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The attached document has been proactively released by the New Zealand Customs Service on behalf of the Minister of Customs.

Paper prepared by:	New Zealand Customs Service
Date considered by Cabinet:	17 July 2022
Name of paper:	Establishing an enduring legislation framework for the New Zealand Traveller Declaration
Cabinet Reference:	SWC-22-MIN-0127
Purpose of the paper:	This Regulatory Impact Statement provided advice to Ministers on the key enforcement settings necessary to implement Tranche three of the New Zealand Traveller Declaration.

Some parts of this paper have been redacted under sections 9(2)(f) (iv) and 9(2)(h) of the Official Information Act 1982.



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Coversheet: Revised Regulatory Impact Statement: Compliance and Enforcement of the Traveller Health Declaration System

Advising agencies:	New Zealand Customs Service
Decision sought:	Analysis produced for the purpose of informing final Cabinet decisions to specify the requirements to comply with, and penalties in relation to, the traveller health declaration system.
Proposing Ministers:	Minister for Customs

Summary: RIS UPDATE 16 JUNE 2022

The COVID-19 Public Health Response (Air Border) Order 2021 was amended to enable Tranche 1 of the traveller health declaration system, following agreement by Cabinet in November 2021.

Following the development of Tranches 2 and 3, and amendment has been made to this Regulatory Impact Statement (RIS):

1. We originally advised that the changes to make the traveller health declaration system (now known as the New Zealand Traveller Declaration (NZTD)) would be implemented through the COVID-19 Public Health Response (Air Border) Order 2021 (Air Border Order).
2. The Air Border Order will likely be repealed in 2022 meaning that the NZTD will need different legislation to continue to operate.
3. The NZTD will now use the Customs and Excise Act 2018 to enable the New Zealand Customs Service (Customs) to require a declaration from travellers and to enable Customs to verify and enforce this requirement.
4. This change is reflected in an updated section on the development of the status quo for 2022 on page 7.

Responsible Manager(s) (completed by relevant manager)

Kathryn MacIver
Group Manager
Policy and Strategy
New Zealand Customs Service

Date: 16/06/2022

Revised Regulatory Impact Statement: Compliance and Enforcement of the Traveller Health Declaration System

Coversheet

Purpose of Document	
Decision sought:	<i>Analysis produced for the purpose of informing final Cabinet decisions to specify the requirements to comply with, and penalties in relation to, the traveller health declaration system.</i>
Advising agencies:	<i>New Zealand Customs Service with support from Ministry of Health, Ministry of Business, Innovation and Employment, Ministry of Justice and the Department of the Prime Minister and Cabinet.</i>
Proposing Ministers:	<i>Minister for COVID-19 Response</i>
Date finalised:	<i>28/10/2021</i>
Problem Definition	
To scale-up the gradual and safe re-opening of New Zealand's borders by operationalising the risk-based entry pathways through a traveller health declaration system already agreed by Cabinet as defined by the Reconnecting New Zealanders framework, an enforcement regime is required to incentivise compliance with providing a health declaration and respond to fraud or gaming of the system.	
Executive Summary	
The public policy objective is to ensure compliance with all travellers providing a health declaration through the traveller health declaration system (THDS), either online or through an assisted channel. The THDS is an administrative tool to help manage New Zealand's public health response to the COVID-19 pandemic. There are two issues that need to be addressed in this Regulatory Impact Statement (RIS) through proposed amendments to the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 (Air Border Order). Issue A: whether to make it mandatory to make a health declaration • Option 1a: do not make it mandatory for travellers to make a health declaration • Option 2a: make it mandatory for travellers to make a health declaration. Issue B: what enforcement regime should be implemented to ensure compliance with the mandatory health declaration. • Option 1b: education approach with no enforcement penalties • Option 2b: amendments to the Air Border Order with existing penalties • Option 3b: amendments to the Air Border Order with highest possible penalties under the COVID-19 Public Health Response Act 2020 (COVID-19 Response Act) • Option 4b: amendments to the Air Border Order and COVID-19 Response Act to include higher penalties possibly including imprisonment for non-compliance. It is anticipated that higher penalties under options 3b and 4b will send a clear message to travellers who do not comply with the THDS requirement, and place New Zealand communities in danger of uncontrolled COVID-19 transmission, that this behaviour will not	

be acceptable in New Zealand. The THDS will simplify the current travel process and make compliance easy to do which will help to increase voluntary compliance levels.

Under the preferred options, option 2a for mandatory to make the health declaration and option 3b for the enforcement option, all travellers will have to make the mandatory declaration. The requirement for travellers make the health declaration includes both New Zealand citizens and residents as well as foreign nationals. In the case of non-compliance with the mandatory health declaration, there will be an offshore and onshore enforcement component.

For offshore non-compliance, the Ministry for Business, Innovation, and Employment (Immigration New Zealand) will issue a 'do not board' directive for non-compliant foreign nationals in breach of their visa conditions. For New Zealand citizens and residents, they will be denied boarding by the airline so that the airline does not cause a non-compliant traveller to arrive in New Zealand.¹

The New Zealand Customs Service (Customs) will enforce THDS requirements at the border using currently established processes and systems. If a traveller fails to comply with a COVID-19 Order they could be issued a warning letter, an infringement fee of \$4,000 or a court issued fine of up to \$12,000. These penalties are the maximum 'high risk' penalties possible under the updated COVID-19 Response Act.²

Following implementation, the amended legislation and new enforcement regime will be monitored and reviewed as part of the wider THDS review process as it moves through the three development tranches outlined in appendix one.

Limitations and Constraints on Analysis

There is a limited timeframe to deliver the traveller health declaration system

Due to the need to ensure the THDS is delivered at pace, there is a limited window for undertaking analysis on the settings needed for implementation. This is compounded by a complex and crowded policy space with competing priorities. The sequencing of advice is not necessarily logical for the THDS work programme, and requirements from Ministers are dynamic as they respond to the changing demands of managing the risk from COVID-19, including the current domestic outbreak. This environment has necessitated the building of the THDS system and the seeking of policy decisions in tandem.

The THDS relies on a number of decisions being taken separately

The THDS is dependent on analysis and decisions from other related work such as the Reconnecting New Zealanders framework. This includes numerous pieces of advice being prepared by the Department of the Prime Minister and Cabinet (DPMC) and the Ministry of Health (MoH), with input from other agencies. These pieces of advice discuss the capacity of the health system to enable re-opening, entry eligibility for different classes of travellers, the health settings that will inform the risk assessment rules for the three entry pathways, and the self-quarantine pilot.

¹ Airlines are generally required to ensure that they do not board travellers who do not comply with any of the requirements in the Air Border Order.

² Subject to the COVID-19 Public Health Response Amendment Bill (No 2) 2021 (the Amendment Bill) going through Parliament.

Data availability is limited

Data about compliance levels is not available, however, data from enforcement of pre-departure test requirements is available and shows a 99.86 percent compliance rate. It is difficult to link this data to expected levels of inadvertent and deliberate non-compliance with the THDS.

Enforcement options are limited because of the operating environment

Adding even a few seconds per traveller to ensure a requirement has been met can exacerbate the already limited frontline processing times, particularly given the manual nature of enforcement processes. Issues are compounded by physical distancing requirements and the impact this has on the economic viability of airlines and space constraints at airports.

Consultation has been limited

No public consultation on the proposed options was undertaken as there were major constraints in timing during the advice/drafting process. However, consultation was undertaken with relevant agencies. Their feedback was supportive of the proposed options.

Responsible Manager(s) (completed by relevant manager)

Kathryn MacIver

Group Manager

Policy and Strategy

New Zealand Customs Service

Date: 28/10/2021

Quality Assurance (completed by QA panel)

Reviewing Agency: New Zealand Customs Service

Panel Assessment & Comment: The New Zealand Customs Service RIA Panel has reviewed the Regulatory Impact Statement (RIS) prepared by the New Zealand Customs Service, and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria. The RIS falls short of the criteria in the area of consultation, as there was no time for any public consultation. However, the Panel notes that the preferred option is based on the penalties in the COVID -19 Public Health Response Amendment Bill (No 2) which is currently before select committee. The public have had the opportunity to comment on this Bill.

The Panel considers that the RIS is a sound basis for informed decision making.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Background

1. On 8 September 2021 Cabinet agreed to fund the development of the THDS [CBC-21-MIN-0090 refers] as an administrative tool to operationalise the three entry pathways outlined in the Reconnecting New Zealanders framework.

Assumption: There will be three risk pathways as part of the Reconnecting New Zealanders framework to re-open the border. The THDS and associated enforcement regime will have to adjust to reflect any changes to this approach.

2. A traveller's vaccination status will become one of the most important considerations in traveller risk, alongside a country-risk assessment as agreed by Cabinet in August 2021 [CAB-21-MIN-3505 refers]. By making a health declaration, all travellers will be assigned to one of three risk entry paths:
 - a. **low-risk** – vaccinated with approved credential and travelling from a low risk country
 - b. **medium-risk** – vaccinated with approved credential and from a medium risk country
 - c. **high-risk** – no vaccine required and travelling from high-risk and very high-risk countries.
3. Even if the pathways and health settings change over time, the THDS will be able to apply a set of criteria to determine the correct processing for individual travellers.
4. The THDS is an administrative tool to support the safe and gradual re-opening of the border as defined under the Reconnecting New Zealand framework. To ensure the intent and integrity of this approach, each traveller will be required to complete a health declaration by providing the required information and health documents via an online or assisted channel. Required information for a declaration to be complete currently consists of:
 - a. evidence of negative result from a pre-departure test (PDT)
 - b. evidence of a vaccinate certificate (unless exempted or on high risk entry pathway)
 - c. self-declared travel history
 - d. contact tracing information
 - e. other required information.³
5. The information in the traveller's declaration will enable health and border agencies to assess the COVID-19 health status of individual travellers prior to boarding and allocate them to one of the entry pathways depending on their risk assessment outcome.

³ Requirements will be added or removed over time. The THDS will include other declarations such as the arrival card as part of stage 3.

6. From 1 November 2021 foreign nationals will need to be fully vaccinated before travelling to New Zealand as part of their visa conditions [CAB-21-MIN-0403 refers]. Temporary entry class visas are granted on the condition that the individual complies with orders made under section 11 of the COVID-19 Public Health Response Act 2020 (COVID-19 Response Act). Therefore, non-compliance with the Air Border Order is a breach of visa conditions and they:
 - a. could be turned around at the border, if identified pre-entry; or
 - b. could potentially be made liable for deportation under section 157 of the Immigration Act 2009, if identified after they have gained entry.
7. The Air Border Order currently requires travellers to produce certain kinds of evidence such as their Managed Isolation and Quarantine (MIQ) allocation voucher and evidence of PDT as well as provide contact tracing information.
8. Travel history will also be a factor in determining how travellers are treated from a health perspective on arrival in New Zealand, with travellers from high-risk countries entering New Zealand on the high-risk entry pathway.
9. The COVID-19 Response Act is also being updated to implement new maximum penalties and the ability to graduate infringement offences into new categories based on the public health risk. This is outlined in appendix two. This work has been subject to a separate RIS and analysis by the Ministry of Justice (MoJ) and Crown Law.

Development of the status quo for Tranche 1

10. The THDS will require travellers to make a declaration that combines all these requirements into one place. This will make compliance simpler and enable health and border agencies to risk assess individual travellers and assign them to a risk entry pathway before they arrive in New Zealand. By simplifying the process, the THDS will make compliance easy to do which will help increase voluntary compliance levels.
11. This will be enabled through amendments to the Air Border Order.
12. Enforcement intervention, will occur before the border and at the border to ensure that travellers have made the mandatory declaration.
13. Non-compliant foreign nationals may be denied boarding, and New Zealand citizens or residents may be denied boarding as a condition of carriage by the carrier.
14. Customs will check and enforce requirements at the border. Consequences of non-compliance at the border will be either a warning letter, an infringement fee, or a court imposed fine.
15. Depending on the severity of the individual's actions, enforcement actions may also include charges under existing mechanisms available, within the Crimes Act 1961 (The Crimes Act) and Immigration Act 2009 (the Immigration Act) that may be applicable where false or misleading information is detected at the border or after a person has entered the country. However, this option will be costly if border agencies were to pursue this option. A public health response may also be required, for example, time required in MIQ to manage COVID-19 health risks.

Assumption: non-compliant travellers will have to enter MIQ. Due to issues around the lack of health personnel available at airports, officials are working on a decision framework. This framework will simplify the process with a proposed testing and MIQ regime for non-compliant travellers.

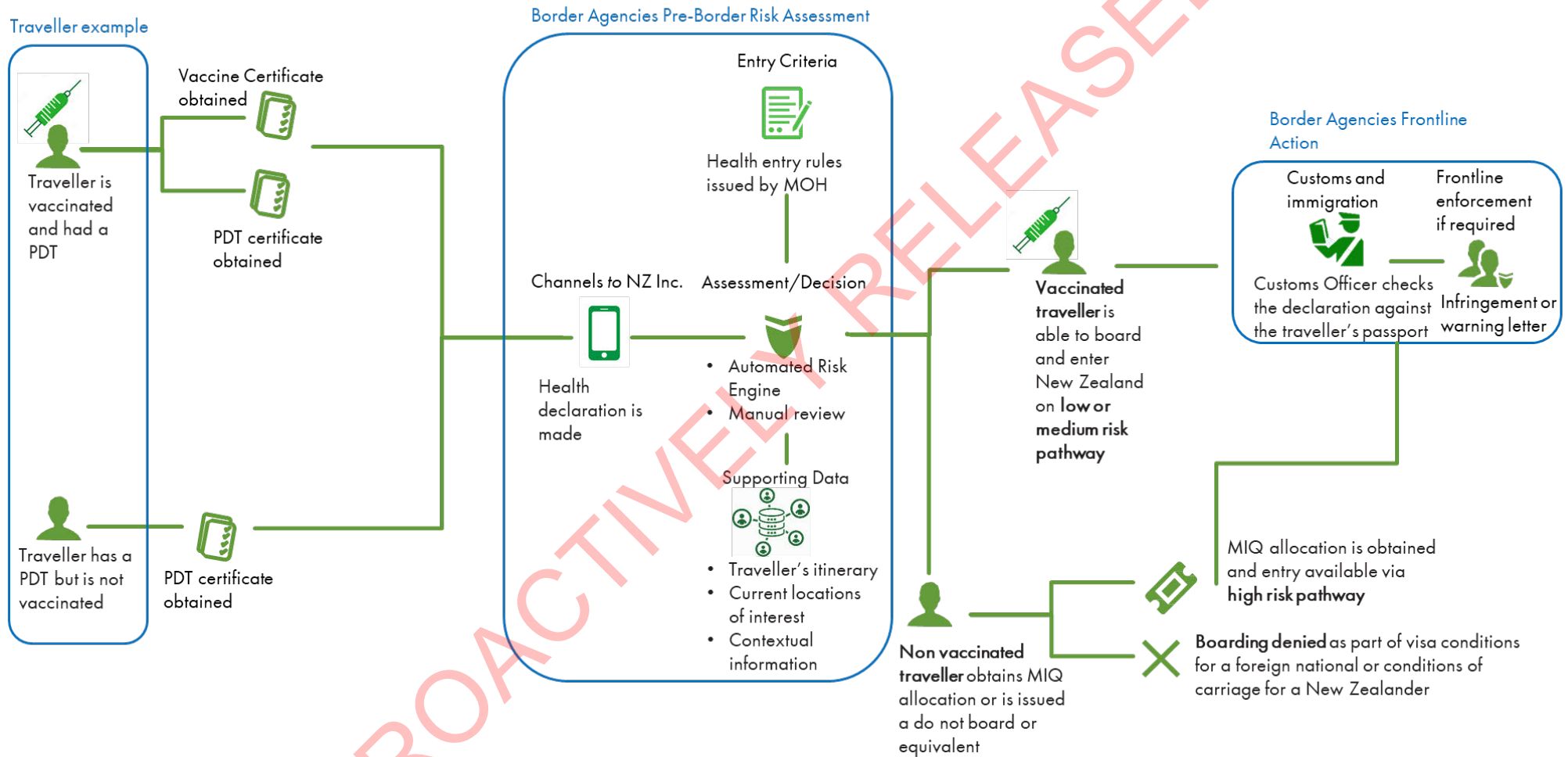
16. As an example, if a New Zealand citizen or resident⁴ was not vaccinated and wanted to travel to New Zealand, they would make a health declaration, however, the THDS may inform them that they are on the high risk entry pathway. However, the THDS response would also provide the traveller feedback on how to become eligible for access to a lower risk pathway. This would include:
- a. getting vaccinated
 - b. seeking an exemption to the requirement to be vaccinated
 - c. obtaining an MIQ allocation and entering New Zealand on the high-risk entry pathway.
17. The diagram below outlines a potential example of both New Zealand citizens or residents and foreign nationals using the THDS.

Development of the status quo for Tranche 3

18. Following the implementation of Tranche 1, the THDS has developed into the New Zealand Traveller Declaration (NZTD) and will use the Customs and Excise Act 2018 to enable Customs to require travellers to make a declaration and to enable Customs to verify and enforce the requirement.
19. This will enable Customs to continue to require a declaration from travellers and to verify that travellers have met Customs and other agencies' data requirements in the NZTD system as currently enabled under Clause 60 (2) of the Air Border Order.
20. Separate RISs have been written for the information and enforcement settings of the NZTD, however, this RIS has been updated to reflect the fact that the regulatory changes identified in this RIS will now be implemented in the Customs and Excise Act 2018 rather than in the Air Border Order.
21. This is because the Air Border Order will be repealed at some point in 2022 and so the Customs and Excise Act 2018 is being amended to enable the continuation of the NZTD as a baseline measure to better manage the border and protect against future pandemics or a resurgence of COVID-19.

⁴ Foreign nationals are required to be vaccinated unless they are exempted. This will be enforced as part of their visa conditions from 1 November 2021.

Pathways into New Zealand (for both New Zealand citizens and residents as well as foreign nationals)



What is the policy problem or opportunity?

22. There are two public policy problems for this RIS:
 - a. should travellers be required to make a health declaration or not; and
 - b. if mandatory, what enforcement should be implemented?
23. Conditions on international travel are in place (or will be put in place) to mitigate the public health risk associated with travel. These currently include the use of face coverings on flights, the requirement to provide evidence of a negative PDT and is likely to include vaccination status and answering questions about eligibility for a particular risk entry pathway. A breach of these conditions could include, for example, arriving in New Zealand without the required evidence of a PDT or failing to correctly declare the travel history which may include a high-risk country.
24. Non-compliance can result in harm to New Zealand, particularly considering the social, economic, and cultural impacts of additional cases of COVID-19 in the community and the subsequent strain on the health system. The enforcement regime will need to provide enforcement options where the use of fraudulent documents is discovered because travellers cannot be considered to have made a declaration if the evidential documents supplied are not verified or valid.

Implications of making the health declaration mandatory and implementing an enforcement regime

25. s 9(2)(h) OIA [REDACTED]
26. Any enforcement regime must be consistent with NZBORA, noting that under section 5, there can be limitations on the NZBORA rights if they are reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
27. The graduation and increase in penalties proposed in the COVID-19 Public Health Response Amendment Bill (No 2) 2021 (the Amendment Bill) have been vetted by Crown Law and MoJ to identify any inconsistencies with NZBORA. s 9(2)(h) OIA [REDACTED]

Impacted groups

28. Nearly all travellers will be affected if the health declaration is made mandatory. Any amendments to implement an enforcement regime will affect a small number of people who commit an offence by not complying with legislative requirements.
29. All travellers, with very limited exceptions, are expected to make a health declaration. For compliant travellers, there will be no further impacts from the THDS.
30. Non-compliance rates are expected to be low based on the compliance rates for PDT requirements of 99.86 percent.

Assumption: Compliance rates for THDS requirements will be similar to PDT compliance rates. However, it is difficult to link this data to expected levels of inadvertent and deliberate non-compliance with the THDS due to the change in incentives with the potential to gain quarantine-free access to New Zealand through non-compliance.

31. Traveller volumes are expected to increase once the THDS is implemented, and travellers are able to use the risk entry pathways to enter New Zealand. This is subject to international developments and policy decisions by other countries.

What objectives are sought in relation to the policy problem?

32. The public policy objective is to ensure compliance with the health declaration requirements to help manage New Zealand's public health response to the COVID-19 pandemic.
33. The infringement regime should provide a meaningful disincentive for non-compliant behaviour, reflecting New Zealand's national interest and public health imperatives.
34. Delivering on this objective will help New Zealand to:
- a. keep risk offshore
 - b. retain the integrity of the risk-based approach as already agreed by Cabinet
 - c. enable the safe and efficient scaling up of the border re-opening
 - d. incentivise compliance
 - e. enable a response where:
 - i. travellers have not made a declaration
 - ii. document fraud or gaming of the system has occurred.

Section 2: Options analysis

What criteria will be used to compare options to the status quo?

35. The proposed options to make the health declaration mandatory and implement an enforcement regime are evaluated against the following six criteria:
- a. **risk** – how does the option incentivise compliance (the presentation of valid and verifiable credentials)
 - b. **deterrence** – how does the option deter non-compliance
 - c. **proportionality** – how does the option enable a proportionate response
 - d. **consistency** – how is the option consistent with similar offences and penalties regimes
 - e. **compatibility** – how is the option compatible with existing systems used by border agencies
 - f. **cost** – how does the option minimise costs to implement and administer.

What scope will options be considered within?

Scope of the analysis

36. The THDS will be implemented in three tranches outlined in appendix one.
37. The scope of this RIS is limited to:
- a. making the health declaration mandatory
 - b. enforcement of non-compliance (ie, penalties and measures to drive compliance with the THDS)
38. The enforcement regime for non-compliance with COVID-19 Orders is provided for in section 26 of the COVID-19 Response Act. There are two categories of offence covered by the section, each with corresponding maximum penalties.

- a. a person who fails to comply with a COVID-19 requirement that has been identified as an infringement offence commits an offence and is liable for a proposed infringement fee of \$4,000⁵
 - b. a person who intentionally fails to comply with a COVID-19 order is liable on conviction for a proposed fine not exceeding \$12,000⁶.
- 39. Under clause 8 of the Air Border Order, most people arriving in New Zealand must have a negative COVID-19 result and must produce evidence of a negative result when requested by an enforcement officer. Part 3 of the Air Border Order exempts certain persons from all or parts of clause 8.
- 40. Section 5 of the COVID-19 Response Act specifies the following persons to be enforcement officers under that Act - the Director General, a medical officer of health, a constable, and authorised persons under s18 of the Act.
- 41. Section 18 of the COVID-19 Response Act allows the Director-General (of Health) to authorise persons, or classes of persons, that are engaged by the Crown or Crown entities to carry out any functions of an enforcement officer under the Act. An authorisation under s18 may be limited to certain functions and powers under the Act. For example, on 20 January the Director General authorised Customs officers as enforcement officers for pre-departure testing.⁷
- 42. The COVID-19 Public Health Response Act 2020 includes three aspects to compliance and enforcement:
 - a. Enforcement powers
 - b. Offences
 - c. Infringement offences.
- 43. The Air Border Order requires persons to produce certain kinds of evidence such as evidence of MIQ allocation upon request by various agency officers or pre-departure testing.⁸ Separately, sections 20 to 24 of the Act give enforcement officers various powers including powers of entry; power to give directions regarding compliance with a COVID-19 Order and to direct a person to provide identifying information. COVID-19 Orders have also granted powers to certain agency officers.
- 44. The following areas are not in scope for this impact assessment:
 - a. determining when travel will resume and under what criteria (DPMC)
 - b. determining the requirements of the risk-based pathways (health settings and requirements are managed by MoH⁹)
 - c. post-arrival management of travellers once they depart a New Zealand airport

⁵ The current maximum penalties in the COVID-19 Response Act are an infringement fee of \$300 and a court imposed fine not exceeding \$1,000. The figures noted above are proposed penalties in the Amendment Bill.

⁶ Criminal prosecution could lead to a six month custodial sentence under the Amendment Bill instead of a fine.

⁷ [COVID-19: Epidemic notice and Orders | Ministry of Health NZ](#)

⁸ Travellers are currently required to produce evidence of MIQ allocation (cl8(2A)); to produce QFT evidence if applicable (cl 8B); and to comply with directions from enforcement officers to stop activities that contravene an order or to undertake activities to prevent or limit non-compliance with an order (s21 COVID-19 Public Health Response Act 2020).

⁹ MoH will separately analyse the regulation changes needed for the health settings and requirements that will inform the health declaration.

- d. Implementation of tranche 3 of the THDS.

What options are being considered to mandate the health declaration?

Option 1a: The health declaration is not mandatory

45. The health declaration could be a voluntary system with travellers choosing to make a health declaration to gain access to quarantine-free entry to New Zealand or automatically enter via the high-risk pathway.

Option 2a: The health declaration is mandatory

46. Mandating the health declaration could be achieved through amendment to the Air Border Order, similar to the approach used to require travellers to provide contact tracing information and proof of PDT.

Table 1: How do the options to make the health declaration mandatory compare to the status quo/counterfactual?

Key for qualitative judgements:	
2	much better than doing nothing/the status quo/counterfactual
1	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-1	worse than doing nothing/the status quo/counterfactual
-2	much worse than doing nothing/the status quo/counterfactual

	Option 1a – the health declaration is not mandatory	Option 2a – the health declaration is mandatory
risk – how does the option incentivise compliance	-1 As the only option to share proof of vaccination, travellers will be incentivised to use the THDS to have the possibility of accessing quarantine-free entry to New Zealand	2 Travellers will have little benefit from not complying as they may be denied boarding if they do not
deterrence – how does the option deter non-compliance	-2 Border agencies will not be able to enforce the health declaration offshore through do not board directives or equivalents	2 Travellers will have to use the THDS or be at risk of being issued a do not board directive or being denied carriage by the carrier
proportionality – how does the option enable a proportionate response	-1 Health and border agencies will not be able to proportionately react to potential public health risks of COVID-19 breach at the border by keeping risks offshore or assigned to an appropriate pathway	2 Health and border agencies will be able to proportionately react to potential risks by keeping travellers offshore or assigned to an appropriate pathway
consistency – how is the option consistent with similar offences and penalties regimes	-1 This approach is not consistent with similar situations such as PDT, contact tracing and MIQ allocation requirements which are all mandatory	1 This approach is consistent with similar situations such as PDT, contact tracing and MIQ allocation requirements which are all mandatory

compatibility – how is the option compatible with existing systems used by border agencies	-2 This approach is not scalable and will increase processing times at the frontline. This approach does not fit with the border agencies' strategy of shifting risk offshore where possible	2 Travellers will be assigned to risk entry pathways before travelling to New Zealand which is scalable, shifts risk offshore, and will decrease processing times at the frontline and enable border agencies to process larger volumes of travellers
cost – how does the option minimise costs to implement and administer	-2 There will be additional costs to implement as officers will need to process travellers that have not made a declaration at the frontline. Additional frontline officers and enduring MIQ spaces may be required	2 Costs associated with checking THDS declarations at the border are considered minimal as the THDS will build on existing infrastructure and processes
Overall assessment¹⁰	-2	2

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Mandating the health declaration

47. Officials' advice is that option 2a, to make the health declaration mandatory, is the best option to deliver on the public policy objective of incentivising compliance with Border Order requirements. This option will also reduce reliance on MIQ which will result in cost savings to government, travellers, and communities.
48. Option 1a does not meet the criteria set out and would lead to scalability issues for border agencies as manual processing of large volumes of travellers is not viable at the frontline. It also does not fit with the policy intent of reducing reliance on MIQ in the future.
49. Option 2a is the preferred option as it best delivers on the proposed criteria and provides a requirement that can be enforced both offshore and onshore.

What enforcement regime options are being considered?

Option 1b: Education approach and no enforcement penalties

50. This could take a mixed approach and include key features such as:
 - a. Continuation with current enforcement regimes such as for MIQ allocation and PDT requirements
 - b. a focus on education for New Zealand citizens and residents
 - c. continuation of the approach to issue 'do not board' (DNB) directives to foreign nationals due to their visa conditions which will require them to be vaccinated from 1 November 2021.

Option 2b: Amendments to the Air Border Order within existing penalties

¹⁰ Overall assessment is based on the average of the ratings.

51. The Air Border Order could be amended to implement a THDS enforcement regime aligned with the proposed enforcement framework in the Amendment Bill.
52. Under the updated COVID-19 Infringement Offence Penalty Regulations, these will be identified as the low and medium risk categories noted in appendix two.
53. The current penalties in the COVID-19 Response Act are an infringement fee of \$300 and a court imposed fine of \$1,000 for individuals. For minor, inadvertent errors, an enforcement officer may issue a warning letter.

Option 3b: Amendments to the Air Border Order with highest possible penalties under the COVID-19 Response Act

54. The Air Border Order could be amended to implement a THDS enforcement regime aligned with the proposed enforcement framework in the Amendment Bill.
55. Under the updated COVID-19 Infringement Offence Penalty Regulations, these penalties will be identified as the high-risk category noted in appendix two.
56. The highest penalties in the COVID-19 Response Act amendments are an infringement fee of \$4,000 and a court imposed fine of \$12,000 for individuals. For minor, inadvertent errors, an enforcement officer may issue a warning letter.

Option 4b: Amendments to the Air Border Order and COVID-19 Response Act to include higher penalties with custodial sentences for non-compliance

57. The Air Border Order and the Covid-19 Response Act could be amended to implement a much stricter THDS enforcement regime with stricter penalties than those proposed with enforcement framework in the Amendment Bill.
58. Stricter penalties would include custodial sentences and higher fines for non-compliance by travellers.

Table 2: How do the options to implement an enforcement regime compare to the status quo/counterfactual?

Key for qualitative judgements:		0	about the same as doing nothing/the status quo/counterfactual
2	much better than doing nothing/the status quo/counterfactual	-1	worse than doing nothing/the status quo/counterfactual
1	better than doing nothing/the status quo/counterfactual	-2	much worse than doing nothing/the status quo/counterfactual

	Option 1b – no enforcement penalties	Option 2b – amendments to the Air Border Order with existing penalties	Option 3b – amendments to the Air Border Order - highest possible penalties under the COVID-19 Response Act	Option 4b – amendments to the Air Border Order with higher penalties and possibly imprisonment for non-compliance
risk – how does the option incentivise compliance	-1 The incentives to comply are low as non-compliance could lead to quarantine-free entry to New Zealand	2 Compliance with the THDS is made easy by the design of the system. Automatic feedback to the traveller will help reduce any unintentional non-compliance	2 Compliance with the THDS is made easy by the design of the system. Automatic feedback to the traveller will help reduce any unintentional non-compliance	2 Compliance with the THDS is made easy by the design of the system. Automatic feedback to the traveller will help reduce any unintentional non-compliance
deterrence – how does the option deter non-compliance	-1 The only result of non-compliance is having to change risk entry pathway and enter MIQ	-1 The current infringement fee costs less than a COVID-19 polymerase chain reaction (PCR) test and much less than a stay in MIQ	2 The proposed infringement fee and court issued fine cost more than a COVID-19 PCR test and a stay in MIQ which will deter non-compliance	2 Severe penalties will strongly deter non-compliance as penalties such as imprisonment are a greater cost to the individual than complying
proportionality – how does the option enable a proportionate response	-2 This approach would still allow travellers to be shifted between risk entry pathways to manage the public health risk, however, this approach is not proportionate to the potential public health risks of a COVID-19 breach at the border. This option also does make use of the graduated infringement offence regulations	0 This option does not take into account the additional risks with a non MIQ route. However, officers will have discretion at the border to deal with administrative issues as this framework provides a full range of graduated responses ranging from warning letters to graduated infringements or court issued fines	2 The proposed penalties for the COVID-19 Response Act have been assessed in a separate RIS and are considered proportionate and necessary. Frontline officers have greater discretion as this framework provides a full range of responses ranging from warning letters to graduated infringements or court issued fines	-1 The response will not be proportionate as severe penalties such as imprisonment are not proportionate to the public health risk as the new penalties for the COVID-19 Response Act have been identified as the maximum proportionate response
consistency – how is the option consistent with similar offences and penalties regimes	0 This approach is not consistent with similar enforcement regimes as it does not follow the framework for enforcement set out in the COVID-19 Response Act	-1 The THDS enforcement regime will be enabled through the Air Border Order which will mean it fits into the existing enforcement framework for the COVID-19 Response Act. However, this would not be consistent with the lifting of the penalties to address the high public health risks of COVID-19 transmission	2 The THDS enforcement regime will be enabled through the Air Border Order which will mean it fits into the existing enforcement framework for the COVID-19 Response Act. The new maximum penalties have undergone a NZBORA vet by MoJ and found to be consistent with NZBORA	-2 The THDS enforcement regime will be enabled through the Air Border Order however, the additional penalties will require changes to the COVID-19 Response Act which will make it inconsistent with that framework and is a considerable limitation of NZBORA rights
compatibility – how is the option compatible with existing systems used by border agencies	-1 This approach would be simple for border agencies to use, however, taking an education approach may require more time per traveller at the frontline. Undue pressure will also be placed on MIQ facilities with too many referrals	2 Customs is already at all ports and has been enforcing PDT requirements. No new processes or systems will need to be created for actions such as issuing infringements	2 Customs is already at all ports and has been enforcing PDT requirements. No new processes or systems will need to be created for actions such as issuing infringements	-2 No new processes or systems will need to be created for actions such as issuing infringements. However, additional prosecution time will drain resources and time, and will be difficult to manage at the frontline
cost – how does the option minimise costs to implement and administer	1 There are no major costs to implement	2 Costs are considered minimal as this enforcement regime will build on existing infrastructure and processes	2 Costs are considered minimal as this enforcement regime will build on existing infrastructure and processes, however, the options to prosecute may result in extra costs.	-2 Costs will be higher as more severe penalties will require prosecution which will lead to costs for court action as well as potential imprisonment. New systems and processes will be needed
Overall assessment	-1	1	2	-2

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Best enforcement option for the THDS

59. Officials' advice is that option 3b, to amend the Air Border Order in line with the updated enforcement framework, is the preferred option to deliver on the policy objective of incentivising compliance with the Air Border Order requirements.
60. Option 1b does not meet the proposed criteria and would lead to negative public health outcomes for New Zealand. With the PDT roll out, an 'education first' approach was taken for the initial period with the full enforcement regime coming into place later. A similar approach could be considered for the THDS; however, this is considered only appropriate for low level risks as the public health impact of a missing or fraudulent vaccination declaration in a delta variant context would be high.
61. Option 2b is similar to option 3b, however, by retaining the current infringement and court issued fines by treating non-compliance as a low or medium risk category, it will not be consistent with similar enforcement regimes once the COVID-19 Response Act is amended. This option does not provide a sufficient deterrence effect because the lower level penalties cost the traveller less than going to MIQ, and in some cases, less than a PDT.
62. Option 4b may be effective in deterring non-compliance with the THDS requirements however, equity and proportionality concerns are more pronounced under this option. This is because of the inherently inequitable nature of financial or incarceration type penalties as they have a proportionately larger impact on lower socio-economic households. This option will also have greater operational costs to health and border agencies because gathering evidence for prosecution is an intensive and time consuming task that will not be possible in large volumes at the frontline unless the Government also makes the decision to fund additional frontline officers and airports expand their footprint to accommodate this.
63. Option 4b is not preferred, however, penalties may need to be reconsidered as part of implementing tranche 3 of the THDS. This option will be considered again at that time.
64. Option 3b is the preferred option as it best addresses each of the proposed criteria. Due to the wide range of potential compliance levels highlighted in appendix three and considering large infringements able to be issued under this option without judicial oversight, proportionality to the non-compliance is required. The time limited nature¹¹ of the enabling COVID-19 Response Act and proposed graduated fee framework in option 3b will help mitigate these concerns. Because of these mitigations, option 3b is the preferred option.
65. Option 3b was also compared against options in Australia, and it was found that the proposed infringement fee was slightly more than the Australian option whilst the court issued fine was the same or less depending on which state jurisdiction was being compared.

¹¹ The COVID-19 Response Act will automatically be repealed 2 years following its commencement if it is not extended by the House of Representatives.

Impact of preferred option on travellers

66. The direct impacts on travellers will differ depending on the scenario. The primary difference will be between foreign nationals and New Zealand citizens and residents. The table below breaks down the impacts on individuals depending on the circumstances around any potential non-compliance.

	Foreign nationals	NZ citizens and residents
Enforcement before the border		
Declaration is complete and requirements met unless exempted (ie, vaccinated)	Board	Board
Declaration is complete and requirements not met (ie, not vaccinated)	Do not board s 9(2)(f) (iv) OIA	Board on high-risk pathway (obtains an MIQ allocation voucher)
Declaration is fraudulent in some way/or not attached to individual – picked up <u>before</u> boarding	Do not board s 9(2)(f) (iv) OIA	Airline asked to check requirements (condition of carriage, s 9(2)(f)(iv) OIA)
Declaration not complete prior to embarking plane	Complete declaration	Complete declaration
Does not meet all requirements for travel	Do not board s 9(2)(f) (iv) OIA	Airline asked to check requirements (condition of carriage, s 9(2)(f)(iv) OIA)
Enforcement at the border		
Declaration is fraudulent in some way / or not attached to individual – picked up <u>after</u> boarding	Infringement fee, court imposed fine, or prosecution under the Crimes Act – sent to MIQ and potential deportation	Infringement fee, court imposed fine, or prosecution under the Crimes Act – sent to MIQ
Health settings change mid flight	Health assessment on arrival (potential change in risk pathway)	Health assessment on arrival (potential change in risk pathway)

What are the marginal costs and benefits of the option?

Proposal	Preferred approach	Summary of costs and benefits
Ensure compliance with the requirements to use the THDS	Amend the Air Border Order to implement option 3b	Costs Seeking the highest penalties under COVID-19 Response Act by categorising non-compliance as high risk will purposely impose costs onto non-compliant individuals. There will be one off costs for training and the provision of guidance to enforcement officers. Benefits It is intended that seeking the highest penalty levels will provide a more appropriate deterrent to non-compliance and send a clear signal that non-compliance of the THDS requirements will not be tolerated. Ensuring all travellers use the THDS before travelling to New Zealand will help to mitigate the risk of community transmission in New Zealand, minimising the social, economic, cultural, and public health impacts of a COVID-19 outbreak.

Section 5: Delivering an option

How will the new arrangements be implemented?

67. Implementation of the preferred options in the Air Border Order will make use of and build on Customs' and Immigration New Zealand's existing systems.
68. Immigration New Zealand will enforce requirements offshore for foreign nationals in breach of their visa conditions through the use of do not board directives to airlines. For New Zealand citizens and residents not complying with the Air Border Order, conditions of carriage can be used to require the airline that they have not met health requirements and should be denied carriage to New Zealand.

Assumption: Regardless of mechanism, non-compliant New Zealand citizens and residents will not be able board a plane to New Zealand s 9(2)(f)(iv) OIA

during the initial stages of the THDS implementation, airlines may be required to sight evidence of a confirmed THDS declaration before boarding travellers.

69. Customs is already utilising a suite of enforcement options at the border with warning letters and infringements. Frontline officers also have the option to pursue court issued fines through referral to the All of Government Enforcement Group.
70. Communication of compliance requirements will be undertaken as part of the wider communications project for the THDS.

71. As the onshore enforcement agency, Customs will implement the enforcement regime and ensure processes are in place and border officers' guidance is updated.
72. It is expected that stage 1 of the THDS will go live near the end of the first quarter of 2022. There are likely to be impacts for all travellers.

How will the new arrangements be monitored, evaluated, and reviewed?

Review of the THDS system

73. The THDS programme is being delivered over three tranches. As this work progresses, there will be three gateways over the next 18 months when decision makers consider whether to continue or to reposition the project. These decision points are:
 - a. whether to proceed with a partial technology solution (around October 2021)
 - b. whether to proceed to an integrated individual risk assessment (around March 2022)
 - c. whether to scale to solutions that support over five million travellers per year (around September 2022).
74. As part of these gateways, the progress of the project will be evaluated and reviewed to support decision making by the Border Executive Board on whether to proceed with the next tranche of the project.
75. This review process will include whether the legislative changes and policy framework are fit for purpose and that there are no unintended consequences of this policy.
76. Under tranche 3 of the THDS, primary legislation enablement will be required. Implementation of tranche 1 will be reviewed as part of the wider THDS review process and any lessons learned and best practice will be carried over into the future legislative changes to enable tranches 2 and 3 of the THDS.

Section 6: Consultation

What level of consultation has there been?

77. No public consultation on the proposed amendments has occurred as there were major constraints in timing during the advice and drafting process. However, consultation on the approach was undertaken with the following government agencies:
 - a. Department of the Prime Minister and Cabinet
 - b. Ministry of Health
 - c. Ministry of Business, Innovation and Employment (MIQ and INZ)
 - d. Department of Internal Affairs
 - e. Crown Law
 - f. Ministry for Primary Industries
 - g. Ministry of Foreign Affairs and Trade.
78. Overall, agencies either had no comment or agreed that option 3b is the preferred option. There were some minor clarifications required around the analysis for option 1a which has been amended to reflect that provision of a vaccine certificate will not entitle all travellers to quarantine-free entry to New Zealand.

79. The Amendment Bill which increases maximum penalties for infringement offences, has undergone a NZBORA vet by MoJ.
80. The Attorney-General did not raise any inconsistencies with the NZBORA when the Amendment Bill was introduced to the House.
81. The public have had an opportunity to comment on the amendments to the COVID-19 Response Act during Select Committee consideration of the Amendment Bill. Submissions closed on 11 October 2021.

PROACTIVELY RELEASED

APPENDICES

Appendix one – implementation tranches of THDS

82. Tranche One Pilot from Q1 2022

- a. All travellers from all countries will be required to submit a travel health declaration but the system will only be able to automatically validate vaccination certificates from certain countries. Travellers will be automatically assigned appropriate public health controls for their arrival based on an automated risk assessment.
- b. Depending on policy settings, persons with vaccination certificates that cannot be automatically verified by the THDS will need to be manually verified by agency 'back office' staff.
- c. Travellers will upload images of their pre-departure COVID-19 test certificates through the THDS. The system will not be able to automatically validate test certificates so this will be done manually by agency 'back office' staff.
- d. Travellers will receive a 'travel pass', ie, proof that their declaration has been processed and approved. Travellers may be asked to present this pass to air carriers and New Zealand border officials to demonstrate they have met applicable requirements.

83. Tranche Two Foundation June 2022 – March 2023 (indicative)

- a. Expansion of the THDS to recognise and validate vaccination certificates from additional countries. This will depend on both technical capacity to read and validate certificates and MoH advice as to which types of vaccinations are acceptable and from what countries
- b. The system will be integrated with existing platforms to allow direct messaging to air carriers and border processing. Air carriers and border officials will not need to see an individual's travel pass as they will be able to access this information directly. The system will also be further integrated with airport systems such as eGates.

84. Tranche Three Enhancement November 2022 – June 2023 (indicative)

- a. Digital arrival card to replace paper version and the travel health declaration will be folded into the broader digital arrival card declaration.
- b. Scaling capacity to support pre-COVID passenger volumes.

Appendix two – update of the COVID-19 Response Act enforcement framework

85. Work is under way to update the COVID-19 Response Act to create a power to make regulations that set out a graduated infringement offence fee framework, as agreed by Cabinet [SWC-21-MIN-0067 refers]. Work is underway to develop this framework which will prescribe infringement classes and corresponding penalty fees and fines commensurate to the offence. The framework will prescribe penalties up to the maximums specified in section 26 of the COVID-19 Response Act.
86. The graduation of offences is likely to break down infringements into classes based on the public health risks - namely:
 - a. **Low risk** – for infringement offences where a breach is administrative and the worst potential outcome is a low likelihood of the transmission and spreading of COVID-19
 - b. **Medium risk** – the worst potential outcome of a breach is the possibility of transmitting and spreading COVID-19 or limiting the capability of the public health response
 - c. **High risk** – the risk of transmitting and spreading COVID-19 as a result of breaching an infringement offence in this class is probable.

Appendix three – compliance triangle

