

Departmental Disclosure Statement

Customs and Excise Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

Attention: Limits on scope of disclosure statement

This Bill is predominantly a revision or consolidation of existing legislation to improve clarity and navigability. Most of the Bill therefore does not change the effect of existing law. For ease of use, information provided in this disclosure statement about the content of the Bill is, unless otherwise indicated, limited to those provisions that involve a substantive change to the law. This includes changes to the law to introduce new policy.

This disclosure statement was prepared by the New Zealand Customs Service.

The New Zealand Customs Service certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

21 November 2016.

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Part One: General Policy Statement

The Customs and Excise Act 1996 applies to the movement of all goods, people, and craft into and out of New Zealand, enabling the New Zealand Customs Service (**Customs**) to collect tax and enforce the law. The Act has been extensively amended since 1996 to account for changed circumstances such as raised standards for trade security, new free trade arrangements, and the use of new forms of information and technology for passenger facilitation and risk targeting. Consequently, businesses in particular report that the Act is too prescriptive, difficult to understand and apply, and in some areas is creating unnecessary compliance costs. In 2013 the Government initiated a review to address these issues, and this Bill will give effect to the results of that review.

This Bill will replace the Customs and Excise Act 1996. It will support the movement of legitimate travellers and goods across the border and provide the legal tools needed to protect New Zealand from people or goods that may cause harm. The Bill also supports the collection of Crown revenue. The objectives behind this legislation include the following:

- balancing the protection of the nation with individuals' rights;
- providing transparent and easy-to-use legislation;
- enabling business and Customs to quickly adopt future changes in technology and business practice;
- improving assurance over the collection of revenue;
- supporting economic growth by making it easier for traders to do business;
- facilitating greater information sharing with other agencies.

Modern revenue and import systems

The new legislation modernises Customs' revenue system to reflect changing trade patterns and volumes and make processes simpler and less cumbersome. Businesses' obligations will be clearer and they will have more flexibility in meeting them. Advance rulings and clarified valuation methodology will give importers and brokers greater certainty and a new regime for provisional values will enable importers to comply in those circumstances where they cannot know final values in advance. A direct appeal to Customs over duty assessments will give a low-cost, less formal avenue to resolve disputes, alongside the existing formal Customs Appeal Authority process. To improve clarity in the Act, the Bill will confirm when excisable goods are not subject to Customs control for refund or remission purposes.

Compliant businesses and individual New Zealanders will benefit from greater assurance that border risks and non-compliance will be identified and minimised. Those who engage with Customs' systems will be required to meet certain criteria, maintain high standards of care, and provide timely and improved information, for example—

- applicants for a licence for a Customs-controlled area will need to meet suitability criteria; and
- excise manufacturers will be required to submit nil returns; and
- the calculation of additional fuel volumes resulting from the addition of butane, slops, and additives at tank farms will be enabled.

The potential for locally grown tobacco to be illicitly supplied, avoiding the payment of excise duty, will be stemmed by reducing the personal allowance for growing and manufacturing tobacco from 15 kg to 5 kg per annum and including curing of tobacco in the definition of the term "manufacture".

The Bill updates the range of sanctions and responses available to Customs to deter non-compliance and ensure that compliant brokers, importers, and manufacturers are not disadvantaged. The scope of some existing sanctions will be extended. In particular, the Bill—

- extends administrative penalties for incorrect declarations to all export entries, with the objective of protecting New Zealand's trading reputation; and
- establishes an infringement notice scheme for minor offending, repealing the existing petty offences regime.

Modern, flexible powers to protect New Zealand

The Bill confirms the majority of Customs' existing powers while recognising privacy concerns and providing greater scope and flexibility to address smuggling and national security in the modern context through—

- restricting the extent of Customs' powers to examine and access electronic devices; and
- facilitating the authorisation of people to exercise Customs' powers and functions in the maritime environment. In the situation where Police or Defence Force personnel are acting as Customs officers, the Arms Act 1983 will recognise that such personnel may be carrying firearms. Customs officers will remain unarmed; and
- streamlining the process to impose import and export controls; and
- introducing a mechanism to enable controlled deliveries to be used to investigate smuggling across a range of goods; and
- enabling certain administrative functions to be performed by Customs officers off-shore, such as the pre-clearance of cruise ship passengers.

Use and management of information

Customs' obligations in respect of information will be set out in a more transparent framework. Information disclosure arrangements will enable regular and ongoing sharing with New Zealand Government agencies, and where appropriate, enable direct access to Customs' databases while protecting personal and commercially sensitive information. These arrangements must be developed in consultation with the Privacy Commissioner. Disclosure arrangements may also govern the regular and ongoing provision of information to non-Government organisations, avoiding repeated Official Information Act requests.

Customs will continue to receive the personal information required to properly manage risk at the border, including people's entry into New Zealand. Assurance will be improved as Customs will be able to request that people undergo biometric identity checks when there is doubt about their identity.

Modern, coherent legislation

The current Act has become increasingly inaccessible and complex due to repeated amendments, with some provisions being overly complex or using archaic language. The Bill significantly modernises both the language and structure of the legislation while preserving the current law, other than making the changes outlined above. The objective is to make obligations, rights, and powers more transparent, certain, and easier to use.

Some detail has been moved to regulations to enable changes to be made in response to emerging risks and new cost-effective risk management approaches and technologies.

The Bill includes powers to make rules that are deemed to be disallowable instruments; these are modernised versions of existing rule-making powers. They provide the regulatory flexibility needed over minor administrative and technical matters and are consistent with the principles identified in the Deemed Regulations Report of the Regulations Review Committee.

Commencement of legislation

The majority of the Bill, where provisions have been modernised but not substantively changed, will come into force on 1 April 2018 or, if later, 6 months after the date of Royal assent.

Exceptions are: changes to extend the administrative penalty regime to exports and the new internal process for reviewing duty assessments, which will require more substantial changes in processes and behaviour. These exceptions will come into force 6 months later or at an earlier time specified by Order in Council.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>'Out of the Shadows', Ernst and Young, 2010, commissioned by British American Tobacco</p> <p>'Review of Ernst and Young's Report on New Zealand's Illicit Tobacco Market', NZIER, 2010 commissioned by ASH New Zealand</p> <p>'The Link Between Transfer Pricing and Customs Valuation – 2014 Country Guide', Deloitte, 2014</p> <p>'World Customs Organization Guide to Customs Valuation and Transfer Pricing', World Customs Organization, 2015</p> <p>'Transfer Pricing and Customs Valuation – Revision', International Chamber of Commerce, Document No. 180/104-536</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
<p>The Customs and Excise Bill will provide for Customs to make rulings on valuation matters in order to provide greater certainty for importers. These provisions are also included in the Trans-Pacific Partnership (TPP) Agreement Bill and are necessary to implement that agreement. Assuming that the TPP Bill will progress more quickly than the Customs and Excise Bill, the provisions in the latter will simply subsume the former.</p>	
2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Customs completed the following Regulatory Impact Statements:</p> <p>Customs and Excise Act Review: Managing and Disclosing Information, 8 September 2015</p> <p>Customs and Excise Act Review: Biometric information, 8 September 2015</p> <p>Customs and Excise Act Review: Valuation of imported goods, 14 September 2015</p> <p>Customs and Excise Act Review: Review of Duty Assessments, 14 September 2015</p> <p>Customs and Excise Act Review: Minor Legislative Changes – Business Records and Customs Areas, 14 September 2015</p> <p>Customs and Excise Act Review: Options for the administrative penalty scheme, 14 September 2015</p> <p>Customs and Excise Act Review: Responses to minor offending, 14 September 2015</p> <p>Customs and Excise Act Review: Excise duty on alcohol products, 15 September 2015</p> <p>Customs and Excise Act Review: Changes to Tobacco Excise, 15 September 2015</p> <p>Customs and Excise Act Review: Excise Duty on Fuel, 22 October 2015</p> <p>Customs and Excise Act Review: Powers and Obligations, 4 November 2015</p> <p>Customs and Excise Act Review: Updated penalty levels, 10 November 2015</p> <p>Customs and Excise Act Review: Controlled Deliveries, 10 November 2015</p> <p>Customs and Excise Act Review: Flexibility and discretion in making and correcting assessments, 10 November 2015</p> <p>Customs and Excise Act Review: Establish competency as a requirement for maintaining Joint Border Management System user registration, 8 March 2016</p> <p>Customs and Excise Act Review: Valuation of imported goods and Customs Rulings, 9 March 2016</p> <p>Customs and Excise Act Review: Excise duty: Further proposal to strengthen the excise and excise equivalent duty system, 16 August 2016</p> <p>All of the above Regulatory Impact Statements can be accessed at http://www.customs.govt.nz/news/resources/customs-and-excise-act-review/Pages/default.aspx</p>	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
<p>Independent opinions on the quality of the Regulatory Impact Statements were provided by or on behalf of the RIA Team in Treasury, including by the Ministry of Justice, the Ministry for Business, Innovation, and Employment, and the Inland Revenue Department.</p> <p>Appendix One sets out the outcome of those reviews, and also lists the Regulatory Impact Statements that were reviewed by Customs' Regulatory Impact Analysis Panel.</p>	
2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>Analysis is available on potential costs and benefits of policy options in the following Regulatory Impact Statements:</p> <p>Customs and Excise Act Review: Valuation of Imported Goods, 14 September 2015, page 21</p> <p>Customs and Excise Act Review: Options for the administrative penalty scheme, 14 September 2015, pages 4, 6</p> <p>Customs and Excise Act Review: Responses to minor offending, 14 September 2015, page 5</p> <p>Customs and Excise Act Review: Excise duty on alcohol products, 15 September 2015, page 18</p> <p>Customs and Excise Act Review: Excise Duty on Fuel, 22 October 2015, page 15</p> <p>Customs and Excise Act Review: Powers and Obligations, 4 November 2015, pages 7, 10, 21</p> <p>Customs and Excise Act Review: Flexibility and discretion in making and correcting assessments, 10 November 2015, page 10</p> <p>The policies that this Bill gives effect to are not expected to cause any group of persons to suffer a loss of income or wealth.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>Appendix One provides references to Regulatory Impact Statements that describe how the potential costs and benefits of proposals are likely to be impacted by compliance, non-compliance, or the level of regulator effort into encouraging or securing compliance.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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Consideration of compliance with international obligations was an important part of Customs' policy development. Customs has reviewed the Bill to determine whether the policy is consistent with New Zealand's international obligations, in particular with New Zealand's Free Trade Agreement requirements.

The Ministry of Foreign Affairs and Trade was consulted during the development of policy proposals that potentially affect New Zealand's international obligations. For example, the Ministry of Foreign Affairs and Trade was consulted on recommendations that related to New Zealand's consistency with the World Trade Organization's Customs Valuation Agreement (Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994).

The Bill includes provisions that will bring New Zealand into closer alignment with recommended practices promulgated by the International Civil Aviation Organisation in respect of the use of airline Passenger Name Record data in passenger processing and risk assessment (clauses 49-50).

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Customs has considered principles of the Treaty of Waitangi during policy development. The March 2015 public consultation document was sent to a number of Maori organisations for review. Customs' view is that the policy to be given effect by the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

[NO]

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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Appendix Two provides further detail on offences and penalties that have been created or amended.

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
A description of consultation with the Ministry of Justice on the creation and amendment of offences and penalties is outlined in Appendix Two.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>The Bill makes a number of changes relating to the collection, use, disclosure and disposal of personal information by Customs, including:</p> <ul style="list-style-type: none"> • Information, including personal information, held by Customs may be disclosed within government for a wider range of government purposes (clause 294); • There be direct access by government agencies to Customs' information databases under information disclosure arrangements for certain restricted purposes (clause 293); • Customs' ability to disclose information with overseas government and intergovernmental authorities is updated (clause 297); • A standardised process for making information disclosure arrangements with government agencies and non-government bodies is created (clauses 294-296); • The provisions around direct access to travel operator databases to search for certain passenger information and the accompanying protections are repealed, and are replaced with updated provisions around supply of that information to Customs that will bring New Zealand into closer alignment with recommended practices promulgated by the International Civil Aviation Organisation in respect of the use of airline Passenger Name Record data in passenger processing and risk assessment, including disposal of such data (clauses 47-51). 	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner was consulted on the above provisions in the form of meetings, phone and email discussions, and the receipt of comments on draft Cabinet papers, regulatory impact statements and on draft Bill provisions. During the development of policy, the Office of the Privacy commissioner was consulted on working papers, and involved in cross-agency meetings.</p> <p>The Bill requires that the Privacy Commission be consulted as part of the process of Customs making or varying an information disclosure arrangement with other government agencies (including for direct access to Customs' databases), a private sector organisation or an overseas government or intergovernmental body that involves the disclosure of personal information.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Customs has undertaken thorough consultation on the Bill, as outlined below.</p> <p>Input into policy development included:</p> <ul style="list-style-type: none"> the establishment of a Stakeholder Reference Group which met regularly during the policy development stages. The Group had significant input into the issues considered in the review of the Act and in providing advice on policy options a public discussion document outlining issues and options (91 submissions were received) several workshops were undertaken with business stakeholders co-designing policy agency consultation. <p>Input into drafting:</p> <ul style="list-style-type: none"> ongoing liaison with business ongoing agency input. <p>Comments on the Bill:</p> <ul style="list-style-type: none"> over 45 businesses were asked to comment on the Bill, 17 responded 40 agencies were asked to comment on the Bill, 15 responded. <p>Businesses strongly supported the process of early and on-going consultation. Feedback from external stakeholders is set out in submissions, and in the relevant Regulatory Impact Statements and Cabinet papers. These papers can be accessed at: http://www.customs.govt.nz/news/resources/customs-and-excise-act-review/Pages/default.aspx</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>As above, Customs has consulted with businesses on the development of the Bill, including the draft Bill. An internal group comprised of officials from across Customs' business groups reviewed an early draft of the Bill. These processes were aimed at ensuring that the Bill's provisions are workable and complete.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	YES
Clause 104. This power is for the purpose of protecting the public revenue against undervaluation of goods subject to <i>ad valorem</i> duty (such as duty based on the customs value of goods, or goods and services tax collected on duties). Customs is required to pay the price payable in accordance with clause 104(8) to the importer of the goods for the goods within 10 working days of the acquisition of the goods. This provision is carried over from the existing Act and is not new policy.	

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
All absolute liability offences in the Customs and Excise Act 1996 have been redrafted in the Bill either as strict liability offences with explicit defences available, or now require the prosecution to prove beyond reasonable doubt that the person who committed the offence did so without reasonable excuse. The table in Appendix Two describes the new strict liability offences in the Bill, the conduct or act the strict liability offence applies to, and why it is necessary that the offence is of a strict liability nature.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>Clauses 245(3-4) and 246(1). These clauses provide that a Customs officer or an employee of a mail carrier, in the case of clause 245(3-4), or a Customs officer, constable, or officer of a relevant international law enforcement agency, in the case of clause 246(1), is not subject to any to any criminal or civil liability for anything done or omitted to be done in the exercise of the relevant controlled deliveries powers. These immunities are necessary because the person undertaking the controlled delivery will be otherwise committing an offence, for example, by being in possession of objectionable publications, which is an offence under sections 123(1)(e) or 124(1) of the Films, Videos, and Publications Classifications Act 1993. The immunity only applies to the person that is exercising the power, and only in cases when the power is exercised in the course of the person's duties (clause 245(3-4), or when the power is exercised in good faith and when reasonable care is taken (clause 246(1)).</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Further information about how the Bill creates or amends decision-making powers is in Appendix Three.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clauses 96 and 97. The Bill clarifies the mechanisms for prohibiting exports to distinguish between situations when specific goods are controlled and when the control focuses on the end use of the goods. Specific goods and classes of goods would continue to be prohibited by Order in Council, but this power has been extended to enable prohibitions to be made in respect of electronic documents generically, rather than just in relation to certain documents. Goods controlled on the basis of their end-use (eg developing biological weapons and terrorism) would be prohibited by the Secretary of Foreign Affairs and Trade making a notice in the <i>Gazette</i> and after consultation with the Minister of Customs, to prohibit the exportation of goods that have a military, paramilitary, national interest, or terrorism prevention-related use.</p> <p>A notice made under clause is a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO

Appendix One: Further Information Relating to Part Two

Independent opinions on the quality of regulatory impact statements – question 2.3.1

Customs and Excise Act Review: Managing and Disclosing Information

The Ministry of Justice's independent RIS panel has reviewed the RIS prepared by the New Zealand Customs Service on behalf of the Regulatory Impact Analysis Team (RIAT) and considers that the information and analysis in the RIS **partially meets** the quality assurance criteria.

While the RIS contains a robust statement of the case for change, the regulatory analysis (including comparing available options) is limited to the high level options to either standardise current information disclosure provisions or expand them. As a result, the regulatory analysis of the specific proposals identified in the appendix cannot be deemed to be either complete or convincing. For example, while there is a statement of the impact of individual proposals provided in the appendix, the RIS does not identify all available options for the individual proposals, nor evaluate them against the stated criteria.

Customs and Excise Act Review: Biometric information

The Ministry of Justice's independent RIS panel has reviewed the RIS prepared by the New Zealand Customs Service on behalf of the Regulatory Impact Analysis Team (RIAT) and considers that the information and analysis in the RIS **meets** the quality assurance criteria.

Customs and Excise Act Review: Valuation of imported goods

MBIE considers that the information and analysis summarised in the RIS for valuation of imported goods **meets** the quality assurance criteria.

Customs and Excise Act Review: Review of Duty Assessments

MBIE considers that the information and analysis summarised in the RIS for reviews of duty assessments **meets** the quality assurance criteria.

Customs and Excise Act Review: Minor Legislative Changes – Business Records and Customs Areas

MBIE considers that the RIS for minor legislative changes – business records partially meets the quality assurance criteria.

MBIE considers that the RIS for customs areas partially meets the quality assurance criteria.

The proposal to enable businesses to adopt modern methods of storing business records is well analysed and the conclusions convincing. However, the rationale for the proposal to treat new applicants for licences to operate Customs areas differently from existing licence holders, and to leave this difference in place indefinitely, does not appear well-founded.

Customs and Excise Act Review: Options for the administrative penalty scheme, 14 September 2015, and Customs and Excise Act Review: Responses to minor offending, 14 September 2015

The Inland Revenue Department considers that the information and analysis summarised in both RISs **meet** the quality assurance criteria.

Customs and Excise Act Review: Excise duty on alcohol products, 15 September 2015

The Regulatory Impact Analysis Team (RIAT) reviewed the RIS prepared by New Zealand Customs Service and associated supporting material, and considers that the information and analysis summarised in the RIS for Excise Duty on Alcohol Products **partially meets** the quality assurance criteria for the proposals to:

- provide where no excise is payable in a given period, a Nil excise return must still be filed as part of a filers normal filing cycle
- provide for off-site storage for all alcohol and an alcohol excise plan.

The status quo and problem are adequately explained for both proposals. The proposals are relatively minor and the analysis is sufficient to justify the changes. However, there is a lack of clear information about the magnitude of the impacts expected from the proposals. The proposals are well consulted.

Only a narrow range of changes were considered. This is because it was determined that the current systems for collecting excise were functioning adequately. While the benefit of the changes is a reduction in compliance costs for businesses in section B [off-site storage of alcohol] is well justified, more information about the government's enforcement regime for excise would be helpful. Decision makers could then be confident the changes will not adversely impact the government's ability to enforce the system for collecting excise.

Customs and Excise Act Review: Changes to Tobacco Excise, 15 September 2015

The Regulatory Impact Analysis Team (RIAT) reviewed the RIS prepared by the New Zealand Customs Service and associated supporting material, and considers that the information and analysis summarised in the RIS Changes to Tobacco Excise **does not meet** the quality assurance criteria.

The RIS contains inadequate quantitative and qualitative information about the extent of the problem. There is some attempt to examine the specific issue of domestically grown tobacco, however the likely impacts of the policy are difficult to quantify. In particular, the RIS lacks information about the current rates of prosecutions against those not in compliance with the regime. Because of this there is little reliable information about the need to implement this policy change.

There is inadequate consideration of the impacts of this policy. There is only limited discussion of potential increases in non-compliance and how non-compliance is dealt with. In particular, the possibility of enabling large scale organised crime is touched on but never addressed in detail. No serious consideration is given to options other than the preferred option. Decision makers, therefore, cannot be confident that all impacts have been properly analysed.

Customs and Excise Act Review: Powers and Obligations, 4 November 2015

The Ministry of Justice's independent RIS panel reviewed the RIS and considers that the information and analysis in the RIS **partially meets** the quality assurance criteria. In particular, proposals 2 (examination of goods accompanying passengers), 3 (examination of electronic devices) and 5 (powers in the contiguous zone) would benefit from more complete and convincing analysis.

Proposal 2 does not provide an option likely to address the stated problem, raising questions as to whether the analysis is complete. Proposal 3 ideally would more clearly state why options that are not preferred (for instance Option 2) do not meet the criteria, in order to be considered convincing. Proposal 5 does not provide evidence of the stated problem, which then affects whether the arguments in favour of the preferred option are convincing.

The following Regulatory Impact Statements were not independently reviewed by the RIA team in Treasury as they did not meet the threshold for independent RIA assessment:

- Customs and Excise Act Review: Excise Duty on Fuel, 22 October 2015
- Customs and Excise Act Review: Updated penalty levels, 10 November 2015
- Customs and Excise Act Review: Controlled Deliveries, 10 November 2015
- Customs and Excise Act Review: Flexibility and discretion in making and correcting assessments, 10 November 2015
- Customs and Excise Act Review: Establish competency as a requirement for maintaining Joint Border Management System user registration, 8 March 2016
- Customs and Excise Act Review: Valuation of imported goods and Customs Rulings, 9 March 2016
- Customs and Excise Act Review: Excise duty: Further proposal to strengthen the excise and excise equivalent duty system, 16 August 2016.

The impact of compliance or non-compliance on the costs and benefits of proposals – question 2.6

Analysis is available on the impact on potential costs and benefits of the level of effective compliance or non-compliance, and/or the level of regulator effort put into securing compliance in the following Regulatory Impact Statements:

Customs and Excise Act Review: Valuation of imported goods, 14 September 2015 pages 15-17

Customs and Excise Act Review: Minor Legislative Changes – Business Records and Customs Areas, 14 September 2015, pages 8-10

Customs and Excise Act Review: Options for the administrative penalty scheme, 14 September 2015, pages 4-6

Customs and Excise Act Review: Responses to minor offending, 14 September 2015, pages 4-5

Customs and Excise Act Review: Excise duty on alcohol products, 15 September 2015, pages 20-21

Customs and Excise Act Review: Excise duty: Remissions, Permits, and Timeframes, 15 September 2015, page 23

Customs and Excise Act Review: Excise Duty on Fuel, 22 October 2015, pages 7-10

Customs and Excise Act Review: Powers and Obligations, 4 November 2015

Customs and Excise Act Review: Updated penalty levels, 10 November 2015, pages 5-6

Appendix Two: Further Information Relating to Part Three

Creation and amendment of offences - question 3.4

Infringement notice scheme

Clauses 376 to 379. An infringement notice scheme has been established for minor offending. It replaces the petty offences regime in the Act which will be repealed. The petty offences regime for minor offending lacks fairness, is time consuming for Customs officers and is inconsistent with the infringement notice schemes operated by other government agencies. Infringement offences and fees will be prescribed in Customs and Excise Regulations.

Administrative penalties

Clauses 263 to 273. The administrative penalty regime has been extended to all export entries to encourage the accurate provision of information and the voluntary disclosure of errors. Under clause 266, the maximum administrative penalty payable because the person did not take reasonable care has reduced from \$50,000 to \$20,000. The maximum administrative penalty payable because the person was grossly careless has reduced from \$50,000 to \$35,000.

Updated penalty levels

Clauses 354, 355, 361, 358, 34, 188, 306, 360, 181, 198, 213, 232, 68, 69, 27, 25, 15, 38, 46, 88, 362, 338, 337, 133, 333, 335, 52, 365, 366, 370, 348, 328, 329, 330, 396. In each of these clauses the maximum fines for individuals and/or bodies corporate have been increased to provide consistency across the Act and with other legislation, ensuring they are set at a level that incentivises compliance. Not all penalty levels have been increased in comparison to the current Act

Clause 348. The maximum term of imprisonment for defrauding the revenue of Customs has increased from six months to five years in line with a similar offence for tax evasion under the Tax Administration Act 1994 (TAA). The burden of proof has also been aligned with the relevant provision of the TAA.

Customs' review of the penalty levels in the Act was supported by independent legal advice.

Persistent poor performance in the use of the Joint Border Management System (JBMS)

Clause 300. The range of sanctions for JBMS users who do not meet their obligations under the Act has been extended to address persistent poor performance. Customs will have the ability to cancel or suspend a user's JBMS registration if the user is persistently making errors, despite efforts to improve their performance.

Searching electronic devices

Clause 207. A new offence where a person in possession of an electronic device fails to provide access information, and other information or assistance that is reasonable and necessary to allow the searching Customs officer to access the device. The maximum fine is \$5,000, which aligns with similar offences under the Act.

Examination of goods accompanying passengers

Clause 34. Where a person fails to comply with an obligation to make any goods in the person's possession or under his or her immediate control available for examination by a Customs officer has been brought within the scope of an existing offence. The maximum fine is \$5,000.

Consultation with the Ministry of Justice about offences and penalties – question 3.4.1

The Ministry of Justice was consulted on the above provisions in the form of meetings, phone and email discussions, and the receipt of comments on draft Cabinet papers and regulatory impact statements and on draft Bill provisions. During the development of policy, the Ministry of Justice was consulted on working papers, involved in cross-agency meetings and was a member of the Senior Officials Advisory Group for the Customs and Excise Act Review (membership is made up of government agencies with an interest in the review).

Infringement notice scheme and administrative penalties

The Ministry of Justice had minor comments and proposals were amended accordingly.

Updated penalty levels

The Ministry of Justice was consulted on penalty levels for offences generally both before and after PCO proposed a rationalisation of penalties to ensure a consistent relativity between fines for individuals and bodies corporate.

For clause 348, the Ministry of Justice advised that if the maximum term of imprisonment for defrauding the revenue of Customs was to increase to five years in line with the TAA, the Customs offence must also be aligned to ensure an equivalent burden of proof on the prosecution. The change has been made in the Bill.

Searching electronic devices

The Ministry of Justice was consulted on the new offence of failing to provide access information to electronic devices.

Appendix Three: Further Information Relating to Part Four

Strict liability or reversal of the usual burden of proof for offences – question 4.4

General background relating to strict liability offending

In the New Zealand context, Customs is one of three government agencies charged with regulating and enforcing laws relating to the transit of goods and people across the border. Customs' key responsibilities are the collection of revenue due the Crown on imported goods, the enforcement of various prohibitions or restrictions on the importation or exportation of a wide variety of goods, and the processing of craft arriving and departing New Zealand. These core functions have remained largely unchanged since the foundation of the Customs Service in 1840 and have been reflected in successive iterations of Customs' legislation.

Offences

Clause	Conduct or act the strict liability offense applies to
88	Offence for making or purporting to make a transshipment request and failing to comply with the necessary requirements.
172(1)	Offence for failing to comply with a direction of a Customs officer to stop and bring ship to for boarding.
172(2)	Offence for failing to comply with a direction of a Customs officer to facilitate such boarding.
177(1)	Offence for failing to leave New Zealand immediately when directed to do so.

Why is it necessary that these offences are of a strict liability nature?

Customs regard the strict liability offences here as justifiable in the context of enforcing a regulatory regime – these offences are imposed on those in positions of authority in relation to craft in relation to obligations that they have in relation to that craft, or on those who make transshipment requests in relation to cargo, but fail to do so in accordance with clause 87. The defendant will be best placed to show that they took all reasonable steps in these situations to ensure that they did what was required to be done by the relevant provisions of the Bill.

Creation or amendment of decision-making powers – question 4.6

Discretion of the Chief Executive of Customs

Clauses 109-110. These clauses give the Chief Executive of Customs' an explicit statutory discretion in the making and correcting of assessments and collection of duty, based on the discretion provided to Inland Revenue in sections 6 and 6A of the Tax Administration Act. Safeguards include a requirement to protect the integrity of the tax system and collect over time the highest net revenue practicable within the law having regard to specified objectives.

Internal review of duty assessments

Pursuant to the administrative review process, in accordance with section 324 and Schedule 7. Traders will have a direct right of appeal on Customs' decisions on duty assessment. Previously traders were only able to appeal to the Customs Appeal Authority.

Search of electronic devices

Clause 207. A person in possession of an electronic device has an obligation to provide access information, and other information or assistance that is reasonable and necessary to allow the searching Customs officer access to the device. Where access to a device has been refused,

and provided the necessary threshold of suspicion of offending has been reached, the device will be subject to the following procedural steps and powers:

- a Customs officer may take possession of the device and attempt to conduct a preliminary search under the usual conditions and if evidence of relevant offending is found, the usual process for dealing with the device and data for evidential purposes will apply;
- when Customs successfully prosecutes a person for refusal to provide access, the court has the power to order the condemnation or destruction of the device as part of the sentencing process; and
- where a device cannot be accessed due to technical limitations, Part 14 of the Customs and Excise Act 1996 applies and the device becomes forfeit to the Crown and liable for seizure after a prescribed period of time.

Customs is required to publish in its annual report the annual total of electronic devices searched by category. A person can seek recompense from Customs through the courts for an unreasonable search of their electronic device. A person also has the right to make a complaint about a Customs officer's search of their device to the chief executive of Customs, the Privacy Commissioner, the Human Rights Commissioner, the Ombudsman or member of Parliament.

Ordering a vessel to leave New Zealand

Clause 176. Customs' existing power to order a vessel to leave New Zealand has been amended to limit its power. The power was too broad to achieve its purpose. The provision only applies to vessels arriving in, or departing from New Zealand; is only to be exercised with the approval of the chief executive of Customs; and is only to be exercised when he or she considers that it is the public interest to do so.