

## ***CAA Medical Certification – rights of review and appeal***

In this edition of *The Legal Lounge*, I discuss the options available to participants to review or judicially challenge an adverse civil aviation medical certification decision.

### **1. Medical Convener Review**

#### *Scope of convener review*

Section 27L of the Civil Aviation Act provides a right of review to a medical convener appointed by the Minister of Transport. Applicants or licence holders may, within 20 working days, seek a convener review of any decision made by the Director:

- declining to issue a medical certificate under s27B(1), or imposing conditions or restrictions on a medical certificate under s27B(4)
- declining to issue a medical certificate under the flexibility provisions (s27B(2) and (3)), or issuing a medical certificate under those provisions with conditions or restrictions
- revoking a medical certificate under s27I(2)(b), on the grounds that the licence holder is unable to safely exercise the privileges to which the certificate relates
- revoking a medical certificate under s27I(3)(ii), on the grounds that the delegated ME issued the certificate other than in accordance with the Act or the terms of the delegation

There is no right of review to the convener if the Director suspends a medical certificate under s27I, and only limited rights to seek a convener review against decisions to amend or impose conditions on a licence, or to disqualify a person from holding a medical certificate, under s27I. Persons subject to any decision under s27I should review the Act or seek legal advice without delay to ascertain what options they have to seek a convener review (or to appeal against) any such decision.

Under section 27M, an application for a medical certificate may also be referred to the convener for advice, by agreement between the Director and the applicant, before the Director makes a decision on the application. Any agreement to make a referral under this section can only be made by the Director or his internal delegates and not external MEs. Further, the ultimate decision cannot be referred back to the convener if advice has already been obtained under this section.

#### *What the convener does*

The convener must review the medical decision and report back the results to the Director in writing as soon as practicable. The convener must draw on the advice and expertise of at least one appropriately qualified and experienced practitioner in relation to the medical issues under consideration, and must have regard to the purpose and scheme of the Act and the Director's duties (as they relate to aviation safety and entry control over participants) in forming his or her opinion. The convener may also require the applicant or licence holder at that person's expense to undergo any tests or examinations if considered necessary as part of their review.

The applicant or licence holder may, directly or through his or her medical experts, participate in the review process by providing relevant evidence regarding any medical matter at issue.

In practice, the convener will usually allow the applicant or licence holder to make a submission about the disputed medical decision, and then allow the Director an opportunity to respond before forming his or her final view.

#### *Final decision to be made by the Director*

Once the convener has reported back, the Director must, within ten working days of receiving the report, consider and make a determination on the final decision and notify the applicant accordingly. It should be noted that the Director is not obliged to follow the views or recommendations of the convener and may implement or follow a contrary determination. However, the reasons for doing so must be explained by the Director, and the convener's views should carry some weight if the Director's decision was subsequently challenged in Court.

#### *Limitations of convener review*

A convener review is limited to reviewing the merits of the medical decision reached. It is not a Tribunal, and thus is not a forum in which arguments as to the legality of the decision or any procedural errors can be aired. These are matters that may have to be pursued by way of judicial challenge. At times, the efficiency of the convener review process has also been inhibited by vacancies and absences of the convener or deputy convener. It is to be hoped that MOT can find ways to ensure convener reviews are not unduly delayed in future by personnel issues of this nature.

Those issues aside, a convener review generally provides a low cost and efficient way of having the medical decision 'peer reviewed' by a medical practitioner independent of the initial assessment and/or of the CAA medical certification unit. There is also a right of appeal concerning any decision of the Director regarding the implementation (or otherwise) of the results of a convener report. There may therefore be little to lose in submitting to a convener review in the first instance.

## **2. Right of Appeal**

Applicants and licence holders have a right of appeal to the District Court against any decision of the Director:

- concerning the issue of a medical certificate under s27B
- imposing or amending any conditions or restrictions under section 27I
- revoking, or disqualifying a person from holding, a medical certificate under s27I
- concerning the implementation of the results of a convener review under s27L or s27M.

Under the District Court Rules an appeal must be filed within 30 days. Section 66 of the Civil Aviation Act states that the decision appealed against continues in effect until such time as the Court rules on the appeal. The Court will reconsider the substantive merits of the decision, and may also rule on any questions regarding the legality of the decision made or the process followed. The Court may then confirm, reverse or modify the decision appealed against. If the Court finds in favour of the appellant, s66(4) permits the Director to implement a result contrary to that decision if he or she has "sufficient grounds supported by factors or evidence discovered since the hearing of the appeal". In my view there would have to be very compelling evidence to do so, and any such decision is subject to a further right of appeal.

### 3. Judicial Review

An applicant or licence holder could also bring a case by way of judicial review in the High Court. This is limited to reviewing the legality of the process, and not revisiting the substantive merits of the decision (although in some cases, a ruling that the process followed was inherently illegal may result in the decision itself being overturned, as recently occurred in a decision concerning Maritime NZ). It is also possible in the High Court to seek an interim injunction restraining the decision in issue from taking effect pending the full hearing. However, the Court of Appeal has recently affirmed (in the *Air National v Director of Civil Aviation* decision) that lodging judicial review proceedings and a concurrent application for an interim injunction in the High Court may not be used as a mere mechanism to circumvent the intent of section 66, which would otherwise require the decision to remain in effect until such time as an appeal is determined in the District Court.

None the less there may be legitimate reasons to bring a judicial review, for example in cases where it may be difficult to challenge the medical evidence or substantive decision, but where it is considered that the legal process followed was unlawful or seriously flawed. However in the absence of a finding of illegality, there is no guarantee of remedy and at best the matter may be reverted back to the Director to make a fresh decision. While there is no time limit on bringing judicial review proceedings, the length of time that has passed since the relevant decision occurred, and the existence of a statutory right of appeal, may also be taken into account by the High Court in determining what (if any) remedy it should impose.

#### **Summary**

In many cases, the convener review process will provide a low cost and efficient mechanism to test the substantive merits of an adverse medical decision of the Director. In other cases, there may be sufficient dispute about the merits of the medical decision to warrant a detailed judicial examination. It should be noted however that this is likely to be expensive and involve briefing and calling expert medical evidence on both sides. For the reasons outlined above, judicial review also has its limitations. If applicants or licence holders are considering a judicial challenge, it is important to seek legal advice or representation at the earliest opportunity to ensure all options are considered, and to ensure there is time to lodge an appeal if that is the preferred option.

In the next edition of *The Legal Lounge*, I will discuss some recent civil aviation medical decisions determined by the Courts on both sides of the Tasman.

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