



MINISTRY OF TRANSPORT
TE MANATŪ WAKA

Independent reviews of the Director of Civil Aviation's decisions

Proposed fees for applicants

Not Government Policy
Consultation Paper
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Preface

The purpose of this paper is to seek your written feedback on options to set application fees for reviews to be carried out by the new independent review function (IRF) created by the Civil Aviation Act 2023 (the 2023 Act). This new function will be operational from 5 April 2025, when the 2023 Act comes into effect.

Page 7 of the paper includes questions on these options, which you may wish to respond to. Please also feel free to provide us with any other comments you consider to be relevant to the proposals in this paper.

Your feedback will help to inform final policy decisions on the fees to be charged to review applicants.

You can provide feedback by writing and sending your input to civilaviationact@transport.govt.nz with the subject line “Feedback – proposed fees for independent review function”.

The consultation period will close at 5pm on 28 October 2024. Following this, we will review all feedback and finalise any proposed changes, taking your views into account.

Use of information

Please note the feedback you provide us with may become publicly available. The Ministry of Transport Te Manatū Waka (the Ministry) may publish any information you submit and identify you as the submitter.

Therefore, please clearly indicate if your comments are commercially sensitive or should not be disclosed for another reason, and/or the reason why you should not be identified as the submitter. Any request for non-disclosure will be considered under the Official Information Act 1982.

Glossary of terms and abbreviations

Applicant	Person in respect of whom a decision is made, or the owner, operator, or person, for the time being, in charge of an aircraft or aeronautical product that is the subject of a decision
Application	Application or request for the review of a decision made by the Director
Final decision	Final decision made by the Director after receiving the independent reviewer's report, on whether to accept any, or all, of the reviewer's recommendations
IRF	Independent review function
Reviewer(s)	Person(s), appointed by the Minister of Transport, responsible for carrying out reviews and reporting their recommendations to the Director
Partial cost recovery	The application of a fee or charge that only covers part (rather than the full amount) of costs incurred in providing a service
Reviewable decisions	Decisions made by the Director that are covered by the IRF, as specified in Regulations
The 2023 Act	The Civil Aviation Act 2023
The Authority	The Civil Aviation Authority
The Director	The person who, for the time being, is the Director of Civil Aviation (or the Acting Director), together with all persons who hold a relevant delegation to act on behalf of the Director
The Ministry	The Ministry of Transport Te Manatū Waka – the department responsible for administering the 2023 Act
The Secretary	The Secretary for Transport

Executive summary

- 1 The Civil Aviation Act 2023 (the 2023 Act), which will enter into force on 5 April 2025, provides for independent reviews of specified decisions made by (or on behalf of) the Director of Civil Aviation (the Director). This will provide a faster and less costly avenue for sector participants to challenge decisions made by the Civil Aviation Authority (the Authority) than through court action.
- 2 The independent review function (IRF) will be administered by the Ministry of Transport Te Manatū Waka (the Ministry), which will incur the operational costs of the function, including reviewer remuneration and expenses, the costs of independent technical advice (where required) and administrative and support costs.
- 3 Based on agency cost recovery guidelines and principles, it is appropriate that the Ministry partially recover the costs of reviews from applicants. A partial cost recovery approach will reflect the mix of private and public good benefits the IRF is expected to generate, and present less of a barrier for individuals of limited means to access reviews than full cost recovery.
- 4 This paper proposes three possible options for partial cost recovery:
 - Option 1: a single fixed fee for all applicants
 - Option 2: a two-tiered fixed fee structure, where organisations pay a higher fee than individuals [*preferred option*]
 - Option 3: the application of an hourly fee for individuals and organisations, up to maximum, capped levels.
- 5 This paper seeks your views on the three proposed options. Your feedback will help inform final decisions on the approach to be taken to partially recover costs of independent reviews.

The proposals in this paper are separate from the consultation underway on the Civil Aviation Authority's pricing review

- 6 The Authority's new pricing review proposals, which are out for consultation until 8 October 2024, are intended to meet the future costs of the Authority's functions and services. In contrast, the proposals in this paper relate to cost recovery options to help the Ministry fund the IRF.

Background

- 7 The 2023 Act establishes a new function that enables the independent review of regulatory decisions made by the Director and persons acting under delegated authority from the Director.
- 8 The IRF will become operative when the 2023 Act enters into force on 5 April 2025.
- 9 The purpose of the IRF is to provide a more agile, less costly alternative to court action through statutory appeal rights (that the 2023 Act carries over from the Civil Aviation Act 1990), or through judicial review. A person who is dissatisfied with a reviewable decision will have the opportunity to challenge the decision without incurring the expense of court proceedings or being subject to the delays inherent to the court system.

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- 10 The IRF is intended to strengthen the quality of, and sector confidence in, decision-making by the Authority in its capacity as the aviation safety regulator.
- 11 The main parameters for how the IRF will operate are set out in Subpart 5 of Part 10 of the 2023 Act. These include the following elements:
- The Minister will appoint the reviewer(s).
 - Any person or entity that is the subject of a reviewable decision may apply for a review. The reviewer must, as soon as reasonably practicable, review the decision and all relevant information and report their (non-binding) recommendations to the applicant and the Director.
 - The final decision in response to a review rests with the Director – this is to ensure that the Director retains the ultimate responsibility for the safe and secure operation of the civil aviation system.
- 12 The Director must, within 10 working days of receiving the reviewer’s recommendations, make a final decision on whether to accept any or all of the recommendations, and notify the applicant of the decision and the reasons for that decision.

Consultation has already been carried out on the scope of decisions to be covered by the function

- 13 The 2023 Act requires the scope of decisions to be covered by the IRF to be set out in regulations.
- 14 Between 27 August 2024 and 24 September 2024, the Ministry carried out consultation with stakeholders on options to set the scope of the IRF. Details on this consultation may be found at this link: <https://www.transport.govt.nz/consultations/independent-review-function-scope-of-reviewable-decisions>. The Ministry is currently assessing the feedback received.
- 15 While the precise scope of reviewable decisions is still to be determined, we expect decisions relating to the aviation documents that determine a person’s or entity’s ability to operate within the civil aviation system will be the central focus of decisions covered by the function.

Support for the function will be provided by the Ministry

- 16 As the department responsible for administering the 2023 Act, the Ministry will provide the administrative and functional support necessary to ensure the effective operation of the IRF.
- 17 The Ministry will establish and maintain procedures for handling review applications, record keeping, the provision of guidance to applicants, and the liaison between applicants, the reviewer(s), and the Authority. The Ministry will also be responsible for the remuneration of the reviewer(s).

There will be a range of costs arising from the operation of the review function

- 18 We anticipate the main costs of the IRF will comprise:
- the remuneration of reviewer(s) and incidental costs
 - the costs of any independent contracted technical advice, where reviews centre on technical matters beyond the expertise of reviewers
 - the cost of secretariat and functional support for the review process that will be provided by the Ministry.
- 19 The Ministry estimates that review costs will average around \$3,300 (excl. GST) per review. This estimate is largely derived from data relating to the current medical convener function, which carries out reviews of the Director's medical certification decisions, and is the model upon which the IRF is based.
- 20 It is difficult at this stage to speculate on the likely total costs of the IRF once it is operational, as this will depend on the scope of reviewable decisions to be specified in regulations and the scale and nature of demand for reviews.
- 21 In the absence of a cost recovery charge, these costs would need to be fully met within Ministry baselines.

What is the most appropriate approach to meeting the costs of the review function?

- 22 The Ministry has assessed a range of options for meeting the costs of the IRF. This assessment was based on the key principles for cost recovery derived from agency guidelines¹, as follows:
- allocation of review costs should broadly reflect public and private benefits of the service
 - all relevant direct and indirect departmental costs should be included in the base cost of the function
 - fees should not be set at levels that preclude or significantly impede the statutory rights of sector participants seeking well-founded reviews
 - fees should be structured simply, fairly, and efficiently.
- 23 The following sections highlight the issues considered as part of this Ministry assessment.

¹ The principles were derived from the Ministry's Transport regulatory system funding principles, Treasury and Office of the Auditor-General guidelines, and the Ministry of Justice cost recovery principles.

There is a sound policy rationale to apply cost recovery for review applications

Review applicants will be the primary beneficiaries of the function

- 24 The IRF has been established specifically for the benefit of aviation participants, enabling them to challenge a Director's decision through a process that avoids the costs and delays of challenging a Director's decision in court.
- 25 An application for a review of a Director's decision will give applicants the opportunity to have decisions opened to independent scrutiny, and potentially modified or withdrawn to their advantage as a result of the reviewer's recommendation(s) to the Director.

There will be wider public benefits arising from reviews, but these are less clearly defined

- 26 The IRF is expected to promote good decision-making by strengthening accountability and transparency around the rationale for regulatory decisions over time, which will generate public good benefits through:
- enhanced effectiveness of the regulatory system
 - increased public confidence in the regulatory system.

The Act provides the statutory authority for cost recovery

- 27 Section 415(1) of the 2023 Act provides that the Governor-General may, by Order in Council, on the recommendation of the Minister, make regulations prescribing, or providing for the fixing of, fees and charges payable for a range of listed purposes, including: “to reimburse the Secretary and the reviewer for costs directly and indirectly associated with the reviewer’s functions under subpart 5 of Part 10”.

Partial cost recovery is the most appropriate option

- 28 While a review is principally for the benefit of an applicant, charging applicants the *full* cost of reviews would be likely to compromise the policy intent of the IRF. This is because it would likely deter some sector participants of limited means from exercising their statutory right to well-founded reviews and would not reflect the broader public good elements the IRF is expected to provide over the longer-term.
- 29 The Government considers the application of *partial* cost recovery for reviews would be a more appropriate approach, given that it would:
- present less of a barrier for individuals of limited means to access reviews than full cost recovery, and so ensure that the intent of the IRF is not compromised
 - broadly reflect the mix of private and public good benefits the IRF is expected to generate
 - support the efficient operation of the function.²

² Charging partial cost recovery fees would mean that the capacity of the IRF to meet the demand for reviews of more impactful decisions would be less likely to be compromised by the demand for speculative and meritless reviews.

The Ministry has identified three options for partially recovering review costs

30 Based on the above principles, we consider it appropriate to set fees at a level that:

- fully recovers the direct administrative costs of processing an application, given the administrative steps will be broadly similar for all applications
- partly reflects the direct costs of the review itself
- is sufficiently high to discourage trivial applications, but not so high as to compromise the IRF purpose of providing a cheaper and faster review mechanism than court action for well-founded review applications.

31 We have identified three options based on these considerations, as set out in the following table.

Table 1: Options for partial cost recovery

Option	Comment
Option 1 – a single fixed fee for all applicants	This would be based on partly recovering a representative average review cost (rather than based on the actual costs of each respective review, which will vary from case to case). A fixed fee approach would be relatively simple to administer.
Option 2 – a two-tiered fixed fee structure	Under this option, organisations would pay a higher fixed fee than in Option 1. The rationale for this two-tier approach is that: <ul style="list-style-type: none"> • application costs are likely to be more of a barrier for individuals than organisations • reviews of decisions affecting organisations are likely to be more technical and complex and therefore more time and resource-intensive.³ As with Option 1, this option would be relatively simple to administer.
Option 3 – recovering costs through an hourly fee, up to a cap	This option would base the level of cost recovery more closely on the actual costs arising from each respective review up to a pre-set limit. It would, however, introduce uncertainty as to actual fee levels and the level of cost recovery, and would be more complex and time-consuming to administer than the other, fixed fee, options.

³ Organisations are subject to extensive operational and technical aviation rule requirements that do not apply to individuals. Consequently, the matters at issue in an organisation's review application are likely to be more technically complex, and thus time-consuming to consider, than in an individual's case.

The Ministry proposes the following fees for the respective options

32 These fees are set out in the table below.

Table 2: Proposed Fee levels

Option 1	\$1,000 (excl. GST) per application
Option 2	\$1,000 (excl. GST) per application for individuals \$1,500 (excl. GST) per application for organisations
Option 3	\$432 (excl. GST) base fee to cover standard administrative expenses, plus an hourly fee for each application of \$189 (excl. GST)/hour, up to total capped levels of \$1,000 (excl. GST) for individuals and \$1,500 (excl. GST) for organisations

33 These fee levels are based on an assessment of expected review costs, and on relativities with charges set for other comparable purposes. For example, the level of the fixed application fees proposed in Option 1 and for individuals under Option 2 is broadly comparable to fees applied in certain other contexts, such as:

- the Australian Administrative Appeals Tribunal (AAAT) applies a standard single application fee of AU\$1,082 (~ NZ\$ 1,176) for reviews of decisions made by the Australian Civil Aviation Safety Authority (CASA)
- the fee payable for appeals to the New Zealand Immigration and Protection Tribunal under the *Immigration and Protection Tribunal Regulations 2010* is set at \$910 (incl. GST) per appeal.

At this stage the Ministry considers Option 2 to be the preferred option

34 The Ministry's initial assessment suggests Option 2 to be the preferred option because:

- a two-tier fixed fee structure would accommodate the likelihood that organisations will generally have greater capacity to pay than individuals, and the tendency for decisions affecting organisations to be more technical and complex
- Option 2 utilises a fixed fee structure that would be reasonably simple to administer, unlike Option 3
- Option 2 will raise more revenue than Option 1 and Option 3, and is not subject to the revenue uncertainty that Option 3 would involve.

35 A more detailed assessment of the three options is set out in Annex One.

A review of the applied fee structure would be carried out once the review function is operational

- 36 Once the IRF is operational and has generated sufficient performance and cost data, we will re-assess the fee level(s) for review applications. Operational data will enable the Ministry to re-evaluate demand and cost assumptions, assess the implications for the level of cost recovery, and identify any consequential fee changes that may be warranted.
- 37 We expect that sufficient information would become available to undertake such a review within the usual three-year cycle that is best practice for reviews of fees and charges.

Questions for feedback

- Do you have any comments on the three options for partial cost recovery set out in this paper, and the fee levels proposed for each option?
- Do you favour, or have specific concerns about, any of these options? If so, please elaborate.
- Are there any amendments to these options you think are warranted, or other options you think would be more appropriate for applying partial cost recovery for independent reviews?
- What do you think would be the impact of these options for you/your organisation or others considering applying for reviews?
- Would any of them cause you or your business significant concerns? If so, please elaborate.
- Do you have any other general or specific comments on the issues canvassed in this paper?

Please send any responses to these questions to: civilaviationact@transport.govt.nz

Annex One: Assessment of options against cost recovery principles

Principle	Option 1 Single fixed fee	Option 2 Tiered fixed fees	Option 3 Hourly charge
Allocation of IRF costs should broadly reflect the public and private benefits of the service	Yes Partial cost recovery reflects the mix of both private benefits to IRF users and the public benefits relating to the operation of the civil aviation regulatory system.	Yes Partial cost recovery reflects the mix of both private benefits to IRF users and the public benefits relating to the operation of the civil aviation regulatory system.	Yes Partial cost recovery reflects the mix of both private benefits to IRF users and the public benefits relating to the operation of the civil aviation regulatory system.
All relevant direct and indirect departmental costs should be included in the base cost of the IRF	Yes IRF costs include direct reviewer costs and IRF-related direct and indirect costs incurred by the Ministry.	Yes IRF costs include direct reviewer costs and IRF-related direct and indirect costs incurred by the Ministry.	Yes IRF costs include direct reviewer costs and IRF-related direct and indirect costs incurred by the Ministry.
Fees should not be set at levels that preclude or significantly impede applicants seeking well-founded reviews	Yes The fee level recognises the likely limited ability of some individuals to pay a high fee. It does not factor in organisations' likely greater ability to pay (or to pass on costs). Not does it reflect that reviews relating to organisations are likely to be more complex and costly to consider.	Yes This two-tiered fee approach, with a higher fee for organisations, recognises that organisations tend to have a greater ability to pay than individuals, and that their review applications are likely to involve more complex considerations. The approach recovers more revenue than Options 1 and 3.	Yes Capping fees at the same levels as for Option 2 would take into account the same ability to pay and complexity of review considerations. Under this option, fees for organisations are more likely to be charged at <i>less</i> than the capped amount than fees for individuals.
Fees should be structured simply, fairly, and efficiently	Yes All applicants pay the same fee and have certainty as to costs. A fixed fee is simple to administer. This option though does not take into account likely differences between individuals' and organisations' ability to pay.	Yes Applicants have certainty as to costs. A higher fee for organisations better reflects relevant costs. Fees would be simple to administer.	No A variable charge does not provide applicants with certainty as to costs and is more complex to administer than a fixed fee.
Provisional overall assessment	Meets the cost recovery principles but does not fully take into account differences between individuals' and organisations' ability to pay. Is relatively simple to administer.	Meets the cost recovery principles. Better recognises ability to pay and that reviews of decisions affecting organisations are likely to be more costly. Is relatively simple to administer.	Does not provide certainty as to costs to applicants or the amount of fee to be received. Is complex to administer and less efficient than fixed fee(s).

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