SANCTIONS

AT A GLANCE

Our goal is to have sanctions that are consistent and fair, and that deter non-compliance and provide appropriate penalties.

We believe that the current range of Customs sanctions is effective.

Getting your feedback

We are interested in your views on the following issues and proposals:

- reviewing the level of penalties across the Act
- replacing the current “petty offences” regime with an infringement notice scheme for minor offending
- administrative penalties:
    - the minimum and maximum amounts for administrative penalties
    - imposing administrative penalties for errors in export entries
    - whether to allow Customs to recover our costs for adjustments to entries
- extending additional duty to:
    - all payments to Customs
    - refunds and drawbacks paid to businesses by Customs and later found to be in error.

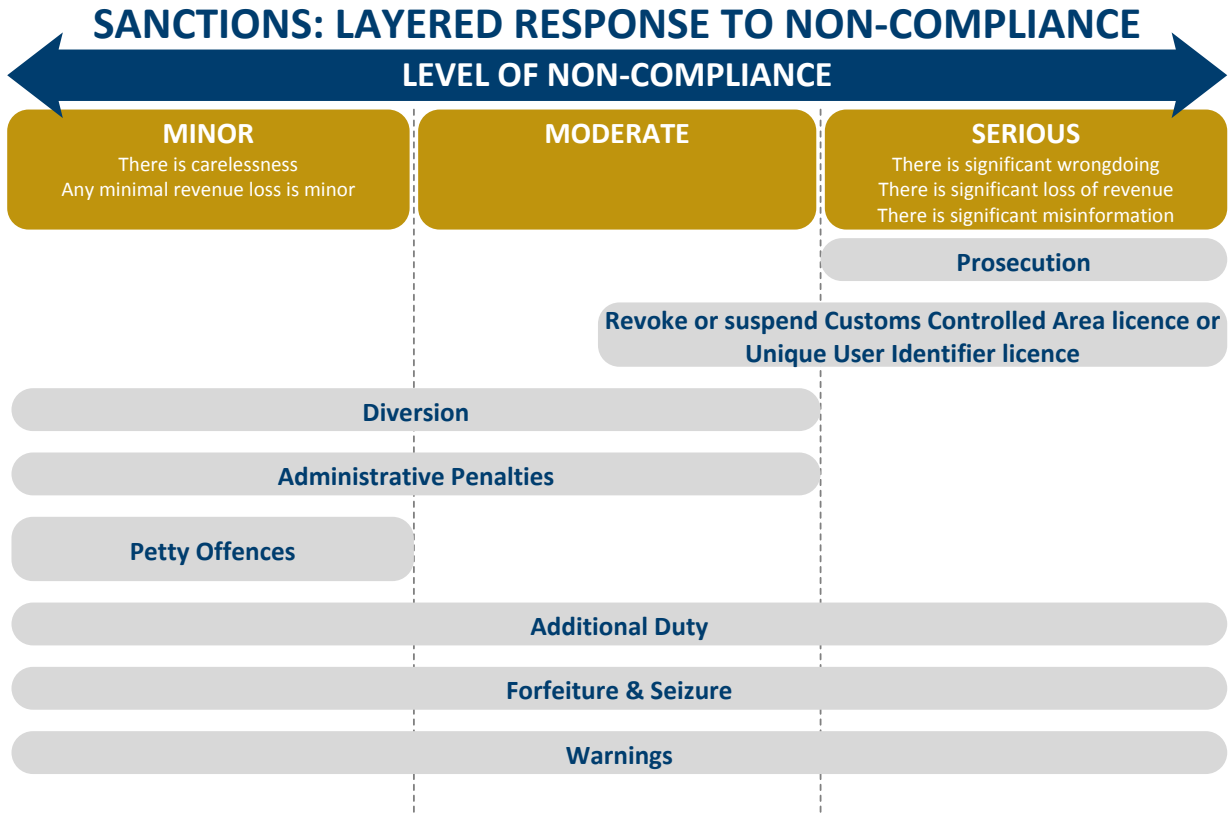
Our challenge is to make compliance easy to do and hard to avoid, and a range of sanctions support this goal. We believe that the key to encouraging compliance is to strike the right balance in applying these different sanctions and their associated penalties.

Sanctions are put in place to denounce and hold accountable those who do not comply with their obligations and to provide a deterrent. Customs also undertakes outreach programmes and education initiatives with people and businesses to encourage voluntary compliance.

Sanctions: The law as it stands

The Act employs a wide range of potential sanctions and we can also respond to non-compliance with non-legislated sanctions, such as warnings. For example, if a traveller or importer makes a minor, unintentional error that has minimal effect, we can encourage compliance by issuing a verbal or written warning instead of imposing a more serious sanction.

The diagram below shows the range of sanctions we might apply at different levels of non-compliance.



Petty offences

If Customs discovers offending at the lower end of the scale, the petty offences regime allows us to consider an alternative sanction to a full prosecution.

Under the petty offences regime, offenders can make a written admission of their offending and request that they be dealt with summarily by the Customs chief executive. The chief executive can then accept from the offender, as full satisfaction of a penalty, an amount not exceeding one third of the maximum penalty that could have applied if they had been prosecuted and convicted. The average petty offences fine is about $300.

> “The average petty offences fine is about $300”

Customs cannot impose a penalty unilaterally – the person must ask to be dealt with in this way. If the person does not want to pay the penalty then the matter may still proceed to prosecution. If the person does pay, then there is a statutory bar to formal prosecution.

Revenue collected under the penalty offences regime is paid to the Crown.

The penalty offences regime has benefits for both sides:

- the offender does not have the potential costs of a full court hearing and avoids a criminal conviction
- the Crown is able to free up court time by not burdening it with a prosecution for a minor matter, while at the same time the harm done by the offender is still recognised.

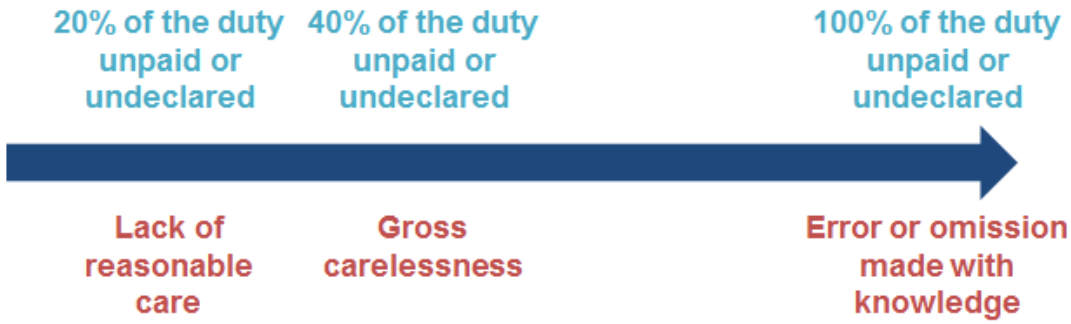
Administrative penalties

Administrative penalties are applied solely for errors in the entry of goods. Accurate entries are essential for Customs to quickly clear compliant goods, identify risk goods, and collect the right amount of revenue. The information contained in entries is also used to compile a range of trade data used in national statistics.

> “In the year to 30 June 2014, Customs issued 745 administrative penalties. Most of these were for $200”

An administrative penalty is not applied when a person voluntarily discloses an error or omission in an entry.

The amount of an administrative penalty is imposed on a sliding scale according to the level of culpability for any errors or omissions that lead to duty, including GST, going unpaid. This is the scale:



The minimum penalty that can be imposed is $200, and the maximum is $50,000. Material errors that do not result in a duty shortfall attract a flat-fee penalty of $200 per entry.

Revenue collected as a result of administrative penalties imposed is paid to the Crown.

A person who receives an administrative penalty notice must pay the amount within 20 working days after the date on which the notice is deemed to have been given. Within the same timeframe they can also ask Customs to review the decision to issue the penalty, at no cost to the person. If they are not satisfied with Customs’ review decision, they have

20 working days after the date of that review decision to appeal to the Customs Appeal Authority.[18]

If the person who made the entry can show they took all reasonable precautions in making the entry, or if there are compelling circumstances supported by the legislation, then Customs will not issue a penalty (or will cancel the penalty if we have already issued it). An example is where the person took all reasonable steps to make an accurate entry and queried the importer about the accuracy of the information they used to compile the entry.

Additional duty

When duty owed to the Crown remains unpaid by the due date, additional duty of five percent is imposed and a further two percent is imposed for each month after that on a compounding basis. This is an effective incentive to pay duty as soon as possible, as continued non-compliance can lead to heavy penalties.

Additional duty currently only applies to payments on Customs' Deferred Payment Scheme and to excise duty payments on locally manufactured goods. It does not apply to other types of payments to Customs. Revenue collected in the form of additional duty is paid to the Crown.

Revoking or suspending privileges

The chief executive of Customs can withdraw privileges granted to our clients if they breach the terms under which they were given the privilege or because of criminal offending.

Licensees for Customs Controlled Areas may have their licence suspended or revoked for a breach of the licence terms and conditions. Customs brokers may have their access to Customs' computer system for lodging entries suspended or revoked either if they breach the relevant conditions or if they are convicted of certain offences.[19]

Revoking privileges is an effective way of encouraging compliance as it directly affects the client's ability to do business.

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[18] The Customs Appeal Authority is a judicial body that is independent of Customs and administered by the Ministry of Justice. The fee for applying to the Authority is $410 (including GST).

[19] Namely, any offence against the Customs and Excise Act or the Misuse of Drugs Act 1975; or a crime involving dishonesty, as defined in the Crimes Act 1961.

Forfeiture

Forfeiture regimes are common internationally as a way of enforcing customs controls at the border. Forfeiture has been a feature of Customs law in this country for over a century.

> “Forfeiture has been a feature of Customs law in this country for over a century”

The Customs and Excise Act provides for a wide range of goods to be automatically seized and forfeited to the Crown, such as goods that have not been declared, prohibited goods, and even craft used to conceal goods. The forfeiture regime does not depend on Customs obtaining a successful conviction, rather it is targeted at the offending goods themselves.

Automatic forfeiture provides an effective way of making compliance hard to avoid, as it is often a significant deterrent.

Criminal prosecutions

Criminal offences are the most powerful of the sanctions in our compliance framework. They carry the stigma of a conviction, as well as the potential for loss of personal freedom or severe financial costs. Prosecutions by Customs are typically for offending relating to:

- illegal drugs and weapons
- objectionable material
- money laundering
- revenue fraud and evasion
- other regulatory offences such as the importing of hazardous waste, or manufacturing tobacco without a Customs controlled licence.

Sanctions: Our goal

Our goal is for Customs to have a range of sanctions that are consistent and fair and that deter non-compliance and provide appropriate penalties. Sanctions should be easily understandable and transparent to people and businesses.

Sanctions: Key issues and opportunities

The key issues we have identified are:

Low penalty levels and poor relativity between penalty provisions

The petty offences regime for minor offending is resource-intensive and lacks certainty

Additional duty on duty unpaid does not apply to all types of payments

For administrative penalties:

- concern about the minimum and maximum amounts that can be imposed
- administrative penalties do not apply to all export goods, but do apply to imported goods
- Customs bears the cost of adjusting or cancelling information submitted to us when this results from an error by a person or business.

Low penalty levels and poor relativity

Offence provisions and related penalties (both financial and imprisonment penalties) in the Act have not had an overall review since the Act was introduced in 1996. This has led to penalties decreasing in real terms, and several fines are now quite low by 2015 standards.

Some offences that tend to undermine Customs controls at the border carry maximum fines of around $1,000. In the example below, we compare the offence of a person making a false declaration to Customs with other offences in border legislation.

Customs and Excise Act 1996	A person who makes a false declaration under the Customs and Excise Act knowing it to be false is liable on conviction, in the case of an individual, to a maximum imprisonment term of **six months** or a maximum fine of **$10,000**. In the case of a corporation, a maximum fine of **$50,000** (sections 204(4) and 204(5)).
Biosecurity Act 1993	A person knowingly makes a declaration that the person is required by law to make that is false or misleading in a material particular is liable on conviction, in the case of an individual, to a maximum imprisonment term of **five years**, a maximum fine of **$100,000**, or both. In the case of a corporation, a maximum fine of **$200,000**. (sections 154O(7)(b) and 157(1)).
Immigration Act 2009	A person produces or surrenders any document or supplies any information to an immigration officer or a refugee and protection officer knowing that it is false or misleading in any material respect is liable on conviction to a maximum imprisonment term of **seven years**, a maximum fine of **$100,000** or both (sections 342(1)(b) and 355(1).

Low penalties bring risks for Customs

There are risks for Customs when a maximum penalty in the Act does not appropriately reflect more serious offending, in that the lower-level penalties do not meet sentencing needs of punishing and deterring offending.

For serious offending, Customs often has to rely on bringing charges under other Acts that may more adequately reflect the seriousness of the offending and provide more appropriate penalties. However, this may not always appropriately reflect the specific offending. We believe that the decision whether to charge under the Customs and Excise Act or another Act should be driven by the appropriateness of the charge for the type of offending, not by the level of the penalty.

Multiple amendments have led to poor relativity

Multiple amendments to the Act over the years have meant there can be a lack of relativity between similar provisions within the Act. One area of particular concern for us is inconsistency of the maximum fines and prison terms within the criminal offence provisions.

Examples of poor relativity

The recently added offence of killing or injuring a Customs dog carries a maximum prison term that is twice that for physically assaulting a Customs officer.

For offences in relation to entries (under section 203(1)), the maximum fine imposed after a criminal conviction is $1,000 for an individual and $5,000 for a body corporate, while the maximum administrative penalty for entry errors is $50,000.

There are also inconsistencies in the Act between different types of sanctions.

Our preferred solution

Review the financial and imprisonment penalties in the Act, including relativity within the Act

Our preferred option would provide penalty levels that reflect the seriousness of the offending. Under this option, we would talk with interested parties and make recommendations on appropriate penalties. If adopted, some of those recommendations may require legislative change.

We are interested in your views on the current penalty levels.

Other solutions we are considering

Status quo: Make no legislative changes

Under this option, there would be no changes to the maximum penalties in the Customs and Excise Act. Retaining the status quo carries risks that penalty levels under the Act are categorised as low level by the courts and that the courts deal with this offending accordingly.

While prosecutions under other Acts can be appropriate and send strong messages, other Acts may not appropriately address the specific offending.

Who is affected by change

Changes to penalties in the Customs and Excise Act could affect a wide range of people and businesses.

Customs also intends to talk to the Ministry of Justice and other government agencies throughout the process of reviewing penalties.

LOW PENALTIES AND POOR RELATIVITY: WHAT DO YOU THINK?

Q 97 Do you have any comments on relativities between penalties in the current Customs sanctions system and the effect of available sanctions on compliance levels?

Q 98 Do you have any concerns with the current penalty levels in the Act?

Q 99 What do you think we need to consider as we review the financial and imprisonment penalties in the Act?

Petty offences

While the petty offence regime provides a useful compliance tool for minor offending, we believe it is time-consuming and lacks transparency. Offenders can typically spend several hours being interviewed and processed by a Customs officer, and this large amount of time does not always appropriately reflect the minor nature of the offending involved.

We are also aware of concerns from some people that the current provision lacks key safeguards that exist in infringement notice schemes.

The petty offence provisions are more commonly used by Customs at international airports. A typical case will be an air passenger who, to avoid paying duty, does not declare tobacco over the concession amount.

Example of a petty offence

A passenger arriving into New Zealand is found to have 800 cigarettes in his baggage, which was picked up by a biosecurity X-ray machine. He admits he owns the cigarettes and did not declare the goods to avoid paying excise duty and GST.

The passenger chooses to make a payment under the petty offences regime for making a false declaration on his arrival card relating to the cigarettes. Customs sets the amount at $300. The passenger also pays the excise duty and GST owing on the cigarettes.

Other New Zealand government agencies have infringement notice schemes for minor offending. The agencies we spoke to have found these schemes to be very effective in dealing with minor offending and encouraging people to comply voluntarily. A familiar example is the biosecurity fee operated by the Ministry for Primary Industries at airports.

Cabinet guidelines for infringement notice schemes

In 2008, Cabinet issued guidelines that set out its expectations for infringement notice schemes. These include the following:

- the offences covered are strict or absolute liability offences only. There must be no requirement for the government agency to prove any mental elements of the alleged offence (“mens rea”) – that is, negligence, recklessness or intentional conduct
- fees should generally be less than $1,000. The penalty should be specified in the legislation and cannot be varied. All fees are paid to the Crown
- there is no conviction or criminal record for the person involved, even if the person decides to challenge the infringement notice in the courts
- there should be a range of payment options available, including around time to pay and means of payment

- there is to be annual reporting. The government agency should collate an annual set of key statistics on the use of infringement notices and file them with the Ministry of Justice.

Our preferred solution

Replace the petty offences regime with an infringement notice scheme

Under this option, changes to the legislation would establish an infringement notice scheme. The new legislation could also specify higher penalties for second and subsequent cases of the same offending.

We believe this option is more likely to achieve Customs' goal of having sanctions that are consistent and fair and that provide a deterrent and appropriate penalties.

An infringement notice scheme would be established under the following legal framework:

- the **Customs and Excise Act** would provide the authority to establish the scheme and set the maximum penalty amount that can be imposed
- the **Customs and Excise Regulations** would provide the detail of which offences are subject to infringement notices, the penalty levels, and the forms to be used
- the **Summary Proceedings Act 1957** would provide a common framework for when the District Court is asked to review or enforce an infringement notice.

We would also intend to align an infringement notice scheme with Cabinet's guidelines (see above), although these do give room for movement in some areas. For example, the guideline that a person should have 28 days to pay an infringement fee may not be realistic where fees are issued at airports, as most fees under the current petty offences regime are issued to short-term visitors.

We would need to do further work and consult more with interested parties to determine which offences could be included under an infringement notice scheme and what the fee levels should be. The following are examples of offences that could be part of an infringement notice scheme when the offending is minor:

- a person or business removes goods from a Customs Controlled Area before the goods have been cleared for removal by Customs. (section 200(1)(a) to (d))
- to avoid paying duty a passenger fails to declare on their arrival card that they have tobacco over the duty concession amount. (section 204(1)).

Other solutions we are considering

Status quo: make no legislative changes

Under this option, the current petty offences regime would continue. Retaining the status quo would mean continuing a regime that is not always easy to understand or administer. The regime will not always be used by Customs officers because it can be time-consuming and costly.

Who would be affected by change

We believe an infringement notice scheme would be particularly effective in dealing with minor offending committed at airports, such as when air passengers fail to declare on arrival that they have excess goods so as to avoid paying duty.

It is too early to say who else could be covered by an infringement notice scheme. We are interested in your views on the types of minor offending against Customs' legislation that could be managed effectively and efficiently under this type of scheme.

PETTY OFFENCES: WHAT DO YOU THINK?

Q 100 Do you have any concerns about the current petty offences regime? If so, what are these?

Q 101 Do you think the petty offences regime should be replaced by an infringement notice scheme? Please give your reasons.

Q 102 What do you think we should consider if we were to replace the petty offences regime with an infringement notice scheme?

Q 103 What minor offences do you think would be suitable or not suitable for an infringement notice scheme?

Administrative penalties

We believe that the administrative penalty regime has performed well in encouraging people to take reasonable care when making entries and to voluntarily disclose any errors or omissions they have made.

Many customs brokers have improved their quality assurance processes and systems, and this had reduced the rate of errors over the past year. The number of voluntary disclosures of errors made to Customs has also increased. In 2013/14 there were 6,964 voluntary disclosures to Customs, compared to 2,365 in the previous year.

Example of an administrative penalty

A customs broker made import entries for building materials regularly imported into New Zealand. As a result of the tariff classification used on each entry, Customs data showed that asbestos-based materials were being imported in large numbers, raising concerns about harm to the community. The materials were in fact found to be asbestos-free: the customs broker had used the wrong tariff classification for the goods.

The information was later corrected and there was no shortfall in duty to be paid. The customs broker was issued with an administrative penalty of $200 for each entry in which they had used the wrong tariff classification.

In the previous section on low penalties and poor relativity, we mentioned the poor relativity between administrative penalties and prosecution. We have also identified three other issues:

- the minimum and maximum administrative penalties may be inappropriate
- export entries are excluded from the regime
- Customs is fixing errors at its own cost.

Minimum and maximum administrative penalties

Some industry groups have told Customs that the minimum administrative penalty of $200 may not be an effective deterrent and that businesses may be treating the amount as a “cost of doing business”.

Some industry groups also think the maximum administrative penalty of $50,000 is too high. We found it difficult to compare the minimum and maximum amounts to those in other penalty schemes in New Zealand or overseas. Penalty schemes for misleading statements relating to imported and exported goods and for shortfall in duty are common in other countries, but these can be quite different in how they are designed and who they are targeted at.

> “As at 1 January 2015, Customs has issued two administrative penalty notices for the maximum of $50,000”

The minimum and maximum amounts were last updated in 2012 (from $50 and $10,000 respectively). Over time, inflation will erode the impact of the amounts.

We do not know enough yet about the impacts of the minimum and maximum amounts. We are interested in your views on this and how this issue may affect your business.

You may also think there are other factors or measures we should consider. For example, some countries reduce or cancel penalties if the business has a good compliance record. We do need to make sure that any provisions in the legislation are clear and transparent to everyone.

Administrative penalties do not apply to exports

Export entries do not involve shortfall in duty so any administrative penalty will be the current amount of $200”

Administrative penalties apply to import entries and to export entries in relation to applications for drawback of duty.

Other export entries are not included in the regime. This is because of a drafting error in changes to the Customs and Excise Act in 2012. Before 2012, administrative penalties included all export entries. Other countries apply penalties to both import and export entries.

Our preferred solution

Apply administrative penalties to all export entries

Our view is that administrative penalties should apply to all export entries.

Having accurate data provides assurance to our trading partners for the goods they are receiving from New Zealand. The data is also used to compile a range of trade data used in national statistics. Accurate data also enables us to intervene to protect New Zealand’s sovereignty or reputation – for example, stopping the illegal exporting of pounamu. Administrative penalties are one method of encouraging accuracy.

This option is consistent with Parliament’s intention in 2012 to apply administrative penalties to all export entries, and is consistent with penalty schemes in other countries.

Other solutions we are considering

Status quo: Make no legislative changes

Retaining the status quo would mean that there would continue to be inconsistent treatment between imports and exports. For the vast majority of export entries Customs would have no ability to issue an administrative penalty for errors.

Who would be affected by change

We recognise that a legislative change could affect the export sector, as it is likely it will be the exporter who will be making the entry to Customs. We would need to work with exporters to make it easy for them to understand and comply with their obligations.

It is difficult to estimate numbers, but we expect that under the preferred option we would issue approximately 400 to 1,000 administrative penalties in the first year to people making export entries.

Customs does not recover costs for fixing errors

There is currently no charge to a person when Customs has to approve an adjustment or cancellation to an entry resulting from the person's error. If an adjustment or cancellation is required, Customs reviews the correct documents submitted by the person and decides whether to approve the adjustment or cancellation.

These adjustments or cancellations are common. The time taken depends on how complex the task is. We estimate that Customs spends approximately $300,000 a year on entry adjustments and cancellations as a result of errors voluntarily disclosed by people making entries. However, the cost is likely to be less under the new Joint Border Management System.

Example of an error resulting in adjustment by Customs

A customs broker makes an import entry based on initial documentation (a shipping order) from their customer. This enables their customer's goods to be cleared by Customs the same day.

Two days later the broker receives full documentation from the customer and voluntarily discloses to Customs that there was an error in the tariff classification in the initial documentation. Customs reviews the full documentation and approves the adjustment.

Solutions we are considering

We have considered two options. We do not currently have a preferred option.

Status quo: Make no legislative changes

Retaining the status quo would mean that Customs will continue to be unable to recover Crown costs for the processing and approval of adjustments or cancellations by people who make entries. Although the Joint Border Management System will streamline the process for brokers and Customs, there will still be costs to Customs for processing and approving adjustments.

Allow Customs the ability to introduce a processing/administration fee to recover our costs for entry adjustments

Under this option, the legislation would need to be changed to allow Customs to set a fee to recover Crown costs. The fee would probably be small. We would need to consult with interested parties on the level of the fee.

In setting the fee level we would need to balance the goal of recovering Crown costs with the need to encourage voluntary disclosures of errors.

ADMINISTRATIVE PENALTIES: WHAT DO YOU THINK?

Q 104 Do you think the current administrative penalty regime supports compliance by individuals and businesses? Please give your reasons.

Q 105 What are your views on the current minimum administrative penalty amount of $200? Is it about right? Please give your reasons.

Q 106 What are your views on the current maximum administrative penalty amount of $50,000? Is it about right? Please give your reasons.

Q 107 Should administrative penalties be imposed for exports? What issues should Customs consider if this happens?

Q 108 Should Customs be able to recover its costs of processing and approving adjustments or cancellations of import and export entries? Please give your reasons.

Q 109 Do you have any other comments on any aspects of the current administrative penalty regime?

Additional duty

Currently, additional duty can be imposed on some, but not all, duty payments owed to Customs that remain unpaid by the due date. We think this creates an anomaly in the Customs and Excise Act.

> “Additional duty of five percent is imposed on payments unpaid after the due date. A further two percent is imposed for each month after that”

Specific situations where additional duty cannot be imposed include the following:

- payments to Customs other than those by businesses on Customs’ Deferred Payment Scheme or by excise manufacturers – for example, late cash payments are not liable for additional duty
- businesses that undergo a Customs audit and have been found to have underpaid duty. They must pay the amount owing but are not liable for additional duty. If the business had overpaid duty, Customs would refund the amount
- where a refund or drawback is paid to a business by Customs but it is later found that the amount was paid out in error. The business must pay back the amount, but Customs cannot impose additional duty to account for the Crown’s loss of that money and the use of that money.

Example of a drawback paid to a business in error

A retailing business received a drawback of approximately $50,000 from Customs for previously paid import duty.

One year after receiving the drawback, they voluntarily disclosed to Customs that, because they had mistakenly submitted inaccurate information, they received the drawback in error. They repaid the $50,000.

The Crown had no ability to recover interest on the loss of that money, which the business had the use of for a year.

We are aware that Inland Revenue can charge interest under its legislation for late payments of tax. This includes interest provisions for tax refunds that are paid out by Inland Revenue but subsequently found to be in error – that is, the taxpayer must pay back the refund plus interest.

We do recognise that most importing businesses that pay by cash must pay Customs before their goods are released from a Customs Controlled Area – that is, “no pay, no go”. If a business does not pay, Customs can take possession of the goods and sell them, or any part of them, to satisfy the debt in full or part.

There will be situations where clients already have use of the imported goods, so in those cases Customs cannot hold the goods – for example, goods that were originally imported as a "temporary import" but that are now staying in New Zealand permanently.

Our preferred solution

Extend additional duty to all payments to Customs, and to refunds and drawbacks paid to businesses and later found to be in error

We believe this option would provide incentives to businesses to pay the right amount to Customs and to claim the right amount of refund or drawback. Legislative change would be required to apply additional duty to:

- all payments to Customs, including cash payments
- refund and drawbacks paid to businesses by Customs and later found to be in error
- payments for a shortfall in duty as a result of a Customs audit.

It is difficult to estimate how much extra revenue we would collect under this option, given there might be cases where the additional duty is remitted or refunded after an application from a payer.

Other solutions we are considering

Status quo: Make no legislative changes

Under this option, additional duty would continue to apply only to deferred payments and excise duty payments to Customs. Customs would not be able to impose additional duty in other situations, including when we find a shortfall in duty during an audit.

Who would be affected by change

Our preferred option would affect all people and businesses that make payments to Customs. Those businesses that do not currently make deferred payments or excise payments to Customs would be liable for additional duty on late payments.

All businesses would be liable for additional duty where they have received a refund or drawback from Customs but it is found to have been paid to them in error. Additional duty would have to be paid on top of the amount of the refund or drawback paid by Customs in error.

All businesses would also be liable for additional duty where a Customs audit finds that the business has underpaid duty. Additional duty would be due to the Crown as well as the shortfall in duty.

ADDITIONAL DUTY: WHAT DO YOU THINK?

Q 110 Should additional duty be extended to all payments to Customs, and to refunds and drawbacks paid to businesses by Customs and later found to be paid in error? Please give your reasons.

Q 111 Do you have any other comments on any aspects of the current additional duty regime?