**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2015-485-395**
**[2016] NZHC 1528**

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| UNDER | the Judicature Amendment Act 1972 a claim for declarations by this Court |
| IN THE MATTER OF | of a decision regarding the interpreation of Part 139 of the Civil Aviation Rules |
| BETWEEN | NEW ZEALAND AIRLINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED<br>Applicant |
| AND | DIRECTOR OF CIVIL AVIATION<br>First Respondent |
| | WELLINGTON INTERNATIONAL AIRPORT LIMITED<br>Second Respondent |

Hearing: 16 and 17 November 2015

Counsel: H B Rennie QC, E M Geddis and R McCabe for Applicant
F M R Cooke QC, M S Smith and D Johnson for First Respondent
V L Heine and S E Quilliam-Mayne for Second Respondent

Judgment: 6 July 2016

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**JUDGMENT OF CLARK J**

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*I direct that the delivery time of this judgment is*
*4 pm on the 6th of July 2016*

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## Introduction

[1] Under New Zealand civil aviation law aerodrome operators must ensure that a runway end safety area is provided at each end of a runway if the runway is used for certain services.[1] A runway end safety area is primarily intended to reduce the risk of damage to an aeroplane undershooting or over-running the runway.[2]

[2] This proceeding has arisen because the Director of Civil Aviation and the New Zealand Airline Pilots' Association, a body representing approximately 2,200 pilots and air traffic controllers, differ over the length the runway end safety area should be at the Wellington International Airport (Wellington Airport) in the event the runway is extended.

[3] In its application for judicial review the applicant, the New Zealand Airline Pilots' Association (NZALPA), says the Director has erred in his interpretation and application of New Zealand law governing the length of the runway end safety area at Wellington Airport. NZALPA says the Director's decision is flawed because it is wrong in law and because he has failed to properly consult NZALPA. It asks the Court to interpret the law according to its view and to return the Director's decision to him so that it can be reconsidered in light of the Court's interpretation of the law.[3]

## Background

[4] The evidence filed in support of NZALPA's application and the written submissions of Mr Rennie QC on behalf of NZALPA provide a useful starting point for understanding the background.

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1 The circumstances in which a runway end safety area must be provided are set out in Rule 139.51 of Civil Aviation Rule Part 139. Broadly speaking where a runway is used for regular air transport services operating internationally or for aircraft that have a seating configuration of more than 30 seats a runway end safety area must be provided.

2 Annex 14 to the Convention on International Civil Aviation ("the Chicago Convention"), Chapter 1 and Rule 1.1 of Civil Aviation Rule Part 1.

3 One of the issues for determination is whether the Director's acceptance of the runway end safety area, communicated in a letter dated 24 March 2015 from the Civil Aviation Authority, is a statutory power of decision or otherwise reviewable under the Judicature Amendment Act 1972. Throughout this judgment I have referred to the letter of 24 March 2015, which is the focus of NZALPA's challenge, as the "Director's decision". That is simply a convenient phrase and does not of itself determine the reviewability of the decision. That issue is addressed at [77]–[95].

[5] The tarmac at Wellington Airport is 2,081 metres in length. That length comprises the runway with a 60 metre strip and a 90 metre runway end safety area at each end. Both the 60 metre runway strip and the 90 metre runway end safety area are used as "starter extensions" to increase the distance available for planes on take-off. Yet, it is said, the "declared distances" available for landing and take-off remain insufficient for the larger commercial aircraft that regularly use the airport. Consequently the larger aircraft are required to operate under weight restrictions.

[6] In addition to the obvious safety implications NZALPA says the consequence of a shorter runway end safety area is to limit the size of aircraft that can operate on a commercial basis and therefore the overseas destinations that Wellington Airport can serve.

*Proposed extension to the north*

[7] The various suggestions to extend the runway mooted over the years crystallised in 2012 into a more specific proposal by Wellington International Airport Ltd (WIAL) to extend the runway by approximately 200 metres to the north.

[8] In August 2012 WIAL sought from the Director clarification as to the length of the runway end safety area necessary in the event of such an extension.

[9] In early 2013 NZALPA became aware of WIAL's intention to extend the runway. It wrote to the Civil Aviation Authority (the Authority) to register its interest in the issue and to express its position that any extension should provide for a runway end safety area of at least 240 metres in length or the use of arresting systems that provide for an equivalent level of safety such as the type of system known as engineered materials arresting system (EMAS).

[10] Throughout the remainder of 2013 NZALPA communicated with the Authority and had several meetings with the Authority concerning WIAL's proposal and its supporting analysis. NZALPA was concerned about the basis on which a runway end safety area length of 90 metres rather than 240 metres was being considered.

[11] On 18 February 2014 the Director advised WIAL that he accepted that if the runway was extended to the north it would not be practicable to provide a runway end safety area in excess of 90 metres length. This advice was conveyed to NZALPA in a letter from the Authority dated 20 February 2014.

[12] NZALPA was extremely concerned about the proposed 90 metre long runway end safety area and whether it would be compliant with the Civil Aviation Rules. From both a legal and technical perspective NZALPA considered the decision was flawed.

[13] In September 2014 NZALPA wrote to the Director to express its concerns. There followed a series of letters and exchanges between NZALPA and the Authority regarding the interpretation of the applicable rule. A fundamental difference of view between NZALPA and the Authority emerged as to the proper interpretation of the Civil Aviation Rules regulating the length of runway end safety areas. The relevant regulatory requirements are discussed in the next section of the judgment dealing with the legislative context. For the moment it is sufficient to note that the physical characteristics for runway end safety areas are regulated by Appendix A.1 of Part 139 of the Civil Aviation Rules which requires, among other things, that (emphasis added):

> (a) A RESA must extend—
>
> (1) to a distance of at least 90 metres from the end of the runway strip, and
>
> (2) **if practicable** —
>
> (i) to a distance of at least 240 metres from the end of the runway strip; or
>
> (ii) to the greatest distance that is practicable between the 90 metres required in paragraph (a)(1) and the 240 metres required in paragraph (a)(2)(i).

*Proposed extension to the south*

[14] Meanwhile, and unbeknownst to NZALPA, WIAL had in fact taken a decision to pursue a runway extension to the south. NZALPA became aware of the revised proposal on 13 March 2015.

[15] The Director considered the safety case for an extension to the south. His acceptance of a proposed 90 metre runway end safety area length was communicated to WIAL in a letter dated 24 March 2015.

[16] NZALPA was first advised by WIAL of the Director's decision in the context of an unrelated meeting on 27 March 2015. In NZALPA's view the Director's decision perpetuated the errors made in relation to the original northern extension. As well, NZALPA expected to be consulted by the Director in respect of WIAL's proposed extension to the south. It decided, therefore, to bring the current proceedings.

**Issues**

[17] The following issues are raised for determination:

1. What is the correct interpretation of Rule 139.51 and Appendix A.1(a) of Part 139 of the Civil Aviation Rules? In particular what meaning is to be given to the term "practicable"?

2. Is there a reviewable decision?

3. Was the Director's decision reached in error of law?

4. Was the Director's decision made without proper consultation with NZALPA?

**The legislative context**

*Civil Aviation Act 1990*

[18] In 1988 a review of civil aviation in New Zealand was completed. The resultant *Swedavia–McGregor Report*[4] and its recommendations found form in the Civil Aviation Act 1990 (the Act).

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[4] Swedavia AB and McGregor & Co *Review of Civil Aviation Regulations and the Resources, Structure and Functions of the New Zealand Ministry of Transport Civil Aviation Division* (April 1988) ["*Swedavia–McGregor Report*"].

[19] The Act establishes basic goals and objectives for the civil aviation system. Two of the primary objectives are to promote safety in civil aviation and ensure that New Zealand's obligations under international aviation agreements are implemented.[5]

[20] The Act's focus on safety has been discussed in a number of decisions.[6] The Act achieves its safety objective by establishing rules of operation and divisions of responsibility within the civil aviation system.[7] Responsibility for aviation safety rests on participants in the aviation system. This sharing of responsibility mirrors the recommendations in the *Swedavia–McGregor Report* which proposed a clear-cut division of responsibilities for safety between the state authority and participants in the system:[8]

> This will allow for lower order regulations and standards to recognise the responsibilities of the participants and to change the authority's role to being one of an overview rather than being involved in operating details which should be resolved by the operators.

[21] Detailed standards, specifications and qualifications for entry into the civil aviation system are found in rules and regulations made under the Act. Entry into the system is via aviation documents. An aviation document is[9]

> any licence, permit, certificate, or other document issued under this Act to or in respect of any person, aircraft, aerodrome, aeronautical procedure, aeronautical product, or aviation related service[.]

[22] Every person who does anything for which an aviation document is required is "a participant".[10] Participants must comply with the Act, the relevant rules and regulations made under the Act, and with the conditions attached to their aviation documents. Every participant shall[11]

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5 Civil Aviation Act 1990, long title.

6 *Andrews v Director of Civil Aviation* [2010] NZCA 505 at [14] referring to *Oceania Aviation Ltd v Director of Civil Aviation* HC Wellington CP162/98, 9 August 2000 at [86] and *Director of Civil Aviation v Paterson* HC Wellington CIV-2005-485-606, 27 April 2005 at [23] and 23 June 2005 at [20] and [59].

7 Civil Aviation Act, long title.

8 *Swedavia–McGregor Report*, above n 4, at [12.2.1].

9 Civil Aviation Act, s 2(1).

10 Section 12.

11 Section 12(3).

> ensure that the activities or functions for which the aviation document has been granted are carried out by the participant, and by all persons for whom the participant is responsible safely, and in accordance with the relevant prescribed safety standards and practices.

[23] The Authority is to undertake its safety, security and other functions in a way that contributes to the aim of achieving an integrated, safe, responsive and sustainable transport system.[12]

[24] The Director is the Chief Executive of the Authority.[13] His powers and functions are conferred by s 72I of the Act. They include:

(a) exercising control over entry into the civil aviation system through the granting of aviation documents under the Act;[14]

(b) monitoring adherence to regulatory requirements;[15] and

(c) taking appropriate action to enforce statutory and regulatory requirements.[16]

[25] In 2004 the statutory objectives of the Minister were modified. The Civil Aviation Amendment Act (No 2) 2004 (the 2004 Amendment Act) amended s 14 of the Act which provided prior to amendment:

> The principal functions of the Minister under this Act shall be to promote safety in civil aviation at a reasonable cost, and to ensure that New Zealand's obligations under international aviation agreements are implemented.

[26] Section 14 now provides:

> The objectives of the Minister under this Act are—
>
> (a) to undertake the Minister's functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system; …

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12 Section 72AA.
13 Section 72I.
14 Section 72I(3)(a).
15 Section 72I(3)(c).
16 Section 72I(3)(b).

[27] The objective of the Authority is to similar effect.[17]

[28] The effect of the legislative amendment means that the two-factor analysis of safety versus cost is no longer mandated. Safety, however, is not to be achieved at any cost.[18] Support for that view is to be found in the record of the passage of the legislation which became the Amendment Act

[29] The Transport Legislation Bill 2004 was the culmination of the preparation of the New Zealand Transport Strategy (NZTS) and a government transport sector review. The purpose of the review was to consider whether the transport sector had the capability to implement the NZTS.[19]

[30] Introducing the Transport Legislation Bill the Minister said:[20]

> The strategy is important in that it moves beyond the narrow focus of the past to a broader vision, to provide a truly integrated approach to transport planning and provision in support of wider social, economic, and environmental goals. The strategy sets out the Government's five objectives for transport as assisting economic development, assisting safety and personal security, improving access and mobility, protecting and promoting public health, and ensuring environmental sustainability.

[31] At the second reading the Minister said of the criteria which the Minister must take into account when establishing rules:[21]

> These criteria list a number of factors that the Minister must take into account, including the costs that particular rules might impose on the industries that are subject to the rules.

[32] At the Committee stage the Minister said:[22]

> A human life 10 years ago was worth about a quarter of a million dollars. I cannot bring to mind what a human life is worth these days…
>
> Now we have a more integrated approach that requires people to think differently. It requires people to take into account a range of factors and to amalgamate them. It moves us away from a safety and efficiency history. It

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17 Section 72AA.

18 D Ferrier and S Winson *Brookers Aviation Law* (looseleaf ed, Brookers, Wellington) at [CV14A.02].

19 Transport Legislation Bill 2004 (172-1) (explanatory note) at 1.

20 (12 August 2004**)** 619 NZPD 14895.

21 (9 November 2004) 621 NZPD 16731.

22 (16 November 2004) 621 NZPD 16897.

> takes us away from fragmentation. It takes us away from: "Let's do safety here and let's do economic undertakings there." … It requires us to integrate our thinking.
>
> …
>
> So let us integrate safety, which means we cannot have safety at reasonable cost alone; we have to have safety as a matter of balance against the other four objectives.

[33] And during the third reading the Minister said:[23]

> The changes that have been made to the legislation are technical in nature and largely respond to concerns about the prominence of safety and ensuring that the full range of New Zealand Transport Strategy objectives are considered in rule making. … Some have tried to argue that the concept of safety at reasonable cost should be retained. The New Zealand transport strategy reflects that New Zealand in the 21st century is a sophisticated place. Our society has a range of economic, social, and environmental goals. This legislation implements this Government's policy, as set out in its *New Zealand Transport Strategy*, by widening the focus on the relevant transport safety legislation, from safety at reasonable cost to contributing to the aim of achieving an integrated, safe, responsive, and sustainable transport system. This provides a framework that can address the full range of transport objectives, while taking into account economic, social, and environmental considerations, as well as those pertaining to safety. The legislation does not mean that safety is less important …

[34] Finally, the 2004 Amendment Act inserted as a mandatory consideration when rules are recommended and made "the costs of implementing measures for which the rule is being proposed".[24]

*The Act in summary*

[35] The Act creates a system in which rules of operation and divisions of responsibility are established in order to promote aviation safety. The primary responsibility of participants is to ensure that their operations are managed and carried out safely. The Director's role is to maintain an appropriate level of oversight of participants by auditing their performance against prescribed safety standards and procedures.[25]

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23 (30 November 2004) 622 NZPD 17228.

24 Civil Aviation Act, s 33(2)(fa).

25 *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629 at [22].

[36] The underlying statutory premise is that an acceptable level of safety is achieved and maintained by aerodrome operators and other participants complying with the applicable standards and their documented systems.

[37] The Director and the Authority have monitoring functions which they discharge by way of safety audits and enforcement action as necessary. But that oversight does not displace the responsibility participants have for complying with their statutory and regulatory obligations, the conditions attached to the aviation documents they hold, and for ensuring the activities they carry out under their aviation documents are carried out responsibly, safely and in accordance with relevant prescribed safety standards and practices.

[38] Although the Minister is no longer required to promote safety at reasonable cost the Act retains the key concept of balancing safety and cost but creates a framework in which the full range of transport objectives — including safety and economic considerations — are to be addressed. Whereas, in a sense, the Minister's principal objective prior to the 2004 Amendment Act pitched safety against reasonable cost alone, the statutory objectives now are to align the transport entities with the NZTS "without materially compromising safety or interfering with New Zealand's international obligations".[26]

*Civil Aviation Rules*

[39] The statutory objective of aviation safety embodied in the Act is achieved by the establishment and enforcement of Civil Aviation Rules (Rules). The balance struck in the Rules system is to enable the CAA to[27]

> maintain continuing regulatory control and supervision while providing maximum flexibility for participants to develop their own means of compliance.

[40] The Minister may from time to time make rules for purposes set out in s 28(1) of the Act. Those purposes include:

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[26] Transport Legislation Bill 2004 (172-1) (explanatory note) at 1.

[27] Civil Aviation Authority "Part 139 — Consultation" <www.caa.govt.nz/rules/Part_139_Consultation.htm>.

(a) implementing New Zealand's obligations under the Convention;

(b) assisting aviation safety and security; and

(c) assisting economic development.

[41] Ordinary rules made by the Minister and emergency rules made by the Director must not be inconsistent with the standards of the International Civil Aviation Organisation (ICAO) relating to aviation safety and security, to the extent adopted by New Zealand or with New Zealand's international obligations relating to aviation safety and security. In making, or recommending the making of, a rule regard shall be had to matters set out in s 33(2). Those matters include the recommended practices of ICAO relating to aviation and security, whether the proposed rule assists economic development and the costs of implementing measures for which the rule is being proposed.

[42] Before turning to the specific provisions governing runway end safety areas I make a final observation about the relationship of the Convention on International Civil Aviation[28] (commonly known as the Chicago Convention) to New Zealand's Civil Aviation Rules. By art 37 New Zealand as a contracting State has undertaken to collaborate

> in securing the *highest practicable degree* of uniformity in regulations, standards, procedures, and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. (Emphasis added.)

[43] The obligation which art 37 imposes on States is "flexible".[29] Article 37, in combination with art 38, which permits departures from international standards and procedures, provides some limited flexibility to States in giving effect to standards under the Convention. The potentially fluid nature of the binding character of Convention obligations recognises the diversity of conditions (economic, geographic

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[28] To which, in 1947, New Zealand became an original party and accordingly became an original member of ICAO constituted under the Chicago Convention. See Keith J's exposition of the international civil aviation setting in *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 at pp 273–275.

[29] *New Zealand Airline Pilots' Association v Attorney-General*, above n 28, at 275.

and climatic for example) covered by the Convention. Ultimately it is for the State to decide how its Convention obligations are to be met.

*Rules governing runway end safety areas*

[44] The Civil Aviation Rules relating to runway end safety areas were amended in 2006. The objective of the amendment was to[30]

> improve aviation safety by incorporating into Part 139 the ICAO Annex 14 requirements for runway end safety areas to be provided at each end of a runway.

[45] Clause 3.5 of Annex 14 details the standards and recommended practices for runway end safety areas:

> ***Dimensions of runway end safety areas***
>
> 3.5.3 A runway end safety area shall extend from the end of a runway strip to a distance of at least 90 m where:
>
> — the code number is 3 or 4;[31] and
>
> …
>
> 3.5.4 ***Recommendation*** — A runway end safety area should, as far as practicable**,** extend from the end of a runway strip to a distance of at least:
>
> — 240 m where the code number is 3 or 4; or a reduced length when an arresting system is installed.

[46] Aerodrome design requirements are set out in Rule 139.51.[32] That rule prescribes the circumstances when an applicant for the grant of an aerodrome operating certificate must ensure that a runway end safety area compliant with Appendix A.1 is provided at each end of a runway.

[47] Rule 139.51(c) provided at the time that:

> The physical characteristics, obstacle limitation surfaces, visual aids, equipment and installations, and RESA provided at the aerodrome must be acceptable to the Director.

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30 Letter from the Director accompanying the final version of the Rule to be signed by the Minister.

31 It is unnecessary to discuss the provisions relating to aerodrome reference codes. They are provided in Appendix B of Part 139. It is sufficient to note that Wellington Airport is "Code 3".

32 Rule 139.51 has been amended twice since the Director's decision on 24 March 2015 but the amendments do not bear on the issues in this proceeding.

[48] The physical characteristics of a runway end safety area at issue in this proceeding, with which the aerodrome operator must ensure compliance, are prescribed in Appendix A.1 of Part 139 (emphasis added):

> **A.1 Physical characteristics for RESA**
>
> (a) A RESA must extend—
>
> (1) to a distance of at least 90 metres from the end of the runway strip, and
>
> (2) **if practicable**—
>
> (i) to a distance of at least 240 metres from the end of the runway strip; **or**
>
> (ii) to the greatest distance **that is practicable** between the 90 metres required in paragraph (a)(1) and the 240 metres required in paragraph (a)(2)(i).
>
> …

[49] Before the Minister made the new rule the Authority engaged in the consultation procedure which s 32 of the Act requires. A number of submitters commented on the proposed use of the term "practicable" with respect to runway end safety area requirements. It was considered to introduce an element of judgement by the regulator which could be subject to change. Some submitters would have preferred to see the term either defined or removed. The Authority agreed the term required interpretation and advisory material on the processes to be followed would be "published as individual cases are dealt with". The Authority recommended[33]

> that anyone contemplating developments to the physical characteristics of an aerodrome include dialogue with the CAA early in their plans as the interpretation of what is practicable for RESA will be on a case by case basis.

[50] Four material conclusions are apparent from the provisions governing runway end safety areas:

(a) Physical characteristics are closely prescribed.

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[33] D Watson *Runway End Safety Area (RESA): Summary and Analysis of, and CAA Response to, Comments and Submissions on NPRM 04-03 Received During Public Consultation* (Civil Aviation Authority, September 2005) at 23–24.

(b) Responsibility for compliance rests on the aerodrome operator.

(c) A runway end safety area must be acceptable to the Director.

(d) A runway end safety area cannot reasonably be acceptable to the Director under Rule 139.51(c) if it does not comply with the physical requirements, including length, prescribed in Appendix A.1 of Part 139. In essence the requirement is that the runway end safety area must be the greatest practicable distance from the end of the runway strip up to at least 240 metres but no less than 90 metres.[34] Consequently, whether it is reasonable or lawful for the Director to find a particular runway end safety area length acceptable turns on the Director's approach to practicability.

[51] Thus the first issue that arises is one of interpretation. What meaning is to be given to the term "practicable" in Appendix A.1(a)?

**First Issue — What meaning is to be given to the term "practicable"?**

*NZALPA's submissions*

[52] As Mr Rennie submitted "practicable" is not defined in the Act and has not been the subject of judicial consideration in the context of civil aviation legislation. The meaning of "practicable" must be "ascertained from its text and in the light of its purpose".[35]

[53] Mr Rennie referred to the Oxford Dictionary definition of practicable:[36]

1. Capable of being put into practice, carried out in action, effected, accomplished or done; feasible.

2. Capable of being actually used or traversed, as a road, passage, ford etc.

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34 The reasons for this conclusion appear at the end of the analysis of the first issue.
35 Interpretation Act 1999, s 5(1).
36 *Oxford English Dictionary – Volume XII* (2nd ed, Clarenden Press Oxford, 1989) at 269.

[54] There is no need to go beyond this ordinary meaning when interpreting Appendix A.1(a); any attempt to gloss the term or to reduce it to an interpretative test is unnecessary and helpful.

[55] In the context of Appendix A.1(a) "practicable" means "feasible" that is, "actually able to be constructed". The assessment of what is actually able to be constructed in a particular situation requires a consideration of practical matters such as the nature of the site in question, available engineering technology, and potential construction options and alternatives. Mr Rennie accepted that resources, including costs, will not be irrelevant but they will not be determinative. An expensive construction will not mean the construction is not "practicable".

*Director's submissions*

[56] For the Director Mr Cooke submitted that the Director's assessment of whether a runway end safety area is acceptable is to be understood against the latitude contemplated by the Chicago Convention. The term "practicable" is inherently evaluative and subjective. Ultimately it is the Director's judgement that prevails because the assessment the Director is required to undertake is against a legislative background which accommodates and approves a margin of appreciation for each of the Contracting States. The standards set at the international level provide a degree of latitude to each of the Contracting States to implement the standards as they find practicable. Furthermore, the term "practicable" is used throughout the international materials in a way that permits States to depart from an international standard where compliance is impracticable[37] and to follow recommendations to the extent it is practicable to do so.

[57] What is practicable is not necessarily that which is possible. Practicability involves "some element of pragmatic limitation".[38]

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[37] Departure from an international standard is a formal step commencing with immediate notification to ICAO. That formality has no place in the case of international recommendations with which States must only comply if they find it practicable to do so.

[38] From the Director's file note which is considered in the next section of this judgment. See Appendix 2 to this judgment.

[58] The feature of "pragmatic limitation" was an important concept in the Director's consideration of the proposal and is a key difference between the approach of NZALPA and the approach of the Director to practicability. A variety of considerations may be permissible including questions about what is feasible, practical or reasonable. Almost inevitably costs will be relevant and where a cost-benefit analysis has formed part of the assessment of "practicability" that of itself is not erroneous.

*WIAL's submissions*

[59] Ms Heine on behalf of WIAL emphasised the margin of appreciation to be afforded to the body charged with administering and overseeing the civil aviation regulatory environment.

[60] Ms Heine submitted that "practicable" is an inherently flexible term used to denote a wide range of obligations. Its meaning in each case must be derived from the context in which it is used. This context includes:

(a) the Act which in turn requires account to be taken of the cost of implementing measures for which a rule is proposed; and

(b) the fact that in the global aviation industry costs of implementing measures including safety improvements are measured against the benefits to be delivered (according to expert affidavit evidence filed on behalf of WIAL).

[61] Ms Heine further submitted that there is nothing to say that "practicable", in and of itself, will always import some measure of reasonability. Neither can it be said that it will inevitably carry a meaning of "possible" or "feasible".

*Analysis*

[62] In ascertaining the meaning of "practicable" in the context of Appendix A.1(a) I am not greatly assisted by authorities construing the word in different contexts nor, really, by dictionary definitions. The parties do not seriously dispute its

grammatical meaning yet the grammatical meaning provides inadequate guidance as to the considerations that are permissible when deciding under Part 139 the distance a particular runway end safety area must extend at any particular aerodrome.

[63] The concept of practicability pervades Part 139. From the many and varying contexts in which it appears it is evident that different considerations will apply in each of those contexts.[39] This breadth of use suggests the inquiry into the meaning of "practicable" in Appendix A.1(a) must be approached conceptually rather than searching for a static and definitive meaning which plainly, in its legislative setting, it does not have.

[64] Accordingly, the injunction in s 5 of the Interpretation Act 1999 becomes acutely relevant. It is necessary to identify the legislative purpose to ensure that it is not obstructed but advanced by the interpretation of "practicable".

[65] In order to promote aviation safety the Act establishes rules of operation and divisions of responsibility within the New Zealand civil aviation system. Importantly, also, the Act is to ensure that New Zealand's obligations under international aviation agreements are implemented. Furthermore, the 2004 Amendment Act broadened the statutory objectives of the Minister and the Authority. Both the Minister's and the Authority's functions are to be undertaken[40]

> in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system.

[66] Achieving this objective will entail potentially complex value judgements.

[67] Four further contextual influences bear on the meaning of practicable:

(a) the Chicago Convention, in particular chapter 3 of Annex 14 which requires a runway end safety area to extend at least 90 metres and recommends[41] that it should "as far as practicable" extend to a distance of 240 metres or a reduced length when an arresting system

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39 See Appendix 1 to this judgment.
40 Civil Aviation Act, ss 14 and 72AA.
41 At [3.5.4].

is installed.

(b) the Ministerial rule-making power and the mandatory nature of the costs consideration in exercising that power;

(c) the *Swedavia–McGregor Report* which was the genesis of the Act in its present form. The Report articulated as the "guiding star" for aviation safety policy[42]

> … the simple fundamental principle … that the benefits to society of any activity should outweigh its costs to society.
>
> …
>
> To find the economic level of effort to devote to such risk reduction, it is necessary to assess the *benefits* so that they can be set alongside the *costs*. This is in order to ensure that the resources used to reduce risk are used efficiently, and that the total budget for accident risk reduction is reasonable.

(d) Part 139 itself which, from the many references to "practicable" in diverse contexts, demonstrates different considerations will be relevant to determining in each particular context whether something is practicable or not.[43]

[68] The foregoing contextual drivers demonstrate that in Appendix A.1(a) "practicable" is not to be confined to that which is actually able to be constructed "without reference to any additional balancing test".[44] Such an approach confines practicability to that which is physically able to be accomplished. Yet where the Rules insist on compliance with a measure if physically practicable the Rule is drafted explicitly to have that fixed and definitive effect. Its meaning is not left to implication. Appendix E.3.6 of Part 139, for example, requires prescribed lighting systems to be provided "where physically practicable". Within the body of Part 139 itself a clear distinction is drawn between that which, to use NZALPA's term, is "actually able to be constructed" and that which is "practicable".

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42 *Swedavia–McGregor Report*, above n 4, at [9.1]–[9.2].
43 See Appendix 1 to this judgment in particular (7) and (8) of the Appendix.
44 Applicants Written Submissions at [82] and [85(a)].

[69] NZALPA's view of the relevance of costs to what is practicable is unduly refined. It accepts that what is "practicable" is not entirely divorced from the availability of resources. It accepts that costs are a relevant consideration. But it seems not to accept that a cost-benefit analysis is appropriate. It is accepted that a cost-benefit analysis would be relevant to determining what is "reasonably practicable" but Mr Rennie submits that "practicable" is not the same as "reasonably practicable"; there may be some actions that it is "practicable" but not "reasonably practicable" to take.

[70] In this legislative context these fine calibrations of meaning are not warranted. In context "practicable" is not a binary or fixed standard. Only a simple inquiry is needed to determine whether a binary or fixed standard, such as the minimum required length of a runway end safety area, is met: "Is the RESA length 90 metres? Or is it not?" By contrast, to determine what is practicable will be to ascertain whether a state of affairs obtains. The determination will be by reference to a variety of potentially complex facts.

[71] Appendix A.1(a) has not enumerated which facts are relevant, or how they are to relate to one another in the ascertainment of what is or is not practicable. There is no dispute that a mix of facts will be relevant. NZALPA concedes that costs are relevant although it contends that a cost-benefit analysis is an erroneous approach when ascertaining whether a particular runway end safety area is practicable. But the legislation does not support this degree of prescription. There is no basis for holding that a cost-benefit analysis has no proper place when ascertaining practicability. In fact the *Swedavia–McGregor Report* concluded a[45]

> cost-benefit analysis should, wherever practicable, be a mandatory tool for rule making in discretionary areas.

*Summary*

[72] In summarising the meaning of Appendix A.1(a) it is helpful once more to set out the provision (emphasis added):

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45 *Swedavia–McGregor Report*, above n 4, at 281.

(a) A RESA must extend—

(1) to a distance of at least 90 metres from the end of the runway strip, and

**(2) if practicable—**

(i) to a distance of at least 240 metres from the end of the runway strip; or

(ii) to the greatest distance **that is practicable** between the 90 metres required in paragraph (a)(1) and the 240 metres required in paragraph (a)(2)(i).

[73] The proper construction of Appendix A.1(a) is that it requires a runway end safety area to be the greatest practicable distance from the end of the runway strip up to at least 240 metres but no less than 90 metres.

[74] This interpretation reflects both the standard in cl 3.5.3 of Annex 14 and the recommendation in cl 3.5.4.

[75] Ascertaining the practicability of the length of a runway end safety area will require a case by case assessment engaging a range of complex factors which will encompass:

- elements of physical feasibility, and reasonableness — because the unvarnished formula[46] in Appendix A.1(a) does import an element of pragmatic limitation. Simply because something is possible does not mean it is practicable in all contexts.

- a balancing exercise in which safety considerations will be weighed against the cost and difficulty of extending a runway end safety area.

- potentially a cost-benefit analysis which may be an aspect of a safety case.

[76] A case by case assessment is commensurate with the degree of flexibility the Chicago Convention contemplates. The statement in Chapter 1 of Annex 14 references this point: where Annex 14 sets out minimum aerodrome specifications

[46] By comparison, for example, with "physically practicable".

for aircraft having the characteristics of those currently operating or planned for introduction —

> … any additional safeguards that might be considered appropriate to provide for more demanding aircraft are not taken into account. Such matters are left to appropriate authorities to evaluate and take into account as necessary for each particular aerodrome.

**Second Issue — A reviewable decision?**

[77] NZALPA pleads that the Director's letter of 24 March 2015 in which he confirmed to WIAL his acceptance of a 90 metre runway end safety area is a reviewable decision. This letter is the focus of the relief which NZALPA seeks in its statement of claim. In the course of the hearing focus was on a file note dated 20 March 2015.

[78] I summarise the file note and letter in the following paragraphs but because they are central to the case both documents are reproduced as Appendices 2 and 3 to this judgment. Where I refer to the "Director's decision" it is to the view of the Director as reflected in either or both of these documents.

*File Note dated 20 March 2015*

[79] In this comprehensive file note the Director documented his view that WIAL's decision to provide a 90 metre runway end safety area in the event it extended the runway was soundly based and acceptable in terms of Rule 139.51(c). The Director:

- referenced the materials he had read and considered.

- summarised the information on which his decision was based.

- explained why he considered a 90 metre runway end safety area provided an acceptable level of safety at the airport.

- noted he had not specifically considered whether the use of an EMAS would provide additional safety benefits.

- emphasised that should there be material change in the information on which his view was based or significant change in the regulatory requirements he would need to revisit his view.

*Letter dated 24 March 2015*

[80] This letter to the Chief Executive of WIAL was signed by Chris Ford, General Manager Aviation Infrastructure and Personnel. The letter was to the point and communicated the Director's acceptance of the proposed 90 metre runway end safety area. Mr Ford highlighted that

- the Director's view was based on the material WIAL had provided and if there were to be any material variation in WIAL's proposal his view might be different.

- the analysis of the safety of a 90 metre runway end safety area was crucial to the Director's view.

- the projected cost of providing the runway end safety area, as analysed by McGregor & Co, was also a significant relevant factor in considering practicability.

- if WIAL decided to proceed with the runway extension both the safety and cost analyses would have to be updated with robust data.

- similarly, if the legislative context significantly changed the Director would need to revisit his view on the basis of the facts and the law at the time.

[81] Nothing turns on the fact that the letter was not signed by the Director. In his affidavit the Director spoke of it as "my letter to WIAL dated 24 March 2015". On 17 April 2014 the Director forwarded to NZALPA a copy of his letter along with "supporting file note".

*Analysis*

[82] Mr Cooke submitted the proceeding was not correctly characterised as a judicial review challenge because no statutory power of decision had been exercised by the Director. Neither was there a proposed exercise of a statutory power. Rather, NZALPA's challenge is to a view formed by the Director and the advice he gave "relating to the perceived acceptability of the future plans of WIAL". The view was provided in advance, even, of a concrete proposal. Furthermore the Director's view was expressed to be subject to material change in information and to legislative amendment. Compliance with the rules could become relevant at the stage of renewing WIAL's aerodrome operator's certificate.

[83] Mr Cooke did not dispute that the Court nevertheless had a role in the proper interpretation of the legislation so that those charged with administering it could do so lawfully.

[84] For the reasons that follow I have reached the view that the steps taken by the Director, as reflected in his letter and file note, are amenable to review.

[85] The Director has the functions and powers conferred or imposed on him by the Act or regulations or rules made under the Act.[47] One of those functions is to determine whether or not a runway end safety area is acceptable. The Director's determination of whether or not a runway end safety area is acceptable will "bite" when an application is made for the grant or renewal of an aerodrome operator certificate. Such an applicant must ensure a runway end safety area complies with the physical characteristics prescribed in Appendix A.1. But there will be occasions short of that crunch point where the Director undertakes to consider and determine whether a runway end safety area is acceptable. When WIAL approached the Director in 2012 seeking clarification of proposed runway end safety area dimensions for the proposed northern runway extension the Director embarked on that assessment and the affidavit evidence and exhibits narrate the ensuing rigorous process. In his affidavit evidence the Director said that he is not required to give

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[47] Section 72I(2).

preliminary views on the acceptability of a runway end safety area length but he decided

> … it was not desirable to require an aerodrome operator to undertake costly construction without an initial view on whether the RESA or other changes were likely to be acceptable to the Director.

[86] Because the Director is not statutorily bound to give his view about the acceptability of the physical characteristics of a runway end safety area in advance of an application for the grant or renewal of an aerodrome operator certificate the view he provided on this occasion has been cast by counsel as a "qualified view". That characterisation may be regarded as expedient rather than determinative of the question whether the Director's decision is justiciable.

[87] Based on the factual and regulatory context at the time of his analysis the Director reached a concluded view about whether the 90 metre runway end safety area proposed by WIAL would be acceptable in terms of Rule 139.51(c). His file note supports that conclusion:

(a) The Director described his significant reliance on the McGregor & Co report in forming his "conclusions" about the acceptability of the proposed runway end safety area length.

(b) While the Director accepted the longer the runway end safety area the lower the level of residual risk he "concluded" the 90 metre runway end safety area provides an acceptable level of safety.

[88] The Director's view was expressed to be subject to any material variation in core information provided to him or material change in the legislation. Mr Cooke submitted that these caveats demonstrated the preliminary nature of the decision under challenge and therefore its non-reviewability. That is not how I regard the qualifications.

[89] A material change in the underlying information or regulatory requirements would require the Director to revisit his assessment. But this does not make his first view preliminary.

[90] Were it a truly "preliminary view" of the type considered by the High Court in *Marlborough Aquaculture Ltd v Chief Executive of the Ministry of Fisheries*,[48] a decision upon which Mr Cooke relied, the Director would be free to change his mind.

[91] In *Marlborough Aquaculture Ltd* the Court struck out of the plaintiff's judicial review proceeding on the basis that the preliminary decision being challenged was not a proposed or purported exercise of power in terms of s 4 of the Judicature Amendment Act. The Ministry had agreed to inform Marlborough Aquaculture of the Ministry's preliminary decision with respect to its application for a marine farm permit and to give the company an opportunity to comment or provide further information before a final decision was made. The Ministry wrote:

> In accordance with the agreement, I am informing you of the preliminary decision and enclosing a copy of the evaluation report so that the applicant is given the opportunity to comment or provide any further information before a final decision is made.

[92] The Judge was satisfied the preliminary decision was simply part of a process of consultation; no indication was given that it would be the final decision and every indication was given that the decision "was now out for comment and debate".[49]

[93] By contrast the Director's decision was neither provisional nor a "preliminary intimation".[50]

[94] A reviewable decision does not lose its amenability to review by virtue only of the possibility for material change in the underlying assumptions on which it is based. The qualifications to which the Director's view was expressly subject do not deprive his decision of the features which make it reviewable.

[95] The Director's decision was reached and communicated to WIAL in exercise of his public regulatory functions and powers. The Director intended it to be relied on and he confirmed in his affidavit evidence that it is able to be relied upon. Short

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48 *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries* [2003] NZAR 362 (HC) at [14].

49 At [22]–[23].

50 As the decision at issue in *Law Practitioners Co-operative Society Ltd v Government Actuary* [1975] 2 NZLR 96 (SC) was described in *Marlborough Aquaculture Ltd*, above n 48, at [20].

of material variations of the kind to which the Director's letter referred the Director cannot simply change his mind. In short the Director's decision was and remains determinative (of the question whether the proposed runway end safety area length was acceptable) and it was and remains operative — unless of course there is material change in the factual or legislative underpinnings.

**Third issue – Was the Director's decision reached in error of law?**

[96] NZALPA contends that the Director's decision was in error of law in the following respects:

(a) The Director adopted an incorrect test to define the term "practicable" in Appendix A.1(a).

(b) The Director incorrectly relied upon the second McGregor & Co report in reaching his decision.

(c) The Director failed to consider EMAS.

(d) The Director failed to consider the possibility of reducing the declared distances on the proposed runway extension in order to allow for a runway end safety area of 240 metres.

[97] I address each contention in turn.

*(a) Director's approach to "practicable" — wrong in law?*

[98] Rule 139.51(c) requires the runway end safety area provided at an aerodrome to be acceptable to the Director. The essence of this part of NZALPA's case is that the proposed 90 metre runway end safety area could not be acceptable to the Director because his approach to the interpretation of "practicable" was flawed in three respects:

(a) His interpretation incorporated elements of feasibility and reasonableness.

(b) From there, the Director determined that "the test of practicability involves balancing safety benefits to be achieved against the associated cost and difficulty".

(c) Finally, relying on the economic cost-benefit analysis in the second McGregor & Co report, the Director concluded it was not "practicable" for WIAL to provide a runway end safety area beyond 90 metres because "the additional safety benefits to be achieved in extending the runway end safety area are significantly outweighed by the cost" of construction.

[99] The fundamental error of law is said to arise because the three steps have brought the Director some considerable distance from the statutory language:

> "Practicable" has become "reasonable" which has in turn been reduced to an economic cost-benefit balancing test. That, it is submitted, represents a fundamental error of law.

*What meaning of "practicable" did the Director adopt?*

[100] On 31 October 2013 the Authority wrote to NZALPA to summarise the Authority's interpretation of "practicable":

> As you are aware, the provisions of Appendix A of Part 139 require that the RESA must be the greatest 'practicable' distance from the end of the runway strip up to 240 metres, but no shorter than 90 metres. The dictionary definitions of the word 'practicable' suggest something "able to be done or put into practice successfully" and "reasonably capable of being accomplished; feasible". The dictionary definitions denote elements of "feasibility" and "reasonableness". The use of the word 'practicable' in Part 139 necessarily imports some element of pragmatic limitation. Simply because something is possible, it does not mean that it is "practicable", in all contexts, for that thing to be done.

[101] The Authority's consideration of "practicable" was elaborated in a memorandum to the Director on 16 December 2013. It set out the explanation immediately above and continued:

> In essence, your consideration of what is "practicable" may involve an element of "reasonability" and this element may be informed by cost benefit considerations. Accepting this, the "practicability" test is a high one. The fact that resources may need to be allocated to implement and comply with a

> rule or standard may necessarily mean it is expensive or inconvenient for an aerodrome operator. Such expense or inconvenience in and of itself does not negate the validity of the standard, nor the need for compliance with it.

[102] When the Director wrote to WIAL on 18 February 2014 conveying his view about the proposed extension to the north he said of the 90 metre runway end safety area:

> …You sought CAA consideration and advice on your view that 90m RESA would provide compliance with Part 139 in such circumstance.
>
> The CAA subsequently required Wellington International Airport Limited (WIAL) to demonstrate due diligence with respect to meeting its compliance requirements by conducting a safety assessment and cost/benefit analysis to substantiate its view with respect to provision of a 90m RESA for an extended runway. These studies were also required because the CAA accepts that ultimately, whether an individual RESA is of the greatest practicable length will come down to a balancing exercise in which safety considerations (benefits) are weighed against the cost and difficulty of providing a RESA length greater than the minimum required in Rule Part 139.

[103] When the Director came to consider the southern proposal he set out his full decision-making process in his file note dated 20 March 2015. The Director summarised his position:

> In summary, I consider the decision of WIAL to provide a 90 m RESA in the event that they extend their runway to be soundly based, and provided the RESA complied in all other respects with the requirements of CAR 139 (those not related to length), my view is that a 90 m RESA would be acceptable in accordance with CAR 139.51(c).

[104] In his affidavit the Director addressed the summary in his file note:

> In giving my view I was aware that, although a longer RESA is always safer, the costs of implementing a longer RESA must be weighed against the costs of not doing so. The fact that a longer length under Appendix A of Part 139 may involve significant cost or the allocation of significant resources does not itself mean that compliance is "impracticable" but the cost and difficulty must be carefully weighed against the safety benefits to be achieved. This is where the cost/benefit analysis is relevant, as is the "practicable" consideration. Having looked at the extensive data and research collected on the proposed southern runway extension I came to the view that a 90 metre RESA was acceptable.

[105] NZALPA criticises the cost-benefit analysis as subordinating the objective of safety to the issue of cost. The criticism is unfounded.

(a) The application of the cost-benefit analysis technique to aviation has been well established since the 1970s.[51]

(b) The criticism tends to fly in the face of the evidence. The Director's approach involved a balancing exercise in which safety considerations (benefits) were weighed against the cost and difficulty of providing a runway end safety area length greater than the minimum required in Rule Part 139. The safety objective is integrated into the requirement for a 90 metre runway end safety area, the minimum length established by the Chicago Convention standard. The cost-benefit analysis was properly applied by the Director who accepted the Authority's briefing memorandum of 16 December 2013 which concluded:

> …expense or inconvenience in and of itself does not negate the validity of the standard, nor the need for compliance with it.

(c) The Director's use of a cost-benefit analysis was not a subordination of safety to cost, but a process by which safety benefits could be rendered in economic terms to be understood properly alongside costs.

[106] It is WIAL as the aerodrome operator who has the responsibility for judging and deciding the characteristics of a runway end safety area, including its length, with the Director having the function of deciding whether its characteristics are acceptable. Providing facts in the mix were relevant to this assessment, the weight to be given to the facts is a matter for WIAL and the Director.

[107] The Director's approach to what was practicable accorded with the approach which I have determined is permissible in determining what is practicable for the purpose of Appendix A.1(a).

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[51] *Swedavia–McGregor Report*, above n 4, at 115.

[108] The Director did not apply a different standard from that expressed in Appendix A.1(a). The Director did not err in assessing WIAL's decision to be soundly based and finding the proposed runway end safety area acceptable to him.

*(b) Director's reliance on McGregor & Co report — wrong in law?*

[109] The argument is that the Director incorrectly relied upon the second McGregor & Co report in reaching his decision.

[110] WIAL provided two reports from McGregor & Co at the Authority's request. The second related to the proposal to extend the runway south. As Ms Heine summarised it the report

> applies a cost-benefit analysis by determining the net present value of the safety benefits to be obtained from a longer RESA and comparing them to the cost of providing a longer RESA of either 140 metres or 240 metres.

[111] Ms Heine drew the Court's attention to an important feature of the report: that the cost of the runway extension project itself was largely irrelevant to McGregor & Co's analysis. Its focus was on the marginal benefit of a runway end safety area being longer than the required minimum.

[112] Mr Rennie submitted that the Director "was wrong as a matter of law" to rely on the cost-benefit analysis contained in the report when determining whether it was practicable to for WIAL to provide a runway end safety area length beyond 90 metres. The point is a corollary of the first error of law contention which is not made out. Cost-benefit analyses are a conventional tool in the civil aviation industry when attempting to achieve acceptable levels of safety.

[113] I accept Mr Cooke's submission that participants are accustomed to this form of assessment and he accurately observed:

> It is a method by which discipline can be brought to bear when bringing together the relevant information, and is to be encouraged for this reason.

[114] There is no proper basis for excluding a cost-benefit analysis when ascertaining practicability.

[115] Next it was said that both McGregor & Co reports were subject to a number of significant and material deficiencies the consequence of which is that the analysis relied upon by the Director was fundamentally flawed.

[116] The first McGregor & Co report was peer reviewed by Covec, an independent firm retained by NZALPA and by Castalia, retained by the Authority. The Authority's Aeronautical Assessment Unit then considered all three reports.

[117] Ms Heine addressed in a detailed appendix to her written submissions the many issues which NZALPA had with the McGregor & Co report and the response of the independent peer reviewers as well as the documentary evidence that tended to refute many of the objections.

[118] Mr Brian Greeves filed an affidavit in this proceeding as an independent expert in the matter of runway end safety areas in order to inform the Court of matters relevant to the interpretation and application of an Annex 14 and Appendix A.1 of Part 139. Mr Greeves' evidence was contested by expert evidence filed on behalf of WIAL. It is not necessary for me to detail the contested issues because the Court in this case is not required to resolve them.

[119] Even putting aside for the moment the principle that, in judicial review proceedings it is wrong to attempt to impugn a decision by later generated material which was not before the decision-maker at the relevant time,[52] Mr Greeves' evidence does not demonstrate error of law on the part of the Director:

(a) NZALPA's position tends to overlook the degree of flexibility afforded by the Chicago Convention to Contracting States in securing uniformity with international standards and regulations.

(b) The contested facts and methodologies that are the subject of the deponents' evidence is not new and was known to the Director at the time he made his decision. Although not in the form of affidavit evidence material of similar content was before the Director.

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[52] *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 658.

(c) The weight the Director gave to the different facts was within his discretion.

[120] Mr Rennie submitted that Mr Greeves' conclusions provided clear evidence that the analysis relied upon by the Director was fundamentally flawed and therefore his determination was in error of law because, relying on *Bryson v Three Foot Six Ltd*[53] the Director's conclusion was:

> so insupportable – so clearly untenable – as to amount to an error of law, because proper application of the law requires a different answer.

[121] Ultimately the ground of challenge is met by the Director's evidence that he took all of this material into account when forming his view. The evidence before the Court establishes that the Director carried out sufficient inquiry before making his assessment; he acquainted himself with the relevant information including the submissions from NZALPA and the legal opinion provided to it; and he conducted his analysis against the backdrop of a proper interpretation of the Part 139, in particular the meaning of "practicable" in Appendix A.1(a). There was no error in the Director's interpretation or his process.

[122] Furthermore, the threshold for establishing an error of law arising from reliance by a decision-maker on flawed evidence has simply not been met evidentially by the applicant.

[123] Having had regard to the evidence of Mr Greeves and Mr Hoskin, the McGregor & Co reports and the reports of Covec and Castalia, Mr Greeves' criticisms — even assuming for a moment those criticisms were not in turn subject to legitimate criticism in reply by WIAL's expert — do not show that the material relied upon by the Director was fundamentally flawed. There were and are differences of opinion. But that does not show the Director's conclusion to be so clearly untenable as to be an error of law.

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[53] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26].

*(c) Failure to consider EMAS — wrong in law?*

[124] In forming his view about the acceptability of the proposed runway end safety area the Director did not specifically consider whether the use of EMAS in constructing the runway end safety area would provide additional safety benefits. Mr Rennie submitted that this constituted a further material error of law.

[125] For this argument to succeed NZALPA must identify the source of the obligation on the Director to consider the engineering techniques and construction options realistically available to the airport operator, including the potential for using EMAS, when assessing the practicability of a runway end safety area longer than 90 metres. Mr Rennie's argument relied on "practicable" bearing the ordinary meaning of "actually able to be constructed". Accordingly, the Director was bound to consider what is actually able to be constructed.

[126] In undertaking his comprehensive analysis of the proposal put to him the Director was not required to turn his mind to alternatives. Part 139 is silent as to EMAS technology. There is no requirement for EMAS to be installed and no assumption that it will be. Part 139 is dissimilar from Annex 14 which permits shortened runway end safety areas where an arresting system is installed. The focus of Part 139 is on length rather than arresting systems.

[127] The responsibility for the design of aerodrome facilities rests with the operator holding the aviation document, here, WIAL. As the Director's function is limited to an assessment of whether the physical characteristics are acceptable, in not turning his mind to the possibility of EMAS the Director was not in error.

*(d) Failure to consider reduced runway extension — wrong in law?*

[128] NZALPA says the Director's failure to consider reducing the declared distances on the proposed runway extension in order to allow for a runway end safety area of 240 metres constitutes a further error of law. The criticism is that the extension is devoted first to the provision of runway and only after that to the provision of a runway end safety area.

[129] Mr Rennie submitted the Director's approach was at odds with ICAO guidance on the interpretation of runway end safety area length requirements in Annex 14:

> Where provision of a runway end safety area would be particularly prohibitive to implement, consideration would have to be given to reducing some of the declared distances of the runway for the provision of a runway end safety area and installation of an arresting system.

[130] The first point is in the difference between ICAO standards and recommended practice. A recommended practice does not have the same level of mandated compliance as is required of a standard. This recommended practice has not been incorporated into New Zealand Civil Aviation Rules. The Director was not required to consider the possibility of a reduced runway extension to enable longer runway end safety areas. The Director's statutory functions require him to assess the adequacy of the proposed safety measure (in this case a 90 metre runway end safety area) not question the rationale for and extent of aerodrome modifications more broadly.

[131] This ground of review is not made out.

**Fourth Issue — Breach of natural justice?**

[132] NZALPA claims the Director breached his obligation to consult NZALPA and therefore his decision is flawed.

*Submissions*

[133] Mr Rennie submitted the Director was under a legal duty to consult NZALPA in relation to the proposed extension to the south. The duty to consult is said to arise from the Director's previous promise and past practice of consultation and the duty to reopen consultation in the event of a substantial change to the proposal under consultation. NZALPA was not advised of the southern proposal until less than two weeks before the Director had reached his decision and at no point was NZALPA provided with an opportunity to express its view on the substance of the proposal.

[134] Mr Cooke's essential submission is that the Director does not have an obligation to consult in relation to his oversight of compliance with the Rules. Any consultation relating to the implementation of the Rules was engaged in as a matter of good practice not legal obligation. Therefore the NZALPA's complaint does not found a claim for judicial review. NZALPA had a proper opportunity in any event to provide its views and to comment on WIAL's proposals in detail. Any legal obligation the Director had to consult with NZALPA was satisfied.

*The consultation*

[135] NZALPA's expectation that it would be consulted on the proposed southern extension is said to be grounded in the consultation process the Director followed when he assessed the northern extension proposal. It is accordingly necessary to examine the nature and extent of that process to determine whether it did in fact generate such a duty.

[136] Around mid-2013 NZALPA became aware of WIAL's plans for a northern runway extension. It wrote to the Authority in March 2013 and again in June 2013 expressing its concerns about the appropriate use of runway end safety areas and EMAS. NZALPA requested that it be included as an interested party in the assessment of WIAL's proposal.

[137] The Authority acknowledged NZALPA as an interested party — "one that had valuable knowledge to inform CAA decision making" should the runway extension activity progress. The Authority subsequently provided to NZALPA the McGregor & Co report and sought NZALPA's comments.

[138] A number of discussions and exchanges of correspondence took place between WIAL, the Authority and NZALPA about the McGregor & Co analysis and the application of the word "practicable" in Part 139.

[139] The Authority met with NZALPA in September 2013 and again, with WIAL included, in October 2013. The proposed runway extension to the north was discussed at both meetings. A note taken of the meeting on 2 October 2013 records that NZALPA wanted to be involved and its involvement had been welcomed by the

Authority. It had been given a copy of the cost-benefit analysis and had been involved in discussions to that point. The Authority had set up the meeting with NZALPA and WIAL so the parties could provide information to each other and discuss concerns. The Authority was there to observe and understand all the issues. It had not formally received a detailed list of NZALPA's concerns although NZALPA had provided general information. The Authority had reached no decision. It was still testing assumptions under Part 139 and it emphasised that this was a decision for the Director. NZALPA's view of the cost-benefit analysis was recorded: that it was flawed, contained errors, did not consider all options and should not be relied upon. And the Authority's approach to practicability was wrong.

[140] In February 2014 the Director reached the view that it would not be practicable for WIAL to provide a RESA in excess of 90 metres. He communicated his view in a letter to WIAL dated 18 February 2014. Two days later the Director wrote to NZALPA informing it of the view he had reached and expressing his appreciation for NZALPA's constructive engagement. He included a copy of his letter to WIAL.

[141] In mid-2014 the Director became aware that WIAL was considering a southern extension to the runway. Before receiving confirmation from WIAL that it was exploring a southern extension the Director received a letter from NZALPA dated 8 September 2014 in which NZALPA set out what it saw as the key issues with a southern extension and disclosing the main arguments it would use in a legal challenge to the Director's decision on the northern extension.

[142] The Authority's reply dated 2 October 2014:

(a) advised that any move to a concept involving a southern extension would require WIAL to submit a new case for fresh consideration;

(b) acknowledged NZALPA's different view on the interpretation of practicable and the scope of the Director's decision-making on the question of EMAS;

(c) referred to NZALPA's belief that the Authority was likely to have been in error in respect of some of its data interpretation and that the wrong risk data had been used to assess risk; and

(d) welcomed further information from NZALPA on these matters without prejudice to the data interpretation models and risk assessment methodology it might choose to apply to any new proposal.

[143] On 13 October 2014 the Authority repeated its invitation to NZALPA to set out its "specific concerns" on the data that had been used to assess risk. (The Director's evidence was that to the best of his knowledge, as at September 2015 the date of his affidavit in this proceeding, NZALPA had not provided this information.)

[144] WIAL confirmed its intention to pursue the southern extension. The Authority advised WIAL that the Director's acceptance of the proposed northern extension could not be automatically transferred to the southern runway extension and a revised safety study specific to the southern proposal was required for the Director's review and consideration.

[145] On 10 December 2014 the President of NZALPA wrote to the Director regarding the fundamental difference between them as to the interpretation of Appendix A.1 and proposed a joint application to the High Court for a declaration as to the proper interpretation.

[146] The Director replied on 8 January 2015 disagreeing with NZALPA's interpretation but requesting a copy of the legal advice to which NZALPA referred. When a copy of that advice was provided in February 2015 the Director considered it.

[147] The Director's view on the proposed southern extension was conveyed by letter dated 24 March 2015.[54]

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[54] See Appendix 3 to this judgment.

*Was there a duty to consult?*

[148] During the assessment of the northern extension proposal a consultative relationship between the Director and NZALPA was established. Although NZALPA initiated it the Director encouraged and welcomed NZALPA's involvement. Had the Director declined at that early stage to hear from NZALPA it is unlikely that decision could have been successfully challenged. The Act generates no obligation on the Director to consult when determining whether a participant's compliance with its regulatory obligations is acceptable. How the Director discharges his function under Rule 139.51(c) is a matter for the Director who is free to take such advice and seek such information as he considers may be relevant and helpful in the circumstances of each case. He had no duty to inform anyone of WIAL's proposal or that it was under positive consideration.

[149] The question is: did the fact of NZALPA's engagement in the northern extension assessment process alter the nature of the legal obligations on the Director?

[150] Where not provided for expressly or impliedly in a statute, a duty of consultation exists in circumstances where there is a legitimate expectation of consultation. A legitimate expectation[55]

> usually arises from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation.

[151] On the basis of my assessment of the earlier engagement between the Director and NZALPA I have concluded that NZALPA did have a legitimate expectation to be heard on the proposed southern extension. I have reached this cautious view in light of particular facts:

(a) When it agreed to NZALPA's request to be involved the Authority acknowledged NZALPA's interest in the potential runway extensions at Wellington Airport and its interest in the question of runway end safety area requirements.

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[55] *R (Stirling) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947 at [34].

(b) Not only was NZALPA's interest acknowledged it was valued. The Authority expressly recognised NZALPA as an interested party and that it had "valuable knowledge" which would inform the Authority's decision making process.

(c) Crucially, the Authority assured NZALPA that subsequent determinations would be

> fully informed by input from all parties, including NZALPA, and it will continue to be recognised as an interested party on the matter.

(d) The modified proposal involved the same airport, the same runway, and the same parties. The southern proposal raised similar kinds of issues as raised by the northern proposal (although NZALPA would say in some respects they were more acute).

[152] While I hesitate to describe the consultation on the northern extension proposal as a "past practice" I am in little doubt that the Authority's assurances, particularly as to continued recognition of NZALPA as an "interested party", founded a legitimate expectation of continued engagement regarding Wellington Airport's runway extension proposals on the part of NZALPA and a commensurate duty on the part of the Director and Authority to meet that expectation.

[153] The reason I express my view as a "cautious" view is because public authorities who are under no obligation to consult but decide to do so as a matter of good practice or good administration should be encouraged in this approach rather than discouraged by the spectre of litigation. But my conclusion that NZALPA had a legitimate expectation to be consulted on the southern proposal derives not from the mere fact of its previous involvement but because of the unequivocal nature of the Authority's assurances. The assurances amounted to a promise of the kind that founds a ground of judicial review when there is a failure to deliver. This brings me to the final question. Has there been a failure to consult?

*A breach of duty to consult?*

[154] In summary, NZALPA's position is that its submissions on the northern extension proposal were not transferable to the southern proposal which, it says, was different in important respects.

[155] Even where there is a duty to consult the manner of its discharge will vary depending on the nature of the proposal on which views are invited and the nature of the interest which is recognised by the very process of consultation. In this case the matter for the Director's assessment concerned compliance with the rules and whether a proposed runway end safety area was acceptable to him. The Director must, of course, act reasonably in selecting who to consult. But beyond that he had a discretion as to the material he would provide to the submitter and the extent of the opportunity he would afford to be heard.

[156] NZALPA does not suggest it was consulted inadequately on the northern extension proposal. I am satisfied for the following reasons that NZALPA was also adequately consulted on the southern extension proposal.

(a) When NZALPA wrote to the Director on 8 September 2014 it expressed the view that the southern extension proposal opened up a fresh opportunity to engage on the runway end safety area issue. It accordingly set out its views on the key issues namely, the length of runway end safety areas at Wellington airport and the use of EMAS.

(b) The Authority's reply not only engaged with these issues but welcomed further information from NZALPA relating to its specific concerns that some of the data interpretation by the Authority was likely to be in error and the wrong risk data had been used to assess risk. Despite a further request for that information it was not provided.

(c) The nature of the involvement which NZALPA sought was articulated in the President's letter of 10 December 2014 to the Director:

> There is now an opportunity to address the interpretation issue on a general basis, rather than in a project-specific way.

The letter summarised the key points of difference which included the hypothetical nature of WIAL's proposal and that therefore the Director should not consider it; and how Part 139 of the Rules should be interpreted and the "practicable" requirement applied. NZALPA's views were not, in that regard, specific to a proposed runway extension to the north but were focused on considerations NZALPA considered relevant to any runway extension at Wellington Airport.

(d) In January 2015 the Director wrote to NZALPA in response to the President's letter setting out that he was "comfortable that from a legal, policy and operational safety perspective" he understood how Part 139 should be applied. Nevertheless he invited the President to provide the legal advice of senior counsel which the Director undertook to carefully consider. That advice was provided in February 2015.

(e) The Director has deposed to considering all of the materials and views of NZALPA in his decision-making process.

[157] In consulting NZALPA the Director was not obliged to negotiate with NZALPA. Ultimately the assessment of whether the runway end safety area was acceptable or not was the Director's call. He made that call having considered in good faith all that NZALPA had to say with regard to NZALPA's key issues. Although the consultation on the southern proposal was of a different order in terms of the length of the process, the detail which NZALPA had and the content of its submissions, NZALPA's key issues were common to both the northern and southern extension proposals. The key issues had been explored in detail and at length.

[158] Accordingly, although truncated, the Director's engagement with NZALPA on the modified proposal was sufficient especially in light of the regulatory function which the Director was exercising and the judgement which the legislation charges

the Director, alone, to exercise. The Director did not breach the duty to consult which existed on this occasion.

**Result**

[159] The application for judicial review is dismissed. If the parties are unable to resolve costs they may submit focussed memoranda.

Karen Clark J

Solicitors:
NZALPA Counsel, Auckland for Applicant
John Sneyd, Civil Aviation Authority, Wellington for First Respondent
Chapman Tripp, Wellington for Second Respondent

**APPENDIX 1**

Examples of "practicable" or similar in the Civil Aviation Rules

(1) Rule 139.407(3): "An applicant for the grant of a qualifying aerodrome operator certificate must establish a procedure for notifying the aeronautical information service provider … *as soon as practicable*, of any change that affects the use of the aerodrome."

(2) Rule 139.457(e): "If it is not *practicable* for the holder of a qualifying aerodrome operator certificate to conduct an aeronautical study prior to the significant change, then the certificate holder must conduct the aeronautical study *as soon as practicable* after the change."

(3) Part 139, Appendix A.1(b): "The width of a RESA must … where *practicable*, be equal to the width of the graded portion of the associated runway strip."

(4) Part 139, Appendix A.1(c): "A RESA must be constructed to … where *practicable*, be clear of any object which might endanger an aeroplane that undershoots or overruns the runway."

(5) Part 139, Appendix E.2.14: "Where it is *impracticable* to install a mandatory instruction sign, a mandatory marking must be provided on the surface of the pavement."

(6) Part 139, Appendix E.2.15: "Where an information sign would normally be installed and it is *impracticable* to install, an information marking must be displayed on the surface of the pavement."

(7) Part 139, Appendix E.3.6(a): "Where *physically practicable*, a simple approach lighting system must be provided to serve a non-precision approach runway, except when the runway is used only in conditions of good visibility or sufficient guidance is provided by other visual aids."

(8) Part 139, Appendix E.3.6(b): "Where *physically practicable*, a precision approach category I lighting system must be provided to serve a precision approach runway category I."

(9) Part 139, Appendix E.3.20: "A visual docking guidance system must be provided when it is intended to indicate, by a visual aid, the precise positioning of an aircraft on an aircraft stand and other alternative means, such as marshallers, are *not practicable*."

(10) Part 139, Appendix F.2(a): "All fixed objects to be marked must, *whenever practicable*, be coloured, but if this is *not practicable*, markers or flags must be displayed on or above them, except that objects that are sufficiently conspicuous by their shape, size, or colour need not be otherwise marked."

(11) Rule 172.57(b): "… control service, or an aerodrome flight information service, must establish procedures to ensure that any aerodrome control tower or aerodrome flight information office … is … constructed and situated to provide … the *maximum practicable* visibility of aerodrome traffic …"

(12) Part 77, Appendix C(e): "For the purposes of paragraph (c) an object may be classed as permanent only if, when taking the longest view possible, there is no prospect of removal being *practicable, possible, or justifiable*, regardless of how the pattern, type, or density of air operations might change."

**APPENDIX 2**

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**FILE NOTE: NZWN-01/3 DW1308901-0**

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**SUBJECT:** WIAL PROPOSED SOUTHERN R/W EXTENSION: RESA
**DATE:** MARCH 20, 2015

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**Introduction**

Wellington airport has advised that it is considering an extension of its runway to the south into Cook Strait. They have advised that if they proceed with the extension they will be providing 90m RESAs in satisfaction of the requirements of CAR 139.101(4) with respect to the design requirements in 139.51(b) [and Appendix A].

While that decision is legitimately theirs, they have asked for an indication from the Director whether I would find such RESA acceptable in accordance with 139.51(c). As I understand it, they have asked for my view on this matter because they need certainty in relation to what they are proposing to construct for the necessary resource management, construction and planning approvals.

Up to this point, the matter has been considered by the CAA's Aeronautical Services Unit and Chris Ford, General Manager Aviation Infrastructure and Personnel, who has now referred it to me for my view on the matter.

I have now read and considered the material in the files provided to me by Mr Ford, including primarily:

- His covering memo
- The assessment of the WIAL proposal and RESA requirement prepared by the CAA's Aeronautical Services Unit
- The cost benefit analysis and risk profile prepared by McGregor & Company, including McGregor's response to questions from the CAA;
- The Aeronautical Service Unit's assessment of the earlier northern extension proposal
- The critique of McGregor's cost benefit analysis for the earlier northern proposal prepared by Covec;
- McGregor's response to the Covec critique
- Castalia's review of the 2013 cost benefit analysis
- Correspondence with NZALPA, including the legal opinion provided by their counsel

**Summary**

In summary, I consider the decision by WIAL to provide 90m RESA in the event that they extend their runway to be soundly based, and provided the RESA complied in all other respects with the requirements of CAR 139 (those not related to length), my view is that a 90m RESA would be acceptable in accordance with CAR 139.51(c).

**Information on which my decision is based**

I accept the validity of the analysis provided by McGregor & Co concerning the probability of overruns and undershoots at Wellington airport. Further I consider that the associated cost/benefit

analysis identifies the costs and benefits of providing RESA in excess of 90m.

I have also read the critique of the earlier northern proposal report of McGregor and Co provided by Covec on ALPA's behalf. I did so acknowledging that the contents of the Covec critique could equally apply to the McGregor and Co report on the new southern proposal, which I understand to be materially the same as that report for the northern proposal. I consider that McGregor & Co adequately addressed those criticisms in its response to Covec critique.

Further, Castalia were asked to peer review the 2013 McGregor report in relation to the then-proposed northern extension, which I understand to be materially the same as the 2014 McGregor report for the southern extension. The 2014 McGregor report applies the same methodology and considers the same underlying data as the 2013 version although I acknowledge the reduction in safety benefits due to the fact that Cobham Drive would no longer be bridged. Castalia were supportive of the methodology and conclusions of the 2013 McGregor report, and I am prepared to accept in light of the material similarities in methodology and data, Castalia's conclusion can equally apply to the 2014 report.

I have relied significantly on the McGregor report in forming my conclusions about the acceptability of WIAL's decision.

**My View: 90m RESA provides an acceptable level of aviation safety risk**

The primary basis for my view is that I am persuaded by the information I have read that a 90 metre RESA provides an acceptable level of safety at the airport, in light of the nature of operations, their frequency, the type of aircraft using the aerodrome, and the consequent risk attendant upon these operations.

The McGregor report concludes that operations that are at greatest risk at Wellington airport are heavy aircraft on domestic operations. The probability of a landing overrun of these aircraft is assessed as being 8.31 occurrences per 10 million landings. Given the projected air traffic volumes at the aerodrome over the future years, this equates to a landing overrun incident once every 209-243 years at projected 2033 movement numbers.

Probabilities in relation to landing undershoots and takeoff overruns are significantly lower again; their most significant probabilities are 4.94 occurrences per 10 million takeoffs (for medium aircraft) and 2.52 occurrences per 10 million landings (for heavy aircraft) respectively.

This demonstrates that there is a very low risk of overrun or undershoot occurrences at Wellington airport. Further, McGregor concludes that a 90m RESA would capture 76% of all landing overruns (which are the highest probability occurrence), 73% of undershoots (which have the next highest probability), and 53% of takeoff overruns (which have a significantly lower probably than the other two).

In this context, a 90m RESA can be assessed as providing an acceptable level of safety, a level that is appropriate in light of Wellington's status as an international airport and key domestic hub. In this regard, I note also in deciding to provide a 90m RESA WIAL will be complying with the relevant international standard specified in Annex 14 to the Convention on International Civil Aviation. 90m is, of course, the length of RESA currently provided by WIAL.

**Cost/Benefit-Practicability of alternatives**

In addition to considering the level of safety risk involved with a 90 metre RESA I have also turned my mind to cost/benefit considerations and whether WIAL have appropriately assessed the practicability of longer alternatives. These must be acknowledged as further mitigating the residual risk that the conclusions of the McGregor report I refer to above identify, ie the remaining percentage of occurrences that would not be captured in a 90 metre RESA.

In considering this question, I have adopted the approach to considering "practicability" that was proposed in the memo provided to me by Mr Ford. That approach involves the following:

- Practicability should be interpreted as incorporating elements of feasibility and reasonableness; some element of pragmatic limitation must be applied;
- "practicable" does not equate to "that which is possible";
- The test of practicability involves balancing safety benefits to be achieved against the associated cost and difficulty.

The fact that rule compliance may involve significant cost or the allocation of significant resources does not of itself mean that compliance is "impracticable"; instead the cost and difficulty must be carefully weighed against the safety benefits to be achieved.

I have read and carefully considered the legal opinion prepared by Hugh Rennie QC and, with the greatest of respect, do not agree with its approach to the question of practicability.

In the present case I accept that the longer the RESA, the lower the level of residual risk associated with undershoots or overruns at that aerodrome. Although I have concluded that the 90m RESA provides an acceptable level of safety, I have also considered whether the cost in extending past the 90m would achieve additional safety benefits that outweigh the cost.

In light of the discussion above, I am of the view that the safety benefits provided by the construction of a longer RESA are small, when calculated with reference to the very low probability of an adverse event in the first place, combined with the level of effectiveness of the 90m RESA.

My view on this is supported by the cost-benefit analysis performed by McGregor, and independently peer reviewed by Castalia. That analysis concludes that the safety benefits associated with the extension of the RESA (to either 140m or 240m) are greatly exceeded by the cost of that exercise – which is around $1M/linear metre of RESA. I am persuaded by this analysis while also noting that it accords with my own assessment that the additional safety benefits, in an already very low-risk environment, do not justify the high cost.

Thus, given the low probability of occurrences, and given the effectiveness of a 90m RESA, I accordingly am of the view that WIAL has appropriately applied the 'practicability test' embodied in CAR 139 in deciding the length of RESA that it will provide and that the additional safety benefits to be achieved in extending the RESA are significantly outweighed by the cost.

**EMAS**

In forming my current view, I have not specifically considered whether the use of EMAS in constructing the RESA would provide additional safety benefits. EMAS does not form a part of Wellington Airport's decision and I accordingly have no information to assess.

I do not believe that I need to specifically consider the use of EMAS given my acceptance that the decision by WIAL to provide a 90m RESA meets the Part 139 requirements.

**Note: Acceptance based on current information**

I note that my view on this matter has been informed by the information provided to me by Wellington Airport about, among other things, the cost of extending the RESA, and the nature of their proposed operations at the airport. If these things were to change materially, or there were to be a significant change in the regulatory requirements, I would need to revisit my view.

Graeme Harris
Director of Civil Aviation

**APPENDIX 3**

24 March 2015

Steve Sanderson
Chief Executive
Wellington International Airport Ltd

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Dear Steve

**Runway End Safety Area – Runway extension NZWN**

In February 2014 the Director of Civil Aviation, Graeme Harris, advised you that he accepted the proposition made by Wellington International Airport Ltd (WIAL) that if the airport's runway was extended to the north, it would not be practicable to provide Runway End Safety Areas (RESAs) in excess of 90m length (ref CAA letter DW1283656-0 dated 18 February 2014).

On October 2 2014 you wrote to the Director advising that WIAL was now contemplating an extension to the south. As the Director's previous view was specific to a northern runway extension WIAL were required to submit a new safety case focusing on a southern extension.

This was subsequently received by the CAA in November 2014. The safety case expressed the view that if a southern extension were to occur, the provision of 90m RESA at each end of the runway would provide compliance with the relevant content of Civil Aviation Rule (CAR) Part 139. WIAL sought the Directors consideration and advice on its view that 90m RESA would provide compliance with Part 139 in such circumstance.

The Director has considered the new safety case provided to WIAL by McGregor & Company, its associated cost benefit analysis report, and the associated file material. After reviewing that material he is of the view that the decision by WIAL to provide 90m RESAs in the event it extends the runway to the south, is soundly based, and provided the RESA complies in all other respects with the requirements of Part 139 (those not related to length), his view is that a 90m RESA would be acceptable in accordance with Part 139.51(c).

Please note that his view is based on the material you have provided. If there is any material variation in what is to be constructed from what you have proposed in that material, his view might be different. In particular, the analysis of the safety of a 90m RESA is crucial to his view. The projected cost of providing the RESA, as analysed by McGregor and Co, is also a significant relevant factor in considering practicability. Clearly, a material change in either, or the underlying data on which the safety case was based, may have an impact on his view.

You should, therefore, update these analyses with robust data in the event you decide to proceed with the runway extension.

It also needs to be highlighted that the Director's view is based on the current requirements of Part 139 of the Civil Aviation Rules and its legislative context. The potential for these requirements to alter at any stage in the future before WIAL commences actual construction of any extension cannot be ruled out given the potentially long lead in time of projects of this nature. If there were to be a significant change in the regulatory requirements, he would need to revisit his view on the basis of the facts and the law at this time.

Yours sincerely

Chris Ford

General Manager Aviation Infrastructure and Personnel