

Chair  
Cabinet Economic Growth and Infrastructure Committee

## REVIEW OF THE CIVIL AVIATION ACT AND AIRPORT AUTHORITIES ACT: KEY POLICY DECISIONS

### Proposal

1. This paper seeks agreement to make changes to the Civil Aviation Act 1990 (the CA Act) and the Airport Authorities Act 1966 (AA Act) to:
  - 1.1. improve the safety and security of the aviation system
  - 1.2. improve the efficiency and effectiveness of regulatory decision-making to facilitate a growing industry
  - 1.3. clarify expectations placed on participants in the aviation system
  - 1.4. preserve New Zealand's national security and national interests
  - 1.5. improve the usability of the legislation.

### Executive summary

2. In the past 25 years since the enactment of the CA Act, New Zealand's aviation sector has flourished. Air passenger transport contributed approximately \$4.3 billion (14 percent) to New Zealand's \$29.8 billion tourism revenue in the year to March 2015.<sup>1</sup> 17 percent of New Zealand exports and imports by value are carried by air. The aviation industry annually exports \$3.8 billion of products and services and contributes 6.9 percent of New Zealand's GDP. The aviation industry is expected to continue to be a major contributor to economic growth.
3. The Ministry of Transport undertook a review of the CA Act and the AA Act (the Review) in 2014 to ensure that New Zealand's aviation legislation could continue to support an effective, efficient, safe, secure and resilient aviation system, which supports the growth of the economy in order to deliver greater prosperity, security and opportunities for all New Zealanders. The Review identified a number of legislative changes that will contribute to achieving this outcome. These changes will:
  - 3.1. improve the safety and security of the aviation system
  - 3.2. improve the efficiency and effectiveness of regulatory decision-making to facilitate a growing industry
  - 3.3. clarify expectations placed on participants in the aviation system
  - 3.4. preserve New Zealand's national security and national interests
  - 3.5. improve the usability of the legislation.

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<sup>1</sup> Tourism Satellite Account: 2015

4. The Ministry of Transport formally consulted with industry in late 2014. Industry provided comment on a wide range of issues, and was generally supportive of the proposed changes. While most changes are unlikely to be contentious, there are a small number of stakeholders with a keen interest in the authorisation of cooperative arrangements between airlines providing international air services, and how airports set charges.
5. Table 1 below summarises the key changes and rationale for change.

*Table 1: Summary of key changes*

<b>Safety</b>	
Protection of safety information (known as a 'Just Culture' <sup>2</sup> approach)	It is important that the level and quality of incident reporting to the Civil Aviation Authority (CAA) is improved. Quality incident reporting is vital to support a pro-active and risk-based regulatory approach. I therefore recommend that the CA Act should state that enforcement or administrative action should not be taken against people who fully and accurately self-report aviation incidents to the CAA, unless the person's behaviour was reckless, the person demonstrated repetitive at-risk behaviour, or it is in the public interest <sup>3</sup> to pursue such action.
Offences and penalties	The offences and penalties regime is operating essentially as intended. While significant changes are not necessary, I propose changes to two sections: <ul style="list-style-type: none"> <li>• section 46B, which creates an offence to provide fraudulent, misleading or intentionally false statements to obtain a medical certificate; to provide that the offence may be committed 'recklessly'</li> <li>• section 65, which sets out the time for filing charging documents; to amend the limitation periods for certain offences relating to the disclosure of information, to 12 months from when the offence was detected (as opposed to 12 months from when the offence was committed).</li> </ul>
Improving processes around fit and proper person tests	The CA Act requires the Director of Civil Aviation (the Director) to determine whether a person is 'fit and proper' to participate in the aviation system. To make that determination, the Director can 'seek and receive' information from third parties. Agencies are concerned that supplying such information may breach the Privacy Act 1993. This can lead to delays in relevant information being received, posing a potential risk to aviation safety. <p>To address this, I propose that the CA Act explicitly states that when the Director seeks information from a third party, it is not a breach of the Privacy Act to supply that information.</p>

<sup>2</sup> A 'just culture' operates when people are not punished for making human errors. A key principle is that safety is more likely to improve from understanding and rectifying the cause of human error, rather than through punishing the individual. Punitive responses are reserved for non-reporting and reckless behaviour, or where there are countervailing public interest considerations.

<sup>3</sup> This is a balancing exercise that the decision-maker will need to undertake before deciding whether or not to take action. The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. An example public interest consideration that may outweigh the CAA's requirement not to take action is the need to maintain public confidence in the system.

	<p>I also recommend making changes to the criteria that the Director considers when making a fit and proper person assessment. This includes adding criteria that the Director routinely takes into consideration, for example, any dependency on alcohol and drugs and a person's compliance history with transport security regulatory requirements in New Zealand or overseas.</p>
<p><b>Security</b></p>	
<p>Clarifying Avsec's search powers in the landside part of security designated aerodromes<sup>4</sup></p>	<p>The Aviation Security Service (Avsec) has authority to act within security designated aerodromes. The CA Act gives Avsec specific authority in security areas (called the airside), but its authority in the rest of the aerodrome (landside) is set out in more general terms.</p> <p>To ensure there is no doubt as to Avsec's existing authority to act landside, I propose amendments to better align Avsec's search and seizure powers in the landside part of security designated aerodromes, with its airside powers (see paragraph 41 to 51 for more detail). I also propose amendments that mean Avsec will be subject to similar requirements about the exercise of its landside powers, as it is airside.</p>
<p>Providing for alternative airport terminal configurations and implications for security screening</p>	<p>The security arrangements in the CA Act have a significant impact on the layout of terminals at security designated aerodromes, potentially constraining airports from using terminal space more efficiently.</p> <p>I recommend amending the CA Act to give the Director, on application by an airport operator, the power to allow any specified group of persons or member of the public to enter or remain in any security area. This will allow airports greater flexibility in how terminals can be designed.</p>
<p>Avsec's institutional arrangements</p>	<p>Avsec has existed as an operational division within the CAA since 1997. This arrangement means that the CAA is regulating and auditing part of its own organisation. This creates an inherent conflict of interest.</p> <p>I recommend that the CA Act and associated Civil Aviation Rules be amended to remove the requirement for Avsec to hold an aviation document.<sup>5</sup> The effect of this will be to remove the Director's independent statutory role as the regulator of Avsec, thereby removing the inherent conflict of interest. A requirement for Avsec to operate to standards commensurate with those provided in Civil Aviation Rules, will ensure Avsec continues to operate to a high standard.</p> <p>The CA Act allows airports (as well as Avsec) to provide aviation security services at security designated aerodromes. However, Avsec is currently the only organisation permitted to provide aviation security services (by virtue of a <i>Gazette</i> notice issued by the Minister of Transport in 1997). I do not propose to remove Avsec's statutory</p>

<sup>4</sup> Security designated aerodromes are the aerodromes where security screening takes place. 'Airside' is the area of a security designated aerodrome where access is controlled. 'Landside' at a security designated aerodrome is the area of an airport, adjacent terrain and buildings, or portion of a building, which is not part of airside—also described as the public area of an airport.

<sup>5</sup> To operate within the civil aviation system, an individual or organisation must be granted an aviation document. The Director grants aviation documents – such as a pilot licence, operating certificate, aircraft registration, engineer licence, air traffic control licence, or aerodrome certificate – only after applicants have demonstrated that they meet the standards set in the Civil Aviation Rules.

	<p>monopoly.</p> <p>I have also considered whether it is appropriate to amend section 79 to allow, in future, groups other than Avsec or aerodrome operators to provide aviation security services. I am not convinced that there is sound justification for removing the monopoly currently held by Avsec at this time.</p>
<b>National security</b>	
<p>Inclusion of national security considerations in the CA Act</p>	<p>The CA Act provides only limited ability to regulate for matters relating to national security. The CA Act and Civil Aviation Rules can regulate in the interests of aviation safety and security including (but not limited to) personal security. Security in this context is read as aviation security. This is relatively narrow in scope—only covering risks to safety from the carriage of dangerous goods and the risk to aviation security by unlawful interference with an aircraft. It does not cover national security.</p> <p>In the intervening years since the 11 September 2001 terrorist attacks on the United States, security concerns have broadened to include activities or operations that may pose a threat to national security.</p> <p>The proposal is to make a range of changes of the Act; including making national security one of the Act’s purposes, allowing for Rules to be made to preserve national security, and making amendments as noted below to align the Act with changes being made through the Outer Space and High Altitude Activities Bill.</p> <p>Cabinet has recently considered policy issues relating to the Outer Space and High Altitude Activities Bill [EGI-16-MIN-0122 refers]. The space regime proposes a requirement for operations taking place between the lower limit of outer space and above the upper limit of controlled airspace (the area between approximately 18kms and 100kms) to obtain a high altitude licence. A national security test is part of the licensing process.</p> <p>It would be prudent to amend the CA Act to provide a process to regulate similar operations taking place in lower altitudes, to treat national security consistently regardless of altitude.</p>
<b>Economic</b>	
<p>Amending the CA Act to improve the regime for authorisation of airline cooperative arrangements</p>	<p>Since 1990, alliances and code-share arrangements have emerged as the preferred way for airlines to offer customers a global service and to expand their networks.</p> <p>Section 88 of the CA Act empowers the Minister of Transport to authorise arrangements between airlines providing international air services, which in effect makes the authorisation arrangements exempt from the Commerce Act requirement.</p> <p>The regime in the CA Act has not evolved to keep pace with this business practice. The Review considered whether amendments to the CA Act, or making the Commerce Commission responsible for decisions when airlines seek to form an alliance, was the preferred</p>

	<p>approach to improve the system.</p> <p>Because of the regulatory environment for international airlines, and the role that government to government treaties play in what airlines can and can't do commercially, wider aero-political and foreign policy considerations are very relevant when determining whether to authorise an airline alliance.</p> <p>I consider that Ministers are best placed to assess the impact of some of these factors, and the weight to be given to them.</p> <p>I recommend amendments to the CA Act to improve the authorisation regime, to ensure it keeps pace with business practice. Proposed changes include:</p> <ul style="list-style-type: none"> <li>• setting an explicit and clear requirement that the Minister assesses whether the arrangements are in the public interest</li> <li>• setting out the process the Minister/Ministry must follow to make a decision, including requirements to consult stakeholders and publish decisions</li> <li>• providing for a time limit and conditions to be attached to any approval (and for approval to be varied or revoked).</li> </ul>
<p>Airport charging</p>	<p>Section 4A of the AA Act allows airport companies to set charges as they see fit. The Review considered whether this provision is necessary given airport companies are subject to the Companies Act 1983.</p> <p>Section 4A was inserted in 1986 at a time when airport companies were new and untested. The section was to avoid doubt and to ensure that airport companies could exercise the powers necessary to operate and manage their airports as commercial undertakings independent of Crown intervention. Now with the passage of time, the provision is hindering normal commercial negotiations. For example, it is possible that section 4A creates an environment where monopoly pricing by airports can occur.</p> <p>Airports and airport users hold opposing views on whether the provision is necessary, with airports supporting retaining the provision.</p> <p>The Companies Act 1993 provides an adequate basis for airports to operate or manage their commercial undertakings. I recommend that section 4A of the AA Act be repealed.</p>
<b>Legislative framework</b>	
<p>Purpose statement</p>	<p>I recommend that the Acts should contain a purpose statement to provide guidance and clarity to readers about what the Acts cover.</p>

6. The legislative changes can be progressed as part of a Civil Aviation Reform Bill [REDACTED] [REDACTED] This Bill will also incorporate proposed legislative changes arising from recent Cabinet decisions to:
  - 6.1. Reduce the risks of alcohol and drug impairment in the commercial aviation sector [CAB-16-MIN-0020 refers]. In particular, to require all commercial operators in the aviation sector to have drug and alcohol management plans (which must include random testing) and to give the Director the ability to undertake non-notified testing for monitoring purposes.
  - 6.2. Improve aviation security as proposed in the Domestic Aviation Security Review [NSC-16-MIN-0001 refers].
7. The Review considered a number of other issues. In addition, the industry raised other matters during consultation. Further analysis post consultation determined that legislative changes were not necessary, as these issues were best addressed through non-legislative mechanisms.

## Background

*Providing a sound legislative foundation to ensure the aviation industry can continue to thrive was a key driver of the Review*

8. In the past 25 years since the enactment of the CA Act, significant change has occurred throughout the aviation industry and in government regulatory reform.
9. Over this period New Zealand's aviation sector has flourished. Air passenger transport contributed approximately \$4.3 billion (14 percent) to New Zealand's \$29.8 billion tourism revenue in the year to March 2015. 17 percent of New Zealand exports and imports by value are carried by air. The aviation industry annually exports \$3.8 billion of products and services and contributes 6.9 percent of New Zealand's GDP. Thirty percent growth is projected over the next five years in light aircraft design and manufacture, business aircraft interiors, aircraft parts, airline operations, airport infrastructure, aviation services, maintenance, repair and overhaul, and training. Overall, the aviation industry is expected to continue to be a major contributor to economic growth.
10. Against this background, the Review was undertaken to ensure that New Zealand's aviation legislation could continue to support an effective, efficient, safe, secure and resilient aviation system, that supports the growth of the economy in order to deliver greater prosperity, security and opportunities for all New Zealanders.
11. Although aviation safety and security, and New Zealand's international civil aviation obligations, will continue to be fundamental drivers, the Review was timely given:
  - 11.1. the Government's expectations of the transport sector as a contributor to economic growth
  - 11.2. the Government's priority to improve the quality of regulation
  - 11.3. the move by the CAA to a more proactive, risk-based approach to aviation regulation, and its change programme to improve regulatory quality, service delivery, efficiency and effectiveness
  - 11.4. ongoing and rapid change within the international aviation industry relating to an increased demand for services and improved technology.

### What do the Acts cover?

12. The CA Act governs the civil aviation system in New Zealand, and:
  - 12.1. establishes the CAA and Avsec
  - 12.2. establishes the framework to participate in the civil aviation system
  - 12.3. confers functions, duties and powers on those operating in the civil aviation system, including the CAA and Avsec
  - 12.4. empowers the Minister of Transport to make Civil Aviation Rules for a range of matters
  - 12.5. empowers the Director to regulate entry into the civil aviation system, and monitor and enforce compliance with the CA Act and Civil Aviation Rules
  - 12.6. empowers the Minister of Transport to establish, maintain and operate aerodromes
  - 12.7. ensures New Zealand's obligations under international civil aviation agreements are implemented
  - 12.8. provides for the economic regulation of licensing and international air services competition for foreign and New Zealand international airlines
  - 12.9. prescribes airline liability and compensation for loss and delay.
13. The AA Act recognises local authorities and airport companies as airport authorities, and confers upon them a range of functions and powers to establish and operate airports.

### **Improving aviation safety**

#### *Issue 1: Protection of safety information*

14. Regulation of the aviation sector is moving towards a risk-based approach. This is in line with International Civil Aviation Organization (ICAO) expectations and the introduction of Safety Management System requirements<sup>6</sup>. Information from incident reports plays an important role in a risk-based system. Timely access to accurate safety information, contained in incident reports, allows the CAA to identify high and emerging areas of risk throughout the aviation system. This provides a more proactive, evidence-based approach to accident prevention.
15. To achieve an effective risk-based regulatory system, there needs to be a maturing safety culture across the aviation sector, where incidents are openly and fully reported, and a growing sector-wide commitment to continuous safety improvement. Protecting information contained in incident reports so that it is only used to maintain and improve safety (unless reckless behaviour is demonstrated), and not used for enforcement or administrative action, is a key way to support more effective reporting.
16. The CA Act and Civil Aviation Rule Part 12 (Part 12) set out requirements for the mandatory reporting of accidents and incidents.
  - 16.1. Accidents are defined in the CA Act and cover instances where a person is killed or seriously injured, the aircraft is badly damaged, or where an aircraft is missing.

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<sup>6</sup> The Safety Management Systems Civil Aviation Rule came into force on 1 February 2016.

- 16.2. Incidents are defined as any occurrence, other than an accident, that is associated with the operation of an aircraft and affects, or could affect, the safety of the operation.
17. Part 12 provides some protection against prosecution.<sup>7</sup> However, the threshold in Part 12 does not meet emerging international best practice, most recently expressed through proposed changes to ICAO Standards and Recommended Practices (SARPs).<sup>8</sup>
18. Key aspects of the ICAO proposal are that safety information captured in a voluntary reporting system and related sources should be protected. This means safety information should not be used for disciplinary action or publicly disclosed, unless an occurrence was caused by an act or omission that constitutes gross negligence, wilful misconduct or was done with criminal intent. In these cases, safety information can be disclosed and used in the proper administration of justice. States can choose whether the same protections are provided to safety information in mandatory reporting systems. The ICAO SARPs will come into force in November 2018.
19. Stakeholders were asked as part of the Review what they perceived were the barriers to reporting incidents. Submitters cited a lack of certainty about how the CAA uses safety information and the prospect of enforcement action as deterrents to reporting. Industry was also concerned that it was not always informed of the outcome of investigations, or how the CAA uses information to improve safety.
20. Despite the fact that the number of accident and incident reports submitted to the CAA is increasing, and prosecutions decreasing, there is an opportunity to address the concerns of industry to provide greater transparency in the way the CAA deals with safety information, and to align with ICAO SARPs and emerging global best practice.
21. To improve the level and quality of incident reports to the CAA, I propose that the CA Act be amended to provide a framework which states that enforcement or administrative action should not be taken against people who fully and accurately self-report aviation incidents to the CAA; unless the person's behaviour was reckless<sup>9</sup>, the person demonstrated repetitive at-risk behaviour, or it is in the public interest to pursue such action. This means that participants will not have blanket protection from enforcement or administrative action when they fully self-report. There will still be instances where reporting must have consequences, for example, where not taking action could result in the loss of public confidence in the system. Key aspects of the framework follow
- 21.1. Enforcement and/or administrative action should not be taken in respect of unpremeditated or inadvertent infringements of the law, which come to its attention through an incident report filed under a CAA incident reporting system.
- 21.2. The protections in paragraph 21.1 shall not apply to any of the following circumstances:
- where the incident report provided is not a full and accurate account of the incident

<sup>7</sup> Part 12 states that the CAA shall not use information from accident and incident reports for the purpose of prosecution, unless an act or omission caused unnecessary danger to any person or property, or false information was submitted, or where the CAA is obliged to release the information pursuant to a statutory requirement or by order of a Court.

<sup>8</sup> Standards and Recommended Practices are adopted by ICAO in order to achieve the highest practicable degree of uniformity in regulations where this will facilitate and improve international air navigation.

<sup>9</sup> The proposed ICAO threshold is where the behaviour constitutes gross negligence, wilful misconduct or was done with criminal intent. These terms are not commonly used in New Zealand statute. The use of the term reckless, is better suited to the New Zealand legislative environment.



- where it is believed on reasonable grounds that the person's behaviour was considered to be reckless or the person demonstrated repetitive at-risk behaviour
- where it is considered in the public interest to pursue enforcement action or where the Director considers it in the interests of aviation safety to pursue administrative action.

22. The framework and specific matters for inclusion in the CA Act are as follows

Objectives:

- i. to improve aviation safety by ensuring that relevant safety information is reported and analysed to ensure risks in the system can be mitigated
  - ii. to ensure that the CAA can continue to take actions necessary to maintain or improve aviation safety.
- a. Persons involved in an incident must, where required to do so under Civil Aviation Rules, report details of the incident to the CAA.<sup>10</sup>
  - b. The CAA should take any necessary measures to ensure appropriate confidentiality of the information it receives via an incident reporting system.
  - c. The CAA should not release identifiable information received via an incident reporting system, unless the CAA is obliged to release the information pursuant to a statutory requirement or by order of a Court. However, aggregated and anonymous information on the type of occurrences and safety related information reported to the CAA through its occurrence reporting systems, should be published to inform the industry of emerging risks in the aviation system.
  - d. Enforcement and/or administrative action should not be taken in respect of unpremeditated or inadvertent infringements of the law, which come to its attention through an incident report filed under a CAA incident reporting system.

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<sup>10</sup> This is an existing requirement under section 26(1A) of the CA Act.

- e. The protections in paragraph five shall not apply to any of the following circumstances:
- i. where the incident report provided is not a full and accurate account of the incident
  - ii. where it is believed on reasonable grounds that the person's behaviour was considered to be reckless
  - iii. where it is considered in the public interest to pursue enforcement action or where the Director considers it in the interests of aviation safety to pursue administrative action.
- f. The CAA should regularly publish a review of safety information containing, but not limited to:
- i. aggregated and anonymous information on the type of occurrences and safety related information reported to the CAA through its occurrence reporting systems
  - ii. identified safety trends
  - iii. instances where the CAA has taken enforcement or administrative action, and disaggregated information about the type of action taken.
23. I do not propose extending the protections to accidents. Given the size of New Zealand, accidents generally come to the attention of the CAA, whereas information about incidents and hazards is often not reported to the CAA. Providing protection to events surrounding an accident would be harder to justify if there was a high level of public interest.
24. Any protections are best placed in the CA Act rather than in Civil Aviation Rules. This is because protections on the use of safety information provide a degree of immunity from punitive action, which more appropriately sits in primary legislation. Provisions in the CA Act will also provide greater clarity and transparency about where the threshold for punitive action sits.
25. The proposed changes to the CA Act will bring New Zealand more in line with the ICAO proposal. However, it is possible New Zealand will need to file a partial difference<sup>11</sup> to the SARPs. New Zealand cannot fully meet the requirements as currently drafted around non-disclosure of safety information, because to do so would be at odds with the Official Information Act 1982 (OIA). While in many cases the CAA could use the withholding provisions in the OIA, the case-by-case nature of the OIA makes it impossible to fully comply with the ICAO SARPs.

#### *Issue 2: Offences and penalties*

26. In general, the offences and penalties regime in the CA Act is operating as intended and significant change is not necessary.
27. Two main amendments are proposed to the CA Act.

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<sup>11</sup> States must notify ICAO where they cannot fully comply with a Standard. This is known as 'filing a difference'.

Table 2: Main amendments to offence provisions

Section	Issue	Change proposed
46B	<p>Pilots and air-traffic controllers are required to hold a medical certificate to participate in the aviation system.</p> <p>The medical certification process is critical to help ensure the safety of the civil aviation system. The Director must be able to rely on the veracity of the information he/she is provided through the medical certification process. As such, there ought to be a suitable deterrent to dissuade people from providing inaccurate information.</p> <p>Section 46B creates an offence for providing fraudulent, misleading or intentionally false statements to obtain a medical certificate.</p> <p>This is an offence where the prosecutor must establish the offender made fraudulent, misleading or intentionally false statements to obtain a medical certificate.</p> <p>The CAA is concerned that the <i>mens rea</i> requirement undermines the importance of the medical certificate regime. It is a high standard, that is difficult to establish and does not provide an adequate incentive for an applicant to take the necessary care to provide accurate information.</p> <p>A recent Court of Appeal case looked at this test in detail, and noted that if a lower standard of <i>mens rea</i> (i.e recklessness) was to be included in the offence this was a matter for the legislature and not the courts.</p>	<p>I propose to amend section 46B(1) to allow for the offence to be committed recklessly.</p> <p>This is consistent with a similar offence in the CA Act (section 56) which relates to the supply of false information affecting safety.</p>
65	<p>Section 65 provides a limitation period of 12 months after the date on which the offence was committed to file charging documentation. At times, the CAA has been unable to pursue enforcement action because offences are not disclosed in time for the work to be undertaken to file a charge within 12 months. As an example, a review of a participant's medical file revealed prior convictions that were not disclosed when the participant previously applied for a medical certificate. Because the CAA did not become aware of the convictions within the 12 month timeframe, it was unable to take enforcement action.</p>	<p>I propose to amend the limitation period for the following offences relating to the disclosure of information, to 12 months from when the offence was detected:</p> <ul style="list-style-type: none"> <li>- Section 46 (acting without necessary aviation document)</li> <li>- Section 46A (acting without a medical certificate)</li> <li>- Section 46B (making a fraudulent, misleading</li> </ul>

		<p>or intentionally false statements to obtain a medical certificate)</p> <ul style="list-style-type: none"> <li>- Section 46C (failure to disclose information required by the Director)</li> <li>- Section 49 (carrying on a scheduled international air service without a licence or contrary to a licence)</li> <li>- Section 52(B) (failure to report an accident or incident)</li> </ul>
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*Issue 3: Improving process to determine if someone is 'fit and proper' to participate in the aviation system*

28. Before someone can enter the aviation system, he or she must undergo a fit and proper person test. Section 10 of the CA Act sets out the process. Participants must continue to be fit and proper to remain in the system.

*Changes to the criteria the Director considers when undertaking a fit and proper person test*

29. The CA Act sets out the matters that the Director 'shall have regard to' and 'give such weight as the Director considers appropriate' when conducting a fit and proper person assessment. This covers such things as a person's compliance history with transport safety requirements, any history of physical or mental health problems and transport convictions. The CA Act also states that the Director is not limited to the matters stipulated in the Act, and may take into account other matters and evidence that may be relevant. Given the age of the CA Act, the matters the Director routinely considers has changed from what is currently expressed in the CA Act.

30. There are matters that the Director routinely considers which are not explicit in the CA Act. These are whether the person has a dependency on alcohol and drugs, and a person's compliance history with transport security regulatory requirements in New Zealand or in another country. Currently the CA Act refers only to safety regulatory requirements.

31. The CA Act should be explicit about matters that the Director routinely considers or takes into account as part of a fit and proper person assessment. Not including these in the legislation creates a presumption that such information will not be routinely considered.

Clarifying that third parties can provide information to the CAA to enable the Director to determine a person's ongoing fit and proper person status, in alignment with the Privacy Act.

32. Occasionally the CAA obtains information that brings into question a person's fit and proper person status. Section 10(3) of the CA Act allows the Director to 'seek and receive' information from third parties to investigate a person's fit and proper status. The CA Act is silent on the obligations of the third party holding the information to disclose it when requested by the Director.
33. The Director does not exercise this power routinely, and only makes around 20–30 requests a year. The CAA most commonly requires information from the Ministry of Justice, Police, Department of Conservation, Ministry of Primary Industries (fisheries), local and regional councils and professional licensing bodies. The kind of information sought by the CAA can be fairly broad, but often relates to when another agency intends to prosecute someone.
34. In most cases, the third party releases the information but it is generally a protracted process. In the meantime, potential safety risks persist and the Director is potentially inhibited from fulfilling his/her statutory functions as outlined in the CA Act.
35. Third parties are often concerned that they will be in breach of the Privacy Act if they provide information to the CAA. [REDACTED]
- To maintain legal professional privilege [REDACTED]
36. I recommend an amendment to the CA Act to provide certainty that providing the CAA with information in response to a 'seek and receive' request does not breach the Privacy Act. The legislative changes can be supported by other initiatives such as ensuring fit and proper person application forms reflect an ongoing consent from the participant for the Director to access information, and the CAA developing memoranda of understanding with key agencies.

## Improving aviation security

### Aviation security in context

37. Avsec (along with the New Zealand Police) has a duty under the CA Act to prevent crimes against the Aviation Crimes Act 1972 (the Aviation Crimes Act) and protect persons and property from dangers arising from crimes or potential crimes in this Act. The Aviation Crimes Act covers crimes relating to aircraft and international airports. In particular, section 5A of the Aviation Crimes Act states that a person commits a crime if they intentionally endanger the safety of an international airport – for example through acts of violence that:
- 37.1. cause or are likely to cause serious injury or death
  - 37.2. destroy or seriously damage airport facilities
  - 37.3. destroy or seriously damage aircraft not in service
  - 37.4. disrupt the services of international airports.

38. The CA Act (supported by Civil Aviation Rules and Directions) confers functions, duties and powers to Avsec to enable it to provide services at security designated aerodromes. These services include:

38.1. screening international air passenger services

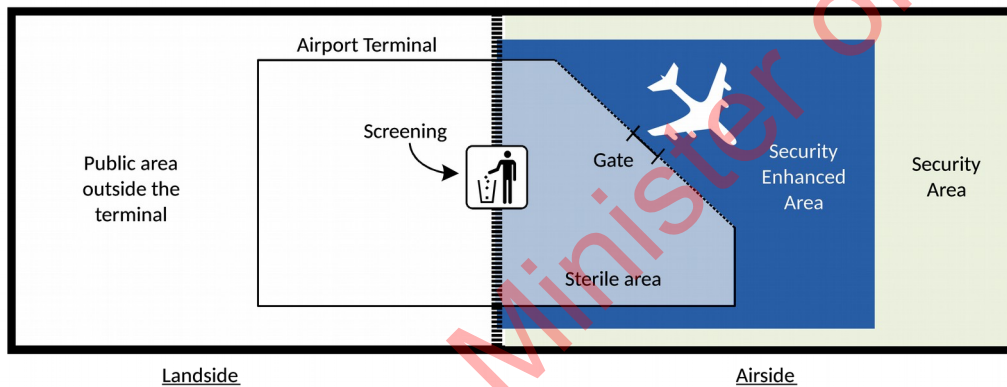
38.2. screening domestic air passenger services using aircraft with more than 90 passenger seats<sup>12</sup>, and reasonable searches if necessary

38.3. screening persons, items, substances, or vehicles entering or within 'security areas'

38.4. carrying out aerodrome security patrols.

39. The following diagram shows the 'geography' of a security designated aerodrome to help explain where Avsec operates.

Figure 1; Security Designated Aerodrome



40. The focus of Avsec's work is within the airside area of security designated aerodromes. Avsec fulfils its patrol function by undertaking random foot and mobile patrols both in the airside and landside parts of the aerodrome. Avsec routinely use Explosive Detection Dogs (EDD) to assist with this function, as this is the most effective and efficient way to identify risks.

<sup>12</sup> This is done by a *Notice of Direction to Require Screening* which was issued by the Director under section 77B of the CA Act.

*Issue 4: Clarifying the Avsec search powers in the landside part of security designated aerodromes*

41. The CA Act provides Avsec with a general power to search in the landside part of security designated aerodromes [section 80(ab)] and to carry out airport security patrols [section 80(b)]. The requirements for these searches under section 80(ab) are limited to those searches being 'reasonable' and 'necessary'. The CA Act appears silent on what Avsec must do, or is permitted to do, in relation to the person or any item/substance discovered in the course of that search. This contrasts with the requirements for Avsec's authority in the airside part aerodrome, which are very prescriptive.<sup>13</sup>
42. The general nature of section 80 creates a lack of clarity about the extent and nature of Avsec's landside search and seizure powers. The problem is most noticeable in relation to how and what an Avsec officer can do to deal with unattended items and vehicles in the landside part of the aerodrome, and the use of EDD as a means to assist Avsec officers in their patrol function and to help rule out whether an unattended item poses a security risk.
- **Unattended items:** By definition, an unattended item poses a security risk until it is cleared. In addition, until Avsec can clear the item, there is the potential for major disruption to airport operations. Around 80% of unattended items are found in the landside part of the airport. The CA Act is not explicit about Avsec's authority to search these items if they are found in the landside parts of the aerodrome.
  - **Vehicles:** Similar to unattended items, the CA Act is not explicit about Avsec's authority to search vehicles in the landside parts of the aerodrome. Vehicles may pose a security risk, depending on the particular circumstances—for example, a vehicle left unattended at the terminal entrance compared to one parked several hundred metres away in the terminal carpark. The vehicle could come to Avsec's (or Police's) attention in multiple ways or for multiple reasons.
  - **Use of EDD:** Unlike a human Avsec officer, an EDD is always 'searching' and does not make the assessment of whether that search is necessary and reasonable. Avsec use EDD as part of its patrol function, as they are a highly effective way to clear an area. If an EDD 'indicates' (i.e., identifies) an item or person of interest, Avsec determines the appropriate response. At present, the CA Act is silent on the use of EDD by Avsec.
43. The CA Act needs to reflect the balance between security imperatives, personal rights (as expressed in the Bill of Rights Act) and the efficient flow of goods and people through the airport. From a Bill of Rights perspective, the CA Act should be clear about what Avsec officers can or cannot do when exercising any search or seizure powers. This needs to be balanced against the fact that security designated airports are busy places.
44. It is critical that Avsec officers have certainty about their authority to act in certain situations. In a security environment, officers must be able to act quickly and decisively to resolve potential security threats. It is also important from a facilitation perspective, to help manage the smooth running of airports.
45. To ensure there is no doubt as to Avsec's existing authority to act landside, I propose amendments to address any uncertainty relating to Avsec's landside search and seizure

<sup>13</sup> For example, refer to sections 80A to 80H of the CA Act. These sections set out the powers and duties of Avsec officers to screen and search for dangerous goods and substances to be carried on to aircraft, into sterile areas and security enhanced areas, and in relation to vehicles entering a security enhanced area. They also set out the way in which the search and seizure is undertaken, and set out the consent requirements to search and screen, including the process to be followed where a person refuses consent.

powers. These amendments will better align the landside and airside requirements, and will clarify Avsec's authority to:

45.1. search vehicles and unattended items

45.2. conduct landside searches, including requirements on:

- when searches are permitted
- how searches are conducted
- what happens to anything that is found.

45.3. use Explosives Detection Dogs

46. The amendments regarding the search of vehicles and unattended items will ensure that the legal authority and the requirements relating to searches are consistent across any security designated aerodrome, landside and airside. In particular, the amendments will mean that before conducting a search, an aviation security officer must either have:

46.1. reasonable grounds to suspect there is an imminent risk to safety and security and the risk requires an immediate response; or

46.2. the consent of the person:

- to be searched; or
- the consent of the person in possession of the item, substance or vehicle to be searched

47. To avoid doubt, the Act will specify that an item, substance, or vehicle may be searched without consent if it is unattended. The Act will also specify that a search under section 80(b) may be conducted either:

- at the request of the aerodrome operator; or
- at the request of Police; or
- in response to any matter identified by an aviation security officer in the course of their duties under the Act.

48. The amendments regarding the use of EDD landside will clarify that they can be used to support Avsec undertaking its functions, duties and powers under the Act. This includes use on patrols, and for the search of persons and property when necessary.

49. The amendments will also clarify that consent needs to be sought prior to a search by an EDD, if the search is directed by the EDD's handler. Consent will not be required if it is not practicable (for example the EDD is being used to clear an area with large numbers of people); the EDD conducts a search without being directed by an aviation security officer to do so; or the item, substance or vehicle being searched is unattended



50. Because these amendments have Bill of Rights implications, my officials will continue to work closely with the MOJ as the drafting progresses to ensure the amendments appropriately address these concerns.
51. I do not propose any increase in the powers that an Avsec officer has for airside or landside searches. These proposals simply clarify the use of the existing powers that Avsec officers have for landside searches, and ensure that these align with those for airside searches.

*Issue 5: Clarifying Avsec's powers to deal with dangerous goods*

52. Dangerous goods include items such as explosives, gases, flammable, corrosive and radioactive materials. Dangerous Goods are defined in the Act as those items or substances either listed in, or classified in accordance with, technical instructions issued by ICAO. Included in this definition, are items or substances that have properties, which would classify them as dangerous goods in these technical instructions.
53. It is an offence against the CA Act and Civil Aviation Rules to carry, or cause to be carried, any dangerous goods on an aircraft. Avsec officers have duties and powers to screen, seize and detain dangerous goods pre-flight.
54. I recommend amendments to address the two problems identified below.
- 54.1. The CA Act does not allow Avsec officers to retain dangerous goods for the purposes of evidence. There is no reason in principle why Avsec should not be able to hold onto the goods for prosecutorial purposes.
- 54.2. Avsec's mandate to seize and retain dangerous goods found on arrival for prosecutorial purposes is unclear. Avsec's primary role is to ensure that dangerous goods are not carried on board an aircraft, and to enforce the rule against doing so. If dangerous goods are discovered after the fact (for example by Customs), it does not alter whether an offence was committed. Avsec should be able to act in this scenario.

*Issue 6: Airport identify cards (AIC)*

55. The CA Act prohibits people from entering or being in a security/security enhanced area unless they wear an AIC or other ID approved by the Director, and are authorised. AICs are only issued to people who receive a favourable security check determination.
56. Some issues exist with the way the AIC system is set out in the CA Act and Civil Aviation Rules, including some inconsistencies that have developed over time. I recommend amending the CA Act to:
- 56.1. require people in security and security enhanced areas to produce, on request by authorised employees of the CAA (including Avsec) AIC or other identity documents
- 56.2. give Avsec the authority to seize an AIC or other identity documents when they are being used in breach of the CA Act or Civil Aviation Rules, or, are being used in circumstances where authorisation has been withdrawn, or where the AIC has expired
- 56.3. define the term 'airport identity card'

- 56.4. address minor inconsistencies in terminology between the CA Act and Civil Aviation Rules.

*Issue 7: Providing for alternative airport terminal configurations and implications for security screening*

57. The security requirements in the CA Act have a significant impact on the layout of airport terminals. For example, the terminal must have space for security screening and it must segregate screened passengers from non-screened passengers and non-passengers. These requirements limit flexibility in terminal configuration, potentially constraining the aerodrome's ability to introduce more efficient or effective layouts.
58. In the past, airport operators have approached the Ministry of Transport to discuss whether it is possible to configure the terminal in a way that allows people (segregated under existing requirements) to mix in common areas. In some cases, this is prompted by physical space constraints within the airport environment.
59. One example of an alternative configuration is the Common Departure Terminal (CDT). Adelaide Airport operates this model, where people intending to greet or farewell passengers are permitted access into the security area within the domestic terminal, but only after passing through security screening.
60. Potential benefits to airport operators of an approach such as CDT include:
  - 60.1. a more efficient use of space and infrastructure, particularly at small airports
  - 60.2. potential savings from not needing to build additional infrastructure
  - 60.3. a reduction in the need to duplicate facilities, including security
  - 60.4. a single amenity zone post-security and improved retail performance by increasing dwell-time in one retail zone.
61. The CA Act requires that no one other than a member of the Police or an Avsec officer may enter or remain in a security area unless that person is wearing an airport identify card. Passengers are exempt from this requirement if they are embarking or disembarking directly through a gateway or thoroughfare. These provisions prove problematic if any airport wished to adopt an alternative terminal design such as a CDT because the CA Act does not permit non-passengers (such as someone wishing to greet or farewell a passenger) to enter security areas.
62. To future proof the Act for the possibility of alternative terminal configurations, I propose amending the CA Act to give the Director, on application by an aerodrome operator, the power to allow any specified group of persons or member of the public to enter or remain in any security area.
63. The Director would still need to be assured that an alternative design meets all the security outcomes as required under the CA Act and Civil Aviation Rules. In addition, Cabinet approval would be required for the amendment of the passenger security charges regulations to support an alternative design, to accommodate an increased number of persons through a security screening point.
64. A secondary policy issue that would need to be resolved if an airport wanted to put in place an alternate configuration, is how the screening of non-passengers would be funded. Avsec's services are currently funded through a passenger security charge that is

averaged out across the airport network and charged to airlines on a per passenger basis. This may not be appropriate given the potential advantages gained by airports. It may be necessary to change this funding mechanism.

65. Along with funding, a range of practical questions would also need to be addressed. This is because other agencies undertake activities tied into the existing airport design. For example, Customs would need to revisit its departure processing, as well as ensure that duty-free goods are only sold to, and remain with, international travellers. This issues should be addressed as part of the approval process.
66. The majority of submitters supported in principle the idea that the CA Act should be future-proofed to allow for alternative configurations.

#### *Issue 8: Avsec's institutional arrangements*

##### Background

67. Avsec has existed as an operational division within the CAA since 1997. It is the only organisation permitted to provide aviation security services in New Zealand. Avsec's statutory monopoly was enacted by a *Gazette* notice issued by the Minister of Transport (Rt Hon Jenny Shipley) in 1997. Avsec is required to hold an aviation document to operate in the aviation system. This is standard for all organisations operating in New Zealand's aviation system.

##### *There is an inherent conflict of interest between the CAA (the regulator) and Avsec (the document holder).*

68. Avsec's institutional arrangement means that the CAA is regulating and auditing part of its own organisation. This creates an inherent conflict of interest. While this conflict of interest is being managed by the CAA Board, it is preferable to remove any perception that a conflict of interest may exist at Chief Executive and Board level.
69. I recommend amending the CA Act and associated Civil Aviation Rules to remove the requirement for Avsec to hold an aviation document. This will remove the Director's independent statutory role as the regulator of Avsec, thereby removing the inherent conflict of interest.
70. The CA Act should also be amended to specify that Avsec are required to meet requirements and standards commensurate with those provided in Civil Aviation Rules, to ensure Avsec continues to operate to high standards.
71. As a result of the proposal, some provisions in the CA Act relating to Avsec may be redundant. For example the legislated requirement to appoint a General Manager of Avsec. Any further amendments will be determined in the drafting of the Bill.
72. Effectively, the CAA would no longer treat Avsec as a regulated service provider. Rather, it would simply be treated as a government agency providing a service in order to meet New Zealand's international obligations, just as the New Zealand Customs Service does, for example.
73. The CAA Board strongly support the proposal. There are potentially a number of other benefits, including efficiencies from consolidating some corporate service provision and giving the CAA greater flexibility about how it structures its corporate functions.

74. A risk associated with this option is that ICAO may express concern over the fact that there would no longer be a clear separation between the service provider and those responsible for quality assurance. The risk is perceived to be low. It could be addressed by the CAA obtaining periodic external audits of Avsec.

No change is proposed either to the current list of organisations permitted to provide aviation security services, or to Avsec's existing monopoly.

75. The CA Act enables Avsec and airport operators to provide aviation security services at security designated aerodromes.<sup>14</sup> However, as noted in paragraph 67, Avsec is the only organisation currently permitted to provide aviation security services in New Zealand.

Withheld, as release of this information is likely to prejudice the security of New Zealand.

Globally, a wide range of models are used for the provision of aviation security services. In a number of other jurisdictions (such as Australia), core aviation security services are provided by the private sector. [REDACTED]

77. I considered whether it is appropriate to amend section 79 of the CA Act to allow, in future, groups other than Avsec or aerodrome operators to provide aviation security services. There is not a strong case to open aviation security services to competition at present, given the lack of demonstrable problems with the existing model. In addition, there is a risk that the benefits of competition could be eroded from increased costs associated with regulating multiple service providers, and the need to maintain a police presence at airports.

78. Any future decision on whether to repeal the Gazette Notice providing Avsec's monopoly would require significantly more analysis. For example there would need to be a restriction on the type of services a private security provider could provide (e.g. they would not have the power to arrest as Avsec officers do). [REDACTED]

Withheld, as release of this information is likely to prejudice the security of New Zealand.

79. I do not, therefore, propose removing Avsec's monopoly to provide aviation security services at this time.

80. Some stakeholders, including Air New Zealand have periodically indicated their support for:

80.1. removing Avsec's monopoly; and

80.2. allowing other parties, in addition to Avsec and Airports, the ability to provide aviation security services (assuming an organisation is able to meet the standards as set out in Civil Aviation Rules<sup>15</sup>).

81. I consider that any further work to extend the list of entities permitted to provide aviation security services, would be more appropriately considered as part of any future work to assess contestable service delivery model for the provision of aviation security services.

<sup>14</sup> Section 79 of the CA Act.

<sup>15</sup> For example, CAR Part 140 sets out requirements for the certification and operation of organisations that provide aviation security services at security designated aerodromes.

*Issue 9: Clarifying that Avsec can search suspicious items of hold baggage without passenger consent*

82. Avsec screens all checked passenger baggage at international airports for items that may present a risk to aviation safety and security. As part of this process, Avsec routinely deals with items that present a safety and security concern, and therefore need closer inspection.
83. The CA Act needs to be clarified to confirm that Avsec has power to search items that trigger a safety or security concern, without the consent of the passenger. Avsec generally tries to locate the passenger, or seek authorisation from the airline operator before searching the bag. However, it may not be appropriate to contact the passenger if significant security concerns exist. In addition, if a passenger or airline representative cannot be located quickly (which is often the case) the security risk cannot be resolved, which in turn risks delays to flights or bags not travelling on the passenger's flight.
84. From a safety and security perspective, it is important for Avsec to quickly resolve any concerns by clearing the item/bag or sectioning off the item/bag promptly to protect people and property.
85. I therefore recommend that the CA Act is amended to be explicit that Avsec can conduct hold stow baggage searches without the consent of the passenger for both domestic and international travel, where there is a risk to aviation safety or security that requires immediate response.<sup>16</sup>

*Issue 10: Amending definition of aviation security officer to include New Zealand Defence Force personnel*

86. There may be times when Avsec needs additional resource to allow a security designated aerodrome to continue operating—for example if there is a significant security incident and additional screening is necessary at very short notice.
87. I propose an amendment that will bring defence force personnel within the definition of aviation security officer. The amendment will mean that, subject to the Defence Act 1990, defence force personnel can act as aviation security officers for specified or limited purposes. I note that under the Defence Act authorisation process, Ministerial and in some scenarios Prime Ministerial authority must be given before armed forces can be used to perform a public service or assist in time of emergency.

*Issue 11: Notices made under section 77A*

88. Under section 77A of the CA Act, the Minister may direct an aviation security provider through a Notice of Direction published in the Gazette, to screen and search people, items, substances or vehicles. The basis for a direction is that the Minister considers it is necessary to improve or enhance aviation security to enable New Zealand to be part of a concerted international response to a threat from aviation security, or if the Minister considers it is in the public or national interest to do so [section 77A(1) refers].
89. Under section 77B, the Director may direct an aviation security provider through the same mechanism. The key difference being that that the basis for the Director's notice is that they believe on reasonable grounds that a security risk exists.

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<sup>16</sup> This is consistent with the approach in a number of other jurisdictions including the United States, Canada, Japan, Austria, Belgium, Finland, Israel, The Netherlands, South Korea, and Switzerland. Australia does not currently permit bag inspection without the passenger present.

90. At present, there has been one notice made under section 77A, and three notices under section 77B. Importantly, one of the notices made under section 77B directs Avsec to search and screen passengers, crew and carry-on baggage on domestic aircraft over 90 seats.
91. During the Domestic Aviation Security Review an issue was identified with Notices issued under section 77A. The existing section does not allow for the Minister's authority to be delegated to any other person. At times it may be necessary for the Director to exempt a particular flight from screening if it is unnecessary in a particular case.<sup>17</sup> This discretion is necessary if it is a day-to-day operational and technical matter that is better determined by the Director.
92. I therefore propose an amendment to section 77A of the CA Act, that will allow the Minister to delegate to the Director the power to exempt any flight from any screening requirements in a section 77A Notice.

*Issue 12: Structure of Part 8 of the CA Act*

93. Part 8 of the CA Act contains the Act's security provisions. The security amendments outlined in this paper, the changes agreed by Government as part of Domestic Aviation Security Review (in particular amendments to accommodate a new level of security designated aerodromes), and several amendments to Part 8 in the past decade, mean that it would be useful to consider what improvements can be made to the structure of Part 8 to aid interpretation and improve the usability of the section.
94. At the drafting stage of the Civil Aviation Reform Bill, officials will work with the Parliamentary Counsel Office to consider what changes could be made to improve the layout of Part 8.

**National security**

*Issue 13: The CA Act does not appropriately consider issues of national security*

95. The CA Act and Civil Aviation Rules can regulate aviation safety and security including (but not limited to) personal security. Security in this context is read as aviation security. This is relatively narrow in scope—only covering risks to safety from the carriage of dangerous goods and the risk to aviation security by unlawful interference with an aircraft.
96. In the intervening years since the 11 September 2001 terrorist attacks on the United States, security concerns have broadened to include:
  - 96.1. using civil aircraft for the purpose of causing death, serious bodily injury or serious damage
  - 96.2. using aircraft for surveillance or information gathering under circumstances that give rise to national security or privacy concerns
  - 96.3. using civil aircraft for the delivery of any chemical, biological, radiological or nuclear (CBRN) weapon in a manner intended to cause death serious bodily injury, serious damage or prolonged denial of access to an area
  - 96.4. using any CBRN or similarly hazardous substance on board or against civil aircraft

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<sup>17</sup> For example, a last minute airline schedule change, where an airline (at an airport where Avsec is currently not present) substitutes an aircraft of 90 or fewer passenger seats with an aircraft of over 90 seats for safety reasons.

- 96.5. the unlawful transport of any CBRN weapon or similarly hazardous substances
- 96.6. the possibility that New Zealand may be used as a development or testing environment for an aircraft of any type where there is a risk that it may be used for any of the above purposes related to CBRN weapon.
- 96.7. cyber attacks on air navigation facilities.
97. In addition, the potential for aircraft to carry and use certain technologies (e.g. remote sensing, communications, surveillance and navigation technologies) that, in the wrong hands, may pose a threat to New Zealand's national security, is increasing.
98. Currently, the CA Act has no powers to control such activities or operations that may pose a threat to national security. I therefore seek approval to include national security considerations in the CA Act. An important objective is to ensure consistency and alignment where applicable with the Outer Space and High Altitude Activities Bill. The following list outlines ways in which national security will be reflected in the CA Act:
- 98.1. in the purpose statement
- 98.2. providing the Minister of Transport with the ability to make Civil Aviation Rules relating to national security
- 98.3. provide the ability to revoke, suspend, or impose conditions on an operator's certificate by the Director of Civil Aviation on the advice of the Minister Responsible for the GCSB or the Minister in Charge of the NZSIS
- 98.4. providing a process to manage national security considerations comprising the following elements (subject to drafting) in line with the process outlined in the Outer Space and High Altitude Activities Bill:
- 98.4.1. The national security Minister(s) should be consulted as part of the decision-making process on the proposed activity.
- 98.4.2. The nature and significance of the risk and extent to which it can be mitigated would be taken into account in the decision-making process (both the Minister Responsible for the GCSB or the Minister in Charge of the NZSIS can agree on the mitigations that should be imposed).
- 98.4.3. In the event that either Minister believes a launch should not proceed, the matter is referred to the specified group of Ministers designated by the Prime Minister.
- 98.4.4. The Minister in Charge of the New Zealand Security Intelligence Service. (NZSIS) and the Minister Responsible for the Government Communications Security Bureau (GCSB) can issue a certificate vetoing the activity, with the agreement of the specified group of Ministers.
- 98.5. provide a right of complaint to the Inspector-General of Intelligence and Security against advice provided by officials that informed Ministers' decisions on national security.
99. New Zealand Defence Force operations are not covered by these requirements.
100. Cabinet has recently considered policy issues relating to the Outer Space and High Altitude Activities Bill [EGI-16-MIN-0122]. The space regime proposes a requirement for

operations taking place between the lower limit of outer space and above the upper limit of controlled airspace (the area between approximately 18kms and 100kms) to obtain a high altitude licence. A national security test is part of the licensing process.

101. In the current climate, the civil aviation regulatory regime needs to align with the space regulatory regime, and be able to take national security into consideration. The CA Act should include a provision that recognises a high altitude licence issued under the Outer Space and High Altitude Activities Act, where appropriate.

## Supporting economic growth

*Issue 14: Amending the CA Act to improve the regime for authorisation of airline cooperative arrangements*

### Airline cooperative arrangements

102. International law requires that if an airline is to provide international air services, these must be provided pursuant to an inter-governmental air services agreement. Although New Zealand has followed an open skies policy<sup>18</sup> for two decades, many of our air services agreements still:
  - 102.1. specify (sometimes in a very restrictive manner) the routes that the airlines may operate
  - 102.2. specify (sometimes in a very restrictive manner) the frequency, capacity or aircraft types that may be operated
  - 102.3. specify how many airlines from each side may operate
  - 102.4. specify at which point on the route passengers and cargo may be picked up or dropped off
  - 102.5. set out how prices should be set (sometimes requiring agreement between the airlines)
  - 102.6. in effect require airlines of either side to be substantially owned and effectively controlled by nationals of the 'designating' (home) country.
103. These restrictions on routes and traffic rights mean that airlines are not able to enter markets in many cases where they identify commercial opportunities. The requirements on ownership mean that mergers and acquisitions, in particular cross-border mergers, are much less common than in other industries, including international shipping.
104. As a consequence, airlines have entered into collaborative arrangements to offer their customers a global service. Originally these were through the International Air Transport Association, but in recent years global alliances and bilateral joint ventures have become more common.
105. Section 88 of the CA Act empowers the Minister of Transport to specifically authorise arrangements for tariffs (airfares) and capacity for international carriage by air, including authorisations, where necessary to avoid "an undesirable effect on international comity between New Zealand and any other State".

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<sup>18</sup> For example, no restrictions on routes, capacity or traffic rights.



106. The effect of authorisation is that the arrangements are exempt from sections 27-29 of the Commerce Act<sup>19</sup>, although parties also have the option of going directly to the Commerce Commission, or to go to the Commission if authorisation under the Civil Aviation Act is declined.

Who should make the decision to authorise airline collaborative agreements?

107. A key issue is whether the power to authorise airline collaborative agreements should fall to an independent authority (ie the Commerce Commission) or should remain with Ministers. This is first and foremost a judgement about the appropriate weight to be placed on wider aero-political matters as part of the overall assessment of what is in the public interest.
108. The Commerce Commission is required to exercise its judgement as to whether it is satisfied on the evidence before it that the arrangement will result, or will be likely to result, in such a benefit to the public that it should be permitted.
109. Economic benefits and detriments would also be taken into account in advice to the Minister of Transport under a Civil Aviation Act regime. However, it may be appropriate in some cases to give different weight to some factors than the Commission might.

Wider aero-political and policy considerations

110. Because of the regulatory environment for international airlines, and the role that government to government treaties play in what airlines can and can't do commercially, wider aero-political and foreign policy considerations are very relevant when determining whether to authorise an airline alliance. This goes beyond the strict content of what is included in any particular air services agreement. Such considerations have been part of the framework in which recent alliances have been considered including:
- 110.1. When looking at the Air New Zealand - Air China alliance the Ministry noted that the Heads of Agreement between Air China and Air New Zealand was announced during a state visit to New Zealand by President Xi in November 2014 with both countries' leaders present at the signing. It was thus positioned as part of a broader relationship between New Zealand and China. The Ministry's report noted that to deny authorisation could damage (although only in a minor way) the relationship between New Zealand and China.
- 110.2. In the case of the alliance between Air New Zealand and Cathay Pacific, the Ministry concluded that there were advantages to a continued "NZ Inc" presence in greater China that went beyond directly quantifiable trade and tourism benefits.
- 110.3. Air New Zealand's strategic alliance with Singapore Airlines in 2015 coincided with the government's wish to strengthen New Zealand's international connections with South East Asia during the ASEAN 40<sup>th</sup> commemorations.
111. Different countries take different approaches to the authorisation of airline cooperative agreements. Some other jurisdictions also take the approach that the aero-political environment in which international aviation is regulated continues to merit a sector specific approach. In Japan and the United States, decisions on airline alliances are made by the equivalent of the Ministry of Transport including aviation specific criteria. In Europe and Australia on the other hand, such arrangements are subject to generic competition law.

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<sup>19</sup> These sections relate to practices that substantially lessen competition.

112. Given the importance of air services to connect New Zealand regions to the world, there may be cases where the impact of an airline alliance on different parts of New Zealand should be given more weight than would be the case under a net national benefit test as set out in the Commerce Act. For example, in developing our international air transport policy in 2012, the Government was conscious of the need to support the Christchurch rebuild.
113. There may also be cases where the benefits or detriments in terms of New Zealand's connectivity and people-to-people links are greater than that reflected in the sort of modeling of the allocative efficiency effects of higher airfares that the Commerce Commission undertook in the Air New Zealand – Qantas case in 2002.
114. I consider that Ministers are best placed to assess the impact of some of these factors, and the weight to be given to them.

Whose advice should the decision maker rely on?

115. A secondary issue is which agency is best placed to provide advice to the decision maker.
116. The Ministry of Transport has a deep knowledge of the sector and aviation markets. It is also responsible for negotiating New Zealand's air services agreements and so has a broad understanding of the current and future state of these. The Ministry has provided the advice on which alliance decisions have been given to date.
117. The Commerce Commission on the other hand is New Zealand's economy-wide competition regulator with deep knowledge and experience at undertaking competition analysis.
118. One approach that could allow Ministers to benefit from both streams of advice would be if the Minister were statutorily required to seek input on competition issues from the Commerce Commission.
119. However, this approach would have implications for the cost of the authorisation process. It could also prejudice the Commission's position in the event that authorisation is declined by the Minister, and the parties subsequently sought authorisation from the Commission.

Issues with the current regime

120. Airlines have increasingly undertaken the cooperation necessary to provide global services through global marketing alliances and integrated bilateral alliances. In the years since 1990, alliances and code-share arrangements have emerged as the preferred way for airlines to offer their customers a global service and expand their networks.
121. The regime in the CA Act to authorise arrangements between airlines providing international air services has not evolved to keep pace with this business practice. In particular, the specific statutory criteria in the CA Act are more suited to assessing agreements on tariffs as opposed to broader cooperative agreements. Problems include:
- 121.1. the specific statutory criteria do not explicitly allow for a full consideration of costs and benefits of arrangements—although a public interest test is implicit in the Ministerial discretion
- 121.2. the legislation does not explicitly provide for a transparent process or consultation with interested parties

- 121.3. there is no clear power to impose conditions or a time limit on authorisations, or for enforcing undertakings the airline applicants voluntarily make
- 121.4. there is no express power to revoke an authorisation.
122. As a consequence, the regime lacks robustness and may be subject to legal risk, such as a judicial review of a decision. Because of the issues identified above, airports and some other stakeholders do not have confidence in the process.
123. The Productivity Commission proposed a set of criteria on which a decision to retain or amend the current competition regime or adopt a Commerce Act only regime should be based. These are:
- 123.1. ensuring the authorisation process is based on a comprehensive analysis of the costs and benefits of trade practices
  - 123.2. ensuring the authorisation process is transparent and provides applicants and stakeholders with sufficient opportunities to make their case
  - 123.3. ensuring the authorisation process has sufficient regard to New Zealand's international air services obligations
  - 123.4. minimising the indirect cost of chilled commercial activity
  - 123.5. minimising the direct cost to government and affected parties.
124. Points 1 and 2 could be addressed either through adopting the processes set out in the Commerce Act, or through a sector specific regime set out in an amended CA Act.
125. Either a decision by the Commerce Commission, or consideration through a revised CA Act process, would take account of the basic elements of air services agreements. Factors such as the route and capacity options under consideration by the applicant airlines, and the potential for market entry under the relevant air services agreements would be a consideration in any market analysis under either option. Air services agreements are often evolving documents and any process would benefit from the decision maker being able to draw on the in-depth knowledge of the Ministry of Transport in this area. The broader foreign policy aspects of air services are discussed above.
126. Airlines have a perception that the Commerce Commission's approach to quantification undervalues some of the benefits of alliances and may make authorisation of beneficial alliances less likely. As such, Air New Zealand submitted there is a risk that a move to a Commerce Commission regime could chill commercial activity by deterring airlines from entering into certain alliance agreements.
127. The current CA Act process imposes significantly lower costs on both government and the applicants than a full Commerce Commission authorisation process. The more robust process proposed for an amended CA Act process is likely to increase costs somewhat – but it is likely that these would still be lower than under the Commerce Act.
128. In light of these factors, I recommend amending Part 9 of the CA Act to replace the current criteria with the following provisions.
- 128.1. Setting an explicit and clear requirement that the Minister assesses whether the arrangements are in the public interest.

128.2. Setting out the process the Minister must follow in making a decision, including requirements to consult stakeholders and publish decisions.

128.3. Providing for a time limit and conditions to be attached to any approval (and for approval to be varied or revoked).

Industry stakeholder views

129. Stakeholders agreed that a more formal procedure is critical but differed on whether the best solution was a move to a process where the Commerce Commission makes decisions under the Commerce Act, or a revised CA Act regime with a more robust process supporting continued decision making. Those who favoured a move to the Commerce Commission (primarily airports) considered that independence was important. While those who favoured a revised CA Act (including Air New Zealand, the Board of Airline Representative of New Zealand, Virgin Australia, and Qantas) took the view that the complexity of the international aviation regulatory system and the way in which it is intertwined with economic, trade, social and foreign policy is such that better decisions will be made if aviation experts and government are closely involved.

Treasury view

130. The Treasury supports most of the recommendations but considers the proposals relating to airline cooperative arrangements should go further. While these proposals represent an improvement on the current model, they remain out of step with international best practice and with the advice of the OECD and the NZ Productivity Commission. The Civil Aviation Reform Bill provides an opportunity to align the regime with the Commerce Act so that before any move to coordinate or merge operations can go ahead, it is subject to a test of a) whether the arrangements substantially lessen competition and, b) if they do, whether there are public benefits that outweigh any competitive detriments. Treasury's preferred approach is, therefore, that the Commerce Commission be granted responsibility for administering airline alliances.

131. The need to take account of New Zealand's broader international interests has been identified as the key reason for the Minister of Transport to retain decision-making rights over authorising airline alliances. The Treasury is not convinced there is a strong case for a sector-specific approach for civil aviation because no clear public policy objectives beyond preventing competitive detriments or ensuring net public benefits have been established. While the Treasury acknowledges there are links between air alliances and New Zealand's broader international interests, the Commerce Commission is in a position to adequately take account of these factors. If there are benefits to New Zealanders that the Commerce Commission would be unable to take account of, these benefits have not been identified. The Commerce Commission routinely assesses both quantified and unquantified impacts as part of a qualitative judgement, applying this approach in other industries.

132. If there are policy objectives that go beyond managing competition impacts and public benefits, and if Ministers consider that political judgement is required (such as trading off long-term with short-term impacts or weighting particular benefits), there may be scope for hybrid approaches. MBIE for example suggest that independent competition analysis could still be provided to inform decisions. Since the review did not consider alternative feasible options involving the Commerce Commission's input, more work would be required to ensure any alternative arrangements can operate effectively.

Commerce Commission view

133. The Commerce Commission considers that competition law is sufficiently flexible to deal with international air carriage agreements. The Commission supports transitioning this industry to a competition regime that is governed by the Commerce Act.
134. The Commerce Commission notes that a hybrid approach has not been adopted in the past and that careful consideration should be given to how this approach may be undertaken in practice. Further consultation on these practicalities would be desirable should this option be considered further.

Ministry of Business Innovation and Employment (MBIE) view

135. In line with competition law in many other developed countries, the authorisation process under the Commerce Act allows an expert independent regulator to robustly and transparently consider a wide range of public benefits and costs that flow from airline cooperation arrangements. The Treasury and the Commerce Commission consider that New Zealand's broader international interests and other considerations are able to be given sufficient weight in the authorisation process. MBIE notes that there may be value in Ministers having the option of using the ability to approve such agreements as a way of ensuring our policy settings maintain New Zealand's reputation as a high quality tourism destination.
136. Should Ministers consider that there are reasons that warrant an ongoing override of New Zealand's generic competition law via a sector specific framework, there are alternative design options that could retain useful elements of the Commerce Act authorisation process such as the provision of the expert competition advice and the transparent process employed. One 'hybrid' design option would be for the Civil Aviation Act to require the Minister of Transport to seek a report from the Commerce Commission as an input into their decision making, alongside the proposed stream of advice from the Ministry of Transport.

Conclusion

137. I consider that the critical issue in deciding whether airline competition decisions should be made under the Commerce Act or the CA Act is the weight to be given to wider aero-political considerations that do not necessarily fit into an economic efficiency framework and are not always quantifiable. I consider that there will be cases where these matters should be given greater weight than the Commerce Commission is likely to give them.
138. A revised CA Act process can appropriately take account of the criteria that the Productivity Commission identified as important in designing the regime for authorisation.
139. Overall, I conclude that Ministers should make the decision. I therefore recommend that authorising airline cooperative arrangements remain within the scope of the CA Act, provided the CA Act is amended to deal with the shortcomings in the current processes and powers.

*Issue 15: Improving the international airline licensing regime*

140. International airlines serving New Zealand on a scheduled basis are required to hold an International Air Service Licence or an Open Aviation Market Licence. Among other things, these licences specify the routes and capacity that the airline may operate. Licensing provides the mechanism to authorise and monitor the exercise of traffic rights exchanged between governments, in New Zealand's bilateral negotiations.
141. Part 8A of the CA Act prohibits anyone from operating a scheduled international air service or a non-scheduled international flight to/from New Zealand without appropriate authorisation. It specifies who may make authorisation decisions, specifies the criteria to consider when doing so and allows conditions to be imposed.
142. The Minister of Transport is the licensing authority for New Zealand airlines operating under a scheduled air service licence. The Secretary for Transport is the licensing authority for New Zealand airlines operating under an open aviation market licence.

*Improvements to allocation decisions*

143. The Minister of Transport is required to make allocation decisions for New Zealand international airlines even where there are no limits on routes and/or capacity. Given the decision does not have any significant impact, it is not necessary that the decision-maker should be at ministerial level.
144. I recommend that the CA Act be amended to designate the Secretary for Transport as the licensing authority for the allocation of routes and/or capacity rights where these are unlimited for New Zealand international airlines.
145. This will reduce the administrative burden on the Minister of Transport for such decisions when there is little or no public detriment. It ensures the CA Act better reflects the more liberal framework of air services arrangements. The Minister of Transport would retain decisions involving the allocation of limited rights. Industry support for this option was unanimous.

*Commercial non-scheduled international flights*

146. The CA Act only distinguishes between two classes of international air services: non-scheduled flights and scheduled international air services. The power to authorise non-scheduled flights rests with the Secretary for Transport.
147. In practice, three broad categories exist and the boundaries between them are not always clear. The three categories are described in the table below.

**Commercial non-scheduled international flights**

**Scheduled international air service**

<p><b>‘Pure’ charters</b> Not systematic, usually one-off, not open to the public generally, not in accordance with a published timetable.</p>	<p><b>Series of flights</b> May have some characteristics of being systematic, open to the public, or being operated in accordance with a published timetable.</p>	<p>Systematic, open to the public generally and in accordance with a published timetable.</p>
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148. The CA Act defines ‘*scheduled international air service*’ but it does not define ‘*commercial non-scheduled international flight*’. In particular, it does not provide a definition or guidance for when flights are so regular or frequent as to constitute a systematic/scheduled service.
149. Purely one-off charter flights do not circumvent New Zealand’s international air services agreements and should not warrant a complete assessment for authorisation by the Secretary for Transport.<sup>20</sup> Authorisation should only be required where services do not meet the criteria for pure charter services, or appear to circumvent our bilateral agreements.
150. I propose that the CA Act be amended to include two categories of commercial non-scheduled flights. This would remove the need for the Secretary for Transport to authorise non-systematic charter flights. In that circumstance, operators would only need to notify the Ministry of Transport when they intend to operate flights and confirm that they have met safety and security requirements. This will make it easier for charter service operators to meet ad-hoc demand, without the added burden of seeking authorisation for their services.

*Issue 16: Airport charging mechanisms in the Airport Authorities Act are outdated*

151. Section 4A of the AA Act allows airport companies to set charges as they think fit. The Review considered whether this provision was necessary given airport companies are subject to the Companies Act 1993 (the Companies Act).
152. Section 4A was inserted in 1986 at a time when airport companies were new and untested. The section was to avoid doubt and to ensure that airport companies could exercise the powers necessary to operate and manage their airports as commercial undertakings independent of Crown intervention. Now with the passage of time, the provision is hindering normal commercial negotiations. For example, it is possible that section 4A creates an environment where monopoly pricing by airports can occur.
153. Airports and airport users hold opposing views.
- 153.1. Airport users argue that an airport’s ability to set charges as they think fit creates an environment where monopoly pricing by airports can occur. They argue that airports should be subject to normal commercial regulation.
- 153.2. Airports argue the provision is necessary because:
- legislative developments following the enactment of the provision make clear that it now serves a broader purpose and is, therefore, a material part of the statutory economic regulation framework for airports

<sup>20</sup> For example a charter operator flying for the Haji season.

- it is a 'circuit breaker' when agreement cannot be reached
- without it, there would need to be a fundamental change in the basis for pricing decisions, creating uncertainty for airports
- repeal would lead to litigation
- repeal could have significant impacts on airport investment.

154. While acknowledging the airports' concerns, I consider that airports should be subject to normal commercial arrangements unless there is a good reason to treat them differently. It is not clear that airports differ from other businesses to the extent that a different regime is necessary.
155. The Companies Act provides an adequate basis for airport companies to operate or manage their airports as commercial undertakings in accordance with the AA Act — making section 4A redundant. The risk of retaining section 4A is that it may be interpreted as giving airport companies greater discretion when setting charges than they would otherwise have under the Companies Act. This is not the intent of the provision.
156. I recommend that section 4A of the AA Act be repealed.
157. The proposed change does not affect information disclosure including price setting for the major airports (Auckland, Wellington and Christchurch) which are regulated under Part 4 of the Commerce Act. MBIE consulted on the effectiveness of this regulatory regime for these airports in 2014. MBIE concluded that no fundamental change in the regime was necessary. It is now undertaking targeted consultation with key stakeholders on minor amendments that could make information disclosure more robust.

## Legislative framework

### *Issue 17: Shape of the legislation—one Act or two?*

158. The Review considered how the design and structure of the CA Act and AA Acts could be modernised to improve usability for people who should comply with, apply and advise on the Acts' provisions. It considered whether modernisation would be best achieved through either:
- 158.1. amalgamating the two Acts (option 1)
  - 158.2. keeping both Acts but subdividing safety and security from the economic regulation components of the CA Act (option 2)
  - 158.3. maintaining both Acts in their current separate format (status quo).
159. Amalgamating the Acts would provide a consolidated framework for civil aviation regulation in New Zealand. It would better reflect that civil aviation is a networked system with many components and participants, and it would diminish the risk of inconsistency between the two pieces of legislation.
160. Keeping both Acts with clear subdivisions between safety and security, and economic regulation, would provide concise and discrete legislation that distinguishes between the regulatory frameworks in place for all participants, and those in place for specific subsectors of the civil aviation system. This would make the Acts easier to understand



and provide for a sharper focus within each Act and for decision-makers. This approach is generally consistent with the approach in a number of other countries—for example Australia and the United Kingdom.

161. Consultation revealed a majority of support for either option 1 or option 2.
162. My officials will engage with the Parliamentary Counsel Office and the Legislation Design and Advisory Committee to ensure the final shape of the Acts reflects best practice legislative drafting.

*Issue 18: Purpose statement and objectives of the CA Act and AA Act*

*Purpose statement*

163. While the CA Act and AA Act have long titles to describe what each Act does, neither Act contains a purpose statement. It is common to include purpose statements in modern legislation to provide guidance and clarity to the reader around what the Act is intended to achieve.
164. There was broad support from stakeholders to include a purpose statement in the Acts. However, some parties (notably Wellington and Christchurch Airports, and the New Zealand Airports' Association) cautioned that a purpose statement may have unintended consequences, such as creating scope for parties to re-litigate issues which have been resolved in reliance on a particular interpretation of the Acts. Provided the purpose statement is sufficiently high level I consider it is unlikely to create a significant risk of re-litigation.
165. Modern legislation can include a description at the beginning of each Part of an Act to describe what is being established and/or provided for, who is being regulated, and by whom. I support the inclusion of a purpose statement in CA Act to better delineate the distinct regimes in place for safety and security regulation and economic regulation.
166. It is proposed that the purpose statements cover the following dimensions:
  - 166.1. to facilitate/contribute to the operation of a safe and secure civil aviation system
  - 166.2. to provide for the regulation of foreign and international New Zealand airlines
  - 166.3. to provide a framework for international and domestic airline liability
  - 166.4. to provide a framework of functions and powers relevant to establishing, developing and operating airports
  - 166.5. to preserve New Zealand's national security and national interest
  - 166.6. to implement New Zealand's international obligations, including treaties and other international agreements relating to civil aviation are implemented.
167. The Acts should reflect that decision makers must undertake their functions in an efficient and effective manner (that is, it does what it intends to do in a cost-effective way). This recognises that any regulation—whether safety and security focussed or economic in nature, must weigh up the costs and benefits. The regulatory burden should ideally be proportionate to the expected benefits.

*The inclusion of a purpose statement means the objectives of the relevant decision-maker may need amending*

168. Under the CA Act, the Minister of Transport and the CAA are required to undertake their functions in a way that 'contributes to the aim of achieving an integrated, safe, responsive and sustainable transport system'. This objective was inserted into the CA Act in 2004 to support the then Government's New Zealand Transport Strategy.
169. Government priorities for transport change over time. The objective in paragraph 168 has been further informed by this Government's objective for transport, the Ministry of Transport's current strategic framework and the CAA's corresponding outcomes for civil aviation.
170. The focus of regulatory activity is nuanced with the government expectations of the day but these expectations should not be directly enshrined in legislation (which can constrain the statute's durability).
171. To simplify the legislation and ensure the longevity of the legislation, I recommend that if Cabinet agree to the inclusion of a purpose statement, the objectives in the CA Act should be amended to appropriately align with the purpose statement.

### **Minor amendments to the Acts**

172. I recommend a number of minor changes to the CA Act and AA Act to improve the effectiveness and usability of the legislation. These are outlined in Appendix 2.

### **Authorisation to make changes during the drafting process**

173. I seek your approval to allow me to make decisions on the detail of the legislation consistent with the policy framework in this paper, to address any issues that arise during the drafting process.

### **Consultation**

174. There has been very positive engagement with the industry through the course of the Review. The aviation industry has appreciated the open engagement process and the opportunity to be involved in the early stages of policy development.
175. On 1 August 2014, the Ministry of Transport began a period of formal consultation that ran until 31 October 2014. This included formal stakeholders meetings around the country and two specific issue-based focus group sessions. The Ministry received 31 written submissions on a wide range of issues in response to the consultation. Submitters were largely supportive of the proposed changes. As noted earlier in the paper, the two issues where submitters held opposing views are airline cooperative arrangements and airport charging.
176. The following government agencies have been consulted on this paper: Office of the Privacy Commissioner, Customs, Treasury, Ministry of Business, Innovation and Employment (competition and tourism), Ministry of Justice, Civil Aviation Authority, State Services Commission, New Zealand Police, New Zealand Defence Force, Commerce Commission, Department of Prime Minister and Cabinet, and the New Zealand Security Intelligence Service.

### **Financial implications**

177. There are no financial implications arising from these proposals.

## Human rights implications

178. Issues around Avsec's landside search and seizure powers raise Bill of Rights implications. My officials have been working with the Ministry of Justice to ensure that Bill of Rights concerns are appropriately addressed in the proposed amendments to the CA Act.

Withheld to maintain the constitutional conventions which protect the confidentiality of advice tendered by Ministers of the Crown and officials.

## Legislative implications

179. A Bill and consequential changes to several Civil Aviation Rules is necessary to implement the proposals in this paper. Subject to Cabinet agreement, the proposals will be included in a Civil Aviation Reform Bill to be drafted by the Parliamentary Counsel Office. [REDACTED] Details about the timing of a draft Bill are set out below.

LEGISLATIVE TIMELINE	
Final policy approvals obtained	October 2016
Drafting instructions to PCO	November 2016
Bill before Cabinet Legislative Committee	April 2017
Requested introduction date	April / May 2017

180. A number of consequential amendments to Civil Aviation Rules will be necessary to support the Act amendments. These include amendments to:

180.1. Rule Part 12 – Accidents, Incidents and Statistics

180.2. Rule Part 19 – Transition Rules

180.3. Rule Part 139 – Aerodromes Certification, Operation and Use

180.4. Rule Part 140 – Aviation Security Service Organisations (Certification).

## Other relevant pieces of work to be included in the Bill

181. The Civil Aviation Reform Bill will incorporate proposed legislative changes arising from recent Cabinet decisions to:

181.1. Reduce the risks of alcohol and drug impairment in the commercial aviation sectors [CAB-16-MIN-0020 refers]. In particular, to require all commercial operators in the aviation sectors to have drug and alcohol management plans (which must include random testing) and to give the Director the ability to undertake non-notified testing for monitoring purposes.

181.2. Improve aviation security as proposed in the Domestic Aviation Security Review [NSC-16-MIN-0001 refers].

## Regulatory Impact Analysis

182. The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper. Four Regulatory Impact Statements (RISs) have been prepared by the Ministry of Transport and are attached.
183. The Regulatory Impact Analysis Team (RIAT) in the Treasury and the Ministry of Transport Regulatory Impact Assessment Pool (the QA reviewers) have jointly assessed:
- the RIS **Amendments to the Civil Aviation Act 1990 and Airport Authorities Act 1966: Safety Regulation**
  - the RIS **Amendments to the Civil Aviation Act 1990: Aviation Security**
  - the RIS **National security considerations within the civil aviation regime**
  - the RIS **Amendments to the Civil Aviation Act 1990 and Airport Authorities Act 1966**
184. The four RISs contain proposals to reform the aviation sector following a major policy review. This involved extensive consultation and engagement with industry stakeholders and experts to identify areas for improvement.
185. The QA reviewers consider that the RIS **Amendments to the Civil Aviation Act 1990 and Airport Authorities Act 1966: Safety Regulation** meets the quality assurance criteria. The RIS states that there are not cost impacts on stakeholders, but this is likely to depend on compliance behaviour, for which there is little detail about the potential use of new tests and penalties. Monitoring of the proposed arrangements should ensure the changes are proportionate and take due account of risk over time.
186. The QA reviewers consider that the RIS **Amendments to the Civil Aviation Act 1990: Aviation Security** partially meets the quality assurance criteria. The reviewers note, however, that the problems addressed as issue four, Avsec institutional arrangements are unclear, the magnitude of costs imposed by status quo arrangements are not obvious, and there has been limited consideration of alternative options. As a result, the preferred options are only weakly supported by the analysis. Nonetheless, the impact of these proposals is small and unlikely to be negative.
187. The QA reviewers consider that the RIS entitled **National security considerations within the civil aviation regime** meets the quality assurance criteria. The reviewers note that although the general case for providing measures to deal with national security threats is well made, there is little detail about the actual concerns or the operation of the proposed measures. This limited transparency makes the impacts of the proposals difficult to assess. However, the reviewers also note the role of classified information in the rationale and the process followed in forming a policy view (including the role of other agencies), and therefore considers that in broad terms the analysis is adequate.

188. The QA reviewers consider that the RIS **Amendments to the Civil Aviation Act 1990 and Airport Authorities Act 1966** partially meets the quality assurance criteria. RIAT notes the differing views of submitters and of agencies, and notes that the uncertain net benefits for the preferred options given many of the intended benefits are largely qualitative. RIAT also notes that assessing the likely impacts and quantifying all the costs is not possible without further policy work, particularly the impacts of option three which envisages a role for the Commerce Commission but with decisions continuing to be made by the Minister of Transport. Careful implementation planning, including a monitoring and evaluation programme, will be needed to mitigate any risks of unintended consequences, regardless of which option is preferred by Ministers.

### Gender implications

189. There are no gender implications.

### Disability perspective

190. There are no disability implications.

### Publicity

191. I propose to make a media statement about the changes to the Acts at an appropriate time—likely to be when the Civil Aviation Reform Bill is introduced.
192. I also intend to direct the Ministry of Transport to publish this Cabinet paper, the accompanying RIS and the summary of submissions to the consultation document on its website at the time of announcements. The documents will be reviewed for consistency with the Official Information Act prior to publication.

### Recommendations

193. The Minister of Transport recommends that the Committee:
1. **note** that the proposals in this paper are the result of a review of the Civil Aviation Act 1990 and Airport Authorities Act 1966, undertaken by the Ministry of Transport in 2014
  2. **note** that the 2016 legislative programme includes a Civil Aviation Reform Bill to amend the Civil Aviation Act 1990 and Airport Authorities Act 1966, [REDACTED]
  3. **agree** to release this Cabinet paper at the appropriate time, following a review for consistency with the Official Information Act

#### *Aviation safety*

4. **agree** that the Civil Aviation Act 1990 be amended to provide a framework which states that:
  - enforcement and/or administrative action should not be taken in respect of unpremeditated or inadvertent infringements of the law, which come to an enforcement agency's attention through an incident report filed under a CAA incident reporting system

- these protections shall not apply to any of the following circumstances:
  - where the incident report provided is not a full and accurate account of the incident
  - where it is believed on reasonable grounds that the person's behaviour was considered to be reckless or the person demonstrated repetitive at-risk behaviour
  - where it is considered in the public interest to pursue enforcement action or where the Director of Civil Aviation considers it is in the interests of aviation safety to pursue administrative action
- 5. **agree** that section 10(1) of the Civil Aviation Act 1990 be amended to include the following matters that the Director of Civil Aviation routinely considers or takes into account as part of a fit and proper person assessment:
  - whether a person has a dependency on alcohol and/or drugs
  - a person's compliance history with transport security regulatory requirements in New Zealand or in another country
- 6. **agree** that section 10 of the Civil Aviation Act 1990, which sets out the criteria for fit and proper person tests, be amended to clarify that the 'seek and receive' provisions authorise an organisation to provide information to the Director of Civil Aviation, without breaching the Privacy Act 1993
- 7. **note** that the Civil Aviation Reform Bill will also incorporate legislative changes arising from recent Cabinet decisions:
  - to reduce the risks of alcohol and drug impairment in the commercial aviation sector [need EGI Min reference here]
  - improve aviation security as proposed in the Domestic Aviation Security Review (NSC-16- MIN 0001 refers).

#### *Offences and penalties*

- 8. **agree** to include a recklessness component to section 46B of the Civil Aviation Act 1990 which makes it an offence to provide fraudulent, misleading or intentionally false statements to obtain a medical certificate
- 9. **agree** to amend the limitation periods for the following offences relating to the disclosure of information in the Civil Aviation Act 1990 to 12 months from when the offence was detected:
  - section 46 (acting without necessary aviation document)
  - section 46A (acting without a medical certificate)
  - section 46B (making a fraudulent, misleading or intentionally false statement to obtain a medical certificate)
  - section 46C (failure to disclose information required by the Director)

- section 49 (carrying on a scheduled international air service without a licence or contrary to a licence)
- section 52(B) (failure to report an accident or incident)

*Aviation security*

10. **agree**, subject to further consideration of the appropriate thresholds and protections around when and how those powers can be exercised, to amend the Civil Aviation Act 1990 to clarify the Aviation Security Service has authority within a security designated aerodrome to:
  - search vehicles and unattended items
  - use Explosives Detection Dogs to support the Aviation Security Service in carrying out its functions, duties and powers under the Act
  - better align the requirements relating to search in the landside with those in the airside parts of any security designated aerodrome, including requirements when searches are permitted, how searches are conducted, and what happens with anything that is found in the course of a search
11. **agree** to amend the Civil Aviation Act 1990 to allow aviation security officers to retain dangerous goods for the purposes of evidence
12. **agree** to amend the Civil Aviation Act 1990 to clarify that if dangerous goods have been detected by aircraft crew or a border agency, the Director of Civil Aviation or any other person authorised by the Director, may seize and retain those goods to determine whether it was lawful to carry them. Subject to this enquiry, the Director may retain the goods for enforcement purposes. Any enforcement decision would be at the Director's discretion
13. **agree** to amend the Civil Aviation Act 1990 to improve the airport identity card (AIC) regime to:
  - require people in security and security enhanced areas to produce, on request by authorised employees of the Civil Aviation Authority, including the Aviation Security Service, AIC or other identity documents
  - give the Aviation Security Service the authority to seize an AIC or other identity documents when they are being used in breach of the Civil Aviation Act 1990 or Civil Aviation Rules, are being used in circumstances where authorisation has been withdrawn or where the AIC has expired
  - define the term 'airport identity card'
  - address minor inconsistencies in terminology between the Civil Aviation Act 1990 and Civil Aviation Rules
14. **Agree** to amend the Civil Aviation Act to require:
  - an aerodrome operator to seek the approval of the Director for any proposed aerodrome layout (within a security designated aerodrome) that would allow the

entry into any security area of persons contrary to the requirements in the Act and Rules; and

- that the approval must be published in the Gazette
- that the Director must issue a Notice under section 77B of the Act directing Avsec to screen and conduct searches at that aerodrome

15. **agree** to amend the Civil Aviation Act 1990 and any associated Civil Aviation Rules to:

- remove the requirement for the Aviation Security Service to hold an aviation document
- specify that the Aviation Security Service is required to meet requirements and standards commensurate with those provided in Civil Aviation Rules
- repeal any provisions relating to Avsec that are necessary to support this proposal
- remove conflicts of interest and simplify institutional arrangements within the Civil Aviation Authority for the provision of Aviation Security Services.



16. **note** that there is not a strong case to move to a contestable service delivery model at this time
17. **agree** to amend the Civil Aviation Act 1990 to make it explicit that the Aviation Security Service can search hold baggage (checked luggage) without the consent of the passenger, where there is a risk to aviation safety or security that requires an immediate response
18. **agree** to amend the definition of 'aviation security officer' in the Civil Aviation Act 1990, to facilitate the use of New Zealand Defence Force personnel in accordance with the Defence Act 1990
19. **agree** to amend section 77A of the Civil Aviation Act 1990 that will allow the Minister of Transport to delegate to the Director the power to exclude any flight from any screening requirements in a section 77A Notice when the Director considers it unnecessary in specific circumstances.

*National security*

20. **agree** to amend to the Civil Aviation Act 1990 to include measures to enable the risks to New Zealand's national security and/or national interest that may arise from aircraft operations within the civil aviation system, to be mitigated as follows:
  - i. allow the Minister to make Civil Aviation Rules to preserve New Zealand's national security and/or national interest
  - ii. allow the Director of Civil Aviation to make emergency Civil Aviation Rules to preserve New Zealand's national security and/or national interest.
  - iii. before making any decision to make an emergency Civil Aviation Rules, the Director of Civil Aviation must consult with, and have the support of, the Minister Responsible for the Government Communications Security Bureau or the Minister in Charge of the New Zealand Security Intelligence Service
  - iv. where a person is subject to a Civil Aviation Rule that requires a national security assessment before issuing a licence (of some kind), the Director of Civil Aviation must consult with security ministers. If the Ministers referred to in paragraph 20(iii) above issue a certificate that the activity poses a risk to national security, the Director of Civil Aviation must not issue the licence
  - v. the Director of Civil Aviation may suspend, revoke, and impose conditions on an aviation document on national security/national interest grounds on the written advice of the Minister Responsible for the Government Communications Security Bureau or the Minister in Charge of the New Zealand Security Intelligence Service
  - vi. any person whose aviation document was suspended, or revoked, or had conditions put on it may lodge a complaint to the Inspector-General of Intelligence and Security

### *Airline cooperative arrangements authorisations*

Either

21. (a) **agree** to amend the Civil Aviation Act 1990 to replace the existing section 88 which sets out the authorisation arrangements for airline cooperative arrangements, with new provisions which provide for:
- an explicit requirement that the Minister of Transport assess the costs and benefits, and whether the arrangements are in the public interest
  - a transparent process the Minister of Transport and Ministry of Transport must follow to make a decision, including requirements to consult stakeholders and publish decisions
  - providing for time limits and conditions to be attached to any approval, and for approval to be varied or revoked

Or (Treasury preferred)

(b) **agree** to amend the Civil Aviation Act 1990 to remove the existing section 88 setting out authorisation arrangements for airline cooperative arrangements, to remove the general exemption from the Commerce Act and to ensure that alliances that risk harming competition would be considered by the Commerce Commission as part of its clearance or authorisation powers.

### *International airline licensing regime*

22. **agree** to amend section 87D of the Civil Aviation Act 1990 to designate the Secretary of Transport as the licensing authority for allocation of routes and/or capacity rights where these are unlimited, for scheduled international air services licenses for New Zealand international airlines
23. **agree** that section 87ZE of the Civil Aviation Act 1990 be amended to include a new category of international air services, to cater for commercial non-scheduled international services

### *Airports*

24. **agree** to repeal section 4A of the Airport Authorities Act 1966, which allows airport companies to set charges as they see fit

### *Legislative framework*

25. **note** that the Review consulted on the structure of the Civil Aviation Act 1990 and the Airport Authorities Act 1966, and whether there was value in amalgamating these Acts
26. **note** that my officials will engage with the Parliamentary Counsel Office and the Legislation Design and Advisory Committee to ensure the final shape of the Acts reflects best practice legislative drafting
27. **agree** to include in the Act a purpose statement covering the following dimensions:

- to facilitate / contribute to the operation of a safe and secure civil aviation system
  - to provide for the regulation of foreign and international New Zealand airlines
  - to provide a framework for international and domestic airline liability
  - to provide a framework of functions and powers relevant to establishing, developing and operating airports
  - to preserve New Zealand's national security and national interest
  - to implement New Zealand's international obligations, including treaties and other international agreements relating to civil aviation.
28. **agree** that the existing objective statements in the Civil Aviation Act 1990 be amended to align with the purpose statement

*Minor issues*

29. **agree** to the amendments to the Civil Aviation Act 1990 and Airport Authorities Act 1966 as outlined in Appendix 1 attached to this paper:
- add the term 'security' in sections 17, 18 and 21 of the Civil Aviation Act 1990, to ensure the Director of Civil Aviation has the explicit authority to use his/her powers in the interests of aviation security
  - amend, as appropriate, sections 10(6) and (7), and 19(6)(a) of the Civil Aviation Act 1990 to allow the Director of Civil Aviation to withhold prejudicial information consistent with the Privacy Act and Official Information Act
  - amend the title of section 65D in the Civil Aviation Act 1990 Act from 'Foreign aircraft outside New Zealand' to 'Liability for offence on foreign aircraft outside New Zealand' to better reflect what the offence covers
  - add the word 'aerodrome' in sections 21(1) and 21(2) of the Civil Aviation Act 1990 to provide the Director of Civil Aviation the necessary powers to impose prohibitions and conditions on aerodromes where the director believes on reasonable grounds, action is necessary to prevent danger to persons or property
  - insert a new provision in the Civil Aviation Act 1990 to allow tariffs to be submitted for authorisation where required by the other government and the relevant air services agreement
  - repeal the Commission Regime provisions in section 89 of the Civil Aviation Act 1990
  - amend section 72I(3)(b) of the Civil Aviation Act 1990 to clarify that the Director of Civil Aviation can take action in relation to the safety and security provisions only

- amend the Civil Aviation Act 1990 to ensure consistency in how the terms 'on reasonable grounds' and 'reasonable grounds to believe' are expressed in the Act
- amend the Civil Aviation Act 1990 to:
  - reduce the timeframe the Director of Civil Aviation can suspend an aviation document if there is an overdue fee from 6 to 4 months, to encourage timely payment of fees and charges and assist in the Civil Aviation Authority's process of debt collection [sections 41(1) and 41(2)]
  - clarify that the Civil Aviation Authority may decline to process an application or provide a service until an outstanding debt has been paid to remove uncertainty and prevent disputes [section 41(4)]
  - allow the Civil Aviation Authority to require a limited audit of levy payers at the Authority's own cost, to ensure that the information it receives is accurate [section 42B]
  - clarify that fees and charges can be prescribed for reimbursing the Civil Aviation Authority for a broad range of costs associated with the Director and Medical Convenor's functions, relating to medical certification, to make it clear that the provision is intended to cover a broad range of services and corporate overheads associated with the Director and Convenor's functions under Part 2A of the Civil Aviation Act 1990 [section 38(1)(ba)]
  - repeal section 72F(3) which states that no provision specifying any liabilities the Authority intends to incur may be included in a statement of intent without the concurrence of the Minister of Finance, as this provision is outdated
  - repeal section 72CA which states that the Aviation Security Service may pay to the Crown any surplus funds, as this provision is not consistent with the Crown Entities Act 2004 or a 2014 Cabinet decision that allows the Service to carry a reserve within a range of \$6–12million (which then acts as a trigger to amend the passenger security charge)
- amend the definition of 'specified airport company' in the Airport Authorities Act 1966 from a threshold based on annual revenue to one based on passenger movements
- amend the Airport Authorities Act 1966 to require all airport companies to consult on certain capital expenditures, to mitigate the risk that airport companies undertake capital expenditure to increase profit, without providing additional services or facilities that are wanted or sufficiently valued by airport users

- amend the Airport Authorities Act 1966 to provide for the following thresholds:

Annual passenger and/or aircraft movements	Threshold for consultation
< 1 million	> \$5 million
> 1 million but < 3 million	> \$10 million
> 3 million	> \$30 million

- repeal section 3BA and 4(2) in the Airport Authorities Act 1966 because changes in the commercial and regulatory environment airports operate in have made these provisions redundant. Commercial incentives and other legislation provide adequate safeguards and coverage
  - define in the Airport Authorities Act 1966 what 'publicly available' means for the purposes of information disclosure under the Airport Authorities Act 1966
  - amend the definition of a joint venture airport in the Airport Authorities Act 1966, to ensure that it is clear that the provisions of Part 10 apply to the Crown's existing joint venture partners.
30. **agree** to repeal sections 35(1) to (3) of the Civil Aviation Amendment Act 1992 relating to Airways Corporation, as this is unused or latent legislation that has not been brought into force since enactment, and there is no ongoing reason for its retention

*Legislative implications*

31. **invite** the Minister of Transport to issue drafting instructions to the Parliamentary Counsel Office to give effect to the relevant recommendations above, including any necessary consequential amendments (including to Civil Aviation Rules), savings and transitional provisions
32. **authorise** the Minister of Transport to make decisions, consistent with the overall policy decisions in this paper, on any issues which arise during the course of drafting.

Hon Simon Bridges  
**Minister of Transport**

Dated: \_\_\_\_\_

**Appendix 1: Minor issues and proposed changes to the Civil Aviation Act and Airport Authorities Act**

**Civil Aviation Act**

Issue	Proposed Act amendments
<p><i>References to safety and security</i></p> <p>Safety and security are fundamental to New Zealand's aviation system. Sections 17, 18 and 21 set out a suite of powers assigned to the Director that are expressed in terms of the necessity to act in the interests of safety.</p> <p>These powers do not expressly refer to action being taken in the interests of security. This could result in security issues not being adequately considered in the CA Act.</p>	<p>To avoid doubt, I recommend including the term 'security' in sections 17, 18 and 21 to ensure the Director has the explicit authority to use his/her powers in the interests of aviation security.</p>
<p><i>Withholding prejudicial information</i></p> <p>As part of a fit and proper person test, the Director considers information that may be prejudicial to a person. The CA Act requires the Director to disclose any prejudicial information to the applicant and give them a reasonable opportunity to refute or comment on the information.</p> <p>The Director's ability to withhold prejudicial information appears limited to situations where release could endanger the safety of any person. It could be interpreted that grounds to withhold information under the Privacy Act are excluded.</p>	<p>I recommend amending as appropriate sections 10(6) and (7), and 19(6)(a) to allow the Director to withhold prejudicial information consistent with the Privacy Act and Official Information Act.</p>

<p><i>Minor issues relating to titles of an offence provision</i></p>	<p>I recommend amending the title of section 65D in the CA Act from 'Foreign aircraft outside New Zealand' to 'Liability for offence on foreign aircraft outside New Zealand' to better reflect what the offence covers.</p>
<p><i>Director's powers in relation to aerodromes</i></p> <p>The CA Act permits the Director to detain aircraft, seize aeronautical products, and impose prohibitions and conditions, if the Director believes on reasonable grounds that action is necessary to prevent danger to persons or property. For non-urgent situations a warrant is required (section 21(1)). A warrant is not needed if the Director needs to take prompt action (section 21(2)).</p> <p>Aerodromes are not included in these sections, meaning the CAA is limited in its ability to intervene regarding the operation of a particular aerodrome.</p>	<p>I recommend the inclusion of 'aerodrome' in sections 21(1) and 21(2) of the CA Act.</p> <p>This will provide the Director with the necessary powers to impose prohibitions and conditions on aerodromes where the Director believes on reasonable grounds, action is necessary to prevent danger to persons or property.</p>
<p><i>The provisions in the CA Act for tariff approvals do not reflect current practice</i></p> <p>The airline tariff (air fares) approval process in the CA Act is out-of-date. Under the open skies approach, New Zealand now seeks tariffs articles in air services agreements that explicitly state that tariffs do not need to be filed and should be set based on commercial considerations in the market place.</p>	<p>I recommend including a new provision in the CA Act to allow tariffs to be submitted for authorisation where required by the other government and the relevant air services agreement. Tariffs would be deemed authorised, unless specifically disallowed. That authorisation would not have the effect of being a specific exemption under the Commerce Act. This strikes a balance between the regulatory practice of non-intervention in airline pricing decisions, while recognising that some of New Zealand's Air Services Agreements continue to provide for tariffs to be approved by governments.</p>

<p><i>The Commission Regime in section 89 of the CA Act is out of date</i></p> <p>Section 89 of the Act provides that the Minister may issue Commission Regimes. The Ministry approved all airfares when the Commission Regime arrangements were put in place in 1986. As part of this arrangement, travel agent and freight forwarder commissions were also regulated. With very limited exceptions, the provisions of the Commission Regime are no longer operative and represent a very different regulatory approach than is applicable today.</p>	<p>I recommend repealing the Commission Regime provisions in the CA Act.</p>
<p><i>Clarification of existing provisions</i></p> <p>The CA Act empowers the Director to ‘take such actions as may be appropriate in the public interest to enforce the provisions in this Act...’ [section 721(3)(b)]. There are a small number of economic-related airline offence provisions that the Director is not accountable for. For example section 49A carrying on scheduled international air service without licence or contrary to licence, and section 49B operating unauthorised non-scheduled international flight or carrying on non-scheduled international flight contrary to licence.</p> <p>The terms ‘on reasonable grounds to believe’ and ‘believes on reasonable grounds’ are used interchangeably throughout the CA Act. For consistency and clarity an objective test should be used throughout to make it clear that the Director, in making decisions, must be acting on reasonable grounds.</p>	<p>I recommend amending section 721(3)(b) of the CA Act to clarify that the Director can take action in relation to the safety and security provisions only.</p> <p>I recommend amending the CA Act to ensure consistency in how the terms ‘on reasonable grounds’ and ‘reasonable grounds to believe’ are expressed in the Act.</p>



*Minor issues relating to fees, charges and levies*

The CA Act sets out how the CAA may recover its costs, that is through fees, charges and levies set by regulation.

There are 6 amendments to the CA Act to address relatively minor issues relating to fees, charges, levies and reporting.

I recommend amending the CA Act to:

1. reduce the timeframe the Director can suspend an aviation document if there is an overdue fee from 6 to 4 months, to encourage timely payment of fees and charges and assist in the CAA's process of debt collection [sections 41(1) and 41(2)]
2. clarify that the CAA may decline to process an application or provide a service until an outstanding debt has been paid to remove uncertainty and prevent disputes [section 41(4)]
3. allow the CAA to require a limited audit of levy payers at the CAA's own cost, to ensure that the information it receives is accurate [section 42B]
4. clarify that fees and charges can be prescribed for reimbursing the CAA for a broad range of costs associated with the Director and Medical Convenor's functions, relating to medical certification, to make it clear that the provision is intended to cover a broad range of services and corporate overheads associated with the Director and Convenor's functions under Part 2A of the CA Act [section 38(1)(ba)]
5. repeal section 72F(3) which states that no provision specifying any liabilities the Authority intends to incur may be included in a statement of intent without the concurrence of the Minister of Finance, as this provision is outdated
6. repeal section 72CA which states that Avsec may pay to the Crown any surplus funds, as this provision is not consistent with the Crown Entities Act 2004 or a 2014 Cabinet decision that allows Avsec to carry a reserve within a range of \$6–12million (which then acts as a trigger to amend the passenger security charge).

<p><i>Repeal of latent legislation relating to Airways Corporation</i></p> <p>Section 99 of the Act provides that the Airways Corporation is the sole provider of certain services, namely area control, approach control, and flight information.</p> <p>A 1992 amendment to the Act, if brought into force, would allow the repeal (through an Order in Council) of section 99, ending the Corporation's statutory monopoly.</p> <p>This amendment should be repealed as it has been unused for well over 20 years, and there is no ongoing reason to retain it.</p>	<p>I recommend repealing sections 35(1) to (3) of the Civil Aviation Amendment Act 1992</p>
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**Airport Authorities Act**

<b>Issue</b>	<b>Proposed Act changes</b>
<p>The threshold, which defines a 'specified airport company' is currently based on revenue, which is no longer appropriate. Left unchanged, smaller airports could be captured and subject to more stringent economic regulation, potentially imposing costs that are disproportionate to their level of market power.</p>	<p>I recommend amending the definition of 'specified airport company' in the AA Act from a threshold based on annual revenue to one based on passenger movements.</p>
<p>Only specific airport companies are required to consult before approving certain capital expenditures.</p>	<p>I recommend amending the AA Act to require all airport companies to consult on certain capital expenditures, to mitigate the risk that airport companies undertake capital expenditure to increase profit, without providing additional services or facilities that are wanted or sufficiently valued by airport users.</p>

<p>The current threshold for consultation is where capital expenditure will, or is likely to, exceed 20 percent of the value of particular assets within a 5-year period. The underlying value of airports has increased substantially since 1998. The 20 percent threshold for consultation is now too high for the three main international airports (Auckland, Christchurch and Wellington).</p>	<p>I recommend amending the AA Act to provide for the following thresholds:</p> <table border="1" data-bbox="1111 308 1906 491"> <thead> <tr> <th data-bbox="1111 308 1507 379">Annual passenger and/or aircraft movements</th> <th data-bbox="1507 308 1906 379">Threshold for consultation</th> </tr> </thead> <tbody> <tr> <td data-bbox="1111 379 1507 416">&lt; 1 million</td> <td data-bbox="1507 379 1906 416">&gt; \$5 million</td> </tr> <tr> <td data-bbox="1111 416 1507 453">&gt; 1 million but &lt; 3 million</td> <td data-bbox="1507 416 1906 453">&gt; \$10 million</td> </tr> <tr> <td data-bbox="1111 453 1507 491">&gt; 3 million</td> <td data-bbox="1507 453 1906 491">&gt; \$30 million</td> </tr> </tbody> </table>	Annual passenger and/or aircraft movements	Threshold for consultation	< 1 million	> \$5 million	> 1 million but < 3 million	> \$10 million	> 3 million	> \$30 million
Annual passenger and/or aircraft movements	Threshold for consultation								
< 1 million	> \$5 million								
> 1 million but < 3 million	> \$10 million								
> 3 million	> \$30 million								
<p>The Review considered whether the following provisions in the AA Act are still necessary:</p> <ul style="list-style-type: none"> <li>• section 3BA requires airport companies to disclose aircraft-related charges</li> <li>• section 4(2) allows airport companies to borrow money, and acquire, hold, and dispose of property as they think fit.</li> </ul>	<p>I recommending repealing section 3BA and 4(2) in the AA Act because changes in the commercial and regulatory environment airports operate in have made these provisions redundant. Commercial incentives and other legislation provide adequate safeguards and coverage.</p>								
<p>Airports are required to make certain information publicly available. However, airports meet this requirement in different ways, resulting in some information that is not always freely and immediately available.</p>	<p>I recommend defining in the AA Act what 'publicly available' means for the purposes of information disclosure under the AA Act.</p>								
<p>The AA Act's definition of a joint venture airport is ambiguous.</p>	<p>I recommend amending the definition in the AA Act to ensure that it is clear that the provisions of Part 10 apply to the Crown's existing joint venture partners.</p>								