

Regulatory Impact Statement: Customs and Excise Act Review – Forfeiture of electronic devices when access is refused

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the New Zealand Customs Service (Customs).

The Customs and Excise Bill establishes an obligation on the user of an e-device to provide access to a Customs officer for the purposes of searching it (provided the legal threshold for the search is met). If access to the device is not provided when required, the Bill states that the device may be detained and after a specified period following detention the device becomes forfeit to the Crown and subject to seizure. This RIS analyses options for the length of that specified period.

The particularity of the length of the time for the forfeiture to apply has not been the subject of public consultation. However, the detail of the e-device search regime has been extensively consulted over during the development of the Customs and Excise Bill, including that a specified period would apply. The Ministry of Justice and the Office of the Privacy Commissioner were consulted on this proposal and were asked to comment on any Bill of Rights Act or privacy implications respectively. Both agree with Customs' preferred option.

Signed by Anna Cook on 31 July 2017

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31 July 2017

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Status quo and problem definition

1. Cabinet has decided the legislative framework to apply to Customs' power to search e-devices [CAB-16-MIN-0351 refers]. Included was a decision that if access to a device has been refused and the device cannot be accessed to search due to technical limitations, Part 14 of the Customs and Excise Act 1996 applies and the device becomes forfeit to the Crown and liable for seizure.
2. Subsequently a Customs and Excise Bill (the Bill) has been drafted and is now before the House. The Select Committee process was completed in May 2017 and the Bill has been reported back.
3. The Bill establishes an obligation on the user of an e-device to provide access to a Customs officer for the purposes of searching it (provided the legal threshold for the search is met). If access to the device is not provided when required, the Bill states that the device may be detained and a search attempted. After a specified period following the detention the device becomes forfeit to the Crown and subject to seizure. The Bill requires the specified period be set by regulation. Regulations must be in place by the time the Bill is scheduled to take effect (currently planned to be from 1 April 2018).
4. The particular situation that the provision is designed to address is that there is no guarantee that every person required to give access to an e-device for the purposes of a search will do so.
5. If there is a refusal to give access, the Bill provides that the device may be detained and a search attempted. That search may be successful in accessing the data on the device (despite not having access provided). In that case the Bill provides that if no evidential material is found the device is returned to its owner. Alternatively, if evidential material is found then Subpart 6 of Part 4 of the Search and Surveillance Act 2012 applies. In either case the person may be prosecuted for the refusal to provide access.
6. However, the search may not be able to be completed without the access codes and the person may still refuse to provide that access. In that case the Bill provides that the device is forfeit to the Crown after the passage of a "prescribed period" from the time of detention.

Problem definition

7. The issue for the regulations to address is to prescribe the time period before the device becomes forfeit (and if a search of it cannot be completed due to the lack of access).

Objectives

8. The objectives are to prescribe a time period that is:
 - reasonable for the person who has the access codes to consider their position in respect of providing access, including in the rare circumstances where the "person" with the user codes may be a corporate entity, or the person is overseas
 - not unreasonably prolonging a stalemate situation whereby access is not provided and the device cannot be searched due to the lack of access codes, and

- a reasonable time for Customs to attempt to search the device when the access codes have not been provided.

Options and impact analysis

Options and evaluation

9. There are no non-regulatory options – the Bill requires that regulations specify the time period before an e-device becomes forfeit. It is appropriate that the prescribed period be set by regulation because the statutory search regime for e-devices limits the right to privacy of persons under certain defined circumstances (where a Customs officer is satisfied that the legal threshold for a search of the device has been met) and to ensure the objectives of the search regime are not defeated, provides for extinguishing the owner's property rights in the device where access for the purposes of conducting a search is refused. A person may also be prosecuted.
10. Three options were evaluated:
 - 10 working days from the time of detention;
 - 20 working days from the time of detention; and
 - 60 working days from the time of detention.
11. The 10 working day option corresponds with Customs' (self-imposed) target for completing searches of e-devices which are referred from the initial search at an international airport to the specialist Electronic Forensic Unit (EFU). EFU staff advise that within that period they are able to establish whether a device can be searched with the tools available. This option is not preferred because it may be an unreasonably short time period in those rare circumstances where the user codes are held by a corporate entity, or the person with the user codes is overseas.
12. The 60 working day option caters for where the user codes are held by a corporate entity, or the person with the user codes is overseas. This option is not preferred. It errs too much on the side of caution given the expected rare nature of the circumstances it seeks to encompass and the nature of modern communications. It unreasonably prolongs a stalemate situation given that Customs will know long before the time period elapses if the device can be searched with the available tools.
13. The 20 working day option is preferred as it provides the best balance. It corresponds with the time period set in the Bill for receiving applications for a review of seizure. This process will apply to e-devices that are seized following forfeiture. Customs' experience is that the vast majority of seizure review applications are received within the 20 working day period.

Impact of preferred option

14. Customs will not incur additional ongoing costs from implementation of the preferred option. There will be minor one-off costs of updating operating procedures and training material. No new or changed compliance costs will arise.
15. Refusal to provide access codes is likely to be a very rare event.

16. Customs currently conducts searches of e-devices under the legal framework for the examination of goods contained in the Customs and Excise Act 1996. Customs officers have been requesting access codes to enable searches of e-devices under this framework.
17. Until recently specific data on searches of e-devices was not kept. In 2016 there were approximately six million international air passenger arrivals into New Zealand. In 2016 Customs recorded conducting 611 preliminary searches of e-devices (as each search record relates to a passenger or consignment multiple devices may be involved). No instances of a person refusing to provide access were recorded.
18. The assumption is that at current levels of intervention with passengers and cargo (and therefore the rate of searches of e-devices as an outcome of those interventions), that 2-3 refusals a year may occur, but it is equally likely that none might occur in any given year. On the other hand, public debate of privacy issues around such searches in the domestic or wider international environment might conceivably induce more refusals.

Consultation

19. The Ministry of Justice, Crown Law, Police, the Ministry of Primary Industries, the Ministry of Justice, the Office of the Privacy Commissioner and the Ministry of Foreign Affairs and Trade were consulted.
20. The particularity of the length of the time for the forfeiture to apply has not been the subject of public consultation. However, the detail of the e-device search regime has been extensively consulted over as part of the development of the Customs and Excise Bill, including that a specified period would apply. The Ministry of Justice and the Office of the Privacy Commissioner were consulted on this proposal and were asked to comment on any Bill of Rights Act or privacy implications respectively. No issues were raised.

Implementation

21. The Customs and Excise Bill is currently before the House having been reported back from Select Committee.
22. The plan for the implementation of the Customs and Excise Bill includes a comprehensive plan for seamless transition to the new arrangements. The power to search e-devices will be included in operational guidelines and staff training. The new regime will apply as of commencement of the legislation (currently planned to be 1 April 2018).
23. There are no implementation risks which require further special action to mitigate them.
24. There will be a communications plan associated with the passing of the Bill to publicise the changes. A further enforcement strategy is not required.

Monitoring, evaluation and review

25. There will be an overall evaluation of the Customs and Excise Act review. This will include evaluation of powers.