

# Regulatory Impact Statement

## National security considerations within the civil aviation regime

### Agency Disclosure Statement

1. The Ministry of Transport has prepared this Regulatory Impact Statement (RIS). It analyses options to provide a regime to address risks to national security arising from civil aviation activities. This RIS accompanies the Cabinet paper entitled *Review of the Civil Aviation Act and Airport Authorities Act: Key Policy Decisions*.
2. We identified the need for this legislation during the drafting of the Outer Space and High Altitude Activities Bill. During the development of the space and high altitude regulatory regime, we became aware of a range of technologies being developed to perform similar functions to satellites. These technologies could be used in New Zealand's airspace. This includes earth observation, internet connectivity and surveillance activities.
3. The Civil Aviation Act provides sufficient powers to regulate aviation safety and security (in relation to risks to safety from the carriage of dangerous goods and the risk to aviation security by unlawful interference with an aircraft). However, the CA Act does not provide sufficient powers to mitigate the risk of certain technologies from being used in a way that poses a threat to New Zealand's national security.
4. The preferred option in this RIS is to amend the Civil Aviation Act (through the Civil Aviation Reform Bill), to include national security considerations. This will provide the foundations in primary legislation to address this regulatory gap. It is possible that Civil Aviation Rules will be necessary to fully implement the proposal. These will be developed (if necessary) following the passage of the Civil Aviation Reform Bill.
5. Consultation has been undertaken with interested government departments but not publically. Consultation with the wider public and aviation industry will take place when the Civil Aviation Reform Bill is before the Select Committee.

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Date: July 2016

## Status quo

6. The CA Act and Civil Aviation Rules regulate aviation safety and security including (but not limited to) personal security. Security in this context relates to civil aviation security. This is relatively narrow in scope—only covering safety risks arising from the carriage of dangerous goods and the risk to aviation security by unlawful interference with an aircraft.
7. Since the 11 September 2001 terrorist attacks on the United States, global aviation security concerns have broadened to include:
  - 7.1. using civil aircraft for the purpose of causing death, serious bodily injury or serious damage
  - 7.2. using aircraft for surveillance or information gathering under circumstances that may give rise to national security or privacy concerns
  - 7.3. using civil aircraft for the delivery or any nuclear, biological or chemical (NBC) weapon for the release of any biological, chemical or radiological (BCR) agent in a manner intended to cause death, serious bodily injury or serious damage or prolonged denial of access to an area
  - 7.4. using any biological, chemical, radiological or similarly hazardous substance on board or against civil aircraft
  - 7.5. the unlawful transport of any NBC weapon or BCR agent or similarly hazardous substances
  - 7.6. the possibility that New Zealand may be used as a development or testing environment for an aircraft of any type where there is a risk that it may be used for any of the above purposes relating to NBC weapons or BCR agents
  - 7.7. cyber attacks on air navigation facilities and aircraft operating systems.

### *Outer Space and High Altitude Activities Bill*

8. The Outer Space and High Altitude Activities Bill will be introduced in September 2016. The imminent commencement of space launches in New Zealand by a company, Rocket Lab, has precipitated the need for this legislation. During the development of this legislation, officials identified that there is a wide range of technologies being developed to operate at very high altitudes that perform similar functions to satellites. This includes earth observation, internet connectivity and surveillance activities.
9. In order to future-proof the space activities regime for developments in technology, and to ensure that different technologies providing similar applications and services are treated consistently, the Outer Space and High Altitude Activities Bill proposes that activities taking place at high altitude (near space) be brought within the scope of the space regime.

10. High altitude activities are those activities taking place above controlled airspace (i.e. above 60,000 feet or approximately 18km from the ground). People operating a high altitude vehicle<sup>1</sup> in this area will require a licence.

11. The Outer Space and High Altitude Activities Bill proposes a process to address any national security risks associated with activities taking place above New Zealand's controlled airspace.

*Civil Aviation Act and national security*

12. There is the potential for the range of technologies being developed to operate at high altitudes, to also operate in lower regions of New Zealand's airspace.

**Problem definition**

Withheld for security reasons

13. There is the potential for aircraft to carry and use certain technologies (e.g. remote sensing, communications, surveillance and navigation technologies) that, in the wrong hands, may pose a threat to New Zealand's national security. [Redacted]

13.1. [Redacted]

13.2. [Redacted]

14. With the introduction of the Outer Space and High Altitude Activities Bill there will be an inconsistent treatment of different technologies that perform similar functions.

15. We wish to make the most of the economic development opportunities associated with the use of new technology. However, we want to ensure New Zealand's ability to regulate where necessary to protect and advance our interests, including national security.

16. The Civil Aviation Act has limited powers to control such activities or operations that originate from New Zealand that may pose a threat to national security or are not in the national interest. [Redacted]

Withheld for security reasons

**Objectives**

17. The policy objective is to ensure a safe and secure civil aviation system. In particular, that any risks to New Zealand's national security and national interest arising from New Zealand civil aviation operations are effectively and efficiently managed. This should be done in a way that minimises compliance

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<sup>1</sup> Defined as an aircraft or other vehicle that travels, is intended to travel, or is capable of travelling, above controlled airspace.

costs for industry and costs on government, and is consistent (where appropriate) with the Outer Space and High Altitude Activities Bill.

## Options

18. The following options were considered to address the problem:
  - 18.1. Option one: status quo
  - 18.2. Option two: develop a stand-alone national security legislation to address the national security issues.
  - 18.3. Option three: amend the Civil Aviation Act to replicate the national security requirements for high altitude activities (as expressed in Part 2 – subpart 6 of the Outer Space and High Altitude Activities Bill). A national security check would be a requirement to operate in the aviation system<sup>2</sup> (albeit with provision to exempt certain types of operations/persons).
  - 18.4. Option four (preferred option): amend the Civil Aviation Act to include national security considerations but not make it a requirement to obtain a national security check to operate in the aviation system. National security considerations could be reflected in the Civil Aviation Act in the following ways:
    - in the purpose statement
    - providing the Minister of Transport with the ability to make Civil Aviation Rules relating to national security
    - providing the Director of Civil Aviation (the Director) with the ability to make emergency rules relating to national security
    - providing the Director with the ability to revoke, suspend or impose conditions on an operator's certificate on the advice of the Minister Responsible for the Government Communications Security Bureau or the Minister in Charge of the New Zealand Security Intelligence Service
    - providing a right of appeal to the Inspector-General of Intelligence and Security in relation to advice given by the NZSIS and GCBS.<sup>3</sup>

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<sup>2</sup> A high altitude licence is required if a person intends to operate a high altitude vehicle from New Zealand, that is capable of travelling, or intended to travel above controlled airspace.

<sup>3</sup> Based on similar process relating to security check determinations in section 77G of the Civil Aviation Act.

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19. The status quo does not meet the policy objectives. The existing regulatory gap would be maintained; meaning risks to national security cannot be effectively managed. [REDACTED]  
[REDACTED]  
[REDACTED] Assuming the passage of the Outer Space and High Altitude Activities Bill, there would also be inconsistent regulatory treatment of similar activities, from a national security perspective.
20. We have ruled out option two on the basis that protecting New Zealand's national security is just one of a suite of objectives that are relevant to civil aviation activities and it is not efficient from a regulatory perspective to design a stand-alone regulatory tool to achieve this objective.
21. We have assessed options three and four against the following criteria:
- Regulatory efficiency.
  - Technology neutrality—different technologies offering similar functions should be regulated consistently.
  - Regulatory effectiveness—the identified risks are appropriately addressed.
22. Options three and four appear similar in terms of regulatory effectiveness and technology neutrality.
23. Option three does not meet the regulatory efficiency criterion. A process similar to the high altitude licence regime (whereby most participants would need to undergo a national security check) is not practical. There are 29,767 licensed individuals, 752 certificated organisations and 4915 licensed aircraft in the aviation system.<sup>4</sup> Requiring most of them to undergo a national security check would be a disproportionate response to the problem, and would create a lot of work for the NZSIS and GCBS.
24. We considered whether the CA Act could stipulate that activities using certain types of technology (e.g. remote sensing, communications, surveillance and navigations technologies) would require operators to undergo a national security check. However, many aircraft use these kinds of technology in normal operation. It would be very difficult to distinguish use that may pose a risk to national security. If such a distinction in how technology is used could be specified, civil aviation rules could be developed to require a national security assessment along the lines of the high altitude licence requirements in the Outer Space and High Altitude Activities Bill.
25. Option four is the preferred option.
- 25.1. It addresses the regulatory gap that prevents the New Zealand government from considering national security risks in the civil aviation regime.

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<sup>4</sup> Figures from CAA Annual Report for 2014/15.

- 25.2. It would make it possible to align the civil aviation regime with the high altitude activities regime as expressed in the Outer Space and High Altitude Activities Bill.

## Impacts

### *Government*

26. The government security community may in the future need to provide advice on whether an operation has national security implications. Close collaboration between the Ministry of Transport, CAA and the security community, would ensure any requests could be closely monitored.

### *Aviation participants*

27. An operation or operator will be impacted where the government security community has provided advice to the Director. The impact will depend on the specific situation. It may mean that conditions are imposed on an operation, an operation may be suspended or if the risk is considered unmanageable, an operator's aviation document may be revoked.
28. If civil aviation rules are developed to place national security requirements on certain types of operations, aviation participants undertaking certain activities using certain types of technology may be required to undergo a national security check. We do not anticipate the number of affected participants to be large. The impact will be assessed in development of the rule.
29. Aligning civil aviation regulation with the requirements of the Outer Space and High Altitude Activities Bill could reduce uncertainty or complexity for operators who may be subject to both regimes. For example, the Civil Aviation Act or Rules could provide that an operator who already held a High Altitude Licence, and had already undergone a national security and national interest assessment, would not require a further national security assessment to operate in civil aviation.

## Consultation

30. The Ministry has discussed this issue with the Department of Prime Minister and Cabinet and government security community and they agree with the proposal. Consultation with the wider public and aviation industry will take place through the Select Committee process.

## Conclusions and recommendation

Withheld for security reasons

31. [Redacted]

32. The proposal to include the ability to consider issues of national security in the Civil Aviation Act addresses this problem. It enables regulatory efficiency, effectiveness and provides some consistency in how different technologies offering similar functions are regulated, regardless of where in New Zealand's airspace they are operating.

### **Implementation**

33. The legislative changes proposed in this RIS (subject to Cabinet approval) will be progressed as part of a Civil Aviation Reform Bill. An implementation plan will be developed for the Bill.
34. In addition to the implementation plan associated with the Civil Aviation Reform Bill, officials from the Ministry of Transport, Civil Aviation Authority, Department of Prime Minister and Cabinet, NZSIS and GCSB, will continue to engage to resolve any outstanding policy issues, and issues of legislative design.
35. We need to assess whether changes to Civil Aviation Rules are necessary to support the provisions in primary legislation. If rules are necessary, these will be developed following the passage of the Civil Aviation Reform Bill, through the normal Transport Rules Programme.

### **Monitoring, evaluation and review**

36. There will be a review of the Outer Space and High Altitude Activities Act three years after its enactment. This will provide an opportunity to ensure harmonisation between the two regulatory regimes.