



ENFORCEMENT GUIDELINES

OPERATIONAL GUIDELINES

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Purpose

When a Customs officer identifies and confirms a non-compliance these guidelines assist in identifying the range of enforcement options available and the circumstances in which they may be used. They are intended to assist a Customs officer with consideration of these enforcement options in a logical way, with the tools that are less severe considered first.

These guidelines must be read in conjunction with Customs Prosecution Policy.

In all cases of an arrest the 'Arrest - Operational Policy – 0322', 'Decide whether to arrest a suspected offender - Guidelines – 0321' and associated arrest procedures must be followed.

Related documents

Use these guidelines in conjunction with the following documents:

Document name	Document type
Customs Formal Warnings policy	Operational Policy
Customs Issue a Formal Warning Letter	Internal Procedure
Customs Issue a Formal Warning verbally	Internal Procedure
Customs Infringement Notice Scheme	Operational Policy
Customs Infringement Notices Guidelines	Internal Guidance
Arrest - Operational Policy	Operational Policy
Decide whether to arrest a suspected offender guidelines and Associated Arrest Procedures	Internal Guidance
Solicitor-General's Prosecution Guidelines	External guidance
Ministry of Justice: Guidelines on Criminal Procedure Act 2011	External guidance and forms
Statutory Consents to Prosecutions	External Guidance
Crown Law Media Protocol	External Guidance

Customs approach to managing compliance

Our approach to compliance and enforcement is framed around meeting Customs' overarching challenge of making compliance easy to do and hard to avoid. This requires a decision on what type of intervention is most suited to mitigate the impact of harms caused by the offending, to influence behaviour towards compliance in the future and deter others, and to achieve Customs' regulatory outcomes.

This means that Customs focuses its resources and activities on detecting and responding to the risks that pose the greatest harms to New Zealand.

Before an investigation can get Intelligence, Investigations and Enforcement resource (for example surveillance or technical support), it goes through a prioritisation process (Priority Tasking Group) to measure it against Customs' priorities. This process creates a record of why the investigation was resourced.

Prosecution should not be the default option for all non-compliance identified. Where there are other appropriate interventions or enforcement options available these should first be carefully considered from least to most restrictive.

Enforcement actions should be fair, effective and proportionate to the breach.

Customs also has statutory obligations such as under s110 of the Customs and Excise Act 2018 that must be considered where relevant.

Hierarchy of enforcement tools

Customs will endeavour to encourage compliant behaviours by providing education, advice and guidance. Where this is not successful, or where users are not willing to comply, Customs will take appropriate and proportionate enforcement action.

The full range of interventions that Customs may use to achieve compliance is set out below, from least to most restrictive or intensive. The application of legislative interventions is subject to the relevant offence provisions.

Where offending involves revenue, Customs will seek to collect all duty owing – regardless of whether the matter proceeds to prosecution. This includes the imposition of interest and penalties and may include debt recovery actions.

There are some offences that Customs considers will almost always warrant consideration for prosecution. In these cases, it may be appropriate to refer immediately to Customs Prosecution Policy unless there are clear public interest reasons against prosecution. These offences include:

- The importation or exportation of any Class A controlled drug.
- The importation or exportation of objectionable publications.
- Knowingly defrauding Customs revenue.

- › The threatening, resisting or assaulting of a Customs officer.

Extent of harm or risk of harm

The risks managed by Customs at the border and those with a domestic component, such as excise and licensing, cover a broad spectrum.

This includes both actual harm and potential harm. Harms may cover a wide range of border related threats, risks or evasions relating to goods, excise, persons or craft. Actions that create risks but do not actually lead to harm occurring can still be serious and require a firm response. Harm may also include the effect that the offending has on the integrity or reputation of the system that Customs regulates.

- › **None:** There is minimal or no harm or risk of harm. For example, this may be a technical breach only.
- › **Minor:** Harm is, or would likely be, easily remedied or mitigated.
- › **Moderate:** Harm is, or would likely be, restricted in scale or effect.
- › **Major:** There is a significant or widespread harm or potential for such harm.
- › **Catastrophic:** There is actual harm caused which is significant and/or widespread.

Conduct of person/attitude to compliance

This relates to the behaviours, intent and culpability of the person whose actions are being considered. Typically, the nature of the response will be informed by, and tailored to, the individual's attitude towards compliance.

- › It is first-time or one-off behaviour that is unlikely to be repeated.
- › The conduct is inadvertent, accidental or resulted from momentary carelessness or the result of a limited understanding of the law (e.g. language difficulties).
- › Whether the person recognised and accepted that their conduct was wrong.
- › The behaviour is deliberate, reckless or involving consistent carelessness and/or the person is unwilling to admit what they have done is wrong.
- › The conduct is repeated, ongoing or sector wide.
- › The person is deliberately encouraging non-compliance by others.
- › There is a serious departure from expected lawful behaviour.

Offence specific Intervention Guidelines

To assist with enforcement action for specific offences Customs has developed offence specific intervention guidelines. These guidelines provide additional considerations that apply

to these types of non-compliance. Intervention Guidelines should be reviewed by Legal to check consistency with the Prosecution Policy and Enforcement Guidelines.

- Border cash offences – Intervention Guidelines
- Tobacco - Intervention Guidelines (draft)

Hierarchy of Enforcement tools

Customs Prosecution Policy outlines the prosecution objectives for Customs. The following table outlines the enforcement options available to Customs officers and circumstances of when their use may be appropriate. These are set out from least to most restrictive. The application of legislative interventions is subject to the relevant offence provisions and some tools, such as cash sums, are only available for certain offences.

Options	Description of option	Objective	Criteria/considerations
No action taken	The non-compliance is identified but it is determined that no action is required.	Recognises that there may be some circumstances where taking no action is an appropriate response	<p>The person accepts they were non-compliant.</p> <p>The person is willing and able to comply in the future.</p> <p>The mistake was inadvertent or unintentional.</p> <p>The non-compliance is of a minor or technical nature.</p> <p>The person has no relevant previous warnings, infringements or convictions.</p>
Refer to another agency	Following further investigation, the relevant manager, refers the offending to another agency for further action.	That the most appropriate agency takes the lead on any enforcement action	<p>For example, lower-level drug importations to local Police Districts for action.</p> <p>Complex fraud matters, involving significant amounts of money (over \$1m) to the Serious Fraud Office.</p> <p>Legal may be consulted if advice is required on the decision to transfer to another agency.</p>

Options	Description of option	Objective	Criteria/considerations
<p>Information & education</p>	<p>Provision of material and/or assistance to educate and prevent further minor breaches or non-compliance.</p> <p>Could include:</p> <ul style="list-style-type: none"> • Fact sheets • Information sheets • Meetings with sector or individual • What's my duty calculator • Customs website 	<p>Aims to increase the person's understanding of their obligations and why their action was non-compliant.</p> <p>Assists and encourages them to be compliant in the future.</p>	<p>The person accepts they were non-compliant but may not fully understand their obligations.</p> <p>The person is willing and able to comply in the future.</p> <p>The mistake was inadvertent or unintentional.</p> <p>The non-compliance is of a minor or technical nature.</p> <p>The person has no relevant previous warnings, infringements or convictions.</p>
<p>Formal warning (verbal or written)</p> <p>Refer: Operational Policy - Formal Warnings</p> <p>Issue a formal warning verbally - Procedure</p> <p>Issue a formal warning letter - Procedure</p>	<p>A formal warning (either verbal or written) given to a person or entity following Customs operational policy and guidelines on formal warnings.</p>	<p>The warning and non-compliance are recorded on the file of the person or entity warned.</p> <p>Mitigates the risk of the behaviour recurring in the future.</p> <p>Impresses on the person that, in Customs' view, the behaviour the person has engaged in amounts to criminal conduct that could otherwise be prosecuted but Customs has chosen not to prosecute.</p> <p>Information about the warning and non-compliance can inform subsequent decisions in the event of further non-compliance.</p>	<p>No other enforcement action has been taken in respect of the offending (e.g. infringement notice or cash sum in lieu of fine).</p> <p>Behaviour is considered to amount to a criminal offence in breach of a law enforced by Customs.</p> <p>The person accepts that they were non-compliant.</p> <p>The person is willing and able to comply in future.</p> <p>The non-compliance is minor, inadvertent, or a first breach.</p> <p>A verbal warning should only be given where it is not practicable to give a written warning.</p> <p>It is appropriate to issue a warning taking into consideration the wider public interest.</p>

Options	Description of option	Objective	Criteria/considerations
<p>Infringement notice</p> <p>Refer: Infringement notice scheme - Operational Policy</p> <p>Infringement notices - Guidelines</p>	<p>Issue an Infringement notice to a person or entity for offences listed in schedule 3 of the Customs and Excise Regulations 1996.</p> <p>Limited to offences where the maximum penalty is \$5,000 for an individual and \$25,000 for a body corporate.</p> <p>Offences are all strict liability: offences are committed when the act has occurred and is proven on the facts of the case. They do not require Customs to prove a mental element (knowledge or intention).</p> <p>Defences are available: the person can either rebut the presumption that they committed an offence or provide a reasonable excuse as to why it occurred.</p>	<p>Demonstrates that the offence is sufficient to warrant a response more than education or a formal warning but less than prosecution action.</p> <p>The notice is recorded in Customs system against the person or entities record and can inform subsequent decisions in the event of further non-compliance.</p> <p>Impresses on the person that, in Customs' view, the behaviour the person has engaged in amounts to criminal conduct that could otherwise be prosecuted but Customs has chosen not to prosecute.</p>	<p>The offence is listed in schedule 3 of the Customs and Excise Regulations 1996.</p> <p>No other enforcement action has been taken in respect of the offending (e.g. formal warning, prosecution, or cash sum in lieu of fine).</p> <p>Low-level offending where the circumstances of the breach do not warrant consideration of prosecution action.</p> <p>The person may have previously received a warnings and/or education or information for the same or similar non-compliance. Where an offence could be subject to an administrative penalty or an infringement notice, the administrative penalty applies (see below).</p> <p>Children and young persons under 18 years of age will NOT be served an infringement notice.</p>
<p>Cash sum for border cash reporting offences</p> <p>Cash sums - Guidelines</p>	<p>Only applies to Anti-Money Laundering and Countering Financing of Terrorism Act 2009 border cash reporting offences under ss 106 & 107.</p>	<p>Allows for a cash sum of up to \$500 to be paid where it is considered just in the circumstances of the case.</p> <p>The cash sum payment and admission of offence committed is recorded in Customs system against the person or entities record and can inform subsequent decisions in the event</p>	<p>Only applies to Anti-Money Laundering and Countering Financing of Terrorism Act 2009 border cash reporting offences under ss 106 & 107.</p> <p>The person has accepted and admitted in writing that they have committed the offence, and they request that the offence be dealt with summarily by the Chief Executive of Customs.</p> <p>No prosecution has been commenced for the offending.</p>

Options	Description of option	Objective	Criteria/considerations
		of further non-compliance.	<p>There is no formal review process or Customs appeal process attached to payment of a cash sum.</p> <p>Customs does not have to accept a cash sum and may consider other enforcement action if a cash sum is not paid.</p>
<p>Administrative penalties</p> <p>Administrative penalties - Operational Policy</p> <p>Administration penalties - Guidelines</p>	<p>Applied to people making an entry to Customs, and where the information on the entry contains an error or omission and has not been voluntarily disclosed to Customs.</p> <p>The minimum is \$200, with the maximum dependent on the action that led to the error or omission.</p> <p>Customs has discretion to impose an administrative penalty or to use another sanction such as a customer compliance letter in the grace period for excise and export entries.</p>	<p>To encourage people to take reasonable care when making entries, and to voluntarily disclose to Customs any errors or omissions.</p>	<p>If Customs is satisfied the entry made by the person contains an error or omission, and either:</p> <ul style="list-style-type: none"> • there is an amount of duty outstanding, or • the entry is “materially incorrect”. <p>Where an offence could be subject to an administrative penalty or an infringement notice, the administrative penalty applies.</p> <p>A person who pays an administrative penalty is not liable for prosecution in relation to the error or omission.</p>
<p>Suspend / revoke privileges</p> <p>JBMS Consider applying remedial conditions to user privileges, or suspend or revoke user privileges or registration - Process</p>	<p>Privileges refers to licensing as a Customs controlled area and registration as a JBMS user.</p> <p>Suspends the user/business’ ability to undertake functions until previously issued compliance requirements have been addressed.</p>	<p>Suspension - encourage compliance by the user/business</p> <p>Revocation - removes risk of ongoing non-compliance</p>	<p>The policies and procedures for suspending or revoking privileges must be referred to for full criteria and considerations.</p> <p>Generally, suspension should only be considered where the breaches are serious or deliberate and/or other early interventions have failed, and the user/business is not complying with reasonable requests.</p>

Options	Description of option	Objective	Criteria/considerations
	Revokes the privileges for a set timeframe and reinstating privilege is subject to providing evidence of compliance.		<p>Generally, revocation should only be considered where there have been repeated suspensions, a conviction for an offence under a relevant enactment, or a previous conviction should have been disclosed at the time the privilege was granted.</p> <p>Additional conditions could be considered appropriate rather than suspension or revocation.</p> <p>Other enforcement action (e.g. prosecution) may be considered in addition to this enforcement option.</p>
<p>Prosecution</p> <p>Refer:</p> <p>Customs Prosecution Policy</p>	Prosecution of a person or entity by Customs under an Act we enforce (e.g. Customs & Excise Act 2018, Crimes Act 1961, Misuse of Drugs Act 1975, Films, Videos, Publications Classification Act 1993).	Strongest enforcement message against serious non-compliance.	<p>Where the test for prosecution under the Solicitor-General's Prosecution Guidelines is met.</p> <p>Offences that would be likely to cause the greatest amount of harm to New Zealand.</p> <p>Moderate or serious offending and/or deliberate and sustained lower-level offending where non-compliant behaviour continues (e.g. despite repeated warnings or infringement notices).</p>

Other non-enforcement actions

Forfeiture and/or seizure of goods

These actions are not included as an enforcement action. The act or omission that led to the forfeiture and/or seizure is subject to an intervention in the form of an enforcement action. Forfeiture and seizure are a consequence.

All goods that are unlawfully imported or exported are forfeit to the Crown. When goods become forfeit, entitlement to the goods effectively moves to the Crown.

Customs will generally seize goods that are forfeit to the Crown or where there is reasonable cause to suspect that an offence has occurred in relation to the goods.

Except in limited circumstances (drugs, CEOT material) Customs must notify people with an interest that these goods have been seized as soon as is reasonably practicable.

Referral to rights holders

Where Customs detains goods that appear to infringe the intellectual property rights of the rights holder, the rights holder has responsibility for asserting their rights in court.

Document and record your enforcement decisions

Comprehensive record-keeping is a critical part of managing compliance. All enforcement decisions and the reasons, no matter the result or option selected, must be recorded (e.g. in an officer's notebook, in CUSMOD, activity report, information report, job sheet or DTP). This is important as:

- Customs needs to understand the overall level of identified non-compliance to monitor and reallocate resources over time.
- many enforcement decisions are subject to review - it is important to ensure that the reasons for a decision and the identity of the decision-maker are recorded in the event of any judicial review or appeal.
- it is important to maintain a record where warnings have been issued and attach a copy of any written warning – so that a more substantial sanction may be applied if the same person or organisation continues to not comply.
- A decision to prosecute memorandum (DTP) must be completed in any case where prosecution is being considered.
- In an arrest situation the DTP may be completed at a later time, or the file may be reviewed directly by the Prosecutor assigned at the relevant Crown Solicitors office. However, the reasons and grounds for the arrest must still be recorded by the arresting officer (e.g. in their notebook, a job sheet, or CUSMOD).

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