

Departmental Disclosure Statement

Customs and Excise (Tobacco) Amendment 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.

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.

28 April 2020.

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Part One: General Policy Statement

This Bill amends the Customs and Excise Act 2018. It enacts measures to combat tobacco smuggling and to secure Crown revenue from taxes on tobacco through imposing import controls over tobacco products, and tobacco leaf and refuse. To reduce the costs of processing border seizures of illicit tobacco, the Bill amends the principal Act to provide for a simplified seizure process. Tobacco products are highly taxed for public policy reasons, and to reflect the negative health impacts and costs of tobacco consumption on individuals and society. Smuggled tobacco is part of an increasing black market to evade tax and current smuggling patterns are undermining the effectiveness of border controls.

The purpose of the Bill is to tighten border controls to reduce revenue evasion by increasing Customs' visibility on imports, and closing off import channels used by smugglers. The measures contained in the Bill are consistent with the principles of the World Health Organisation Framework Convention on Tobacco Control.

Permit required to import certain tobacco products

The Bill imposes import controls in the form of making tobacco products and tobacco leaf and refuse prohibited imports, which can only be imported if a permit to import has been issued by the Chief Executive of Customs. The passenger duty free concession operating at airports and seaports is unaffected. Any importation without a permit, or that is not in compliance with the conditions of the permit, would be subject to forfeiture (which is the case with smuggled tobacco currently).

Tobacco products are defined to include cigarettes, pipe and hand rolling tobacco but to not include cigars and similar products. The Bill provides that a condition of every permit issued is that the permit holder not import the goods using any method that requires the goods to be received by or transmitted through a registered postal operator.

Simplified seizure process and compensation for destruction of goods in error

To further disincentivise smuggling, and to reduce Customs' processing and storage costs for dealing with smuggled tobacco products, the Bill amends the principal Act to allow a seizure process for illegally imported tobacco products that requires a written notice to the importer informing them that the goods have been seized and destroyed. Customs would destroy the goods as soon as possible.

The Bill provides that in the event of tobacco products being seized and destroyed in error by Customs (for example when the person had a valid permit to import), that the importer be entitled to apply for compensation for the customs value of the goods lost.

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
Each year the three large tobacco multinational companies fund a report on the size of the illicit market in New Zealand. The report is produced by KPMG in the United Kingdom. They have estimated that illicit tobacco consumption increased from 9.2% to 10.2% of total consumption between 2017 and 2018. There are reasons to believe that the methodology used gives an over-estimate. Given the issue is aimed at illicit tobacco imports and unlicensed manufacturing, there are some constraints on quantifying the evidence of the problem. With any illicit market, it is difficult to measure the extent of the activity. About 13.8% of the adult population smokes. It is not known with any certainty what proportion of smokers access tobacco from the illicit market or the proportion of total tobacco consumed that is illicit.	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

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
Customs completed the following Regulatory Impact Summaries in December 2019: Impact Summary: <i>Imposing import controls over tobacco products and tobacco leaf and refuse</i> Impact Summary: <i>Process to seize, store and dispose of tobacco imported illegally</i> The Regulatory Impact Summaries will be published after Budget 2020 has been finalised, with any redactions that would be justified if the information had been requested under the Official Information Act 1982. They will be available at: https://www.customs.govt.nz/about-us/information-releases/cabinet-material/ .	

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?	NO
The RIAs did not meet the threshold for RIA Team assessment. The RIAs were assessed by Customs' RIA Panel and were judged to meet the criteria.	

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
The analysis is set out in the two Regulatory Impact Summaries and in Appendix One. Only those who are importing these products with the intent of evading excise will have the potential to suffer a loss of income or wealth because of these policy changes.	

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?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>It is anticipated that the level of voluntary compliance with the permit regime by legitimate importers will be high. There are relatively few legitimate importers. Customs will communicate individually with them about the requirement to obtain a permit, and has taken steps to ensure that the permit application process is simple and straightforward, especially for those importers with an established history. There is no charge for a permit so there is no financial disincentive towards non-compliance.</p> <p>The effectiveness of excise legislation is, by its nature, reliant on effective and voluntary compliance. The level of effective compliance or non-compliance with specific applicable obligations, and the nature of regulator effort, may have an impact on the potential costs or benefits particularly in relation to the identification of smuggling taking place.</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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As part of the policy development process, the proposed policy was looked at in relation to the World Health Organisation Framework Convention on Tobacco Control. It was determined that the proposed prohibition would be consistent with the principles of the World Health Organisation Framework Convention on Tobacco Control.
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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?

The Bill is consistent with the principles of the Treaty of Waitangi as it only targets those importers who are smuggling or undertaking manufacture of tobacco products to evade excise duty. Maori have a higher smoking rate than the population generally, with Maori women higher still. The availability of cheap tobacco through illicit markets undermines public health measures to encourage smokers to quit through taxes raising the price of tobacco.
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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
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The Bill has been vetted and advice will be available on the Ministry of Justice website when the Bill is introduced, see

https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>The Bill makes failure to comply with a term or condition of the permit an offence by amending section 388 of the Act (Offences in relation to importation or exportation of prohibited goods). In section 388(1)(e), "section 96 or 97" is replaced with "section 95A, 96, or 97".</p> <p>The Bill amends section 389 (Offences in relation to knowingly importing or exporting prohibited goods). In section 389(1)(d), "section 96 or 97" is replaced with "section 95A, 96, or 97".</p> <p>Schedule 3A (Permit to import tobacco and tobacco products) Clause 6 provides for "An applicant who is dissatisfied with a decision of the chief executive under this clause may, within 20 working days after the date on which the notice of the decision is given, appeal to a Customs Appeal Authority against that decision".</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted during the policy development and were supportive of the proposals.	

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?	NO

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
Due to the proposals addressing exploitation of weaknesses in border controls, there has been limited consultation. The three largest importers of tobacco products and the one large manufacturer of tobacco products have been consulted on the high level proposals and are supportive of them. Other importers have not been consulted due to the risk of further exploitation of weaknesses in border controls by smugglers.	

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
All proposals in the Bill have been reviewed by internal operational subject matter experts under Customs standard process for assessing the feasibility of any new policy initiatives and ensuring they are workable and cost effective. This involves assessing whether systems need to be changed and, if so, whether formal testing needs to be carried out. None of the measures in the Bill have required formal testing.	

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?	NO

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
Clause 13 of the Bill amends section 388 (1) (e) (Offences in relation to importation or exportation of prohibited goods). This is a mechanical change to reflect that tobacco importations are prohibited under new s.95A of the Act rather than under existing ss.95 or 96. The elements of the offence are not changed.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

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?	NO

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?	NO

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

Extent of impact analysis available – question 2.5(a)

Information on the size of potential costs and benefits

The smuggling of tobacco products and the importation of tobacco leaf and tobacco refuse to evade tax has grown rapidly in the last 12 to 18 months off a historically low base and is on an upwards trajectory. Interceptions of smuggled cigarettes at the border have increased by 352 percent between 2015 and the end of August 2019. Interceptions in 2018 were 53 percent higher than in 2017. This is putting at risk the collection of Crown revenue from excise taxes along with Goods and Services tax.

The main purpose of the Bill is to combat tobacco smuggling and to secure the Crown revenue from tobacco excise of about \$2 billion in 2019/2020. The Bill tightens border controls to reduce revenue evasion by increasing Customs' visibility on imports and closing off import channels used by smugglers. It will also disrupt the illicit market in New Zealand for tobacco products by requiring a permit for tobacco leaf and refuse.

Tobacco products are only illegally imported to evade taxes. The importer is happy to walk away from them if intercepted, as they cost so little in the source country. Given the problems are evidence of an increase in unlawful activity occurring through importation, the range of options to address them are limited to strengthened regulatory controls at the border. These controls are necessary to enable Customs to meet its legislative obligations at the border in relation to tobacco products.

There is expected to be minimal impact of the proposed legislation on legitimate importers. For established importers there will be no change at all for the next year, as they will have a permit issued to them for one year from the date of commencement, or for the length of time a manufacturer holds a licence to manufacture tobacco products. The administration costs for importers will be low as they will need to complete a simple permit application form.

There will be increased costs to private individuals importing for their own use, as they will no longer be able to use the mail stream. They will incur an increased freight cost and fast freight clearance fee using fast freight rather than the mail stream. This is likely to only affect a small number, as there are not many private individuals who are currently importing and paying excise.

The permit regime will ensure Customs is aware of the identity of importers of tobacco products before importation takes place and can perform due diligence to manage the risk of non-payment of excise prior to granting a permit. Customs estimates the cost of establishing and operating the permitting system for tobacco products, leaf and refuse is about \$205,000 per annum.

The Bill simplifies the seizure process and will reduce the costs for Customs to process seizures of illicit tobacco. The simplified seizure process will further disincentivise smuggling and reduce process and storage costs for dealing with smuggled tobacco products. It will free up resources to allow Customs to focus on risk goods, manage volume growth, and keep up a smooth flow of parcel processing for legitimate importers at the International Mail Centre. It is estimated that compared to the status quo, this simplified seizure process will reduce the process/storage time from seizure to

destruction from one to six months under the status quo, to as few as seven days to a maximum of a month. In monetary terms it is estimated it would reduce Customs' processing costs (based on volumes of illegal tobacco processed over 2018/19) by between 10 and 20% or between \$75,000 and \$150,000 per annum.

In the unlikely event of tobacco products being seized and destroyed in error (for example, when the person had a valid permit to import), the importer will be entitled to compensation for the customs value of the goods.

Smuggled tobacco is part of an increasing black market to evade tax. In 2019, Customs' seizures of tobacco products represented approximately \$10.8 million of excise tax foregone. However, seizures do not give a full picture of excise tax foregone as further offending may have taken place but was not identified.

Customs suspects imported leaf is being cut (manufactured) without a licence to make 'roll your own' tobacco or cigarettes, to evade excise. Based on import volumes in 2019, this would incur about \$5 million in excise if the leaf were manufactured into smoking tobacco.