

Regulatory Impact Statement

Customs and Excise Act Review: Updated penalty levels

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by Customs.

It provides an analysis of options related to updating penalty levels for offences against Part 13 of the Customs and Excise Act. To do this, it outlines the advantages and disadvantages of modifying these provisions, compared to retaining the status quo.

The following are constraints to the analysis:

- There are relatively few prosecutions taken under the Act. The review of penalty levels was a systematic review of penalties rather than simply relying on anecdotal evidence and feedback, and was also informed by independent legal advice
- There is no evidence on the effectiveness of the current or proposed penalties in terms of deterring undesired behaviours. In benchmarking against comparable legislation, Customs has assumed that the penalty levels in other relevant legislation are set at appropriate levels to deter undesired behaviours.

Signed by Terry Brown on 10 November 2015

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10 November 2015

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Executive Summary

1. Many of the penalties in Part 13 of the Customs and Excise Act are 19 years old, while others are quite recent. Consequently many of the penalties lack relativity with other penalties in the Act and with similar provisions in other Acts. Some fine levels are also low by today's standards.
2. Customs undertook a systematic review of the offences and penalties, which was informed by independent legal advice, as part of its review of the Customs and Excise Act 1996. This advice provided analysis and conclusions, which informed Customs' proposals. The Ministry of Justice was extensively consulted on the proposals during the review.
3. Twenty-six changes are proposed to ensure penalties are consistent across the Act and with other relevant legislation, sufficient to deter non-compliance and to provide for a proportionate response. These changes require amendments to the Act.
4. As part of implementing the new Act, Customs will develop a compliance strategy and associated guidelines so Customs officers are aware of the interventions available to them, including prosecution.

Status Quo and Problem Definition

5. This regulatory impact assessment covers options associated with offences and penalties prescribed in Part 13 of the Act. It does not include an analysis of offences associated with proposed new Customs powers. These are discussed in the regulatory impact statements that deal with those proposals.
6. Part 13 of the Act currently makes provision for 51 Customs-related offences and associated penalties. The current offences and penalties are set out in Appendix A.
7. Many of these penalties date back to the assent of the Act in 1996 and are now 19 years old. Others are quite recent (e.g. administrative penalties which were reviewed in 2012 and penalties relating to the Joint Border Management System prescribed in 2014).
8. The review revealed a number of examples of inconsistencies within the Act and with other legislation, such as defrauding the revenue of Customs which has a maximum penalty of six months imprisonment, or a fine not exceeding \$10,000 (\$50,000 for a body corporate). Similar offending under the Tax Administration Act 1994 carries a maximum penalty of five years imprisonment or a \$50,000 fine, or both.
9. This presents a number of issues for Customs:
 - the value of penalties set 19 years ago has diminished substantially in real terms, which indicates that they probably carry less of a deterrent value than they once did
 - the penalties also lack relativity within the Act, and with penalties for similar offences in other legislation.
10. Relatively few prosecutions are taken under the Act. The exact number of Customs' prosecutions is not available. There is a risk that if the current penalties continue, their deterrent value will erode over time.
11. Customs' review of penalty levels was a systematic review of penalties rather than simply relying on anecdotal evidence and feedback. The review was also informed by independent legal advice.
12. The independent legal advice involved analysis of each offence and penalty in Part 13, including looking at the nature of the offence and current penalty. Opinion was given as to which penalties should be reconsidered including examples of penalties in other relevant legislation. This independent advice informed Customs' proposals, which were then consulted with the Ministry of Justice.

Objectives

13. Options for considering updates to the penalties in Part 13 of the Act were assessed against the following objectives:
- penalties should be consistent across the Act and with other relevant legislation, particularly other border legislation
 - penalties should be at levels which are sufficient to encourage compliance and deter non-compliance
 - penalties should be fair, easily understood and efficient in their application
 - penalties should provide for a proportionate response to a range of offences against the Act (i.e. penalties are appropriate to the consequences and impacts of the offending).

Options and Analysis

14. In relation to offences and penalties covered by Part 13 of the Act, the following two options were considered:
- retaining penalties at their current levels (status quo), or
 - updating penalties to more closely meet the objectives for dealing with offences against the Act (preferred).
15. A summary of the two options relating to penalty levels is provided in the table below. Each option is ranked from 1 (low) to 3 (high) against each of the objectives listed in paragraph 9. The option related to updating the offences and penalties in Part 13 of the Act ranks more highly than the status quo.

Summary of options analysis for penalty levels

Objectives	Option 1 (status quo): retain offences and penalties in their current form	Option 2: Update offences and penalties
Consistency across the Act and with other legislation	1	3
Encourage compliance and deter non-compliance	2	3
Fair, easily understood and efficient	2	3
Proportionate response to offending	1	3
Total	6	12

Changes to penalty levels

16. To ensure that the offences and penalties framework prescribed in Part 13 of the Act continues to meet Customs objectives for an effective sanctions framework, changes are recommended to 26 of the 51 offences in this Part and the rationale for them (see appendix 1 for details).
- Twenty-one of the changes relate to increasing the fines to retain their deterrent value and relativity with other penalties.
 - Four involve introducing a differential between individuals and body corporates by way of a new financial penalty for body corporates (e.g. failure to keep business records).
 - One change, and the most significant change, relates to an increase in the maximum term of imprisonment for defrauding the revenue of Customs (section 211). This has been increased from its current level of six months, to five years to reflect the seriousness of the offending and to ensure consistency with similar provisions in Section 143(B) of the Tax Administration Act 1994 for tax evasion.
17. The offence of defrauding the revenue of Customs will also need to be updated to align the elements of the offence so that there is an equivalent burden of proof on the prosecution with that in section 143B of the Tax Administration Act 1994.
18. Increases in fine amounts were determined by their relativity with fines under similar provisions within the Act and in other relevant legislation, particularly border legislation. The table below summarises the changes in maximum fines for individuals and body corporates.

Summary of maximum fine increases

Individual		Body corporate	
Current	Proposed	Current	Proposed
\$1,000	\$5,000	\$5,000	\$15,000
\$2,000		\$10,000	
\$5,000	\$20,000	\$12,000	\$60,000
\$10,000		\$15,000	
		\$20,000	

19. Similarly, the levels of three new fines introduced for body corporates was determined by relativity with fines under similar provisions within the Act and in other relevant legislation.
20. The proposed modifications to these offences and penalties, if implemented, will help to address issues of relativity with other offences and penalties, are fairer on those to whom this legislation applies, maintain the deterrent value overtime, and allow a more gradated response to offending. The rationale for changes to the penalties is set out in appendix 1.

21. In terms of simplicity and cost effectiveness, there is no difference between the status quo and the preferred option, as the processes for applying the penalties will remain the same under both options.
22. These changes are unlikely to have any material operational cost implications, except for the proposed increase to the penalty for defrauding the revenue of Customs.
23. The proposal to increase the maximum prison sentence from six months to a new maximum of five years passes the threshold for a jury-based court hearing and could have implications for the courts and the Department of Corrections. However, prosecutions under these provisions are extremely rare. Any impact on the courts therefore, is likely to be minimal.
24. This provision will ensure a strong deterrence applies to serious offending associated with defrauding the revenue of Customs and therefore Crown revenue.

Consultation

25. While specific changes to offences and penalties were not shared with stakeholders for the purposes of public consultation, the proposed changes are consistent with the views of a number of submitters that penalty levels should be considered in light of relativities with other provisions, and should be appropriate to the offence and proportionate to the offending. The proposed changes were made in light of these observations and reflect detailed discussions with Ministry of Justice officials.
26. Proposed changes were described in a public discussion document,¹ with an opportunity for public comment provided from April 2015 to May 2015. Of the 89 parties making submissions, six commented on reviewing the penalty levels. Most of the comments were in support of a penalties regime which is fair, consistent and proportionate. Other comments mentioned specific penalties that could be reviewed.
27. Penalty levels, and associated offences, were reviewed with these concerns in mind, with proposed changes to specific provisions developed in conjunction with Ministry of Justice officials.
28. The following government agencies were consulted on the proposed changes: Ministry for Primary Industries; Ministry for Business, Innovation and Employment; New Zealand Police; Inland Revenue; Ministry of Justice; the Treasury; Crown Law Office; Ministry of Transport; Department of Internal Affairs; Ministry of Foreign Affairs and Trade; Ministry for Primary Industries; Civil Aviation Authority; Maritime New Zealand; Ministry of Defence; New Zealand Defence Force; Ministry of Health; Parliamentary Counsel Office; the New Zealand Security Intelligence Service; and the Office of the Privacy Commissioner. The Department of Prime Minister and Cabinet was informed.

¹ <http://www.customs.govt.nz/news/resources/corporate/documents/ceact1996review-discussionpaper2015.pdf>

Implementation

29. The Bill is intended to be introduced to the House in mid-2016 with the aim of receiving Royal Assent by the end of 2016. Part 13 of the Act would need to be amended to give effect to recommended changes to penalty levels described in Appendix A.
30. From an operational perspective Customs will also need to establish:
- operational guidelines (i.e. a compliance strategy and associated enforcement intervention guidelines) to help ensure that Customs officials know the circumstances under which they should issue the range of interventions available to them, including the use of warnings and referral to prosecution;
 - a training programme to ensure that Customs officers and other relevant staff are aware of the changes;
 - data collection proportionate to resources available.

Monitoring, evaluation and review

31. As part of the implementation of the proposed changes, Customs will implement additional monitoring and evaluation mechanisms to ensure the benefits of the changes are being realised. In areas where no monitoring is currently done, we will be creating long-term processes that enable adequate information to be collected.

Appendix A: Updated penalty levels

Offence	Current penalty	Recommendation	Rationale
Offences in relation to Customs and Customs officers' powers			
Section 177 Obstructing Customs Officer or interfering with Customs property (includes interference or impairment of Customs dog, equipment, vehicles, communications equipment)	Maximum 3 months imprisonment; Maximum \$1,000 fine.	Increase fine to maximum of \$5,000	
Section 177A False allegation or report to Customs officer	Maximum 3 months imprisonment; Maximum \$2,000 fine	Increase fine to maximum of \$5,000	
Section 179 Counterfeit seals, stamps, markings, substances, or devices	For an individual: Maximum \$2,000 fine For a body corporate: Maximum \$12,000 fine	For an individual: Increase fine to maximum of \$5,000 For a body corporate: Increase fine to a maximum of \$15,000	

Offence	Current penalty	Recommendation	Rationale
<p>Section 180 Obligations of persons arriving in or departing from New Zealand (includes failing to report to Customs on arrival and failure to follow directions given)</p>	<p>For an individual: Maximum \$1,000 fine</p>	<p>Increase fine to maximum of \$5,000</p>	
<p>Section 185 Failure to answer questions (includes incorrect answers)</p>	<p>For an individual: Maximum \$1,000 fine For a body corporate: Maximum \$5,000 fine</p>	<p>For an individual: Increase fine to maximum of \$5,000 For a body corporate: Increase fine to maximum \$15,000</p>	
<p>Section 186 Failure to produce evidence of identity, entitlement to travel, or other matters (without reasonable excuse)</p>	<p>Maximum \$1,000 fine</p>	<p>Increase fine to maximum of \$5,000</p>	



Offence	Current penalty	Recommendation	Rationale
<p>Section 187 Failure to produce or account for goods</p>	<p>Maximum \$5,000 fine</p>	<p><i>For a body corporate: Introduce maximum fine of \$15,000</i></p>	
<p>Section 188 Failure to comply with a requisition (where there is cause to suspect that goods have been illegally imported or undervalued)</p>	<p>For an individual: Maximum \$1,000 fine For a body corporate: Maximum \$5,000 fine</p>	<p><i>For an individual: Increase fine to maximum of \$5,000 For a body corporate: Increase fine to maximum of \$15,000</i></p>	
<p>Offences in relation to Customs controlled areas</p>			
<p>Section 189 Use of (a Customs controlled) area without licence</p>	<p>For an individual: Maximum \$5,000 fine For a body corporate: Maximum \$10,000 fine</p>	<p><i>For a body corporate: Increase fine to maximum of \$15,000</i></p>	

Offence	Current penalty	Recommendation	Rationale
<p>Section 190 Failure to comply with conditions of (a Customs controlled area) licence</p>	<p>For an individual: Maximum \$1,000 fine For a body corporate: Maximum \$5,000 fine</p>	<p>For an individual: Increase fine to maximum of \$5,000 For a body corporate: Increase fine to maximum of \$15,000</p>	
<p>Offences in relation to arrival and departure of craft and persons</p>			
<p>Section 192 Offences in relation to inward report</p>	<p>For an individual: Maximum \$5,000 fine For a body corporate: Maximum \$15,000 fine</p>	<p>For an individual: Increase fine to maximum of \$20,000 For a body corporate: Increase maximum fine of \$60,000</p>	
<p>Section 192A Offences in relation to inward cargo report</p>	<p>For an individual: Maximum \$5,000 fine For a body corporate: Maximum \$15,000 fine</p>	<p>For an individual: Increase fine to maximum of \$20,000 For a body corporate: Increase maximum fine of \$60,000</p>	

Offence	Current penalty	Recommendation	Rationale
Section 194 Offences in relation to advance notice of departure	For an individual: Maximum \$5,000 fine For a body corporate: Maximum \$15,000 fine	For an individual: Increase fine to maximum of \$20,000 For a body corporate: Increase maximum fine of \$60,000	
Section 194B offences in relation to outward cargo report	For an individual: Maximum \$5,000 fine For a body corporate: Maximum \$15,000 fine	For an individual: Increase fine to maximum of \$20,000 For a body corporate: Increase maximum fine of \$60,000	
Section 194C Offences in relation to transhipment requests	For an individual: Maximum \$5,000 fine For a body corporate: Maximum \$15,000 fine	For an individual: Increase fine to maximum of \$20,000 For a body corporate: Increase maximum fine of \$60,000	
Other offences			
Section 196 Adapting craft for smuggling	Maximum \$10,000 fine	For an individual: Increase fine to maximum of \$20,000 For a body corporate: Introduce	

Offence	Current penalty	Recommendation	Rationale
Section 197 Interference with seals, etc	Maximum \$5,000 fine	<p>maximum fine of \$60,000</p> <p>For a body corporate: Introduce a maximum fine of \$15,000</p>	
Section 198 Interference with cargo (goods are removed, unpacked or thrown overboard)	Maximum \$5,000 fine	Increase fine to maximum of \$15,000	
Section 199 Unloading goods without authorisation (goods subject to Customs control)	Maximum \$5,000 fine	For a body corporate: Introduce maximum fine of \$25,000	

Offence	Current penalty	Recommendation	Rationale
<p>Section 205 Offences in relation to records (failure to keep business records relating to imports and exports)</p>	<p>Maximum \$2,000 fine for first offence Maximum \$4,000 fine for second offence Maximum \$6,000 fine for third offence With intent to defeat the purpose of the Customs and Excise Act 1996 Maximum \$50,000 fine or maximum 24 months imprisonment</p>	<p>For a body corporate, introduce the following maximum fines: \$6,000 fine for first offence \$12,000 for second offence \$18,000 for third offence</p>	
<p>Section 205A Offence relating to failure to give Customs access to information (without reasonable excuse)</p>	<p>For an individual: Maximum \$5,000 fine For a body corporate: Maximum \$15,000 fine</p>	<p>For an individual: Increase fine to maximum of \$20,000 For a body corporate: Increase maximum fine of \$60,000</p>	

Offence	Current penalty	Recommendation	Rationale
<p>Section 205B Offence relating to disclosing whether required to give Customs access to information (applies to persons concerned with the movement of craft, goods or persons)</p>	<p>For an individual: Maximum \$5,000 fine For a body corporate: Maximum \$25,000 fine</p>	<p><i>For an individual: Increase fine to maximum of \$20,000 For a body corporate: Increase maximum fine of \$60,000</i></p>	
<p>Section 209 Offences in relation to importation or exportation of prohibited goods</p>	<p>Importing, transporting or breaching licence conditions related to prohibited goods: For an individual: Maximum \$5,000 - \$10,000 fine For a body corporate: Maximum \$10,000 - \$50,000 fine For objectionable publications: For an individual: maximum 10 years imprisonment For a body corporation: maximum \$100,000 fine</p>	<p><i>For an individual mens rea offence: Increase fine to maximum of \$20,000 For a body corporate mens rea offence: Increase fine to maximum of \$60,000</i></p>	

Offence	Current penalty	Recommendation	Rationale
<p>Section 210 Offences in relation to exportation of goods (failure to comply with requirements relating to entry of information on goods for export, or lands goods for export in New Zealand)</p>	<p>For non-mens rea offences: Maximum \$5,000 fine For mens rea offences: For an individual: Maximum \$10,000 fine or maximum 6 months imprisonment For a body corporate: Maximum \$50,000 fine</p>	<p><i>Increase mens rea offences to: For an individual: \$20,000 For a body corporate: \$60,000</i></p>	
<p>Section 211 Defrauding the revenue of Customs</p>	<p>Maximum fines ranging from \$10,000 to \$100,000 Maximum 6 months imprisonment</p>	<p><i>Increase maximum term of imprisonment to 5 years and align the elements of the offence so that there is an equivalent burden of proof on the prosecution with that in the Tax Administration Act 1994</i></p>	

Offence	Current penalty	Recommendation	Rationale
<p>Section 216 Offences in relation to Customs Appeal Authorities (deception, false or misleading statements; failure to attend proceedings, give evidence etc.)</p>	<p>For deception, false or misleading statements: For an individual: maximum \$5,000 fine For a body corporate: maximum \$50,000 fine For failing to attend proceeding, give evidence etc: Maximum \$1,000 fine</p>	<p><i>For an individual: Increase maximum fine to \$25,000 For a body corporate: Increase maximum fine to \$60,000 For failing to attend proceeding, give evidence etc.: Increase maximum fine to \$5,000</i></p>	