

## Regulatory Impact Statement

# Customs and Excise Act Review: Regulations – Maintaining Registration as a User of the Joint Border Management System

## Agency Disclosure Statement

1. This Regulatory Impact Statement (RIS) has been prepared by the New Zealand Customs Service (Customs).
2. This work builds on earlier Cabinet decisions made in March 2016 [refer EGI-16-MIN-0037]. The RIS analyses options in relation to regulating maintenance of on-going registration of users of the Joint Border Management System. It covers three related pieces of policy as follows:
  - 2.1. Part One – Requirements to Maintain On-going Registration
  - 2.2. Part Two – Suspension and Revocation Processes
  - 2.3. Part Three – User Registration Conditions.
3. Analysis has included a review of available guidance (LAC Guidelines, CO 99 (6)<sup>1</sup>, and *Achieving Compliance: A Guide for Compliance Agencies in New Zealand*), information provided by Customs and MPI subject-matter experts, and consultation with industry stakeholders.
4. Subject-matter experts from the operational branches of Customs and the Ministry for Primary Industries have provided advice during development and testing of the options. Further numerical data has not been collected in relation to the status quo since Cabinet consideration in 2016.
5. It is not expected that the proposed interventions will address all JBMS data quality issues. Issues caused by systemic errors (eg errors in the data chain) are not addressed by this policy.

*Signed by Anna Cook on 3 July 2017*

Anna Cook  
Director Policy

3 July 2017

---

<sup>1</sup> Policy Framework for Occupational Regulation.

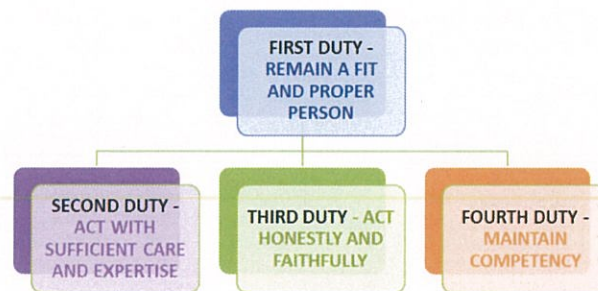
## Executive summary

6. The Joint Border Management System (JBMS) is used by Customs and the Ministry for Primary Industries (MPI) to calculate duty and for risk management at the border. It is reliant on accurate data input by businesses (eg, customs brokers, importers/exporters and freight-forwarders) in relation to shipment details (eg, cargo reports, advance notices of arrival/departure).
7. A small percentage of JBMS users persistently make errors which the current statutory framework is inadequate to deal with, despite numerous non-regulatory interventions.
8. In March 2016 [EGI-16-MIN-0037 refers], Cabinet agreed to establish on-going competency<sup>2</sup> as a requirement for maintaining a user's registration as well as extended powers of suspension and cancellation (to be used as a last resort). This is separate from the existing requirements which apply upon initial registration as a user (a "fit and proper person" test and, for certain users, competency tests).
9. The Customs and Excise Bill provides for development of JBMS regulations. This paper makes recommendations in relation to these regulations, expanding and building on Cabinet's original decisions. The proposals are intended to provide all users with a clear set of performance standards as well as transparency around possible consequences arising from persistent or serious breach of those standards.

### Part One – Requirements to Maintain On-going Registration

10. Customs prefers an option setting out a series of "Duties of a Registered User of the Joint Border Management System" which clearly state the standards government (and industry) expects of users. The Duties also specifically target the problem behaviour and provide a clear link through to the proposed suspension and revocation processes. The proposed duties are summarised at **Diagram 1** below.

**Diagram 1: Proposed Duties of a Registered User of the Joint Border Management System**



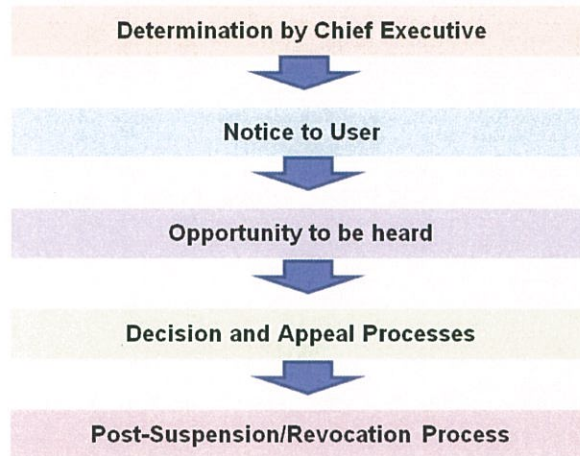
<sup>2</sup> Competency in relation to the JBMS was defined as the registered user having and maintaining the required knowledge and skills to determine the correct information and to enter that information with reasonable care to minimise errors and omissions.



## Part Two – Suspension and Revocation Processes

11. It is intended that suspension and revocation are used only as a last resort where other interventions have failed. Both processes follow the same basic process set out at **Diagram 2** below.

**Diagram 2: Proposed Suspension and Revocation Processes**



## Part Three – User Registration Conditions

12. Customs recommends an option whereby “conditions” would be defined to include remedial action to target specific data quality issues.

### Impacts on business

13. All users will be subject to the Duties and current standard and administrative conditions (as applicable). Additional costs are minimal or non-existent for the vast majority of users, as any expectations above and beyond what would be expected of an ordinarily competent user (eg retraining) are targeted predominantly at high-risk problem users.
14. A very small subset of users can be expected to face remedial conditions, suspension or revocation. Based on current experience, two or three users annually might be expected to face potential suspension by reason of persistent quality data issues. There have only been two revocations of user registration in total, both following convictions, and this is only expected to be necessary in the most extreme of circumstances.



## Status quo and problem definition

15. JBMS enables smarter and swifter border processing for goods and craft going in and out of New Zealand. It allows exporters, importers, and others in the cargo industry to meet border clearance requirements in one place, instead of many. JBMS is modernising Customs' and the Ministry for Primary Industries' border systems, enabling them to share processes, data and technology. It provides the two agencies with sophisticated risk management and targeting tools at the border. The result is continuous improvement in understanding of risks, better decision-making and minimised interruption to travel and trade.
16. JBMS is used by a variety of businesses (eg customs brokers, importers/exporters, freight-forwarders). It is reliant on accurate data input in relation to shipment details by those businesses (eg, cargo reports, advance notices of arrival/departure).
17. To qualify for initial registration as a JBMS User, applicants must meet a "fit and proper person" test.<sup>3</sup> This will not change; it is intended that the relevant statutory provision will be migrated to regulations made pursuant to a new Customs and Excise Act (a bill is currently before the House). Depending on the information they input, some users are also required to meet competency requirements.
18. The vast majority of registered JBMS users want to comply with data quality requirements and do. However, a small percentage of JBMS users persistently make errors.
19. Problem user behaviour includes:

- Lack of user competence leading to multiple incorrect entries
- Providing incorrect or inaccurate detail in respect of:
  - classification, valuation for duty, GST, freight
  - origin of goods, scientific/botanical identity, processing details, packaging details
  - facility detail, personnel responsible, operating processes
- Failing to supply documents in support of claims within a timely period
- Making claims (eg, concessions, drawbacks, preference)<sup>4</sup> which cannot be supported and or sustained
- Deliberate misinformation to avoid correct revenue payments or inspection
- User carelessness brought about by time pressure (company interest in volume and turnover)
- "Self-serve" registration clients (who create client codes for third parties) not providing full and accurate information and documentation

<sup>3</sup> Refer section 132A, Customs and Excise Act 1996.

<sup>4</sup> A "concession" is granted when Customs duty is reduced or removed from goods that would normally be subject to it. Some goods may be admitted free of GST as well. "Drawbacks" are a refund of duty when goods which have been imported are re-exported. "Preferential tariff" is a lower rate of duty applied to certain goods from certain specified countries and groups of countries.



20. In 2016, Cabinet noted that, on average, 75-90 of 2900 declarants<sup>5</sup> (2.5-3.1%) appeared in at least one high risk category of each of Customs' regular assurance monitoring reports of JBMS data entries. Of these, 10-15 were referred for further investigation due to the high error rate or appearing in more than one category.
21. Such user behaviour negatively impacts:
  - 21.1. maintenance of border security
  - 21.2. New Zealand's biosecurity
  - 21.3. revenue payment and collection
  - 21.4. government-to-government assurances on exports, potentially impacting on market access for exported products
  - 21.5. targeting by both the Ministry for Primary Industries and Customs for risk assessment purposes
  - 21.6. the proportionate use of departmental time and resources.

### Case Study 1 – Revenue

Drawback is a refund of duty when goods which have been imported are re-exported. Incorrect entries, insufficiently supported by evidence, can lead to erroneously re-funded duty.

In March 2017, a Customs broker input several drawback entries into JBMS relating to shoes exported to Australia.

Detail on the entries, subsequent Customs actions and impact are summarised in the table below:

Entry	Original amount	Customs' action	Amended amount following action	Difference
Exported 17/2/17	\$44,019.20	Entry drawn as part of weekly review – led to multiple Customs' requests for details, numerous reminders and check of details	\$13,064.79	\$30,954.41
Exported 24/2/17	\$132,190.25	Entry automatically held for verification [REDACTED] – led to check of details	\$1,320.87	\$130,869.38
Exported 17/3/17	\$6,507.32	Entry drawn as part of weekly review – led to requests for further documentation and information	\$6,234.14	\$273.18
			<b>Total difference</b>	<b>\$162,096.97</b>

<sup>5</sup>There are two categories of JBMS users (referred to as declarants and non-declarants). Declarants lodge import and export entries, inward cargo reports and cargo report for export when requesting write-offs. Non-declarants enter registrations for client, broker and supplier codes and inward cargo report and cargo report for export (where no write-off is requested).



### Case Study 2 – Biosecurity

High-risk goods can enter New Zealand where incorrect or inadequate detail is put into the import declaration. If the goods are assessed by MPI, they would enter quarantine before clearance for entry.

A recent example identified by MPI is the importation of ‘paper shapes’ (a novelty paper item). The novelty attraction was that the paper had seeds embedded in it – the sheet of paper or paper shape grew when dampened. [REDACTED]

Unwanted plant species introduced to New Zealand can have serious effects – various plant diseases are carried through the seed for a large percentage of plants.

This breach was picked up through an x-ray screen of a similar importation and traced back on previous importations. The items were subsequently destroyed, as phytosanitary certification and specific seed identification were unable to be provided. [REDACTED]

22. Customs and the Ministry for Primary Industries have a suite of interventions to address performance issues with users of JBMS (eg engagement and education, limited ability to suspend and cancel registration, and application of administrative penalties<sup>6</sup>). In most cases, these interventions are successful. However, data quality and timeliness issues persist in relation to a small number of users.
23. Suspension and cancellation are provided for under Section 135 of the Customs and Excise Act 1996 if imposed conditions are not complied with or following conviction for a relevant offence. This framework does not enable a corrective response where the user has made numerous and on-going errors with no improvement in accuracy. Nor does it enable the suspension/revocation of specific user privileges to provide a targeted response to a performance issue.

---

<sup>6</sup> Clause 264 of the Customs and Excise Bill prescribes that the chief executive may issue a penalty notice to a person if the chief executive is satisfied that — (a) an entry made by that person contains an error or omission; and (b) either of the following applies: (i) as a result of the error or omission, an amount of duty payable — (A) has not been paid or declared for payment; or (B) would not have been paid or declared for payment: (ii) the entry is otherwise materially incorrect.



## Previous consideration

24. In March 2016, Cabinet [EGI-16-MIN-0037 refers]:
- 24.1. **agreed** that competency in the use of the Joint Border Management System (JBMS) be established as a requirement in legislation for maintaining the user's registration
  - 24.2. **noted** that competency in relation to the JBMS is the registered user having and maintaining the required knowledge and skills to determine the correct information and to enter that information with reasonable care to minimise errors and omissions
  - 24.3. **agreed** that the requirement for competency be grounds for suspension or cancellation<sup>7</sup> of a JBMS user's registration or of specific privileges in the JBMS where there is evidence that the user is no longer competent
  - 24.4. **agreed** that immediate suspension may only be taken in exceptional circumstances where the chief executive of Customs considers that there is evidence of significant risks to revenue or risk management
  - 24.5. **agreed** that performance measures and standards be developed for JBMS registered users to establish the required performance level
  - 24.6. **agreed** that suspension or cancellation of a JBMS user's registration or of specific privileges in the JBMS be subject to a right of appeal to the Customs' Appeal Authority
  - 24.7. **agreed** that the performance measures and standards and the operational procedures be subject to consultation with representative industry organisations before being finalised
  - 24.8. **noted** that Customs will liaise with the Parliamentary Counsel Office (PCO) to determine the appropriate way to reference the key operational details (including performance measures and standards) in legislation and report back with a recommendation as part of the review of the Customs and Excise Regulations.

---

<sup>7</sup> The term "cancellation" was used during the initial Cabinet process. The Custom and Excise Bill refers to the same process as "revocation", which is the term used in the remainder of this paper.



## Customs and Excise Bill

25. The Customs and Excise Bill was reported-back to the House from the Foreign Affairs, Defence and Trade Committee on 16 May 2017 and is currently awaiting its second reading.
26. The Bill provides the following in relation to registration of JBMS users:

### CI 300 Registration of users of registered user systems

- (1) The chief executive may register persons to use a registered user system.
- (2) Regulations may do any of the following:
  - (a) prescribe requirements for the registration of users of registered user systems (including requirements for qualifications and training);
  - (b) allow the chief executive (i) to register persons subject to conditions determined by the chief executive; (ii) to vary or revoke a condition; (iii) after a person is registered, to impose new conditions determined by the chief executive; (iv) to revoke or suspend registrations;
  - (c) provide for the cancellation or expiry of registrations;
  - (d) provide for registered users to nominate representatives for the purpose of this subpart and prescribe requirements in respect of nominated representatives.
- (3) Regulations may— (a) provide for applications for registration; and (b) without limiting paragraph (a), require applications for registration to be made in the way prescribed by the chief executive's rules.
- (4) A person who is dissatisfied with any of the following decisions may, within 20 working days after the date on which notice of the decision is given, appeal to a Customs Appeal Authority against that decision: (a) a refusal to register a person; (b) a decision made under regulations made for the purposes of subsection 2(b).

27. Clause 305 further states that 'regulations may make provision regulating access to registered user systems'.

## Objectives and Criteria

28. The primary objective of this work is to increase accuracy and timeliness in revenue collection and risk assessment and to improve quality of data provided to other agencies. Specific objectives related to this overall goal are:
  - 28.1. Within one year from commencement of regulations, all users will be able to identify their obligations and understand the potential consequences of data quality and timeliness issues.
  - 28.2. Within one year from commencement of regulations, given the opportunity to address identified quality assurance issues, users identified as high risk will



demonstrate a positive increase in attitude towards compliance, as measured by a Customs/MPI checklist.

28.3. Within two years from commencement of regulations, users identified as high risk will have improved data quality to within parameters acceptable to Customs/MPI managers.

29. Options are being analysed using the following criteria (applied as relevant to each Part):

Criteria	What this means		
	Part One – Requirements to Maintain On-going Registration	Part Two – Suspension and Revocation Processes	Part Three – User Registration Conditions
<b>Effective</b>	<p>User understanding and attitude and quality of information provided to JBMS increases as per objectives</p> <p>Captures both deliberate errors and on-going capability/capacity issues</p>	<p>User understanding and attitude and quality of information provided to JBMS increases as per objectives</p> <p>Captures both deliberate errors and on-going capability/capacity issues</p> <p>Provides sufficient deterrents for non-compliance (consequences are sufficient to encourage most people to comply)</p> <p>Provides sufficient sanctions where evidence of on-going lack of competence or other issues</p>	
<b>Proportionate, Fair and Targeted</b>	<p>The costs of maintaining compliance falls on the non-compliant and does not affect the compliant</p>	<p>The costs of maintaining compliance falls on the non-compliant and does not affect the compliant</p> <p>Consequences:</p> <ul style="list-style-type: none"> <li>▪ address the range of conduct and harm</li> <li>▪ are used as a last resort</li> </ul> <p>Principles of natural justice are adhered to</p>	
<b>Practical, Workable and Transparent</b>	<p>Procedurally simple</p> <p>Easy to understand and easy to enforce (obligations and consequences)</p>	<p>Procedurally simple</p> <p>Easy to understand and easy to enforce (obligations and consequences)</p> <p>Quick resolution for affected parties</p>	
<b>Cost-effective</b>	<p>Compliance costs do not outweigh the benefits</p>		
<b>Future-proofed</b>	<p>Flexible enough to enable Customs and MPI to meet emerging data quality issues</p> <p>Able to be modified relatively easily in time (primarily without recourse to legislative amendment)</p>	<p>Not subject to appeals by reason of lack of regulatory clarity</p> <p>Flexible enough to enable Customs and MPI to meet emerging data quality issues</p> <p>Able to be modified relatively easily in time (primarily without recourse to legislative amendment)</p>	

## PART ONE – REQUIREMENTS TO MAINTAIN ON-GOING REGISTRATION

### Part One - Options and impact analysis

30. Four options feasibly wholly or partly achieve the policy’s objective. Key points of analysis are described under each of the five options set out in paragraphs 32 to 42 below.
31. As noted in the **Status Quo and Problem Definition** section, the status quo has already been considered and was rejected by Cabinet in March 2016.

### Option 1 – Ethics Approach

This option is not recommended.

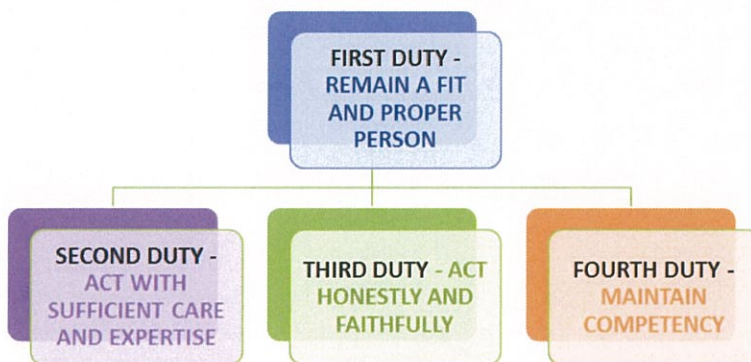
32. Users would be subject to short set of simple yet fundamental behavioural propositions. For example:
  - 32.1. “Professional Competence” – Users will maintain professional skill and knowledge at the standard expected of a JBMS User.
  - 32.2. “Good Faith” – Users will not deceive or mislead Government or their business associates.
33. Option 1’s strength lies in its simplicity. It is easy for users and enforcers to remember and cite. It captures both deliberate and careless behaviour, and would provide a flexible system for maintaining standards and addressing poor performance. However, the approach is insufficiently detailed to proactively target the problem behavioural issues and would be more reliant on underlying operational procedure and discretion (potentially leading to inconsistencies in application across New Zealand). Because the standards are so general, ease of understanding for the user and ease of enforcement would be moderate only as further expectations would be clear only from reference to additional materials. Natural justice considerations are met, as this option allows for:
  - 33.1. differentiation between voluntary admissions of error by the user and mistakes picked up through audit/investigation
  - 33.2. consideration to be given to deliberate compliance/non-compliance with requests by Customs or the Ministry for Primary Industries
  - 33.3. consideration to be given to extenuating circumstances in the data chain leading to errors being made (eg incorrect information provided by brokers).



## Option 2 – Duty/Obligations Approach

This option is the **preferred Option**.

34. JMBS users would be legally bound to certain more specific acts or courses of action than under Option 1. The proposed “Duties of a Registered User of the Joint Border Management System” are:



35. Regulatory references to the Duties will be drafted by Parliamentary Counsel. However, **Table 1** below sets out the key components of each duty from a policy perspective:



**Table 1 – Proposed Duties of a Registered User of the Joint Border Management System**

**FIRST DUTY – REMAIN A FIT AND PROPER PERSON**

The key components of the first duty are:

- a. Compliance with the relevant law. Failure to meet this standard comprises:
  - i. a serious or repeated failure by or on behalf of the user to comply with requirements in or under the Customs and Excise Act, the Biosecurity Act 1993, the Hazardous Substances and New Organisms Act 1996, the Food Act 2014 or any other enactment that regulates the importation or exportation of goods or the arrival of craft or passengers (or with requirements in or under any corresponding overseas laws)
  - ii. convictions for any border-related offence, dishonesty offence, or drugs offence entered against all or any individuals who are, or are representatives or other agents or employees of, or are concerned in the management of, the applicant entity.
- b. Compliance with these Duties. Not knowingly breached or not taking reasonable care.
- c. Compliance with registration conditions. Not knowingly breached or not taking reasonable care.

**THIRD DUTY – ACT HONESTLY AND FAITHFULLY**

The key components of the third duty are:

- a. Preparing and reporting all information fairly and honestly.
- b. Providing all information free of any false or misleading representation.
- c. Acting honestly and straightforwardly in professional dealings.

**SECOND DUTY – ACT WITH SUFFICIENT CARE AND EXPERTISE**

The key components of the second duty are:

- a. Taking all reasonable steps to ensure that information and documentation provided to JBMS is complete, and meets published standards relating to information accuracy and quality. This includes entries containing no errors which would give rise to an administrative penalty and taking reasonable care in submitting registrations or other reports (eg inward cargo reports, advance notice of arrival, and advance notice of departure).
- b. Supplying documents in support of an entry within a timely period.
- c. Supporting or sustaining any claims made (eg concessions, drawback or preference).
- d. The information provided meeting Customs' and the Ministry for Primary Industries' other data quality requirements (including further provision of information as required to maintain border services).

**FOURTH DUTY – MAINTAIN COMPETENCY**

The key components of the fourth duty are:

- a. Having sufficient training and experience to carry out the functions and privileges of a JBMS user.
- b. Seeking out ongoing professional development where quality assurance issues are identified or where key developments in industry-relevant information or standards are promulgated.
- c. Seeking out supervision by an appropriately experienced senior user (or equivalently experienced person) during any training phase and where quality assurance issues are identified.



36. As with Option 1, this option has a certain powerful simplicity, captures both deliberate and careless user behaviour and incorporates natural justice considerations. Option 2 more specifically and comprehensively targets the problem behaviour, however, meaning it has an increased likelihood of addressing those issues and so improving data quality. Its greater level of detail also provides high ease of understanding for the user and high ease of enforcement for Customs and the Ministry for Primary Industries. Costs under this option are proportionate as any expectations above and beyond what would be expected of an ordinarily competent user (eg retraining) are targeted predominantly at high-risk users.
37. Consideration was given to a fifth duty (a Duty to Maintain Capacity<sup>8</sup>). This was primarily focused on the employer's role in managing data quality. As the Bill empowers regulation of *users* rather than their employers,<sup>9</sup> however, this duty was removed from the proposals. In addition, one stakeholder felt it might shift primary responsibility for data quality onto employers rather than users themselves. Monitoring of the policy will include consideration of whether capacity issues are unduly affecting data quality.

### Option 3 – Continuing Education Approach

This option is not preferred (note: partially incorporated into preferred Option).

38. Option 3 focuses on substantive proactive refreshing of existing user skills and development of new skills as the environment and profession changes. For example, all users would be required to undertake 10 hours of Continuing Professional Development (CPD) annually (eg training courses approved by Customs/the Ministry for Primary Industries) as well as annual CPD planning and reporting to government. This might include re-sitting competence examinations every 3/5 years (depending on the information the user inputs).
39. This option captures capability issues, but by applying the same standard to all users when only a very small amount have issues. It is flexible and likely to be able to respond to emerging data quality issues, but only captures deliberate behaviour in a limited fashion (eg through an ethical component of CPD). It does not of itself provide clear expectations for either the user or Customs/MPI. It is likely to be somewhat costly

<sup>8</sup> The key components of the Duty to Maintain Capacity were:

- a. The user has sufficient time to perform their functions so as to provide them with a *reasonable opportunity* of inputting 100% error-free entries
- b. The user has sufficient resources to perform their functions so as to provide them with a *reasonable opportunity* of inputting 100% error-free entries.

<sup>9</sup> The Bill does regulate businesses in other ways and a trader who provides inaccurate information to a user may also face sanctions. For example, an importer who engages an agent to make entries on their behalf may also be liable to penalties as clause 372 (liability of principal and agent) deems any act done by an agent on their principal.

for the user, and costs would also have a disproportionate impact on businesses with a small number of users and limited (or no) economy of scale.

40. A proportionate element of this Option (seeking professional development where issues are identified) has been incorporated into the preferred Option.

## Option 4 – General Discretionary Approach

This option is not preferred.

41. Customs and the Ministry of Primary Industries would be given a general permissive power to address perceived issues. For example, an officer may require certain action by a user where he/she considers that JBMS quality standards have been breached, and the user must then comply with all reasonable requests of the officer.
42. This option captures both deliberate and careless behaviour, and is flexible and able to respond to emerging data quality issues. However, it does not provide transparent expectations for either the user or Customs/MPI. Government would be likely to face significantly increased review/appeal costs due to the broad nature of power. There may also be natural justice issues arising from inconsistent applicable across New Zealand. This risk may be mitigated through operational procedure, however the risk would remain.

## Part One – Requirements to Maintain On-going Registration –Conclusions and Recommendations

43. Customs recommends Option 2. This option best targets the issues while keeping costs minimal for the majority of users.
44. Costs are discussed in greater detail from paragraph 82 as they are considered in relation to the suite of options considered in this paper.



## PART TWO – SUSPENSION AND REVOCATION PROCESSES

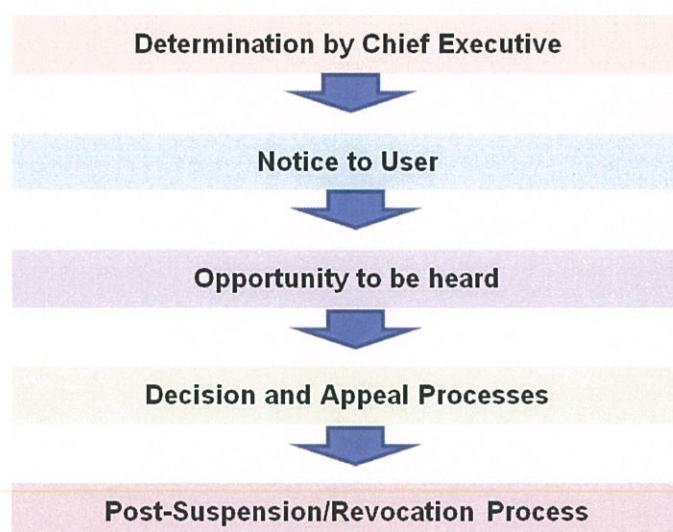
### Options and impact analysis

45. Three options feasibly wholly or partly achieve the policy's objectives.
46. In each case, suspension or revocation might be of specific privileges (eg, the ability to enter inward cargo reports) or of the whole user registration.
47. Key points of options analysis are described under each of the three options set out in paragraphs 49 to 60 below.
48. As noted in the **Status Quo and Problem Definition** section, the status quo has already been considered and was rejected by Cabinet in March 2016.

### Option 1 – “Due Process” (preferred Option)

This option is the **preferred option**.

49. Option 1 includes clear grounds for decision-making, the right to be heard, appeal rights and post-suspension/revocation processes. The same basic process is proposed for both suspension and revocation.



50. The suspension and revocation processes are set out in detail below at **Diagram 4**.



Diagram 4 – Proposed Suspension and Revocation Processes

**SUSPENSION**

**Determination by Chief Executive of Customs**

The chief executive decides (in consultation with the Director-General for Primary Industries) to suspend the user's current privileges or entire registration by reason of:

- a) the user's persistent failure to comply with the Duties of a JBMS user;
- b) reasonable cause to believe there has been a serious or repeated failure to comply with the requirements of the Customs and Excise Act, the Biosecurity Act 1993, the Hazardous Substances and New Organisms Act 1996, the Food Act 2014 or any other enactment that regulates the importation or exportation of goods or the arrival of craft or passengers (or with requirements in or under any corresponding overseas laws);
- c) any failure by the user to comply with registration conditions; or
- d) any conviction relevant to initial registration that arose before the user's registration but first came to the attention of the chief executive after the registration.

*In the early stages of the regulations coming into force, it is intended that Customs and the Ministry for Primary Industries will review suspension determinations prior to a final decision being taken to ensure consistency of application and interpretation across New Zealand.*



**Notice to user**

The chief executive must give written notice of the suspension to the user, specifying:

- a) the intention to suspend specified user privileges or registration (depends on the facts of the case)
- b) the reason for the suspension
- c) the period of the suspension, including the date and time at which it commences
- d) any conditions or requirements in relation to the suspension
- e) a reasonable date by which the user must respond to the chief executive in writing. The timeframe for a response must be consistent with natural justice principles.



**Opportunity to be heard**

The chief executive must give the user a reasonable opportunity to be heard.



**Decision and Appeal Processes**

The chief executive makes her/his final decision, in consultation with the Director-General for Primary Industries, and provides written notice to the user of the decision. If the chief executive has received a response from the user, he/she must take that response into account in making the final decision. This would take the form of an internal review process.

A person has 20 working days after the date on which notice of the decision is given to appeal to the Customs Appeal Authority against that decision.

The suspension can last for up to three months.

The chief executive must lift a suspension before its period ends if the chief executive is satisfied that the conduct occasioning the suspension has been rectified.



**Post-Suspension Process**

The chief executive may impose new conditions on registration if he or she considers it necessary or desirable to do so. The chief executive would need to observe the rules of natural justice in exercising this power and appeal rights would apply to the decision.

The user's entries would be examined for a reasonable period following the suspension.



## REVOCATION

### Determination by Chief Executive of Customs

The chief executive decides (in consultation with the Director-General for Primary Industries) to revoke the user's current privileges or entire registration, by reason of:

- a) existing justification for suspending user registration or privileges but, in light of repeated suspensions in the past, a finding it would be more appropriate to revoke the user's registration;
- b) a serious or repeated failure to comply with the requirements of the Customs and Excise Act, the Biosecurity Act 1993, the Hazardous Substances and New Organisms Act 1996, the Food Act 2014 or any other enactment that regulates the importation or exportation of goods or the arrival of craft or passengers (or with requirements in or under any corresponding overseas laws); or
- c) any conviction relevant to initial registration that arose before the user's registration but first came to the attention of the chief executive after the registration.

*In the early stages of the regulations coming into force, it is intended that Customs and the Ministry for Primary Industries will review revocation determinations prior to a final decision being taken to ensure consistency of application and interpretation across New Zealand.*



### Notice to user

The chief executive has given the user notice in writing, specifying:

- a) the intention to cancel the user's privileges or registration
- b) the reason for revocation
- c) a reasonable date by which the user must respond to the chief executive in writing. The timeframe for a response must be consistent with natural justice principles.



### Opportunity to be heard

The chief executive must give the user a reasonable opportunity to be heard.



### Decision and Appeal Processes

The chief executive makes her/his final decision, in consultation with the Director-General for Primary Industries, and provides written notice to the user of the decision. If the chief executive has received a response from the user, he/she must take that response into account in making the final decision. This would take the form of an internal review process.

A person has 20 working days after the date on which notice of the decision is given to appeal to the Customs Appeal Authority against that decision.

The user's registration is de-activated.



### Post-Revocation Process

The user may apply for a new user registration six months after the revocation takes effect.

The user must meet the requirements of the Regulations and any other requirements to become a user (eg fit and proper person test, competency tests). The chief executive may choose to place additional conditions on the registration of the user.

**What does "persistent" mean?** "Persistent" issues are data quality issues which continue to exist over a prolonged period. Customs and MPI would need to have reasonable cause to believe the user will continue in a course of action (knowingly or recklessly or because of capacity issues).

**What does "reasonable cause to believe" mean?** A set of facts or circumstances that, when viewed objectively, would cause the decision-maker to conclude that it is highly likely that the thing believed is so.



51. A finding that data quality issues are persistent is unlikely to be a linear process. Rather, a pattern of behaviour would develop that eventually reaches a tipping point. Customs or the Ministry for Primary Industries may choose to escalate or de-escalate the matter, depending on a number of factors. Operational policy will be developed to provide guidance to officers in making this determination and the decisions will be made at an appropriately senior level. Factors which may be relevant are suggested below:

Factors which may be relevant to de-escalation	Factors which may be relevant to escalation
User (or employing entity) self-discloses error Error was accidental	A pattern emerges that indicates that there are quality issues with user (highlighted through audit or investigation)
Length of time as a JBMS user	Supplying false information without reasonable care
User's history of compliance	Wilfully/knowingly supplying false or unsupported information
User (or employing entity) complies with reasonable requests in relation to the specific data quality issue (eg training, supervision)	Refusing to comply with reasonable requests of Customs/Ministry of Primary Industries in relation to addressing data quality issues
User (or employing entity) has or develops internal quality assurance, professional development and/or performance management policies and processes	User agrees to address data quality issues, but does not meet that commitment (reasonableness test)
Following audit, only minor further mistakes are picked up	
User lacks control over the time and resources they are given to complete their work	

52. In very rare circumstances, the chief executive may need to immediately cut off a user from accessing the JBMS (for example, belief of significant fraud or biosecurity threat). This would be a temporary suspension of the user's registration while the full suspension process was conducted. This process is set out at **Diagram 5**.



**Diagram 5 – Proposed Extraordinary Suspension Process**

**Determination by Chief Executive of Customs**

The chief executive decides (in consultation with the Director-General for Primary Industries) to suspend the user’s registration by reason of a reasonable cause to believe:

- a) that there has been a serious or repeated failure to comply with the requirements of the Customs and Excise Act, the Biosecurity Act 1993, the Hazardous Substances and New Organisms Act 1996, the Food Act 2014 or any other enactment that regulates the importation or exportation of goods or the arrival of craft or passengers (or with requirements in or under any corresponding overseas laws); AND
- b) immediate suspension of the user is necessary in the public interest in order to protect the integrity of the border management system.

The suspension (maximum period: one month) takes effect immediately.

Additional ground to ordinary suspension process. I.e. where the chief executive of Customs considers that there is evidence of significant risks to revenue or risk management (pursuant to Cabinet decisions of March 2016).



**Notice to User** (as above)



**Opportunity to be heard** (as above)



**Decision and Appeal Processes**

The chief executive must make a final suspension decision within one month.

Once that decision is made, the chief executive may extend the suspension in monthly increments (for a maximum of three months) where the chief executive has reasonable cause to believe the circumstances giving rise to the original suspension still exist.

All other requirements relating to decision (including requirement to lift the suspension early) and appeal rights apply as above.



**Post-Suspension Process** (as above)



53. This option includes processes and sanctions which are targeted, fair and likely to support the making of desired behavioural changes. The processes are transparent, easy to understand and enforce, and natural justice considerations have been met through the opportunity to be heard and appeal rights. Costs will only fall on non-compliant users and appeals are likely to be low once any initial test cases have been finalised.

## Option 2 – “Due Process Plus”

This option is not recommended.

54. Option 2 is basically the same as Option 1, with the following amendments:
- 54.1. The user may provide their response to notified intention of suspension/cancellation orally (as well as in writing)
  - 54.2. The user provided with notice of intention to suspend/cancel may request formal internal review of proposed suspension/revocation decision (ie prior to an appeal)
  - 54.3. Suspension would be a maximum of six months (rather than three).
55. This Option shares many of the benefits of Option 1 (it is targeted, natural justice considerations are met, it is procedurally simple and with proportionate administration costs). It also provides greater accessibility for users facing potential suspension/revocation through the ability to respond orally and through a formal internal review. The deterrent effect of a possible six-month suspension is also likely to be higher under this Option.
56. However, a six-month suspension is considered to be disproportionate (a de facto revocation) causing significant loss of livelihood to users. This also increases the likelihood of appeal and the associated costs. It is impractical to include a formal internal review process following the decision being made as the Customs and Excise Bill provides that appeals on suspension/revocation decisions must be filed within 20 days. “Review” of the decision has, however, been incorporated through the right to be heard before the final decision has been made. With such serious consequences at stake and where process records may be key in determining any appeals, it is also preferable to require written responses to potential suspension/revocation from users.



## Option 3 – “Due Process with Discretionary Elements”

This option is not recommended.

57. Option 3 is also similar to Option 1, with the following amendments:
  - 57.1. Grounds for suspension/revocation would be tied more generally to whether the user continues to be a “fit and proper” person for registration (rather than specified as in the preferred option)
  - 57.2. The chief executive would determine a reasonable period of suspension based on facts of the case
  - 57.3. The chief executive would consider re-registration after one year.
58. This Option has the benefit of being highly flexible and effective, with sanctions being applied which fit the circumstances of the case (with the corresponding high deterrence factor). It also incorporates natural justice considerations.
59. However, there is a risk of such a high level of discretion leading to:
  - 59.1. Inconsistent application, including a risk of the processes being used otherwise than as a last resort
  - 59.2. Some individual decisions unreasonably disrupting livelihoods
  - 59.3. Increased appeals with associated costs.
60. The risk could be somewhat mitigated by good operational policies and procedures, but remains substantial.
61. There have been two cancellations (renamed revocations in the Customs and Excise Bill) of JBMS User Registration. In one of these cases, the Courts found that six months was a reasonable period of time after which re-registration should be reconsidered.

## Part Two – Suspension and Revocation Processes – Conclusions and Recommendations

62. Customs recommends Option 1.



## PART THREE – User Registration Conditions

63. Conditions may be applied to a user’s registration under the current Customs and Excise Act 1996. What that comprises is largely undefined. As an operational matter the only standard condition placed upon registration is that declarants must be domiciled in New Zealand. Further common administrative conditions include:
- 63.1. Conditions on the type of entry a user may make
  - 63.2. Conditions about what commodities or tariff items a user may make entries for
  - 63.3. Security requirements for Unique User Identification
  - 63.4. Changes to employment details
  - 63.5. Renewal of Unique User Identification.
64. Clause 300(2)(b) states that regulations may provide for the chief executive to make registrations subject to conditions (and to vary and revoke conditions). This part considers the parameters around what conditions are and can relate to.

### Options and impact analysis

65. Two options feasibly wholly or partly achieve the policy’s objectives.
66. Key points of options analysis are described under each of the three options set out in paragraphs 67 to 73 below.

#### Option 1 – Status Quo (“conditions” not defined to include remedial matters)

This option is not recommended.

67. Customs does not currently use registration conditions to manage data quality issues. Arguably, Customs could change its operational policy so as to include the use of remedial conditions.
68. However, the authority to do so would remain ambiguous, lacking transparency and fairness to users and risking increased appeals.

#### Option 2 – “Conditions” defined to include remedial matter (preferred option)

This option is the **preferred option**.

69. The regulations would define “registration condition” to provide for special conditions to be placed upon a registration requiring remedial action to address data quality issues (in addition to codifying current conditions).



70. Specifically, the chief executive would be able to make a registration subject to any of the following conditions:
- 70.1. conditions relating to individual user capacity (remedial condition where persistent data quality issues have been identified) – eg, training, supervision or use of a professional agent
  - 70.2. conditions relating to organisational user capacity (remedial condition only applicable to entities with an organisational unique user identification,<sup>10</sup> and only where persistent data quality issues have been identified) – eg, policies and procedures relating to data quality, professional development, performance management, internal audit and risk identification
  - 70.3. any other conditions the chief executive deems necessary to protect the integrity of the border management system.
71. Where consideration was being given to imposing a remedial condition, the chief executive would be required to:
- 71.1. give reasons for the imposition of the condition
  - 71.2. give the user an opportunity to respond to the proposed imposition of the condition
  - 71.3. take into account the size and complexity of the relevant business, the user's compliance history and any potential disproportionate or unreasonable effects arising from the imposition of the condition
  - 71.4. consult with the Director-General for Primary Industries.
72. In addition:
- 72.1. remedial conditions would expire after a set period of time
  - 72.2. a user would be able to appeal to the Customs Appeal Authority on a decision to make a registration subject to conditions (refer clause 300(4) of the Customs and Excise Bill).
73. This option provides users with greater certainty as to what conditions can be used for and allows Customs and the Ministry for Primary Industries to respond to quality assurance issues in a more targeted fashion as necessary (potentially lessening recourse to suspension or revocation processes).

---

## Consultation

74. The Ministry for Primary Industries assisted with the development of this paper and supports its conclusions. The following government agencies have also been consulted: the Accident Compensation Corporation, the Civil Aviation Authority, the Department of Conservation, the Department of Internal Affairs, Inland Revenue, the

---

<sup>10</sup> Under the Customs and Excise Bill, corporate entities are able to apply to be users. Individuals engaged by the entity will then be able to use their user registration. However, this is not currently enabled by the technology.



New Zealand Transport Agency, Maritime New Zealand, the Ministry of Business, Innovation and Employment, the Ministry of Culture and Heritage, Ministry for the Environment, the Ministry of Foreign Affairs and Trade, the Ministry of Health, the Ministry of Justice, the Ministry of Transport, Police, Statistics New Zealand and the Treasury were consulted. The Department of the Prime Minister and Cabinet and Parliamentary Counsel Office were informed. Feedback has been incorporated into the final proposals.

75. Representatives of the following industry stakeholders attended a workshop in March 2017, at which their views were sought on the proposed “Duties” and proposed suspension and revocation processes: Customs Brokers and Freight Forwarders Federation of NZ (CBAFF); Conference of Asia Pacific Express Carriers /TNT; DHL; Fonterra; Mondiale Freight and Shipping Services; and Toll Global Forwarding. Stakeholders were supportive of the proposals and suggested refinements have been incorporated into the final recommendations.
76. Industry representatives (the above, along with Chartered Accountants Australia New Zealand and KPMG) were also consulted on this paper. Fonterra indicated it was happy with the proposals and believed the approach, including sanctions, was reasonable. CBAFF questioned “how Customs proposes to ensure that users seek out *on-going professional development where quality assurance issues are identified* etc and seek out *supervision during any training phase* if there is no mandated on-going training” and offered to provide such training to ensure user compliance and competency. Customs does not consider the issues noted in this paper warrant a regulatory mandate for training. However, possible “preferred provider status” is an operational matter which Customs will consider alongside implementation. No further comments were received.

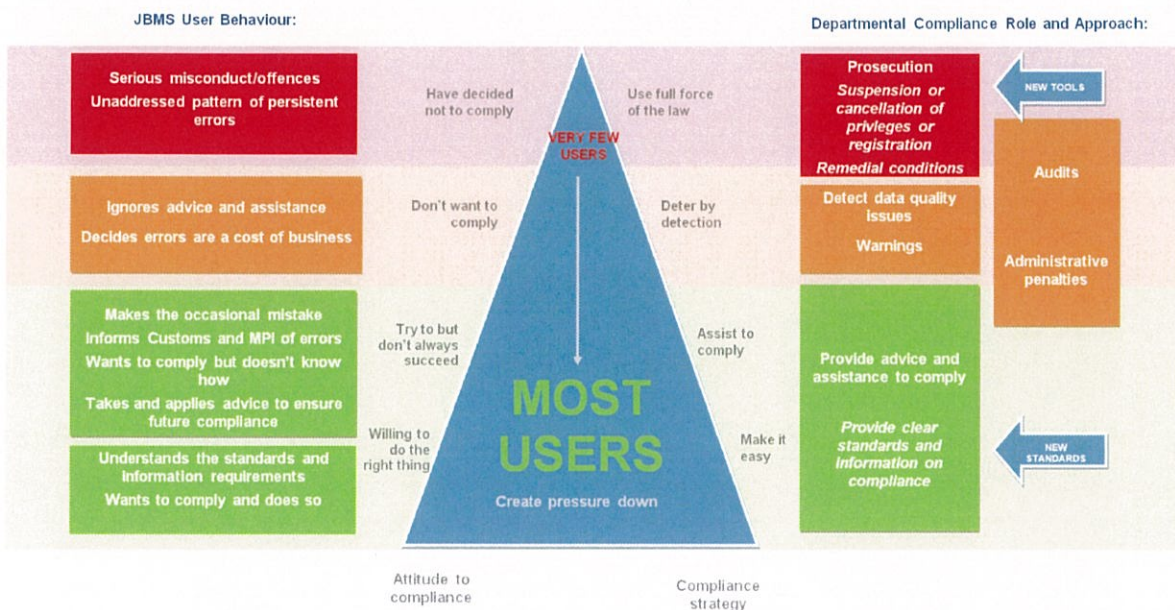
## Conclusions and recommendations

77. Customs recommends:
  - 77.1. A set of four core “Duties of a Registered User of the Joint Border Management System” (Part One – Option 2)
  - 77.2. The suspension and revocation processes proposed in this paper (Part Two – Option 1)
  - 77.3. A definition of conditions including remedial conditions (Part Three – Option 2).
78. This suite of policy proposals is intended to provide all users with a clear set of standards as well as transparency around possible consequences arising from persistent or serious breach of those standards. Only a very small minority of users are expected to face imposition of remedial conditions or possible suspension and revocation.



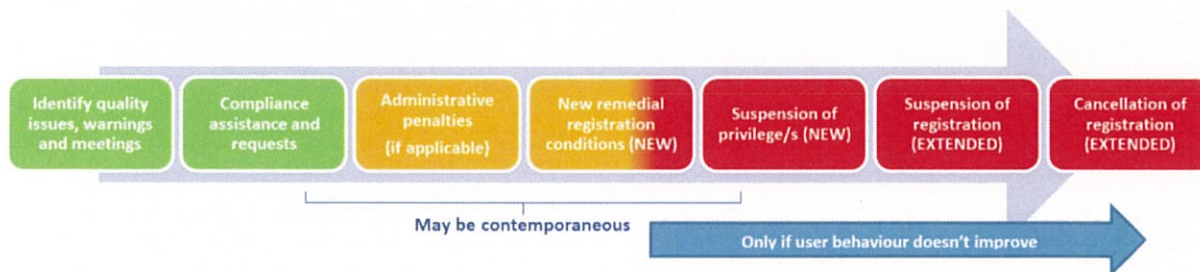
79. Customs' and the Ministry for Primary Industries' role and approach are demonstrated in **Diagram 6** below.

**Diagram 6: Compliance Pyramid (JBMS User Behaviour and Departmental Role and Approach)**



80. It is likely the most common issue the regime will manage will be persistent data quality issues. **Diagram 7** below demonstrates how the process is expected to work:

**Diagram 7: Customs/MPI Management of Data Quality Issues Under Proposals**



81. **Table 4** demonstrates how the proposals would work in comparison with the status quo.

**Table 4: Status Quo Versus Proposed New Environment**

Status Quo	Under Proposals
<ul style="list-style-type: none"> <li>✓ Engagement with user, including:                             <ul style="list-style-type: none"> <li>▪ identifying issues</li> <li>▪ offering assistance to comply</li> <li>▪ requests to comply (eg additional training)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>✓ Engagement with user, including:                             <ul style="list-style-type: none"> <li>▪ identifying issues</li> <li>▪ offering assistance to comply</li> <li>▪ requests to comply (eg additional training)</li> </ul> </li> </ul>



Status Quo	Under Proposals
✓ Administrative penalties (where applicable)	✓ Administrative penalties (where applicable)
✗ Ambiguous ability to vary or impose new remedial registration conditions	✓ Clear ability to vary or impose new remedial registration conditions
✗ No ability to suspend user privileges or registration to address data quality issues	✓ Ability to suspend user privileges or registration to address data quality issues
✗ No ability to revoke user privileges or registration to address data quality issues	✓ Ability to revoke user privileges or registration to address data quality issues

## Costs to government

82. One-off implementation costs arising from this proposal include development and review of operational policies, processes and procedures, training of Customs and Ministry of Primary Industries staff and engagement with industry to publicise the changes.
83. It is anticipated that one additional FTE (annual salary, overheads and associated costs approximately \$85,000) will be required to administer the new regime on an on-going basis. This role will include proactive advice to users around standards and compliance, management of the processes relating to the imposition of remedial conditions, suspension and revocation, and maintenance of national consistency across decision-making. There is potential for this role to diminish within three years due to an increase in industry knowledge and voluntary compliance.
84. Set-up, administration and associated costs will be managed through the wider implementation of the Customs and Excise Bill and baseline. No additional funding is being sought.

## Costs to business

85. The policy has been designed so that costs fall only on a small number of users/businesses (those with persistent or serious data quality issues). For these users, costs might arise from additional training<sup>11</sup> or (in more extreme situations) from a requirement to use a professional agent to make JBMS entries. In relation to a decision to suspend or revoke a registration or to impose conditions, costs relating to appeals to the Customs Appeal Authority<sup>12</sup> might arise. These costs are not large, although they will affect a particular business differently depending on its size. A number of elements have been built into the process (eg right to be heard as part of any suspension or

<sup>11</sup> Short training courses cost approximately \$800.

<sup>12</sup> Appeal to the Customs Appeal Authority is \$400 plus GST.



revocation discussion, the requirement to take account of effects on the relevant business when imposing conditions) to support the policy intent that any remedial decisions made are fair and proportionate.

86. The majority of users will have minimal to no additional costs arising from the proposals. Some stakeholders have suggested that some costs may arise from changes to employees' contracts to reflect the new Duties.

## Avoided harms and savings

87. Avoided harms arising from the policy include harm to New Zealand through biosecurity and food threats, as well as negative impact on New Zealand's export industry. Other avoided harms include reduced frequency and costs of incursions (to both government in investigation and responses, and primary sector in loss of production and pest management costs), reduced costs in border intervention, and reduced loss of market access for exports. Avoided harms and savings have not been able to be quantified in monetary value.

## Conclusions

88. Customs (supported by the Ministry for Primary Industries) consider the initiatives proposed through this paper will be effective additional tools in managing persistent and serious data quality issues, as well being fair, targeted and proportionate both in terms of impact on users and costs.

## Implementation plan

89. This analysis is being undertaken as part of the Review of the Customs and Excise Act 1996. A Customs and Excise Bill is currently before Parliament.
90. A key part of the success of this policy will be development of an enforcement strategy and underlying operational policy and procedure. The latter will include policy on management of error tolerances and escalation policies relating to decisions to impose or vary conditions and to pursue suspension and revocation. Customs intends to develop the relevant strategy, operational policies and procedures by 31 October 2017.
91. There will also be an industry engagement plan to publicise the changes.

## Monitoring, evaluation and review

92. There will be an overall evaluation of the new Customs and Excise Bill and the underlying regulations. In relation to this policy, monitoring and evaluation will be conducted on:
- 92.1. whether the interventions are achieving the policy objectives
  - 92.2. whether other actors in the data integrity chain (eg importers or other people within a company providing incorrect information to users) are negatively affecting data quality.



93. Baseline data will be collected prior to commencement in order to assess the success of the regulatory intervention.

Crown Copyright © 2017



This work is licensed under the Creative Commons Attribution 3.0 New Zealand licence. In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to the Crown and abide by the other licence terms. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/3.0/nz/>.

Please note that no departmental or governmental emblem, logo or Coat of Arms may be used in any way that infringes any provision of the Flags, Emblems, and Names Protection Act 1981 ([www.legislation.govt.nz/act/public/1981/0047/latest/whole.html#DLM51358](http://www.legislation.govt.nz/act/public/1981/0047/latest/whole.html#DLM51358)). Attribution to the Crown should be in written form and not by reproduction of any such emblem, logo or Coat of Arms.