

PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

FORTIETH REPORT:

Fish Resources Management Amendment Regulations 1999

Presented by Hon R L Wiese MLA (Chairman)
and
Hon N D Griffiths MLC (Deputy Chairman)

June 1999

Joint Standing Committee on Delegated Legislation

Members

Hon Bob Wiese MLA (Chairman)
Hon Nick Griffiths MLC (Deputy Chairman)
Hon Simon O'Brien MLC
Hon Ray Halligan MLC
Hon Jim Scott MLC
Mr Bill Thomas MLA
Mr Iain MacLean MLA
Mr Norm Marlborough MLA

Advisory/Research Officer

Nigel Pratt

Committee Clerk

Jan Paniperis

Terms of Reference

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
- (b) unduly trespasses on established rights, freedoms or liberties;*
- (c) contains matter which ought properly to be dealt with by an Act of Parliament; or*
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

ISBN No: 0 7309 9833 X

Report of the Joint Standing Committee on Delegated Legislation

in relation to

Fish Resources Management Amendment Regulations 1999

1 Executive Summary

1.1 The Committee is of the view that the *Fish Resources Management Amendment Regulations 1999* as gazetted are within power and has resolved not to recommend disallowance after considering:

- (a) a submission from Hon Kim Chance MLC dated 6 May 1999;
- (b) a facsimile from Mr A J O O'Connor, Registrar, Legal and Licensing Division, Fisheries Western Australia by facsimile dated 11 May 1999; and
- (c) a facsimile from Ms Karen Levinge, Legal Council for the West/Central Area, Civil Aviation Safety Authority dated 21 May 1999.

1.2 However, the Committee has identified two issues of importance after reviewing the forms purporting to be part of the *Fish Resources Management Amendment Regulations 1999* and obtaining advice from the Civil Aviation Safety Authority. These issues are:

- (a) that the forms "Application for Ministerial Authority to Enter the Abrolhos Islands Reserve by Means of an Aircraft or to use an Aircraft in a Reserve" and "Application for Ministerial Authority to Enter the Abrolhos Islands Reserve by Means of an Aircraft or to use an Aircraft in a Reserve - Further Information - Commercial Operations" ("Further Information Form") do not form a valid part of the Amendment Regulations; and
- (b) that the "minimum standards" contained in the Further Information Form are inconsistent with Commonwealth Regulations governing aircraft and to that extent are invalid pursuant to section 109 of the Commonwealth Constitution.

2 Introduction

- 2.1 In the exercise of its scrutiny function the Committee reviewed the *Fish Resources Management Amendment Regulations 1999* (“Amendment Regulations”) created pursuant to the *Fish Resources Management Act 1994*. A copy of the Amendment Regulations have been attached to this report and marked “Annexure A”.
- 2.2 Under the Committee’s Joint Rules, if the Committee is of the opinion that a matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House. It is also the function of the Committee to consider and report on any regulation that appears not to be within power.
- 2.3 According to the explanatory memorandum¹, received from Fisheries Western Australia, the Amendment Regulations have been promulgated to provide for:
- (a) the regulation of aircraft in the Abrolhos Islands Reserve; and
 - (b) the refund of fees paid under the Act.

The Committee is not concerned in this report with (b) above.

- 2.4 Fisheries Western Australia has advised the Committee that the intent and effect of the Amendment Regulations is to manage aircraft accessing the Abrolhos Islands. Historically, this has proceeded on a basis that did not require formal regulation by the Government. However, the Minister for Fisheries has determined that some degree of formal regulation is now appropriate.
- 2.5 Regulation 105A of the Amendment Regulations prohibits an operator/pilot of an aircraft from entering the Abrolhos Islands reserve unless they have the written authority of the Minister for Fisheries. The regulation provides for the making of applications (including the payment of a fee of \$100.00 per application) and the granting of written authorities for a specified period of time, with or without conditions. The Amendment Regulations were developed in response to recent industry activities and, as such, no formal consultation was undertaken by Fisheries Western Australia².

¹ Explanatory Memorandum attached to a letter from Fisheries Western Australia addressed to the Committee dated 7 April 1997 (“Explanatory Memorandum”)

² Explanatory Memorandum p.1

2.6 The Amendment Regulations impose a penalty of \$10 000.00 in the event that an operator of an aircraft enters or uses an aircraft in the Abrolhos Islands Reserve without first obtaining written authority from the Minister for Fisheries.

2.7 Hon Kim Chance MLC, who is not a member of the Committee, moved a motion to disallow the Amendment Regulations on 6 May 1999 as follows:

“That *Fish Resources Management Amendment Regulations 1999*, published in the *Gazette* on March 26 1999, and Tabled in the Legislative Council on April 20 1999, under the *Fish Resources Management Act 1999*, be and are hereby disallowed. (TP 924).”³

2.8 Hon Kim Chance provided a written submission to the Committee, dated 6 May 1999 regarding the Amendment Regulations and his motion for disallowance. In summary, Hon Kim Chance has concerns regarding the processes that have been used by Fisheries Western Australia to implement the Amendment Regulations and the effect of those processes. These concerns are set out in parts 3 and 4 of his submission. A copy of the submission is attached to this report and marked “Annexure B”.

2.9 The Committee first considered the Amendment Regulations at its meeting on 10 May 1999 and resolved to request from Fisheries Western Australia a copy of the approved application form referred to in Amendment Regulation 105A(2)(a) and any Ministerial conditions or criteria relating to the granting by the Minister for Fisheries of a written authorisation under the Amendment Regulations. A written response was received from Mr A J O O’Connor, Registrar, Legal and Licensing Division of Fisheries Western Australia by facsimile dated 11 May 1999. This response included copies of the following:

- (a) the form for Application for Ministerial Authority to Enter the Abrolhos Islands Reserve by Means of an Aircraft or to use an Aircraft in a Reserve; and
- (b) the form for Application for Ministerial Authority to Enter the Abrolhos Islands Reserve by Means of an Aircraft or to use an Aircraft in a Reserve - Further Information - Commercial Operations (“Further Information Form”).

The Further Information Form in (b) above requires an applicant to demonstrate certain “minimum standards” for operator/pilots as “... a ‘pre-condition’ to the entertainment of

³ Legislative Council Notice Paper, Tuesday May 4, 1999

an Application for the Minister's approval."⁴ A copy of the facsimile from Fisheries Western Australia is attached to this report and marked "Annexure C".

- 2.10 In order to obtain advice regarding the "minimum standards" set out in the Further Information Form which must accompany the aircraft operator's application for written authorisation, the Committee resolved to write to the Civil Aviation Safety Authority ("CASA"). A copy of the letter from the Committee's Advisory/Research Officer to CASA dated 13 May 1999 is attached to this report and marked "Annexure D".
- 2.11 Ms Karen Levinge, CASA Legal Council for the West/Central Area replied by facsimile dated 21 May 1999 a copy of which is attached to this report and marked "Annexure E".
- 2.12 The advice received from CASA in relation to the "minimum standards" required of operator/pilots contained in the Further Information Form indicate that these "minimum standards" significantly exceed Federal licence requirements for pilots under the *Civil Aviation Regulations 1988* ("Federal Regulations") made under the *Civil Aviation Act 1988*.
- 2.13 The Committee notes that in relation to the pilot in command hours, for pilots of single engine aircraft required in sub-paragraph 1.2 of the Further Information Form, that these hours exceed (by over 10 times) the minimum qualifications set by Federal Regulations for commercially trained pilots. In the case of the "minimum standards" contained in sub-paragraph 2.2 relating to twin engine aircraft the Further Information Form requires a minimum of 3000 hours of flight time as pilot-in-command including a minimum of 150 hours as pilot in command of a twin engine aircraft. Federal Regulations require:
- (a) in the case of Visual Flight Rules (VFR) operations, at least 100 hours experience as pilot in command of multi-engine aeroplanes and at least 5 hours experience as pilot in command of the aircraft type; and
 - (b) in the case of Instrument Flight Rules (IFR) operations at least 10 hours experience as pilot in command of the aircraft type, which may include flight time accrued as pilot acting in command under supervision.
- 2.14 The Further Information Form in sub-paragraphs 1.4 and 2.3 require an operator/pilot to demonstrate to a Grade 1 flight instructor an ability to take off and land on a landing strip which is 500 metres long. In relation to this requirement CASA's advice was as follows:

⁴ Facsimile Mr A J O'Connor, Fisheries WA dated 11 May 1999 p.1

“... the ability to do that depends on the performance of the aircraft concerned rather than the capacity of the pilot per se [sic]. Whether a particular aircraft is capable of being operated under those conditions is assessed by looking at performance charts or WAT (weight, altitude, temperature) charts. If a particular aircraft is capable of being operated under those conditions and the pilot is endorsed on that type of aircraft, then it is assumed that the pilot is capable of so operating the aircraft. There is no further requirement under the legislation for the pilot to demonstrate that manoeuvre.”⁵

- 2.15 The Committee also notes that there is an absence in the Further Information Form of a requirement on an applicant who intends to operate an aircraft for a commercial purpose to produce an Air Operator’s Certificate issued by CASA as a pre-condition to the granting of ministerial authorisation.

3 Legislative Background

- 3.1 The Amendment Regulations were published in the *Government Gazette* on 26 March 1999 and tabled on 20 April 1999. The power to make the Amendment Regulations is contained in Section 121 of the *Fish Resources Management Act 1994* (“Act”) which provides for the creation of regulations regarding the Abrolhos Islands Reserve as follows:

“121 (1)The regulations may provide for any matter necessary for the protection or management of the Abrolhos Islands reserve.

(2) Without limiting subsection (1), the regulations may -

...

(c) prohibit or regulate entry to the reserve by persons, vehicles, aircraft and boats and the bringing into the reserve of animals, plants or other things;

...

(i) regulate the use of aircraft in the reserve;

...

(r) prescribe fees or charges for admission to the reserve or any part of the reserve and for the use of any land or facilities on the reserve, and provide for the payment and method of collection of the fees or charges.”

⁵ Facsimile CASA dated 21 May 1999 p. 5

3.2 The general penalty provision is contained in Section 256 of the Act which states:

“256 (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

(2) The regulations may create offences and may provide for a penalty not exceeding \$10 000 and a daily penalty not exceeding \$100.”

3.3 The Committee is satisfied that Section 121 of the Act provides broad powers to create regulations for the purpose of regulating aircraft in the Abrolhos Islands Reserve and that Section 256 of the Act clearly permits a penalty of \$10 000.00 to be imposed for a breach of the Amendment Regulations.

3.4 The Committee is satisfied that the Amendment Regulations published in the *Gazette* are within the power granted by the enabling Act. However, the Committee notes that neither the Application Form nor the Further Information Form are included in the body of the Amendment Regulations. The “minimum standards” which attach to the Further Information are a pre-condition for the granting of a written authority by the Minister for Fisheries. The Committee has some concerns regarding the Further Information Form and the minimum standards attached to it to the extent that:

- (a) the Further Information Form and the Application Form do not form a valid part of the Amendment Regulations; and
- (b) “minimum standards” contained in the Further Information Form are inconsistent with Commonwealth Regulations governing aircraft and to that extent are invalid pursuant to section 109 of the Commonwealth Constitution.

4 The Committee’s Concerns

4.1 Section 41 of the *Interpretation Act 1984* provides that subsidiary legislation comes into operation on the day of publication. Section 42 of the Interpretation Act provides that all “regulations” (which is defined in s 42(8) to include “rules, local Laws and by-laws”) must be laid before each House of Parliament within six sitting days after being published in the *Gazette*. Section 42(2) provides that if this requirement is not met, the regulations “thereupon cease to have effect”.

4.2 Neither the Application Form nor the Further Information Form have been published in the *Gazette* or tabled as part of the Amendment Regulations. To the extent that the Further Information Form seeks to impose “minimum standards” on applicants for Ministerial Authority and purports to be part of the Amendment Regulations it is inoperative pursuant to Section 42(2) of the *Interpretation Act 1984*.

4.3 Section 109 of the Constitution provides:

“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”

The High Court has determined that this provision is applicable to inconsistent Commonwealth and State regulations.⁶ As the Further Information Form does not form part of the Amendment Regulations and is therefore inoperative, the apparent conflict between the “minimum standards” contained in that Form and the requirements of the *Civil Aviation Regulations 1988* become academic.

4.4 However, the Committee is of the view that to the extent that the “minimum standards” contained in the Further Information Form conflict with the requirements of Federal Regulations, they are repugnant. The primary test used in determining questions of inconsistency between State and Federal legislation under Section 109 is the “covering the field” test. This test was described by Isaacs J in *Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 489* as follows:

“If... a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.”

A similar test has been used in relation to inconsistency in relation to delegated legislation.⁷

4.5 The Commonwealth has jurisdiction in relation to aircraft.⁸ Aviation is strictly regulated under the *Civil Aviation Act 1988* and the accompanying *Civil Aviation Regulations 1988*.

⁶ Hume v Palmer (1926) 38 CLR 441.

⁷ Victoria v The Commonwealth (1937) 58 CLR 618 per Dixon J at p.630

⁸ Airlines of NSW Pty Ltd v The State of NSW (No 1) (1964-65) 113 CLR 1; and Airlines of NSW Pty Ltd v The State of NSW (No 2) (1964-65) 113 CLR 54

The Committee is of the view that the Commonwealth’s intent in relation to these laws is to cover the field in relation to aviation regulation. To the extent that the “minimum standards” contained in the Further Information Form exceed Commonwealth Regulations, these “minimum standards” are *ultra vires*.

5 Conclusion

5.1 The Committee has resolved not to recommend disallowance of the Amendment Regulations on the basis that those Amendment Regulations which have been published in the *Government Gazette* are within power. However, due to the views expressed by the Committee above in relation to the non compliance with the formal requirements of the *Interpretation Act 1984* and the apparent conflict with Federal Regulations, the Committee has resolved that this report be tabled for the assistance and guidance of the House in its deliberations.

.....
Hon R L Wiese MLA
Chairman
June 15, 1999

ANNEXURE A

26 March 1999]

GOVERNMENT GAZETTE, WA

1279

— PART 1 —

3530/36

FISHERIES

FI301*

Fish Resources Management Act 1994

**Fish Resources Management Amendment
Regulations 1999**

Made by the Governor in Executive Council.

1. Citation

These regulations may be cited as the *Fish Resources Management Amendment Regulations 1999*.

2. Regulations amended

These regulations amend the *Fish Resources Management Regulations 1995**.

[* *Published in Gazette 29 September 1995, pp. 4503-646.*
For amendments to 3 March 1999 see 1997 Index to Legislation of Western Australia, Table 4, pp. 82-3, and Gazette 2 and 9 January, 19 June, 7 July and 25 September 1998 and 15 January 1999.]

3. Regulation 105A inserted

After regulation 105 the following regulation is inserted —

“

105A. Aircraft

- (1) A person (“the operator”) who owns or operates an aircraft must not cause or permit any person —
- (a) to enter the reserve by means of the aircraft; or
 - (b) to use the aircraft in the reserve,

unless the operator has been given written authority by the Minister.

Penalty: \$10 000.

- (2) An application for an authority under subregulation (1) —

- (a) is to be made to the Executive Director in a form approved for that purpose by the Executive Director;

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GOVERNMENT GAZETTE, WA

[26 March 1999

- (b) is to be accompanied by the fee set out in item 20 of Part 2 of Schedule 1; and
 - (c) is to be lodged at the Department's Geraldton office.
- (3) An authority has effect for the period, and is subject to the conditions, specified in the authority by the Minister.
 - (4) The Minister may vary or cancel a condition specified in an authority by notice in writing given to the holder of the authority.
 - (5) The Minister may vary or cancel an authority by notice in writing given to the holder of the authority.
 - (6) A person who holds an authority must not contravene a condition specified in the authority.
Penalty: \$10 000.

”.

4. Regulation 181 amended

Regulation 181 is amended by deleting “reduction or waiver” and inserting instead —

“ reduction, waiver or refund, in whole or in part, ”.

5. Schedule 1 amended

Part 2 of Schedule 1 is amended by inserting after item 19 the following item —

“

- 20. Authority to land or use aircraft in reserve (reg. 105A) 100

”.

By Command of the Governor,

M. C. WAUCHOPE, Clerk of the Executive Council.

ANNEXURE B

SUBMISSION

From: Kim Chance MLC

To: Joint Standing Committee on Delegated Legislation

Date: May 6th 1999

Re: Fish Resources Management Amendment Regulations 1999, Regulation 105A inserted.

INTRODUCTION

Thank you for the opportunity to give my views to the committee on the above regulation and its proposed disallowance in the Legislative Council.

From the outset I need to say that I do not believe that the regulation is in any way ultra vires the relevant Act. My concern is about the processes that have been used to implement the regulation, and the effect of those processes, rather than the legitimacy of regulation 105A.

HISTORY

The management of islands in the WA jurisdiction is almost exclusively within the power and responsibility of the Minister for the Environment and, presumably, the Minister for Lands. The exceptions to this general rule are Rottnest Is., managed by a statutory authority, and Garden Is. in which the Commonwealth has a role. Of the remaining islands, only those of the Abrolhos group are subject to different management arrangements, the control of these islands rests with the Minister for Fisheries.

This is a long standing arrangement and is in recognition of the central role that the Abrolhos Group occupies in the WA Rock Lobster industry. Politically, the management of the islands by Fisheries has been and still is supported by all of the major parties although there is some pressure for change.

Air services to the islands have been provided since 1966, in the first instance by Geraldton Building Company (GBC) which built strips on Big Rat and Wallaby Islands, through its subsidiary Geraldton Air Charter, and then by the Geraldton Fishermen's Cooperative who bought Geraldton Air Charter's aircraft in 1982 and built an airstrip on North Island.

Between 1978 and 1982 two operators competed for business. Since 1982 the cooperative has had the exclusive landing rights and the service has been provided by Shine Aviation Services on a tender for service basis. These tenders are let and managed by the cooperative but there has been significant investment by the state in the airstrip infrastructure and maintenance.

AUTHORITY

On March 19th 1997, I asked the then Minister for Transport representing the Minister for Fisheries why fixed wing air services had been contracted to a particular monopoly operator when it was apparent that the Dongara-Abrolhos service could be provided at a lower cost than had been accepted in the tender process. (*Hansard 19/03/97 page 573*)

Amongst other issues, I was advised that the Minister's authority to grant the cooperative exclusive landing rights (and thus the right to appoint an exclusive operator), was drawn from his power under s.121(2)(c) of the Fish Resource Management Act 1994 (the FRMA).

On receiving that answer I let the matter drop because I accepted that the arrangement was conducted under the proper authority of the FRMA.

Late last year I became aware that the Dongara based company, Arkell Aviation, had legal advice from Mr Graeme McNeish of the firm Cox McNeish to the effect that the Minister was not relying on the FRMA for his authority but rather on a statutory trusteeship which McNeish claimed was invalid on the basis that the trustees had not been appointed since 1951 or thereabouts. It was apparent that while the FRMA did provide the power to regulate air services, no regulations had ever been promulgated to give legal effect to the Minister's actions since 1994, the date of the Act.

Arkell then began offering a competing air service based on this advice, this service began on November 1998.

I presume that at this stage the Minister would have called for a legal opinion on his position and of the validity of the arrangements that were in place.

I further presume that the Minister later determined that McNeish was correct in his view and that the current arrangements were invalid. I form this view because no action was taken against Arkell between November 1998 and March 29th 1999 for their apparent breach of the purported regulations and because new regulations were gazetted on March 26th 1999 to give effect to the former and apparently invalid regulations.

Arkell then contacted me and asked me to advise them if new (and valid) current or retrospective regulations were gazetted which would cause their continued operations to be a breach of the Act.

I advised Arkell as soon as I became aware of the new regulations which were gazetted on March 26th 1999 and they immediately ceased operations, this would have occurred on March 29th 1999, the Monday following publication of the Gazette.

As a result of my concern at the process that had taken place I then caused notice to be given of my intention to move for the disallowance of the new regulation 105A.

DISALLOWANCE ISSUES

(1) Sub-regulation (2) of Regulation 105A requires that an applicant for the required written authority from the Minister to use an aircraft on the (Abrolhos Islands) reserve must be made to the Executive Director (of Fisheries) in a form that is approved for that purpose by the Executive Director, the regulation does not provide for the Minister's power to grant authority to be devolved.

Arkell sought an approved form, presumably on Monday 29th 1999, and was told by Fisheries that none were available. Both Arkell and later, the Dongara Denison Chamber of Commerce, have informed me that Shine Aviation were continuing to operate air services on that date. If this is so they were doing so in breach of the regulation since no Ministerial authority in accordance with the regulation could have been granted in the absence of the required form under regulation 105A(2). If Shine had continued to operate services after March 26th 1999 and before a decision by the Minister under 105A(1) they could only have been operating under the authority of the allegedly invalid provisions, or without any authority at all.

When I became aware of this, I called the Minister's office to make them aware of the difficulty that had been created and asked that the Minister be advised that it was a matter that needed to be quickly resolved, I also advised of my intention to seek disallowance.

To this date, May 6th 1999, I understand that Shine is still flying and that Arkell is still waiting for a response to their application.

(2) Criteria which have been developed by the Minister for applicants to fly into the reserve are far in excess of those required by the Civil Aviation Regulations (CAR) and appear to be constructed on the basis that the airstrips do not meet the relevant CAR requirements. I am informed that all strips do in fact meet CAR levels for safe operation.

(3) The criteria seem to be an attempt to perpetuate the existing monopoly by requiring a level of pilot experience that is not required in any other equivalent air service in Australia.

(4) It is questionable that the Minister has the power to determine pilot qualification levels that are in excess of the requirements of the relevant Commonwealth authority. The only qualification and experience that is required by the proper authority under the Civil Aviation Regulations are those requisite to the appropriate licence type.

(5) The application form provided under 105A(2) contains a number of highly unusual requirements and demonstrates a lack of understanding of the relevant Air Navigation Orders, a lack of familiarity with the relevant Civil Aviation Regulations, and unnecessarily duplicates the requirements of the Certificate of Air Worthiness which apply in any case.

(6) It is also apparent that regulation 105A breaches the National Competition Policy which provides that essential infrastructure such as airstrips ought to be available on reasonable terms to operators so as to promote competitive markets. Neither 105A, nor the earlier invalid regulations, are within the spirit of NCP and this is itself sufficient reason for the regulation to

be disallowed.

4

CONCLUSION

While I understand that the Joint Committee's charter may confine its consideration to those matters of the intra vires or ultra vires status of subject regulations, I nonetheless urge you consideration of the issues that have been raised. I believe that 105A is simply bad law and that its effect is not in the best interests of the state.

The issues of process may not be of direct relevance to the Committee however in this case I believe the processes and the regulation itself are inseparable. This is because the effect of the new, and probably valid regulation, is to give retrospective authority to what was an apparently invalid and somewhat questionable process that had existed for some time, at least since the commencement of the Fish Resources Management Act 1994.

I am extremely concerned that there seems to have been an attempt to set civil aviation requirements in such a manner as to preclude competing operators and I have doubts as to whether the WA Minister for Fisheries has the legal authority to determine civil aviation criteria which is a matter within the specific ambit of Commonwealth law and which consequently raises the obvious constitutional question.

Similarly, I am concerned that regulation 105A might be in conflict with the National Competition Act.

ANNEXURE C

Facsimile Message



FISHERIES
WESTERN AUSTRALIA

3RD FLOOR, SGIO BUILDING,
168 ST GEORGES TERRACE
PERTH WESTERN AUSTRALIA
TELEPHONE (08) 9482 7333

WEBSITE <http://www.wa.gov.au/wa/fish>

To Nigel Pratt
Advisory Research Officer
Legislative Council Committee Office

Tel 9222 7406
Fax 9222 7805

cc Colin Chalmers
Fish Habitat Program Manager

From A J O'Connor
Registrar

Fax 9482 7389
Tel 9482 7379

Your Ref Our 269/98v3
Ref

Subject *Fish Resources Management Regulations 1995* Amendment Gazetted
26/3/99 - Regulation 105A - Air Access to the Aboholhos Islands



Page 1 of 7 Date 11 May 1999

The information contained in this facsimile message may be privileged and is confidential information intended only for the use of the recipient named above. If you are the receiver of this message and not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this message is strictly prohibited. If you have received this message in error, please immediately notify the Agency by return facsimile or telephone.

Nigel

I refer to our telephone conversation this morning in which you requested a copy of the 'Application Form' and 'Ministerial conditions'.

For your information no conditions-of-approval have yet been formulated in relation to applications made under this Regulation. Four applications have been received and are being processed. What you may be referring to is the material specified as required to accompany the Application and in support of the application. This information will permit the Minister when considering an Application to be sufficiently informed of the [air service] proposal to make a sufficiently-informed decision.

The material might properly be characterized - if a Ministerial condition at all - to be a 'pre-condition' to the entertainment of an Application for the Minister's approval.

The notion underpinning this approach lies in s 135(2) of the *Fish Resources Management Act 1994* and is a common requirement set out in a variety of 'further information' sheets for many application types under the Act.

A copy of the Application form and the relevant 'further information' sheet is attached.

Regards

A J O'Connor
REGISTRAR
Legal & Licensing Division
Fisheries WA
Tel - (08) 9482 7365
Fax - (08) 9482 7389

*Fish Resources Management Act 1994***APPLICATION FOR MINISTERIAL AUTHORITY TO ENTER THE
ABROLHOS ISLANDS RESERVE BY MEANS OF AIRCRAFT OR TO USE AN
AIRCRAFT IN THE RESERVE****Regulation 105A**

This form is to be used by a person to apply to the Executive Director for written Ministerial Authority to enter the Abrolhos Islands Reserve by an aircraft or to use an aircraft in the Reserve. (The Reserve is vested in the Minister for Fisheries).

Regulation 105A of the *Fish Resources Management Regulations 1995* states:-

105A Aircraft

- (1) A person ("the operator") who owns or operates an aircraft must cause or permit any person -
 - (a) to enter the reserve by means of the aircraft; or
 - (b) to use the aircraft in the reserve,unless the operator has been given written authority by the Minister.
Penalty: \$10,000
- (2) An application for an authority under subregulation (1) -
 - (a) is to be made to the Executive Director in a form approved for that purpose by the Executive Director;
 - (b) is to be accompanied by the fee set out in item 20 of Part 2 of Schedule 1; and
 - (c) is to be lodged at the Department's Geraldton office.
- (3) An authority has effect for the period, and is subject to the conditions, specified in the authority by the Minister.
- (4) The Minister may vary or cancel a condition specified in an authority by notice in writing given to the holder of the authority.
- (5) The Minister may vary or cancel an authority by notice in writing given to the holder of the authority.
- (6) A person who holds an authority must not contravene a condition specified in the authority.
Penalty: \$10,000

Applicants should address the information requirements published in any 'Further Information' sheet accompanying this Form and such other material which may be relevant from time to time - e.g. Ministerial Guidelines.

Applicants - particularly applicants who have no known history of commercial aircraft activities in the Abrolhos will be expected to be capable of demonstrating their qualifications and experience in documentation provided in support of the Application.

**The Application should be lodged at the Geraldton Regional Office of Fisheries
WA, 69 Connell Road, Geraldton.**

Instructions for completing this Application

Please use block letters when completing this Application in writing.

PART A

1. **Applicant** - State the full name and business address. In the case of a company, specify the company's ACN. Enter the daytime telephone number at ☎, facsimile number and email address where relevant.

PART B

2. **Activity for which Ministerial Authority is required.**

The applicant must state whether the application in respect of intended -

- (a) commercial flying operations involving landing and take-off from nominated airstrips or helipads within the Reserve;

OR

- (b) commercial flying operations in the area of the Reserve which will **not** involve landings and take-offs from airstrips or helipads on the Reserve, (eg float planes or amphibious aircraft);

OR

- (c) Flying operations of a non-commercial nature or for a non commercial purpose. (Provide details).

3. **State the period for which the Authority is required** (e.g. "... weekly for one year").
4. **Declaration** - there are penalties under the *Fish Resources Management Act 1994* for making false or misleading statements.
5. **Execution of Documents** -

Sign and date the Application in the places indicated

Note: Accompanying documentation

Please attach any relevant supporting documentation to the Application form.

Fisheries Western Australia
 Geraldton Regional Office
 69 Connell Road
 GERALDTON 6530
 ☎ (08) 9921 6800
 Facsimile (08) 9921 3617

Office Use Only	
Date Received	
Applic. Fee Paid	
Receipt No.	
License No. Issued	
Rec. License No.	
Chart No.	
Registered	

Fish Resources Management Act 1994

**APPLICATION FOR MINISTERIAL AUTHORITY TO ENTER THE
 ABROLHOS ISLANDS RESERVE BY MEANS OF AIRCRAFT OR TO USE
 AN AIRCRAFT IN THE RESERVE**
 Regulation 105A

To the Executive Director
 Fisheries Western Australia

The applicant named in Part A, pursuant to Regulation 105A of the *Fish Resources Management Regulations 1995*, hereby applies for the Minister for Fisheries' written Authority to enter the Abrolhos Islands Reserve by means of an aircraft or to use an aircraft in the Reserve, in the manner and for the period the details of which are set out below [and in any documents accompanying this form].

PART A

- Applicant:**
 Name:(ACN)
 Business Address: Post Code:
 ☎: (.....) Facsimile No.:
 Email Address:

PART B

- Activity for which Ministerial Authority is required**
 What are the intended flying operations or activities for which an Authority is required?
 (Please tick relevant box below)
 Commercial flying operations
 involving the use of airstrips/helipads
 Commercial flying operations
 not involving the use of airstrips/helipads

2 Activity for which Ministerial Authority is required cont

Other
.....
.....

If spaces provided are insufficient for the purpose, use additional sheets to describe the intended activities.

3. Period for which Authority required

.....

4. Declaration

I declare that the statements made in this Application are true and correct.

5. Execution of Application

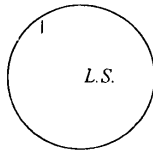
5.1 Signature(s) of person(s)

..... Date:
.....
.....

OR If the person is a Corporation.

5.2 The Common Seal of the Corporation is hereunto affixed in accordance with the corporation's Articles of Association.

Affix
Seal
Here



Signatures of Officers:

Director:
(print name) Date:

Director/Secretary:
(print name) Date:

5.3 Signature of Attorney

under Power:
(print name) Date:

*Fish Resources Management Act 1994*APPLICATION FOR MINISTERIAL AUTHORITY TO ENTER THE
ABROLHOS ISLANDS RESERVE BY MEANS OF AIRCRAFT OR TO USE AN
AIRCRAFT IN THE RESERVE**Further Information - Commercial Operations**

This form is to be used by a person in association with an Application for the Minister's Authority to enter the Abrolhos Islands Reserve by means of aircraft or to use an aircraft within the Reserve.

The Application form together with any 'Further Information' sheets or other documentation in support of the application is to be lodged with the Executive Director at the address shown on the first page of the form.

The prescribed Application Fee of \$100.00 must accompany this application.

Further Information - Commercial Operations

Applicants are to provide the following classes of information where relevant to the Application:

1. **Operator/Pilots** (Minimum Standard - Single Engine)
 - 1.1 Operator/Pilot holds valid Australian Commercial Pilot Licence?
 - 1.2 Pilot-in-Command - hours (minimum 750)?
 - 1.3 Hours on [nominated] type or group of aircraft (minimum 150)?
 - 1.4 Demonstrated ability to operate from 500 metres at sea level at ISA Nil wind with maximum nominated payload plus fuel? (Note does not apply to rotary aircraft).

Note: Nominated payload equals the load made up of pilot and passengers plus fuel plus reserve that can be lawfully carried into and out of specified aircraft landing area - (for example East Wallabi Island).
2. **Operator/Pilot** - (Minimum standard. Twin Engine)
 - 2.1 Operator/Pilot holds valid Australian Commercial Pilot Licence?
 - 2.2 Hours Pilot-in-Command (minimum 3000)?
Hours Pilot-in-Command (twin engine minimum 150)?
 - 2.3 Hours on type or group of aircraft (minimum 150), plus compliance with 1.4 above?

Note: Nominated payload equals the load made up of pilot and passengers plus fuel plus reserve that can be lawfully carried into and out of specified aircraft landing area - (for example East Wallabi Island).
3. Pilot has demonstrated to a Grade One Flight Instructor his / her ability to comply with 1.4?

Note: Twin engine pilots have demonstrated an ability to control the aircraft and bring it to a full stop, following a simulated engine failure at take off safety speed?

4. Is operator capable of meeting Minimum Safety Equipment standards for "overwater" operations? For example -
 - Approved life jackets for all persons on board
 - Buoyant Emergency Positioning Indicating Radio Beacon
 - Emergency Locator Transmitter
5. Are Cross-hired or rental aircraft proposed to be used?

Note 1

It will be a condition of approval that insurance carried by the Operator is -

- Not less than \$5 Million;

Note: The Minister for Fisheries WA and the Executive Director must be named in the Operator's Policy and held harmless and a waiver of subrogation must be included

- Not less than \$500,000 each passenger.

Note 2

Landing Fees

Operators should anticipate payment of landing fees

ANNEXURE D



Our ref: 3530/36

13 May 1999

Ms Karen Levinge
Legal Officer
Civil Aviation Safety Authority
PO Box 1082
Cloverdale WA 6105

By facsimile: (08) 9366 2810

Dear Ms Levinge

Fish Resources Management Amendment Regulations 1999.

The Joint Standing Committee on Delegated Legislation ('Committee') is considering the above Amendment Regulations which require the owner or operator of an aircraft intending to enter or use an aircraft in the Abrolhos Islands Reserve to obtain the written authority of the Minister for Fisheries.

An application for Ministerial authority in relation to commercial operations requires the applicant to submit further information to support the application. This further information is required as a 'pre-condition' to the application being considered and sets minimum conditions for pilot experience in respect to single engine and twin engine aircraft.

Please find **enclosed** copies of the following:

1. *Fish Resources Management Amendment Regulations 1999;*
2. Form for Application for Ministerial Authority to Enter the Abrolhos Islands Reserve by Means of an Aircraft or to use an Aircraft in a Reserve; and
3. Form for Application for Ministerial Authority to Enter the Abrolhos Islands Reserve by Means of an Aircraft or to use an Aircraft in a Reserve - Further Information - Commercial Operations.

The Committee would appreciate if you could assist it by providing it with answers to the following questions:

1. What minimum standards are required by Commonwealth aviation Acts and Regulations for operating a commercial aircraft landing and taking off from the three airstrips located at the Abrolhos Islands? In your answer please cite the relevant provisions of applicable Commonwealth Acts and Regulations.

PARLIAMENT HOUSE PERTH WA 6000 TELEPHONE +61 8 9222 7222 FACSIMILE +61 8 9222 7809
E-MAIL(GENERAL OFFICE): council@parliament.wa.gov.au

2. In respect to each of the minimum conditions set out in 1-5 of the Further Information- Commercial Operations Form in 3 above, to what extent do these conditions either fall below or exceed the requirements specified in Commonwealth Acts and Regulations for operating single engine and twin engine commercial aircraft?
3. Are the three airstrips at the Abrolhos Islands subject to any Commonwealth regulation? If so, what are the relevant provisions and regulations which apply to the operation of the airstrips?

Due to the parliamentary procedures for the review of delegated legislation the Committee has only a limited time to consider these Amendment Regulations. The Committee would appreciate receiving your reply by no later than Friday 21 May 1999.

If you have any questions in respect to the above or require any further information, please do not hesitate to contact Nigel Pratt, the Committee's Advisory / Research Officer on (08) 9222 7406.

Yours sincerely



Nigel Pratt
Advisory/ Research Officer

ANNEXURE E



CIVIL AVIATION
SAFETY AUTHORITY
AUSTRALIA

Ref:

Mr Nigel Pratt
Advisory/Research Officer
Joint Standing Committee on Delegated Legislation
Legislative Council Committee Office
Parliament House
PERTH WA 6000

BY FACSIMILE: 9222 7805

Dear Mr Pratt

Fish Resources Management Amendment Regulations 1999

I refer to your letter dated 13 May 1999.

I have considered the documents enclosed with that letter and address each of you questions below.

Question 1 - What are the minimum standards required by the Commonwealth aviation legislation for operating a commercial aircraft landing and taking off from the three airstrips located at the Abrolhos Islands?

Firstly, the aircraft must have the proper authorisation. "Commercial aircraft" is not a term which is used in the Commonwealth aviation legislation. If an aircraft is flown or operated for a commercial purpose, that activity must be authorised by an Air Operator's Certificate ("AOC") issued by the Civil Aviation Safety Authority ("CASA") (unless the aircraft is a foreign aircraft, in which case other rules apply): see section 27 of the Civil Aviation Act 1988 ("the Act").

Subregulation 206(1) of the Civil Aviation Regulations 1988 ("CAR 1988") prescribes the following commercial purposes for the purposes of section 27 of the Act:

- (a) aerial work purposes, being purposes of the following kinds:
 - (i) aerial surveying;
 - (ii) aerial spotting;
 - (iii) agricultural operations;
 - (iv) aerial photography;
 - (v) advertising;
 - (vi) flying training, other than conversion training or training carried out under an experimental certificate issued under regulation 21.195A of CAR 1998 or under a permission to fly in force under subregulation 317(1);

- (vii) ambulance functions;
 - (viii) carriage, for the purposes of trade, of goods being the property of the pilot, the owner or the hirer of the aircraft (not being a carriage of goods in accordance with fixed schedules to and from fixed terminals);
 - (ix) any other purpose that is substantially similar to any of those specified in subparagraphs (i) to (vii) (inclusive);
- (b) charter purposes, being purposes of the following kinds:
- (i) the carriage of passengers or cargo for hire or reward to or from any place, other than carriage in accordance with fixed schedules to and from fixed terminals or carriage under a special flight permit under regulation 21.197 of CAR 1998 or under a permission to fly in force under subregulation 317(1);
 - (ii) the carriage, in accordance with fixed schedules to and from fixed terminals, of passengers or cargo or passengers and cargo in circumstances in which the accommodation in the aircraft is not available for use by persons generally;
- (c) the purpose of transporting persons generally, or transporting cargo for persons generally, for hire or reward in accordance with fixed schedules to and from fixed terminals over specific routes with or without intermediate stopping places between terminals.

Therefore, if an aircraft is operating, or being flown, for any of the commercial purposes referred to above, be operated under an AOC which authorises the operations to be conducted.

Secondly, the pilot of the aircraft must be appropriately licensed. I note that the document entitled "Further Information - Commercial Operation" refers to the "operator/pilot [holding a] valid Australian Commercial Pilot Licence". There are 5 different types of commercial pilot licence ("CPL"); a commercial pilot (aeroplane) licence, a commercial pilot (helicopter) licence, a commercial pilot (gyroplane) licence, a commercial pilot (balloon) licence and a commercial pilot (airship) licence.

I presume that it would be unlikely for gyroplanes, balloons or airships to be using the landing strips at the Abrolhos Islands, therefore I will confine my comments to aeroplanes and helicopters. However, please let me know if you would like any further information about the other aircraft.

The qualifications for a commercial pilot (aeroplane) licence are set out in regulation 5.104 of CAR 1988. In terms of aeronautical experience, the minimum qualifications are:

- a) if the person is commercially trained (ie is a person who has successfully completed a training course conducted by a commercial flying school in accordance with the relevant aeroplane syllabus), at least 150 hours of flight time flown in a registered aeroplane and including:
 - (i) 70 hours of flight time as a pilot in command; and
 - (ii) 20 hours of cross-country flight time as pilot in command; and
 - (iii) 10 hours of instrument flight time. (See regulation 5.111)
 - b) if the person already holds a commercial (helicopter) pilot licence or an air transport (helicopter) pilot licence; at least:
 - (i) 60 hours of flight time as a pilot of a registered aeroplane or a recognised aeroplane;
 - (ii) 10 hours of cross-country flight time as pilot in command of a registered aeroplane, or a recognised aeroplane; and
 - (iii) 10 hours of instrument flight time in a registered aeroplane, or a recognised aeroplane. (See regulation 5.113)
 - c) if the person already holds a private pilot (helicopter) licence, at least:
 - (i) 80 hours of flight time as a pilot of a registered aeroplane, or a recognised aeroplane;
 - (ii) 15 hours of cross-country flight time as pilot in command of a registered aeroplane, or a recognised aeroplane; and
 - (iii) 10 hours of instrument flight time in a registered aeroplane, or a recognised aeroplane. (See regulation 5.114)
- or
- d) if a person does not come within any of the above categories, at least:
 - (i) 100 hours as pilot in command;
 - (ii) 100 hours of flight time in a registered aeroplane, or a recognised aeroplane;
 - (iii) 20 hours of cross-country flight time as pilot in command of a registered aeroplane, or a recognised aeroplane; and
 - (iv) 10 hours of instrument flight time in a registered aeroplane, or a recognised aeroplane. (See regulation 5.115).

In addition, there are other requirements which relate to the need to undergo regular flight reviews (regulation 5.108) and to have recent experience (regulation 5.109). There is also a restriction on pilots who are 60 years of age or older (regulation 5.110).

The qualifications for a commercial pilot (helicopter) licence, in terms of aeronautical experience, are similar to those for a commercial pilot (aeroplane) licence and are found in regulation 5.127 of CAR 1988.

Once a person holds a commercial pilot (aeroplane) licence or a commercial pilot (helicopter) licence, however, he or she is still limited to flying only those aeroplanes or helicopters for which he or she also holds a type or class endorsement or a special design feature endorsement, if the aeroplane or helicopter has a special design feature.

That is, the type or class of aeroplane or helicopter which the pilot is permitted to fly will be endorsed on his or her licence. I enclose a copy of sections 40.1.0 and 40.3.0 of the Civil Aviation Orders which deals with aeroplane endorsements and helicopter endorsements, respectively.

Thirdly, there are requirements which relate to the landing strips. Subregulation 92(1) of CAR 1988 provides that:

“An aircraft shall not land at, or take-off from, any place unless:

- (a) the place is an aerodrome established under the Air Navigation Regulations; or
- (b) the use of the place as an aerodrome is authorised by a licence granted under regulation 89C; or
- (c) the place is an aerodrome for which an arrangement under section 20 of the Act is in force and the use of the aerodrome by aircraft engaged in civil air navigation is authorised by CASA under that section; or
- (d) the place (not being a place referred to in paragraph (a), (b) or (c)) is suitable for use as an aerodrome for the purposes of the landing and taking-off of aircraft;

and, having regard to all the circumstances of the proposed landing or take-off (including the prevailing weather conditions), the aircraft can land at, or take-off from, the place in safety.

Penalty: 25 penalty units”.

As I understand it, the Abrolhos Islands airstrips come within paragraph 92(1)(d) of CAR 1988. There is no requirement for such a landing area to be licensed by CASA. However, CASA has issued guidelines which set out the factors that may be used to determine the suitability of a place for the landing and take-off of aeroplanes. I enclose a copy of the guidelines, found in Civil Aviation Advisory Publication No. 92-1(1) for your information.

Question 2 - In respect of each of the minimum conditions set out in 1-5 of the “Further Information - Commercial Operations” form, to what extent do these conditions either fall below or exceed the requirements specified in the Commonwealth Acts and Regulations for operating single engine and twin engine commercial aircraft?

I will deal with each of the conditions in turn, using the same numbering as on the “Further Information - Commercial Operations” form.

- 1.1 As stated above, the condition ought to state the type of commercial pilot licence required. However, to fly an aircraft for charter operations, a pilot must hold the relevant commercial pilot licence which is endorsed for the type or class of aircraft to be flown. If the operation were one for regular public transport (ie scheduled flights open to the public of the type ordinarily conducted by, for example, Ansett or Qantas), then the pilot needs to hold an air transport pilot licence.

- 1.2 Exceeds the requirement (see regulations cited above).
- 1.3 The minimum number of hours required to obtain a type endorsement or a class endorsement (there is no such thing as a “group of aircraft” as referred to in the conditions) depends on the type or class of aircraft in question. Section 40.1.0 of the Civil Aviation Orders sets out the requirements for the issue of type and class endorsements. However, there is no type or class endorsement which requires a minimum of 150 hours flight time to obtain the endorsement.
- 1.4 I understand this condition to mean that the pilot has demonstrated his or her ability to land and take-off on a landing strip which is 500 metres long and is at sea level. I am advised that the ability to do that depends on the performance of the aircraft concerned rather than the capacity of the pilot per se. Whether a particular aircraft is capable of being operated under those conditions is assessed by looking at performance charts or WAT (weight, altitude, temperature) charts. If a particular aircraft is capable of being operated under those conditions and the pilot is endorsed on that type of aircraft, then it is assumed that the pilot is capable of so operating the aircraft. There is no further requirement under the legislation for the pilot to demonstrate that manoeuvre.
 - 2.1 I repeat the comments made in relation to 1.1 above.
 - 2.2 To fly a twin engine aeroplane, the pilot would have to have that particular aeroplane type endorsed on his or her licence: see section 40.1.0 of the Civil Aviation Orders. However, in no case would the minimum requirement to obtain such an endorsement be 3000 hours as pilot in command of a single engine aircraft (which is what I take the first part of condition 2.2 to mean) or 150 hours in a twin engine aircraft. An operator who holds an AOC authorising charter operations is also under an obligation to ensure that the pilot in command of multi-engined aeroplane not exceeding 5700kg must have:
 - (a) in the case of VFR (visual flight rules) operations, at least 100 hours experience as pilot in command of multi-engined aeroplanes and at least 5 hours experience as pilot in command of the aircraft type; and
 - (b) in the case of IFR (instrument flight rules) operations, at least 10 hours experience as pilot in command of the aircraft type, which may include flight time accrued as pilot acting in command under supervision (see paragraph 4.1 of section 82.1 of the Civil Aviation Orders).
- 2.1 I repeat the same comments as in 1.3 and 1.4 above.
3. There is no legislative requirement that a pilot’s ability to take-off and land be tested by a Grade 1 flight instructor. I am advised that the note to condition 3 is incorrect in its usage of the phrase “take-off safety speed”, which has a particular definition (see paragraph 3.1 of section 20.7.4 of the Civil Aviation Orders). Whether an aircraft can safely come to a full stop on a landing strip which is 500m long depends, as stated above, on the performance levels of the aircraft, rather than on the capabilities of the pilot. The capacity of the pilot to handle emergency procedures would be tested at the time of obtaining the licence or endorsement concerned. Pilots are also required to undergo biennial flight reviews to test their continuing capacity to hold their licences and endorsements (see regulation 5.108 of CAR 1988).

4. Section 20.11 of the Civil Aviation Orders sets out the emergency and lifesaving equipment and requirements for passenger control in emergencies. I presume that the reference in condition 4 to "Minimum Safety Equipment" is a reference to section 20.11. Perhaps it would be clearer if the condition simply referred to compliance with section 20.11.
5. I do not know what is meant by "cross-hired" aircraft. There is no legal impediment to an operator using an aircraft for charter purposes provided that it is of a type listed as authorised to be used by the operator on his or her AOC.

Note 1 - Under the Civil Aviation (Carriers' Liability) Act 1959 (Commonwealth) and the recent amendments to enacted Civil Aviation (Carriers' Liability) Act (Western Australia), carriers' liability insurance is compulsory for all aircraft engaged in commercial operations.

Question 3 - Are the three airstrips at the Arolhos Islands subject to any Commonwealth regulation? If so, what are the relevant provisions which apply to the operation of the airstrips?

This question has already been dealt with in my answers to the previous questions.

Conclusion

I have answered your questions purely on a legal basis. That is, I make no comment as to whether it is appropriate in this case for the Minister to require qualifications above the minima specified by the legislation for operations at the Arolhos Islands. As you have seen, the legislation governing aviation is quite complex. However, with due respect to the drafter of the conditions, the terminology used in the "Further information - Commercial Operations" form is not entirely correct.

I hope that the above information is of assistance to the Committee. Please do not hesitate to call me if you would like clarification of any of the matters referred to in this letter. My direct line is 9366 2808.

Yours faithfully



Karen Levinge
LEGAL COUNSEL, WEST/CENTRAL

21 May 1999