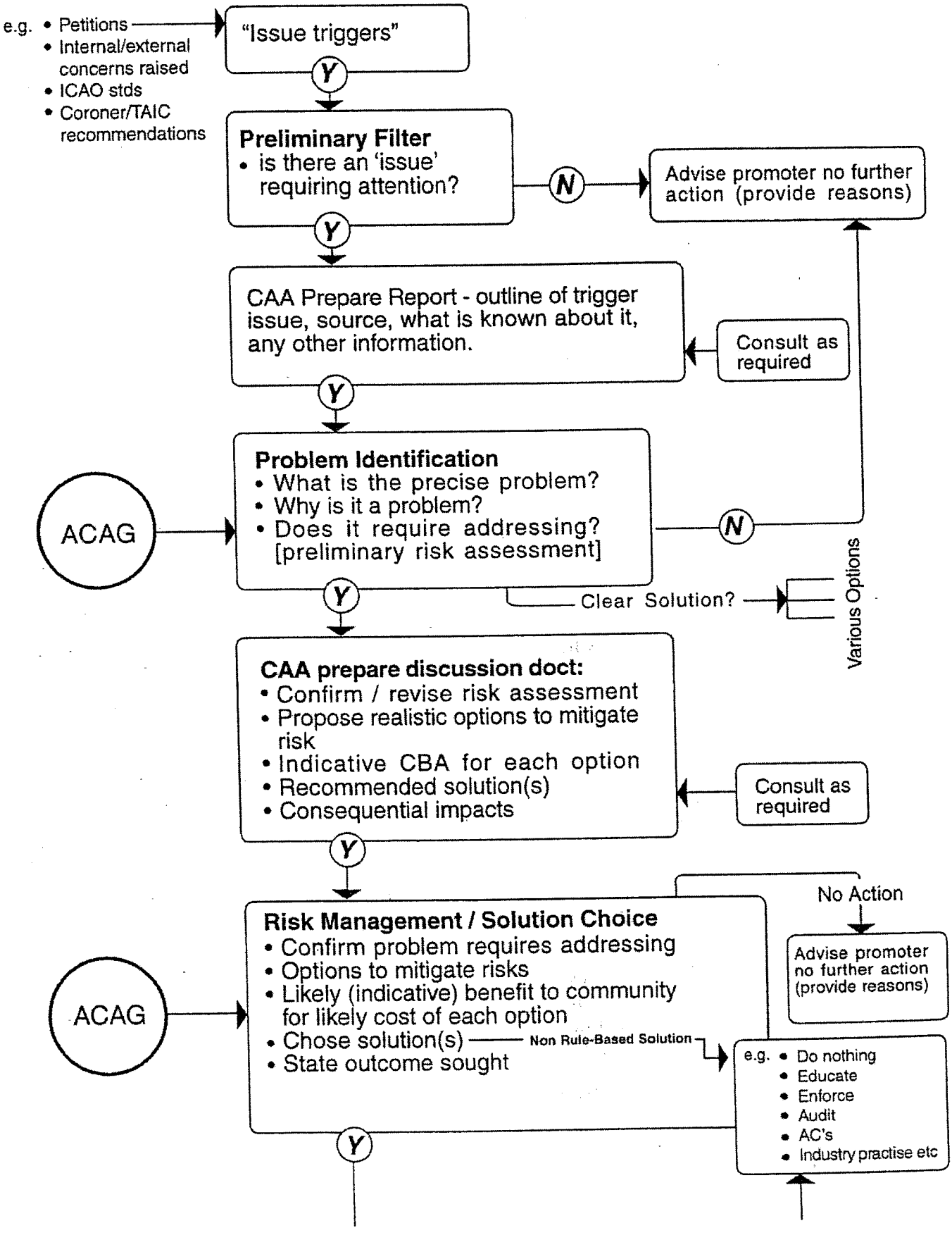
	• Ministry considers comments, and consults with Minister and agency as appropriate.	with agency in case of adverse comment.
Week 10	• Ministry consider and consult on comments and revise papers. • *PCO draft of any regulations would be approved by Ministry/agency at this stage*	
Week 11	• Paper for Minister and Cabinet Paper(s) finalised • Internal Ministry sign off.	
Week 12	• Papers to Minister • Minister considers papers and consults with Coalition Minister.	
Week 13	• Minister considers and consults. • FIN paper to be lodged with Cabinet Office by 10am Thursday	More time will be required if the House is in recess.
Week 14	• *LEG Paper for any Regulations lodged with Cabinet Office by Monday 10am for any Consequential Regulations* • FIN Meeting - Wednesday • *LEG meeting – Thursday*	
Week 15	• Cabinet Meeting on Monday - Minister signs Rule following Cabinet meeting.	1 week allowed post - Cabinet for Minister to sign rule.
Week 16	• Notice of Rule placed in *Gazette* (Thursday) • Any regulations signed (Monday) by Governor-General and Gazetted on Thursday	
Week 17	• 28 day Gazette Period	
Week 18	• 28 day Gazette Period	
Week 19	• 28 day Gazette Period	
Week 20	• 28 day Gazette Period ends on Friday – Earliest date rule can come into force.	

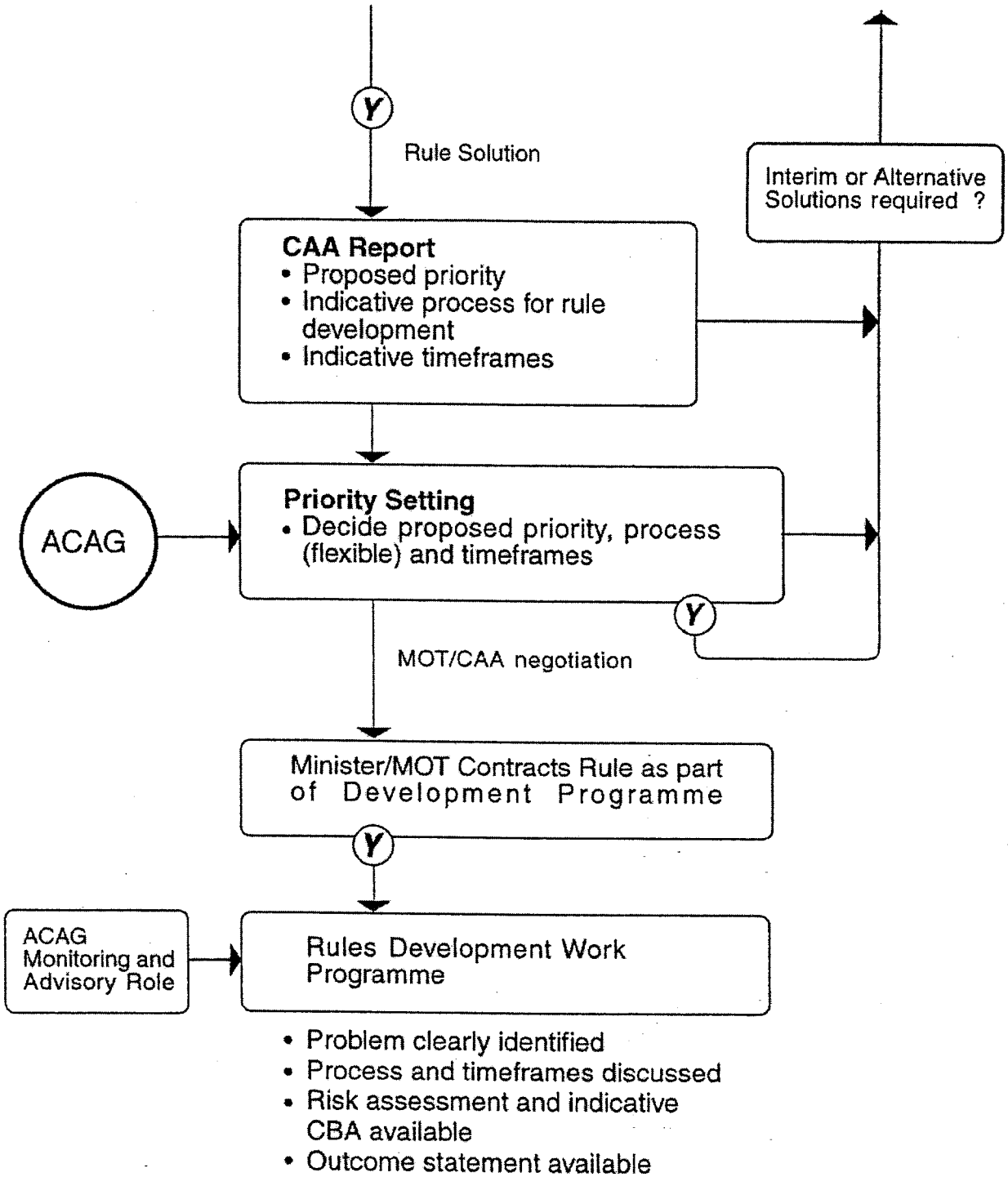
Note: These timings are minimal - Ministry resources may not always immediately available.

Outline For Processing Issues Which May Require Rule Change

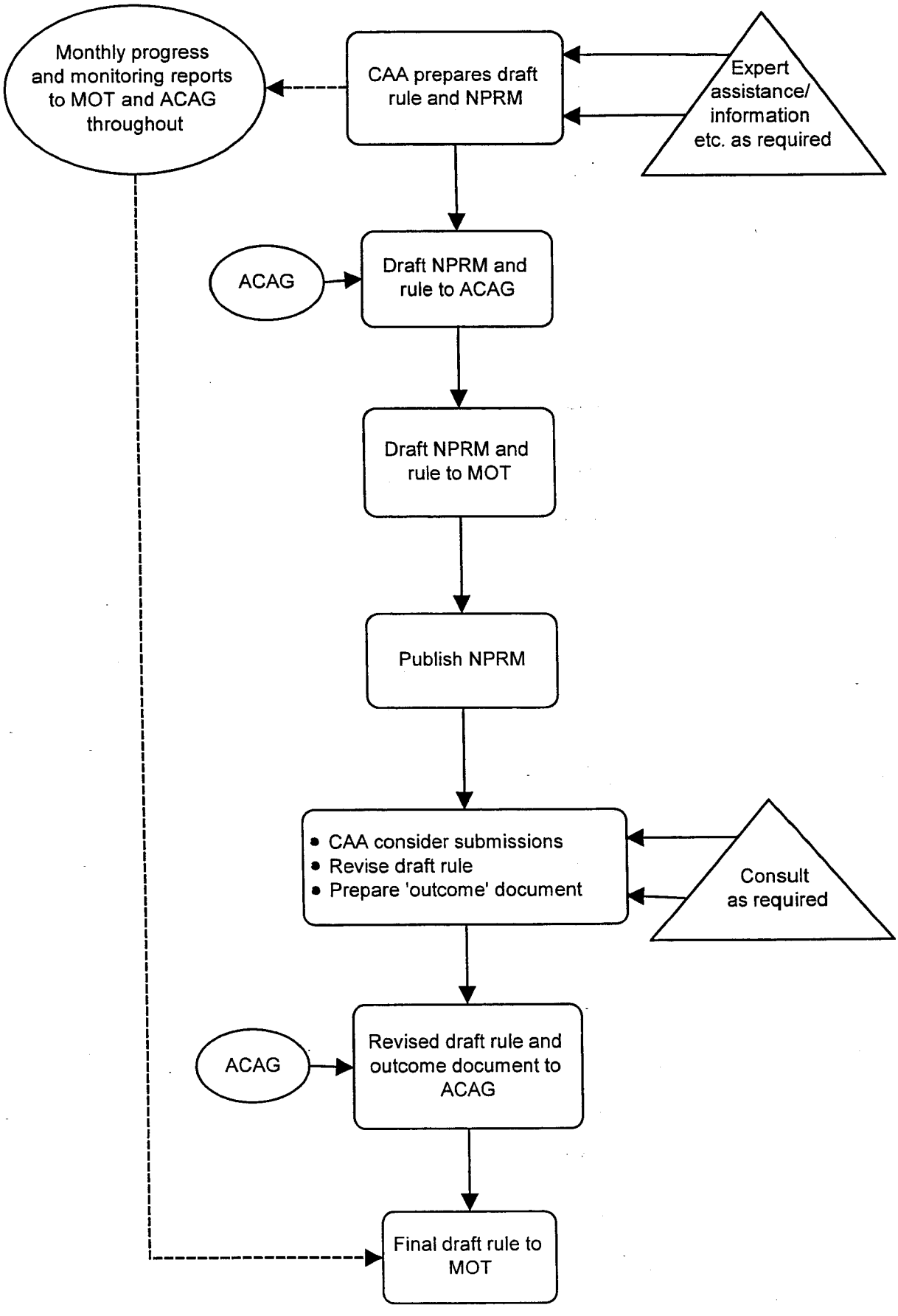


Outline For Processing Issues Which May Require Rule Change




Rule Solution
Interim or Alternative Solutions required ?
CAA Report
• Proposed priority
• Indicative process for rule development
• Indicative timeframes
ACAG
Priority Setting
• Decide proposed priority, process (flexible) and timeframes
MOT/CAA negotiation
Minister/MOT Contracts Rule as part of Development Programme
ACAG Monitoring and Advisory Role
Rules Development Work Programme
• Problem clearly identified
• Process and timeframes discussed
• Risk assessment and indicative CBA available
• Outcome statement available

RECOMMENDED RULE DEVELOPMENT PROCESS: CAA



CURRENT RULE DEVELOPMENT PROCESS: MOT