Australia vs New Zealand approach to suspending an 'AOC' (Part 1)

In the this edition of *The Legal Lounge* I review a recent Australian Federal Court decision, which shows the approach of that Court to determining whether an Air Operator Certificate (AOC) should be suspended under the Australian statutory regime. Next month, I will compare this to the approach adopted by the Courts in New Zealand, as illustrated in the 2011 *Air National* case. I will also comment on the need for possible legislative reform of the suspension powers in New Zealand.

Australian regime for suspending and taking other action against 'authorisations'

Introduction of new Part 3A Civil Aviation Act 1998

Prior to 2003, the Australian Civil Aviation Act 1998 (the Act) provided CASA with sole powers to suspend, vary or cancel an 'authorisation' (broadly equivalent to an aviation document in New Zealand), subject to a right of appeal against those decisions. However, there was a growing perception that the Civil Aviation Safety Authority (CASA) was "judge, jury and executioner" over all such matters, and that the right of appeal, in particular against any initial suspension action, was ineffective and inefficient. This led to the enactment of a new Part 3A of the Act, in 2003.

Part 3A enables CASA to issue an initial suspension notice against the holder of an authorisation, if CASA has reason to believe that the holder has engaged, is engaging, or is likely to engage in *"conduct that constitutes, contributes to or results in a serious and imminent risk to air safety".* However, the initial suspension is limited to five working days. If CASA wishes to extend the suspension while investigating or deciding on further action to be taken, CASA must apply within the first five day period to the Federal Court for a "prohibition order" preventing the authorisation holder from exercising the privileges of the authorisation for up to a maximum of a further 40 days.

Such applications are dealt with urgently, and are usually determined within days. If the Court refuses to make a prohibition order, this operates as a stay against further suspension (although CASA may still continue to investigate and consider other action against the authorisation holder). If the Court makes a prohibition order, this effectively extends the suspension, but may only last for as long as the court considers necessary for CASA to complete its investigation.

CASA must complete its investigation before that order expires. Should it wish to take further adverse action, it must issue a "show cause" notice within five days of the prohibition order expiring, inviting the participant to comment. The suspension automatically continues by operation of law during that five day period, and if a "show cause" notice is issued, it continues in force until such time as CASA makes a final decision. Any final decision must be made within five days after the response period for the "show cause" notice expires (a maximum of 28 days). I understand that the right to appeal to the Administrative Appeals Tribunal against any final determination still remains.

Legal test for Court issued "prohibition order" against authorisation holder

If the Federal Court is satisfied that there are *"reasonable grounds to believe"* that the authorisation holder has engaged in, is engaging in, or is likely to engage in, *"conduct that constitutes, contributes to or results in a serious and imminent risk to air safety"*, then the Court must issue a prohibition order, for such further period up to a maximum of 40 days, as is considered necessary.

In deciding whether this test is met, the Federal Court must have regard to the fundamental objectives of the Act, in particular, the emphasis on *"preventing aviation accidents and incidents"*, and CASA's overriding obligations in exercising its powers and functions, to *"regard the safety of air navigation as the most important consideration".*

The following case illustrates the approach of the Federal Court in applying this test to decide whether to make a prohibition order against the holder of an Air Operator Certificate (AOC).

***Civil Aviation Safety Authority* v *Alligator Airways Pty Ltd* (No 3) [2012] FCA 610**

On 3 May 2012 CASA issued a suspension notice against Alligator Airways' AOC for five working days. It applied to the Court for a prohibition order to extend the suspension on 9 May 2012. The matter was heard over three days, from 15 to 17 May 2012, and on 18 May 2012 the Federal Court issued a prohibition order for a period of ten working days. Taking into account the subsequent statutory time frame to issue a "show cause" notice, this had the effect of extending the suspension period to 4 June 2012. By this time CASA would be required to have completed its investigation and, if it considered it necessary to take further adverse action, to issue a "show cause" notice.

In applying the statutory test for a prohibition order, the Court stated that the requirement for *"reasonable grounds to believe"* is a low statutory threshold. It does not require proof of facts even to the civil standard of the balance of probabilities, but only that there is the existence of facts which are sufficient to induce that belief in a reasonable person. Nor does it require that it need be proved that any identified risks are in fact present, but only that the Court is satisfied there are reasonable grounds to believe they are present.

As to the meaning *of "serious and imminent risk to air safety"*, the Court stated that seriousness of the risk is related both to the probability of the risk eventuating, and the significance of the consequences if the risk is realised. This requires more than conduct falling short of "best practice", or some elevation of the level of risk. There must be a significant prospect that the risk of considerable harm or damage would actually materialise if the order is not granted.

The Court noted that, although not relied on by CASA as the primary basis for seeking the order, there existed a background of a myriad of incidents between 2009 – 2011 which had been the subject of earlier "show cause" notices, and which themselves were indicative of problems with the safety culture of the organisation. This included several breaches of maintenance requirements and practices including unauthorised maintenance or required maintenance not being completed; conduct of overweight flights (involved in air passenger operations); failure to report safety incidents to the relevant agencies, including an incident of an aircraft door opening in mid-flight with passengers on board, and of a pilot overshooting a runway; keeping inadequate flight check and training records; and continuing to operate for 20 days without an approved Chief Pilot.

However the key incidents relied on by CASA, and which were accepted by the Court as establishing that a *"serious and imminent risk to air safety"* exists, were as follows:

- During a scenic passenger flight on 24 June 2010, a single engine aircraft suffered an engine failure, necessitating a forced landing. The failure was attributed to lack of oil. Earlier problems with oil consumption had twice been brought to the operator's attention including by the Chief Pilot, but had not been properly investigated and rectified prior to this flight.

- During a passenger flight on 17 May 2011 the right engine of a multi-engine aircraft failed. During the emergency landing the pilot did not complete the engine failure drills or "feather" the failed engines as required by the Operations Manual or Pilot Operating Handbook, seriously increasing the risk to air safety on executing the landing.

- On 31 May 2011 the same pilot was ascending after take-off from an aircraft when it suffered a runaway electric elevator trim control. The pilot did not disengage the trim switch as she should have, and had to enlist the help of a passenger to help her regain control of the aircraft and level out its pitch. On descent to land the pilot was described by passengers as confused and out of control, with the aircraft bunny hopping and nearly stalling prior to landing.

- On 14 April 2012 a single engine aircraft suffered a catastrophic engine failure and was forced to make an emergency landing by gliding into a cattle station. Subsequent investigations revealed an oil filter full of metal fragments, caused by the shifting of a main crankshaft bearing. This problem was not properly investigated, and nor was the aircraft removed from service until the problem was properly identified and rectified.

- On 28 April 2012 a single engine aircraft suffered a failure of its turbo charge. The failure was noticed by the pilot prior to take-off, but he still attempted to take off. Although able to take off, the aircraft was not able to climb to a sufficient height. Rather than attempt to land in a nearby field, the pilot then elected to return to the airport to land. Video footage taken by a passenger showed that one wing came within about 2 feet of striking the ground on landing. The pilot's errors were acknowledged to be very serious.

Alligator did not deny that the incidents were all serious, and posed a serious risk to air safety. Rather, it asserted that its own conduct did not constitute, contribute to or result in the risk. It argued that each of the incidents were 'one off' or attributed to pilot error, and that in any event, the two pilots and chief pilot involved in three of the incidents had since been made redundant. Most of the maintenance issues had occurred under the previous Chief Engineer who was now also no longer employed. Alligator also undertook to have all future maintenance work outsourced. It therefore argued that there was no serious or imminent risk to air safety going forward.

The Court was highly critical of this stance by the Operator. CASA contended, and the Court agreed, that the incidents all showed poor maintenance standards, poor supervision and training of pilots, and a poor overall safety and risk management culture.

The Judge noted that s97A of the Act explicitly states that any failure by an employee is considered to be conduct of the body corporate, unless the body corporate can establish that it took reasonable precautions and exercised due diligence to avoid the conduct occurring.

While acknowledging some safety and pilot training improvements made over the years, the Judge was not satisfied that the operator had done enough to improve its overall safety and operational procedures, and was concerned by on-going maintenance problems with the aircraft fleet. He also noted that the operator's response both to the key incidents in the proceedings, and in its response to earlier "show cause" notices issued by CASA over the other background incidents, had all too often been to deny any responsibility and shift all blame to its employees.

The Judge viewed this attitude as indicative of a systemic problem and an inability to grapple with or attempt to sufficiently improve the overall approach to safety in the organisation. As such the Judge was satisfied that the risk posed by the operator to air safety remained current, and a prohibition order was necessary so that the suspension could continue pending the outcome of CASA's investigation and any final determinations made.

I understand that this is the first time that the Federal Court has issued a prohibition order under the new enactment against an AOC holder.

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