



# Civil Aviation Act 1990 and Airport Authorities Act 1966 Consultation Document 2014



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Ministry of **Transport**  
TE MANATŪ WAKA  
New Zealand Government

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# Foreword

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The aviation sector is dynamic. The sector has changed significantly since the Civil Aviation Act 1990 and Airport Authorities Act 1966 were enacted. And the pace of this change is accelerating as new technologies and innovations transform aviation.

The review of these Acts will help to ensure that the provisions of both Acts are fit for purpose, given:

- the growth and diversification of the aviation sector over the past 20 years
- the Government's priority to improve the quality of regulation
- the Government's expectations of the transport sector as a contributor to economic growth
- the move by the Civil Aviation Authority to a more proactive, risk-based approach to aviation regulation and its change programme to improve regulatory quality, service delivery, efficiency and effectiveness
- the Productivity Commission's recommendation that, subject to a review of the passenger-specific impacts, the Government considers adopting a regime for regulating international air services under the Commerce Act 1986.

Policy work to date indicates no fundamental flaws with either the Civil Aviation Act 1990 or the Airport Authorities Act 1966. Aviation safety and security and New Zealand's international aviation obligations will continue to be fundamental drivers.

However, the review has identified a large number of issues that legislative change could address, to:

- improve regulatory decision-making
- provide effective competition and licensing regulation for international air services
- address aviation-related safety and security issues where appropriate
- clarify the expectations placed on participants in the aviation system
- improve the usability of the legislation.

Your response to the questions in this consultation document will be used to develop recommendations to Government for amendments to the current provisions of the Civil Aviation Act 1990 and Airport Authorities Act 1966.

You can make a submission by using the submission template available at <http://www.transport.govt.nz/air/caa-act1990-aa-act1966-review-consultation/> or in the appendix to this document.

Given the breadth of issues covered by the review, there may be issues that are not covered in this document, or addressed in as much detail as you would like. We encourage stakeholders to contact the review team directly at [ca.act@transport.govt.nz](mailto:ca.act@transport.govt.nz) to seek clarification or discuss any issues in more detail.

A number of stakeholders have already provided input to the review team. Thank you for your feedback so far — we look forward to continuing to engage with you during the consultation period.

A handwritten signature in blue ink, appearing to read 'Martin Matthews', with a stylized flourish at the end.

Martin Matthews  
**Secretary for Transport**

# Introduction

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*“The New Zealand aviation industry in 2009 is estimated at \$9.7 billion in revenue, with \$5.9 billion from domestic activities and \$3.8 billion from export activities. There are more than 1,000 organisations participating in the industry, employing 23,535 staff with wages and salaries estimated at \$1.3 billion.... The industry is conservatively forecast to grow by 2015 to \$12.6 billion (5.3% per annum)....”*

*New Horizons<sup>1</sup>*

1. Aviation connects New Zealand and New Zealanders to the world, provides access to global markets, and generates trade and tourism.
2. Commercial aviation businesses are run by the private sector. The Government holds a majority shareholding in Air New Zealand and a number of local authorities have an ownership interest in their local airports. Airways New Zealand is a State-owned enterprise. These arrangements are likely to continue.
3. In addition, private, sport and recreational flying continues to thrive in New Zealand. It is estimated that around:
  - 3.1. 44 percent of all aircraft on the New Zealand Aircraft Register are in the private, sport and recreation category
  - 3.2. 65 percent of all pilots are likely to be in the private, sport and recreation category.

## The Civil Aviation Act 1990

4. The Civil Aviation Act 1990 (the Act) governs the civil aviation system in New Zealand, and:
  - 4.1. establishes the safety and security framework for civil aviation
  - 4.2. establishes the Civil Aviation Authority and the Aviation Security Service (Avsec) and sets out their functions, duties, and powers
  - 4.3. sets out the criteria for entering the civil aviation system and the privileges and duties of those participating in it
  - 4.4. empowers the Minister of Transport to make civil aviation rules for a range of matters
  - 4.5. empowers the Director of Civil Aviation to regulate entry into the civil aviation system, and to monitor and enforce compliance with the Act and the rules and regulations made under it
  - 4.6. ensures New Zealand’s obligations under international civil aviation agreements are implemented

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<sup>1</sup> *New Horizons: A report on New Zealand’s Aviation Industry*. Prepared for New Zealand Trade and Enterprise by Knotridge Ltd, 2010.

- 4.7. provides for the economic regulation of licensing and international air services competition for foreign and New Zealand international airlines
- 4.8. empowers the Minister of Transport to establish, maintain and operate aerodromes
- 4.9. prescribes airline liability and compensation for loss and delay.

### **New Zealand and the International Civil Aviation Organization**

5. New Zealand's safety and security framework is shaped significantly by international requirements. New Zealand is obliged to secure, to the highest degree practicable, compliance with aviation global standards as established by the International Civil Aviation Organization (ICAO).<sup>2</sup>
6. ICAO serves as the forum for cooperation in all fields of civil aviation among its 190 member States. It sets standards and regulations necessary for aviation safety, security, and efficiency, as well as for aviation environmental considerations. Although the ability to adopt different practices is permitted, the strength and effectiveness of the international system relies on setting and adhering to these global standards.
7. Based on ICAO's Universal Safety Oversight Audit Programme (USOAP) results, New Zealand is above the global average level in effectively implementing ICAO's Standards and Recommended Practices (SARPs).

8. The Act is over 20 years old and has been amended on a number of occasions since it was enacted.
9. Amendments to the Act include the addition of aviation security provisions; changes to give effect to various international conventions; changes to civil aviation rule-making provisions and medical certification requirements; and implementing mutual recognition of airline safety certification with Australia.
10. Conversely, changes to other legislation have removed provisions in the Act. For example, the Crown Entities Act 2004 removed a raft of provisions associated with the governance and operation of the Civil Aviation Authority. A list of the Act amendments can be found here:  
[www.legislation.govt.nz/act/public/1990/0098/latest/versions.aspx](http://www.legislation.govt.nz/act/public/1990/0098/latest/versions.aspx).

### **Purpose of the review**

11. The review provides an opportunity to refresh and improve the Act's usability, and ensure that its provisions are current and effective.
12. In the past 20 years, significant change has occurred throughout the aviation industry and in government regulatory reform.

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<sup>2</sup> New Zealand is a signatory to the Convention on International Civil Aviation. ICAO serves as the forum for cooperation in all fields of civil aviation among its 190 member States. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental considerations.

13. One change has been that New Zealand's aviation business has flourished. In 2009, aviation-related revenues were estimated to be almost \$10 billion. This was expected to grow to almost \$15 billion by 2015.<sup>3</sup> Air passenger transport contributed approximately \$4.3 billion (18 percent) to New Zealand's \$23.9 billion tourism revenue in the year to March 2013.<sup>4</sup> Fourteen percent of New Zealand exports by value are carried by air. Government expects the industry to continue to be a major contributor to economic growth.
14. Another change is the Government's „Better Regulation“ initiative. The review is a response to find new ways to approach transport regulation to ensure it is high quality and implemented in a cost-effective manner.
15. The Civil Aviation Authority has moved to a more proactive, risk-based approach to aviation regulation. It is implementing a change programme to improve regulatory quality, service delivery, and effectiveness. We want to ensure the Act can support the Civil Aviation Authority to be a responsive and results-driven organisation, and support high quality cost-effective regulation.
16. Finally, the international aviation industry is changing rapidly because of increased demand for services, improved technology, the increasing cost of jet fuel and environmental concerns. It is important that the Act supports a flexible, responsive regulatory system.

### The Airport Authorities Act 1966

17. As part of the review, we are undertaking a section-by-section review of the Airport Authorities Act 1966. This Act provides for the recognition of local authorities and airport companies as airport authorities and confers upon them a range of functions and powers relevant to establishing and operating airports.

### Purpose of the review

18. The purpose of the review is to ensure that the provisions of the Airport Authorities Act 1966 provide for the effective and efficient establishment, operation, and development of airports by airport authorities, while also having due regard to airport users. The review also provides an opportunity to ensure the provisions of that Act are clear, concise and accessible. This includes the opportunity to remove provisions that are redundant.

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<sup>3</sup> *New Horizons: A report on New Zealand's Aviation Industry*. Prepared for New Zealand Trade and Enterprise by Knotridge Ltd, 2010.

<sup>4</sup> *Tourism Satellite Account: 2013*. Statistics New Zealand, Wellington, 2013.

### How to have your say

19. We would like to know what you think about the ideas and options in this document, what you support, and whether we have missed anything relating to the provisions of the Civil Aviation Act 1990 and the Airport Authorities Act 1966. At the end of the document is a set of questions to guide your feedback. So that we understand your viewpoint, please give reasons for your answers.
20. You can send us a written submission by using the submission template available at <http://www.transport.govt.nz/air/caa-act1990-aa-act1966-review-consultation/>. Please choose which sections you would like to answer.
21. Please email your submission to [ca.act@transport.govt.nz](mailto:ca.act@transport.govt.nz) with the word "Submission" in the subject line, or post it to:  
  
Civil Aviation Act and Airport Authorities Act Review  
Ministry of Transport  
PO Box 3175  
Wellington 6140
22. The deadline for all forms of submission is 31 October 2014.

23. We appreciate the feedback received from stakeholders and the issues that they have raised to date. Given the breadth of the issues, we have not been able to capture all of them in the consultation document. We encourage stakeholders to contact the review team directly at [ca.act@transport.govt.nz](mailto:ca.act@transport.govt.nz) to discuss any issue/s that have not been included in the consultation document, or make a submission on these.

### How will responses and submissions be used?

24. The project team will consider submissions and develop recommendations to government for amendments to the current provisions of the Civil Aviation Act 1990 and Airport Authorities Act 1966. A summary of submissions will be published on the Civil Aviation Act Review page on the Ministry of Transport website.

### Confidentiality

25. Your responses and submissions on this consultation document will be subject to the Official Information Act 1982. The Official Information Act requires government agencies to make official information available upon request, unless there is good reason to withhold it.
26. If you do not want your submission released, you need to let us know what material you want to be withheld and why. Under the Official Information Act, the decision on whether to release or withhold any material rests with the Ministry of Transport. Any decision to withhold information can be investigated and reviewed by the Ombudsman.

### The outcomes sought for transport

27. The Government's goal for transport is to have an effective, efficient, safe, secure, accessible and resilient transport system that supports the growth of our economy, in order to deliver greater prosperity, security and opportunities for all New Zealanders.
28. To support the Government's overall transport objective, government transport agencies have adopted four long-term goals for transport in New Zealand:
  - 28.1. resilient — meets future needs and endures shocks
  - 28.2. effective — moves people and freight where they need to go in a timely manner
  - 28.3. efficient — delivers the right infrastructure and services to the right level at the best cost
  - 28.4. safe and responsible — reduces the harms from transport.
29. The Civil Aviation Act Review has the potential to make a major contribution in supporting these outcomes, for example by:
  - 29.1. improving the efficiency of regulatory decision-making; for example, considering whether some of the Minister's rule making powers could be delegated to the Civil Aviation Authority Board or Director of Civil Aviation
  - 29.2. clarifying the expectations placed on participants in the aviation system; for example, creating potential enhancements to allow pilots who have a long-term stable medical condition to follow an abbreviated route to gain their medical certificates
  - 29.3. addressing aviation safety and security issues where appropriate; for example, enhancements to encourage accident and incident reporting, to ensure the Civil Aviation Authority has robust information to make accurate and timely safety and security decisions
  - 29.4. providing effective competition and licensing regulation for international air services; for example, ensuring that the process of authorising contracts, arrangements and understandings between airlines is transparent and based on a comprehensive analysis of the costs and benefits.
  - 29.5. improving the usability of the legislation; for example, using plain English and markers to orientate users about the contents of the Act.

# Part A: Statutory framework

## Overview

1. Part A primarily focuses on:
  - 1.1. the structure of the Civil Aviation Act 1990 and Airport Authorities Act 1966
  - 1.2. the purpose and objectives of the Acts
  - 1.3. the roles and responsibilities of those tasked with regulating civil aviation and providing aviation security services under the Acts.<sup>1</sup>

CIVIL AVIATION	Minister of Transport	Civil Aviation Authority (CAA)		Director of Civil Aviation (Director)	Secretary of Transport
		CAA	Aviation Security Service (Avsec)		
Safety Regulation	✓	✓		✓	
Security Regulation	✓	✓		✓	
Security Services			✓		
Economic regulation (Airlines)	✓				✓
Economic regulation - (Airports)	✓				✓

2. In aviation the term 'economic' regulation is used to distinguish it from safety regulation. For example, economic regulation captures authorising international scheduled and non-scheduled services by airlines and applying international conventions on consumer rights.

## Objectives of the review

3. The general aim of the review is to ensure that the Civil Aviation Act 1990 and the Airport Authorities Act 1966 are fit for purpose, including that they:
  - 3.1. maintain a safe and secure civil aviation system
  - 3.2. promote effective and efficient regulation of civil aviation to support a dynamic aviation sector
  - 3.3. provide clear, concise and accessible legislation.

<sup>1</sup> Note that an assessment of the functions, duties and powers of the Aviation Security Service is considered in Part B of the Consultation Document: page 82–93 refer.

4. To achieve this, the functions and duties of those responsible for regulating civil aviation, and the provision of aviation security services, should:
  - 4.1. be clear, concise and appropriately aligned; and
  - 4.2. support and enhance capable and effective regulatory oversight of the civil aviation system.
5. In addition, the design and structure of the legislation should be easily navigable for those who are expected to know, comply with, apply and advise on the Acts' provisions.

### Overall assessment

6. The Civil Aviation Act 1990 and Airport Authorities Act 1966 have had a number of amendments over their respective 24 and 50 years — significant material has been both inserted into, and repealed from, each Act.<sup>2</sup> Different drafting styles are evident within both Acts given their age and the number of amendments that have been made to them.
7. The Civil Aviation Act 1990 contains safety, security and economic regulation. Although the Act is divided into Parts that are distinguishable by subject matter, limited guidance is provided within each Part to orientate the user about its contents for example, what is being established and/or provided, who is being regulated and by whom.
8. Work to inform the review to date has concluded that a modernisation process is desirable to improve the usability of the legislation, and to better align the functions and duties of decision-makers within each Act.
9. The drivers for change and proposed options are discussed in the following sections:
  - 9.1. Item A1: Legislative structure
  - 9.2. Item A2: Purpose statement and statutory objectives
  - 9.3. Item A3: Statutory Functions
    - Item A3.1: Functions of the Minister of Transport
    - Item A3.2: Functions of the Civil Aviation Authority
    - Item A3.3: Functions of the Director of Civil Aviation
    - Item A3.4: Independent statutory powers
    - Item A3.5: Secretary of Transport
  - 9.4. Item A4: Structure of the Civil Aviation Authority

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<sup>2</sup> See paragraph 9 and 10, page 6 of the Introduction section to this Consultation Document for further detail.

### Item

#### Item A1: Legislative structure

##### Background

10. The Civil Aviation Act 1990 sets out:
  - 10.1. the safety and security framework for the civil aviation system and:
    - 10.1.1. establishes CAA and Avsec. It specifies the functions performed by CAA and Avsec and gives them the powers necessary to carry them out.
    - 10.1.2. sets out the criteria for entering the civil aviation system and the privileges and duties of those participating in it. In this system, every participant shares a responsibility for safety and security. Aviation organisations, pilots, engineers, air traffic controllers and aircraft owners are each responsible for meeting the relevant statutory safety and security standards.
    - 10.1.3. empowers the Minister of Transport to make civil aviation rules that participants in the civil aviation system are required to follow to keep aviation safe and secure. It empowers the Director to monitor and enforce compliance with these rules.
  - 10.2. the economic framework for the regulation of:
    - 10.2.1. foreign and New Zealand international airlines for licensing, non-scheduled services and international air services competition. It includes the corresponding duties and powers of the Minister of Transport and Secretary for Transport.
    - 10.2.2. airline liability for loss and delay for both international and domestic air carriage, which includes passengers, baggage and cargo.
  - 10.3. the arrangements for the Minister of Transport to establish, maintain and operate aerodromes, including agreements with one or more local authorities to establish, maintain and operate aerodromes as joint venture partners.
11. The Airport Authorities Act 1966 provides for recognising local authorities and airport companies as airport authorities, and confers upon them a range of functions and powers relevant to establishing, developing and operating airports.

##### Is there a problem?

12. The review is the first time since the Civil Aviation Act 1990 was enacted that civil aviation safety, security and economic regulation is being assessed concurrently to determine fitness for purpose.

13. The work of the review to date has identified a large number of issues that it would be beneficial to address with legislative change (discussed in Parts A to F of the Consultation Document). If amendments to the Act are progressed, we recommend that both Acts undergo a complete legislative rewrite to deliver high quality, efficient and effective civil aviation legislation.
14. Therefore, there is an opportunity to consider the structure of the Civil Aviation Act 1990 and Airport Authorities Act 1966. The review has considered whether:
  - 14.1. to amalgamate the Civil Aviation Act 1990 and the Airport Authorities Act 1966 — to provide a consolidated framework for civil aviation regulation  
*or*
  - 14.2. to separate the provisions in the Civil Aviation Act 1990 into three separate Acts — to further delineate between the frameworks for safety and security regulation, and the economic regulation of airlines, air navigation services, and airports.  
*or*
  - 14.3. retain the status quo.

### Options

15. The table below proposes two possible future legislative structures for civil aviation-related legislation, in addition to the status quo.

Option One — Amalgamate the Civil Aviation Act and the Airport Authorities Act into one Act				
Safety and security <sup>3</sup>	Airline liability <sup>4</sup>	Airline licensing, competition <sup>5</sup> and financing <sup>6</sup>	Air navigation services <sup>7</sup>	Airports <sup>8</sup>
Part 1: Entry into the Aviation System Part 1A: ANZA <sup>9</sup> Mutual Recognition	Part 9A: International Carriage by Air	Part 8A: International Air Services Licensing	Part 11 — Section 99: Airways Corporation	Part 10: Aerodromes, facilities and joint venture airports
Part 2: Functions, Powers and Duties of Participants in the Civil Aviation System Part 2A: Medical Certification	Part 9B: Domestic Carriage by Air	Part 9: International Air Carriage Competition	Section 99A and 99B: Regulations relating to information disclosure and information to be supplied to the Secretary for Transport for air traffic services	Airport Authorities Act 1966 provisions
Part 3: Rules		Part 12: Cape Town Convention and Aircraft Protocol		
Part 4: Fees and Charges <sup>10</sup>				
Part 5: Offences and Penalties Part 5A: Unruly Passengers				
Part 6: Rights of Appeal				
Part 6A: Civil Aviation Authority of New Zealand				
Part 7: Registries and Information Services				
Part 8: Aviation Security				

Option Two — Separate the provisions in the Civil Aviation Act into three separate Acts				
An Act dealing with safety and security	An Act dealing with airline and air navigation services regulation			An Act dealing with airport regulations
Part 1: Entry into the Aviation System Part 1A: ANZA Mutual Recognition	Part 9A: International Carriage by Air	Part 8A: International Air Services Licensing	Part 11— Section 99: Airways Corporation	Part 10: Aerodromes, facilities and joint venture airports
Part 2: Functions, Powers and Duties of Participants in the Civil Aviation System Part 2A: Medical Certification	Part 9B: Domestic Carriage by Air	Part 9: International Air Carriage Competition	Section 99A and 99B: Regulations relating to information disclosure and information to be supplied to the Secretary for air traffic services	Airport Authorities Act 1966 provisions
Part 3: Rules		Part 12: Cape Town Convention and Aircraft Protocol		
Part 4: Fees and Charges <sup>11</sup>				
Part 5: Offences and Penalties Part 5A: Unruly Passengers				
Part 6: Rights of Appeal				
Part 6A: Civil Aviation Authority of New Zealand				
Part 7: Registries and Information Services				
Part 8: Aviation Security				

16. While the Parts referred to in the table above are the existing Civil Aviation Act Parts, they have been included as placeholders. We expect that the order of the parts and their structure, and sections within each Part, will change as a result of the review.

17. The following aviation-related legislation is outside the scope of this review or possible legislative amalgamation: the New Plymouth Airport Act 1961, Whangarei Airport Act 1963, Auckland Airport Act 1987, and the Wellington Airport Act 1990; the Aviation Crimes Act 1972, the Air Facilitation Act 1993 and the Air Facilitation (Domestic Passengers and Cargo Act) 1994; the Transport Accident Investigation Commission Act 1990.

<sup>3</sup> See Part B of the consultation document.

<sup>4</sup> See Part C of the consultation document.

<sup>5</sup> See Part D of the consultation document. Depending on the outcome of the review, international air carriage competition provisions may be moved out of transport legislation and into the Commerce Act 1986.

<sup>6</sup> See Part F of the consultation document.

<sup>7</sup> See Part F of the consultation document.

<sup>8</sup> See Part E of the consultation document.

<sup>9</sup> Australia New Zealand Aviation

<sup>10</sup> See Part F of the consultation document.

<sup>11</sup> See Part F of the consultation document.

### Option 1: Amalgamate the Civil Aviation Act 1990 and the Airport Authorities Act 1966

18. This option involves amalgamating the Airport Authorities Act 1966 provisions into the Civil Aviation Act 1990 to provide a consolidated framework for civil aviation regulation in New Zealand.
19. Under this option, an overview section could be included at the beginning of the Civil Aviation Act 1990 or at the beginning of the Parts to describe each Part's contents — for example, what is being established and/or provided, who is being regulated and by whom. This could better delineate the distinct regimes in place for safety and security regulation, and economic regulation.
20. This approach would improve the Civil Aviation Act's navigability, and provide useful markers for delineating the different frameworks for safety and security regulation and the economic regulation of airlines and airports.

### Option 2: Separate the provisions in the Civil Aviation Act 1990 into three separate Acts

21. This option involves the disaggregation of the existing Parts of the Civil Aviation Act 1990, to recognise the distinct regimes in place for safety and security regulation, and economic regulation.
  - 21.1. The safety and security-related parts of the Civil Aviation Act 1990 set out a life-cycle approach to civil aviation regulation within a closed system — determined by the safety and security regulatory framework prescribed in the Civil Aviation Act 1990 and rules. All participants are subject to these standards, which are operational and technical in nature.
  - 21.2. The economic regulation of civil aviation participants is narrower in scope, and applies to airlines, air navigation service providers and airports.

Regulatory decision-making	Civil Aviation Act		Civil Aviation Act and Airport Authorities Act <sup>12</sup>
	Safety (All participants) Security	Economic (Airlines)	Economic (Airports)
	Minister of Transport	Minister of Transport	Ministers of Transport, Finance, and State Owned Enterprises
	Governor-General by Order in Council	-	Governor-General by Order in Council
	CAA, including the Director	Secretary for Transport	Secretary for Transport

22. This option would provide concise and discrete legislation that distinguishes between the regulatory frameworks in place for all participants, and those in place for specific subsectors in the civil aviation system.

<sup>12</sup> Sections 4A–4C and 9A–9D of the Airport Authorities Act 1966 contain provisions related to the economic regulation of airports, including information disclosure. In 2008, the Commerce Act was amended to strengthen the information disclosure regime applicable to Auckland International Airport Limited, Wellington International Airport Limited and Christchurch International Airport Limited. They are subject to information disclosure under the Commerce Act rather than the Airport Authorities Act.

23. This option is generally consistent with the approach in a number of other countries whose legislation distinguishes between safety and security regulation, and economic regulation.<sup>13</sup>

**Option 3: Status Quo — Civil Aviation Act 1990 and Airport Authorities Act 1966 maintained**

24. If the status quo continues, the enhancements described in Option 1 (paragraph 19 refers), would be considered to improve the navigability of the Civil Aviation Act 1990.

**Question A1:** Which option do you support? Please state your reasons.

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<sup>13</sup> For example, Australia and the United Kingdom.

## Item A2: Purpose statement and objectives

### Purpose statement

25. The Civil Aviation Act 1990 and the Airport Authorities Act 1966 have long titles to describe what the Acts do. However, neither Act contains a purpose statement.

### Is there a problem?

26. Long titles and purpose statements are not interchangeable. Long titles describe *what* the Act does, whereas purpose statements say *why* it has been enacted.
27. Purpose statements are common in modern legislation and should be considered for inclusion in civil aviation legislation. For example, a purpose statement was included in recent amendments to the Land Transport Management Amendment Act 2013 as an interpretation aid to describe the primary purpose of that Act.
28. Purpose statements provide an indication of the objectives of the legislation, and clearly indicate to users of the Act (for example, civil aviation participants, decision-makers and judges) what the statute is intended to achieve.

### Concepts to consider for inclusion

29. Item A1 proposes three legislative structures — page 12–16 refer.
30. Concepts that could be included in a purpose statement will relate to the subject matter of the legislation — the final legislative structure will determine this.
31. However, we are seeking your feedback on the concepts that could be included in a purpose statement for civil aviation legislation.

	Concept	Commentary
Safety and security related	To contribute to a safe and secure civil aviation system	<i>Civil aviation legislation provides a comprehensive safety and security regime to minimise harm, based on the standards and recommended practices prescribed in annexes to the Convention on International Civil Aviation. Maintaining a safe and secure aviation system will continue to be the fundamental driver of New Zealand’s civil aviation regulatory regime.</i>
Economic — airports related	To provide regulation of airports	<i>Airports-related legislation establishes a framework of functions and powers relevant to establishing, developing and operating airports.</i>
	To facilitate the operation of airports, while having due regard to airport users	<i>Airports related legislation (the Airport Authorities Act 1966) facilitates the operation of airports, while having due regard to airports users; for example, through the availability of airport charges and performance information in an open and transparent manner</i>

	Concept	Commentary
Economic — airline-related	To provide for the regulation of international New Zealand and foreign airlines with due regard to New Zealand's civil aviation safety and security regime and bilateral air services.	<p><i>Airline related legislation establishes a framework for the regulation of foreign and New Zealand international airlines for licensing, non-scheduled services, and competition without:</i></p> <ul style="list-style-type: none"> <li>- <i>compromising civil aviation safety and security; or</i></li> <li>- <i>circumventing New Zealand's bilateral air services.</i></li> </ul>
	To enable airlines to engage in collaborative activity that enhances competition, while minimising the risk resulting from anti-competitive behaviour <sup>14</sup>	<i>The Civil Aviation Act provides the decision-making framework for addressing economic international air transport activities; enabling airlines to engage in collaborative activity that enhances competition, while minimising the risk resulting from anti-competitive behaviour</i>
	To provide a framework for international and domestic airline liability that balances the rights of airlines and passengers	<i>The Civil Aviation Act provides airline liability provisions for international air carriage in the event of injury to, or death of, a passenger, and domestic air carriage in the event of delay. These provisions give effect to our international obligations through the Warsaw, Guadalajara, and Montreal Conventions. The Act also provides airline liability provisions for domestic air carriage for delay, and strike a balance between the rights of airlines and passengers.</i>

<sup>14</sup> Depending on the outcome of the review, international air carriage competition provisions may be moved out of transport legislation and into the Commerce Act 1986. See Part D of the consultation document for further detail.

## Objectives

32. Under the existing Civil Aviation Act 1990, the Minister of Transport and 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 Act in 2004, to support the New Zealand Transport Strategy.<sup>15</sup>
33. There is no corresponding objective in the Airport Authorities Act 1966 because it was not considered applicable at the time of drafting.

## Is there a problem?

34. Government priorities for transport change over time, as evidenced in the past 10 years. The objective referred to above (paragraph 32) has been further informed by:
  - 34.1. the current Government's objective for transport — an effective, efficient, safe, secure, accessible and resilient transport system that supports the growth of our economy, in order to deliver greater prosperity, security and opportunities for all New Zealanders
  - 34.2. the Ministry of Transport's current strategic framework — to develop a transport system that maximises the economic and social benefits for New Zealand and minimises harm.
  - 34.3. CAA's corresponding outcome for civil aviation — safe flight for social connections and economic benefit.
35. 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). We recommend that the status quo changes.
36. In addition, there are inconsistencies associated with the application of objectives across decision-makers within the Civil Aviation Act 1990:
  - 36.1. The objective above (paragraph 32) assigned to the Minister of Transport is currently located in Part 2 of the Civil Aviation Act 1990, which outlines the functions, powers and duties of participants in the civil aviation system from a safety and security standpoint. It is not clear that the Minister is required to carry out his/her economic functions<sup>16</sup> in a way that contributes to this objective.
  - 36.2. The Secretary for Transport has a discrete set of economic functions in the Civil Aviation Act 1990. However, the Secretary is not currently bound by the requirement to carry out his/her functions in a way that contributes to the objective referenced above.

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<sup>15</sup> A New Zealand Transport Strategy (NZTS) was released in December 2002. The NZTS vision was that by 2010 New Zealand would have an affordable, integrated, safe, responsive, and sustainable transport system. The strategy objectives focussed on economic development, safety and personal security, access and mobility, public health and environmental sustainability. The NZTS has been superseded by Connecting New Zealand, a summary of the government's policy direction for transport, released in August 2011.

<sup>16</sup> International air service licensing and air carriage competition — existing Parts 8A and 9 of the Civil Aviation Act refer.

## Proposed change

37. For simplicity and consistency, we recommend that statutory objectives:
  - 37.1 be assigned to the Minister, CAA and the Secretary for Transport
  - 37.2 be linked to the proposed purpose of the Act or Acts that relate to the decision-makers' function/s.
38. For example, CAA would be required to carry out its functions in a way that contributes to a safe and secure civil aviation system.
39. We also recommend that the statutory objectives assigned to the Minister, CAA and the Secretary require these decision-makers to carry out their functions in an effective and efficient manner.

### *Effective and efficient*

40. Transport is an enabler for social and economic connectivity. Any regulation — whether it is safety and security focused or economic in nature — must weigh up benefits and costs. The regulatory burden should ideally be proportionate to the expected benefits.
41. Civil aviation regulation should achieve its desired outcome in an effective and efficient way — that is, it does what it intends to do in a cost-effective way.
42. In 2012, the Ministry of Transport developed a set of sector-wide outcomes for transport (which are referenced in Ministry and CAA planning documents). These provide a useful description of what the terms effective and efficient mean in a transport context:
  - 42.1 Effective — moves people and freight where they need to go in a timely manner.
  - 42.2 Efficient — delivers the right infrastructure and services to the right level at the best cost.

### **Other objectives**

43. The Civil Aviation Act 1990 also currently requires the Minister to ensure that New Zealand's obligations under international civil aviation agreements are implemented.
44. Aviation safety, security and economic regulation are heavily shaped by our international obligations. Implementation and ongoing compliance with these obligations will continue to be an important factor to ensure New Zealand access to international aviation systems.
45. Therefore, we recommend that this objective be retained and reflected in the Act/s.

**Question A2a:** Do you support including the concepts listed in paragraph 31 in a purpose statement? Please state your reasons.

**Question A2b:** What other concepts do you think should be included in the purpose statement of the Act or Acts? (Please specify)

**Question A2c:** Should the revision of statutory objectives align with the purpose of the Act or Acts?

**Question A2d:** Do you support revising the statutory objectives to include a requirement that decision-makers (for example, the Minister, CAA, and the Secretary of Transport) are required to carry out their functions in an effective and efficient manner?

### Item A3: Statutory functions

CIVIL AVIATION	Minister of Transport	Civil Aviation Authority		Director	Secretary for Transport
		CAA	Avsec		
Safety Regulation	✓	✓		✓	
Security Regulation	✓	✓		✓	
Economic regulation (Airports)	✓				✓
Economic regulation - (Airlines)	✓				✓
Security Services			✓		

46. In the main, we are not contemplating any wholesale changes to existing functions, or the allocation of these functions between decision-makers, listed in the table above.
47. However, we are seeking feedback on specific issues, that may result in changes to the following:
- 47.1. placement of independent statutory powers with the Director (located in this Part of the Consultation Document, Item A3.4, pages 29–32 refer)
  - 47.2. civil aviation rule-making (located in Part B of the Consultation Document, Item B9, pages 63–70 refer)
  - 47.3. allocation decisions for New Zealand international airlines involving *unlimited rights*<sup>17</sup> (see Part D of the Consultation Document, Item D2, pages 119-120).
  - 47.4. authorisation of international air carriage competition arrangements between airlines (located in Part D of the Consultation Document, Item D6, pages 126–130 refer).
48. The functions assigned to the decision-makers listed in the table are considered in further detail below.

<sup>17</sup> Rights include routes that can be flown, or capacity (frequency and aircraft types) that may be offered.

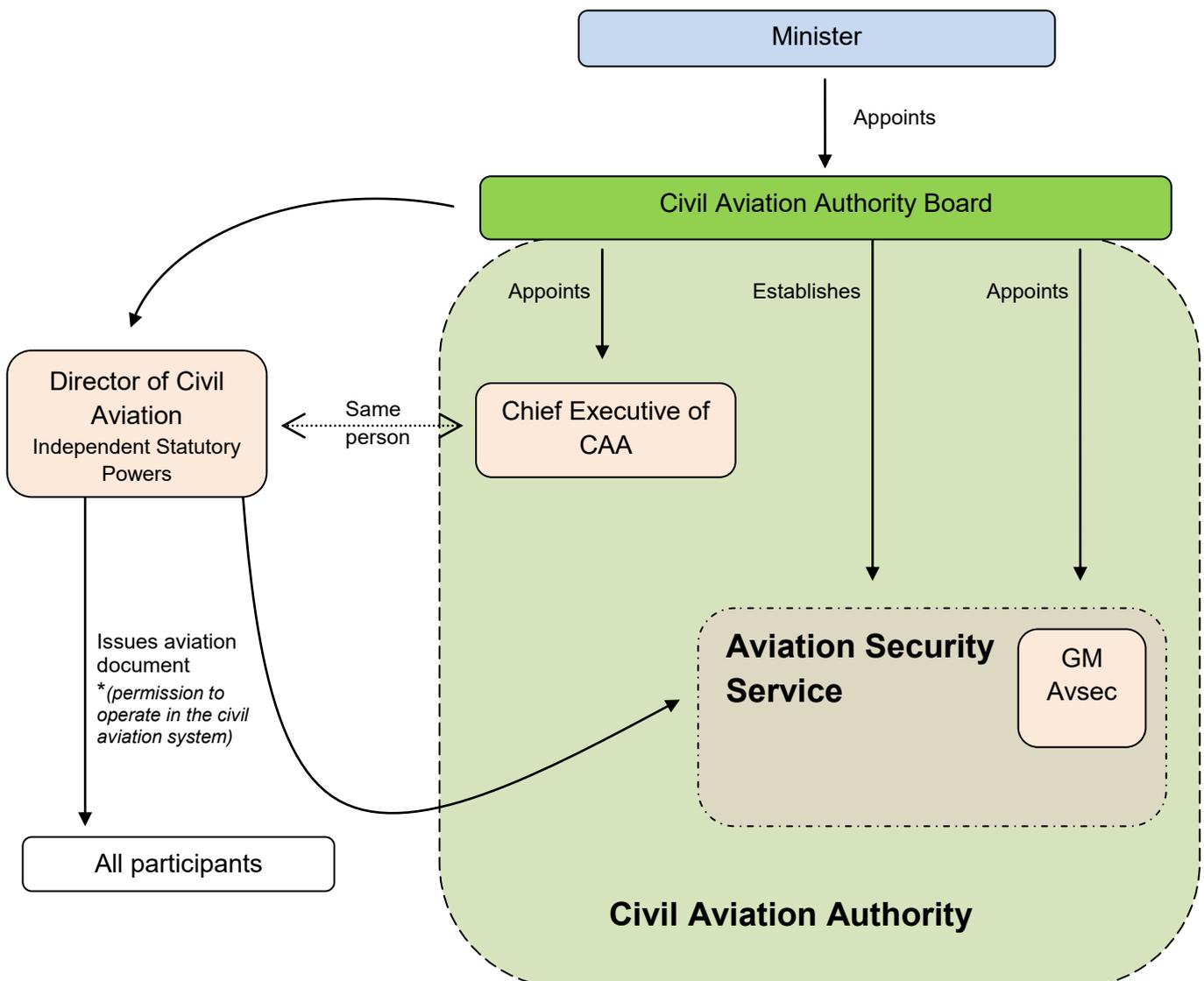
### Item A3.1: Functions of the Minister of Transport

49. The functions of the Minister of Transport as set out in section 14A of the Civil Aviation Act 1990 are to:
  - 49.1. promote safety in civil aviation
  - 49.2. administer New Zealand's participation in the Convention on International Civil Aviation and any other international aviation convention, agreement, or understanding to which the Government of New Zealand is a party
  - 49.3. administer the Crown's interest in aerodromes
  - 49.4. make rules under the Act.
50. The Minister has a range of additional functions prescribed in the Civil Aviation Act 1990 — including those relating to aviation security, international airline licensing and international air carriage competition arrangements. The duties and powers of the Minister in relation to these functions are described in a number of different parts and sections of that Act.
51. The Minister's functions in the Airport Authorities Act 1966 are incorporated within various provisions of that Act.
52. We recommend that:
  - 52.1. where possible, a high level description of the Minister's functions be consolidated into one section of the Act or Acts for clarity and consistency
  - 52.2. to avoid doubt, the Minister's existing function — ~~to~~ promote civil aviation safety" should include security.

## Issue A3.2: Functions of the Civil Aviation Authority

53. CAA has two distinct roles within the Civil Aviation Act 1990:

- 53.1. regulatory authority for civil aviation safety and security
- 53.2. aviation security service provider (through Avsec).



*\*By virtue of Ministerial Gazette Notice 3702, only Avsec can be granted an aviation document to provide aviation security services*

54. CAA's regulatory role is considered in further detail below.

55. CAA's regulatory functions are to:

- 55.1. promote civil aviation safety and security in New Zealand

- 55.2. promote civil aviation safety and security beyond New Zealand in accordance with New Zealand's international obligations
  - 55.3. establish and continue a service to be called the Aviation Security Service
  - 55.4. investigate and review civil aviation accidents and incidents in its capacity as the responsible safety and security authority, subject to the limitations set out in section 14(3) of the Transport Accident Investigation Commission Act 1990
  - 55.5. notify the Transport Accident Investigation Commission in accordance with section 27 (of the Act) of accidents and incidents notified to CAA
  - 55.6. maintain and preserve records and documents relating to activities within the civil aviation system, and in particular to maintain the New Zealand Register of Aircraft and the Civil Aviation Registry
  - 55.7. ensure the collection, publication, and provision of charts and aeronautical information, and enter into arrangements with any other person or organisation to collect, publish, and distribute such charts and information
  - 55.8. provide to the Minister such information and advice as the Minister may from time to time require
  - 55.9. cooperate with, or provide advice and assistance to, any government agency or local government agency when requested to do so by the Minister, but only if the Minister and CAA are satisfied that the performance of the functions and duties of CAA will not be compromised
  - 55.10. provide information and advice about civil aviation, and foster appropriate information education programmes about civil aviation that promote its objective
  - 55.11. enter into technical or operational arrangements, or both, with civil aviation authorities of other countries.
56. CAA may also employ a chief executive (~~who shall also be known as the Director of Civil Aviation~~) and may employ a General Manager of Avsec.
57. We consider that the description of CAA's regulatory functions in paragraph 55 is generally clear, concise and adequately defined.
58. However, for further clarity, we recommend an amendment to CAA's investigation function in paragraph 55.4 above.

### Accident and incident investigation

59. Section 72B(2)(d) requires CAA to ~~investigate and review civil aviation accidents and incidents in its capacity as the responsible safety and security authority, subject to the limitations set out in section 14(3) of the Transport Accident Investigation Commission Act 1990.~~
60. CAA investigates aviation accidents and incidents that impact on the integrity of the civil aviation system. The aim is to learn from them and rectify any imbalances to the system. To avoid doubt, we propose an amendment to this section to provide CAA with discretion about whether or not to investigate an accident or incident.

61. Discretion is implicit within the section as it is currently drafted.
- 61.1. CAA is not compelled to investigate and review every single accident and incident given the absence of the word all (that is, section 72B(2)(d) does not say that the Authority is ~~to~~ investigate all accidents and incidents...”).
- 61.2. CAA is required to investigate and review civil aviation accidents and incidents ~~in~~ its capacity as the responsible safety and security authority”. CAA has determined that its regulatory activity is characterised by a responsive, evidence-based and analysis-led, risk-based approach. Resources are finite, and CAA’s approach enables it to target its resources to better quantify and mitigate risks, and apply the most appropriate interventions. This approach informs how it determines whether, when and why it investigates and reviews accidents and incidents.<sup>18</sup>

## Recommendation

62. We recommend amending section 72B(2)(d) to record that CAA (in its capacity as the responsible safety and security authority), has a discretion to investigate and review civil aviation accidents and incidents, subject to the limitations set out in section 14(3) of the Transport Accident Investigation Commission Act 1990.

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<sup>18</sup> The CAA undertakes investigations of incidents or accidents where the accident or incident highlights an issue or problem that poses a threat to the integrity of the civil aviation system. The CAA takes into consideration seven broad criteria when making its decision: (i) the risk profile of the operator involved; (ii) the aircraft involved and the type of operation; (iii) any evidence to suggest that repeat events are likely; (iv) the CAA’s Regulatory Operating Model; (v) the capability of those involved to conduct their own investigation; (vi) the impact for the aviation system; and (vii) the hazards associated with the accident or incident.

### **Other matters in relation to CAA's functions**

63. New Zealand is party to the Convention on International Civil Aviation and the Minister of Transport is responsible for New Zealand's participation in the Convention. New Zealand's obligations include having a comprehensive safety and security regime based on the standards and recommended practices prescribed in annexes to the Convention.
64. CAA is responsible, via Ministerial designation and delegation, for a range of functions and powers related to the State's ICAO obligations.<sup>19</sup> As part of the review, we considered whether CAA's technical role in New Zealand's ICAO-related activities should be prescribed as a function in the Act.
65. We have concluded that CAA's existing objective: *to promote civil aviation safety and security beyond New Zealand in accordance with New Zealand's international obligations*, coupled with the existing ICAO-related designations and delegations, is the most appropriate and pragmatic approach.
66. Assigning roles and activities for specific international obligations through designations/delegations is administratively more efficient and flexible if changes are required in the future.
67. Outside of the Act review, the Ministry of Transport will lead the development of an international fora plan across government agencies, including CAA. The purpose of this plan is to ensure that New Zealand's engagement with international bodies, such as ICAO, is sufficiently coordinated and focused, and achieves maximum benefit for New Zealand.

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<sup>19</sup> For example, the CAA is designated as the Aviation Security Authority, and the Personnel Licensing Authority, and has delegated responsibility for ICAO-related technical or safety regulatory matters.

### Item A3.3: Functions of the Director of Civil Aviation

68. Section 72I sets out the regulatory functions of the Director, which include:
- 68.1. exercising control over entry into the civil aviation system by granting aviation documents<sup>20</sup>
  - 68.2. monitoring and enforcing provisions of the Act and regulations/rules made under the Act (including carrying out inspections and monitoring)
  - 68.3. ensuring regular reviews of the civil aviation system.
69. Section 72I(4) allows the Director to act independently when carrying out his/her functions (in respect of any particular case). As outlined earlier, the Director is not accountable to the Minister or CAA when he/she issues an aviation document to operator X, removes a document from operator Y, or takes action against operator Z for breach of civil aviation rules.
70. We believe that the Director's regulatory functions are generally clear, concise and adequately defined. However, we recommend one small change. Section 72I(3)(b) empowers the Director to ~~take~~ such actions as may be appropriate in the public interest to enforce the provisions of this Act....". This section should be clarified to be clear that the Director can take such action in relation to civil aviation safety and security provisions. There is a small number of economic-related airline offence provisions included in the Act that the Director is not accountable for.<sup>21</sup>

Note:

71. Section 72I(3)(c)(i)-(iv) requires the Director to monitor participants' adherence within the civil aviation system to any regulatory requirements:
- 71.1. safety and security, including (but not limited to) personal security
  - 71.2. access and mobility
  - 71.3. public health
  - 71.4. environmental sustainability.
72. The matters specified in section 72I(3)(c)(i)-(iv) correspond to the matters for which the Minister can make civil aviation rules.
73. Part B: Issue B9 of this consultation document sets out proposed modifications to rule-making powers.
74. The regulatory matters the Director is required to monitor participant adherence to [section 72(3)(i)-(iv)] may need to be adjusted as a result.

<sup>20</sup> Means any licence, permit, certificate or other document issued under the Civil Aviation Act to or in respect of any person, aircraft, aerodrome, aeronautical procedure, aeronautical product, or aviation related service.

<sup>21</sup> For example, carrying on a scheduled international air service without a licence / contrary to a licence (Section 49A refers), operating an unauthorised non-scheduled international flight, or carrying on a non-scheduled international flight contrary to a licence (Section 49B refers).

## Item A3.4: Independent statutory powers

75. The Director's independent statutory responsibilities put the Director in a position not dissimilar to that of the Commissioner of Police, whose position combines two functions — that of Chief Constable in charge of policing and cases, and responsibility for the effective management of the New Zealand Police.
76. The Director's functions and independence reflect the findings of Sir Kenneth Keith's review of the constitutional aspects of civil aviation authorities (circa 1991).
  - 76.1. CAA has a regulatory function that must always be seen to be implemented in an independent manner.
  - 76.2. Several of its functions involve judgements about particular people, things and situations.
  - 76.3. Such functions are usually exercised by independent experts (for example, Director of Civil Aviation) not subject to any specific control by Ministers or others who are ordinarily superior to them in an administrative hierarchy.
  - 76.4. The power should be exercised following a proper process and independently by the responsible person, subject to any rights of appeal.
  - 76.5. These arrangements should be implemented to maintain public confidence in the decision-making process.

## Discussion

### Background

77. The transport agencies, CAA, Maritime New Zealand and the New Zealand Transport Agency, are Crown Agents responsible for implementing government policy. Their Crown Agent status provides for a high degree of Ministerial oversight and management of the Crown's interest in these agencies. Appointment and dismissal of Board members are made at the Minister's discretion.
78. Placing independent regulatory powers within transport agencies (controlling entry to/exit from the system, and regulatory enforcement action) vary across transport modes. While independent powers reside with individual office holders (Directors) in aviation and maritime, independent powers reside with the New Zealand Transport Agency (NZTA) Board in land.<sup>22</sup>
79. The review has considered whether independent regulatory powers should continue to reside with the Director of Civil Aviation or whether they should reside with the CAA Board.

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<sup>22</sup> Following the Next Steps in the Land Transport Sector Review (2007), the State Services Commission advised that decisions relating to the operation of a statutory Crown entity must be made by, or under the authority of the entities Board — that an entity's functions and powers are vested in the board as the governing body. As a result, the Land Transport Management Act 2008 transferred the Director of Land Transport's independent statutory powers to the New Zealand Transport Agency Board.

## Aviation context

80. CAA is governed by a Chairperson and four members (the CAA Board) who report directly to the Minister of Transport. CAA Board members are appointed by the Minister of Transport. The CAA Board is accountable to the Minister for the performance of CAA, including the delivery of CAA's functions as specified in Section 72B of the Act and for delivery of Avsec functions as specified in Section 80 of the Act.
81. A high degree of Ministerial oversight and management of the Crown's interest in civil aviation is appropriate given the significant contribution civil aviation makes to New Zealand's social and economic wellbeing. Aviation connects New Zealand and New Zealanders to the world, provides access to global markets, and generates trade and tourism.
82. In addition, New Zealand is a signatory to the Convention on International Civil Aviation. The Minister of Transport is responsible for New Zealand's participation in the Convention, which requires New Zealand to have a comprehensive safety and security regime based on the standards and recommended practices prescribed in the Convention's annexes.
83. However, at times CAA's regulatory enforcement role requires significant judgements about particular persons or organisations in the aviation industry. These decisions require a substantial degree of technical expertise, and judging a complex set of circumstances. These decisions can impact very directly upon individual rights and freedoms. The status quo places that decision-making with the Director of Civil Aviation — an independent expert adviser — distancing Ministers from enforcement action.
84. The table below considers the strengths and weakness of two options:
  - 84.1. the status quo — Ministerial appointed Board with licensing and enforcement powers held by a Director of Civil Aviation.
  - 84.2. licensing and enforcement powers resting with the Board.

	Option One: Crown Agent (Ministerial appointed Board) with licensing and enforcement powers held by a Director [Status Quo]	Option Two: Crown Agent (Ministerial appointed Board) with licensing and enforcement functions vested in the CAA Board
Criteria	Commentary	Commentary
<b>Oversight and Accountability</b>	<p>Under this option, there is a risk that licensing and enforcement decisions are not directly connected to the policy settings surrounding the function and power.</p> <p>However, the Director's independence would not preclude, and indeed should require CAA to have checks and balances in place to assure itself that the Director carries out his/her functions with care, skill and diligence.</p> <p>For example:</p> <ul style="list-style-type: none"> <li>- Clear delineation between Chief Executive functions and Director functions; performance objectives for each role could be included within the job description.</li> <li>- CAA's <i>Regulatory Operating Model</i> - supported by the <i>Use of Regulatory Tools Policy</i> and the <i>Enforcement Policy and Use of Interventions Tools Policy</i> - which outlines the principles that underpin CAA's regulatory approach.<sup>23</sup></li> </ul>	<p>The CAA Board is able to delegate its functions and powers to individuals within the organisation, and hold those individuals to account for both the way in which they make a decision and for the decision made. This option provides a consistent oversight for the way in which decisions are made and the decisions themselves.</p> <p>However, it assumes that the CAA Board will delegate functions and powers sufficiently to ensure that its governance role is not adversely impacted (for example, time and resources) by operational and technical decision-making. This option risks blurring the separation between the CAA Board's governance and strategic role, and the operational and technical activities of CAA.</p>
<b>Independence and Decision-making</b>	<p>At times CAA's regulatory enforcement role requires significant judgements about particular persons or organisations in the aviation industry. These are decisions that require a substantial degree of technical expertise, and judgement of a complex set of circumstances. CAA is involved in decisions that impact very directly upon individual rights. These decisions must be implemented in an independent manner, free of control, influence, or perception of bias, given the potentially catastrophic impact of an aviation safety or security failure.</p> <p>In addition, the government has a substantial ownership interest in both Air New Zealand and Airways New Zealand, which are both certified to operate in the civil aviation system and are subject to regulatory oversight.</p> <p>Therefore, as a decision-maker CAA has a greater need to be independent of the Minister and a Ministerial appointed board.</p> <p>This option places decision-making with an independent expert, and credibly distances Ministers from individual licensing decisions and enforcement actions.</p>	<p>For functions and powers it retains, the CAA Board must operate in a way that enables those decisions to be made in a timely manner. The CAA Board must be able to demonstrate that it has made the decision, not merely accepted a recommendation.</p> <p>Current legislation states that the Minister shall request from organisations that have "a substantial interest in the civil aviation industry in New Zealand" the names of persons the industry believes to be appropriate candidates for appointment to the CAA Board. Existing board appointment provisions could give rise to a conflict of interest/presumption of bias — particularly where board appointees (with perceived or actual aviation interests) are required to make decisions regarding aviation documents or enforcement action against individual participants in the system. In New Zealand, access to suitable board candidates with appropriate sector knowledge is likely to be more limited than in other jurisdictions (for example, Australia and the United Kingdom which have far larger populations and aviation sectors.)</p>
<b>International obligations</b>		<p>CAA would be accountable for both the regulatory oversight<sup>24</sup> of Avsec <u>and</u> delivery of Avsec's services. The regulator would be regulating itself. This would give rise to an actual conflict of interest, and potentially breach New Zealand's international obligations. These obligations require that the management, setting priorities and organising the national civil aviation security quality control programme is undertaken independently of implementing civil aviation security measures.<sup>25</sup></p>

<sup>23</sup> See Part B – Participant obligations, Pages 42–44 for further detail.

<sup>24</sup> Entry to the civil aviation system is managed by issuing aviation documents. Once entry requirements are met, the appropriate aviation document is issued and the individual or organisation becomes a participant in the New Zealand civil aviation system. While in the system participants must continue to comply with the standards and conditions of their document/s. Civil Aviation Rules set out the specifications and qualifications participants must meet and the standards they are required to follow.

<sup>25</sup> Article 3.4.7 of Annex 17 to the Convention on International Civil Aviation refers.

### Recommendation

85. On balance, we recommend that the independent statutory powers (described in section 72I) of the Act continue to be vested in the Director of Civil Aviation to:
  - 85.1. provide clear separation between the CAA Board's governance and strategic role, and the operational and technical activities of CAA
  - 85.2. maintain decision-making with an independent, expert adviser, credibly distancing Ministers (and a Ministerial appointed Board) from individual decision-making.

**Question A3.4:** Should independent statutory powers continue to reside with the Director of Civil Aviation? Please state your reasons.

### Item A3.5: Secretary for Transport

86. The Secretary for Transport is accountable for a small number of discrete economic-related functions in both the Civil Aviation Act 1990 and the Airport Authorities Act 1966:
  - 86.1. granting an open aviation market licence for New Zealand and foreign airlines for scheduled and non-scheduled services (sections 87R–87Z of the Civil Aviation Act 1990)
  - 86.2. granting commercial non-scheduled international flight authorisation for New Zealand and foreign airlines. This may also be done by Ministry staff under delegation (section 87ZE of the Civil Aviation Act 1990).
87. For transparency and clarity, we propose to include a formal list of functions for the Secretary for Transport in the revised legislation, similar to the approach taken for the Minister and CAA.

# Part B: Safety and security

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## Overview of this Part

1. This part primarily focuses on sections 6–87 of the Civil Aviation Act 1990 which prescribe the safety and security framework for civil aviation.
2. Maintaining a safe and secure aviation environment will continue to be the fundamental driver within New Zealand’s civil aviation regulatory regime.
3. The social costs and reputational impacts of air accidents are significant, particularly for public air transport. As well as the intrinsic safety benefits for passengers and other users, safe flight leads to public confidence in New Zealand’s civil aviation system.
4. A loss of confidence in New Zealand’s civil aviation system could have significant economic and social impacts for New Zealand by:
  - 4.1. eroding access to foreign markets and undermining the aviation industry’s development. Assurance of safe flight is a critical foundation to support the development of both domestic and international trade and tourism.
  - 4.2. having a negative impact on New Zealand’s international reputation as a responsible ICAO citizen. Compliance with ICAO requirements provides our international partners with confidence in our aviation safety and security standards, and ensures that vital air links with these partners are retained. Any significant degradation from those standards could damage our reputation and cause other countries to question the integrity of New Zealand’s aviation system.

## Objectives and Criteria

5. The general aim of the review is to ensure that the Civil Aviation Act 1990 and the Airport Authorities Act 1966 are fit for purpose, including that they:
  - 5.1. maintain a safe and secure civil aviation system
  - 5.2. promote effective and efficient regulation of the civil aviation system to support a dynamic aviation sector
  - 5.3. provide clear, concise, and accessible legislation.
6. To achieve this aim, the safety and security framework that is prescribed in legislation should:
  - 6.1. support and enhance transparent and consistent decision-making by the Minister of Transport, Civil Aviation Authority (CAA) including the Aviation Security Service (Avsec), the Director of Civil Aviation (the Director), and aviation security officers
  - 6.2. sufficiently describe the obligations placed on participants in the civil aviation system to support participant knowledge and compliance
  - 6.3. be proportionate to the issues they seek to address
  - 6.4. be consistent with other legislation and New Zealand’s international obligations where appropriate

- 6.5. provide for administrative and operational efficiency
- 6.6. be durable and flexible.

### Key matters assessed

- 7. We have not identified any fundamental problems with the existing safety and security regulatory framework contained in Parts 1–8 of the Civil Aviation Act 1990.
- 8. However, we have identified a number of specific issues within Parts 1–8 that could be addressed with legislative change. These are analysed in the following sections:
  - 8.1. Entry into the civil aviation system
  - 8.2. Participant obligations
  - 8.3. Medical certification
  - 8.4. Offences and penalties
  - 8.5. Appeals
  - 8.6. Regulatory framework
  - 8.7. Information management — reporting
  - 8.8. Security

### Entry into the civil aviation system

9. Part 1 (sections 6–11J) of the Civil Aviation Act 1990 sets out the requirements for entry to the civil aviation system. It includes compliance with civil aviation rules that set out relevant standards, specifications and qualifications. Entry is managed through issuing aviation documents.<sup>1</sup> Aviation documents include pilot licences, air operating certificates, aircraft registration certificates, aircraft maintenance engineer licences, air traffic control licences, and aerodrome operating certificates.
10. Once the Director is satisfied that the entry requirements are met, the appropriate aviation document is issued and the individual or organisation becomes a participant in the New Zealand civil aviation system. While in the system participants must continue to comply with civil aviation rules and with the conditions set out in their documents.
11. New Zealand’s civil aviation safety system is based on a ‘life-cycle’ approach promoted in the Swedavia-McGregor Report<sup>2</sup> and is consistent with ICAO requirements.

<b>Number of participants in the New Zealand civil aviation system as at March 2014</b>	
Approximate number of aviation document holders in New Zealand	14,984 <i>Includes: 27 airports and aerodromes; 10,207 current/active pilots; 2,640 aircraft maintenance engineers; 9 large aircraft transport operations; 15 medium aircraft transport operations; 97 small aircraft transport operations; 102 agricultural operations; 34 adventure aviation operations; 8 recreational aviation operations; 58 aviation training operations; 14 aviation design operations; 20 aviation manufacturing operations; 64 aviation maintenance organisations.</i>
Approximate number of pilots licensed in New Zealand’s civil aviation system each year	1388 licences on average issued annually since 2005.
Aircraft registered to operate in New Zealand airspace	4,852

12. In practice, CAA makes entry decisions about individuals and organisations at the time of one of the following events:
  - 12.1. upon applying to enter the system for the first time
  - 12.2. upon application to increase the level of participation in the system (for example, upgrading from a private to a commercial pilot licence)

<sup>1</sup> Some participants may not be required to hold an aviation document, for example non-certificated aerodromes and the suppliers of aeronautical parts under Part 19 sub-part F of the civil aviation rules.

<sup>2</sup> The Swedavia-McGregor Report (1988) was the result of a study “to consider the need, in the interests of safety, for regulatory controls of civil aviation and their enforcement, to identify the appropriate level of regulation, and to determine the resources needed for a civil aviation safety authority”.

- 12.3. upon application to continue existing participation in the system (renewal of a time-limited document).<sup>3</sup>
13. The entry regime involves an assessment of:
  - 13.1. whether a person/organisation has the necessary experience and qualification(s)
  - 13.2. whether they are fit and proper' (essentially, an assessment of attitude, character, compliance and competence)
  - 13.3. whether they meet all other Act and rule requirements relating to the particular aviation document
  - 13.4. aviation safety.
14. Part 1 of the Civil Aviation Act 1990 includes specific provisions relating to the entry of aircraft into the New Zealand civil aviation system, supported by Civil Aviation Rule Part 47 (Aircraft Registration and Marking).
15. In addition, Part 1A of the Civil Aviation Act 1990 enables the mutual recognition of certain aviation-related safety certification between New Zealand and Australia.

### Overall assessment

16. There is no evidence to date to suggest that the legislative framework around entry requirements is not operating as intended.
17. In recent years no appeals have been lodged about entry decisions for first time applicants. Litigation has generally involved participants who have been exited from the system (following regulatory action), who have then sought to re-enter the system either immediately or some years later.
18. Although to date we have not identified any significant problems in Part 1 of the Civil Aviation Act 1990, there is opportunity to align its fit and proper person' provisions with other transport legislation.

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<sup>3</sup> For example, an Air Operator Certificate (which is issued for a maximum 5 years).

### Item

#### Item B1: Provisions relating to fit and proper person assessment

19. After considering any application for the grant or renewal of an aviation document, the Director shall, –as soon as is practicable”, grant the application if he or she is satisfied that the applicant, and any person who is to have or is likely to have control over the exercise of the privileges under the document, is a fit and proper person (section 9 of the Civil Aviation Act 1990 refers).
20. Under section 9(3), it is a condition of every current aviation document that the holder continues to satisfy the fit and proper person test specified in section 9(1)(b)(ii).

#### *Purpose of the fit and proper person assessment*

21. The intention of the fit and proper person test is to assure the public of the safety of participants operating within the system. The test provides a measure to assess an applicant’s competency and honesty, so the public is protected from the risks of aviation activities being carried out incompetently or recklessly. It is designed to provide confidence that a person has undergone an appropriate and robust assessment.
22. The concept of being fit and proper’ is similar to the approach taken in Australian civil aviation regulation.
23. The fit and proper person test is not unique to aviation. It applies in various other occupational and licensing fields.
24. The approach taken to legislation prescribing fit and proper person tests in other occupational and licensing fields differs. Some, like the Civil Aviation Act 1990, specify criteria while others do not. These differences reflect the fact that the test must be applied in the context of the activity being proposed.
25. A number of court cases have aided the interpretation and application of fit and proper person tests. Notwithstanding contextual differences between industries, case law provides assistance in understanding the measures likely to be applied by the courts.
26. Case law has confirmed that:
  - 26.1. The focus of the test is forward looking (that is, the decision-maker must attempt to identify the likely conduct of the applicant in the future) and is not a punishment for past conduct.
  - 26.2. The onus of proving fitness is on the applicant. (However, note that the Director must prove the document holder is not fit to exercise the privileges of the document when exiting a participant from the civil aviation system).
  - 26.3. Due recognition must be given to the circumstances of youth where errors may have occurred as a result of immaturity.
  - 26.4. It is important to look at all the facts of the case as a whole and not just consider the fact of previous conviction.

### Is there are problem?

27. Section 10 of the Civil Aviation Act 1990 sets out the following fit and proper person test criteria<sup>4</sup>:
  - 27.1. the person's compliance history with transport safety regulatory requirements
  - 27.2. the person's related experience (if any) within the transport industry
  - 27.3. the person's knowledge of the applicable civil aviation system regulatory requirements
  - 27.4. any history of physical or mental health or serious behavioural problems
  - 27.5. any conviction for any transport safety offence, whether or not—
    - 27.5.1. the conviction was in a New Zealand court<sup>5</sup>; or
    - 27.5.2. the offence was committed before the commencement of the Civil Aviation Act 1990
  - 27.6. any evidence that the person has committed a transport safety offence or has contravened or failed to comply with any rule made under the Civil Aviation Act 1990
  - 27.7. in the case where a New Zealand Air Operator Certificate with Australia New Zealand Aviation (ANZA) privileges applies, the person's compliance with the conditions specified.
28. The Director is not confined to considering the express criteria and may take into account such other matters and evidence as may be relevant (section 10 (2) of the Act refers). CAA currently relies on this section to ask people applying to enter the system for information about any criminal convictions they may have.
29. However, for clarity and transparency, the Civil Aviation Act 1990 could be more explicit about when non-transport safety offences or charges may be considered by the Director for the purposes of a fit and proper assessment.

### Options

#### Option 1: Status quo

30. Under the status quo, the Director “may take into account such other matters and evidence as may be relevant” in determining whether or not a person is fit and proper.
31. This gives the Director the discretion to consider, for example, any criminal offending and persistent or serious complaints that may be relevant.

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<sup>4</sup> See section 10 of the Civil Aviation Act 1990.

<sup>5</sup> Note that the release of any criminal history information as part of a fit and proper person test is subject to the Criminal Records (Clean Slate) Act 2004.

### **Option 2: Align the fit and proper person test in the Civil Aviation Act 1990 with other transport legislation** (Ministry of Transport preferred option)

32. Under Option 2, the Director would continue to be empowered to take into account –such other matters and evidence as may be relevant” in determining whether or not a person is fit and proper.
33. However, the Civil Aviation Act 1990 could be amended to be more explicit about when offences or charges may be considered by the Director for the purposes of a fit and proper assessment.
34. Although the Civil Aviation Act 1990 refers to transport safety offences’ other offences are potentially relevant to the Director’s decision making; for example, dishonesty, violence, or offences involving alcohol or drugs.
35. Under this option, the Director would be explicitly required to take into account additional matters that may be relevant to assessing a person’s or an organisation’s fit and proper status under the Civil Aviation Act 1990.
36. For example, maritime transport legislation explicitly requires the Director of Maritime New Zealand to consider information about wider offences, including convictions for offences relating to controlled drugs or prescription medicine, or involving violence, or causing danger to a person or criminal damage. This information may be considered, whether or not the conviction was in a New Zealand court and regardless of when the offence was committed.<sup>6</sup>
37. The Land Transport Act 1988 takes a slightly different approach. That Act imposes a general requirement on the New Zealand Transport Agency (the Agency) to consider matters that should be taken into account in the interests of public safety and to ensure the public is protected from serious or organised crime. However, it then specifies the matters that the Agency may consider (as opposed to must’ in the other Acts) and adds criteria relating to criminal history generally, complaints, and persistent failure to pay fines. It also provides the ability to consider the fact that a person has been charged with an offence, if the public interest would require a person convicted of the offence to not be considered fit and proper.
38. The Land Transport Act 1988 then goes on to specify what the Agency must consider, in relation to particular types of services provided under land transport documents:
  - 38.1. For small passenger services — violence, sexual, drugs, arms, and organised criminal offending, persistent offending of any kind, and persistent or serious complaints.
  - 38.2. For large passenger services — serious behavioural problems indicating a propensity for violence, and violence or sexual offending.
  - 38.3. For goods service licences — any criminal activity conducted in the course of the service.

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<sup>6</sup> See section 50 of the Maritime Transport Act 1994.

## Part B: Safety and security

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39. Making the Civil Aviation Act 1990 more explicit about the matters the Director must consider gives confidence to the public that certain matters have been considered before a person or organisation is permitted to undertake aviation activities. This is particularly important for participants who provide, or are seeking to provide, commercial passenger services.
40. We consider there may be merit in bringing the following provisions from other transport legislation into the Civil Aviation Act 1990:
  - 40.1. a requirement for the Director to consider information about wider offences, including:
  - 40.2. any offence relating to controlled drugs (as defined in the Misuse of Drugs Act 1975) or relating to any prescription medicine (as defined in the Medicines Act 1981), whether or not—
    - 40.2.1. the conviction was in a New Zealand court; or
    - 40.2.2. the offence was committed before the commencement of the revised Civil Aviation Act:
  - 40.3. the discretion for the Director to consider the fact that a person has been charged with any offence of a nature that the public interest would require a person convicted of that offence not be considered fit and proper.

Question B1a: Which option do you support? Please state your reasons.

Question B1b: Are there any issues with the provisions in Part 1 or 1A of the Civil Aviation Act 1990 that you think should be addressed? If so, what options do you propose to address the issue(s)?

### Participant obligations

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41. Part 2 (sections 12–27) of the Civil Aviation Act 1990 covers the “functions, powers and duties of participants in the civil aviation system”. Multiple matters are covered by Part 2, including:
  - 41.1. participant obligations
  - 41.2. investigative powers of the Director
  - 41.3. response/intervention powers of the Director.

### Overall assessment of the sections

#### Participant obligations

42. Participant obligations are included in Part 2, which is entitled “Functions, powers and duties of participants in the civil aviation system”. However, participants (aviation document holders) do not generally have powers as such under the Civil Aviation Act 1990. Instead, participants exercise privileges under the document, subject to certain obligations placed upon them.
43. The obligations, duties and conditions placed on pilots, document holders and others operating within the civil aviation system are spread throughout different sections of the Civil Aviation Act 1990, in addition to Part 2, which can make them difficult to identify or navigate.
44. If amendments to the Civil Aviation Act 1990 are progressed, we recommend that, where possible, obligations placed on participants in the system are consolidated into one Part of the Act, to make the provisions easier to follow.
45. Note that issues associated with the requirement for participants to report accident and incident information to CAA are discussed in the Information Management section below (pages 74-81).

#### Shared responsibility for safety

46. The Civil Aviation Act 1990 places safety responsibilities on the holders of aviation documents. The Civil Aviation Act 1990 requires participants to ensure that all activities and functions are carried out safely and in keeping with the relevant safety standards and practices. For certified organisations, for example, this includes ensuring that their employees are appropriately trained and supervised, that the organisation is appropriately resourced, and that its management system will ensure compliance with the rules and any conditions attached to its aviation document(s).
47. If amendments to the Civil Aviation Act 1990 are progressed, we recommend that the Act should explicitly state the shared responsibility for safety and security placed on all participants in the system.

### Director powers

48. The Civil Aviation Act 1990 enables CAA to take both administrative action and enforcement action to ensure safety. Administrative action includes the ability for the Director to amend, revoke or place conditions on aviation documents. Enforcement action includes the ability to issue formal warnings or notices, or take prosecution action against aviation participants.
49. Criteria to inform when the Director can impose conditions, suspend, or revoke an aviation document are set out in sections 17 and 18 of the Civil Aviation Act 1990.
  - 49.1. Section 17 empowers the Director to suspend an aviation document or impose conditions where the Director considers it necessary in the interests of safety, and considers or is satisfied in relation to certain other matters.
  - 49.2. Section 18 provides that the Director may revoke an aviation document in the interests of safety following an inspection, monitoring or investigation.
50. Section 21 empowers the Director, where the Director believes on reasonable grounds that persons or property are endangered, to detain, seize, prohibit use, or impose conditions on the use of an aircraft or product, if authorised by a warrant. Where prompt action is necessary the Director may do this without a warrant. A detention or seizure may be maintained only so long as is necessary to ensure safety.
51. The CAA's *Use of Regulatory Tools Policy*<sup>7</sup> provides further guidance on the use of section 17 and 18 powers. An aviation document may be suspended, revoked or have conditions imposed upon it where the facts of a particular case support such action:
  - 51.1. where there is reason to believe a significant risk to safety exists
  - 51.2. the Director has no confidence that the document holder(s) involved will take voluntary action to mitigate that risk
  - 51.3. consistency with the criteria contained in sections 17 and 18 of the Civil Aviation Act 1990.

### Discussion

52. Decisions taken under section 17, 18 and 21 require significant judgements about particular persons, organisations, aircrafts and products participating/operating in the civil aviation system. The Director is involved in decisions that impact very directly upon individual rights and freedoms.
53. In the past 5 years, CAA has developed and refined a number of policies that provide direction on the selection and use of the various regulatory tools available to it, including the Director's powers in the abovementioned sections<sup>8</sup>. The following principles underpin the CAA regulatory approach.
  - 53.1. Proportionality — making reasoned, risk based and informed decisions requires consideration of the known facts and circumstances pertaining to a specific event. Proportionality ensures that the approach taken is neither too lenient nor too excessive.

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<sup>7</sup> [http://www.caa.govt.nz/Policy\\_ops/Use\\_Regulatory\\_Tools.pdf](http://www.caa.govt.nz/Policy_ops/Use_Regulatory_Tools.pdf)

<sup>8</sup> In exercising powers, the Director and his/her delegates act as independent decision-makers and each case must be considered on its own merits.

## Part B: Safety and security

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- 53.2. Consistency — taking a similar approach in similar circumstances.
- 53.3. The decision-maker demonstrates reasonable judgement.
- 53.4. The decisions taken are:
  - 53.4.1. impartial and fair
  - 53.4.2. made in a timely fashion.
- 54. We are testing whether the Civil Aviation Act should be amended to provide legislative recognition of the CAA's regulatory approach (see the Information Management section, Pages 74–81 below).
- 55. In addition, we are also seeking your views on clarifying references to safety and security in the Civil Aviation Act 1990 outlined below.

### Item

#### Item B2: References to safety and security in the Civil Aviation Act

56. Safety and security are fundamental to New Zealand's aviation system. The Oxford Dictionary defines 'safety' as including 'freedom from danger and security; a state of feeling safe.' However, the Civil Aviation Act 1990 often refers to 'safety' and 'security' as separate concepts (see, for example, section 15A).

#### Is there a problem?

57. It could be argued that, for the purposes of the Civil Aviation Act 1990, Parliament does not intend safety to include security.
58. 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.
- 58.1. Section 17 empowers the Director to suspend an aviation document or impose conditions where the Director considers it necessary in the interests of safety, and considers or is satisfied in relation to certain other matters.
- 58.2. Section 18 provides that the Director may revoke an aviation document in the interests of safety, following an inspection, monitoring or investigation.
- 58.3. Section 21 empowers the Director, where the Director believes on reasonable grounds that persons or property are endangered, to detain, seize, prohibit use, or impose conditions on the use of an aircraft or product, if authorised by a warrant. Where prompt action is necessary the Director may do this without a warrant. A detention or seizure may be maintained only so long as necessary to ensure safety.
59. The Director's powers outlined above do not expressly refer to action being taken in the interests of security. This limitation could result in security issues not being adequately considered under the Civil Aviation Act 1990.

#### Recommendation

60. To avoid doubt, we 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.
61. This is consistent with the functions assigned to the Director in section 72I of the Civil Aviation Act 1990, to:
- 61.1. "monitor adherence to any regulatory requirements relating to... safety and security"; and
- 61.2. "take such actions as may be appropriate... to enforce the provisions of the Act and Rules made under the Act, including the carrying out, and requiring of inspections and monitoring..."
62. Other places in the Civil Aviation Act 1990 may require the same clarification. We intend to clarify the provisions of the Civil Aviation Act 1990 to ensure that it is clear as to whether one or both of these concepts apply.

## Part B: Safety and security

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Question B2: Are there any other issues in relation to participant obligations and Director's powers in Part 2 of the Civil Aviation Act 1990 that you think should be addressed? If so, what options do you propose to address the issue(s)?

### Medical certification

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63. The medical certification framework prescribed in Part 2A of the Civil Aviation Act 1990 supports a safe and secure aviation system. This Review seeks to enhance the framework's practical application, and better support capable and effective regulatory oversight by clarifying the legislation and removing interpretation ambiguity. The analysis focused on three areas:
- 63.1 provisions relating primarily to the issue of medical certificates
  - 63.2 actions that can be taken for participants who hold existing medical certificates
  - 63.3 medical examiners and delegation of the Director's powers.

### Overall assessment of the sections

64. There is no evidence that the framework in the Civil Aviation Act 1990 is not operating as intended or that the provisions are not fit for purpose. Although there is no compelling case for legislative change, possible amendments are proposed to improve the clarity of the legislation.
65. Sector criticism has largely been related to CAA practice (rather than being a product of unworkable provisions) and the cost of the medical certification application fee introduced in 2012.
66. Many of the issues that have arisen in the course of this Review require rules or policy changes that can be developed within the framework of the existing legislation.
67. Since Part 2A of the Act was enacted in 2002, litigation has been limited and has been primarily in the form of appeals of medical decisions.

### Items

#### Item B3: Certification pathways and stable conditions

68. Section 27B provides two pathways for medical certification:
- 68.1. Pathway one: ordinary' certification — requires the Director, after considering an application, to issue a medical certificate if he/she is satisfied that the applicant meets the medical standards prescribed in the rules, unless the Director has grounds to believe that the applicant has any characteristic that may interfere with the safe exercise of the privileges to which the medical certificate relates.
  - 68.2. Pathway two: certification by way of the use of flexibility' — the Director may rely on flexibility to issue a medical certificate to an applicant who does not meet the medical standards, if an Accredited Medical Conclusion (AMC)<sup>9</sup> indicates that aviation safety will not be jeopardised.

#### What is the problem?

69. The current system directs those with stable conditions down a flexibility route that may be unnecessary and impose additional costs on CAA and participants. Better outcomes may be able to be achieved by introducing a third pathway to certification that aligns to a graduated framework for dealing with medical conditions.
70. CAA's records for the 2012/13 financial year indicated that:
- 70.1. 7,600 applicants were certificated via pathway one
  - 70.2. 748 applicants were certificated via pathway two.
71. Of the 748 applicants that were certificated via pathway two, 280 were straightforward or routine' in nature.
72. We have received some feedback that pathway two was probably unnecessary for those routine cases where a long-term stable condition had previously been assessed via an AMC.

#### Options

##### Option 1: Status quo

73. As the statutory framework is operating as intended there does not appear to be a pressing case for change.
74. However, the status quo may be imposing unnecessary costs on the CAA and participants by forcing them to use the AMC process when their condition has not changed.

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<sup>9</sup> An AMC is a conclusion reached by an expert who is acceptable to the Director to consider the particular case of that applicant.

75. A pilot who has lost a finger is an example of a long-term stable condition that may not require ongoing assessment via an AMC. If an initial assessment finds that the pilot's condition does not affect their ability to fly safely, then unless there is any further deterioration in the pilot's condition, this assessment is unlikely to change. In such circumstances, undergoing the AMC process again is likely to impose time and resource costs on both the pilot and CAA.

### **Option 2: Developing a third pathway to certification**

76. Providing a third pathway to certification or an abbreviated form of AMC could better cater for those individuals affected by stable, long-term or fixed conditions. Currently these individuals are only be able to progress via pathway two, irrespective of no change in their condition since they last went through an AMC process. A third pathway to certification would be likely to provide savings for both the participant and CAA.
77. Some industry members have suggested that the Civil Aviation Act 1990 should provide for a system that is similar to the Federal Aviation Administration (FAA) Statement of Demonstrated Ability (SODA) framework.
78. Under the FAA system, a SODA may be granted, instead of an Authorization, to a person whose disqualifying condition is static or non-progressive and who has been found capable of performing their duties without endangering public safety.
79. A SODA is valid for an indefinite period or until an adverse change occurs that results in a condition being worse than that stated by the SODA. A SODA authorises a designated examiner to issue a medical certificate of a specified class if the examiner finds that the condition described on the SODA has not adversely changed.

Question B3a: Which option do you support? Please state your reasons.

Question B3b: What savings would be likely to result from a third pathway to medical certification?

### Item B4: Provision for the recognition of overseas Medical Certificates

80. The CAA has asked us to consider whether overseas medical certificates, particularly those without any operational endorsements, issued by States with a robust aviation medical certification regime, should be recognised in New Zealand. This would remove an obligation for a licence holder to obtain a New Zealand medical certificate issued under the Act.
81. It is our understanding that the concept of limited recognition of medical certificates issued by an International Civil Aviation Organization (ICAO) contracting State has always been part of New Zealand's civil aviation system.
82. Such an approach has a number of benefits including:
- 82.1. promoting a bilateral approach to aviation medical certification
  - 82.2. reducing compliance costs for pilots moving between countries
  - 82.3. facilitating the New Zealand pilot training industry's ability to source trainees in countries without resident New Zealand Medical Examiners.
83. We are interested in your views about:
- 83.1. whether it is appropriate to recognise overseas medical certificates and, if so, should the Director provide oversight or should we rely on the issuing State to provide the oversight. For example, if the holder has a change in their medical condition, should they be required to advise the Director; or should some mechanism enable the Director to be provided this information from the State that granted the medical certificate.
  - 83.2. If you believe overseas medical certificates should be recognised under the New Zealand system, what provisions in Part 2A of the Civil Aviation Act 1990 should apply, to ensure the Director has appropriate oversight over foreign document holders operating in New Zealand.
84. If the original policy intent to recognise overseas medical certificates remains, it is likely that minor amendments will be needed to the Act and Part 67 to allow this process to function effectively.

Question B4a: Should the Act allow the Director of Civil Aviation to recognise medical certificates issued by an ICAO contracting State? Please state your reasons.

Question B4b: Should the Director of Civil Aviation or the State that has issued the medical certificate provide oversight? Please state your reasons.

Question B4c: If you agree that the Director of Civil Aviation should provide oversight, what provisions in Part 2A of the Civil Aviation Act should apply?

### Other issues considered by the review

85. Mechanism to appeal an Accredited Medical Conclusion (AMC). The review considered whether a mechanism to appeal an AMC would help ensure that issues in dispute are clear and the court can better understand the matter to be resolved in any appeal. We did not find evidence of any significant problem with the existing system. We note that applicants currently have the ability to seek a Convener review of medical certification decisions by the Director and that, where the decision is based on an AMC, the Convener invariably reviews that aspect of the decision.

#### *Consistency of wording of the Director's reasonableness test*

86. The on reasonable grounds to believe' test is used in Part 2A of the Civil Aviation Act around the Director's power to revoke, suspend or amend medical certificates. The test is used in eight other provisions throughout the Act. The Civil Aviation Act 1990 also refers to the test believes on reasonable grounds' to inform the Director's powers. Both tests are used interchangeably within the Act. There does not appear to be any judicial comment on the difference between the two tests in the context in the Civil Aviation Act 1990 but for the sake of clarity and consistency we recommend an amendment which makes it clear that the Director, in making relevant decisions, must be acting on reasonable grounds.

### Item B5: Medical Convener

87. The Civil Aviation Act 1990 has a process whereby CAA's decisions on medical certificates for pilots and air traffic controllers can be reviewed by a Medical Convener appointed by the Minister of Transport (sections 27J, K, L and M).
88. An independent Medical Convener system was established to provide a means of recourse for applicants to seek a review of the Director's medical certification decisions.
89. The Medical Convener role has not been reviewed since it was first established in 2002. One of the purposes of this Review is to determine the Convener's future status, and whether the Convener's functions are fit for purpose and effective.

### Background

90. The Convener role was established by legislation enacted in response to a review conducted by Professor John Scott and Professor Des Gorman.<sup>10</sup> One of the review's recommendations was that pilots or air traffic controllers whose medical certificates had been declined would have a right to a review of medical decisions (before undertaking a District Court process).

### What is the problem?

#### Is there still a need for the Convener review process?

91. The ongoing need for the Convener process needs to be evaluated given the small number of cases reviewed each year (ranging from a minimum of 6 to a maximum of 18 cases), and the fact that applicants have other mechanisms through which their medical certification decisions can be reviewed (that is, through appeal to the District Court).
92. Since 2002, the Convener has upheld the majority of decisions made by the Director. This indicates that individuals and the public can have confidence in the decisions being made by the Director. But it also raises questions as to the added value of the Convener process given the Convener has disagreed with the Director in only a small number of cases.

#### Cost of Convener reviews and the recovery of those costs

93. The cost of the Medical Convener process has varied widely since it began. Recently, the Convener costs appear to have reduced from a high in 2004 of just over \$9,000 per case reviewed, down to \$2,180 per case in 2012. The cost is dependent on a number of factors such as the complexity of the case<sup>11</sup>, which has an impact on the time and cost associated with reviewing it.

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<sup>10</sup> The CAA commissioned the Professors Scott and Gorman review (*The process of determining fitness to fly aeroplanes in New Zealand. A review of current practices and recommended changes*, 2001) [http://www.caa.govt.nz/pubdocs/Scott\\_Gorman\\_Report.pdf](http://www.caa.govt.nz/pubdocs/Scott_Gorman_Report.pdf)

<sup>11</sup> Factors that take more time when reviewing cases include the level of research required, the level of detail of an applicant's file, whether consultation with a specialist is needed, comparing cases and ensuring decisions are applied consistently, and comparing New Zealand standards with international aeromedical standards.

94. The Civil Aviation Act 1990 includes a provision (section 38(1)(b)(ba)) to charge applicants a fee for the Medical Convener review. The costs directly associated with the Convener's functions that are incurred by the Convener and the CAA are currently recovered through the medical certification application fee, which is collected by the CAA. The current fee is \$313. Anyone who applies for a medical certificate is subject to this fee.

### Length of time to complete review

95. Stakeholders have raised an issue about the length of time it has taken for Convener reviews to be completed, with some of the earlier reviews taking over 2 years. However, in the past 3 years the process has been far more efficient, with the average number of working days to complete the reviews dropping from 444 in 2007 to 73 working days in 2012. We do not consider the length of time to complete reviews is an issue.

### Options

#### Option 1: Status quo (Ministry of Transport preferred option)

96. Retaining the status quo:
- 96.1. pilots and air traffic controllers continue to have a right of review through the Convener process, based on the assessment of the case by a medical expert
  - 96.2. the Convener acts as a good gauge for the Director to check the validity of his/her decision-making
  - 96.3. applicants may have their case reviewed before considering a more costly exercise through the District Court<sup>12</sup>
  - 96.4. costs to the District Court would not increase, based on the assumption that if the Convener process was not available, a higher percentage of applicants than do currently would pursue the Court process.

#### Option 2: Status quo continues and a separate fee for the Medical Convener is charged to applicants

97. This option would involve charging applicants a separate fee to have their case reviewed by the Medical Convener. That fee would be set by Order in Council. A small reduction in the current medical certification application fee may be expected but applicants for a Convener review would face higher costs.
98. Further analysis of an appropriate level of the fee would need to be undertaken separately from the Civil Aviation Act review.
99. Separating the Convener's direct costs from those of the medical certification system would emphasise the Convener's independent role. It may also help reduce the cost of medical certification for pilots and air traffic controllers.

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<sup>12</sup> District Court costs: \$200 for an application fee, and \$900 per day of hearing to take an appeal. It also costs the defendant (in this case, the CAA), \$75 to file a defence. These costs do not include legal fees for both the applicant and CAA.

### Option 3: Disestablish Medical Convener role

100. This option would result in the disestablishment of the Convener role and the repeal of the relevant sections of legislation in the Civil Aviation Act 1990.
101. This option may increase costs associated with appeals to the District Court, based on the assumption that more applicants would take their cases through these mechanisms because the Convener process is not available. It could also increase costs for CAA and individuals.
102. New Zealand could also risk being seen to be out of touch with other countries that have review mechanisms available before an appeal to the courts. Canada has a multi-pronged appeal process for reviews of decisions made on aviation medical certificates, with an appeal to the Aviation Medical Review Board first, and then the Transportation Appeal Tribunal of Canada, before undertaking a court process.
103. Likewise, the United States, United Kingdom and Australia provide rights of review of medical certification decisions that can be exercised before appealing to the courts. Similarly, other jurisdictions in New Zealand such as Work and Income, ACC and the Department of Immigration all have review mechanisms in place before an appeal through a court process is undertaken.

Question B5a: Which is your preferred option? Please state your reasons.

Question B5b: How much would you be prepared to pay to have your case reviewed by the Medical Convener?

Are there any other issues with the provisions in Part 2A of the Civil Aviation Act that you think should be addressed? If so, what options do you propose to address the issue(s)?

### Offences and penalties

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104. Part 5 of the Act sets out the offences and penalties applicable in the Act, under the headings:
  - 104.1. Safety offences
  - 104.2. General offences
  - 104.3. Security offences
  - 104.4. Infringement offences
  - 104.5. Charging documents and burden of proof.
105. A number of sections in this part also relate to disqualification orders under the heading Disqualification.
106. Part 5A sets out the Unruly Passenger offences under the headings:
  - 106.1. Preliminary provisions
  - 106.2. Unruly passenger offences.
107. Part 11 of the Act has a number of miscellaneous provisions and included are offence provisions relating to liquor, smoking and nuisance.
108. Offences and penalties in the Act were initially reviewed to ensure they are fit for purpose, and can continue to perform their intended function — that is, to ensure the public are adequately protected from behaviour that is a threat to their safety and security in the aviation sector and to punish those people who cause harm.

### Overall assessment

109. There is no evidence that the offences and penalties framework in the Act is not operating as intended or that the provisions are generally not fit for purpose. The most significant issue is whether penalty levels are set at the right amount to deter the unsafe behaviour discussed below. We are also aware of industry concern about the offence provisions in sections 43, 43A and 44 of the Act, which are discussed in the Information Management section (pages 74–81 refer).

### Items

#### Item B6: Penalty levels

##### What is the problem?

110. The Act contains a mixture of offences. They range from low-level offending through to more serious matters where the situation poses a danger to people or an aircraft. The Act also contains some public welfare regulatory offences (that is, offences that recognise the serious threat to a person's health or safety from the activity). The offences are spread across those that can be committed by operators, passengers, and other persons.
111. The penalties mirror these distinctions: infringements (that is, fine only) for matters such as smoking on an aircraft, through to up to 2 years' imprisonment or up to a \$10,000 fine for a person who endangers an aircraft or any person on it.
112. The penalties for offences have not been reviewed since the early 1990s. Given that many of these penalties are monetary ones, the relative impact reduces over time. This may affect both the deterrent and punishment value of the penalty. There are also concerns about consistency, both with other comparable legislation and with overseas jurisdictions.
113. However, it is important to note that the number of prosecutions brought under the Act is low, and there appears to be little evidence to suggest that the courts have felt constrained by the scale or nature of penalties available.

##### Options

###### Option 1: Status quo

114. The status quo would leave the penalty levels unchanged.

###### Option 2: Increase penalty levels

115. Under this option, the maximum penalty levels would be increased. We are seeking your views on two related aspects of this option. First, are increases to penalties (or particular penalties) necessary and/or justifiable? And second, if they are necessary/justified, to what extent should they be increased?
116. Any increases would need to be offence-specific, as it would not be appropriate to simply increase all the penalties by a set factor or percentage. This approach reflects the fact that the penalties:
  - 116.1. are mixed in type and tariff; some include imprisonment, some are fine only, some include a period of disqualification, and some are infringement offences
  - 116.2. apply at different levels for individuals and for bodies corporate
  - 116.3. are aimed to regulate, deter and/or punish different and diverse kinds of conduct.

## Part B: Safety and security

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Question B6a: Which is your preferred option? Please state your reasons.

Question B6b: If you consider that increases to penalty levels are necessary, which penalties, and by how much?

### Item B7: Acting without the necessary aviation document

#### What is the problem?

117. Section 46 of the Act sets out the offence of “acting without the necessary aviation document”.
118. Section 46 provides that every person commits an offence who—
- (a) Operates, maintains, or services; or
  - (b) Does any other act in respect of—
- any aircraft, aeronautical product, or aviation related service, either (i) without holding the appropriate current aviation document or (ii) knowing that a current aviation document is required to be held in respect of that aircraft, product, or service before that act may lawfully be done and knowing that the appropriate aviation document is not held.
119. There is some doubt about what section 46 requires — is it one or two separate offences, and to which part of the offence does ‘mens rea’ (knowledge element) apply?
120. This doubt is shared by the courts, with one High Court decision (Director of Civil Aviation Authority v Barr) noting that section 46 allows for both a strict liability offence (where there is no need to prove knowledge) and a mens rea offence (where there is a need to prove the defendant had knowledge of their wrongdoing).
121. The Court held that if a charge was laid under the first limb of section 46(1)(b) it is not necessary for the prosecution to prove knowledge on the part of the defendant. However, the prosecution does have to prove knowledge if a charge is laid under the second limb of 46(1)(b). The Court also noted that the requirement to prove knowledge is far more stringent than proving an offence of strict liability.
122. Given the comments from the High Court and the confusion in this area it seems preferable that section 46 should be amended to split the offence into the two parts. The penalty levels would need to be adjusted as it likely that a higher penalty would be necessary for a knowledge offence.

#### Options

##### Option 1: Status quo

123. Under this option no legislative changes would be made.

##### Option 2: Amend the provision to separate out the offences (Ministry of Transport preferred option)

124. Under this option, legislative change would be made to separate the offences to remove any ambiguity.

Question B7: Which is your preferred option? Please state your reasons.

### Appeals

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#### Item B8: Appeals process

125. Part 6 of the Civil Aviation Act 1990 (sections 66–72) prescribes the appeal procedures available under the Civil Aviation Act 1990.
126. The Civil Aviation Act 1990 provides a full merit based appeal process through the District Court for applicants who want to appeal specified decisions made by the Director of Civil Aviation. These include decisions relating to: medical certification, aircraft registration, the detention of unsafe aircraft and other aeronautical products, and, most notably, the revocation and suspension of aviation documents. The Court may confirm, reverse, or modify the decision appealed against.
127. The Civil Aviation Act 1990 also provides for further appeal to the High Court and Court of Appeal.

#### Is there a problem?

128. Industry participants have periodically expressed concerns about the Director of Civil Aviation's decision-making process, and the appeals processes contained within the Civil Aviation Act 1990. Both the timeliness and cost implications of decision-making (particularly the appeals process through the District Court) have been cited as issues for appellants.
129. Some participants have argued that an alternative means of challenging the Director's decisions, such as a hearing by a specialist panel or tribunal, may be more cost-effective, timely, and efficient.
130. The Productivity Commission's draft report that examined regulatory institutions and practices noted that "specialist tribunals can be cheaper and faster than court processes, and can provide a greater level of technical expertise in assessing the appeal where this is required. However courts will have greater expertise in applying law, and can provide a higher degree of public confidence".<sup>13</sup>
131. In other jurisdictions, for example Australia and Canada, appeal and review of the decision is to a tribunal rather than a court.
  - 131.1. In Australia, reviewable decisions are reviewed on a merits basis by the Administrative Appeals Tribunal. The Tribunal provides independent review of a wide range of administrative decisions made by the Australian Government and some non-government bodies. The Tribunal has the power to affirm, carry and set aside the decision under review. The only appeal from a decision of the Administrative Appeals Tribunal to the Federal Court is on a question of law and not on the merits of the facts.

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<sup>13</sup> Regulatory Institutions and Practices, Issues Paper, August 2013.

131.2 In Canada, a two-step review and appeal process is available through the Transportation Appeal Tribunal. The Transportation Appeal Tribunal of Canada provides a recourse mechanism to the national transportation sector for administrative actions taken by the Minister of Transport and the Canadian Transportation Agency under various pieces of Federal transportation legislation. The Tribunal holds Review and Appeal hearings at the request of those affected by these administrative decisions. The review itself is conducted by a single Tribunal member. An appeal against the initial determination of a Tribunal member can be appealed to a panel of three members. A decision of an appeal panel of the Tribunal is final and binding on all parties.

### Comment

132. Although we have not undertaken a detailed cost-benefit analysis, we expect the costs and administrative effort involved in setting up an aviation specific panel or tribunal would be difficult to justify given the small number of civil aviation appeals lodged with the District Court each year.

133. Potential costs to applicants of having their cases heard also need to be considered. It is difficult to state with certainty the possible range these costs might be in, as it will depend on what resources and capability the panel or tribunal requires. As an indication:

133.1. under District Courts Fees Regulations 2009<sup>14</sup> the following costs apply

Filings	\$50 – \$900
Hearing fee for each half-day or part of a half-day after the first half-day	\$900

133.2. the application fee for applying to the Australian Administrative Appeals Tribunal for review of certain of decisions is A\$816.

134. In the past 5 years, 15 appeals have been heard by the Court, and of those, the majority were discontinued.<sup>15</sup> CAA advises that it does not have any data on why those appeals were discontinued.

Total number of appeals	Discontinued	Dismissed by Court	Ongoing
15	9	3	2
		1 (initially upheld but then dismissed)	

<sup>14</sup> <http://www.justice.govt.nz/services/court-fees/court-fees-and-charges>.

<sup>15</sup> Data sourced from litigation reports to the CAA Board. Does not include judicial review or private law claims.

## Part B: Safety and security

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135. In establishing a specialist panel or tribunal, some questions that would need to be considered include:
  - 135.1. Who should appoint the members/who would the panel or tribunal be accountable to?
  - 135.2. What level of expertise would members require?
  - 135.3. How available are appropriate candidates?
  - 135.4. What powers would the panel or tribunal hold and what would be the effect of its decisions (for example, would it have a recommending role similar to the Medical Convener, or be empowered to affirm, vary or set aside the original decision)?
  - 135.5. What are the perceived benefits of having a panel or tribunal?
  - 135.6. What are the overall costs of a panel or tribunal, including support services, staff, facilities (for example, hearing rooms), IT equipment?
  - 135.7. Who should pay for the costs of a panel or tribunal?
  - 135.8. What would the panel or tribunal's terms of reference be (including procedural matters and case management)?
  - 135.9. Where would the panel or tribunal be located/where would it hear cases?
136. If work to explore the concept of an appeal body or tribunal across regulatory agencies occurs in the future, consideration of appeals to the tribunal from transport-related regulatory decisions should be assessed and considered for inclusion where appropriate.

Question B8a: Should a specialist aviation panel or tribunal be established in addition to the current District Court process? Please state your reasons.

Question B8b: How much would you be prepared to pay for a panel review?

### Regulatory framework

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137. Part 3 of the Civil Aviation Act 1990 (sections 28–37) sets out requirements for civil aviation rule-making. In summary, this Part establishes the Minister’s power to make rules, specifies the subject matter of rules and the matters that must be taken into account when making them, and prescribes procedures applying to rule-making. It also specifies the powers and procedures applying to emergency rule-making by the Director of Civil Aviation.
138. The Ministry of Transport contracts the CAA to develop an agreed programme of rules. Each year the CAA and Ministry of Transport develop a programme of rules, which is then agreed by Cabinet.
139. In the context of this discussion, ‘regulatory framework’ can be described as the system of civil aviation rules and regulations, and the mechanisms used to assist, promote, encourage and enforce compliance with them. This section is principally interested in how fit for purpose the aviation regulatory framework is to enable a safer and more responsive aviation system.

### Overall assessment

140. The regulatory framework has delivered a very safe and internationally respected aviation system but with some inefficiencies, especially in the length of time taken to make rule amendments. The rule-making system lacks a degree of flexibility and responsiveness that has inhibited the government, CAA and industry from responding to risks and technological changes in a timely manner.
141. For example, technological changes in aviation are rapid, with new and frequent updates of important safety equipment, and the introduction of new and safer ways of doing things. The rigidity of the rule-making process means in many cases aviation rules are not aligned with international best practice. Global navigation satellite systems and collision avoidance systems on larger aircraft are specific examples of this.
142. The Productivity Commission acknowledges the need to consider how regulatory regimes can respond to ongoing changes in technology.<sup>16</sup>
143. We consider that changes could potentially be made to the aviation regulatory framework that would be beneficial to address these issues.
144. We note that changes to the aviation regulatory framework would have significant implications for the maritime and land sectors that operate under almost identical regulatory frameworks. The implications of this work across the transport sector will be considered as part of the Ministry of Transport’s Regulatory Reform Programme.

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<sup>16</sup>F9.6, Page 226 of the Productivity Commission’s Regulatory institutions and practices final report (July 2014).

### Items

#### Item B9: Rule making

##### What is the problem?

145. The general consensus across government and the industry is that rules (across all the transport modes) take too long to make. Such criticism has existed for a number of years. This is evidenced by a number of rules that have sat on the annual transport rules programme for several years.
146. The rule development process not working effectively has specific consequences to aviation. These consequences include:
  - 146.1. a risk to safety and economic efficiency as the introduction of technology is delayed, put off altogether or introduced without any formal regulator approval
  - 146.2. rules becoming out of date, irrelevant and undermined through a lack of adherence and trust by participants
  - 146.3. New Zealand being out of step with international aviation best practice, putting at risk New Zealand's international reputation
  - 146.4. increased use of 'work-arounds' by using regular exemptions that would generally be addressed through a rule change.
147. An example of how problems with the regulatory system are manifesting in practical terms can be found in rules for the use of modern communications equipment (Rules 91.515 and 91.519). These rules require that aircraft communications equipment meet level 1 standards specified in Appendix A, A.9 and is capable of continuous communications with air traffic services. Appendix A, A.9 is a list of radio equipment that was appropriate many years ago and is now completely out of date. It lists equipment that is no longer in use and does not list modern digital equipment that is now in use. In particular, it does not list satellite phones. Satellite phones are lighter, cheaper, draw less power, and are clearer to hear than High Frequency radio. An increasing number of exemptions to the rule requirements are needed, putting unnecessary regulatory burden on participants. Because of the number of higher priority rule projects, it has not been possible to include in the annual rules programme the rule change necessary to address this issue .
148. The causes of the rules development problems are complex but include the following:
  - 148.1. Rule solutions were proposed without proper analysis of the problem to determine whether a rule was the best solution, resulting in an overloaded rules programme.
  - 148.2. There was a tendency to write prescriptive rules that more easily become out dated.
  - 148.3. An increasing number of safeguards have been added to the rule development process to provide greater government oversight of the rules programme across all modes; for example, Cabinet approving an annual rules programme and agreeing the policy content of all rules.
  - 148.4. Ministry and CAA roles in the rule development process were not clearly delineated.

- 148.5. Both the CAA and Ministry of Transport may have constrained capacity to ensure rules are progressed in a timely manner and that the suite of rules is effectively maintained and reviewed.
- 148.6. Rules are the only legislative tool, forcing very simple issues to go through the same legislative development process as more complex issues.
- 149. The root cause' of the problems appears to lie with a lack of flexibility in the regulatory regime both:
  - 149.1. in how issues can be dealt with legislatively, and
  - 149.2. with the one-size fits all' administrative processes governing the development of rules.

### *Recent improvements to the rule development process*

- 150. The rule development process has been closely scrutinised over the past decade. Several reviews, both aviation-specific and across all the modes, have been undertaken to reduce the duration and complexity of the rule-making process.
- 151. Changes were made to the Civil Aviation Act 1990 in 2010 to streamline the rule-making process while ensuring appropriate safeguards remained. Legislative changes included:
  - 151.1. repealing mandatory requirements to notify proposed rule changes in local newspapers and to provide a reasonable period of time for interested persons to make submissions. The appropriate form of public notice and consultation is instead left to the Minister (bearing in mind consultation is still required)
  - 151.2. allowing the rules to provide for matters to be determined, and for requirements to be imposed by, CAA or the Director or any other person
  - 151.3. allowing rules to empower CAA, the Director, or any other person to impose requirements or conditions as to the performance of an activity
  - 151.4. empowering the Governor-General to make rules by Order in Council.
- 152. Additionally, in response to the Government's drive to achieve better regulation, more structure has been put around regulatory development and practice in the transport sector. Changes brought about by the Ministry of Transport's Regulatory Reform Programme, specifically the Transport Regulatory Policy Statement<sup>17</sup> and the Regulatory Development and Rule Production Handbook introduced in 2011, will contribute to a more efficient and effective rule-making process, despite being essentially administrative in nature.
- 153. Although the changes noted above have gone some way to improving the rule development process, we consider other changes could potentially be made to enable greater legislative flexibility. This would ensure the regulatory framework more efficiently and effectively influences the safety and security outcomes of the aviation system.

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<sup>17</sup> <http://www.transport.govt.nz/assets/Import/Documents/Transport-Regulatory-Policy-Statement-2012-Edition-Issued-4-May-2012.pdf>

### Options

154. Four options are discussed below:
- 153.1. Option 1 — status quo
  - 153.2. Option 2 — power for CAA Board to make temporary rules
  - 153.3. Option 3 — power to enable the Minister to delegate some of his/her rule-making powers to the Director or Authority
  - 153.4. Option 4 — creation of a new tertiary level of legislation (for example, Standards)

#### **Option 1: Status quo**

154. Option 1 proposes that no changes are needed to the Civil Aviation Act 1990 and that the recent amendments to rule-making powers and administrative enhancements should be given the opportunity to be fully realised.

#### *Regulatory Reform Programme*

155. Changes brought about by the Ministry of Transport's Regulatory Reform Programme and subsequent changes within CAA to develop a policy capability have improved the quality of regulatory analysis and help provide a strong foundation for the development of robust and timely rules. Issues are more fully assessed to determine what the problem is and what the best solution is. This has meant that more issues are dealt with through non-regulatory means, ensuring a more targeted rules programme. These changes are still in their infancy and it may be premature to provide a full assessment of their contribution to improve the effectiveness and efficiency of the rule development process.
156. The Regulatory Reform Programme continues to examine other possible enhancements to provide more strength to the system. Some of the administrative safeguards have been removed (for example, Cabinet agreeing the policy content of each rule before it is made). However, there is further scope to ensure that only significant policy issues are considered by Cabinet, leaving the Minister to sign rules that have minimal impact or are the minimum necessary to ensure New Zealand's compliance with ICAO requirements, without reference to Cabinet.
157. The Ministry of Transport and the CAA is placing greater emphasis on understanding and influencing, where appropriate, the international environment that drives the regulatory programme. These moves should provide greater assurance on the changes New Zealand will need to implement, and in some cases shape what the requirements will be.

#### *Performance-based vs prescriptive rules*

158. The Act does not prevent a performance-based approach to rule drafting. Examples of performance-based rules are evident in many of the operator certification rules.<sup>18</sup> However, a process could be developed to require specific consideration of the type of rule design (performance-based or prescriptive) to be applied — bearing in mind that prescriptive rules may be necessary in certain circumstances.

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<sup>18</sup> As an example, Part 119.75 requires operators to establish an air operator security programme that meets the requirements of Part 108. The rule requirement allows the operator some discretion as to how the security programme is to be drafted.

### *Recent legislative amendments*

159. Amendments to the Civil Aviation Act 1990 in 2010 have not had ample opportunity to be exercised. The changes to section 28(5) could be more fully used to deal with technical matters, such as those relating to the design, manufacture, operation and maintenance of aircraft, and the provision and operation of aviation-related services and facilities.
160. The ability for the Governor-General to make rules has not been used to date, but could be more fully utilised for emerging issues that need to be addressed urgently, for example, issues relating to adopting new technology. The only drawback to this approach is that it still requires Cabinet consideration, which would have some impact on the timeliness of the response.
161. This option recognises that anecdotally the New Zealand aviation rule-making framework compares favourably to regulatory frameworks of other countries. It also recognises that when the system is functioning well, urgent issues can be dealt with in a timely manner. An example of this the speed at which drug and alcohol rules for the adventure aviation sector were implemented in 2012.

### **Regulatory options**

162. The following options provide ways to achieve greater delegated authority to the Director or CAA Board to make tertiary legislation. We are interested in your views on each of the options but, crucially, on what issues or areas the Director or CAA Board should be able to legislate for.

### **Option 2: Power for the CAA Board to make temporary rules**

163. Under this option the Authority would have the ability to make temporary rules for emerging issues that have safety or security implications, but that don't meet the threshold of an emergency rule. We consider that the power should lie with the CAA Board to ensure a degree of separation between who makes the law and who enforces the law.
164. As noted above, the rapid pace of technological developments challenges the responsiveness of the rule-making system. At times the traditional rule development process has hampered the ability to adopt safer or more efficient technology in a timely manner. Allowing the CAA Board to make temporary rules provides a more responsive approach.
165. We envisage that the safeguards for rule-making in the Act would be applicable to all temporary rules (for example, consultation and taking into account the matters outlined in section 33 of the Act).
166. The temporary rules would have time limits placed on them. At the end of the time period the Minister would either:
  - 166.1. confirm the rule; or
  - 166.2. revoke or amend the rule if issues arise with the temporary rule.
167. If the Minister does not take action, the rule would be revoked automatically over time.
168. The ability for the Governor-General to make rules would probably not be necessary and the Act would be amended to remove this power.

### Option 3: Power to enable the Minister to delegate some of his/her rule-making powers to the Director or Authority

169. Under this option the Minister maintains rule-making powers but is given the power to delegate some of his or her rule-making powers within certain parameters. Defining these parameters needs careful consideration. However, the parameters could be rules that:
- 169.1. are essential for New Zealand to comply with existing international obligations that are binding on New Zealand (assuming the policy work confirms that a rule is preferred over filing a difference).
  - 169.2. require routine or editorial revisions, for example where changes are needed to improve legislative clarity, to fix errors or to clarify existing legislative intent.
  - 169.3. are current industry practice.
170. The power to make new rule parts or revoke rule parts would be maintained by the Minister.
171. An amendment to section 28(9) of the Civil Aviation Act 1990, which states that the Minister shall not delegate any of his rule-making powers, would be necessary.
172. Any rules made by the Authority or Director would be disallowable instruments and subject to Regulations Review Committee oversight. Rules would also be subject to the controls around rule-making contained in the Civil Aviation Act 1990. For example, the matters that must be taken into account under section 33 of the Civil Aviation Act 1990 and the procedures for rule-making set out in section 34 of the Civil Aviation Act 1990 would be applicable.
173. A preference for rules to be drafted with an outcomes focus would be signalled — bearing in mind that at times, prescriptive rules may be more appropriate or necessary to comply with our international obligations.
174. This option recognises the pressures on Ministerial time and that the Director is well placed to assess the need for, and development of, changes to technical requirements where the cost of such requirements are minor.
175. Greater use of delegated legislation is supported by the Productivity Commission. In its draft report it notes:
- There is scope for the greater use of delegated legislation, subject to stronger controls discussed in this report, to ensure regulation can keep pace with technological and other developments. Designers of regulatory regimes need to consider whether delegation could help future-proof the regime, particular in areas subject to technological or other changes.”*<sup>19</sup>
176. A question remains about how much more quickly the CAA Board or Director would be able to make these rules.
177. On the negative side, it may be difficult to clearly define what matters could be delegated.

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<sup>19</sup> F 9.9, Page 233 of the Productivity Commission's Regulatory institutions and practices final report (July 2014).

### **Option 4: Creation of a new tertiary level of legislation (for example, Standards)**

178. This option proposes the creation of a power or a process under which the CAA Board or Director could make a form of tertiary legislation in specific circumstances.
179. This option would build on the present legislative ability of the Minister of Transport to make a rule that provides for a matter to be determined by the CAA Board or the Director.
180. The advantage if this approach is that it builds greater flexibility into the system by allowing the CAA Board or Director to set technical requirements (in certain circumstances).
181. The difficulties of this approach would include:
- 181.1. determining in advance the aspects of regulation that would not raise issues sometimes requiring consideration at a ministerial level and which could be legislated for by the Director at a tertiary level
  - 181.2. a breakdown of cohesion and accessibility to requirements concerning particular matters, such as operational and equipment requirements — with the regulated and regulator having to refer to different instruments to determine, for example, what safety equipment should be carried in an aircraft
  - 181.3. a necessary range of checks and balances; for example, requirements to consult, so the extent to which greater efficiencies can be gained is questionable.
182. Given the potential for a negative impact on the accessibility of legislation and questionable time savings, Option 3 is preferred over Option 4. Option 3 clearly mitigates any difficulties participants may have clearly and easily understanding their obligations

### **Out of scope**

183. Two approaches were raised as part of the Review but were considered to be out of scope.

### *Performance-based regulatory framework*

184. Consideration was given to whether the regulatory framework should move to become a purely performance-based regulatory regime. This option would be a considerable change to the current regulatory framework (with many rules needing re-drafting) and a 'first principles' assessment of the regulatory regime would be necessary. Such an approach was considered out of scope for this review.
185. A performance-based regime, such as the Building or Workplace Health and Safety regulatory frameworks, could see rules continue to be made by the Minister. However, the rules would be performance-based in design and contain the functional requirements for participants and the performance criteria participants must comply with. Guidance material would be necessary to outline how compliance could be achieved.
186. Given the global nature of aviation regulation, there will be times when prescriptive rules are more appropriate or necessary to comply with ICAO standards. The aviation regulatory system needs a degree of flexibility to cater for situations where New Zealand needs to implement a more prescriptive approach.

### *Having all rules made by the Director*

187. The option to have the Director make all aviation rules was also raised. Arguably the highly technical nature of aviation regulation and the level of expertise and judgement required to make such regulation, means decisions should be made by the person/group of people who hold the appropriate level of technical expertise. In the aviation context this is likely to be the Director. The Minister could have a ‘call-in’ power for any rules made by the Director that were not considered appropriate by the government.
188. The Civil Aviation Act review was not a first principles review, so did not contemplate such significant changes to the regulatory framework. We note that if this approach was favoured a thorough examination of the CAA’s capability and capacity would be necessary, along with a review of the way rules are funded.

### Summary of options

Regulatory reform programme					
<i>Improvements to the rule-making process will continue whether or not legislative changes are made</i>					
Option 2		Option 3		Option 4	
Temporary Rules made by the CAA Board	<p>Act amended to allow the CAA Board to make temporary rules.</p> <p>Same safeguards as rule-making provisions already in Act.</p> <p>Temporary rules with time limits. At end of time period, Minister would confirm, revoke or amend the temporary rule.</p>	Delegation of some of the Minister’s rule-making powers to the CAA Board or Director	<p>Amend Act to allow Minister to delegate some rule-making within certain parameters</p>	Creation of new tertiary level of legislation	<p>CAA Board or Director could set technical requirements in a new tertiary level of legislation (e.g. Standards).</p> <p>Builds on the present ability of the Minister to make a rule that provides for a matter to be determined by the Director/CAA Board.</p>
	<p><b>Advantages</b></p> <p>Provides another tool to potentially respond more rapidly to emerging technology.</p>		<p><b>Advantages</b></p> <p>Recognises pressures on ministerial time.</p> <p>Allows lower priority issues to be dealt with rather than relying on inclusion on the annual rules programme.</p>		<p><b>Advantages</b></p> <p>Provides greater flexibility in the system.</p> <p>Allows the more prescriptive elements in rules to be removed to another legislative level.</p>
	<p><b>Disadvantages</b></p> <p>How much more quickly these temporary rules could be made is questionable given safeguards needed to ensure temporary rules are developed appropriately.</p>		<p><b>Disadvantages</b></p> <p>May be difficult to define the parameters of delegation.</p> <p>May not be that much quicker than current system when it is working as intended.</p>		<p><b>Disadvantages</b></p> <p>Difficult to determine in advance what matters may need Ministerial scrutiny.</p> <p>Raises accessibility concerns with requirements spread over different documents.</p>

## Part B: Safety and security

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Question B9a: What enhancements could be made to the rule-making process?

Question B9b: Which is your preferred option? Please state your reasons.

Question B9c: If you prefer Option 3 (delegation of some of the Minister's rule-making powers to the CAA Board or Director), what matters should the Director or CAA Board be delegated to make rules for?

Question B9d: Is a 'first principles' review of rule-making required to consider the out of scope options (paragraphs 184–189) in more detail? Please state your reasons.

### Item B10: Possible amendments to Part 3

190. The changes proposed in Part A of this consultation document regarding the purpose of the Act and the Minister's objectives will have a flow-on effect to rule-making provided in Part 3 of the Civil Aviation Act 1990.

#### Section 28 and 33(2)(f)

190. Section 28 of the Civil Aviation Act 1990 provides the Minister with the power to make rules for a range of specific purposes including:

- 190.1. assisting aviation safety and security (including but not limited to personal security)
- 190.2. assisting economic development
- 190.3. improving access and mobility
- 190.4. protecting and promoting public health
- 190.5. ensuring environmental sustainability

191. Section 33(2)(f) requires the Minister (or Director for emergency rules) to have regard to whether the proposed rule assists economic development, improves access and mobility, protects and promotes public health, and ensures environmental sustainability.

192. The matters specified in section 28 and 33(2)(f) were introduced into the Civil Aviation Act 1990 in 2004 to give effect to the objectives of the New Zealand Transport Strategy to achieve an integrated, safe, responsive and sustainable transport system.

193. As discussed in Part A of the Consultation Document (refer to Item A2, pages 17–21), the focus of regulatory activity is nuanced with government expectations of the day. However these expectations should not be directly enshrined in legislation (which can constrain a statute's durability).

194. Therefore, it is likely the matters referred to in section 28 and 33(2)(f) will be removed and replaced with more generic language that allows the Minister to make rules for safety, security, economic development and environmental purposes, for example.

#### Sections 29–30

195. In addition to the purposes specified in section 28, sections 29, 29A, 29B and 30 expand on the matters the Minister can make rules for, including safety and security, airspace, noise abatement, and general matters including the certification of aircraft, crews, and aerodromes, and setting standards and conditions of operation for some flights.

196. There may be some opportunity to consolidate these sections when the legislation is redrafted.

### Section 33 Matters to be taken into account in making rules

198. Section 33 outlines the matters that the Minister must take into account before making a rule. These include the:
- 197.1. recommended practices of ICAO
  - 197.2. level of risk to aviation safety and security in each proposed activity or service
  - 197.3. level of risk to aviation safety and security in New Zealand generally
  - 197.4. cost of implementing measures for which the rule is being proposed
  - 197.5. and any other matters the Minister considers appropriate in the circumstances.
198. We consider that modifications of, and additions to, section 33 could be made to provide greater clarity and better reflect the principles of good regulatory practice. Some possible amendments include:
- 198.1. section 33(2)(b) requires the Minister to have regard to the level of risk existing to aviation safety in each of the proposed activities. Section 33(2)(d) requires the Minister to have regard to the level of risk existing to aviation safety and security in New Zealand in general. We believe that these two provisions could be combined and amended to clarify and align with moves to a risk-based approach to regulation, for example *'whether the proposed rule reduces the level of safety and security risk.'*
  - 198.2. section 33(2)(e) requires the Minister have regard to the need to maintain and improve aviation safety and security, including (but not limited to) personal security. We believe that this provision could be simplified to read: *'the need to maintain and improve aviation safety and security.'*
199. Section 33 already contains some aspects of good regulatory practice, for example consideration of the costs of a rule proposal. Other aspects of good regulatory practice include:
- 199.1. considering whether the proposed rule addresses the identified problem
  - 199.2. considering best international practice and standards when proposing change
  - 199.3. considering an evaluation of alternative means of achieving the objectives of the proposed amendment in determining the proposed rule
  - 199.4. considering the impact of implementing the measures for which the rule is being proposed.
200. We are interested in your views as to whether section 33 should be extended to include these aspects of good regulatory practice, or whether they are more appropriately addressed administratively.<sup>20</sup>

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<sup>20</sup> For example, through the Transport Regulatory Policy Statement or other guidance material that provides expectations for best practice regulatory development and implementation.

Question B10: What matters should the Minister take into account when making rules? Please specify and state your reasons.

### **Section 34: Procedures for making ordinary rules**

Section 34 sets out the process the Minister must follow when making an ordinary rule, including notification of the Minister's intention to make a rule and corresponding consultation requirements. A subsection was inadvertently revoked when the Civil Aviation Act 1990 had consequential amendments in 2010. It is recommended that the following clause be re-inserted:

*'Give interested persons a reasonable time, which shall be specified in the notice published under paragraph (a) of this subsection [34(1)], to make submissions on the [proposed ordinary rule];'*

### Information management

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#### Background

202. ICAO acknowledges the important role that effective reporting plays in a safe aviation system.

203. ICAO notes that:

*International civil aviation's outstanding safety record is, among others, due to one key factor: a continuous learning process based on the development and free exchange of safety information.*<sup>21</sup>

204. CAA is heavily reliant on participants' reporting safety information to ensure that proper, robust and timely decisions are made in the interests of aviation safety. The challenge for CAA is to balance:

204.1. the need to regulate for aviation safety; while

204.2. creating an environment where stakeholders trust that the CAA will not take unreasonable action based upon reported occurrences, such as prosecution for an honest mistake that did not, or could not, have resulted in harm or damage.

205. CAA's approach to aviation regulation is based on the premise that the purpose of intervention is to meet the public interest in a safe and secure civil aviation system. This is articulated through CAA's *Regulatory Operating Model*<sup>22</sup> and supported by the *Use of Regulatory Tools Policy* and the *Enforcement Policy and Use of Interventions Tools Policy*. The *Regulatory Operating Model* outlines the principles that underpin CAA's regulatory approach.

206. Figure B1 illustrates CAA's general approach to its day-to-day decision making to assure safety performance. That approach reflects that most operators are participants who responsibly and willingly perform their safety responsibilities.

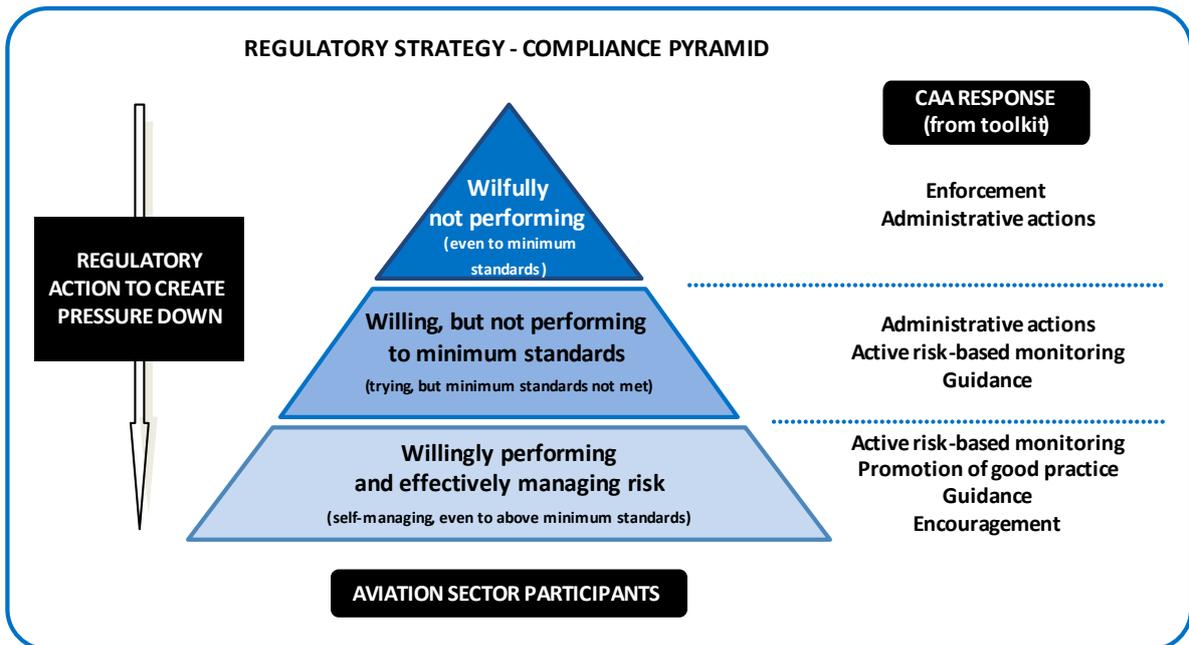
207. CAA prefers not to take enforcement action against those who fully report details of accident and incidents. However, enforcement action is more likely to result when reporting is patently incomplete or reveals reckless or repetitive at-risk behaviours.

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<sup>21</sup> Safety Management Manual (SMM): International Civil Aviation Organization; Third edition (2013).

<sup>22</sup> [http://www.caa.govt.nz/Policy/Regulatory\\_Op\\_Model.pdf](http://www.caa.govt.nz/Policy/Regulatory_Op_Model.pdf)

Figure B1: CAA's Regulatory Strategy



### Item B11: Accident and incident reporting

209. CAA's move towards risk-based regulation, in line with ICAO's expectations, is heavily reliant on safety information and reports to help identify areas of highest risk and emerging trends of risk.
210. Although the Civil Aviation Act 1990 (section 26) and Civil Aviation Rules (Part 12) place an obligation on participants to report accidents and incidents, CAA estimates that it only receives a small fraction of the safety reports required to be submitted. Additionally, CAA is aware that at times participants may submit the required report but will not provide all the relevant or required details.
211. Under-reporting of accident and incident information could compromise the safety of the aviation system. We consider it is important to investigate:
- 211.1. the barriers you perceive to fully reporting on accidents and incidents
  - 211.2. options that could be implemented to create an environment of free and open disclosure of information.

### Discussion

212. In 2004, the Flight Safety Foundation<sup>23</sup> published a report into aviation safety reporting, entitled *A Roadmap to A Just Culture: Enhancing the Safety Environment*. The report used New Zealand's civil aviation regulatory framework as one of four case studies. The report concluded that in New Zealand:

*there will need to be some legislative changes and considerably more selling of the concept to the aviation industry (particularly at the general aviation end) in order to get the necessary paradigm shift (away from fear of the regulator when considering whether or not to report occurrences).*

213. Industry has periodically raised concerns about disclosing incidents in detail to CAA, citing concerns about the enforcement action that CAA might take under the Civil Aviation Act 1990.
214. In 2008, the Ministry of Transport received a petition for an amendment to the Civil Aviation Act 1990 advising that:
- 214.1. section 43/43A and 44 discourage reporting to CAA of safety failure caused by human error. (It is an offence, under these sections, for an aviation document holder to cause unnecessary danger to a person or property, or for a person to operate an aircraft in a careless manner or to cause unnecessary danger through the use of an aircraft, aeronautical product, or aviation-related service.)
  - 214.2. the legislation does not define whether the act or omission that constitutes an offence is the result of human performance or a conscious disregard of the risks (reckless endangerment).
215. Following consideration of the petition, the Ministry determined that this issue should be included for consideration in any future review of the Civil Aviation Act 1990.

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<sup>23</sup> An international not-for-profit organisation focused on providing impartial, independent, expert safety guidance and resources for the aviation and aerospace industry."

### CAA's Regulatory Operating Model

216. In the past 5 years, CAA has refined its Regulatory Operating Model, which provides regulatory principles and strategies that guide its focus and underpin day-to-day decision-making. It has also developed and refined a number of policies that provide direction on the selection and use of the various regulatory tools available to it, including prosecutorial actions.
217. One non-regulatory option could involve CAA developing a strategy to better inform the industry on how it is likely to deal with the information it receives as set out in the *Regulatory Operating Model*.
218. As outlined earlier, CAA prefers not to take enforcement action against those who fully report details of accident and incidents. However, enforcement action is more likely to result when reporting is patently incomplete or reveals reckless or repetitive at-risk behaviours. This approach ensures that the CAA has flexibility to determine the most appropriate intervention depending on the specific circumstances of each case.
219. A regulatory option could be to amend the Civil Aviation Act 1990 to provide legislative recognition for the approach taken by CAA within its Regulatory Operating Model and associated policies.
220. Possible amendments to the Civil Aviation Act 1990 to give effect to this option could include:
  - 220.1. explicitly requiring the CAA to create a regulatory operating model, and ensuring it is regularly reviewed
  - 220.2. requiring the CAA to promote the approach taken in any regulatory operating model that CAA has adopted by, for example, promulgating the model and associated policies to industry, together with educational information
  - 220.3. amending the criteria for fit and proper person assessments to take into account a person's willingness to fully report accidents and incidents to CAA and their degree of cooperation in fully investigating such accidents and incidents
  - 220.4. considering a person's willingness to report accidents and incidents when the Director is undertaking an investigation
  - 220.5. requiring the Director to advise the participant on why he/she has chosen to take enforcement action rather than administrative action, in situations where a participant willingly reports but neglects to fully report critical safety information.
221. This approach is not intended to establish a no blame reporting culture where participants are not penalised simply because they voluntarily report an occurrence. CAA would retain the ability to investigate all occurrences, and pursue appropriate enforcement or administrative action if considered necessary.

### Strict liability offences

222. Some stakeholders consider that sections of the Civil Aviation Act 1990, for example, sections 43, 43A and 44 offences, are a barrier to promoting full safety-related reporting as they do not expressly cover the mental attitude of the aviation document holder.

223. These offences are drafted as strict liability offences. That is, it is not necessary to establish a guilty mind (*mens rea*) on the part of the defendant to obtain a conviction for the offence. However, it is open to the defendant to show that the offence occurred without any fault on his or her part.
224. Under this option, a requirement for *mens rea* could be inserted into these offences. For example, the occurrence was caused by an action considered to be conduct with intent to cause damage, or conduct with knowledge that damage would probably result — equivalent to reckless conduct, gross negligence or wilful misconduct.
225. While we acknowledge the concerns expressed by stakeholders, we have reservations about having no strict liability offences for this regime. Strict liability offences are used in the regulatory context and are intended to ensure that people take the precautions necessary to ensure their conduct does not endanger the public. To require an intention to commit the offence could undermine that purpose.

### ICAO developments

226. ICAO is also currently considering developments regarding the use of safety information, and proposals that attempt to distinguish between appropriate and inappropriate use of safety information across a range of Annexes; including Annex 13 (Aircraft Accident and Incident Investigation) and Annex 19 (Safety Management Systems). Annex 13 sets out the standards and recommended practices for notification, investigation and reporting. Annex 19 sets out the standards and recommended practices around safety data collection, analysis, protection and exchange.
227. ICAO proposals are currently the subject of formal consultation with all ICAO member States. We are currently considering the ICAO proposals and note that these will inform this review.

Question B11a: What are the barriers to fully reporting accidents and incidents to CAA?

Question B11b: What could be done to overcome the barriers referred to in Question B11a?

### Item B12: Accessing personal information for fit and proper person assessments

#### Background

229. To ensure a high degree of safety, the aviation system relies on the ongoing integrity of all participants. To ensure this, the Director has a statutory function to determine whether someone wishing to enter the system is fit and proper to exercise the privileges conferred by the aviation document. It is a condition of every aviation document that the holder continues to satisfy this test. Failure to do so may result in the Director suspending or revoking the aviation document.
229. Background about the fit and proper person test is covered in Item B1 (page 38).
230. The Director does not have direct access to the personal information he /she requires to make a fit and proper determination. To enable him/her to undertake this function, the Civil Aviation Act 1990 provides the Director with an express power to seek and receive information from other agencies holding information that may be relevant.
231. Section 10(3) of the Civil Aviation Act 1990 provides that:
- The Director may, for the purpose of determining whether or not a person is a fit and proper person for any purpose under this Act,—*
- 231.1. *Seek and receive such information (including medical reports) as the Director thinks fit); and*
- 231.2. *Consider information obtained from any source.*
232. The Director uses this power to obtain information such as a person's medical history, criminal history and transport offence history.

#### Assessment

233. In general the system to access personal information is working well, as in the majority of cases the onus is on the participant to supply the information the Director requires to make a fit and proper determination. However, there is a question as to how much information the Director should be able to access in order to undertake a robust fit and proper person assessment.
234. In particular we are considering whether legislative change is needed to enable the Director to more effectively and efficiently get relevant information to investigate a participant whose existing 'fit and proper' status is under consideration.

#### Is there a problem?

235. At times the Director is provided with information about participants that he/she needs to examine to determine whether valid concerns exist about a person's fit and proper status.
236. This may require the Director to ask other government agencies to disclose personal information about a participant. Good practice is that the Director will inform the participant of the concern and that information from a third party has been requested.
237. However, at times it is not appropriate for the participant to be made aware of the concerns — for example, in some instances to protect the identity of the source of the concern.

238. Attempts by the Director to gather personal information from government agencies without the consent of the participant has, on occasion, raised concerns about compliance with the Privacy Act 1993, in particular, Privacy Principle 11, which places limits on the disclosure of personal information.
239. Despite the seek and receive provision referred to in paragraph 232 above, the Civil Aviation Act 1990 is silent on the obligations of government agencies holding the information to disclose that information to the Director. Government agencies are, therefore, at times doubtful about providing the Director with the relevant information — citing the risk of breaching the Privacy Act as their reason for refusing. Government agencies will release information but it can be a protracted process. If the concerns are genuine, this can potentially have significant safety implications.
240. We are seeking feedback to determine the appropriate balance between the Director's need to access personal information in a timely manner, to enable him/her to effectively regulate the aviation system in the public interest, and an individual's right to privacy, especially when there may only be a suspicion of wrong-doing.
241. The options to resolve this issue cover a broad spectrum from doing nothing, through to compelling government agencies (through specific requirements in the Civil Aviation Act 1990) to provide information on individuals when requests are made by the Director.

### **Option 1: Status quo**

242. Under this option the status quo would continue, and the Director would pursue administrative arrangements (such as a memorandum of understanding) with key government agencies (for example the Ministry of Justice and the New Zealand Police) to determine a process to clarify and improve how personal information will be shared.
243. This option is only valid if agencies that are party to a memorandum of understanding with CAA can guarantee information will be provided in a timely manner.
244. CAA advises that the number of agencies the Director may require information from is potentially large and varied. This option may not guarantee efficiency gains, or provide sufficient clarity around the Director's seek and receive powers. Agencies the Director does not have agreements with may still question the Director's ability to seek and receive personal information in relation to the requirements in the Privacy Act.

### **Option 2: Act amendment**

245. The Ministry and CAA believe section 10(3) of the Civil Aviation Act 1990 clearly authorises persons or agencies holding information to disclose such information to the Director without exposing themselves to potential breaches of the Privacy Act.
246. However, given the issue identified above, the Civil Aviation Act 1990 could be amended to require that an organisation receiving a request for information from the Director, under section 10(3) of the Civil Aviation Act 1990, for the purpose of a fit and proper person assessment, must make that information available.

## Part B: Safety and security

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Question B12a: What information does the Director need to undertake a fit and proper person assessment?

Questions B12b: Should the Director be able to compel an organisation to provide information about a person in order to undertake a fit and proper person test? Please state your reasons.

### Security

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#### Background

248. Part 8 of the Civil Aviation Act 1990 (sections 76–87) sets out how aviation security services are to be delivered in New Zealand. In particular, it sets out the powers and duties of the authorised provider of those services, and the respective roles of the Minister of Transport and the Director of Civil Aviation.
248. Part 8 also needs to be read in conjunction with the Aviation Crimes Act 1972, which gives effect to a number of international conventions relating to the prevention of crimes against international air services. It includes specific guidance on the exercise of certain powers set out in the Civil Aviation Act.

#### Security Designation

249. Section 82 of the Civil Aviation Act 1990 allows the Minister of Transport to designate an aerodrome as a security designated aerodrome by *Gazette* notice. Section 76 of the Civil Aviation Act 1990 makes Avsec jointly responsible with the New Zealand Police for preventing aviation crime at Security Designated Aerodromes.
250. Security designated aerodromes are subject to comprehensive security measures to help manage the risks posed by unlawful interference with civil aviation. Consistent with New Zealand's obligations under a number of international conventions<sup>24</sup>, the focus was originally on protecting international air passenger services. However, since 2001 this has expanded to include larger domestic passenger services. Internationally, and in New Zealand, we recognise that these air services require a higher level of security than others.
251. Section 80 of the Civil Aviation Act 1990 confers functions and duties on Avsec to support this level of security. These include screening international air passenger services, domestic air passenger services using aircraft with more than 90 passenger seats<sup>25</sup>, and persons, items, substances, or vehicles entering or within security areas.
252. Avsec also has related search and seizure powers, and a patrol function. The purpose of patrolling is to detect and deter threats to the security of an aerodrome operation and is further elaborated in Civil Aviation Rule Part 140. Patrolling includes both mobile foot patrols and vehicle patrols.

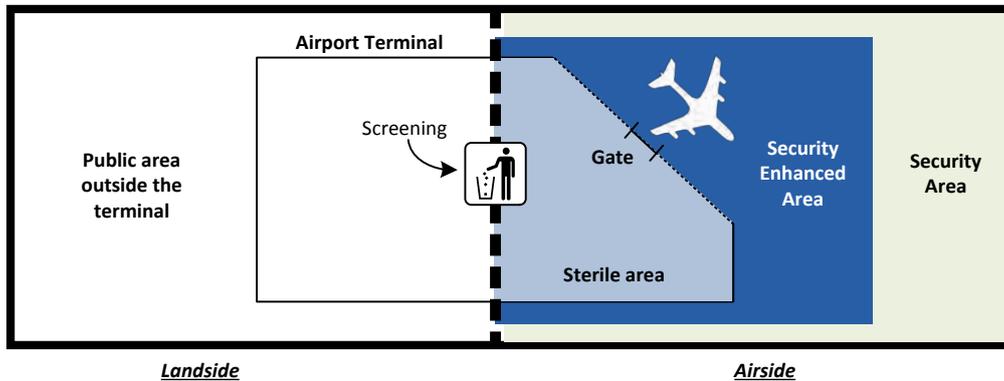
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<sup>24</sup> For example, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, and the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.

<sup>25</sup> In 2011, the Director of Civil Aviation re-issued the domestic screening direction for crew, passenger and baggage screening on aircraft of more than 90 passenger seats. This Direction was issued under section 77B of the Civil Aviation Act 1990, which provides powers and duties of the Director to require screening, searching and seizing in specified circumstances. The Minister of Transport has similar power under section 77A of the Act.

Terminology

Figure B2: Security designated aerodrome  
Figure 1; Security Designated Aerodrome



254. The following terms regarding the ‘geography’ of an airport are used in the Security chapter of this consultation document, and are shown in Figure B2 above.

<b>Airside</b>	The movement area of an airport, adjacent terrain and buildings or portions thereof, access to which is controlled — comprising the security area, security enhanced area and sterile area.
<b>Landside</b>	The area of an airport, adjacent terrain and buildings or a portion thereof, which is not part of the airside. Also described as the public area of an airport.
<b>Security designated aerodrome</b>	A security designated aerodrome refers to the total area, usually referred to as ‘the airport’. It is comprised of the secure areas (airside) and the public areas (landside).
<b>Security Area</b>	The area known as the airside part of an airport where aircraft and supporting vehicles normally move about, together with the adjacent terrain and buildings or portions thereof, for which access is controlled.
<b>Security enhanced area</b>	Those areas of the airside of an airport that are identified as priority risk areas where, in addition to access control, other security controls are applied.
<b>Sterile area</b>	The sterile area comprises the area after people, items and baggage have passed through screening and includes the departure lounges through to the gate to the aircraft. Access to this area is limited to authorised personnel, passengers and crew.

255. Along with terminology about the geography of a security designated aerodrome, reference is made to three key powers or functions that can be undertaken by an Avsec officer.

<b>Patrol</b>	An Avsec officer may <u>patrol</u> anywhere within an aerodrome — that is, both airside and landside. The purpose of a patrol is to detect and deter activity that poses a threat to civil aviation.
<b>Screen</b>	An Avsec officer is required to <u>screen</u> any and all persons, items and substances passing through screening points into sterile areas, and a portion of persons, items, substances and vehicles entering into/within security enhanced areas. The purpose of screening is to detect the presence of any item or substance specified in a <i>Direction</i> <sup>26</sup> — that is, any items or substances that pose a threat to civil aviation. If something is found during a screening process, the Avsec officer has different options depending on the circumstances. These options include powers relating to search and seizure.
<b>Search</b>	A search refers to a (typically) more intrusive examination of a particular person, vehicle or item to determine whether they pose a threat to civil aviation. Searches can arise through patrols, screening to go airside, or if there has been an arrest. Any search must comply with the strict rules set out in both the Civil Aviation Act 1990 and the Aviation Crimes Act 1972.

### Ongoing evolution of civil aviation security risks and response

256. Internationally, unlawful interference with civil aviation continues to evolve. The traditional siege-hostage event onboard aircraft to raise awareness of a political grievance or extract concessions from a government authority, was undertaken with guns and munitions. Unlawful interference of aircraft has developed to include in-flight destruction of aircraft using improvised explosive devices and aircraft used as weapons.
257. Aviation security measures have been enhanced in response to the evolution noted in paragraph 252 above:
- 257.1. Following the events of 11 September 2001 in the United States, a number of countries (including New Zealand) extended security screening to domestic flights.
  - 257.2. In line with international requirements, New Zealand introduced hold-stow baggage screening for all departing international passenger flights in January 2006.
  - 257.3. In 2007, British police foiled a terror plot to destroy aircraft over the Atlantic using liquid explosives. Following new international practices, New Zealand implemented new requirements for airline passengers carrying liquids, aerosols and gels in their hand luggage.

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<sup>26</sup> Section 77A and 77B of the Civil Aviation Act 1990 refers, providing powers and duties of the Minister of Transport and Director to require screening, searching of persons, items or substances and the seizing of items and substances in specified circumstances.

258. In addition, legislation passed in 2007 gave Avsec officers a range of additional powers to further strengthen New Zealand's aviation security in line with international requirements. These included powers to: search for and seize items prohibited or restricted from being taken on aircraft; screen and search airport workers; search passengers' outer garments; and undertake pat-down searches.
259. More recently, international focus has increased on cargo and mail, cyber threats and landside security issues. Landside security concerns have been heightened by a number of high profile security-related events, as perpetrators attempt to identify and exploit vulnerabilities within the wider aerodrome environment.
260. For example, in 2007 a vehicle at Glasgow International Airport loaded with propane canisters was driven into the front of the terminal and set ablaze. And on 24 January 2011 a suicide bomber loyal to the Chechen separatist cause detonated explosives in the arrivals hall at Domodedovo International Airport, killing 37 and injuring 173.
261. Recently, the ICAO Aviation Security Panel noted that airport landside areas continue to be an attractive target for terrorists and present a major security challenge. In response, ICAO recently proposed amendments to its *Recommended Practices* in relation to landside security measures, involving greater coordination between agencies and organisations working in an airport environment.

### New Zealand context

262. The Civil Aviation Act 1990 emphasises security measures for access and entry airside and onboard aircraft. These are the areas of the highest apparent risk, and are relatively easy places to implement robust and reasonable security measures. For a start, there is an expectation of screening/searching of people, and items going into those areas/on board aircraft. These areas act as a natural funnel that everyone and everything has to pass through. The volume of traffic is relatively predictable.
263. Landside of an aerodrome, there are less predictable (but potentially very large) numbers of people, vehicles, and objects that are not subject to active or systematic scrutiny, but are immediately proximate to airside. Avsec currently undertakes random foot and mobile patrols both airside and landside, in accordance with section 80(b) of the Civil Aviation Act 1990. The purposes of the patrols are to detect and deter unlawful interference with civil aviation. The New Zealand Police also conduct patrols and a range of other activities as necessary and appropriate to effective policing in an aerodrome environment.
264. While the threat of terrorism in New Zealand remains low, the attempted hijacking of a regional passenger service in New Zealand in February 2008<sup>27</sup> highlighted the ongoing need for high levels of security vigilance by all involved in the New Zealand aviation system. It demonstrated that incidents of unlawful interference may not be confined to terrorist acts. The potential threat from acutely disaffected persons and those who carry out 'copycat' type acts or act on their own initiative is an area that needs appropriate and ongoing recognition. All acts of unlawful interference against aviation are considered significant because of the potential loss of life and property, economic loss, and loss of domestic and international confidence in New Zealand's aviation system.

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<sup>27</sup> In February 2008, Asha Ali Abdille hijacked a regional commuter flight from Blenheim and demanded to be flown to Australia.

266. Against this backdrop, we have assessed Avsec's authority in the landside part of the aerodrome, and a set of wider issues, against the following tensions:
- 265.1. personal rights — particularly the rights relating to unreasonable search and seizure
  - 265.2. security — that is, the extent of intrusive powers required to minimise or prevent unlawful interference with aircraft
  - 265.3. facilitation — allowing for the reasonable flow of people and commerce.

### Objectives and criteria

266. The objective of the review is to ensure that aviation security powers are current and effective, and support a secure civil aviation system and in particular that:
- 266.1. the powers given to CAA and the authorised provider of security services (Avsec) are sufficient to discharge their wider obligations under the Act
  - 266.2. the Act is clear about the nature of those powers, including when and how they can be exercised
  - 266.3. the Act provides a stable framework for both CAA and Avsec to operate within
  - 266.4. the Act is sufficiently flexible to accommodate future developments in aviation security, if appropriate.

### Overall assessment

267. Changes to Part 8 of the Civil Aviation Act 1990 appear warranted to clarify search powers, retention and seizure of Dangerous Goods, and matters associated with the Airport Identity Card regime. In addition, the current wording and layout is complex, which can create difficulties in applying it. Part of this difficulty is the way the Act balances three competing tensions identified in paragraph 261 above. We also recommend that the wording and structure of Part 8 could be revised.

### Items

#### Item B13: Search powers

268. Section 80(ab) allows Avsec to “undertake, if necessary, reasonable searches of crew, passengers, baggage, cargo, aircraft, aerodromes, and navigation installations”.

#### Clarifying what happens with anything found in a section 80(ab) search

269. At present, sections 80A, 80B and 80C allow for Avsec to do certain things with items found in the course of screening and searching. Section 80A relates to Avsec’s powers and duties regarding dangerous goods — primarily to screen for these goods and determine whether they may be lawfully carried on an aircraft. Section 80B and 80C relate to Avsec’s powers in airside areas (that is, sterile, security, and security enhanced areas). These include powers to seize and detain, to dispose or destroy or deliver to police.

270. No equivalent provision is made for things identified in searches undertaken under section 80(ab). For the sake of consistency, and to avoid any unintended consequences, this situation ought to be clarified.

#### Unattended items

271. As presently drafted, section 80(ab) provides Avsec with no explicit authority to search unattended items.

272. Unattended items in the landside area of a security designated aerodrome are incongruous and an obvious risk. Unattended baggage, for example, is treated as an item of interest until measures can be taken to rule out the presence of dangerous material (for example, explosives). If not resolved quickly, these incidents can cause disruption to airport operations, which may also cause aircraft delays.

273. We are seeking comment on whether Avsec should be given specific authority to deal with unattended items in landside areas. Our initial view is that this is not a major extension of Avsec’s authority and is more about the practicalities of busy airports.

274. Avsec already successfully and responsibly manages the screening and searching of all manner of items and baggage, unattended or otherwise in airside areas. It has well-developed expertise and the required tools for that task, for example, Explosive Detector Dogs (EDD).

275. EDD units are a proven and reliable tool in the location of explosives — particularly their accuracy, portability and the speed with which they can clear an area or a potential hazard. A comprehensive training, certification and audit process is in place to ensure that each EDD team (handler and dog) operates to strict internationally-recognised standards. EDD are trained to be non-intrusive when interacting with people and are passive when responding to / detecting explosives (i.e. an EDD will sit in front of an item or person when it detects an explosive odour).

276. The alternative is to deploy police in all instances to deal with unattended items. However, in our view, this could be inefficient and have significant resource implications for police who have a wide-range of policing matters to attend to at Security Designated Aerodromes.

277. Unattended items subject to Avsec scrutiny and assessed as benign would need to be referred to the owner; or if the owner cannot be found, the airport operator or police (where the unattended item is evidence of criminal offending). Unattended items subject to Avsec scrutiny, and assessed as suspicious, would be treated in accordance with existing New Zealand Police and Avsec procedures<sup>28</sup> to mitigate any imminent harm to life and property.

Question B13a: Should Avsec be allowed to search unattended items in the landside part of the aerodrome? Please state your reasons.

### Vehicles

278. Section 83(4) of the Civil Aviation Act 1990 gives Avsec the ability to enter vehicles (which are not being used for commercial purposes) when the Avsec officer believes on reasonable grounds that there is in that vehicle "a person or thing" likely to endanger the aerodrome. In those circumstances, access to the vehicles is limited to peaceful and non-forcible entry where a police constable is not present. Such a high threshold/justification to enter a vehicle, in the absence of a police constable, is necessary given the intrusive nature of this power.
279. No distinction is drawn between vehicles that are airside or landside, but there is also no express corresponding power to screen or search vehicles in landside areas.
280. We are seeking comment on whether Avsec should be able to more closely examine the exterior of vehicles landside that are of interest to an Avsec officer. Examination would include the use of EDD or other non-invasive tools for the purposes of establishing whether the vehicle is likely to endanger the aerodrome, for example to rule out the existence of explosives. Avsec already has the resources (for example, EDD) and well-developed expertise with screening and searching vehicles airside, meaning it has expertise and the required tools for the task.
281. A vehicle assessed by an Avsec officer as being of interest will vary depending on the situational awareness of the officer, informed by the circumstance, and time and place. For example, an unoccupied vehicle at the drop-off point (in front of the airport terminal) is incongruous. It would be treated as suspicious until the presence of dangerous material (for example, explosives) is ruled out. These incidents can cause disruption to airport operations that may also cause aircraft delays until the matter is resolved.
282. We are testing whether Avsec should be given specific authority to do what is reasonable and necessary to detect any security threat presented by a vehicle landside, through the use of non-invasive search tools.
283. Vehicles of interest that are subject to Avsec scrutiny and assessed as benign would need to be referred to the owner; or if the owner cannot be found, the airport operator or police (where the vehicle is evidence of criminal offending).

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<sup>28</sup> Contained in the Memorandum of Understanding (2009) between the General Manager, Aviation Security Service and the Commissioner of New Zealand Police.

285. In the case of non-commercial vehicles, a power of entry would be exercised only after a non-invasive search, in the circumstances described in section 83(4) of the Civil Aviation Act. That is, where the Avsec officer has reasonable grounds to believe that there is in that vehicle a person or thing likely to endanger the aerodrome or installation or any of its facilities or any person. It is unlikely that the power would be exercised without a police presence, as is current procedure.<sup>29</sup>
285. We have considered whether a screening power or a searching power is required. A power to search is preferred, in that it would be limited to a particular vehicle of interest, whereas a power to screen suggests a much broader and systematic assessment of all vehicles.

Question B13b: Should Avsec be allowed to search vehicles, in the landside part of the aerodrome, using non-invasive tools such as EDD? Please state your reasons.

### Patrol with EDD

286. The Civil Aviation Act 1990 requires Avsec to undertake aerodrome security patrols. The purpose of patrols is further elaborated in Civil Aviation Rule Part 140 — to detect and deter threats to the security of an aerodrome operation. Patrol includes both mobile foot patrols and vehicle patrols.
287. We are seeking comments on whether the legislation should be amended to explicitly authorise Avsec officers to patrol landside with EDD (for example, public car-parks and airport terminals generally).
288. Airside, EDD are routinely used as a way of assessing potential threats close to aircraft. EDD are also routinely used in aerodrome-wide patrols targeting such areas as control tower externals, buildings, hangars, and boundary fences.
289. The use of EDD on patrol landside of an aerodrome would bring EDD into direct contact with non-passengers. Although use of EDD is minimally intrusive, their use constitutes a search.
290. A search of a non-passenger can otherwise occur only when Avsec has “reasonable grounds to believe that an offence has been or is being committed by that person” against certain sections of the Aviation Crimes Act 1972 or the Arms Act 1983. The Avsec officer must arrest that person before starting the search. Section 85 of the Civil Aviation Act 1990 sets out the powers of arrest.
291. These sections reflect the way in which the Act balances security imperatives and the personal rights of non-passengers — at present the balance tilts more to the latter. There does not appear to be any strong justification to give Avsec officers a broader power to search non-passengers (given New Zealand’s relatively low-threat environment). The existing test for a search of a non-passenger should be retained.
292. However, an EDD does not make a distinction between an item, a vehicle or a person. It is driven by odour only, and is in a permanent ‘seek’ mode. This means that anyone, or anything, at any time in the dogs’ vicinity could be subject to a ‘search’ by the dog.

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<sup>29</sup> Section 14 of the Search and Surveillance Act 2012 provides police with a warrantless search power with respect to vehicles when (a) an offence is being committed, or is about to be committed, that would be likely to cause injury to any person, or serious damage to, or serious loss of, any property: (b) there is risk to the life or safety of any person that requires an emergency response.

## Part B: Safety and security

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293. If the Civil Aviation Act 1990 explicitly authorises any search, the circumstances in which that search is permitted, and the methods that can be employed to conduct it must be established. This minimises the risk that the search could be considered unlawful, and helps ensure that any evidence collected during such a search can be used in any subsequent prosecution.

Question B13c: Do you support the use of EDD within a landside environment of an airport, including public car parks and airport terminals generally? In particular, do you consider it appropriate for EDD to be used around people, including non-passengers? Please state your reasons.

### Item B14: Dangerous goods

294. It is an offence against the Civil Aviation Act 1990 and the civil aviation rules to carry or cause to be carried any dangerous goods on an aircraft (section 65O). These goods are defined as articles or substances that are capable of posing risk to health, safety, property, or the environment, and are classified as dangerous goods under the ICAO technical instructions.
295. These instructions cover nine classes of materials — including explosives, gases, flammable liquids and solids, corrosives, and radioactives. The list is broadly similar to properties of goods defined as hazardous substances in the Hazardous Substances and New Organisms Act 1996.
295. The penalty for carrying dangerous goods is a fine of only up to \$2500.<sup>30</sup>
296. Section 80A sets out the powers and duties of aviation security officers relating to dangerous goods. Officers can screen any person boarding an aircraft or any thing to be carried by an aircraft. They can seize and detain dangerous goods to decide whether they may be lawfully carried on board.
297. If there is no lawful basis to carry them, the officer is obliged to inform the aircraft operator, and then may either give the goods to the operator or dispose of them.
298. The Civil Aviation Act 1990 provides a general direction (to Avsec) about where it can exercise its powers — within the security designated aerodrome (the airport) or security designated navigation installation. Particular emphasis is given to Avsec's powers and duties in security enhanced and sterile areas. A key objective is to prevent the commission of crimes on board an aircraft.
299. There are limited references to the role of other agencies in their relationship with the Civil Aviation Act 1990 or with Avsec itself:
- 299.1. Section 107B(b)(iv) of the Biosecurity Act 1993 gives an inspector who has reasonable cause to suspect that the person has contravened the Civil Aviation Act 1990 the power to direct a person to stay in a biosecurity control area, until the person is dealt with by the relevant authority
- 299.2. Section 175A of the Customs and Excise Act 1996 is more explicit, and allows a customs officer to seize and detain goods if they have cause to suspect on reasonable grounds that the goods are ~~dangerous~~ civil aviation goods that may not be lawfully carried on an aircraft".
300. The latter reference is a good example of the type of cooperation that might be expected amongst agencies at the airport, particularly given their mandate to identify items that pose significant risks to public health and safety.
301. Two issues have been raised about the dangerous goods provisions. These are whether Avsec has the:
- 301.1. authority to retain such goods as evidence (and if not, should it?)
- 301.2. mandate to seize such goods on arrival' (and if not, should it?).

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<sup>30</sup> See section 65, 65Q(2)(f), and Civil Aviation (Offences) Regulations 2006, Schedule 1, p.55

### What is the problem?

#### Retaining as evidence

302. Currently, section 80A offers no option for officers to retain dangerous goods for the purposes of evidence. This appears inconsistent with the powers of officers in security enhanced or sterile areas (section 80C). In these areas, officers have the option of delivering what they find ~~to~~ a constable”.
303. There seems no reason in principle why Avsec should not be able to hold on to the goods for prosecutorial purposes. This would provide only a limited extension of Avsec’s authority, and is consistent with similar powers in other areas of the aerodrome. It would also ensure an explicit evidentiary chain in any subsequent prosecution.
304. The question remains as to for whom the evidence should be retained. That is, who is the prosecuting agency in such circumstances? Carriage of dangerous goods is a breach of the Civil Aviation Rules, meaning it is within the responsibility of the Director. The Act appears to focus on the New Zealand Police as the relevant authority.
305. The offence itself is at the lower end of the scale (that is, fine only). An infringement notice may be issued, or court proceedings may be commenced. However, CAA notes that while some 20,000–25,000 items are intercepted each year, the number of infringement notices issued is very low (available data suggests less than 45 a year), and there have been no prosecutions in the last 3 years.

#### Seizure on arrival

306. The offence of carrying dangerous goods is listed in the act as an unruly passenger offence. These offences can be committed only while on the aircraft. Difficulties arise where the offence is detected by other agencies after the person leaves the flight.
307. The primary role for Avsec is to ensure that dangerous goods are not carried on the aircraft, and to enforce the rule against doing so. That these goods are discovered after the fact does not alter whether an offence is committed. How the information is discovered is relevant only to the extent that the evidence has been lawfully obtained.
308. If dangerous goods are detected in flight, it would be open to the pilot-in-command to alert the Director/Avsec upon arrival, and for an infringement notice to be issued by the Director or proceedings brought. If the dangerous goods are detected upon arrival, for example by Customs, it would be open to the New Zealand Customs Service (Customs) to alert the Director/Avsec.
309. At present, if dangerous goods are detected an officer may either pass the goods to the operator, or destroy or otherwise dispose of them. A decision is then made about any enforcement action. If goods are discovered after a flight, the imperative to do something with the goods is less relevant (as the risk has passed). However, the offence has still occurred, and it is up to Avsec on behalf of the Director to determine whether any infringement notice is issued, or prosecution is taken.

### Options

#### Option 1: Status quo

310. The risk in retaining the status quo is to persist with an underlying inconsistency with the approach to other items in the security enhanced and sterile areas. However, given the limited number of infringement notices issued, and prosecutions undertaken, the risk appears small.

### **Option 2: Amend the act to clarify provisions related to dangerous goods** (Ministry of Transport preferred option)

311. Under this option section 80A of the Civil Aviation Act 1990 would be amended to:
- 311.1. clarify that if an Avsec officer determines there is no lawful basis for carrying dangerous goods on an aircraft, the officer either destroy or dispose of the goods or deliver them to the Director. There would be no discretion for Avsec to return the goods to the relevant operator or delivery service. Any enforcement decision would be at the Director's discretion.
  - 311.2. clarify that if dangerous goods have been detected by aircraft crew or a border agency, the Director 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 or any other person authorised by the Director may retain the goods for enforcement purposes. Any enforcement decision would be at the Director's discretion.

### **Recommendation**

312. Option 2 is our preferred option because it addresses an inconsistency, and helps limit the risks to a successful prosecution.

### Item B15: Security check procedures and airport identity cards

#### Background

313. The Civil Aviation Act 1990 prohibits people from entering or being in security/security enhanced areas unless they:
- 313.1. wear an airport ID card issued under the rules –or other identity document approved by the Director under the rules” (section 84(2)(a)), and
  - 313.2. are –authorised by the Director or the airport manager or other person having control of the area” (section 84(2)).
314. There are some exceptions. For example, New Zealand Police and Avsec staff; persons specified in the rules; and passengers embarking and disembarking aircraft through areas approved by the airport manager.
315. The intent is that airport identity cards may be issued only to people who receive favourable security check determinations, and that the Director is able to recognise cards issued by other agencies to their staff, provided they have undergone acceptable alternative security checks.
316. Under the rules, the requirement for security checks does not apply to the Director issuing or approving temporary identity cards.
317. The rules also require:
- 317.1. a person entering or within a security/security enhanced area to produce his/her ID card or other identity document for inspection
  - 317.2. card holders to return the ID card if he/she is no longer working in an area for which the card is required or is no longer entitled to hold it.

#### What is the problem?

318. There are sound reasons for having security check procedures. They are an integral element within the wider security system, and are aimed at ensuring that only authorised persons are permitted in secure areas and/or can carry out certain security-sensitive roles as per the rules.
319. We are not proposing any fundamental changes to this process. However, some issues exist with the way the system is set out in the Civil Aviation Act 1990 and rules, including some inconsistencies that have developed over time. The specific issues identified by the Review include the following:
- 319.1. Should people in security and security enhanced areas be required to produce airport ID cards or other identity documents to Avsec on request? At present, the rules state anyone entering these areas must produce to an 'authorised person' but do not say what an 'authorised person' is.
  - 319.2. Should Avsec have the power to seize airport ID cards or other identity documents? At present, the Civil Aviation Act 1990 does not appear to confer sufficient authority for Avsec to do so.
  - 319.3. 'Airport ID card' is not defined in the Civil Aviation Act 1990; only 'aviation ID card' is, a term which is not used anywhere in the Civil Aviation Act 1990 or the rules.

- 319.4. Should the Civil Aviation Act 1990 include an offence for being in a security or security enhanced area without authorisation (as distinct from being there without approved identification)? At present, Avsec can require a person without authorisation to leave. It is also an offence to carry on an activity requiring authorisation, if the authorisation has been withdrawn or revoked under sections 77F and 77G.
- 319.5. The Civil Aviation Act 1990 and the rules have a range of minor inconsistencies in terminology.

### Recommendations

320. The close connection between the Civil Aviation Act 1990 and rules means amendments to the former will likely require consequential amendments to the latter. The Review has also identified some issues with the rules themselves. These can be addressed within the wider consequential work that will flow from any amendments to the Civil Aviation Act 1990.
321. We propose amending the Civil Aviation Act 1990 to:
- 321.1. require people in security and security enhanced areas to produce, on request by authorised employees of the CAA, including Avsec, airport ID cards or other identity documents
  - 321.2. give Avsec authority to seize airport ID cards or other identity documents in limited circumstances — for example, when such cards or documents are:
    - 321.2.1. being used in breach of either the Civil Aviation Act 1990 or the rules
    - 321.2.2. being used in circumstances in which the holders' authorisation to enter a secure area has been withdrawn
    - 321.2.3. expired
  - 321.3. make it an offence to be in a security enhanced area without authorisation
  - 321.4. define the term airport identity card
  - 321.5. address minor inconsistencies in terminology between the Civil Aviation Act 1990 and the rules as necessary.

Question B15: Do you have any comments about Security Check Determinations (sections 77F and G) and the Airport Identity Card regime?

### Item B16: Alternative terminal configurations

#### Background

322. The security requirements within Part 8 of the Civil Aviation Act 1990 have a significant impact on the layout or configuration of airport terminals. For example, the terminal must make allowance for passenger/baggage security screening (for both domestic and international travellers), and the segregation (post-security screening) of passengers and non-passengers. As discussed earlier, the airport is (in broad terms) separated into landside areas where access is generally unrestricted, and the airside where access is restricted according to status either as a passenger, or as an authorised person.
323. Along with the requirements set out in the Civil Aviation Act 1990, the terminal needs to accommodate all of the other amenities and facilities necessary to run an airport. These range from the retail areas, through to the border control areas controlled and administered by agencies such as the New Zealand Customs Service, Immigration New Zealand and the Ministry for Primary Industries.
324. A question arises as to whether the Act should be amended to specifically allow for alternative configurations in the future. The Review considered one such alternative — the Common Departure Terminal (CDT). But there may be other configurations to consider.

#### Discussion — Common Departure Terminal

325. The core idea behind a CDT is to allow people, who previously would have been segregated, to mix in a common area. There are (at least) two distinct variations of the CDT model, which would allow the following groups to share a common area from check-in to boarding:
  - 325.1. departing passengers and non-passengers
  - 325.2. international and domestic passengers.
326. It is worth noting some examples of the former exist (in Australia where non-passengers are permitted to go through the domestic screening point).
327. Both variations have similar benefits, namely that they:
  - 327.1. permit more efficient use of space and infrastructure, particularly at small (regional) airports
  - 327.2. allow savings from not needing to build additional infrastructure
  - 327.3. reduce the need for duplicate facilities, including security facilities
  - 327.4. enhance security for all airport users
  - 327.5. provide a single amenity zone post-security and improved retail performance by increasing dwell-time in one retail zone.

328. However, there are number of issues that are balanced against these benefits, as noted below. Of particular interest is that both CDT models would require significant re-scoping of Avsec resources and subsequent practice. This would occur largely because more people would need to be screened, to a higher standard, and possibly more than once, into enlarged sterile common areas. The increased screening would also include all retail goods destined for the sterile common areas.<sup>31</sup>
329. Under a CDT model, additional screening equipment and staff would be needed to cope with increased numbers of people and items entering the sterile common areas. A significant implication of this increased activity is that the funding model for Avsec may no longer be appropriate.
330. Currently Avsec's duties are funded per passenger, with different charges for domestic and international passengers, with the overall charge averaged across the six Avsec bases. This method of funding would need to be revisited, not only because of the greater number of people being screened, but also because a CDT rearrangement at one airport could impose additional costs on passengers departing from other airports that use the existing standard terminal layout.
331. Along with funding, a range of practical questions would 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.

### Summary of the issues with CDT

332. The following summarises issues associated with CDT concepts.

#### *Mixing passengers and non-passengers:*

- 332.1. Subjects non-passengers to (albeit voluntary) screening and searching.
- 332.2. A screening point at a terminal entrance would need to be active at any time people required access to the interior, including when there were no passengers boarding, because of the need to keep the terminal sterile.
- 332.3. Either the whole terminal beyond the screening point would need to be searched each day to create a sterile area or a 24/7 staffing of screening points would be required.
- 332.4. A security breach within a CDT would require the terminal to be cleared and all people rescreened.
- 332.5. Liquids, aerosols and gels would need to be removed from non-passengers at initial screening, or further screening would be required for passengers immediately before boarding.
- 332.6. Potentially creates chokepoints for Customs' processing as passengers delay boarding to remain with friends/relatives.

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<sup>31</sup> Unless international screening requirements were implemented at the main screening point, an additional screening point would need to be developed to apply liquids, aerosols and gels screening once international passengers were segregated before boarding their flight.

### *Mixing domestic and international passengers*

333.7 Different standards of screening or higher (international) standard of screening would need to be adopted for domestic passengers.

### *In both cases*

333.8 Processes would need to be developed to prevent the post-screening transfer of goods between non-passengers and passengers (for example, duty-free goods, cash).

333.9 Would require passengers (on domestic aircraft of 90 seats or less) who are not currently screened to be screened.

333.10 Would require legislative amendment.

333.11 May create inconsistencies in practice between airports.

334 We do not have a final view on the merits or otherwise of a CDT or on alternative configurations. We are keen to hear from both industry and the public on the risks, benefits, and costs of allowing these alternatives.

Question B16a: Should alternative airport designs or configurations be allowed in the future, for example a common departure terminal?

Question B16b: If yes, how should processing costs be funded?

# Part C: Carriage by air – airline liability

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1. Parts 9A and 9B of the Civil Aviation Act 1990 contain provisions relating to airline liability for international and domestic carriage by air of passengers, baggage, and cargo.
2. International airline liability provisions are based on the Convention for the Unification of Certain Rules for International Carriage by Air (the 1999 Montreal Convention). Just over half of the States who are members of the International Civil Aviation Organization (ICAO) have signed and adopted the 1999 Montreal Convention.<sup>1</sup> New Zealand is a party to the Convention.
3. Domestic airline liability provisions were included in the Civil Aviation Act via a Civil Aviation Act amendment in 2004, which:
  - 3.1. repealed the provisions of the Carriage of Air Act 1967 relating to civil liability for mental injury resulting from a domestic air accident<sup>2</sup>
  - 3.2. re-enacted provisions similar to those in the Carriage of Air Act relating to liability for passenger delay in a domestic air service.

## Objectives and criteria

4. The following objectives were established at the outset of the Review to assess the Civil Aviation Act's airline liability provisions:
  - 4.1. to confirm that New Zealand's international carriage by air provisions are still relevant to international convention requirements
  - 4.2. to ensure that the current domestic carriage by air provisions fairly balance the interests of passengers (consumers) and airlines.
5. In assessing the provisions, the following criteria were used to determine whether these objectives were met:
  - 5.1. consistency with international convention requirements
  - 5.2. alignment with New Zealand's consumer protection framework
  - 5.3. flexibility and durability
  - 5.4. striking an appropriate balance between the rights of airlines and passengers
  - 5.5. providing net benefits.

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<sup>1</sup> 103 of the 191 ICAO Member States have ratified the 1999 Montreal Convention.

<sup>2</sup> The ACC regime in New Zealand covers passengers in the event of a personal injury or death in a domestic air accident.

### Overall assessment

#### International airline liability provisions

6. The international airline liability provisions in the Civil Aviation Act are focused on liability in the event of injury to, or death of, a passenger; damage or delay of baggage and cargo; and delay of passengers.
7. These provisions have been reviewed in their entirety as part of the present Review. The Review has confirmed that these provisions are still necessary, relevant, and appropriate to give effect to New Zealand's international convention requirements.<sup>3</sup>

#### *Advance payments*

8. Sections 91T(1)(a) and (b) of the Civil Aviation Act allow the Governor-General to make regulations to prescribe advance payments for compensation, or arrangements for making advance payments for compensation, to relatives of passengers injured or killed during international air carriage.<sup>4</sup> To date, no regulations have been made under section 91T(1).
9. Work to assess whether regulations for advance payments should be made is not currently on the Ministry of Transport's work programme. Any future work can occur outside of this Review.

#### Domestic airline liability provisions

10. The domestic airline liability provisions in the Civil Aviation Act relate to passenger delay. Some key provisions are:
  - 10.1. Liability of a carrier in situations of delay (section 91Z) — carriers are liable for damage caused by delay, except in situations where they can prove that the delay was a result of matters outside of their control (such as meteorological conditions) or was necessary to save life.
  - 10.2. Limitation on liability (section 91ZC) — carriers are liable for the lesser of the amount of damage proved to have been sustained as a result of the delay, or an amount representing 10 times the sum paid for the carriage.<sup>5</sup>
  - 10.3. Limitation of actions (section 91ZL) — passengers are limited from taking an action against a carrier after two years from the date the aeroplane arrived at its destination or, if it didn't arrive, the date on which it should have arrived or the date carriage stopped, whichever is later.

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<sup>3</sup> The Warsaw Convention, the Guadalajara Convention, and the Montreal Convention.

<sup>4</sup> Article 28 of the Montreal Convention provides for air carriers to make advance compensation payments in accordance with national law to relatives of passengers injured or killed during carriage to which the Convention applies.

<sup>5</sup> The Act does not prevent carriers from contracting to increase the amount of liability.

## Part C: Carriage by air – airline liability

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11. Compensation for serious injury and/or death sustained by a passenger as a result of an accident occurring on a domestic air service is governed by the ACC regime, except where the passenger is on the domestic leg of an international flight that he or she has travelled on (in which case Part 9A of the Act applies). Damage to baggage or cargo is addressed under the Carriage of Goods Act 1979. There may also be residual situations in which it is appropriate to take action under the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.
12. Three airline liability matters are addressed in the following section:
  - 12.1. the necessity of specific domestic airline liability provisions
  - 12.2. the effectiveness of specific domestic airline liability provisions
  - 12.3. the limit on liability for damage caused by delay.

### Items

#### Item C1: The necessity of specific domestic airline liability provisions

##### Background

13. Circumstances in which air carriers may avoid liability are contained in sections 91Z(2) and 91ZA of the Civil Aviation Act and section 33 of the Consumer Guarantees Act.
14. In the context of Part 9B of the Civil Aviation Act, limitation is concerned with the quantum of damages and the time for bringing any action. Under the Consumer Guarantees Act, there are no specific limits on liability. The courts or dispute tribunal would decide the quantum. The time for bringing proceedings under the Consumer Guarantees Act could be decided under the Limitation Act 2010.
15. Both Part 9B of the Civil Aviation Act, and the Consumer Guarantees Act govern matters of private law; therefore, it is the responsibility of the passenger to seek compensation for delay.

##### Are the domestic airline liability provisions in the Civil Aviation Act necessary?

##### *Exemptions to liability*

16. Under Part 9B, section 91Z of the Civil Aviation Act, a carrier is not liable for damage by delay if the carrier can prove that the delay:
  - 16.1. arose by reason of meteorological conditions; compliance with instructions, advice, or information given by an air traffic control service; or obedience to orders or directions given by a lawful authority
  - 16.2. was made necessary by force majeure
  - 16.3. was necessary for the purpose of saving or attempting to save life.
17. If Part 9B were removed from the Civil Aviation Act, air carriers would have greater scope to argue against liability. For example, under section 33 of the Consumer Guarantees Act, there is no right of redress against the supplier of a service if the service is provided in breach of the specified guarantees because of:
  - 17.1. an act or default or omission of, or any representation made by any person other than the supplier or a servant or agent of the supplier; or
  - 17.2. a cause independent of human control.

##### *Onus of proof*

18. A key difference between the Consumer Guarantees Act and the Civil Aviation Act is the burden of proof.
19. Under the Civil Aviation Act, the onus is on the carrier to prove that the delay was a result of matters outside the carrier's control.

## Part C: Carriage by air – airline liability

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20. However, under section 28 of the Consumer Guarantees Act, the onus is on the consumer to show that the carrier did not use reasonable skill and care in providing its services and that consumers have suffered a loss as a result. Under section 30 of the Consumer Guarantees Act, the onus is on the consumer to show that the services were not completed within a reasonable time.
21. Therefore, it is easier for a consumer to claim compensation for delay under the Civil Aviation Act.

### *Business travellers*

22. While the Consumer Guarantees Act provides protection for individuals, it does not provide protection for business travellers, as carriers can and have opted out of providing cover under that Act.<sup>6</sup> However, business travellers are covered under provisions in the Civil Aviation Act.
23. On 18 June 2014, the Consumer Guarantees Amendment Act 2013 introduced a new criterion for contracting out — that it must be *“fair and reasonable”* for the parties to be bound by such a provision.<sup>7</sup> This is a higher test for contracting out than in the current law and carriers will need to work out how to meet the criterion.

### *Distinction between other modes of transport*

24. For passengers travelling on other forms of scheduled public transport such as buses, trains and ferries, liability for delay is determined by common law in accordance with the Consumer Guarantees Act. Some have argued that air travel should be treated in a similar way to other forms of scheduled public transport. Historically, likely because of the cost involved, the approach to air travel has been somewhat different.
25. International air travel is governed by international conventions, which include liability for, among other things, delay of passengers, baggage and cargo. This has an impact on the approach taken to domestic air travel liability.
26. However, an aircraft that is delayed or overbooked is likely to have a higher impact on passengers than a delayed bus. In New Zealand, the time taken or distance travelled is often longer, and the cost higher. The provisions in the Civil Aviation Act give passengers quick and easy access to compensation when faced with unforeseen or inconvenient circumstances, such as missing a connecting flight or being stranded overnight.

### **Recommendation**

27. We consider that the domestic airline liability provisions in Part 9B of the Civil Aviation Act are still necessary because:
  - 27.1. without them, passengers may be deterred from seeking compensation because of court costs and the shift in the burden of proof
  - 27.2. the cap on liability provides air carriers with greater certainty about what compensation they may be obliged to provide in certain circumstances

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<sup>6</sup> See Jetstar's conditions of carriage: <http://www.jetstar.com/nz/en/conditions-of-carriage>; or Air NZ's conditions of carriage: <http://www.airnewzealand.co.nz/assets/PDFs/conditions-of-carriage-18-january-2013.pdf>.

<sup>7</sup> See section 13 of the Consumer Guarantees Amendment Act 2013.

## Part C: Carriage by air – airline liability

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- 27.3. they provide less scope to avoid liability than the Consumer Guarantees Act
- 27.4. they align with the approach taken to liability for delay in international air carriage.

Question C1a: Should air carriers continue to be presumed liable for loss caused by delay in exchange for a limit on that liability? Please state your reasons.

Question C1b: The Civil Aviation Act delay provisions relate to passenger delay. Should there be a presumption of fault for delay in the carriage of baggage as well?<sup>8</sup>

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<sup>8</sup> Note that the Carriage of Goods Act appears to cover the loss of or damage *to* baggage but not losses/damages resulting *from* delayed baggage. So the passenger would need to seek redress under the Consumer Guarantees Act.

### Item C2: The effectiveness of specific domestic airline liability provisions

#### What is the problem?

28. We have no data to confirm how often section 9B provisions are referred to by delayed passengers, and we are not aware of any specific examples of passengers seeking compensation under these provisions. This may be because consumers are not well informed of these provisions and/or because carriers have generally been proactive in offering compensation.
29. To the extent that the latter is occurring, it may be the case that the Civil Aviation Act's provisions are incentivising carriers to ensure that dissatisfied passengers are compensated. Moreover, even if the provisions have not been explicitly relied upon to date, the protections may be important with the possibility of additional "no frills" air carriers entering the market.

#### Option 1: Status quo and potential educational measures developed (Ministry of Transport preferred option)

30. To date, we have not identified fundamental problems with the provisions in Part 9B of the Civil Aviation Act. While it seems that these provisions have been seldom referred to, they may be providing an incentive for carriers to compensate consumers because the onus of proof is on the carrier to prove that they have not caused damage by delay.
31. As part of this Review we have discovered that some smaller domestic carriers are still referencing the repealed Carriage by Air Act 1967, rather than Part 9B of the Civil Aviation Act or other consumer legislation, in their conditions of carriage. We are contacting carriers about this issue.
32. Given this situation, as well as passengers' lack of knowledge and awareness about the provisions in the Civil Aviation Act, further educational measures (such as guidelines or information on consumers' rights) to better inform passengers and carriers could be explored. This issue is examined further below, as are some other issues that have been raised if the status quo continues.

#### What educational measures could be developed?

33. A range of non-regulatory measures could be developed to better inform consumers of their rights. These could include:
  - 33.1. information on the provisions in the Civil Aviation Act displayed online
  - 33.2. a 'Know Your Rights' pamphlet for passengers, with information on the provisions in the Civil Aviation Act and the Consumer Guarantees Act — working in conjunction with carriers and the Ministry of Business, Innovation and Employment
  - 33.3. adopting an approach similar to one used in Australia, working with carriers to introduce a 'Customers Charter' or something similar, which could outline each carrier's policies on responding to passenger complaints.
34. Departments that administer legislation in New Zealand are responsible for the provisions contained in that legislation. The Ministry of Transport, as the department

## Part C: Carriage by air – airline liability

that administers transport legislation, would be responsible for developing educational measures.

35. We will explore the option of educational measures outside of the Review, and in liaison with industry stakeholders as appropriate. Our initial view is that basic guidance (that could be displayed on the Ministry of Transport website) about the international as well as domestic provisions contained in the Civil Aviation Act would be sufficient.

### Conclusion

36. The status quo is our preferred option. This would mean Part 9B of the Civil Aviation Act remains and sits alongside generic consumer law. This option would also include considering educational measures that could be developed to inform consumers of their rights. This could happen separately from this Review.

### Option 2: Strengthen the consumer protection provisions in the Civil Aviation Act

37. Option 2 would result in stronger provisions to protect passengers' rights in situations of delay and/or cancellation.
38. A number of different approaches could be adopted to strengthen the consumer protection provisions in the Civil Aviation Act. One provision would be to adopt a definition of 'delay' in Part 9B of the Civil Aviation Act to provide clarity about the timeframe that constitutes a delay — for example, three hours.
39. European Union Regulation 261/2004<sup>9</sup> has defined 'delay' according to distance travelled and when the passenger was delayed and/or their flight cancelled. New Zealand could adopt a similar approach that could be tailored towards our domestic market (for example, distance travelled).

Benefits	Costs
<ul style="list-style-type: none"> <li>• Could strengthen consumers' rights of redress against carriers.</li> <li>• Clarifies uncertainty in legislation that does not define what delay means</li> </ul>	<ul style="list-style-type: none"> <li>• Could impose unreasonable costs on carriers without justification for doing so.</li> <li>• Could create perverse incentives such as in the United States where carriers now cancel flights instead of delaying them as it means they do not have to pay compensation.</li> </ul>

40. We note that other jurisdictions, for example Canada, the United States, and the United Kingdom provide additional aviation industry-specific protections.<sup>10</sup>

### Conclusion

41. At this stage we have not identified significant problems for consumers with the current provisions in the Civil Aviation Act. The main problem appears to be with whether passengers and carriers are aware of the current consumer protections available. In our initial view, the scale of the problem is not large enough in New Zealand to necessitate strengthening the provisions in the Act at this time.

<sup>9</sup> [http://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC_1&format=PDF)

<sup>10</sup> Appendix C1 outlines developments within the international aviation community and other states.

## Part C: Carriage by air – airline liability

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Question C2a: Which is your preferred option? Please state your reasons.

Question C2b: Do you think that educational measures are necessary? If so, what should they be?

Question C2c: Do you think that stronger protection provisions are necessary in the Civil Aviation Act?

Question C2d: If you answered yes to question C2c, what do you think should be included in the Act?

## Part C: Carriage by air – airline liability

### Item C3: The limit on liability for damage caused by delay

42. Given our preferred option, retaining the existing domestic airline liability provisions, we have considered the current liability limits as set out in the Civil Aviation Act.
43. Section 91ZC of the Civil Aviation Act limits liability of the carrier for damage caused by delay to the lesser of the amount of the damage sustained, or an amount representing 10 times the sum paid for the carriage. This section of the Civil Aviation Act was carried over from the Carriage by Air Act 1967. The sufficiency or appropriateness of the value was not assessed at that time.
44. The inclusion of the liability amount representing 10 times the sum paid for the carriage responded to Article 19 of the English Non-International Carriage Order 1952, where compensation for delay was set at a minimum of double the sum paid for the carriage but with no limit on liability. Ten times the sum paid for the carriage was considered to be a compromise — double the sum was too low for passengers, and no limit on liability did not provide certainty for carriers.

#### Options

##### Option 1: Status quo

45. If feedback from the consultation shows that the limit of 10 times the sum paid for domestic air carriage is adequate to compensate passengers and gives carriers appropriate certainty, then the status quo may be preferable.

##### Option 2: Revise the domestic liability limit for damage caused by delay

46. Given the current liability limit was set in 1967 — when the costs of air travel were quite different from today — we are interested to hear about the liability limit and whether 10 times the sum paid for domestic air carriage is still fair and reasonable.
47. The table below illustrates the domestic liability limit — 10 times the sum paid — based on two regional air fares sourced on-line.

Flight	Airfare	Liability Limit
Invercargill – Kaitaia	\$680 – \$900	\$6,800 – \$9,000 (10 x amount paid)
Wellington – Auckland	\$50 – \$364	\$500 – \$3,640 (10 x amount paid)
<i>as a comparison</i>		
Liability limit for international air carriage		\$NZ 8,722.71 <sup>11</sup>

<sup>11</sup> The limit for international carriage is 4,694 special drawing rights, which equates to approximately \$US7,242.49 or \$NZ8,722.71.

## Part C: Carriage by air – airline liability

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Question C3a: Which is your preferred option? Please state your reasons.

Question C3b: If you selected Option 2 for Question C3, what do you consider would be an appropriate liability limit for domestic air carriage and why?

### Appendix C1

#### International environment

48. At the ICAO Worldwide Air Transport Conference in Montreal in March 2013, one of the agenda items was international and domestic carriage by air. The ICAO Secretariat and other member States presented papers on the effectiveness of consumer protection regulations.
49. The conference noted the importance of protecting the interests of consumers and the need for more convergence and compatibility between different member States' domestic consumer protection provisions. It was recommended that ICAO establish an ad hoc group to develop some high level, non-prescriptive core principles on consumer protection that strike an appropriate balance between the protection of consumers and industry competitiveness.
50. At the Twelfth Meeting of the ICAO Air Transport Regulation Panel in May 2014, the Panel considered a core set of non-binding principles on consumer protection. The Panel was asked to consider if and how the core principles on consumer protection, and related future developments, should be incorporated into existing ICAO material.
51. The International Air Transport Association (IATA), a representative group of 240 carriers around the world, released its own core principles for passenger rights regulation at its annual meeting in June 2013.<sup>12</sup> These principles were developed in response to concerns about the complex web of consumer protection laws in different countries and calls for more unification of these laws across countries.

#### Approaches other countries have taken

52. A range of approaches has been adopted in overseas countries to consumer protection for domestic carriage by air. Most countries have their own generic consumer law (similar to New Zealand), and some like Australia and Singapore rely mainly on that to cover passenger rights for carriage by air. Other countries like the United Kingdom, the European Union, and the United States take a stronger regulatory approach to consumer protection with aviation-specific provisions.
53. International experience has been that strengthening consumer protection provisions has developed as a result of one-off incidents. For example, in 2007 in United States passengers were stranded on the tarmac because of a blizzard, without access to food, water and lavatories. As a result, the United States Congress put in place a law prohibiting carriers operating domestic and international flights from allowing an aircraft to remain on the tarmac for more than three hours, with exceptions for safety, security and air traffic control related-reasons. The law also requires United States carriers to provide basic services such as access to lavatories and water in the event of extended tarmac delays.

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<sup>12</sup> <http://www.iata.org/pressroom/pr/Pages/2013-06-03-03.aspx> and [http://www.icao.int/Meetings/a38/Documents/WP/wp073\\_en.pdf](http://www.icao.int/Meetings/a38/Documents/WP/wp073_en.pdf).

## Part C: Carriage by air – airline liability

54. In Europe, European Union Regulation (EC 261/2004) establishes minimum rights for passengers in cases of denied boarding, denied flights, and cancelled flights; as well as automatic compensation to passengers.<sup>13</sup> Additionally, a recent decision in the European Union Court of Justice has meant that delay has been defined as three hours or longer, enabling consumers to claim for compensation in these instances.
55. As well as regulation, countries like Canada, Australia and the United Kingdom have developed non-regulatory initiatives to strengthen consumer protection in their respective countries. The European Commission has also launched a free app for smart phones that details passengers' rights for air and rail transport when delayed or when baggage is lost.

### Case study: Australia

The Australian government has worked with airlines to establish the 'Airline Customer Advocate' — an independent complaints handling body, funded by participating airlines, that acts as a facilitator between passengers and airlines to resolve complaints within 20 days. It is an alternative option available to any customer who has been unable to resolve a complaint directly with an airline. If customers are not satisfied with the outcome, they can still take action under Australian consumer law.

In addition, the government has also worked with airlines to introduce a 'Customers Charter', which outlines each airline's service commitment and complaint handling procedure to provide greater transparency for customers when choosing between airlines and the various fare types on offer.

56. Initiatives such as these are positive non-regulatory tools that can strengthen consumers' knowledge about their rights as well as provide information to businesses on the relevant regulations that need to be followed.

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<sup>13</sup> Compensation depends on the distance of the delayed/cancelled flight and when the flight has been delayed/cancelled. The maximum amount of monetary compensation is €600 for a delay of more than four hours and a flight length of over 3,500km.

# Part D: Airline licensing and competition

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1. Part D: Airline licensing and competition covers the review of existing parts 8A and 9 of the Civil Aviation Act 1990.
2. Part 8A covers international air services licensing. It sets out the provisions relating to application, authorisation, variation, transfer, renewal, suspension and revocation of licences.
3. Part 9 of the Civil Aviation Act 1990 provides for:
  - 3.1. authorisation of certain arrangements in international air transport
  - 3.2. the Minister of Transport to issue commission regimes
  - 3.3. authorisation of tariffs by the Minister

and sets out the application of the Commerce Act 1986 to Part 9 of the Civil Aviation Act 1990.

### International air services licensing

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#### Context

4. International airlines serving New Zealand on a scheduled basis are required to hold an International Air Service Licence or an Open Aviation Market Licence (Part 8 of the Civil Aviation Act 1990 refers). Among other things, these licences prescribe the routes and capacity that may be operated by the airline concerned. Licensing provides the mechanism for authorising and monitoring the exercise of the traffic rights exchanged in New Zealand's bilateral negotiations.
5. For New Zealand airlines, licensing is also the method for allocating New Zealand traffic rights which, under many air services arrangements, are still restricted.
6. International air services around the world are governed by bilateral and multilateral air services agreements.
7. The Ministry of Transport has primary responsibility for conducting international air services negotiations. Matters covered in air services agreements include:
  - 7.1. routes that can be flown
  - 7.2. capacity (frequency and aircraft types) that may be offered
  - 7.3. 'designation' criteria (the basis on which a particular airline is eligible to exercise the traffic rights negotiated by a particular government)
  - 7.4. how many airlines may operate
  - 7.5. how tariffs are regulated.
8. New Zealand has air services agreements with 64 partners as of March 2014.
9. New Zealand's International Air Transport Policy Statement sets the framework for negotiating these agreements.<sup>1</sup>

#### Background

10. Part 8A of the Civil Aviation Act 1990 prohibits anyone from operating a scheduled international air service or a non-scheduled international flight to/from New Zealand without the appropriate authorisation. It also specifies who may make authorisation decisions, prescribes the criteria to be considered when doing so and allows conditions to be imposed.
11. There are four distinct classes of authorisation:
  - 11.1. a scheduled international air services licence for New Zealand airlines, granted by the Minister (sections 87D–87K)
  - 11.2. a scheduled international air services licence for foreign airlines, granted by the Secretary for Transport (sections 87L–87Q)

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<sup>1</sup> <http://www.transport.govt.nz/ourwork/air/internationalairtransportpolicyreview/iatrpolicystatement/>

## Part D: Airline licensing and competition

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- 11.3. an open aviation market licence for New Zealand and foreign airlines for scheduled and non-scheduled services, granted by the Secretary for Transport (sections 87R–87Z)
- 11.4. a commercial non-scheduled international flight authorisation for New Zealand and foreign airlines, granted by the Secretary for Transport or Ministry staff under delegation (section 87ZE).

### Objectives and criteria of these sections

- 12. The objectives of these sections are to support an efficient decision-making process for the authorising air services licenses without compromising the safety and security requirements of the Director of Civil Aviation (the Director).
- 13. The criteria used to measure whether the objectives are met are:
  - 13.1. clear, flexible and concise legislation
  - 13.2. increased efficiency of the process
  - 13.3. safety or security is not compromised.

### Overall assessment of the sections

- 14. Although the process for assessing air services licence applications made under Part 8A is essentially sound, it can be protracted because:
  - 14.1. the Act does not fully distinguish between licensing decisions that involve an allocation of scarce rights and those that do not
  - 14.2. the Act provides a definition for scheduled international air services that follows an International Civil Aviation Organization (ICAO) definition. By implication, a non-scheduled international flight is a service that does not meet that definition. However, this does not necessarily provide a fair reflection of the diverse variety of commercial non-scheduled services that can be operated, nor does it necessarily reflect the types of ad hoc or supplementary services that are authorised according to New Zealand's international air transport policy.

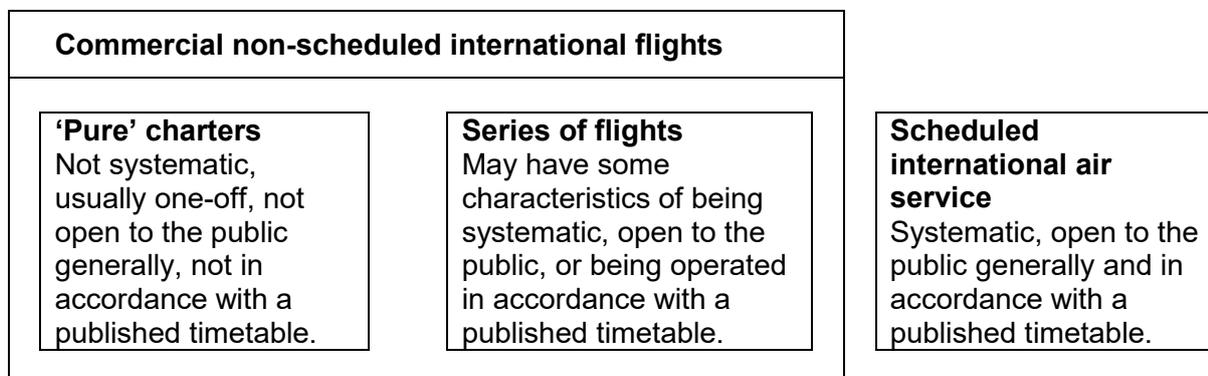
### Items

#### Item D1: Commercial non-scheduled flights

16. The power to authorise commercial non-scheduled international flights rests with the Secretary for Transport (the Secretary). In practice, this authorisation is done by Ministry staff under delegation.
17. The operator of a proposed commercial non-scheduled international flight is required to advise the Ministry of the details of the flight.
18. If there are more than two take-offs or landings within New Zealand in any consecutive 28-day period, or more than eight take-offs or landings within New Zealand in any consecutive 365-day period, the operator also needs to apply for the appropriate operating certificate from the Director.<sup>2</sup>
19. The Ministry assesses applications for authorisation of commercial non-scheduled international flights on a case-by-case basis, taking into consideration the following criteria set by the Minister:
  - 19.1. whether or not the flight circumvents bilateral air services arrangements
  - 19.2. the safety and security requirements of the Director.

#### What is the problem?

20. While the Act only distinguishes between two classes of international air services (non-scheduled flights and scheduled international air services), in practice three broad categories exist and the boundaries between them are not always clear.



21. The 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 service".
22. Changes in airline distribution channels has also made it more difficult to determine whether a flight is available to the public generally and has clouded the meaning of the term published timetable'.

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<sup>2</sup> Part 129 foreign air operator certificate or Part 119 air operator certificate.

## Part D: Airline licensing and competition

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23. ICAO has noted that with the evolution of the airline industry and the introduction of liberal air policies in some States and regions, the distinction between scheduled and non-scheduled air services has become increasingly blurred. For operations between States within the European Union, the regulatory distinction between the two has effectively been eliminated. ICAO guidance also recognises the existence of so-called 'programmed' or schedulised charters.
24. Operators may seek to operate services that fall outside the routes or frequency for which they hold an international air services licence. In other cases, operators who do not hold a licence may seek to offer a series of flights to meet seasonal demand.
25. The requirement for authorisation for commercial non-scheduled international services<sup>3</sup> places an administrative burden on both operators and the Ministry of Transport. Where a flight or series of flights is consistent with the criteria set out in paragraph 19 above there is usually little or no reason to withhold authorisation.

### Options

#### Option 1: Status quo

26. This option would continue to require, and provide for, authorising commercial non-scheduled international flights. This option would also leave the precise scope of non-scheduled services under defined.
27. In practice the Secretary or his/her delegates authorise the operation of all flights for which authorisation is sought, provided they:
  - 27.1. meet the safety and security requirements of the Director
  - 27.2. do not circumvent bilateral air services arrangements.
28. Ministry guidelines to inform decisions by the Secretary for his/her delegates would be retained. (Six months would continue to be the defacto definition of when a series of flights take on the nature of a scheduled service and should, therefore, be covered by an air services licence.)<sup>4</sup>
29. Requiring formal authorisation for infrequent commercial flights imposes unnecessary compliance costs on the operators of charter flights that meet the safety and security requirements of the Director, do not circumvent bilateral arrangements, and would serve demand for services into New Zealand.

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<sup>3</sup> This requirement reflects New Zealand's obligations under the Chicago Convention, Article 5 refers. Some commercial flights do not require authorisation. Essentially, these are medivac flights, but could also include medical retrieval flights; that is, collecting/delivering donor organs. We have no record of how many such flights occur.

<sup>4</sup> <http://www.transport.govt.nz/assets/Uploads/Air/Documents/Commercial-non-scheduled-international-flights-information.pdf>

## Part D: Airline licensing and competition

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### **Option 2: Remove the need for case-by-case authorisation for services that do not follow a systematic pattern and provide explicitly for authorising supplementary services or a systematic series of flights** (Ministry of Transport preferred option)

30. Under this option the Act could be amended to clearly provide for three classes of commercial international air services:
  - 30.1. non-systematic services which would not require authorisation by the Secretary
  - 30.2. services operated outside of an international air services licence (these may be systematic and may be open to the public generally) which would need authorisation from the Secretary
  - 30.3. scheduled international air services that are operated pursuant to an international air services licence.
31. This option would remove the need for authorisation where commercial non-scheduled international flights are operated without a systematic pattern and the operator meets the safety and security requirements of the Director. The Secretary would then only require prior notification of the flights being operated and confirmation that the safety and security requirements of the Director have been met. These would be flights that in effect have none of the characteristics of a scheduled flight (i.e. they are not open to the public generally; not systematic; and not operated according to a published timetable).
32. Removing the requirement for authorisation of non-systematic flights would reduce the administrative burden on both the Ministry and on operators. In addition, a number of non-scheduled flights are operated at short notice in order to meet time-sensitive objectives. The requirement to seek authorisation could result in delays.
33. This option would also explicitly provide for authorisation (other than by issuing an international air services licence), by the Secretary, of services that have some or all of the characteristics of a scheduled service.
34. In taking this approach, the legislation will be aligned more fully with the intent of New Zealand's international air transport policy of recognising the benefits to the New Zealand aviation system of new or additional services by overseas airlines.
35. Under this option operators would still need to seek the Director's approval under sections 10 and 12 of the Act, and apply for an aviation document under section 7(1) in order to enter the system.
36. This approach would require a definition of systematic. Two options are:
  - 36.1. use the same threshold for authorisation by the Secretary as is used for requiring an foreign air operator certificate (that is, more than two take-offs or landings within New Zealand in any consecutive 28-day period, or more than eight take-offs or landings within New Zealand in any consecutive 365-day period)
  - or**
  - 36.2. explicitly define systematic as some other number of services on the same route over a particular time period.

## Part D: Airline licensing and competition

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37. The Ministry of Transport facilitates communication between an operator and Customs and the Ministry for Primary Industries (particularly for services into non-international airports). Information relevant to those agencies is also published on the Ministry of Transport website and in the New Zealand Aeronautical Information Publication.

Question D1a: Which is your preferred option? Please state your reasons.

Question D1b: Do you agree with the proposal to remove the need for authorisation of services that do not follow a systematic pattern? Please state your reasons.

Question D1c: If you answered yes to Question D1b, which approach to determining what is systematic do you prefer? Please state your reasons.

Question D1d: If you selected Approach 2, how should the term systematic be defined?

### Item D2: Allocation decisions for New Zealand international airlines

39. The Minister of Transport is the licensing authority for New Zealand airlines operating under a scheduled air service licence (Section 87D). The Secretary for Transport is the licensing authority for New Zealand airlines operating under an open aviation market licence (Section 87S).
40. Licensing decisions involving the allocation of *limited rights* (routes or capacity) to New Zealand airlines should continue to sit with the Minister. This would ensure that the decision stays at a ministerial level, where considerations beyond Air Services Agreements and including international comity<sup>5</sup>, competition and the wider impact of air services licensing are taken into account. It also ensures that an elected official is tasked with representing the public interest when making this decision.

#### What is the problem?

41. An Air Services Agreement may place no limits on routes and/or capacity. In those cases, there is no allocation decision to be made. The administrative burden of the status quo may be excessive given that decisions involving *unlimited rights* are unlikely to have any public detriment. To reduce administrative burden, such decisions could be designated to the Secretary for consideration.

#### Options

##### Option 1: Status quo

42. While the status quo does not create a large administrative burden, licensing decisions involving *unlimited rights* place a relatively simple decision before the Minister for his/her consideration, where a public detriment would be hard to find. No substantial costs would be incurred in retaining the status quo, but doing so may be a missed opportunity to ensure that the provision better reflects the more liberal framework of air services arrangements currently in place.

##### Option 2: Status quo and Secretary to consider New Zealand licence involving unlimited rights under delegation

43. Under the State Sector Act 1988, the Minister could delegate to the Secretary the power to make licensing decisions involving unlimited rights.
44. A Ministerial delegation would provide a flexible mechanism to shift the decision-making power to the Secretary, as it would allow the Minister to reclaim his/her licensing authority if he/she saw fit to do so. In this way, unlike a legislative amendment, a delegation would be more easily reversible.

##### Option 3: Amend the Act to allow the Secretary to consider New Zealand licence involving unlimited rights (Ministry of Transport preferred option)

45. A provision allowing the Secretary to consider an application from a New Zealand international airline for a scheduled international air services licence would still retain the same matters the Minister would be required to consider when processing the application.

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<sup>5</sup> International comity comprises legally nonbinding practices adopted by States for reasons of courtesy.

## Part D: Airline licensing and competition

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46. Where the licensing decision involves *unlimited rights*, there would be no public interest matters for consideration, as the decision would not involve an allocation of rights but simply granting a previously agreed-to set of open rights that were signed off by the Minister and Cabinet.
47. The global framework of air services arrangements also reflects a trend towards liberalisation and more open air service rights. New Zealand's policy of pursuing liberal agreements with other countries was approved by Cabinet.
48. Therefore, under this option, while the decision to allocate open rights to New Zealand airlines would remain with the Secretary, Ministers would still have an input into the types of air services arrangements New Zealand negotiates that have far greater impacts on the public interest than air services licensing.
49. Furthermore, the principle of the Secretary making licensing decisions where there is no allocation decision to be made is already present in the Act, as the Secretary is the licensing authority for open aviation market licences.
50. Option 3 is our preferred option given that there is no public detriment arising from an allocation decision concerning an unlimited set of air service rights.

Question D2: Which is your preferred option? Please state your reasons.

### Item D3: Public notice

52. At present the Act requires the Secretary to give notice in the *New Zealand Gazette* when an application for a new, amended or renewed scheduled international air service licence by a New Zealand airline is received. At least 21 working days for representations to be received must also be provided.

#### What is the problem?

53. The necessity of this provision is questionable, given that the Ministry has received only one submission in response to an air service licence Gazette Notice over the last 20 years.
54. As Air Services Agreements have increasingly provided for open routes and capacity the need to alert other, actual or potential New Zealand airlines that available rights are being sought by another airline is diminishing.
55. Although the *New Zealand Gazette* remains an important official publication, in practice stakeholders are more likely to look at sources such as the Ministry website for information.
56. The period of 21 days may delay the start of commercial operations.

#### Options

##### Option 1: Status quo

57. While we are not aware of the status quo being overly burdensome, the current process adds little value to the processing of an application for an amended or renewed scheduled international air service licence by a New Zealand airline.
58. Although providing a 21-day submission period gives stakeholders time to consider the impacts of an application for a new or renewed scheduled air services licence, we consider that it is an unnecessary time burden for applications that do not involve an allocation of air service rights between airlines already operating in the system.

##### Option 2: Amendment to the Act (Ministry of Transport preferred option)

59. The 21 day period could be reduced, for example to 14 days, without having an impact on the ability of third parties to consider and make submissions. It would align with New Zealand's International Air Transport Policy which seeks liberal arrangements with other countries, as it would allow for earlier commencement of air services.
60. Another situation to consider is where the rights being sought are unlimited so allocation to one airline does not preclude services by another operator. Any potential representations in this case would not be on the basis that the submitter is themselves seeking the capacity available. In addition, any safety and security concerns will be addressed by the Act itself. These issues could be dealt with by legislating for a notice to be given only when limited rights are being allocated.
61. Our preferred option is to amend the Act to:
- 61.1. reduce the submission period from 21 days, for example to 14 days or 10 working days

## Part D: Airline licensing and competition

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- 61.2. require notice to be given only when limited air service rights for routes or capacity are being allocated
- 61.3. require a notice be published in the *New Zealand Gazette* and in any other medium the Minister/Secretary considers appropriate (for example, Ministry of Transport website).

Question D3a: Which is your preferred option? Please state your reasons.

Question D3b: What is the appropriate submission period to balance the desirability of allowing third parties to make representations, with reducing delay for airlines that are planning and implementing services?

### Item D4: Transferring licences

63. The Act provides for the transferring of scheduled international air service licences and open aviation market licences between operators. (See sections 87K and 87Y respectively.)

#### What is the problem?

64. In practice, these provisions require the Minister or Secretary to treat transfers as if they were applications for a new licence.
65. We have no record that these provisions have been used at any point over the last 20 years.
66. Mergers, change of legal names and variations to capacity have all been dealt with through using other provisions in the Act.
67. Additionally, the Minister has the authority, under the Act, to remove or revoke licences under certain conditions, including if the services authorised under the licence have been terminated (for example, when a business has collapsed).

#### Options

##### Option 1: Status quo

68. Retaining these sections will not incur significant administrative or regulatory burden.
69. However, considering that mergers and change of legal names have been made without using section 87K or 87Y, it is unlikely that retaining this provision would affect the licensing process.

##### Option 2: Repeal sections 87K and 87Y, and amend sections 87J, 87Q and 87X (Ministry of Transport preferred option)

70. Sections 87K and 87Y appear to be redundant and for the purpose of a clear and concise regulatory framework, repealing these provisions is our preferred option.
71. For clarity, an amendment to sections 87J, 87Q and 87X could include the name of the operator as a term or condition of the licence that can be varied by the Minister/Secretary.<sup>6</sup>

Question D4: Which is your preferred option? Please state your reasons.

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<sup>6</sup> Sections 87J and 87Q of the Act provide for the variation of terms and conditions of a scheduled international air service licence for New Zealand airlines and foreign airlines respectively. Section 87X provides for the variation of terms and conditions of an open aviation market licence for all airlines.

## Part D: Airline licensing and competition

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### Item D5: Airline operations from countries with which New Zealand does not have an Air Services Agreement

73. Section 87L provides for the licensing of foreign international airlines of countries with which New Zealand does not have an Air Services Agreement or similar arrangement.

#### What is the problem?

74. This provision was initially intended to allow airlines from Taiwan to be licensed to operate services to New Zealand without a full Treaty-status Air Services Agreement in place.
75. Its only use to date was in March 2014 when Qatar Airways was licensed to offer code-share services to New Zealand before a negotiated Air Services Agreement had been agreed by Cabinet (and thus brought into provisional effect).

#### Options

##### Option 1: Status quo (Ministry of Transport preferred option)

76. The example above demonstrates one rationale for retaining this provision: to promote competition in the New Zealand aviation market.
77. Retaining the ability to issue a licence in the absence of an Air Services Agreement would also be consistent with New Zealand's International Air Transport Policy which seeks to grant approval for extra-bilateral services pending new or expanded air services arrangements being put into place.
78. The status quo is our preferred option.

##### Option 2: Repeal

79. It could be argued that this option would give New Zealand a stronger bargaining position from which to enter air services negotiations as it would be able to seek reciprocity more readily from the other party. However, this is unlikely to be the case as our approach in the New Zealand International Air Transport Policy to services that benefit the New Zealand economy are clear.
80. Repeal would appear to be a backward step in air services liberalisation and would introduce a significant barrier to operating commercially viable air services.
81. It would also restrict the ability of the Minister to authorise air services as only carriers from countries with which New Zealand has an Air Services Agreement would be permitted to apply for a licence.

Question D5: Which is your preferred option? Please state your reasons.

### International air carriage competition

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83. Existing Part 9 (sections 88–91) of the Act provides for the authorisation of certain arrangements in international air transport, including fixing capacity (number of flights), fixing and applying of tariffs (price of an air ticket), and issuing commission regimes (which specify arrangements between airlines and booking agents). The effect of authorisation is that the arrangements are exempt from sections 27 to 29 of the Commerce Act. These provisions do not apply to domestic aviation or airline equity (shareholding/investment) arrangements.

Since 2000:

- Authorisation has been sought for 30 alliance or code-share arrangements<sup>7</sup> This has included major arrangements such as:
  - the Air New Zealand–Qantas proposal in 2006 (subsequently withdrawn)
  - the Air New Zealand–Virgin Alliance in 2010 and 2013
  - the Qantas–Emirates Cooperation Agreement in 2013.

Approximately 190 tariffs have been authorised.

The current commission regime was issued in 1983.

### Objectives and criteria of these sections

84. The objectives of these sections are to support a modern and efficient decision-making framework for addressing international air transport competition issues. Such a framework will help minimise the risk of detriment resulting from anti-competitive behaviour, while enabling airlines to engage in collaborative activity that enhances competition.

### Overall assessment of the sections

85. The criteria for considering international air transport arrangements captured within Part 9 of the Act are outdated. The provisions do not generally reflect international best practice, or take into account the realities of modern international air carriage arrangements. There are opportunities to improve both the criteria and transparency of decision-making processes and repeal redundant provisions.

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<sup>7</sup> Code share arrangements relate to fixing capacity. Alliance arrangements may relate to both fixing capacity and fixing or applying tariffs.

### Items

#### Item D6: Authorisation of contracts, arrangements and understandings between airlines

86. International law requires that if an airline is to provide international air services these services must be provided pursuant to an inter-governmental Air Services Agreement.
87. Although New Zealand has followed an open skies policy for many years some Air Services Agreements still:
  - 87.1. specify (sometimes in a very restrictive manner) the routes that the airlines may operate
  - 87.2. specify (sometimes in a very restrictive manner) the frequency, capacity or aircraft types that may be operated
  - 87.3. specify how many airlines from each side may operate
  - 87.4. specify at which point on the route passengers and cargo may be picked up or dropped off
  - 87.5. set out how prices should be set (sometimes requiring agreement between the airlines)
  - 87.6. in effect require airlines of either side to be substantially owned and effectively controlled by nationals of the designating (home) country.
88. These restrictions mean that airlines are not able to enter markets in all cases where they identify commercial opportunities. Mergers, in particular cross-border mergers, are much less common than in other industries.
89. At the time the Commerce Act was passed the primary mechanism through which airlines cooperated to provide travellers with a global service was the interline tariff setting mechanism and associated arrangements agreed through the International Air Transport Association (IATA).
90. Section 88 of the Civil Aviation Act was enacted to take account of the situation where the IATA system was viewed as integral to international aviation, but at the same time as being in direct conflict with the Commerce Act 1986.
91. Section 88 empowers the Minister to specifically authorise arrangements for tariffs 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”.

#### What is the problem?

92. Although elements of the IATA system remain important, airlines have increasingly cooperated 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. Full IATA fares are used by a small percentage of travellers.

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93. However, the regime for considering these arrangements has not changed, leading to the following issues for section 88:
- 93.1. The specific statutory criteria are more suited to assessing agreements on tariffs as opposed to broader cooperative agreements.
  - 93.2. 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.
  - 93.3. The legislation does not explicitly provide for a transparent process or consultation with interested parties.
  - 93.4. It is debatable whether conditions (including time limitations on authorisations) can be imposed on an authorisation. There is also no express power to revoke an authorisation.
  - 93.5. The authorisations provided are limited to matters relating directly or indirectly to tariffs and capacity. (This has been interpreted widely, but arrangements that do not involve tariffs and capacity, arrangements involving equity and arrangements relating to domestic services are subject to Commerce Commission oversight, meaning split regulatory oversight for aviation arrangements.)
  - 93.6. With the (proposed) changed regime for international shipping, international civil aviation represents an anomaly in the area of competition law. Decisions on aviation agreements are made by a Minister based on advice from aviation experts (or by aviation experts under delegated authority) rather than being made by an independent regulator with competition expertise.
  - 93.7. The legislation includes terms such as ‘community’ whose practical interpretation is not clear.
94. While no submitters in previous processes have pointed to any particular decision by the Minister of Transport or the Ministry as being ‘wrong’, stakeholders other than Air New Zealand do not have confidence in the process.

### *Productivity Commission*

95. In 2011, as part of its inquiry into international freight, the Productivity Commission was asked inter alia to pay particular attention to the effectiveness of current regulatory regimes (including those in the Civil Aviation Act 1990 and Shipping Act 1987) and the potential costs and benefits of alternative regulatory arrangements, with international comparisons. The Commission issued its final report in April 2012. It recommended that subject to a review of the passenger-specific impacts, the Government should consider adopting a Commerce Act-only regime for regulating international air services.
96. In its final report to government in April 2012, the Productivity Commission considered that an assessment of whether to retain or amend the current competition regime (in the Act) or adopt a Commerce Act-only regime should be based on:
- 96.1. ensuring the authorisation process for trade practices is based on a comprehensive analysis of the costs and benefits of trade practices

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- 96.2. ensuring the authorisation process has sufficient regard to New Zealand's international air services obligations
  - 96.3. ensuring the authorisation process is transparent and provides applicants and stakeholders with sufficient opportunities to make their case
  - 96.4. minimising the direct cost to government and affected parties
  - 96.5. minimising the indirect cost of chilled commercial activity.
97. The Productivity Commission noted that a Commerce Act regime would be more costly, but also more comprehensive.<sup>8</sup> The current approach has a stronger emphasis on civil aviation policy and international comity. The Productivity Commission also noted the Commerce Commission advised that it could take into account international civil aviation obligations in a Commerce Act authorisation process, if these obligations were described in a submission.
98. Following consideration of, and subsequent hearings about the Productivity Commission report, the Commerce Committee decided that international shipping services should transition to a Commerce Act-only regime, while competition issues in international aviation should be considered as part of this current Civil Aviation Act review. This approach would allow a full consideration of the issues, including passenger-specific implications that had been outside the scope of the Productivity Commission inquiry.

### Options

99. Although we gave consideration to retaining the status quo, this is not our preferred option. We consider that retaining it won't help achieve the objectives set out above because it:
- 99.1. does not ensure that the authorisation process is based on a comprehensive analysis of the costs and benefits of trade practices
  - 99.2. does not ensure that the authorisation process is transparent and provides applicants and stakeholders with sufficient opportunities to make their case
  - 99.3. is not flexible enough to deal with changes in the aero-political and commercial aviation environment
  - 99.4. is not consistent with international best practice.
100. We also considered an option to transition to the Commerce Act regime with sector specific provisions. This option would allow particular consideration to be given to the factors unique to international civil aviation.

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<sup>8</sup> The Productivity Commission considered that a Commerce Act-only regime would benefit from specialist Commerce Commission resources, including the then Mergers and Acquisitions Guidelines, economic and legal staff who specialise in competition assessments; and good working relationships with overseas competition authorities.

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101. One approach would be for the Commerce Act to require the Commerce Commission to take into account the views of the Minister of Transport when making a decision on arrangements relating to international air transport. To have a practical effect the requirement under any such provision would need to be more specific than the obligation to have regard to economic policies of the government pursuant to section 26 of the Commerce Act 1986.
102. A second approach would be to insert a requirement that in such cases the Commerce Commission must take into account New Zealand's international arrangements, agreements and obligations relating to international aviation. This option would bring the Commerce Commission's competition issues to bear while ensuring that the regulatory environment unique to international civil aviation is also specifically taken into account.
103. We do not recommend this approach because it could:
  - 103.1. undermine the cross economy nature of the Commerce Act regime, given no sector specific provisions are currently in the relevant part of the Commerce Act
  - 103.2. lead to a perception that international agreements are not a consideration that the Commerce Commission can take account of in other sectors
  - 103.3. confuse accountabilities on international aviation issues between the Minister of Transport and the Commerce Commission
  - 103.4. undermine the independence of the Commerce Commission if it was required to, in effect, abide by the views of the Minister of Transport.
104. We are considering the following two options:

### **Option 1: Amended Civil Aviation Act regime**

105. This option would amend Part 9 of the Act to include the following:
  - 105.1. an explicit requirement that the Minister assesses costs and benefits of the regime/assesses whether the arrangements are in the public interest (and only authorise arrangements with less competition where the benefits outweigh the costs)
  - 105.2. setting out the process the Minister/Ministry must follow in making a decision, including requirements to consult stakeholders and publish decisions
  - 105.3. providing for conditions to be attached to any approval (and for approval to be varied or revoked).
106. The advantages of amending Part 9 of the Act include:
  - 106.1. greater transparency and clearly defined processes for input from interested parties
  - 106.2. consistency with other jurisdictions (for example Japan and the United States)
  - 106.3. having an aero-political and aero-commercial expert decision-maker.

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### Option 2: Commerce Act

107. Under this option, Part 9 of the Civil Aviation Act would be repealed and the Commerce Commission would become responsible for considering clearance or authorisation for cooperative arrangements in international aviation. (The Commerce Commission's analytical framework and procedures would apply).
108. The regulatory constraints inherent in international aviation would be taken account of in market analysis, developing the counterfactual and looking at actual and potential competition in the market.
109. Air services/aero-political matters could be taken into account through submissions to the Commerce Commission by the Ministry, or if considered necessary through a section 26 (Commerce Act) statement. The advantages of applying the Commerce Act to civil aviation include:
  - 109.1. greater transparency and clearly defined processes for input from interested parties
  - 109.2. statutory independence
  - 109.3. access to the Commerce Commission's competition expertise
  - 109.4. consistency with the Australian regime (many airline alliances involve trans-Tasman sectors, and therefore require approval from authorities in both Australia and New Zealand).
110. The Commerce (Cartels and Other Matters) Amendment Bill introduces a collaborative activities exemption. This should make it clear to businesses that pro-competitive and efficiency enhancing activities are to be encouraged under the Commerce Act. The exemption has been designed so that businesses can assess for themselves whether their proposed collaboration falls within its scope. A number of administrative and lower level arrangements are likely to be covered by the exemption but comprehensive alliance arrangements may require clearance or authorisation.

Question D6a: Which is your preferred option? Please state your reasons.

Question D6b: How do the two options meet the criteria in paragraph 96?

Question D6c: What are the costs, benefits, and risks of the two options?

Question D6d: Under each option, how do you envisage the decision-making process working? (For example, under Option 1 who would undertake the competition analysis and what information gathering powers would be needed to undertake this analysis?)

### Item D7: Commission Regimes (Section 89)

#### What is the problem?

112. At the time the Act was passed in 1990, all air fares (tariffs) were approved by the Ministry — fares lower than those approved (illegal discounting) could not be offered. This regime was included in the Act in part to prevent travel agents taking a lower than standard commission, thereby offering consumers a lower price (base fare + commission) than the price set by regulation.
113. The current Commission Regimes in place for both passengers and cargo were issued in 1983.
114. The difficulties with the regimes include:
  - 114.1. With very limited exceptions the provisions of the Commission Regimes are no longer operative.
  - 114.2. They have not been enforced by government since 1985 (previous legislation provided that nobody could pay a commission except pursuant to a Commission Regime — but that clause was not carried over into the 1990 legislation).
  - 114.3. They are extraordinarily complex (even the drafter described them as having a large number of complex definitions complexly inter-related).
  - 114.4. The legislative history suggests that one of the drivers for the Commission Regime provisions was a desire to prevent manipulation of commission levels as a way to engage in illegal discounting of tariffs — a very different regulatory approach than is applicable today.

#### Options

##### Option 1: Status quo

115. Under this option, the provisions of section 89 would be retained, which allows a Commission Regime to be issued and retains the current Commission Regimes.

##### Option 2: Repeal and reissue

116. Under this option, the provisions of section 89 would be retained, which allows a Commission Regime to be issued and revises the current Commission Regime.

##### Option 3: Complete repeal (Ministry of Transport preferred)

117. This option would repeal the existing Commission Regime and section 89. This is our preferred option because the Commission Regime is archaic and confusing and does not robustly achieve any purpose we are aware of.

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118. That said, the Travel Agents Association of New Zealand (TAANZ) provides in its constitution that:

*TAANZ members shall comply with all acts of Parliament Regulations, and Statutory Notices which affect them in the management and operation of their business as travel agents. In particular a TAANZ member who deals on any terms whatsoever involving receipt of or payment of any commission or remuneration in lieu thereof in respect of international air services, or facilitates purchase or resale in respect of international air services on any terms whatsoever, shall at all times and in all respects comply with the obligations set out in the Civil Aviation (Passenger Agents' Commission Regime) Notice 1983.*

119. TAANZ, in particular, points to requirements relating to customer and airline funds and holding them in trust.
120. In this way the Commission Regime could be said to provide some regulatory underpinning to what is in essence a self-regulatory regime by parts of the industry.
121. Option 3 is our preferred option. We acknowledge that TAANZ references the current Commission Regime. However, in our view it is obsolete. Today's regulatory approach is hands-off — airlines and travel agencies set prices in the market.

Question D7: Which is your preferred option? Please state your reasons.

### Item D8: Authorisation of unilateral tariffs by the Minister (Section 90)

#### What is the problem?

123. Section 90 allows for the approval of tariffs offered by individual airlines. In providing approval, the Minister is required to consider a range of factors:
  - 123.1. whether the proposed tariff is excessive in terms of a reasonable return on investment by the supplier
  - 123.2. whether it is likely that supply of the relevant carriage can be carried on for a reasonable period at the level of tariff proposed
  - 123.3. whether a substantial degree of benefit is likely to accrue to consumers generally, or to a significant group of consumers, as a result of the application of the proposed tariff
  - 123.4. that the granting of such authorisation will not prejudice compliance with any international convention/agreement or arrangement that New Zealand is a party to.
124. Section 90 was included in the legislation in 1990 at a time when all tariffs were required to be authorised by government and were, in the main, set and agreed through International Air Transport Association processes.
125. Traditional Air Services Agreements mandated that tariffs should be approved by aeronautical authorities. Under our open skies approach New Zealand now seeks tariffs articles that explicitly state that tariffs do not need to be filed.
126. In 1994, the Ministry wrote to all airlines setting out its expectation that, as a matter of administrative practice, there was no requirement for tariffs to be filed — except when an airline wanted to apply standard tariffs higher than the tariffs previously filed and approved. The requirement to file higher fares has also largely fallen away over the intervening 19 years.
127. Many of our bilateral partners have agreed more liberal tariffs articles in Air Services Agreements, and others have also applied deregulatory approaches as a matter of administrative practice. This means that filings of single airline tariffs are very rare.
128. Given the changes to the tariff regulatory regime, the matters to which the Minister should have regard in section 90(2)(a-c) are no longer appropriate. Section 90(2)(b), which seems targeted at preventing excessively low fares, is particularly inappropriate.

#### Options

##### Option 1: Status Quo

129. Retention of section 90 in its current form would continue to allow authorising single airline tariffs. However, it would be based on criteria that were put in place when all tariffs were being authorised and represents a degree of interference in commercial decisions that is no longer appropriate.

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### Option 2: Amended provision (Ministry of Transport preferred option)

131. As long as some Air Services Agreements require filing of tariffs there is a possibility that an airline may seek approval of a tariff. Reflecting the rare occasions when such a tariff might be filed, and the de-regulated nature of airline tariffs, a simplified procedure would be warranted.
132. To cover those rare situations where a single airline tariff is filed, the recommended approach is to replace section 90 with a provision similar to regulation 19A(4) of the Australian Air Navigation Regulations 1947. That regulation provides that if the Secretary does not make a decision about a tariff within 7 days the tariff is taken to have been approved. Such an authorisation should be solely for the purposes of complying with the relevant Air Services Agreement and should not have any Commerce Act-related effects.
133. This is our preferred option because it enables New Zealand to meet its international obligations while also being more consistent with New Zealand's overall approach to regulation of airfares.

### Option 3: Complete repeal

134. If section 90 were repealed and no replacement enacted there would be no mechanism for airlines to seek authorisation of unilateral fares.
135. Such a situation would be consistent with our overall approach to regulating airfares but could potentially leave New Zealand in a position where another party could claim that we are in breach of our obligations under an international treaty.

Question D8: Which is your preferred option? Please state your reasons.

### Application of Commerce Act 1986 (Section 91)

136. Section 91 sets out the relationship between authorisations granted under the Civil Aviation Act and the provisions of the Commerce Act. Consequential amendments to section 91 will be required, to reflect any amendments to sections 88–90 following the review.

# Part E: Airports

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1. Part E: Airports includes an assessment of airport-related legislative provisions contained in the Civil Aviation Act 1990 and the Airport Authorities Act 1966.

## *Part 10 — Civil Aviation Act 1990*

2. Part 10 of the Civil Aviation Act 1990 empowers the Minister of Transport to establish and maintain aerodromes, and for the Minister and joint venture partners to agree to jointly establish and operate aerodromes. For joint venture airports, it also specifies requirements relating to how Crown funds are to be used.

## *Airport Authorities Act 1966*

3. The Airport Authorities Act provides for recognising local authorities and airport companies as airport authorities, and confers upon them a range of functions and powers relevant to establishing and operating airports. Among other things, the Airport Authorities Act:
  - 3.1. provides for the establishment of airport companies by the Crown and local authorities
  - 3.2. requires airport companies to consult their users about charges
  - 3.3. requires specified airport companies to consult their users about certain capital expenditures
  - 3.4. allows airport authorities to act in conjunction with Ministers and other authorities, and for local authorities to assist airport authorities
  - 3.5. allows airport authorities to grant leases as long as they do not interfere with the safe and efficient operation of the airport
  - 3.6. allows airport authorities and local authorities to create bylaws for a range of purposes
  - 3.7. requires airport companies to disclose certain information.
4. Major amendments to the Airport Authorities Act 1966 were made in 1986, 1997, and 2000. Appendix E1 summarises those amendments and the rationale for them.

### A summary of the key definitions in the existing Civil Aviation Act 1990 and Airport Authorities Act 1966

Term	Act	Definition
Airport authority	Airport Authorities Act 1966 Civil Aviation Act 1990 (for the purposes of section 38 — fees and charges)	A local authority or person(s) authorised to establish, maintain, operate, or manage an airport with the prior consent of the Governor-General by Order in Council.
Airport company	Airport Authorities Act 1966	A registered company authorised to exercise the functions of a local authority to establish, maintain, operate, or manage an airport with the prior consent of the Governor-General by Order in Council.
Joint venture airport	Civil Aviation Act 1990 (for the purposes of Part 10 — aerodromes, facilities, and joint venture airports)	An aerodrome or airport that is established, maintained, operated, or managed as a joint venture by and between the Crown and an Airport Authority under the Civil Aviation Act 1990 and the Airport Authorities Act 1966.
Specified airport company	Airport Authorities Act 1966	An airport company that in its last accounting period received more than \$10 million in revenue.

### Airport statistics at a glance

Number of airports operated by an airport authority under the Act	24 <sup>1</sup>
Number of airports operated by an airport company under the Act	21
Number of joint venture airports	6 <sup>2</sup>
Number of Crown-owned airports	1 <sup>3</sup>
Number of airport companies with a Crown shareholding	3 <sup>4</sup>
Number of airports that have, in the past, been partly or wholly owned by the Crown, but are not covered by the Civil Aviation Act or Airport Authorities Act	5 <sup>5</sup>

<sup>1</sup> Figure includes airport companies. According to the definitions in the Airport Authorities Act 1966, airport companies are also airport authorities.

<sup>2</sup> The joint venture airports are located in Whangarei, Taupo, Whakatane, New Plymouth, Whanganui and Westport.

<sup>3</sup> The Crown-owned airport is Milford Aerodrome.

<sup>4</sup> The Crown has a shareholding in Christchurch, Dunedin and Hawke's Bay airports.

<sup>5</sup> This includes Wigram Aerodrome, which has ceased operation.

### Objectives and criteria of these sections

5. The following objectives were developed at the outset of the Review of Part 10, Civil Aviation Act 1990 and the Airport Authorities Act 1966:
  - 5.1. To provide a regulatory framework for airport authorities, the Crown and local authorities to effectively and efficiently establish, operate, and develop civil aviation aerodromes.
  - 5.2. To ensure that airport authorities have due regard for all users when operating and developing civil aviation aerodromes.
6. We used the following criteria to assess whether the current provisions of the legislation met those objectives:
  - 6.1. administratively and operationally efficient
  - 6.2. necessary and relevant
  - 6.3. any thresholds are durable and appropriate
  - 6.4. clear and unambiguous
  - 6.5. consistent with normal commercial arrangements unless there are sound reasons to treat them differently.

### Overall assessment of Part 10 — Civil Aviation Act 1990

7. There is no evidence to suggest that Part 10 of the Civil Aviation Act is not working. Its provisions remain relevant and necessary, as the Crown currently retains ownership of Milford Aerodrome and an interest in six joint venture airports. Part 10 also gives the Crown and local authorities the ability to establish or operate airports if they decide to undertake such action.
8. The definition of a joint venture airport in Part 10 of the Act is currently ambiguous. For the purposes of Part 10, section 92 of the Civil Aviation Act defines a joint venture airport as:

*“an aerodrome or airport that is established, maintained, operated or managed as a joint venture by and between the Crown and an Airport Authority under the Airport Authorities Act 1966.”*
9. The term ‘Airport Authority’ is not defined for the purposes of Part 10, and the Crown’s current joint venture partners are not defined as airport authorities under the Airport Authorities Act 1966.
10. We consider it appropriate to define the term ‘Airport Authority’, or define ‘joint venture airport’ in some other way, to ensure that it is clear that the provisions of Part 10 apply to the Crown’s existing joint venture partners.

### Overall assessment of the Airport Authorities Act

11. Overall, the framework set out by the Airport Authorities Act 1966 functions well. However, the section-by-section Review of this Act found that several of its provisions are redundant, outdated, or ambiguous. We propose amendments to these sections to make the provisions of the Act more clear and concise.

### *Relationship to the Commerce Act 1986*

12. Sections 4A–4C and 9A–9D of the Airport Authorities Act 1966 contain provisions related to the economic regulation of airports. These include setting out the relationship between the Airport Authorities Act and the Commerce Act 1986, as well as consultation and information disclosure requirements on airport companies.
13. In 2008, the Commerce Act was amended to strengthen the information disclosure regime applicable to Auckland, Wellington and Christchurch airports. This amendment enables the Commerce Commission to publish a summary and analysis of disclosed information for the purpose of promoting greater understanding of the performance of individual regulated suppliers, their relative performance and changes in performance over time.<sup>6</sup>
14. The purpose of this regulation is to promote the long-term benefit of consumers by promoting outcomes consistent with those produced in workably competitive markets. The Commerce Commission was also required to report to the Ministers of Transport and Commerce as to how effectively information disclosure regulation is achieving this purpose for a specified airport service.<sup>7</sup> The Commerce Commission has now completed its reports on Auckland, Wellington and Christchurch airports following the completion of the airports' pricing events.
15. Later this year officials will provide advice to the Ministers of Transport and Commerce on how the Government should respond to the reports. One of the matters that officials may provide advice to Ministers on is the consistency of the Airport Authorities Act, with any possible changes to the economic regulation of airport companies in the future. This advice may include possible changes to sections 4A to 4C of the current Act, which allows airports to set charges as they think fit, and requires consultation on airport charges and certain capital expenditures.
16. On 1 August 2014, the Ministry of Business, Innovation and Employment released the Effectiveness of Information Disclosure Regulation for Major International Airports consultation paper. That consultation paper seeks feedback on the effectiveness of the current regulatory regime for airports regulated under Part 4 of the Commerce Act 1986, including the interaction between the Commerce Act information disclosure regime and the provisions for consultation and price setting under the Airport Authorities Act.
17. The reason for this approach is two-fold:
  - 17.1. the response to the Commerce Commission's reports will focus on the regulatory regime for the main international airports, whereas the review of sections 4A and 4C concern issues of relevance to all airport companies.
  - 17.2. in addition to addressing issues of market power (which will be the focus of the response to the Commerce Commission reports), the requirement to consult on capital expenditures (section 4C) is relevant to our international commitments. Both International Civil Aviation Organization policies and some of New Zealand's Air Services Agreements state that parties will "encourage consultation".

<sup>6</sup> See the Commerce Act 1986, section 53B(2).

<sup>7</sup> See the Commerce Act 1986, section 56G(1).

### Items

#### Item E1: Specified airport companies

##### Background

18. The term specified airport company was included in the Act following the enactment of the Airport Authorities Amendment Act 1997. This amendment made several changes to the Airport Authorities Act 1966 to guard against potential monopoly abuse by airports and to protect consumers' interests.
19. The Airport Authorities Act currently defines a specified airport company as an airport company that in its last accounting period received revenue greater than \$10 million, or some other amount that the Governor-General may prescribe by Order in Council. To date, the Governor-General has not prescribed any other threshold by Order in Council.
20. Under the Act, specified airport companies are:
  - 20.1. subject to more stringent information disclosure requirements than other airport companies
  - 20.2. required to consult their substantial customers about certain capital expenditures.

##### Comment

21. Fully competitive markets ensure effective pricing and optimal investment through competition between suppliers. However, airports, particularly large international airports, have some natural monopoly characteristics and there is a risk that they will use their market power to extract excessive profits.
22. The purpose of creating the distinction between specified airport companies and other airport companies is to recognise that larger airports have more market power than smaller ones.
23. We consider the distinction between specified airport companies and other airport companies is still relevant. The distinction helps ensure the existing requirements in the Act which are intended to mitigate the risk of monopoly abuse, are proportional to the level of that risk.

##### What is the problem?

24. The \$10 million threshold may no longer be appropriate given inflation between 1998, when it was set, and the present. At the time that this threshold was established, Auckland, Wellington and Christchurch airports were specified airport companies. Today, Queenstown and Dunedin airports also meet the threshold.
25. In reality, no single measure distinguishes airports with lower market power from those with higher market power. The question is whether or not the \$10 million threshold provides a useful distinction between airports that are in a position to exercise significant market power and those that are not.

26. Revenue may not be the best threshold for defining specified airport companies. All airports generate revenue from contestable non-aeronautical activity, which can be significant at some airports. This means that revenue alone is not necessarily the best measure of aeronautical activity at an airport.

**Options**

**Options overview — definition of specified airport company**

<b>Option 1: Status quo</b>	<b>Option 2: Revise the threshold</b>	<b>Option 3: Amend the threshold to be based on revenue from identified airport activities</b>	<b>Option 4: Amend the threshold from annual revenue to passenger movements (Preferred)</b>
<p>An airport company that in its last accounting period received revenue exceeding \$10 million,</p> <p><i>or</i></p> <p>some other amount prescribed by the Governor-General by Order in Council.</p>	<p>An airport company that in its last accounting period received revenue exceeding \$15 million,</p> <p><i>or</i></p> <p>some other amount prescribed by the Governor-General by Order in Council.</p>	<p>An airport company that in its last accounting period received revenue from identified airport activities exceeding \$10 million,</p> <p><i>or</i></p> <p>some other amount prescribed by the Governor-General by Order in Council.</p>	<p>An airport company that in its last accounting period had in excess of one-million passenger movements,</p> <p><i>or</i></p> <p>some other amount prescribed by the Governor-General by Order in Council.</p>

**Option 1: Status quo**

27. Over time the \$10 million threshold may capture smaller airports that are less likely to have a high level of market power. For example, airports that receive an increasing proportion of their revenue from contestable non-aeronautical sources (for example, retail, grazing leases, car parking) may reach the \$10 million threshold, but are not in a position to risk exercising monopoly power.
28. Under the status quo, Auckland, Wellington, Christchurch, Queenstown and Dunedin airports meet the threshold to be considered specified airport companies.
29. While the Governor-General may prescribe by Order in Council a higher threshold, this Review provides an opportunity to amend the threshold stipulated in the Act.

**Option 2: Revise the threshold**

30. Under this option, a specified airport company would be defined as an airport company that, in its last accounting period, received revenue exceeding \$15 million, or some other amount prescribed by the Governor-General by Order in Council.
31. This option represents a simple revision of the existing threshold. Based on inflation over the past 15 years, \$10 million in 1998 equates to between \$14 million and \$15 million today.

32. Under this option, Auckland, Wellington, Christchurch and Queenstown airports would be considered specified airport companies.

### **Option 3: Amend the threshold to be based on revenue from identified airport activities**

33. Under this option, a specified airport company would be defined as an airport company that, in its last accounting period, received revenue from identified airport activities<sup>8</sup> exceeding \$10 million, or some other amount prescribed by the Governor-General by Order in Council.
34. Compared to the status quo, this threshold is a better reflection of the level of aeronautical activity at an airport. The Governor-General could prescribe some other amount to ensure that the threshold remained relevant and appropriate.
35. Under this option, Auckland, Wellington, Christchurch and Queenstown airports would be considered specified airport companies.

### **Option 4: Amend the threshold from annual revenue to passenger movements** (Ministry of Transport preferred option)

36. Under this option, a specified airport company would be defined as an airport company that in its last accounting period had in excess of one million passenger movements, or some other number prescribed by the Governor-General by Order in Council.
37. This is our preferred option because we consider passenger movements to be a better measure of aeronautical activity at an airport than revenue, they are not directly affected by inflation.
38. Under this option, Auckland, Wellington, Christchurch and Queenstown airports would be considered specified airport companies.

Question E1a: Which is your preferred option? Please state your reasons.

Question E1b: Is changing the threshold for a 'specified airport company' the most effective way to distinguish between airports that are in a position to exercise significant market power and those which are not? Please state your reasons.

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<sup>8</sup> Defined in the Airport Authorities Act 1966 as "any 1 or more of the following, as the case may be:

- (a) airfield activities;
- (b) aircraft and freight activities;
- (c) specified passenger terminal activities".

### Item E2: Redundant provisions

#### What is the problem?

39. One of the objectives of the present Review is to provide clear, concise, and accessible legislation. Retaining provisions that are not necessary or relevant is not consistent with that objective. We consider that the following provisions could be repealed.

#### Option to repeal

##### Section 3BA

40. Section 3BA requires airport companies to disclose aircraft-related charges.
41. We consider that section 3BA is redundant because airport companies have a commercial incentive to disclose aircraft-related charges on request, or go further and proactively make them publicly available. As with other commercial entities, airport companies risk losing potential business if they choose not to disclose their charges.
42. Most airport companies are also subject to other regulation related to the disclosure of charges. The Official Information Act 1982 applies to all airport companies in which more than 50 percent of the ordinary shares are owned by, or by any combination of, the Crown, any local authority, or any council-controlled organisation.
43. Under the Airport Authorities (Airport Companies Information Disclosure) Regulations 1999, specified airport companies (that is, Queenstown and Dunedin airports) must disclose information about their charges annually. In addition, Auckland, Wellington and Christchurch airports are subject to information disclosure under Part 4 of the Commerce Act 1986.

Question E2a: What impact, if any, would removing section 3BA have?

Question E2b: Do you support repealing section 3BA? Please state your reasons.

##### Sections 4(2) and 4A

44. Section 4(2) allows airport companies to borrow money, and acquire, hold, and dispose of property as they think fit. Section 4A allows airport companies to set charges as they think fit, and clarifies the relationship between this section and certain provisions in the Commerce Act 1986.
45. The provisions in section 4(2) and 4A were inserted in 1986 at a time when airport companies were new and untested. To avoid doubt, the sections were inserted to ensure that airport companies could exercise the powers necessary to operate and manage their airports as commercial undertakings independent of Crown intervention.
46. It is now understood that airport companies can undertake the same activities as any other company, subject to the Companies Act 1993, any other enactment, and the general law. These activities include the ability to borrow money, acquire, hold, and dispose of property, and set charges.

47. Airport companies are by definition companies registered under the Companies Act 1993. Under section 16 of the Companies Act, subject to that act, any other enactment, and the general law, a company has, both within and outside New Zealand, “full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction”.
48. We consider that this provides an adequate basis for airport companies to operate or manage their airports as commercial undertakings in accordance with section 4(3) of the Airport Authorities Act. (Section 4(3) explicitly requires that every airport operated or managed by an airport authority to be operated or managed as a commercial undertaking.) This makes the provisions in sections 4(2) and 4A of the Act redundant.
49. Retaining the status quo carries the risk that the provisions in question may be misinterpreted by users. For example, users of the legislation may assume that sections 4(2) and 4A somehow give airport companies greater discretion when entering into particular transactions than they would otherwise have under the Companies Act 1993. As set out in paragraph 45, this is not the intent of the legislation.
50. If section 4A is repealed, we would need a consequential amendment to section 38 of the Civil Aviation Act to ensure that charges could not be prescribed by regulation for an airport company without the agreement of that airport company.
51. It is important to note that although there is a relationship between section 4A and 4B, we do not propose any changes to the latter. Section 4B requires all airport companies to consult substantial customers concerning charges. This provision is supported by a body of case law that has clarified the intent of the Airport Authorities Act with respect to the consultation process. We consider that section 4A can be repealed without affecting the consultation requirements set out in section 4B.

Question E2c: What impact, if any, would removing sections 4(2) and 4A have for airports that are not regulated under the Commerce Act 1986?

Question E2d: Do you support repealing sections 4(2) and 4A for airports that are not regulated under the Commerce Act 1986? Please state your reasons.

Please note that the proposed amendments to sections 4A to 4C of the Airport Authorities Act in this consultation document are being looked at solely in the context of airports not regulated under Part 4 of the Commerce Act. See page 139 for more detail.

### Item E3: Consultation on certain capital expenditure

52. Section 4C of the Airport Authorities Act 1966 requires specified airport companies to consult substantial customers before approving certain capital expenditures. This section was inserted by the Airport Authorities Amendment Act 1997 to address concerns that airport companies could abuse their monopoly position by undertaking capital expenditure without considering the needs of their customers.
53. We consider the consultation requirement is still relevant because:
- 53.1. both International Civil Aviation Organization (ICAO) policies and some of New Zealand's Air Services Agreements state that parties will "encourage consultation"
  - 53.2. it gives airport users the opportunity to have a say in which services are needed and catered for in new developments
  - 53.3. the value of airport assets in relation to identified airport activities can have an impact on airport charges.

#### What is the problem?

54. We are considering whether section 4C should apply to all airport companies, as much of the rationale for consultation (outlined in paragraph 53) applies to all airport companies, not only those specified.
55. We acknowledge that airports with less market power may not be in a position to pass on the full cost of capital expenditure to their customers. Nevertheless, we consider the benefits of consultation are wider than just preventing potential monopoly abuse.
56. While we are investigating whether all airport companies should be required to consult, airports will continue to have the ultimate decision-making role for capital expenditure.

#### Options

##### Option 1: Status quo

57. Under this option, the requirement to consult would continue to apply to specified airport companies.
58. Airport companies have commercial incentives to work with their users to reach common ground on investment decisions. Both airports and their users have a mutual interest in ensuring that capital developments meet current and future demand.
59. These commercial incentives may motivate airport companies to voluntarily consult with users before undertaking significant capital developments. If this is the case, extending the provision to all airport companies may not be necessary to achieve the objectives of the Review.

**Option 2: Require all airport companies to consult on certain capital expenditures**  
(Ministry of Transport preferred option)

60. An objective of the Review of the Airport Authorities Act is to ensure airport companies have due regard for users when developing airports. While this may be occurring to some extent under the status quo, requiring all airport companies to consult on certain capital expenditures would strengthen the likelihood of achieving this objective.
61. The risk associated with this option is that the requirement to consult may be burdensome for smaller airports. We consider that this risk can be mitigated by ensuring that the threshold at which consultation is triggered is linked to the size of the airport. Options for differential thresholds for consultation on certain capital expenditure are discussed below.

Question E3a: Which is your preferred option? Please state your reasons.

Question E3b: Under the status quo, to what extent do airport companies that are not specified consult on capital expenditure? Please give examples.

Question E3c: What would be the costs and benefits of expanding this provision to cover all airport companies?

**Item E4: Threshold for consultation on certain capital expenditure**

62. 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.

**What is the problem?**

63. The underlying value of airports has increased substantially since 1998, when section 4C came into effect. The 20 percent threshold for consultation is now too high for the three main international airports. For example, an airport company with identified assets valued at \$400 million would only have to consult before approving capital expenditure of \$80 million. Therefore, the status quo is not preferred and we are exploring options to amend the threshold.

64. We appreciate that if this provision is extended to all airport companies, different thresholds may be required for airports of different sizes so that consultation is not triggered too often or too seldom.

**Options**

65. The status quo is not preferred because we consider that the existing threshold is too high to be effective for most of the airports covered by the provision. Initial feedback from stakeholders has shown that both airlines and airports acknowledge the threshold for consultation would benefit from revision.

66. We considered a flat figure for the threshold. For example, where capital expenditure will, or is likely to, exceed \$30 million within a 5-year period. A flat threshold is easily understood and may currently be an appropriate level for specified airport companies. However, it is possible a flat figure would quickly become too low because of the effect of inflation. If the requirement to consult is extended to all airport companies, a flat threshold would be either too low or too high for some airports.

67. If all airport companies are required to consult, it is likely that differential thresholds will be required for airports of different sizes. We are considering changing the threshold for 'specified airport company' from revenue to passenger volumes (see paragraphs 18–38). For consistency, we propose that the threshold for consultation should be linked to the definition of 'specified airport company'.

**Figure E1: Options for amending the threshold for consultation on certain capital expenditures**

Passenger volumes	OR	Annual revenue	Option 1 threshold for consultation	Option 2 threshold for consultation	Option 3 threshold for consultation
< 1 million		< \$10 million	> \$5 million	10% of identified airport assets (excluding land)	The lower of 30% of identified airport assets or \$30 million
> 1 million but < 3 million		> \$10 million but < \$50 million	> \$10 million		
> 3 million		> \$50 million	> \$30 million		

Note: The thresholds for passenger volumes, annual revenue, and capital expenditure under Option 1 are indicative.

### Option 1: Stepped thresholds

68. Under this option, airport companies would be required to consult substantial customers before approving certain capital expenditures that will, or are likely to exceed a threshold depending on its passenger volumes or annual revenue within a 5-year period.
69. This option provides a reasonable threshold for all airport companies. While smaller airports would be required to consult with substantial customers, the operational burden would be low because only very significant capital developments would meet the threshold. Figure E1 shows how the thresholds might be stepped under this option.

### Option 2: 10 percent of identified airport assets (excluding land)

70. Under this option, airport companies would be required to consult substantial customers before approving certain capital expenditures that will, or are likely to exceed 10 percent of identified airport assets excluding land, within a 5-year period.
71. This option might be appropriate for airports of a particular size range, but is too high for small airports and too low for very large international airports. For small airports this threshold will be administratively burdensome. For very large airports this threshold will be less effective in achieving the objectives of the present Review.

### Option 3: The lower of 30 percent of identified airport assets or \$30 million

72. Under this option, airport companies would be required to consult substantial customers before approving certain capital expenditures that will or are likely to exceed the lower of \$30 million or 30 percent of assets for specified airport activities within a 5-year period.
73. This option may result in implementation problems because the threshold would be more appropriate in some cases than in others. For example, for an airport with \$5 million in assets associated with identified airport activities, the threshold for consultation would be \$1.5 million. However, given that small airports rarely undertake major capital works (a runway has a useful life of about 20 years) this option may not be too onerous.

Question E4a: Which is your preferred option? Please state your reasons.

Question E4b: If you prefer Option 1, where do you consider the thresholds for consultation should be set and why?

### Item E5: Termination of leases without compensation or recourse for compensation

74. Section 6(1) of the Airport Authorities Act currently allows airport authorities to grant a lease of land vested in the airport authority, so long as it does not interfere with the “safe and efficient operation of the airport”.
75. Section 6(3) allows airport authorities to terminate a lease at any time if the property is required for the “purposes of the airport”.
76. Section 6(4) removes any rights of redress through the Courts for damages or compensation where a lease has been terminated under subsection (3), except where compensation is provided for under the lease.
77. Compensation for improvements may be agreed by parties to the lease or determined by arbitration under the Arbitration Act 1996.

#### What is the problem?

78. The Airport Authorities Act does not define what is meant by the “purposes of the airport”. Therefore, it is unclear for what reasons leases can be terminated without compensation. Under the current provisions, there is a risk that airports may terminate leases unfairly with no compensation or recourse for lessees.
79. We cannot give a firm indication of the scale of this risk, but based on the lack of complaints to us about airport lease issues, we infer that it is either small or being mitigated in some way (for example, through contracts).
80. The ability of airports to terminate leases is not in question, but the Act could benefit from greater clarity about the circumstances in which airports can terminate leases without compensation, or recourse for compensation.

#### Options

81. Note that neither the status quo nor any of the proposed options below limit the ability of airports or lessees to negotiate compensation provisions, relocation conditions, or notice periods.

#### Option 1: Status quo

82. Under this option lessees have no right to compensation or legal recourse, except where the lease agreement provides for it. The risk is that airports could exercise this power in a manner that may be considered unfair and inconsistent with normal commercial arrangements.
83. The advantage of this option is that it gives airports greater flexibility to enter into lease agreements without compromising their ability to efficiently respond to changing aviation conditions and demands.

### **Option 2: Amend the Act to clarify the reasons for which airport authorities can terminate leases without compensation or recourse for compensation**

84. This option would involve an amendment to section 6(4) to provide that compensation is not payable for termination if it is done for the purposes of the safe and efficient operation of the airport, unless compensation in such circumstances is provided for in the lease.
85. This option provides greater clarity than the status quo. Under this option, section 6(4) would permit lessees to seek compensation only for the termination of leases for purposes other than the safe and efficient operation of the airport. This is consistent with section 6(1) which states that leases “not interfere with the safe and efficient operation of the airport”.
86. The intent would be to ensure that both existing and new leaseholders could seek compensation, if termination was done for purposes other than the safe and efficient operation of the airport.

Question E5a: Which is your preferred option? Please state your reasons.

Question E5b: Are there any other issues with section 6 of the Airport Authorities Act that you think should be addressed? If so, what options do you propose to address the issue(s)?

### Item E6: Bylaw making powers

87. Section 9(1)(a-ff) of the Airport Authorities Act currently provides for local authorities and airport authorities to make bylaws for:
- 87.1. the good rule and management of the airport
  - 87.2. the more effectual carrying out of the functions and powers of the airport authority in respect of the airport
  - 87.3. protecting any property used in connection with the airport from damage or injury
  - 87.4. prescribing precautions to be taken for the protection of persons or property from accident or damage
  - 87.5. regulating traffic, whether pedestrian or vehicular, and the provision and use of parking places for vehicles at the airport
  - 87.6. prescribing the times, terms, and conditions upon which the public may enter or be in or upon the airport
  - 87.7. providing for the establishing and maintaining of facilities at the airport for the reception and storage of lost property.
88. Section 9(1)(g-j) also provides for local authorities and airport authorities that are not airport companies to make bylaws:
- 88.1. prescribing charges for certain purposes
  - 88.2. generally for the administration of the airport, for the control of trading activities on the airport or for the management of any business related to the airport.

### Is there a problem?

*Are all of the bylaw-making powers still relevant?*

89. To date, nine airport companies have made bylaws under section 9. No airport authorities that are not airport companies have made bylaws under the Act.
90. There may be an opportunity to reduce the number of bylaw making powers in the Act, or even remove them. Many airports operate safely and effectively without using bylaws. If certain bylaws are necessary for the safe operation of airports, they could be set through regulations to ensure consistency across all airports.

*What is the appropriate level of oversight for approving bylaws?*

91. Currently, airport bylaws made by local authorities require the approval of the Minister of Transport. Bylaws made by airport authorities that are not local authorities require the approval of the Governor-General by Order in Council.
92. The framework set out in section 9 of the Act has been largely unchanged since it was enacted in 1966. We are interested in your views on whether the current level of oversight specified in the Act is still appropriate.

93. In particular, given that local authorities can make bylaws and set charges in a range of other contexts, is Ministerial approval of these bylaws still required? There are alternative ways of ensuring that local authorities only make airport bylaws that are fair and reasonable, such as:
- 93.1. providing the Minister of Transport with the power to revoke a bylaw
  - 93.2. setting out a process or criteria that local authorities must comply with when making airport bylaws.

### Options

#### Option 1: Status quo

94. Although some bylaw-making powers are currently not used, the status quo does give local authorities or airport authorities the option of creating bylaws for a range of purposes.
95. Under the status quo, bylaws made by local authorities will still require the approval of the Minister of Transport. Bylaws made by airport authorities that are not local authorities will require the approval of the Governor-General by Order in Council.

#### Option 2: Repeal some or all bylaw-making powers

96. As yet, few bylaws have been made pursuant to section 9(1)(g-j) of the Airport Authorities Act. The provisions may therefore be redundant or of little relevance to current airport operations.
97. If the provisions are redundant or unnecessary, they should be repealed. This would be consistent with the objectives of the present Review of the Act.
98. Under this option, if any bylaw-making powers remain, the Governor-General's role in approving bylaws will continue for airport companies. We would assess what level of oversight is appropriate for bylaws made by local authorities.

Question E6a: Which is your preferred option? Please state your reasons.

Question E6b: For what purposes do you consider it necessary for local authorities, airport authorities, and airport companies to have bylaw-making powers, and why?

Question E6c: If airport authorities did not have bylaw-making powers, how would or could they manage the matters covered by section 9(1)(a-ff) of the Airport Authorities Act?

Question E6d: If bylaw making powers are retained, what is the appropriate level of oversight for local authorities, airport authorities and airport companies seeking to make bylaws?

### Item E7: Information disclosure and specifying what ‘publicly available’ means

99. Section 9A of the current Airport Authorities Act allows the Governor-General to make regulations regarding disclosure of information for airport companies.
100. The purpose of the information disclosure regime is to ensure that parties are better equipped to arrive at a fair assessment of the value of services provided by airports, and that charges can be set accordingly.
101. The Airport Authorities (Airport Companies Information Disclosure) Regulations 1999 require specified airport companies to disclose a range of information, and other airport companies to disclose a more limited range of information.
102. Auckland, Wellington, and Christchurch airports undertake information disclosure under Part 4 of the Commerce Act 1986.
103. We consider the information disclosure provisions set out in the Act and in the regulations made under section 9A are appropriate. They achieve their purpose (see paragraph 100) while ensuring the administrative burden on airport companies is proportional to the size (as a proxy for market power) of airports.

Question E7a: What are the costs and benefits of the current information disclosure regime under section 9A of the Act?

#### What is the problem?

104. The Act currently allows the Governor-General to make regulations requiring airport companies to make certain information publicly available. We consider that specifying what ‘publicly available’ means in section 9A will add greater transparency and increase the effectiveness of the information disclosure regime.

#### Options

##### Option 1: Status quo

105. Although airport companies do make information publicly available, under the status quo this information is not always freely and immediately available.

**Option 2: Specifying what publicly available means in section 9A** (Ministry of Transport preferred option)

106. Section 108 of the Land Transport Management Act 2003 provides useful wording to give clarity to the term publicly available:

*A person who gives notice of a document under subsection (2) or (4) must make the document available—*

*for inspection, free of charge; and*

*for purchase at a reasonable price; and*

*on the relevant person's Internet site in a format that is—*

*readily accessible; and*

*if practicable, capable of being utilised by the visually impaired.'*

107. We consider that similar wording could be used to clarify what publicly available means for the purposes of airport information disclosure, and would ensure that this information is readily accessible.

Question E7b: Which is your preferred option? Please state your reasons.

#### A brief history of the Airport Authorities Act 1966

108. Major amendments to the Airport Authorities Act 1966 were made in 1986, 1997, and 2000. This appendix provides a summary of those amendments and the rationale for them.

#### Airport Authorities Amendment Act 1986

109. Before 1986, most airports in New Zealand were developed as joint ventures between the Crown and local authorities. Airport fees and charges were set by regulations and reviewed periodically. Domestic landing charges were generally calculated as a percentage of gross ticket revenue, and international charges as a fee per landed tonne.
110. In 1985, the government considered a new policy to establish companies to purchase the assets of joint venture airports and operate airports on a commercial basis. The Airport Authorities Amendment Act 1986 provided the legislative authority for the Crown and local authorities to form and hold shares in airport companies and to transfer airport assets to those companies.
111. Amendments to section 4 of the Airport Authorities Act 1966 made it clear that airport companies could borrow money, acquire, hold and dispose of property, and set charges, independent of government intervention.

#### Airport Authorities Amendment Act 1997

112. The objective of the Airport Authorities Amendment Act 1997 was to guard against potential monopoly abuse by airport companies and protect consumers' interests.
113. The Airport Authorities Amendment Act 1997 resulted in the following significant amendments to the Airport Authorities Act 1966.
  - 113.1. A new section 4B was inserted to clarify the requirements for airport companies to consult customers about charges. The purpose of this section was to ensure that airport companies are required to regularly consult substantial customers about charges, including charges to passengers.
  - 113.2. A new section 4C contained a requirement for specified airport companies to consult with substantial customers before approving certain capital expenditures. The purpose of this section was to ensure that airlines and other users have a say in which services are needed and catered for in new developments, and which are not.
  - 113.3. A new section 9A was inserted to enable the Governor-General to make regulations requiring disclosure of certain information by airport companies. The rationale for information disclosure provisions was that if full information is available and there is adequate consultation, parties will be better equipped to arrive at a fair assessment of the value of services provided by airports, and charges can be set accordingly.

### Airport Authorities Amendment Act 2000

115. The objective of the Airport Authorities Amendment Act 2000 was to address the risk that, under section 3A of the Act, a local authority could transfer land that was vested in it in trust, under the Reserves Act 1977, to an airport company without Crown agreement.
116. Six airports operate under joint venture agreements between the Crown and local authorities. Where Crown land has been contributed for the purpose of a joint venture airport, the land has usually been vested in the local authority joint venture partner to hold in trust under the Reserves Act 1977 for airport purposes. Although the local authority is the registered proprietor on the certificate of title, the Crown has a reversionary interest in the land if the reserve status is revoked or the vesting is cancelled under the Reserves Act 1977. However, before the 2000 amendment, there was the risk the land could be transferred to an airport company without Crown agreement, meaning the Crown would lose its right to revoke the vesting and return the land to Crown ownership.
117. New sections 3A(7A) to 3A(7C) were inserted to provide statutory protection for the Crown's reversionary interest in the land, requiring a local authority to obtain the consent of the Minister of Transport, or a certificate from the Chief Surveyor stating the land was not vested in the local authority by the Crown, before transferring any land vested in it under the Reserves Act to an airport company.

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# Part F: Other matters

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## Item F1: Airways Corporation statutory monopoly

### Background

1. Section 99 of the Civil Aviation Act 1990 provides that Airways Corporation shall be the only person entitled to provide:
  - 1.1. area control services (en route, high altitude)
  - 1.2. approach control services (arrival/departure from airport)
  - 1.3. flight information services (including meteorological and possible hazards).
2. In 1991, Cabinet agreed that, once civil aviation rules were in place providing for the certification of organisations able to provide air traffic services, Airways Corporation's (Airways) statutory monopoly should be repealed.
3. Section 35 of the Civil Aviation Amendment Act 1992 was subsequently enacted to give effect to Cabinet's decisions, providing for the repeal of Airways' statutory monopoly on a date to be appointed by the Governor-General by Order in Council.

### *Air traffic service certification*

4. From 1 January 1998, Civil Aviation Rule Part 172 (Air Traffic Service Organisations — Certification) prescribed the certification requirements for the issue of an aviation document for organisations currently providing, or intending to provide, any air traffic service.<sup>1</sup>
5. Airways is fully certified under Part 172 and currently provides all air traffic services in New Zealand. There is, however, scope for other organisations to enter the market to provide aerodrome control services and aerodrome flight information services.
6. In accordance with Cabinet's September 1991 decisions, and the Civil Aviation Amendment Act 1992, an Order in Council should have been enacted to repeal the Airways' statutory monopoly provisions. However, to date an Order in Council has not been made.

### Comment

7. At the outset of the review we concluded that the repeal or not of Airways' statutory monopoly was outside of the review's scope. Consideration of a robust analysis of safety and economic implications, including consultation with industry, should precede any decision to repeal section 99 of the Civil Aviation Act 1990. We note that previous stakeholder feedback on this matter revealed concerns about removing Airways' statutory monopoly.<sup>2</sup>

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<sup>1</sup> Air traffic services include aerodrome control, approach control, area control, flight information and aerodrome flight information services.

<sup>2</sup> For example, that repealing Airways' monopoly status would not necessarily improve the efficiency of air traffic services provision in New Zealand.

8. In addition, we do not consider that it is appropriate to enact an Order in Council to remove Airways' monopoly status.
9. Parliament should make this decision, given its significance and the critical role that air traffic services play in maintaining a safe aviation system. It would be more appropriate to remove Airways' monopoly status through an act of Parliament if this status was to be removed at any point in the future.
10. Therefore we recommend the following:
  - 10.1. the repeal of section 35 of the Civil Aviation Amendment Act 1992 (which provides for the repeal of Airways' statutory monopoly on a date to be appointed by the Governor-General by Order in Council)
  - 10.2. the retention of Section 99 of the Civil Aviation Act 1990 (which provides for Airways to be the sole provider of area control services, approach control services, and flight information services).

Question F1: Do you agree with our recommendations in paragraph 10? Please state your reasons.

### Item F2: International conventions

11. We have considered the aviation conventions that New Zealand has either adopted or could adopt. New Zealand is a party to a number of international civil aviation agreements. The review considered whether our domestic law continues to appropriately reflect our obligations under these conventions, and also looked at whether any further treaty action should be taken.
12. The conventions covered in this document are only those where the review identifies material issues. That said, legislative change may not be necessary to address the issues that were identified.

#### The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010 (the Beijing Convention)

13. Under the Beijing Convention, State parties agree to criminalise a number of terrorist acts, including the use of a civil aircraft as a weapon, the use of dangerous materials to attack aircraft or other targets on the ground, and the illegal transport of biological, chemical, and nuclear weapons. The Convention is not yet in force, and New Zealand has neither ratified nor acceded to it. However, the acts criminalised by the convention are already largely addressed in New Zealand legislation through the Aviation Crimes Act 1972, the Crimes Act 1961, and the Suppression of Terrorism Act 2002.
14. The acts criminalised by the Beijing Convention are already largely addressed in legislation. However, New Zealand might consider adopting the Beijing Convention in the future to ensure that we take all reasonable measures required as part of an internationally coordinated effort to ensure aviation security.
15. Any work to determine whether New Zealand should accede to the Beijing Convention will take place outside of the present review, along with an analysis of the legislative changes needed to ensure that our domestic law is consistent with the obligations under the Convention.<sup>3</sup>

#### The Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (the Tokyo Convention)

16. The Tokyo Convention empowers the pilot-in-command of an aircraft to take action against anyone who is committing an offence recognised by the aircraft's State of registration, or who is jeopardising the safety of the aircraft, the safety of those on board, or good order and discipline.
17. Action may be taken if the offence occurs while the aircraft is in flight and engaged in international air navigation, and includes the ability to restrain and disembark a person and, in serious cases, refer him or her to the appropriate authorities. The Convention protects the pilot from proceedings taken against him or her in relation to any such action.
18. The Tokyo Convention specifies offences against penal law and any actions that jeopardise the safety of persons or property on board civilian aircraft while in-flight. The Convention is in force and has been ratified by 185 States including New Zealand.

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<sup>3</sup> The work would need to be undertaken alongside the Ministry of Justice which administers the bulk of the relevant legislation, and the Ministry of Foreign Affairs and Trade. This includes legislation related to extradition which is also an element of the Beijing Convention.

19. New Zealand gives domestic effect to the Convention in the Aviation Crimes Act 1972. Unruly behaviour onboard aircraft is managed through the Civil Aviation Act 1990. New Zealand also accommodates certain facets of the Tokyo Convention, such as extradition, through the Extradition Act 1999.
20. The Tokyo Convention in its current form is addressed in New Zealand law. However, the recently finalised Montreal Protocol 2014<sup>4</sup>, which amends the Tokyo Convention, may result in further amendments to the Act in the future.

### **The Convention on the Compensation for Damage Caused by Aircraft to Third Parties (Montreal — Damage, 2009)**

21. This Convention deals with the liability of the operators of aircraft for damage caused by aircraft on international flights, other than damage resulting from unlawful interference. If an operator's aircraft causes death, bodily or mental injury, or damage to property or to the environment they will be liable to compensate the affected parties, but that liability is capped.
22. New Zealand has neither ratified nor acceded to this convention. In New Zealand, personal injuries are dealt with under our Accident Compensation Corporation (ACC) system (through the Accident Compensation Act 2001). Anyone suffering damages to property would need to bring a claim (for example, for negligence) in the civil courts.
23. As New Zealand has a suitable regime for compensating affected parties through the ACC system, we are very unlikely to implement Montreal — Damage 2009. Montenegro is the only country to have ratified Montreal — Damage 2009 and it is unlikely that this situation will change in the foreseeable future. Therefore we do not propose any amendments to the Civil Aviation Act 1990 to accommodate this convention.

### **The Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft (Montreal — Unlawful Interference, 2009)**

24. This Convention is similar to Montreal — Damage 2009 but specifically relates to damage resulting from unlawful interference. If adopted, Montreal — Unlawful Interference 2009 would establish an international fund that would be drawn on to compensate claimants. Each participating State would contribute to the fund.
25. New Zealand has neither ratified nor acceded to Montreal Unlawful Interference 2009. This is unlikely to change in the foreseeable future. New Zealand has a regime for compensating affected parties and we do not consider that this convention offers an improvement on that regime. Therefore we do not propose any amendments to the Act to accommodate this convention.

### **The Convention on International Interests in Mobile Equipment 2001 (the Cape Town Convention)**

26. The Cape Town Convention and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Aircraft

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<sup>4</sup> The Protocol expands the jurisdiction over offences and acts committed on board civil aircraft and enables in-flight security officers to be deployed pursuant to bilateral or multilateral agreements between the contracting states. The Protocol will come into force, once 22 member states have ratified it. New Zealand is yet to publically consult on the Protocol and any proposed treaty ratification process is expected to take approximately 2 years.

Protocol) enable creditors (financiers) to register their financial interests in aircraft and aircraft objects and provide standard remedies in the event of default by the debtor. The Aircraft Protocol offers creditors additional remedies, including the ability to require removal of an aircraft from a national civil aircraft register and export it.

27. New Zealand acceded to the Cape Town Convention and the Aircraft Protocol in July 2010. The Civil Aviation (Cape Town Convention and Other Matters) Amendment Act 2010 amended the Civil Aviation Act 1990 to:
  - 27.1. give the Cape Town Convention and the Aircraft Protocol the force of law in New Zealand, and to ensure these instruments prevail over any inconsistent domestic law
  - 27.2. require the Director of Civil Aviation to de-register an aircraft when requested to do so by a creditor in accordance with new processes set out in the Aircraft Protocol.
28. As part of the Review, questions have been raised about how parties can register their financial interests. Specifically, the question of whether parties with a financial interest in aircraft or aircraft objects need to register their interest on both the International Registry of Mobile Assets and Personal Property Securities Register.
29. Dual registration of financial interests is, in fact, optional.
30. An amendment to the Civil Aviation Act 1990 is not required to address this matter.
31. However, we recognise that it would be useful to provide further guidance about the intention of the Cape Town Convention and the Aircraft Protocol, the processes companies should use when registering Irrevocable De-registration and Export Request Authorisations for aircraft and aircraft objects, and how financial interests could be recorded.

### International Civil Aviation Organisation (ICAO) statistical requirements

32. Article 67 of the Chicago Convention requires Contracting States to submit data as specified in the ICAO Statistics Programme. For some categories the data is for both international and domestic aviation, while in other categories only international data is required.
33. ICAO analyses statistics for trends to determine whether its strategic objectives are being met. ICAO then disseminates its findings.
34. Civil aviation data requirements, including New Zealand's international obligations in this regard, will be considered during the development by the Ministry of Transport and Statistics New Zealand of a Transport Domain Plan for the transport sector.
35. The Plan will take a holistic view of the transport sector/system, and identify initiatives that will ensure that information collected is relevant, high quality and meets the sector's needs into the future.
36. Further information about the Transport Domain Plan can be found here: [www.transport.govt.nz/research/transport-domain-plan](http://www.transport.govt.nz/research/transport-domain-plan).

### Fees and charges

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37. Part 4 of the Act sets out how the Civil Aviation Authority (CAA) may recover the costs it incurs to implement the Act. That is, the recovery of costs through fees, charges, and levies set by regulations.
38. Part 4 (sections 38–42D) includes the necessary empowering provisions, the purpose for which the respective fees, charges and levies are payable, and the basis upon which they are payable.
39. Two sets of regulations are currently in force:
  - 39.1. Civil Aviation Charges Regulations (No 2) 1991 (SR 1991/143)
  - 39.2. Civil Aviation (Safety) Levies Order 2002 (SR 2002/84)

### Objectives and criteria of these sections

40. The objective of reviewing Part 4 of the Act is to ensure that those provisions that provide for the funding of the CAA to implement the Act are fit for purpose. That is, the cost-recovery mechanisms provided are justifiable, reasonable and transparent, and generate sufficient income to recover costs associated with the performance of the CAA's functions.
41. In assessing Part 4 of the Act, the following criteria were used to ensure legislation is fit for purpose:
  - 41.1. legislation is clear, concise and accessible
  - 41.2. provisions in or made under the Act are consistent with one another and with other legislation
  - 41.3. the Act provides funding mechanisms sufficient to recover costs associated with the CAA and the Aviation Security Service (Avsec) implementing the objectives and performing the functions and duties assigned to them by the Act.

### Overall assessment of the sections

42. Overall, there is no evidence to suggest that Part 4 of the Act is not working in practice. The status quo provides effective, relevant, clear and transparent funding mechanisms.
43. Issues have been raised about the regulations themselves, that is the level at which fees, levies and charges have been set, and who should pay. These matters have not been considered as the content of these regulations is out of scope of the review.
44. A funding review of the CAA was completed in 2012, and a further review is scheduled to be completed in 2015. This is the appropriate forum to address questions relating to regulations, particularly policy questions around who should pay and how much.
45. During the Avsec Review 2013, stakeholders urged the Avsec review team to investigate the possibility introducing a more flexible price-setting mechanism (such as upper and lower thresholds, or a formula) for passenger security charges.

46. The price-setting mechanism will not be changed in the short-term. Further work is necessary to investigate whether a more flexible mechanism could be available in the future. Any changes to the price-setting mechanism would need to maintain the appropriate level of Cabinet oversight, and ensure sufficient certainty and transparency about what amount people were liable to be charged.
47. However, further investigation of alternative price-setting mechanisms is more appropriate outside the review of the Civil Aviation Act 1990. It has implications for other entities that set and collect fees, charges and levies, and it is not isolated to Avsec, the CAA or transport agencies alone.

### Items

#### Item F3: Length of time before the Director can revoke an aviation document because of unpaid fees or charges

48. Section 41(1) and 41(2) permits the Director to suspend an aviation document if there is an overdue fee or charge payable in relation to that document, and to revoke an aviation document if the related fee or charges is overdue by six months.

#### Is there a problem?

49. The CAA advises that approximately 90 percent of payers pay their fees and charges within a reasonable period. The remaining 10% of payers have long-term (considered to be more than 2-3 months) unpaid debt amounting to \$320,000. The CAA indicates that long-term debt has only become a problem since new fees and charges took effect from November 2012.
50. The CAA is currently looking at its accounts receivable policy and exploring the other tools that may be available to it to recover debts.
51. The CAA utilises section 41(2) as a tool for incentivising payment, and believes that six months is too long for debts to remain unpaid. Some operators see six months as the last date for payment. The CAA advises that the six month threshold to revoke an aviation document is too long in a modern economic and safety climate.

### Options

#### Option 1: Status quo

52. The Director may only revoke an aviation document because of an unpaid fee or charge related to that document six months after that fee or charge was due.

#### Option 2: Reduce the threshold from six to four months

53. Six months is a long time for the CAA to effectively hold debt without consequence to the debtor.
54. The CAA considers that moving from six to four months will be effective at encouraging timely payment of fees and charges, and assist it in its process of debt collection.

Question F3: Which is your preferred option? Please state your reasons.

### Item F4: Power to stop supplying services until overdue fees and charges have been paid

55. Section 41(4) provides for the CAA, the Director, or other persons, to decline to process an application or provide a service under the Act until fees and charges have been paid, but not if the safety of any person would be put at risk.
56. Based upon the current wording of section 41(4), it is not clear whether the provision covers outstanding debt for applications or services that have already been processed or performed.

#### Is there a problem?

57. The problem relates to the ability of the CAA to stop supplying services until a debtor has paid, or made arrangements to pay, overdue fees and charges. The CAA considers that it should have this ability.
58. Narrowly read, section 41(4) does not enable the CAA from using this section to stop supply until existing outstanding debt has been paid.

#### Options

##### Option 1: Status quo

59. Under the status quo, Section 41(4) would continue to cover current and future applications or provision of services — but not applications or services that have already been processed or performed.
60. This ambiguity could lead to disputes over the interpretation of the provision and whether the CAA has the power to decline to process an application or provide service until an outstanding debt has been paid.

##### Option 2: Amend section 41(4) to clarify its intention

61. Under this option, section 41(4) would be amended to make it clear that the CAA, the Director and other persons may decline to process an application or provide a service under the Act until the appropriate fee or charge *and outstanding debt* has been paid, or arrangements for payment made.
62. We consider that clarifying the Act for both current and future applications could remove uncertainty and prevent disputes.
63. In addition, section 41(4) contains the issue of public safety. The CAA cannot withhold services if ~~the~~ safety of any person would be put at risk". The CAA would need to review all of its services to determine which have a personal safety risk component, and to be clear as to which services can be declined until payment has been received.

Question F4: Which is your preferred option? Please state your reasons.

### Item F5: The Civil Aviation Authority's ability to audit operators from which it collects levies

64. Section 42A allows the Governor-General to impose levies on holders of aviation documents and persons who are exempted under the Act from holding a document. These levies must be for the purpose of enabling the Authority to carry out its functions under the Act.
65. Section 42B provides that levies may be imposed at different rates for different persons, aircraft, times of use, or other bases. The rates may be calculated according to several factors including the quantity of fuel and the purpose for which the aircraft is used.

#### What is the problem?

66. The CAA is reliant on the accuracy of information provided by other parties as the basis for setting fees, charges and levies.
67. The CAA does not have the power to audit these parties to ensure the information it receives is accurate.
68. Where parties have agreed to be audited, the audit has been conducted on their terms.
69. We are not aware of any operators rejecting a request to undertake an audit.

#### Options

##### Option 1: Status quo

70. The CAA relies on operators to voluntarily agree to an audit.

##### Option 2: Amend section 42B to include a power for the CAA to require an audit at the CAA's own cost

71. This option would enable the CAA to require an audit of operators to ensure that the information it receives is accurate.
72. Under this option the CAA would cover the cost of the audit. This recognises that if the CAA did not cover the cost of the audit, it could impose undue and costly requirements on smaller operators.

Question F5: Which is your preferred option? Please state your reasons.

### Item F6: Fees and charges for medical costs

73. Section 38(1)(ba) allows the Governor-General to make regulations prescribing the fees and charges for the purpose of reimbursing the CAA for costs directly associated with the Director and Convener's functions under Part 2A of the Act.

#### What is the problem?

74. The Report of the Regulations Review Committee in response to a complaint regarding the Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2012 highlighted a lack of clarity around what constitutes "costs directly associated with" the Director and Convener's functions under Part 2A.
75. Some complainants argued that the medical application fee given effect by the Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2012 exceeds the legislative authority granted by section 38(1)(ba), because a significant proportion of the fee consists of indirect costs attributable to the CAA's overheads.
76. The Committee found that that Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2012 do not exceed the legislative authority granted by section 38(1)(ba) and are in accordance with the general objects and intentions of the statute under which they are made.<sup>5</sup>

#### Options

##### Option 1: Status quo

77. Under the status quo, the fees and charges regulations for medical certification can include all costs directly associated with the Director and Convener's functions under Part 2A. These costs include relevant corporate overheads.
78. We agree with the scope of the current provision. However, we consider that without change section 38(1)(ba) may be interpreted as having a more limited scope than intended.

##### Option 2: Amend section 38(1)(ba) to clarify its intention

79. To avoid doubt, the wording of section 38(1)(ba) could be amended to make it clear that the provision is intended to cover a broad range of services and corporate overheads associated with the Director and Convener's functions under Part 2A (that is, both direct and indirect costs).
80. We consider that changing the wording of section 38(1)(ba) would prevent future uncertainty about what costs the CAA can be reimbursed for by fees and charges made pursuant to this provision.
81. In particular, the words 'directly associated with' are sometimes confused with the notion of 'direct costs', which has a specific meaning — one which is more limited in scope than the current provision.

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<sup>5</sup> The Regulations Review Committee Report can be found here: [http://www.parliament.nz/resource/en-nz/50DBSCH\\_SCR6116\\_1/171710e8826e8e41b5a4b1402f26ef19d609a57d](http://www.parliament.nz/resource/en-nz/50DBSCH_SCR6116_1/171710e8826e8e41b5a4b1402f26ef19d609a57d)

Question F6: Which is your preferred option? Please state your reasons.

# Questions for your submission

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This submission form is intended to be used alongside the consultation document to guide your feedback. Please give reasons for your answers or in support of your position so that your viewpoint is clearly understood, and also to provide more evidence to support decisions.

You can send us a written submission focusing on the questions in this document that are relevant to you by completing all or part of this submission template.

Please email your written submission to [ca.act@transport.govt.nz](mailto:ca.act@transport.govt.nz) with the word "Submission" in the subject line, or post it to:

Civil Aviation Act Review  
Ministry of Transport  
PO Box 3175  
Wellington 6140

The deadline for all forms of submission is 31 October 2014.

## Your role

Your name \_\_\_\_\_

Your email address \_\_\_\_\_

*Why is your email needed?  
Your email address is needed in case we need to contact you with any questions about your submission.*

### 1. What is your interest in Civil Aviation Act and Airport Authorities Act Review?

Are you:

- A private individual?
- Part of the transport industry?

### 2. If you are part of the sector, please describe your role:

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### Part A: Statutory framework

#### Item A1: Legislative structure

**Question A1a:** Which option do you support?

- Option 1:** Amalgamate the Civil Aviation Act and the Airport Authorities Act
- Option 2:** Separate the provisions in the Civil Aviation Act into three separate Acts:
  - (i) an Act dealing with safety and security regulation
  - (ii) an Act dealing with airline and air navigation services regulation
  - (iii) an Act dealing with airport regulation
- Option 3:** Status Quo – Civil Aviation Act and Airport Authorities Act maintained.
- Some other option** (please describe):

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Please state your reasons:

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## Part A: Statutory framework

### Item A2: Purpose statement and objectives

**Question A2a:** Do you support the concepts listed in Part A, paragraph 29 for inclusion in a purpose statement?

Subject area of the Act or Acts	Purpose	Do you support?
Safety and security related	To contribute to a safe and secure civil aviation system	<input type="checkbox"/> Yes <input type="checkbox"/> No
Economic - airport related	To facilitate the operation of airports, while having due regard to airport users	<input type="checkbox"/> Yes <input type="checkbox"/> No
Economic – airline related	To provide for the regulation of international New Zealand and foreign airlines with due regard to New Zealand's civil aviation safety and security regime and bilateral air services	<input type="checkbox"/> Yes <input type="checkbox"/> No
	To enable airlines to engage in collaborative activity that enhances competition, while minimising the risk resulting from anti-competitive behaviour <sup>1</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No
	To provide a framework for international and domestic airline liability that balances the rights of airlines and passengers	<input type="checkbox"/> Yes <input type="checkbox"/> No

Please state your reasons:

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<sup>1</sup> Depending on the outcome of the review, international air carriage competition provisions may be moved out of transport legislation and into the Commerce Act 1986.

## Part A: Statutory framework

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**Question A2b:** What other concepts do you think should be included in the purpose statement of the Act or Acts? (Please specify)

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**Question A2c:** Should the revision of statutory objectives align with the purpose of the Act or Acts?

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**Question A2d:** Do you support the revision of statutory objectives to include a requirement that decision-makers (for example, the Minister, the CAA, and the Secretary of Transport) be required to carry-out their functions in an effective and efficient manner?

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### Item A3.4: Independent statutory powers

**Question A3.4:** Should independent statutory powers continue to reside with the Director of Civil Aviation?

**Yes**

**No**

Please state your reasons here.

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**Entry into the system**

**Item B1: Provisions relating to fit and proper person assessment**

**Question B1a:** Which option do you support?

- Option 1:** Status quo – no change to the matters which the Director should consider when undertaking a fit and proper person test
- Option 2:** Align the fit and proper person test in the act with other transport legislation (Ministry of Transport preferred option)
- Some other option** (please describe):

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Please state your reasons here.

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### Participant obligations

**Question B2:** Are there any issues in relation to participant obligations and Director's powers in Part 2 of the Civil Aviation Act 1990 that you think should be addressed? If so, what options do you propose to address the issue(s)?

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Medical certification

Item B3: Certification pathways and stable conditions

Question B3a: Which option do you support?

- Option 1:** Status quo – two pathways for medical certification
- Option 2:** Develop a third pathway for medical certification for individuals affected by stable, long-term or fixed conditions.
- Some other option** (please describe):

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Please state your reasons

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## Part B: Safety and security

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**Question B3b:** What savings would likely occur from a third pathway to medical certification?

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**Item B4: Provision for the recognition of overseas and other Medical Certificates**

**Question B4a:** Should the Act allow the Director to recognise medical certificates issued by an ICAO contracting State?

- Yes
- Yes, but only those without any operational endorsements issued by States with a robust aviation medical certification regime
- No

Please state your reasons

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**Question B4b:** Should the Director of Civil Aviation or the State that has issued the medical certificate provide oversight?

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## Part B: Safety and security

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**Question B4c:** If you agree that the Director of Civil Aviation should provide oversight, what provisions in Part 2A of the Civil Aviation Act should apply?

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### Item B5: Medical Convener

**Question B5a:** Which is your preferred option?

- Option 1:** Status quo continue: Medical Convener retained (Ministry of Transport preferred option)
- Option 2:** Status quo continues and a separate fee for the Medical Convener is charged to applicants
- Option 3:** Disestablish Medical Convener role
- Other option:** please describe

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Please state your reasons here

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## Part B: Safety and security

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**Question B5b:** How much would you be prepared to pay to have your case reviewed by the Medical Convenor?

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Are there any other issues with the provisions in Part 2A of the Civil Aviation Act that you think should be addressed? If so, what options do you propose to address the issue(s)?

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### Offences and penalties

#### Item B6: Penalty levels

**Question B6a:** Which is your preferred option?

- Option 1:** Status quo – penalty levels remain unchanged
- Option 2:** Increase penalty levels
- Other option:** Please describe

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**Question B6b:** If you consider that increases to penalty levels are necessary, which penalties, and by how much?

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### Item B7: Acting without the necessary aviation document

**Question B7:** Which is your preferred option?

- Option 1:** Status quo
- Option 2:** Amend the provision to separate out the offences (Ministry of Transport preferred option)
- Other option:** Please describe

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Please state your reasons

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**Appeals**

**Item B8: Appeals process**

**Question B8a:** Should a specialist aviation panel or tribunal be established in addition to the current District Court process?

**Yes**

**No**

Please state your reasons:

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**Questions B8b:** How much would you be prepared to pay for a panel review?

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### Rules and regulatory frameworks

#### Item B9: Rule making

**Question B9a:** What enhancements could be made to the rule-making process?

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**Question B9b:** Which is your preferred option?

- Option 1:** Status quo – no change
- Option 2:** Power for Civil Aviation Authority Board (CAA Board) to make temporary rules
- Option 3:** Power to enable the Minister to delegate some of his/her rule-making powers to the Director or CAA Board
- Option 4:** Creation of a new tertiary level of legislation (e.g. Standards)
- Some other option:** Please describe

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## Part B: Safety and security

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**Question B9c:** If you prefer Option 3 (Delegation of some of the Minister's rule-making powers to the CAA Board or Director), what matters should the Director or CAA Board be delegated to make rules for?

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**Question B9d:** Is a „first principles“ review of rule-making required to consider the out of scope options (paragraphs 183 – 187) in more detail?

**Yes**

**No**

Please state your reasons:

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### Item B10: Possible amendments to Part 3

**Question B10:** What matters should the Minister take into account when making rules?  
Please specify and state your reasons.

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**Information management**

**Item B11: Accident and incident reporting**

**Question B11a:** What are the barriers to fully reporting accidents and incidents to CAA?

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**Question B11b:** What could be done to overcome the barriers in Question B11a?

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### Item B12: Accessing personal information for fit and proper person assessments

**Question B12a:** What information does the Director need to undertake a fit and proper person assessment?

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**Question B12b:** Should the Director be able to compel an organisation to provide information about a person in order to undertake a fit and proper person test?

Yes

No

Please state your reasons:

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Security

Item B13: Search powers

**Question B13a:** Should the Aviation Security Service (Avsec) be allowed to search unattended items in the landside part of the aerodrome?

- Yes
- No

Please state your reasons here.

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**Question B13b:** Should Avsec be allowed to search vehicles, in the landside part of the aerodrome, using non-invasive tools such as Explosive Detector Dogs (EDD)?

- Yes
- No

Please state your reasons here.

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## Part B: Safety and security

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**Question B13c:** Do you support the use of EDD within a landside environment of an airport, including public car parks and airport terminals generally? In particular, do you consider it appropriate for EDD to be used around people, including non-passengers?

**Yes**

**No**

Please state your reasons:

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## Part B: Safety and security

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### Issue B15: Security check procedures and airport identity cards

**Question 15:** Do you have any comments regarding Security Check Determinations (sections 77F and G) and the Airport Identity Card regime?

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### Item B16: Alternative terminal configurations

**Question B16a:** Should alternative airport designs or configurations be allowed in the future, for example, a common departure terminal?

**Yes**

**No**

Please state your reasons here.

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**Question B16b:** If yes, how should processing costs be funded?

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## Part C: Carriage by air - airline liability

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### Items

#### Item C1: The necessity of specific domestic airline liability provisions

**Question C1a:** Should air carriers continue to be presumed liable for loss caused by delay in exchange for a limit on that liability?

- Yes
- No

Please state your reasons:

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**Question C1b:** The Civil Aviation Act delay provisions relate to passenger delay. Should there be a presumption of fault for delay in the carriage of baggage as well?<sup>2</sup>

- Yes
- No

Please state your reasons here:

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<sup>2</sup> Note that the Carriage of Goods Act appears to cover the loss of or damage *to* baggage but not losses/damages resulting *from* delayed baggage. So the passenger would need to seek redress under the Consumer Guarantees Act.

## Part C: Carriage by air - airline liability

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### Item C2: The effectiveness of specific domestic airline liability provisions

**Question C2a:** Which is your preferred option?

- Option 1:** Status quo and potential educational measures developed (Ministry of Transport preferred option)
- Option 2:** Strengthen the consumer protection provisions in the Act
- Other option:** Please describe

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Please state your reasons:

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**Question C2b:** Do you think that educational measures are necessary? If so, what should they be?

- Yes** (please tick one or more below)
  - Online information on the provisions in the Civil Aviation Act.
  - A „Know Your Rights“ pamphlet or other printed materials for passengers.
  - Government departments working with carriers to introduce a „Customers Charter“ or something similar.
  - Other. Please specify:

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- No**

## Part C: Carriage by air - airline liability

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Please state your reasons here:

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**Question C2c:** Do you think that stronger protection provisions are necessary in the Civil Aviation Act 1990?

**Yes**

**No**

Please state your reasons here:

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**Question C2d:** If you answered yes to question C2c, what do you think should be included in the Act?

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## Part C: Carriage by air - airline liability

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### Item C3: The limit on liability for damage caused by delay

**Question C3a:** Which is your preferred option?

- Option 1:** Status quo – liability is capped at an amount representing 10 times the sum paid for the carriage
- Option 2:** Revise the domestic liability limit for damage caused by delay
- Other option:** Please describe

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Please state your reasons:

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**Question C3b:** If you selected Option 2 for Question C3a, what do you consider would be an appropriate liability limit for domestic air carriage and why?

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### International air services licensing

#### Item D1: Commercial non-scheduled services

**Question D1a:** Which is your preferred option?

- Option 1:** Status quo – the Act continues not to specify the precise scope of „non-scheduled services“
- Option 2:** Remove the need for case-by-case authorisation for services that do not follow a systematic pattern and provide explicitly for authorisation of supplementary services or a systematic series of flights (Ministry of Transport preferred option)
- Some other option** (please describe):

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Please state your reasons:

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## Part D: Airline licensing and competition

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**Question D1b:** Do you agree with the proposal to remove the need for authorisation of services that do not follow a systematic pattern?

**Yes**

**No**

Please state your reasons:

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**Question D1c:** If you answered yes to Question D1b, which approach to determining what is systematic do you prefer?

**Approach 1:** use the same threshold for authorisation by the Secretary as is used for requiring an foreign air operator certificate (that is, more than two take-offs or landings within New Zealand in any consecutive 28 day period, or more than eight take-offs or landings within New Zealand in any consecutive 365 day period)

**Approach 2:** explicitly define systematic as some other number of services on the same route over a particular time.

Please state your reasons:

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## Part D: Airline licensing and competition

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**Question D1d:** If you selected Approach 2, how should the term systematic be defined?

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## Part D: Airline licensing and competition

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### Item D2: Allocation decisions for New Zealand international airlines

**Question D2:** Which is your preferred option?

- Option 1:** Status quo – the Minister of Transport continues to consider licensing decisions for New Zealand airlines that involve allocating both limited and unlimited rights
- Option 2:** Status quo and Secretary to consider licensing decisions for New Zealand airlines involving unlimited rights under delegation
- Option 3:** Amend the Act to allow the Secretary to consider licensing decisions for New Zealand airlines involving unlimited rights (Ministry of Transport preferred option)
- Some other option** (please describe):

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Please state your reasons:

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## Part D: Airline licensing and competition

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### Item D3: Public notice

**Question D3a:** Which is your preferred option?

- Option 1:** Status quo – the Act provides for a 21 day submission period when an application for a new, amended or renewed scheduled international air service licence by a New Zealand airline is received.
  
- Option 2:** Amendment to the Act to:
  - reduce the 21 day submission period, for example, to 14 days or 10 days
  - require notice to be given only when limited air services rights for routes or capacity are being allocated.

(Ministry of Transport preferred option)

- Some other option** (please describe):

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Please state your reasons here:

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## Part D: Airline licensing and competition

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**Question D3b:** What is the appropriate submission period to balance the desirability of allowing third parties to make representations with reducing delay for airlines that are planning and implementing services?

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## Part D: Airline licensing and competition

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### Item D4: Transferring licences

**Question D4:** Which is your preferred option?

- Option 1:** Status quo – Sections 87K and 87Y retained.
- Option 2:** Repeal sections 87K and 87Y, and amend sections 87J, 87Q and 87X (Ministry of Transport preferred option)
- Some other option** (please describe):

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Please state your reasons here:

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## Part D: Airline licensing and competition

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### Item D5: Airline operations from countries with which New Zealand does not have an Air Services Agreement

**Question D5:** Which is your preferred option?

- Option 1:** Status quo – the Act continues to provide for the licensing of foreign international airlines of countries with which New Zealand does not have an Air Services Agreement or similar arrangement (Ministry of Transport preferred option)
- Option 2:** Repeal – the Act ceases to provide for the licensing of foreign international airlines of countries with which New Zealand does not have an Air Services Agreement or similar arrangement
- Some other option** (please describe):

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Please state your reasons:

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## Part D: Airline licensing and competition

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### International air carriage competition

#### Item D6: Authorisation of contracts, arrangements and understandings between airlines

**Question D6a:** Which is your preferred option?

- Option 1:** Amended Civil Aviation Act regime – amend the existing provisions to explicitly require an assessment of costs and benefits, specify the process for making a decision, and provide for conditions to be attached to any approval
- Option 2:** Commerce Act – the authorisation of contracts, arrangements and understandings between airlines will be considered and made under the Commerce Act
- Some other option** (please describe):

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Please state your reasons:

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**Question D6b:** How do the two options meet the criteria in paragraph 96?

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## Part D: Airline licensing and competition

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**Question D6c:** What are the costs, benefits, and risks of the two options?

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**Question D6d:** Under each option, how do you envisage the decision-making process working? (For example, under Option 1 who would undertake the competition analysis and what information gathering powers would be required to undertake this analysis?)

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## Part D: Airline licensing and competition

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### Item D7: Commission Regimes (section 89)

**Question D7:** Which is your preferred option?

- Option 1:** Status quo – the Act provides for a Commission Regime to be issued and retains the current Commission Regimes
- Option 2:** Repeal and reissue – the Act provides for a Commission Regime to be issued and revises the current Commission Regime
- Option 3:** Complete repeal - repeal the existing Commission Regime and section 89 (Ministry of Transport preferred option)
- Some other option** (please describe):

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Please state your reasons:

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## Part D: Airline licensing and competition

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### Item D8: Authorisation of unilateral tariffs by the Minister

**Question D8:** Which is your preferred option?

- Option 1:** Status quo – the Act continues to provide for authorisation of single airline tariffs
- Option 2:** Amended provision – replace section 90 with a provision similar to regulation 19A(4) of the Australian Air Navigation Regulations 1947 (Ministry of Transport preferred option)
- Option 3:** Complete repeal – the Act ceases to provide for authorisation of single airline tariffs
- Some other option** (please describe):

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Please state your reasons:

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**Airport Authorities Act**

**Item E1: Specified airport companies**

**Question E1a:** Which is your preferred option?

- Option 1:** Status quo – specified airport companies are defined as an airport company that in its last accounting period received revenue exceeding \$10 million.
- Option 2:** Revise the threshold – specified airport companies are defined as an airport company that in its last accounting period received revenue exceeding \$15 million.
- Option 3:** Amend the threshold to be based on revenue from identified airport activities – for example, specified airport companies are defined as an airport company that in its last accounting period received revenue from identified airport activities exceeding \$10 million.
- Option 4:** Amend the threshold from annual revenue to passenger movements – for example, airport company that in its last accounting period had in excess of one-million passenger movements (Ministry of Transport preferred option)
- Some other option** (please describe):

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Please state your reasons:

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**Question E1b:** Is changing the threshold for a „specified airport company“ the most effective way to distinguish between airports that are in a position to exercise significant market power and those which are not?

**Yes**

**No**

Please state your reasons:

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**Item E2: Redundant provisions**

**Question E2a:** What impact, if any, would removing section 3BA have?

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**Question E2b:** Do you support repealing section 3BA?

**Yes**

**No**

Please state your reasons:

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**Question E2c:** What impact, if any, would removing sections 4(2) and 4A have for airports that are not regulated under the Commerce Act 1986?

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**Question E2d:** Do you support repealing sections 4(2) and 4A for airports that are not regulated under the Commerce Act 1986?

- Yes**
- No**

Please state your reasons here:

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**Item E3: Consultation on certain capital expenditure**

**Question E3a:** Which is your preferred option?

- Option 1:** Status quo - specified airport companies are required to consult substantial customers before approving certain capital expenditures
- Option 2:** Require all airport companies to consult on certain capital expenditures (Ministry of Transport preferred option)
- Some other option** (please describe):

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Please state your reasons:

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**Question E3b:** Under the status quo, to what extent do airport companies that are not „specified“ consult on capital expenditure? Please give examples.

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**Question E3c:** What would be the costs and benefits of expanding this provision to cover all airport companies?

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**Item E4: Threshold for consultation on certain capital expenditure**

**Options for amending the threshold for consultation on certain capital expenditures**

<b>Passenger volumes</b>	<b>OR</b>	<b>Annual revenue</b>	<b>Option 1</b>	<b>Option 2</b>	<b>Option 3</b>
< 1 million		< \$10 million	> \$5 million	10% of identified airport assets (excluding land)	The lower of 30% of identified airport assets or \$30 million
> 1 million but < 3 million		> \$10 million but < \$50 million	> \$10 million		
> 3 million		> \$50 million	> \$30 million		

**Question E4:** Which is your preferred option?

- Option 1:** Stepped thresholds
- Option 2:** 10 percent of identified airport assets (excluding land)
- Option 3:** The lower of 30 percent of identified airport assets or \$30 million
- Some other option** (please describe):

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Please state your reasons:

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**Item E5: Termination of leases without compensation or recourse for compensation**

**Question E5:** Which is your preferred option?

- Option 1:** Status quo - airport authorities may terminate a lease at any time if the property is required for the “purposes of the airport”, and lessees may not seek redress through the Courts for damages or compensation, except where compensation is provided for under the lease.
- Option 2:** Amend the Act to clarify the reasons for which airport authorities can terminate leases without compensation or recourse for compensation
- Some other option** (please describe):

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Please state your reasons:

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**Item E6: Bylaw making powers**

**Question E6a:** Which is your preferred option?

- Option 1:** Status quo – the existing bylaw making powers of airport companies, airport authorities, and local authorities are retained
- Option 2:** Repeal some bylaw making powers
- Some other option** (please describe):

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Please state your reasons:

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**Question E6d:** If bylaw making powers are retained, what is the appropriate level of oversight for local authorities, airport authorities and airport companies seeking to make bylaws?

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**Item E7: Information disclosure and specifying what “publicly available” means.**

**Question E7a:** What are the costs and benefits of the current information disclosure regime under section 9A of the Act?

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**Question E7b:** Which is your preferred option?

- Option 1:** Status quo – the Act does not specify what “publically available” means in section 9A
- Option 2:** Specifying what publicly available means in section 9A (Ministry of Transport preferred option)
- Some other option** (please describe):

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Please state your reasons:

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**Item F3: Length of time before the Director can revoke an aviation document because of unpaid fees or charges**

**Question F3:** Which is your preferred option?

- Option 1:** Status quo – the Director of Civil Aviation may revoke an aviation document if the related fee or charge is overdue by six months
- Option 2:** Reduce the threshold from six to four months
- Some other option** (please describe):

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Please state your reasons:

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**Item F4: Power to stop supplying services until overdue fees and charges have been paid**

**Question F4:** Which is your preferred option?

- Option 1:** Status quo – Section 41(4) the Civil Aviation Act provides for the CAA, the Director and other persons to decline to process an application or provide a service under the Act until the appropriate fee or charge has been paid (or arrangements for payment made).
- Option 2:** Amend section 41(4) to clarify its intention – to explicitly provide for the CAA, the Director and other persons to decline to process an application or provide a service under the Act until the appropriate fee or charge or outstanding debt has been paid (or arrangements for payment made).
- Some other option** (please describe):

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Please state your reasons:

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**Item F5: The Civil Aviation Authority’s ability to audit operators that collect levies**

**Question F5:** Which is your preferred option?

- Option 1:** Status quo – the Act does not allow the CAA to require an audit of operators from which it collects levies.
- Option 2:** Amend section 42B to include a power for the CAA to require an audit of operators from which it collects levies at the CAA’s own cost
- Some other option** (please describe):

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Please state your reasons:

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Item F6: Fees and charges for medical costs

Question F6: Which is your preferred option?

- Option 1:** Status quo – section 38(1)(b) of the Civil Aviation Act allows the Governor-General to make regulations prescribing the fees and charges for the purpose of reimbursing the CAA for “costs directly associated with” the Director and Convener’s functions under Part 2A of the Act.
- Option 2:** Clarify section 38(1)(b) that this section is intended to cover a broad range of services and corporate overheads associated with the Director and Convener’s functions under Part 2A of the Act
- Some other option** (please describe):

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Please state your reasons:

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