



WELLINGTON NEW ZEALAND

PURSUANT to Section 28 of the Civil Aviation Act 1990

I, WILLIAM ROBSON STOREY, Minister of Transport,

HEREBY MAKE the following ordinary rules.

SIGNED AT Wellington

this *10th* day of *August* 1993

by **WILLIAM ROBSON STOREY**

A handwritten signature in black ink, appearing to read 'W. Robson Storey'.

Minister of Transport

Civil Aviation Rules

Part 11

**Procedures for Making Ordinary Rules
and Granting Exemptions**

Docket Nr. 1023

**Civil Aviation Rules
Part 11**

**Procedures for
Making Ordinary Rules and Granting
Exemptions**

RULE OBJECTIVE, EXTENT OF CONSULTATION, AND COMMENCEMENT

The objective of Part 11 is to provide procedures for the production of ordinary rules made under the Civil Aviation Act 1990, and for granting exemptions from those ordinary rules.

In May 1990 the Air Transport Division of the Ministry of Transport published a notice of intention to carry out a complete review of the aviation regulatory system. This notice, in Civil Aviation Information Circular Air 3, listed the areas in which rules would be made and invited interested parties to register their wish to be part of the consultative process. This register was identified as the Regulatory Review Consultative Group. Some thirty-one organisations and individuals registered their wish to be consulted in the development of rules for general rule making procedures.

A draft document was developed by the rules rewrite team in consultation with the members of the consultative group. An informal draft was published and distributed in September 1991.

A period of informal consultation followed. This included some written comments, telephone discussions and a meeting with The New Zealand Airline Pilots' Association. This informal consultative process culminated in the issue of Notice of Proposed Rule Making 92-2 under Docket number 1023 NR on 26 February 1992. The publication of this notice was advertised in the daily newspapers in the five main provincial centres on 26 February 1992.

The notice was mailed to all members of the Regulatory Review Consultative Group and to other parties, including overseas Aviation Authorities and organisations, who were considered likely to have an interest in the proposal.

A period of sixty-three days was allowed for comment on the proposed rules. Two commenters were allowed an extra fourteen days to comment. Fourteen written submissions were received in response to this notice. Further discussions were held with some commenters to amplify or clarify their comments. These submissions and discussions were considered and where appropriate the proposed rules amended to take account of the concerns raised.

The rules as amended were then referred to and signed by the Minister of Transport.

Part 11 comes into force 28 days after the date of its notification in the New Zealand Gazette.

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Subpart A — General

11.1 *Applicability*

(a) This Part prescribes the procedures governing proposals to create, amend or revoke ordinary rules, and the procedures governing the granting of exemptions from ordinary rules.

(b) A procedure in this Part shall not apply in any case where the Authority finds the procedure to be impractical, unnecessary or contrary to the public interest except that, in every case before making an ordinary rule, the Minister —

- (1) publishes a notice of his or her intention to make the rule in each of 5 daily newspapers published in Auckland, Hamilton, Wellington, Christchurch, and Dunedin, respectively, or publishes the notice in the *Gazette*; and
- (2) gives interested persons a reasonable time to make submissions on the proposal; and
- (3) consults with such persons, representative groups within the aviation industry or elsewhere, Government departments, and Crown agencies as the Minister considers appropriate —

as required by section 34(1) of the Act.

(c) Where the Authority finds any procedure required under 11.25 to be impractical, unnecessary or contrary to the public interest, but proceeds to institute rulemaking procedures, the Authority shall state that finding together with a brief statement of reasons for the finding in the Notice of Proposed Rule Making published under 11.27 and, if a final rule is made, in the final rule published under 11.31.

(d) Where the Authority finds any procedure required under 11.27 or 11.29 to be impractical, unnecessary or contrary to the public interest, the Authority shall, if a final rule is made, state that finding together with a brief statement of reasons for the finding in the final rule published under 11.31.

(e) No ordinary rule or exemption shall be invalid because a requirement in this Part was not complied with.

11.3 Definitions

In this Part —

CARRIL means Civil Aviation Rules Register Information Leaflet:

Civil Aviation Registry means the Registry established under section 74 of the Act:

Civil Aviation Rules Register Information Leaflet means the publication circulated by the Director on a regular basis to inform interested persons of current rule making and exemption actions:

Ordinary rule means a rule made by the Minister under section 28, 29 or 30 of the Act:

Rule making includes rule amendment and rule revocation; and make a rule has a corresponding meaning.

11.11 Dockets

Official records relating to each rule making action and exemption action are maintained in files referred to collectively as a docket. Dockets are held in the Civil Aviation Rules Register within the Civil Aviation Registry and include the following:

- (1) Petitions for rule making and exemptions:
- (2) Summaries of petitions for rule making:
- (3) Summaries of petitions for exemptions:
- (4) Written material received in response to summaries of petitions for rule making and exemptions:
- (5) Notices granting or denying petitions for rule making:
- (6) Notices granting or denying petitions for exemptions:
- (7) Summaries of determinations in respect of petitions for rule making and exemptions:
- (8) Notices of intention to make a rule and Notices of Proposed Rule Making:
- (9) Written material received in response to Notices of Proposed Rule Making:
- (10) Notices and records of public hearings:
- (11) Ordinary rules:
- (12) Exemptions.

11.15 Advisory Circulars

Advisory circulars issued by the Authority contain information about standards, practices and procedures that the Authority has found to be acceptable for compliance with the associated ordinary rule.

Subpart B — Ordinary Rules other than for Airspace Assignment and Use and other than Airworthiness Directives

11.21 Scope

This Subpart applies to ordinary rules other than —

- (1) ordinary rules relating to airspace assignment and use; and
- (2) ordinary rules that are airworthiness directives.

11.23 Petitions for Rule Making

(a) Any interested person may petition the Minister to make a rule to which this Subpart applies.

(b) Each petition to make a rule to which this Subpart applies shall —

- (1) be submitted in duplicate to the Rules Docket Clerk, Civil Aviation Authority of New Zealand, PO Box 31441, Lower Hutt, or delivered to 1 Market Grove, Lower Hutt; and
- (2) state the name of the petitioner; and
- (3) state the test or substance of the rule or amendment proposed, or specify the rule that the petitioner seeks to have revoked, as the case may be; and
- (4) explain the interests of the petitioner in the action requested; and
- (5) contain any information, views, or arguments supporting the action requested; and
- (6) include a summary of the petition for publication in the CARRIL. The summary must contain a brief description of the general nature of the proposal and a brief description of the pertinent reasons presented in the petition for instituting rule making procedures.

Note: Rule Petition Summary Forms are available from the Rules Docket Clerk.

11.25 Action on Petitions for Rule Making

(a) **General.** No formal procedure, other than that contained in paragraphs (b) to (g), is required to be followed in respect of any petition for rule making under this Subpart.

(b) **Publication of summary of petition for rule making.** After the Authority receives a petition to make a rule to which this Subpart applies, the Authority shall publish in the CARRIL a summary of the petition which shall include —

- (1) the docket number of the petition; and
- (2) a brief description of the general nature of the proposal; and
- (3) the name of the petitioner and a brief description of the pertinent reasons presented in the petition for instituting rule making procedures; and
- (4) a statement of the date by which comments must be submitted; and
- (5) any questions that the Authority considers will promote comment on the petition.

(c) **Consideration of comments.** The Authority shall, before taking any action on the petition, consider all comments that are received within the time specified for comments in the publication of the petition summary.

(d) **Notification of status of petition.** Within 120 days after publication of a summary of a petition to make a rule to which this Subpart applies and every 120 days after that, unless the petitioner has been notified under paragraph (e) or (f) of the grant or denial of the petition, the Authority shall advise the petitioner in writing of the status of the petition.

(e) **Notification of grant of petition for rule making.** If the Authority determines that a petition to make a rule to which this Subpart applies and any comments on that petition show sufficient reason for instituting rule making procedures, the Authority shall notify the petitioner of that determination and of the period within which it expects to institute rule making procedures.

(f) **Notification of denial of petition for rule making.** If the Authority determines that a petition to make a rule to which this Subpart applies and any comments on that petition do not show sufficient reason for instituting rule making procedures, the Authority shall notify the petitioner of that determination.

(g) **Publication of summary of determination in respect of petition for rule making.** The Authority shall publish in the CARRIL a summary of its determination in respect of a petition to make a rule to which this Subpart applies. The summary shall include —

- (1) the docket number of the petition; and
- (2) a brief description of the general nature of the proposal; and
- (3) the name of the petitioner; and
- (4) a statement as to whether or not rule making procedures are to be instituted; and
- (5) the reasons for instituting or not instituting rule making procedures, as the case may be.

11.27 Notice of Proposed Rule Making

(a) Where the Authority considers sufficient reason exists for instituting rule making procedures to make a rule to which this Subpart applies, the Authority shall —

- (1) publish, on behalf of the Minister, the notice of intention required by section 34(1)(a) of the Act; and
- (2) publish in the CARRIL a notice of intention to make the rule.

(b) The proposed rule shall be published in the Civil Aviation Rules Register as a Notice of Proposed Rule Making.

(c) The Notice of Proposed Rule Making shall include —

- (1) a statement of the nature of the proposed rule making action; and
- (2) a reference to the section or sections of the Act under which the proposed rule is made; and
- (3) a description of the subjects and issues involved or the substance and terms of the proposed rule, or both; and
- (4) a statement of how and to what extent interested persons may make submissions on the proposed rule; and
- (5) a statement of the date by which written submissions must be submitted and the required number of copies; and
- (6) the requirements of the proposed rule.

11.29 Action on Notice of Proposed Rule Making

- (a) **Written submission.** Any interested person may make a written submission on a Notice of Proposed Rule Making for a rule to which this Subpart applies.
- (b) **Informal appearance.** Any interested person may request an informal appearance before an appropriate employee of the Authority to make an oral submission on a Notice of Proposed Rule Making for a rule to which this Subpart applies.
- (c) **Address for submissions.** Written submissions and requests for informal appearances shall be sent in writing to the Rules Docket Clerk, Civil Aviation Authority of New Zealand, PO Box 31 441, Lower Hutt, or delivered to 1 Market Grove, Lower Hutt, and identify the docket number of the Notice of Proposed Rule Making.
- (d) **Extensions.** A request for extension of the time specified in the Notice of Proposed Rule Making for submissions on the proposed rule shall be submitted in duplicate not later than 2 days before that time expires. The filing of the request does not automatically extend the time for comments. The Authority shall grant the request if it is satisfied that —
- (1) the person making the request shows a substantive interest in the proposed rule and shows good cause for the extension; and
 - (2) the extension is consistent with the public interest.
- (e) **Comments on submissions.** The Authority may request any person to comment on any other person's submission on a Notice of Proposed Rule Making for a rule to which this Subpart applies.
- (f) **Consideration of submissions.** The Authority shall, before taking any action on the Notice of Proposed Rule Making, consider all submissions that are received —
- (1) within the time for submissions specified in the Notice of Proposed Rule Making; and
 - (2) within extensions of that time from persons granted extensions.
- (g) **Public hearings.** The Authority may hold a public hearing or follow any other procedure it considers appropriate to further consider a Notice of Proposed Rule Making for a rule to which this Subpart applies.
- (h) **Public hearings — notice, participation and record.** Where the Authority proposes to hold a public hearing as specified in paragraph (g), the Authority shall, —

- (1) within a reasonable period before the hearing, publish notice of the time and place of the hearing in the CARRIL; and
- (2) at the hearing, give interested persons an opportunity to participate; and
- (3) after the hearing, prepare a record of the proceedings.

11.31 Making of Rules

- (a) After the Authority has completed its analysis and evaluation of the submissions and comments on a Notice of Proposed Rule Making for a rule to which this Subpart applies, the Authority shall, if satisfied that it is appropriate, prepare a final rule.
- (b) If the final rule is prepared, it is placed before the Minister to be signed.
- (c) After the final rule is signed, except where for reasons of security it is inappropriate, the rule is notified in the *Gazette* as required by section 34(2) of the Act.
- (d) After the final rule is signed, except where for reasons of security it is inappropriate, the Authority shall publish notice that the rule has been made in the CARRIL and publish the final rule in the Civil Aviation Rules Register.

Subpart C — Ordinary Rules for Airspace Assignment and Use

(RESERVED)

Subpart D — Ordinary Airworthiness Directives

(RESERVED)

Subpart E — Exemptions

11.501 Scope

This Subpart applies to the granting of exemptions under section 37 of the Act from ordinary rules.

11.503 Petitions for Exemptions

(a) Any interested person may petition the Director to grant an exemption from any specified requirement in any ordinary rule that does not specifically exclude the granting of exemptions.

(b) Each petition for an exemption shall —

- (1) be submitted in duplicate to the Rules Docket Clerk, Civil Aviation Authority of New Zealand, PO Box 31441, Lower Hutt, or delivered to 1 Market Grove, Lower Hutt; and
- (2) state the name of the petitioner; and
- (3) unless good cause is shown in that petition, be submitted at least 120 days before the proposed effective date of the exemption; and
- (4) state the text or substance of the rule requirements from which exemption is requested; and
- (5) explain the interests of the petitioner in the action requested including the nature and extent of the relief sought and a description of each person, aircraft, aeronautical product, aerodrome and aviation related service to be covered by the exemption; and
- (6) contain any information, views, or arguments supporting the action requested; and
- (7) explain why the petitioner believes the exemption should be granted and how the exemption may affect aviation safety; and
- (8) include a summary of the petition for publication in the CARRIL. The summary must contain a reference to each rule requirement from which exemption is requested and a brief description of the general nature of the exemption requested.

Note: Exemption Petition Summary Forms are available from the Rules Docket Clerk.

11.505 Action on Petitions for Exemptions

(a) **General.** No formal procedure, other than that contained in paragraphs (b) to (i), is required to be followed in respect of any petition for an exemption.

(b) **Publication of summary of petition for exemption.** After the Director receives a petition for an exemption, except as provided in paragraphs (h) and (i), the Director shall publish in the CARRIL a summary of the petition which shall include —

- (1) the docket number of the petition; and
- (2) the name of the petitioner; and
- (3) a reference to each rule requirement from which exemption is requested; and
- (4) a brief description of the general nature of the exemption requested; and
- (5) a statement of the date by which comments must be submitted.

(c) **Consideration of comments.** The Director shall, before deciding whether to grant an exemption, consider (in accordance with section 37(2) of the Act) all comments that are received within the time specified for comments in the publication of the petition summary.

(d) **Grant of petition for exemption.** The Director may, pursuant to section 37 of the Act, grant any exemption requested if the rule does not specifically exclude the granting of exemptions.

(e) **Denial of petition for exemption.** If the Director refuses to grant an exemption he or she shall notify the petitioner of the refusal.

(f) **Publication of summary of determination in respect of petition for exemption.** Except as provided in paragraph (h), the Director shall publish in the CARRIL a summary of his or her determination in respect of a petition for an exemption. The summary shall include —

- (1) the docket number of the petition; and
- (2) the name of the petitioner; and
- (3) a reference to each rule requirement from which exemption was requested; and
- (4) a brief description of the general nature of the exemption requested; and
- (5) a statement as to whether the petition has been granted or denied; and
- (6) the reasons for the grant or denial of the petition.

(g) **Notification of number and nature of exemptions.** The number and nature of exemptions granted are notified in the *Gazette* as required by section 37(3) of the Act.

(h) **General exception.** The publication and comment procedures of paragraphs (b), (c) and (f) do not apply to petitions for exemptions from the requirements of Part 67 (Medical Standards and Certification).

(i) **Exceptions to publication of summary of petition for exemption.** The publication and comment procedures of paragraphs (b) and (c) do not apply whenever the Director finds, for good cause shown in a petition for exemption, that action on the petition should not be delayed by those publication and comment procedures. Factors that may be considered in determining whether good cause exists include —

- (1) whether a grant of exemption would set a precedent or whether the petition for exemption and the reasons presented in it are identical to exemptions previously granted; and
- (2) whether the delay in acting on the petition for exemption that would result from publication would be detrimental to the petitioner; and
- (3) whether the petitioner acted in a timely manner in filing the petition for exemption.

CONSULTATION DETAILS

*(This statement does not form part of the rules contained in Part 11.
It provides details of consultation undertaken in making the rules.)*

Background to the Rules

In April 1988 the Swedavia - McGregor Report on Civil Aviation Regulation in New Zealand was completed. This report concluded that aviation safety should be a joint responsibility of both the Civil Aviation Authority and the participants in the civil aviation system. There was widespread agreement that a complete overhaul of the civil aviation regulatory system was necessary. As a result, the Government enacted the Civil Aviation Act 1990 to implement the first stage of the report's recommendations. To implement the remaining recommendations of the report the Civil Aviation Authority is undertaking a complete review and rewrite of all existing secondary civil aviation legislation.

Considerable research was carried out to determine the format for the new legislation. The Authority decided that the most suitable legislative framework should incorporate the advantages from the system being developed by the European Joint Aviation Authorities (JAA) and from the existing United States of America Federal Aviation Administration (FAA) system. The European Joint Aviation Requirements (JAR) are being structured in a manner similar to the Federal Aviation Regulations (FAR) of the FAA and aim to achieve maximum harmonisation while allowing for national variations.

New Zealand's revised requirements will be published in several Parts as Civil Aviation Rules (CAR). Each Part will set out a series of individual rules that relate to a particular aviation activity.

Accompanying each Part of the CAR will be at least one associated Advisory Circular (AC). These will expand, in an informative way, specific requirements of the CAR Part and show an acceptable means of compliance. For example, an AC will contain the minimum acceptable practice or practices that will be necessary to meet the rules.

The CAR numbering system is based on the FAR Part numbering system. As a general principle the subject matter of a CAR Part will harmonise with the FAR, although the title may differ to suit New Zealand terminology. Where a proposed CAR Part does not readily equate with a FAR number code, a number has been selected that does not conflict with any existing FAR Part.

The FAR has been used as the start point for the development of many of the CAR, but there are likely to be significant differences in the content of each Part of the Rules.

The FAR Part 11 is written for a justice system that differs widely from that in New Zealand.

The objective of the new rules system is to strike a balance of responsibility for safety between the State authority and those who provide services and who exercise privileges in the civil aviation system. This balance must enable the State Authority to maintain continuing regulatory control and supervision while providing the maximum flexibility for participants to develop their own means of compliance.

Notice of Proposed Rule Making

The Authority issued Notice of Proposed Rule Making 92-2 under Docket Number 1023 NR on 26 February 1992 to provide public notice of and the opportunity for comment on the proposed new rules. This Notice proposed the introduction of Civil Aviation Rules Part 11 to provide procedural rules for production of ordinary rules and for granting exemptions from them.

Supplementary information

All comments made on the Notice of Proposed Rule Making (NPRM) are available in the rules docket for examination by interested persons. A report summarising each substantive contact with the Civil Aviation Authority contact person concerning this rule making has been filed in the docket.

Availability of the document

Any person may view a copy of these rules at Aviation House, 1 Market Grove, Lower Hutt. Copies may be obtained from the Civil Aviation Authority of New Zealand, PO Box 31-441, Lower Hutt.

Summary of comments to Docket Number 1023 NPRM

Fourteen written submissions and one telephoned submission were received. Forty-two issues were raised by the commenters and some of these were raised by more than one commenter. Seventeen general comments were made by the commenters.

1. General comments on the NPRM

Royal New Zealand Aero Club (Inc) said that the general impression of the procedures in Part 11 was that they are far superior to the present procedure. But, they said, there are weaknesses in the publication of the stages of the process of rule making and petition for exemption. They said that any avoidance of publication (of details) needs to be restricted and limited.

The Society of Licensed Aircraft Engineers and Technologists (NZ Inc), in a general statement, said that they would like to see plain English and provision of adequate explanations for terms used. They added that they had accepted the contents of Part 11.

An individual commenter said that Part 11 could function but it will be slow, obstructive and expensive. He thought that it would lead to the legal profession being able to " ... strip the aviation industry of our revenue". He said "If anyone, regardless of qualification or aviation involvement, is allowed to have a say in the process, more staff and overall cost will be involved".

CAA response: The Authority does not agree that Part 11 will be slow, obstructive and expensive. Part 11 has been streamlined and simplified to provide certainty of process for those seeking to influence rule making and those carrying out rule making. It is likely to facilitate not obstruct rule making. Clarity of process is likely to create efficiencies not increase cost. Heavy involvement of the legal profession is unlikely in view of the safeguards built into 11.1. The Authority does not wish to restrict interested persons from making submissions because of lack of qualification or experience. Wide consultation promotes the quality of legislation. The rulemaking experience to date indicates too little rather than too much response on proposals.

Ansett New Zealand welcomed the proposed rules. They said " ... they bring clarity, transparency and generally demystify the process". Ansett were concerned that Part 11 contains no provision for review of a rule once promulgated. They considered that there should be a mechanism to provide for review in the event that it has an unexpected or unforeseen consequence, particularly in airspace and airworthiness directions.

CAA response: Once a rule is made (signed by the Minister), it is subject to the Regulations (Disallowance) Act 1989. Under that Act the rule may be challenged and disallowed (revoked) by Parliament. This formal procedure aside, the Authority considers that the possibility of unexpected or unforeseen consequence arising from a rule is sufficiently provided for in powers contained in the Civil Aviation Act 1990 to make emergency rules and grant exemptions and to amend ordinary rules.

The New Zealand Air Line Pilots' Association (NZALPA), whose early submissions led to the work on Part 11, commented about the need for it. They said that rule making, the way we are doing it, is "an innovation with no autochthonous foundation in New Zealand's constitution or jurisprudence". They said that "the careful and considered formal establishment of rulemaking procedures by means of a rule on rule making would enable:

1. The joint consideration of the objective of a rule making procedure and a proposed means of attaining that objective; and
2. The presentation of perceptions had by aviation industry participants as to the purpose and effect of rules and as to their creation and institution; and
3. The crystallisation of an agreed rule making procedure comparatively immune to later challenge"

They added that a rule on rulemaking "would enable transparent and accountable rule making by procedures reached in a consultative manner between aviation industry participants".

They are, therefore, pleased to note the presence of the proposal and the intended presence of the rule.

NZALPA thought that the economic analysis of the proposal could have been more in depth. They pointed to the FAA economic analysis requirements for "major rules" and "other rules". They said that a meaningful cost-benefit analysis is likely to be of advantage to all aviation industry participants. They thought that the analysis presented in Part 11 was cursory, but a welcome attempt anyway.

Another commenter said that he had no quarrel with any part of the document.

Another commenter said that he had a "problem with the legal standing of advisory circulars". He wanted to know if enforcement action could be taken if the standards or procedures in them are not complied with.

CAA response: Advisory circulars are not legal requirements. However, they contain relevant information and in many cases show an acceptable (or a range of acceptable) means to comply with the rule (or rules). Therefore, while the decision to take enforcement action must be based on the terms of the rule, the advisory circular may be relevant in any prosecution in determining what clearly satisfies the rule.

Air Safaris and Services (New Zealand) Ltd said that the proposal "seems well laid out and logical with fair and open procedures".

Airways Corporation of New Zealand said that they were concerned how the rules in Subpart D will apply when the Authority has made the new rules for airspace assignment and use.

A commenter said that he was generally happy with everything in the proposal except the statement in 11.1 that Part 11 does not apply to emergency rules.

Another commenter thought that Part 11 should also relate to Emergency Rules.

CAA response: The Authority does not wish at this stage to have detailed procedural rules for making emergency rules. The need for such rules and the nature of their contents will be evaluated when the Authority has had some experience in making emergency rules. This will ensure that any such rules are appropriate for emergency rule making. In the meantime, the broad procedures for emergency rule making contained in the Act are considered adequate.

Wellington International Airport Limited supported the broad thrust of the rules. They saw merit in the clear definition of the rule making process and in the checks and balances built into it.

One commenter said that he found the proposal, in the main, to be enlightening, sensible and straightforward. He did, however, think that the Authority's obligations in respect of petitions for exemptions were too long-winded and unnecessarily democratic.

T.J. Frederickson and Associates Limited strongly expressed the view that the consultation process for rule making must be sufficiently wide to ensure that all affected parties have an opportunity to comment before final action on rule making. They emphasised the need for recognition that laws administered by different Departments/Agencies can and do overlap and that this requires acceptance of dual responsibility to ensure that all affected persons are notified of proposals. They used a past occurrence in the United States as an example of how a lack of communication and consultation by officials could be used by activists with a particular bent as a vehicle for achieving narrow objectives that would disadvantage operations in the aviation industry.

CAA response: The Authority recognises the importance of and need for inter-agency consultation and takes a pro active approach to this. Broad consultation obligations now appearing in legislation reflect government's policy to consult widely - the Civil Aviation Act 1990 is an example. The Authority is confident its own rulemaking procedures allow all affected persons to be aware of proposals and afforded an opportunity to comment on them. At the end of the day though, full consultation depends on the vigilance and communication of both law makers and those subject to the law.

The Law Commission thought that the exemption procedures could have been separated from the rule procedures.

T.J. Frederickson and Associates Limited also commented on the separation of the exemption process from the consultation process. They thought the benefits to users of separating and defining the processes well outweighed the undesirability of the extra words required to do this.

Another commentator said "Don't combine the rule making process with the exemption process. It looks complicated enough now. Separate sections for each item are best".

CAA Comment: The Authority agrees that separation of these procedures will result in a simpler and clearer document. All the procedures for granting exemptions are now contained in Subpart E of the final rule.

Aeromotive Overhauls Ltd commented that they believe Part 11 can achieve what it aims to do. They are happy to see a public petitioning procedure, both for rules and exemptions. However, they think that the document is rather complicated. They said " ... the simpler you can make it, the easier it will be for people to better understand". They concluded that they " ... would be inclined not to follow the FAA line".

CAA response: The Authority agrees that the NPRM could have been less complicated and Part 11 has now been shortened, simplified, and to some extent, reorganised.

Air Nelson Ltd expressed general acceptance of the proposed rule. They observed that the " ... fact that a rule can be altered by the described process will permit this rule to be amended should practical experience indicate such a need". They said that it was " ... vitally important that the CARRIL is published in a timely fashion and circulated widely to industry The New Zealand Gazette is not normally received by certificate holders".

CAA response: The Authority agrees. The CARRIL will have a wide circulation.

Air New Zealand Engineering Services made general comment about typing errors in the rule and suggested that we have clearer wording in the Advisory Circulars. They suggested that Advisory Circulars be made available on the same basis that NPRM were (in AC 11-2 paragraph 8).

CAA response: Every effort is made to avoid typographical errors but some can appear in the NPRM. These are rectified when the final rule is prepared. In line with section 34(2) of the Act, rules and advisory circulars are made available for inspection free of charge and for purchase.

Aaleda Systems Limited considered that Part 11 was the most important rule as “it puts in place the mechanism for visibility in the rule making process, particularly in the area of waivers, concessions [exemptions]”.

The Law Commission said that they thought the CAA were “very generous” with the constraints that it had imposed upon itself. They said that such openness would raise questions for other departments to ask themselves. They hoped that the CAA example would be successful.

CAA response: In attempting to harmonise with other countries’ codes, and to be seen to consult with its public, the Authority needs such openness. However 11.1 contains certain safeguards to avoid a rule’s validity being challenged because a particular procedure was inadvertently not followed when the rule was made.

2. Specific comments on Rules proposed in the NPRM.

Comment on Rule 11.1

NZALPA “considers that a brief statement of the reasons for the non-application of this Part’s procedures to the making of any particular rule ought, in the first place, be made at the NPRM stage of the procedure or, if that stage is itself not applied in the making of any particular rule, in the rule explanation”.

CAA response: The NPRM stage is in fact always applied in the making of ordinary rules (Act S. 34). However, the Authority accepts that it would be appropriate to include a statement of reasons in the NPRM where in any case the publication and comment procedures for a petition for rule making were not followed. Further, it considers that the final rule should contain a statement of reasons for non-application of both any petition and any NPRM procedures not applied. 11.1 has been amended accordingly.

NZALPA said that, in a rule imposing mandatory requirements, the language of the rule (this comment applies to the whole of Part 11) must reflect its mandatory nature. They gave examples of text written descriptively such as “... records are maintained ... Dockets are held ... This Subpart applies” and so on. They thought such descriptive statements should be written using imperatives to reflect the mandatory nature of the rule, as follows “... records shall be maintained ... Dockets shall be held ... This Subpart shall apply”.

CAA response: The Authority agrees with this comment and the rules have been written using the imperative form. Where this is not the case it is because, in the particular context, the use of the present tense is appropriate and more natural; for example, “This Part applies..” is not improved by the addition of an imperative.

Air Safaris considered that 11.1(b) in the NPRM contradicted the spirit of the new rules. They said that “A sceptic would say that having established a fair and open procedure at some length, the effect is spoiled by seeming to say that the Authority can by-pass everything if they wish. Air Safaris said that they realise that it is meant to cover the Authority for special situations, but they think the emergency rules process is a better vehicle in such situations. Even if their objections did not amount to much, they would like to see better wording because “as it stands, it appears out of character with the overall stance of the procedures”.

One commenter said that 11.1(b) was rather draconian and questioned the need for this paragraph.

Wellington International Airport Limited thought that 11.1(b) was too broad and needed further definition to guard against its use because of poor administrative action.

Aaleda Systems Limited said that 11.1(b) was not necessary and “... violates the visibility we are trying to achieve”. They believed the criteria for “impractical”, “unnecessary” or “contrary to the public interest” are not satisfactorily tested, monitored or appealed by the rules.

CAA response: Part 11 provides definition and transparency in rule making within the very broad procedural requirements contained in the Civil Aviation Act 1990. The Authority does not view 11.1(b) of the NPRM (see now 11.1(b),(c), (d), of the final rule) as a licence to by-pass the procedures. Rather, these provisions recognise that a certain amount of administrative flexibility is necessary to allow for special cases where a procedure is inappropriate or inadvertently not observed. Also, as an added discipline, the Authority is required to state in its rule publications why the procedure was not followed. Emergency rules are not seen as an appropriate mechanism for these situations. 11.1(b) of the NPRM has been written in clearer terms.

The Law Commission asked “what happens if the Authority does not follow the rules for rule making? Could a future court case cause chaos by finding activities that had been going on for years were illegal because of an administrative failure”. They suggested that we might need a clause to make a rule signed by the Minister proof against such proceedings.

CAA response: Rule 11.1 has been amended to provide for this situation.

Comment on Rule 11.3

NZALPA wanted a definition of “Rule making” to simplify later wording. They made a proposal.

CAA response: The Authority agrees, and has inserted the proposal with minor amendment.

Comment on Rule 11.15

A commenter asked “who originates the content of Advisory Circulars”. He wanted to know how the content was to be validated and wondered if that would be a breeding ground for confusion and dissent.

CAA response: The advisory circulars originate from and are issued by the Authority.

Comment on Rule 11.21

One commenter said that this rule does not reflect the intent of the main heading.

NZALPA also considered that the title for Subpart B and its “scope” statement were at odds. They expected to see the provisions of Subpart B applying to Subpart E.

CAA response: These observations are valid, however 11.21 has now been amended to clarify that Subpart B does not apply to ordinary rules for airspace assignment use or ordinary rules that are airworthiness directives. The making of those rules will be covered independently in Subparts C and D at a later date.

Comment on Rule 11.23

A commenter wanted the word order of the heading changed so that the word “procedures” appeared first.

CAA Response: 11.23 of the NPRM has been omitted from the final rule. Its positioning in the NPRM was confusing from a chronological viewpoint and it was advisory in nature. The substantive requirements covering the institution of rule making procedures are now in 11.25 and 11.27 of the final rule.

Comment on Rule 11.25 and 11.27

A commenter said that naming a petitioner could be counterproductive because it could introduce personality conflict. He considered that petitions should stand on merit of content. He also said that “Petitioning for an exemption will almost certainly be to achieve a commercial rather than a safety related advantage. Appeals against exemptions will try to reduce an operator’s exemption advantage. Any intelligent process could be slowed or halted. Well written rules and intelligent updates could eliminate the petitioning for exemption process”.

Another commenter said that he thought that a reason for the new rules was to remove some confusion arising from many exemptions and dispensations under the present regulations. However, if there was to be exemptions, he favoured publication of the details as proposed because it provides for communication and consensus.

Another commenter wondered what would happen to comments to a published petition. He is concerned at what use the Authority might have for them, or put them to.

Wellington International Airport Limited supported the idea that anyone petitioning for a rule change will have a summary published under their name. They thought it would make the process "open and above board". Similarly, they supported publication of petitions for exemption. They saw that as a protection against unfair competitive advantage, that it would allow affected organisations to lodge an objection.

Royal New Zealand Aero Club (Inc) wants to restrict the avoidance of publication of petitions. They think it appropriate that petitioners have a summary of their petition published under their name. That would "help avoid any 'in-house' [the Authority] or 'minority group' slipping through a change without allowing the opportunity of public comment or following a transparent process". "Also, it is important that the Civil Aviation Authority be seen to publicly and openly petition ... to change the rules or grant exemptions".

One commenter saw petitioning for an exemption to a rule as a matter purely between an individual and the Authority. He made the observation that 11.25 appeared to require sufficient information in petitions for exemption for the Authority to make a favourable or unfavourable decision based solely on the petitioner's case and meeting an acceptable standard of safety.

The commenter considered that the actions required by 11.27(c) would be of no real benefit to the Authority or the petitioner. They would just prolong the process. He said, in addition, that the material provided or required to be provided, might be commercially sensitive. It would not be to the petitioner's advantage to release such information. He, therefore, considered that 11.27(c), (e), (g) and the publication of a summary of denial of a petition be deleted. At a later interview he reiterated that 11.25(b) required more than enough for the Director to make a decision on an exemption, that public comment would just "cloud the issue". He said that the delay (for publication of the petition) was too great. He said that exemptions [concessions] had not, to date, been a public process and there was no need to change that. He gave examples where such concessions, if they were generally known, might cause unease in an uninformed public arena. After further discussion, and elaboration of the procedures, the commenter said that he was a little more satisfied about them.

The Royal New Zealand Aero Club (Inc) wanted a right of appeal against denials of petitions for exemptions. They said that "There should be an automatic right of appeal against the Director's denial of a petition for exemption ...".

Wellington International Airport Limited supported a right of appeal against exemptions.

Ansett New Zealand Limited, referring to 11.51, said that there was no right of appeal against denials of petitions for rule making. They said that, while there was a need to prevent expensive and ongoing appeals and possible litigation, there remains a view that natural justice should prevail and an appellate structure should be introduced. They made other comments about such an arrangement which would "...strengthen client confidence in CAR ...".

CAA response: The Authority considers that publishing petitions for rule making and exemptions, allowing comments on them, and publishing the Authority's determination on such petition's, are necessary steps in achieving accountability, transparency and quality in rule making, and a 'level playing field' for those subject to the rules. These factors are seen as essential if rulemaking is to be truly consultative. Commercial interests of participants in the aviation system must be pursued within a rulemaking environment that recognises these broader objectives.

The Civil Aviation Act 1990 does not include the Director's decision to grant or refuse an exemption as one of the decisions that may be appealed against to the District Court. The criteria in section 37 of the Act together with the publication and comment procedures of Part 11 provide an adequate procedure for assessing the merits of a petition for exemption. However there is no reason why a petitioner denied an exemption could not request the Director to reconsider or why a petitioner could not re-petition at a later date, particularly if circumstances had changed.

The Authority does not support the proposal to introduce a formal right of appeal against denials of petitions for rule making. The power to make ordinary rules is vested in the Minister of Transport and rulemaking is at the Minister's discretion. The publication and comment procedures in the Civil Aviation Act 1990 and Part 11 of the rules allow for full consultation and informed decision making in rulemaking.

It is unlikely that the publication procedures for exemptions will cause "unease in an uninformed public arena". Section 37(3) of the Act does create a statutory requirement to publish the number and nature of exemptions in the Gazette. The detailed information however will be disseminated to the aviation industry rather than the general public.

NZALPA proposed an amendment to 11.25(a) given the definition of “rulemaking” it proposed.

CAA response: The proposal is used in 11.23 of the final rule.

NZALPA considered the reference to “Rules Docket” in 11.25(b)(1) should be a reference to “Rules Docket Clerk”.

CAA response: This has been amended as suggested.

Wellington International Airport Limited said that they thought the 120 days lead time required by 11.25(b)(2) for an exemption request was too long. They proposed that 60 days would be sufficient.

Aaleda Systems Limited Ltd considered that the 120 day lead time for exemptions would be too long in certain cases where instance waivers may be required at much shorter notice. They gave as an example imported aircraft with systems/equipment that provided equivalent safety but did not meet the strict wording of the rules.

CAA response: The Director considers 120 days to be an appropriate lead time for petitions for exemptions in view of the time needed for publication, distribution, comment, assessment and summary of comment, research and decision making. An exemption from a legal requirement is viewed as a serious matter requiring consultation and due consideration, not a spur of the moment decision. If the rules are properly consulted and well written there should be few exemptions needed. The Authority does not wish to regulate aviation safety through the granting of numerous exemptions from poorly defined rules. Despite this, provision is made for a shorter period “where good cause is shown”.

Air New Zealand engineering services commented that the word “test” in 11.25(b)(3) was incorrectly typed and should read “text”.

CAA response: The meaning of the term to “test” a rule [Concise Oxford dictionary] is “a means of so examining; a comparison or trial; circumstances suitable for this”. Some people may not be able to say exactly how the text of a rule should be amended, but they could describe a situation that tests the validity of the existing text and finds it wanting. That would leave it to the Authority to draft suitable wording to amend the rule. To force petitioners to draft proposed amendments may discourage them from petitioning.

The Law Commission questioned the meaning of the words “and how it will affect aviation safety” in 11.25(b)(6).

CAA response: The word “will” has been replaced with the word “may”.

NZALPA suggested the omission of part of 11.25(c) since it repeated material already covered in 11.25(b). The same suggestion was made in respect of the equivalent wording in 11.25(d). They also suggested the words "rule requested" in 11.25(c) be replaced with "proposal".

CAA response: The Authority agrees. 11.25(c) has in fact been deleted. Its contents are now located in 11.23(b)(6). 11.25(d) is now 11.503(b)(8).

A commenter said that 11.27(a) was not consistent with 11.33(a)(2).

CAA response: This is not the case. 11.27(a) (now 11.25(a)) deals with petitions for rulemaking. 11.33(a)(2) (now 11.29(h)) deals with rule making procedures (the NPRM process).

NZALPA, in its submission on mandatory content of rules, proposed various amendments to 11.27.

CAA response: Most of these have been incorporated into 11.27 with minor amendments.

The Law Commission said that the Authority needed to highlight the provision for "timely" comments at the end of 11.27(b).

CAA response: This is now covered in 11.25(c). The CARRIL will specify the time for comments on petitions.

The Royal New Zealand Aero Club (Inc) thought that the general exception in 11.27(i) excepting petitions from exemptions from Part 67 from the publication and comment procedures, was too broad. In their view, they should be limited to petitions that involve a person's medical history while all other petitions from Part 67 should follow public process. Later, the representative said that the Director should not have the discretion to issue exemptions without prior publication, " ... it puts too much pressure on the Director from interested parties" without the counterbalance from disinterested ones.

CAA response: In the Authority's view, any argument for applying or not applying any one of the requirements in Part 67 will inevitably lead to consideration of a person's medical history which raises the question of confidentiality. This exception will therefore remain as stated. It is now 11.505(h) in the final rule. It should be recalled that the Civil Aviation Act 1990 does not expressly require the Director to consult with interested persons before granting exemptions (contrast rulemaking). The granting of exemptions, while now made subject to consultation by Part 11, is at the Director's discretion.

Royal New Zealand Aero Club (Inc) considered that 11.27(j)(2) (excepting some petitions for exemptions from publication on the grounds that process will cause a detrimental delay) is too open to abuse. They considered that "detrimental delay" could result in many exemptions not being placed before public scrutiny since most petitions for exemption will involve a detrimental delay to the petitioner.

CAA response: Whether or not good cause exists for not publishing a petition for exemption is a matter for the Director's discretion. Detrimental delay is but one example of a range of factors that may or may not be considered. In any such case the Director weighs the seriousness of the detriment against any other relevant factors but in particular against the paramount need to be transparent and consistent in granting exemptions.

Comment on Rule 11.29

NZALPA said that an economic analysis must be provided at the NPRM stage of a rule proposal. "That economic analysis ought to provide answers to:

1. What objectives ought the proposed rule pursue? and
2. How should the objectives be accomplished?"

They said that "the answers given by an adequate cost-benefit analysis will be, respectively:

1. Those objectives the benefits of which equal or outweigh the cost of achieving them; and
2. The objectives should be accomplished for the lowest possible cost".

NZALPA offered the Federal Aviation Authority's economic analysis requirements for "major" and other rules as a good example. They pointed out that rule making "ought consciously avoid making large differentiations between the rules of one country and another". They said that "...For reasons of economy, simplicity, safety and even common sense, coincidence - rather than discordance - between civil aviation requirements of different jurisdictions is widely considered to be of optimal benefit". They offered a number of reasons for advocating New Zealand's conformity with international civil aviation norms, in particular with the FAR's and JAR's - the requirements of the major aviation states. These reasons explained why New Zealand is not a good laboratory for the testing of new parameters of aviation safety and highlighted the experience and technical expertise of the major aviation States. NZALPA therefore proposed the amendment of 11.29 to include the following in the list of items required in the NPRM:

“ An analysis of the economic consequences of the proposed rule quantifying, to the extent practicable, its estimated cost as well as its anticipated benefits and impacts; and

A reference to the Annexes or Rules or Requirements of each the Convention, FAR’s and JAR’s which relate to the subject matter of the proposed rule; and... ”

CAA response: The Authority agrees with NZALPA’s comments on the desirability for global uniformity in aviation regulation and for conformity with the major aviation States. However it is for these very reasons that the Authority does not consider it appropriate at this stage to incorporate the above amendments. It is because New Zealand is “not a good laboratory for the testing of new parameters of aviation safety” that the CAA will not be attempting in depth cost benefit analyses but rather looking at the relevant economic conclusions of the major aviation States. There may be any number of Annexes, FAR’s, and JAR’s that “relate” in some way to proposals - in each case it will be a question of judgement as to what is directly relevant. The broad requirements in the Civil Aviation Act 1990 to promote safety at a cost that is exceeded by the resulting benefit and to be consistent with the standards of ICAO, are considered to provide sufficient constraints (and flexibility) to ensure economic and internationally consistent rule making without the need for further prescription in the procedural rules.

The Law Commission said that in 11.29(a)(1)(v) the word “or” should be “and”.

CAA response: This provision has now been written in more general terms.

Comment on Rule 11.33

NZALPA proposed a replacement rule to reflect its general comment about the need for the rules to be written in mandatory terms.

CAA response: This provision has been written in mandatory but more general terms and its contents are now in 11.29(h) and (i).

Comment on Subpart C

A commenter said that 11.41 “should be included either in each subpart or put in a general section at the start of [the] whole document”.

NZALPA considered that if its recommendations to amend 11.27 and 11.29 were accepted 11.45, 11.51 and 11.53 could all be deleted.

NZALPA said that it does not understand the reference to “representative” in 11.47. They did not want the rule making functions to be devolved to another “representative”. Therefore, 11.47(b) ought to be deleted.

CAA response: With the exception of 11.49 (Adoption of rules), the provisions of Subpart C of the NPRM generally repeat material that is in Subpart B. Therefore, Subpart C (Processing of ordinary rules other than for airspace assignment and use) has, for reasons of economy, been omitted from Part 11. The requirements concerning the adoption of rules are now in 11.31 (Making of rules).

The Royal New Zealand Aero Club (Inc) said that the adoption of 11.49 “... allows an annotated, unscrutinised decision by the Civil Aviation Authority on the format of the final rule. Followed immediately by Ministerial agreement and signature”. They think that public scrutiny is important at this stage and the final rule should be circulated “... in order that the Minister can be petitioned or approached to not agree to, or sign, the final rule”. They said “... there needs to be given 28 days before signing ...”. “It is the last opportunity in the process to prevent an inappropriate CAA rule from being passed”.

Another commenter said that we need a provision for anyone to petition the Minister not to sign a Final Rule.

CAA response: Under the Civil Aviation Act 1990, the Minister of Transport must, before making an ordinary rule, consult with such persons and organisations as he or she considers appropriate. The publication and comment procedures in Part 11 allow for an informal and a formal round of consultation to be carried out on the Minister’s behalf plus any additional consultation considered appropriate. However, at some point in the process the consultation must cease and the rule must be made. Each rule contains a comprehensive summary of submissions received together with the Authority’s responses. In addition, notification of the signing of the rule is published in the Gazette and in the CARRIL. The rule may not come into force until at least the 28th day after its notification in the Gazette. During this period a rule may be “disallowed” by Parliament under the Regulations (Disallowance) Act 1989. Any person who considers a rule that has been made to be inappropriate may petition for the amendment or revocation of that rule.

The Law Commission wanted to know how, under 11.49 of the NPRM, a rule could be published in the Rules Register and then not be notified to the public. They thought that the Rules Register would make a rule public.

CAA response: The Civil Aviation Rules Register is part of the Civil Aviation Registry established by the Act. Notification of the signing of a rule is given in the Gazette and the CARRIL. The Civil Aviation Rules Register is the repository for the original final rule and for the copies that are distributed for public use.

Comment on Subparts D and E

NZALPA pointed out that 11.65 should be amended for conformity with its suggestions to 11.29 and that 11.69 should be amended for conformity with its suggestions to 11.49. They also wanted the words “or in any other manner that the Authority considers necessary or desirable” deleted from 11.75(b).

Wellington International Airport Limited also wanted the words “or in any other manner that the Authority considers necessary or desirable” deleted from 11.75(b). They thought the words were too broad and could allow the Authority to ignore petitions at whim. They said that if the purpose of the clause was to deal with vexatious, trivial or clearly undesirable petitions then the clause should say so.

Wellington International Airport Limited commented that the phrase “unless, for reasons of security, public notification is inappropriate” in 11.69 was contradictory. They asked how the rule could be complied with if it was a secret.

A commenter thought that 11.71 was good and simple. But he thought that exemptions should be dealt with separately and not be bound up with other provisions that made for complicated reading and confusion. Ansett New Zealand Limited wanted an amendment to Subpart E to require the CAA to contact and advise operators affected by airworthiness directives. They thought that it would provide a pro-active backup to the communications channels between manufacturer and operator. They thought, also, that it would provide an opportunity to discuss cost and impact problems with the Authority.

Ansett questioned the need to publicise the making of AD in newspapers. They said that such a course is likely to trigger unwarranted media attention to what may be a complex, perhaps contentious and probably emotional area. They thought that publication in the the CARRIL would be sufficient because it would reach all interested parties.

NZALPA considered that 11.85 should be deleted because the subject matter is dealt with in 11.29 as amended. Also, they do not understand the reference to “representative” in 11.87(b). They oppose any suggestion that the Authority can “devolve rule making functions otherwise than in accordance with its functions and powers under the Act”. In their submission, 11.87(b) ought to be deleted.

The Royal New Zealand Aero Club (Inc) said that its comment on 11.49 applied equally to 11.89.

A commenter said that there is no previous paragraph in Subpart E relating to the exemption petitioning process for AD’s described in 11.91.

CAA Response: The Authority has reviewed the contents of Subparts D and E of the NPRM and decided to delay the procedures for making airworthiness directives and making rules for airspace assignment and use. The submissions received on these Subparts (notably an early submission from Airways Corporation of New Zealand Ltd) raise issues of certainty, clarity, flexibility and completeness that can not be confidently addressed without further experience in the making of these kinds of rules. Subparts C and D of the final rule have been reserved for the addition of these procedures at a later date.

Conclusion

The Authority believes that Part 11 meets the public's need for transparent practices and procedures for rule making and exemptions. It believes Part 11 is consistent with the recommendations of the Swedavia - McGregor Report of 1988. Specific issues that have been identified in the comments have been addressed and, where appropriate, changes have been made to meet the concerns raised. The comments and all background material used in formulating the rules are held on the docket file and are available for public scrutiny. Persons wishing to view the docket file should call at Aviation House, 1 Market Grove, Lower Hutt and ask for Docket File No: 1020.

Regulatory Evaluation

There are no regulatory amendments or revocations associated with the coming into force of this rule Part.