

The Fit and Proper Person test –proposed adverse decisions

In the February issue of *The Legal Lounge*, I discussed the potential implications of criminal or traffic convictions and infringements on a person's fit and proper person (FPP) status within the civil aviation system, and the on-going obligation to disclose relevant information to the CAA.

In this issue of *The Legal Lounge*, I outline the circumstances that may give rise to a proposed adverse decision about a person's FPP status, the potential consequences if that decision becomes final, and who in the CAA can make those decisions. I also offer some general guidance on the legal process and issues to be aware of when responding to a proposed adverse FPP decision.

What circumstances may give rise to a proposed adverse FPP decision?

The Director of Civil Aviation may determine that a person is not fit and proper to participate in the civil aviation system for any purpose when:

- A person applies to enter the civil aviation system for the first time, or an existing participant applies to exercise a new privilege or obtain a new aviation document; or
- A CAA initiated investigation is undertaken to determine whether an existing participant remains fit and proper to continue to exercise any privileges or hold any aviation document.

An investigation could be initiated for a variety of reasons, including a poor safety record or a serious incident or accident involving an aviation document holder, or new information coming to light that may be considered relevant to a person's FPP status.

However, the Director must first issue a proposed adverse decision, which allows the affected person an opportunity to comment and make submissions, before a final decision can be made.

If a proposed adverse FPP decision is made, is a final adverse decision a “fait accompli”?

No. In addition to the statutory process that must be followed before a final decision can be made (discussed below), the Director must observe the principles of natural justice.

In essence, the Director must keep an open mind, and must take into account and properly and fairly consider any submissions and relevant new information, before making a final decision. Failing to do so would open up the Director to judicial challenge and risk the decision being overturned.

That said, persons subject to a proposed adverse FPP decision should be under no misapprehension that the Director has formed at least an 'interim view' on the person's fitness to participate in the system. For this reason, how any person responds to a proposed adverse FPP decision and manages their involvement in the process, is vital and may well have a real impact on the eventual outcome.

What are the potential consequences of an adverse FPP decision?

For new applicants, an adverse FPP decision could result in a decision to impose restrictions or conditions on the document or privileges sought, or not to grant the document or privileges at all. This is part of the “entry control” powers of the Director.

For existing participants, an adverse FPP decision could result in restrictions or conditions being placed on the participant's aviation document or privileges, or in the most serious of cases, revocation of the document or privileges.

Within a certificated organisation, an adverse FPP decision could see a person being removed from a CAA approved senior person position. This forms part of the Director's "exit control" powers.

Who in the CAA makes adverse FPP decisions?

The power to issue aviation documents and privileges is usually delegated to lower level managers and staff. However, in practice, given the serious potential consequences, if it is proposed *not* to issue a document or privilege on the basis of an adverse FPP decision, that decision will usually be elevated to the Director or at least to senior management to make. For existing participants, any decision to revoke or impose permanent conditions on an aviation document on the grounds of an adverse FPP decision *must* be made by the Director and cannot be delegated.

What is the legal process for adverse decisions, and what are some of the issues to be aware of?

1. *The Director must notify the affected person of the proposed decision(s) and the grounds for the proposed decision(s).*

The first point to note is that the notice will usually contain more than one proposed adverse decision. That is, a proposed adverse decision that a person is not fit and proper for any purpose, will necessarily lead on to a further proposed adverse decision dealing with the outcome. For example, it may be proposed to revoke a person's aviation document. It is important in responding, to address both proposed adverse decisions separately. This is because, even if a participant can't convince the Director that the proposed adverse FPP determination is wrong, he or she may still yet be able to convince the Director that the proposed outcome can be dealt with differently. For example, by placing restrictions on an aviation document rather than revoking the document. It will also best ensure that the participant has fully considered and responded to all of the issues that are relevant to each proposed adverse decision.

The second point to note is that the notice will usually only contain a short summary of the grounds relied on. A person wanting to see all information relevant to a proposed adverse decision will need to request this information from the CAA. If time is of the essence (for example if an aviation document is suspended), the information should be requested as soon as practicable, and the request should state that it is urgent due to the time limit to respond (refer to point 2 below). It can also assist if the information request is specific about what you want. Avoid making the request unduly wide, and inform the CAA of any information you already hold that does not need to be supplied again.

2. *The notice must specify the date by which submissions must be received and the date on which, unless the Director determines otherwise, the final decision will come into effect.*

In most cases, the Director will only allow for the statutory minimum time periods for receipt of submissions (21 days), and for the final decision to potentially take effect (28 days). Legally, the person who is the subject of the proposed adverse decision bears the responsibility to ensure the Director receives all relevant information and submissions within the time period stipulated in the notice. Failure to do so may lead to the final decision coming into effect seven days later.

Thus, it is important to start preparing any response well in advance of the deadline, and to ensure any supporting information can be obtained and sent to the Director on time.

If a participant believes more time is going to be needed to make submissions or provide relevant information, a formal written request should be made, and reasons provided.

While the Director is not obliged to accept such a request, the Director must consider it, and should be amenable to extending the deadline if there are legitimate reasons.

3. *The Director must notify any document holder whose operations will be significantly affected, and may notify any other document holder that may be affected, by the proposed decision*

The fact that third parties may be notified of a proposed adverse decision about an individual is something many participants may not be aware of, and may be of particular relevance for employees or senior persons within certificated aviation organisations. In some cases, the organisation may already be aware of and involved in a CAA investigation concerning the participant. If not, and while it may be a difficult one to call, participants may need to consider informing their organisations about the investigation to avoid an embarrassing situation later on, in the event a proposed adverse decision is made.

4. *After considering any submissions and other relevant information, the Director shall finally determine whether or not to make the proposed adverse decision, and notify accordingly*

If a final adverse decision is made, there is an automatic right of appeal to the District Court. The District Court may consider all of the evidence and may uphold, reverse or substitute the decision. Although there is no time limit in the Civil Aviation Act, the District Court Rules currently impose a time limit to appeal against such decisions, of 30 days from the date of the decision. Any person considering an appeal should therefore consult with a lawyer as soon as possible.

An adverse FPP decision may also be judicially reviewed in the High Court, although this is limited to reviewing the process followed and not revisiting the merits of the substantive decision. A successful outcome in this forum will usually result in the decision being submitted back to the Director for reconsideration.

Concluding remark

It would be prudent and advisable for any person subject to a proposed adverse decision to seek legal advice before responding, particularly where commercial interests are at stake. However, I hope that this article sheds some light on how the process works and some issues that participants may need to be aware of when faced with a proposed or final adverse decision.

In the next edition of *The Legal Lounge*, I will provide some further guidance and tips on some of the “do’s” and “don’ts” when responding or making written submissions on a proposed adverse decision. I will also address any questions or comments readers may wish to submit for consideration on the FPP issues discussed in this, and the previous edition, of *The Legal Lounge*.

Angela Beazer is a lawyer and Director of AMC Legal Services Ltd, a law firm specialising in aviation and public law matters. Previous articles from *The Legal Lounge* series may be viewed at www.amclegal.co.nz

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