Customs and Excise Amendment Bill (No 3)

Government Bill

Explanatory note

General policy statement

This Bill amends the Customs and Excise Act 1996 (the **Act**). The purpose of the Bill is to—

- enhance statutory appeal and review rights in relation to the forfeiture and seizure regime contained in Part 14 of the Act:
- provide greater flexibility for Customs to deal with ad hoc arrivals and departures:
- remedy legislative inconsistencies relating to the illegal manufacture of tobacco.

Enhancement of statutory appeal and review rights in relation to forfeiture and seizure regime

As a result of the Law Commission's report *Forfeiture under the Customs and Excise Act 1996* (NZLC R91, 2006), Government agreed that enhancements should be made to the forfeiture and seizure regime set down in Part 14 of the Customs and Excise Act 1996. The regime enables Customs officers to seize certain goods, such as goods associated with offending under the Act and goods that have been unlawfully imported or exported contrary to a range of other enactments. Those parties who wish to reclaim their interest in goods seized as forfeited can apply to either the District Court or the Minister of Customs, or both, depending on the circumstances.

In its report, the Law Commission highlighted concerns with the dual system of appeal to a court and a ministerial review, and stated that it should be possible to challenge the seizure by an initial internal review process, which should involve little or no expense to

the challenger and should be able to be accomplished without delay. To give effect to these particular concerns, the appeal avenues contained in the Act, as they relate to forfeiture, are being repealed and replaced with a Customs internal review process. The internal review process will enable applicants to apply to the Chief Executive of Customs for the return of goods seized. Applicants who are dissatisfied with a decision resulting from an internal review will be able to appeal that decision to the Customs Appeal Authority. Customs Appeal Authority decisions will be appealable to the High Court.

Ad hoc arrivals and departures

With the exception of compelling circumstances, such as stress of weather or other navigation-related requirements, all craft arriving into and departing from New Zealand are required to do so at a Customs place. In recent years there has been an increase in ad hoc requests for both commercial and recreational purposes for arrivals at and departures from ports and airports that have not been designated as Customs places. The Customs and Excise Act 1996 is to be amended to provide the Chief Executive of Customs with the discretion to approve arrivals and departures outside of Customs places subject to any conditions the Chief Executive considers appropriate, and subject to consultation with other agencies with border-related interests.

Illegal manufacture of tobacco

The illicit manufacture and supply of tobacco contributes to health, economic, and social harms. For this reason the manufacture of tobacco products in New Zealand is restricted under the Customs and Excise Act 1996 to licensed Customs controlled areas, which facilitates the collection of excise duty on tobacco products. The only exception to this requirement is a personal use exemption that enables the small-scale manufacturing of tobacco leaf into smokable product. To qualify for the exemption, the manufacturing must occur at an individual's dwelling place, using tobacco grown on his or her own land, and the tobacco products must be exclusively smoked by that individual. However, enforcement activity has highlighted that commercial quantities of tobacco are being cultivated and manufactured with no legitimate end use.

To address the issue of illegally manufactured tobacco products, the personal use exemption needs to be clarified to assist Customs in

identifying cases of illicit tobacco manufacture (while still allowing individuals who wish to cultivate and manufacture a small quantity for their own consumption to do so), and altered to increase penalties to provide a strong disincentive to discourage abuse of the exemption.

Other amendments

The Bill also makes a machinery amendment to the Act in respect of section 148B(1), and minor amendments to clarify the Act in respect of sections 209(1A) and 288(1)(a).

Clause by clause analysis

Clause 1 relates to the Title.

Clause 2 provides that the Bill, once enacted, comes into force on a day to be appointed by Order in Council and 1 or more orders may be made to bring different provisions into force on different dates. The reason for having flexible commencement provisions is that some clauses (in particular *clause 12*, which sets out a new procedure for reviewing seizure under section 226 of the principal Act) will require training and planning before they can be brought into force.

Part 1
Amendments to principal Act

Clause 3 provides that in Part 1 the principal Act being amended is the Customs and Excise Act 1996 (the **principal Act**).

Clause 4 makes it clear that the Chief Executive of Customs has a general discretion to authorise the arrival of a craft in a place other than a Customs place. The Chief Executive must consult with relevant agencies before granting such an authorisation and may impose conditions.

Clause 5 consequentially amends section 30 of the principal Act to reflect the changes made by *clause 6*.

Clause 6 makes it clear that the Chief Executive of Customs has a general discretion to authorise the departure of a craft from a place in New Zealand other than a Customs place. It is subject to the same qualifications as the grant of an authorisation to arrive referred to in *clause 4*.

Clause 7 rectifies an error in section 148B of the principal Act.

Clauses 8 and 10 to 12 increase penalties for offences in sections 200, 211, 212, and 213 respectively for offences involving tobacco to a maximum of 6 months imprisonment or a fine not exceeding $20,000, or to both, for an individual, or a fine not exceeding $100,000 in the case of a body corporate.

Clause 9 amends section 209(1A) to clarify that this offence provision involves the element of mens rea (guilty mind).

Clause 13 inserts *new sections 231 to 235C* of the principal Act. *New section 231* provides that a person who has an interest in goods that have been seized under section 226 may, within a specified period (20 working days after the date on which notice of seizure is given to the applicant), apply to the Chief Executive for a review of the seizure. An application for review of the seizure may be made on the grounds that—

- there was no legal basis for the seizure of the goods:
- the applicant should, in all the circumstances, be granted relief.

New section 232 provides that the Chief Executive must conduct the review on the papers unless the Chief Executive directs otherwise. The applicant must establish, on the balance of probabilities, that the applicant has an interest in the seized goods and acquired that interest in good faith.

New section 233 requires the Chief Executive to dispose of the application for review in 1 of 3 ways. The Chief Executive may dismiss the application, allow it (in whole or in part), and direct that the goods be given (in whole or in part) to the person entitled to possess the goods, or grant relief (either unconditionally or subject to conditions) if satisfied that it is equitable to do so.

New section 233 also sets time limits in relation to the making of decisions on review and sets out requirements in relation to the giving of reasons for the decision and advice to the applicant of rights to appeal to a Customs Appeal Authority.

New section 234 sets out the factors that the Chief Executive must have regard to in deciding whether or not to grant relief.

New section 235 sets out the methods by which relief may be granted. The first method is that the goods be given to the applicant or another person who would, but for the seizure, be entitled to their possession. The second method is that the goods be sold and the following persons be paid the part or parts of the proceeds specified by the Chief Executive—

- the applicant:
- any other person who has an interest in the goods:
- the Crown.

New section 235(3) sets out the conditions that may be imposed on the grant of relief.

New section 235A provides that if an application for review is dismissed, the dismissal is deemed to be an order for condemnation of the goods to the Crown. That order takes effect on the 20th working day after the Chief Executive gives his or her decision on the review unless an appeal against the decision on review is lodged before then.

New section 235B confers a right of appeal to the Customs Appeal Authority on a dissatisfied applicant. An application for review must be made within 20 working days after the date on which the notice of the decision on review is given.

New section 235C provides that the goods that are the subject of an appeal are condemned to the Crown if the appeal is discontinued or the decision of the Customs Appeal Authority does not disallow the seizure of the goods or grant relief.

Clause 14 amends section 286 (the regulation-making power) to ensure that regulations exempting the manufacturing and processing of goods from the requirement that it take place in a Customs controlled area can be made subject to extensive conditions. The purpose of this is to ensure that exemptions such as the existing personal use exemption for tobacco can be tightly controlled.

Clause 15 amends section 288(1) of the principal Act by amending paragraph (a) to allow the Chief Executive to prescribe the form and content of outward (as well as inward) reports required to be delivered under the Act and the particulars of those reports that must be verified by declaration and the manner in which, and the time or times within which, those reports must be delivered to Customs.

Part 2
Consequential amendments and transitional provisions

Clauses 16 to 18 consequentially amend, respectively, the Protected Objects Act 1975, the Misuse of Drugs (Prohibition of Cannabis Utensils and Methamphetamine Utensils) Notice 2003, and the United Nations (Iraq) Reconstruction Regulations 2003.

Clause 19 is a transitional provision that continues the existing statutory regime in respect of goods seized before *clause 13* comes into force.

Regulatory impact statement

Executive summary

This regulatory impact statement covers 3 proposals in the Customs and Excise amendment Bill relating to:

- enhancements to the appeal and review processes contained in Part 14 of the Customs and Excise Act 1996:
- the ability to approve craft arrivals and departures outside of Customs places:
- clarification of the personal use exemption for manufacturing tobacco, and a strengthening of the penalty regime in respect of unlawfully manufactured tobacco.

Forfeiture

This document updates the regulatory impact statement considered by Cabinet in July 2007 when the preliminary scope of proposals submitted at that time, now contained in the attached draft Bill, were considered and agreed to by Cabinet. These proposals, and the further developed detail contained in the Cabinet paper, are intended to enhance appeal and review processes available in relation to forfeiture under the Customs and Excise Act 1996 (the **Act**) in a way that improves access to justice without compromising the integrity of the forfeiture regime or of the Act.

This is to be achieved by replacing the 2 currently separate avenues of review and appeal in relation to forfeited goods (ministerial waiver of forfeiture and the ability to apply to the court for disallowance of seizure) with a single two-tiered process comprising at the first stage an internal Customs review process, supported at the second stage by a statutory right of appeal to the Customs Appeal Authority. Decisions of the Customs Appeal Authority will be able to be appealed to the High Court. This option has been selected because an internal review would considerably enhance existing statutory rights and improve access to justice, and would provide a safeguard for the strict nature of the forfeiture regime.

It is proposed that there be a single point of entry into the Customs internal review process, and that applicants should apply to the Chief Executive of Customs for a review in the first instance. One

point of entry is considered to provide a simpler system and avoids the complexities that a dual system would present, such as issues as to how the 2 systems would interface.

It is also proposed that the internal review will be conducted on the papers, unless the review raises issues that could be more effectively dealt with by way of a hearing. It is also proposed that, in considering whether to grant relief, the Chief Executive should have regard to the circumstances of the situation and any other matters that may be relevant to the applicant's case, such as:

- the breach of Customs law that gave rise to the seizure of the goods, the circumstances in which the breach took place, and the seriousness of the breach:
- whether or not the person who committed the breach has previously committed such a breach or engaged in any similar conduct:
- the culpability of the person who committed the breach:
- the nature, quality, quantity, and estimated value of the seized goods:
- whether the seized goods were imported or exported for a commercial purpose and the nature and extent of any commercial gain resulting from the breach:
- the nature and extent of any loss or damage suffered by any person as a result of the alleged breach.

Consideration was also given as to whether the Chief Executive should be authorised to pay compensation, if appropriate, as an outcome of an internal review application. Under the current forfeiture regime the court is able to make an order that the Crown pay compensation for any depreciation in the value of the goods resulting from their seizure, as well as any associated transport or storage costs.

It is considered desirable that an ability to obtain compensation in appropriate circumstances should remain; however, because of the shift to an internal Customs regime, it is proposed that compensation be dealt with by way of the Chief Executive's existing financial delegations (in accordance with Cabinet Office Circular CO (99) 7), rather than transferring to the Chief Executive the existing ability of the court to authorise compensation.

Craft arrivals and departures

Changes to the Act are proposed to enable the Chief Executive of Customs to approve arrivals and departures of craft outside of Customs places other than for emergency purposes (craft arrivals and departures outside a Customs place).

Illegal Tobacco Manufacture

In the last 12 months the outcome of court cases involving the illicit manufacture of tobacco has highlighted some inconsistencies with the personal use exemption for tobacco manufacture and also suggested a low level of deterrence. In addition, advice from the Crown Law Office indicates that the personal use exemption is probably *ultra vires*.

These inconsistencies represent a risk to the Government's revenue collection and increase the potential illicit supply of tobacco products. There are a range of social, economic, and criminal costs associated with the availability of illicit tobacco.

To enable more effective compliance with the legislation it is proposed that an amendment be made to the personal use exemption provisions within the Customs and Excise Regulations 1996. Accompanying this change, it is proposed to increase penalties for illicit manufacture and supply of tobacco.

Adequacy statement

Customs has reviewed the RIS guidelines, and has determined that this RIS is adequate according to the criteria agreed to by Cabinet. The Regulatory Impact Analysis Unit is not required to review this RIS because none of the proposals will have a significant impact upon economic growth.

Customs forfeiture regime

Status quo and problem

Under the forfeiture regime contained in the Act applicants may make application to the District Court for an order that the seizure of goods (as forfeited to the Crown) be disallowed on the grounds that no reasonable cause for the seizure, or the continued detention of the goods, exists under the Act. Alternatively, or additionally, applicants can apply to the Minister of Customs for a waiver of forfeiture.

Forfeiture may be waived in whole or in part, where it is considered equitable to do so.

The Law Commission concluded in its recent report on *Forfeiture under the Customs and Excise Act 1996* (NZLC R91, 2006) that the rights of review and appeal in relation to forfeiture are unsatisfactory because—

- while the ability to apply to the court for disallowance of seizure provides a reasonable avenue of appeal, it does not allow forfeiture to be challenged as unreasonable in the circumstances:
- the ability to waive forfeiture is an inappropriate power for a Minister:
- the current provision allowing an application for waiver of forfeiture is inadequate as there is no provision for an extension of time within which people may apply, no time frame within which the Minister must respond to an application, and no provision to enable an appeal against the Minister's decision;
- the dual system, of appeal to the court for disallowance of seizure and to the Minister of Customs for waiver of forfeiture, is considered to be too limited.

The Commission also recommended specific protection of third party interests and noted that in some instances forfeiture may be a disproportionate remedy.

Objectives

The objectives of the amendments to the Act are to enhance appeal and review processes available in relation to the seizure of forfeited goods under the Act in a way that improves access to justice without compromising the integrity of the forfeiture regime or of the Act as a whole.

Alternative option

Rather than absorbing the ministerial waiver into the proposed new internal review process, consideration was given to retaining the current ability to apply to the Minister of Customs for waiver of forfeiture. However, the risk of this approach is that it maintains the perception that Ministers could be biased by factors such as the involvement of a local constituent when making a decision to waive. There would also be significant issues to work through in respect of

the interface between an internal review (which excluded the ability to waive forfeiture) and the ministerial waiver process, for example, whether the 2 processes would run in parallel or sequentially and how that would work in practice.

In terms of the appeal from decisions arising from the internal review process, consideration was also given to establishing the District Court, rather than the Customs Appeal Authority, as the court to hear appeals from internal review decisions. However, while the District Court has current experience in dealing with forfeiture matters (it hears applications for disallowance of seizure), costs can be higher than the Customs Appeal Authority and therefore discouraging to applicants.

Preferred option

The preferred option is to replace the 2 currently separate avenues of review and appeal in relation to forfeited goods (ministerial waiver of forfeiture and the ability to apply to the Court for disallowance of seizure) with a single two-tiered process comprising at the first stage an internal Customs review process, supported at the second stage by a statutory right of appeal to the Customs Appeal Authority. This option has been selected because an internal review would considerably enhance existing statutory rights and improve access to justice, and would provide a safeguard for the strict nature of the forfeiture regime.

While it is recognised that ministerial waiver currently provides a low cost and swift avenue of redress for affected parties, this feature would not be lost if the function were to be absorbed into an internal review process. A single process of internal review that deals with all grounds for review is considered to be an efficient, fair, and expeditious way of considering all challenges to seizure and forfeiture, rather than allowing 2 avenues for challenge that depend on the ground for challenge. It would provide a simplified process for all concerned.

Absorbing the waiver of forfeiture stream into the internal review process would not result in any compliance costs for the public, as it is not intended that a charge be made for applications for internal review. While there is likely to be a cost to the department both in designing and implementing the new process of internal review (estimated at $268,338), this will be absorbed within baseline costs. In terms of dealing with ongoing applications, a considerable portion of the ongoing costs is currently met in reviewing files and

writing reports for the Minister in respect of each waiver of forfeiture application.

Any person who wishes to challenge the outcome of the internal review and go to the Customs Appeal Authority is likely to be required to pay an application fee of $400 by reference to the fee currently required in relation to matters dealt with by the Customs Appeal Authority. However, application to the District Court costs $750, with hearing fees for each half-day or part of a half day (after the first half day) of a further $750. The Customs Appeal Authority would provide applicants with a more accessible and cost effective forum for hearing appeals. The Customs Appeal Authority also has the advantage of being able to decide appeals 'on the papers' if both parties agree. This would considerably lower the cost to applicants in that there is a one-off fee and legal representation is a matter of choice, and would address any concerns that current court processes can be stressful and intimidating.

The further detail of the preferred option has now been worked through in respect of the following matters.

Single point of entry

It is proposed there should be a single point of entry into the Customs internal review process, whereby applicants should apply to the Chief Executive of Customs, in the first instance, for an internal review. The single entry system has been developed in response to the Law Commission's view that the existing dual system (under the current Customs forfeiture regime, of challenge to the Minister and/or to the court) is limited and should be abolished in favour of a system that allows an opportunity for first review by the Chief Executive with a right of appeal to an independent body. Also, from an access to justice point of view, one point of entry provides a simpler system and avoids the complexities that a dual system presents (such as how the 2 systems interface).

Compensation

Under the current Customs forfeiture regime, a court is able to make an order that the Crown pay an applicant compensation for any depreciation in the value of the goods resulting from their seizure, as well as any related storage or transport costs. It is desirable that an ability to obtain compensation remain; however, because of the shift to an internal review, it is proposed that compensation be dealt with

by way of the Chief Executive's existing financial delegations that allow the Chief Executive to make ex-gratia and compensatory payments in accordance with Cabinet Office Circular CO (99) 7.

Factors to be taken into account when considering an internal review application

The internal review will be conducted on the papers, unless the review raises issues that would be better dealt with by way of a hearing. Where an applicant wishes to be granted relief from forfeiture it is proposed that the Chief Executive should have regard to the circumstances of the situation and any other matters that may be relevant to the applicant's case such as—

- the breach of Customs law that gave rise to the seizure of the goods, the circumstances in which the breach took place, and the seriousness of the breach:
- whether or not the person who committed the breach has previously committed such a breach or engaged in any similar conduct:
- the culpability of the person who committed the breach:
- the nature, quality, quantity, and estimated value of the seized goods:
- whether the seized goods were imported or exported for a commercial purpose and the nature and extent of any commercial gain resulting from the breach:
- the nature and extent of any loss or damage suffered by any person as a result of the alleged breach.

Role for Minister of Customs in policy guidelines for internal reviews

The Minister of Customs, under the existing Customs forfeiture regime, receives and considers applications for waiver of forfeiture. This role is to be absorbed into the proposed new Customs internal review process in response to the Law Commission's view that a Minister should not determine the nature of penalties to be imposed or make decisions in individual cases.

In its previous consideration of these proposals, Cabinet agreed there should continue to be a role for the Minister of Customs in the new review process in the setting of higher level policy and guidelines for waiver of forfeiture that the Chief Executive could apply in individual cases relating to applications for internal review. It is

proposed that these matters do not need to be expressly provided for in legislation.

Criteria for matters to be heard by Customs Appeal Authority

It is proposed that a person who is dissatisfied with a decision of the chief executive as a result of an internal review application should be able to appeal that decision to the Customs Appeal Authority (the **CAA**). The CAA was set up in 1996 to hear appeals against decisions made by the chief executive under the Act. Appeals against internal review decisions will therefore be dealt with in the same way as other appeals against statutory decisions of the chief executive. Appeals against decisions of the CAA are, in accordance with the Act, able to be appealed to the High Court.

Craft arrivals and departures outside a Customs place

Status quo and problems

Currently the Act requires that craft arrive within a Customs place. However, Customs receives ad hoc requests for craft to arrive and depart from ports and airports that have not been designated as Customs places. In the past Customs has relied on section 25(1)(c) of the Act to authorise such arrivals and departures. However, a recent review of that process by Customs identified doubt about the scope of that provision. This means that people may only depart from and arrive in New Zealand in a limited number of places, which may in some circumstances be unnecessarily restricting.

Objectives

The following policy objectives were considered when analysing this issue:

- to address uncertainties within the Act:
- to facilitate passenger movements into and out of New Zealand:
- to help enhance New Zealand's desirability as a tourist destination:
- to enable the Government to meet public expectations where reasonable to do so:
- to ensure Customs participation in a whole of Government approach.

Alternative options

Currently arrivals and departures must be at a Customs place. Customs has the power to gazette every potential place of arrival or departure as a Customs Place; however, this would lead to a proliferation of locations where Customs is unable to risk-manage or resource arrivals and departures on anything other than a one-off basis.

Preferred option

The preferred option is to provide the Chief Executive of Customs with the power to approve arrivals and departures at other than Customs places on a case-by-case basis where this is deemed appropriate. Prior to approving an arrival or departure outside of a Customs place the Chief Executive will consult with the chief executives of the Ministry of Agriculture and Forestry, the New Zealand Police, the Ministry of Transport, the Department of Labour and every other department of State whose operations may, in the Chief Executive's opinion, be affected by the action. It is intended that Customs will gazette as many places of arrival and departure as practicable; however, the proposed power is to be used where gazetting as a place of arrival or departure is not appropriate due to the one-off nature of the request being granted. The ability to impose appropriate conditions on those arrivals and departures and to have full Customs powers and authority apply is required.

Implementation and review

Customs is not intending to implement any special review requirements for this process other than those currently employed to monitor its procedures relating to arrival and departure of craft.

Regulatory impact

Compliance costs may be incurred by the public due to the conditions imposed by the Chief Executive on craft arrivals outside a Customs place. However, these compliance costs will only apply to those who choose to arrive outside of a Customs place and any costs that will be imposed will only be of a level necessary to allow Customs to complete its tasks. It is expected that if the current provision is not amended the compliance costs for the public will be greater than those incurred by arrival outside a Customs place. This is because the public will have to arrive only at designated Customs

places, which could be time consuming and expensive. It is expected that the number of requests where approval may be given to arrive at a place that has not been gazetted as a Customs Port or Airport will be no more than a handful a year.

Illegal tobacco manufacture

Status quo and problem

The current regime for controlling the manufacture of tobacco is contained in the Act. This means it is illegal to manufacture tobacco products outside a licensed Customs controlled area. The personal use exemption contained in regulation 7 of the Customs and Excise Regulations 1996 does however allow persons to manufacture tobacco for their own use without a CCA licence.

Customs has conducted several investigations since 2000 targeting persons in the Golden Bay and Marlborough areas who have been cultivating and manufacturing multi-tonne quantities of tobacco. A number of successful prosecutions of the persons involved have followed these investigations.

The illegal manufacture of tobacco products has undesirable health and social consequences, including making tobacco products available at low cost, which encourages higher consumption levels, with associated health impacts. The illegal manufacture of tobacco products also reduces the amount of excise duty the Government collects.

Two court cases earlier this year have highlighted an issue with the current offences and penalties. Those cases saw the persons involved convicted under the Act offence provisions; however, the court ordered the return of large quantities of unprocessed tobacco even though it was clearly not for personal use.

There are currently no limits on how much tobacco a person may cultivate. Under the present regime a person may cultivate and possess large quantities of tobacco and tobacco products on his or her property and claim it is all for their personal consumption or not intended for manufacture. The relevant offence only relates to the manufacture of tobacco products outside a CCA.

In addition, advice from the Crown Law Office indicates that the personal use exemption is currently *ultra vires*. Therefore some legislative change will be required, irrespective of the option that is advanced.

Objectives

The main objective of the change being sought is to ensure compliance with the excise regime, which requires the licensing of manufacture of excisable goods. This will minimise the opportunities for the manufacture and supply of illicit tobacco and ensure revenue is collected as appropriate.

Alternative options

Alternative approaches to achieving the objective (discussed below).

Option 1—Retain status quo

Retaining the current regime is not considered to be desirable. The numbers of persons thought to be involved in illegal tobacco manufacture and supply are believed to be small, although the quantities involved have been up to several tonnes. One of the features of recent investigations has been the reappearance of certain individuals allegedly involved in illicit manufacture and supply. This indicates that the current law is not providing an adequate disincentive.

The current problem of domestic illicit tobacco cultivation has been the subject of some media coverage, which has highlighted the non-compliance and the small penalties being imposed compared with potential profits. This may encourage others to become involved in illicit manufacture.

Option 2—Banning cultivation of tobacco

This is the most radical of the options. However, within New Zealand there are currently only 2 licensed manufacturers who could potentially source some tobacco from New Zealand (both have indicated that they currently source tobacco from offshore). A total ban is therefore unlikely to have a significant economic impact on any future legitimate growers in New Zealand.

A variation of this option would be to ban all commercial growing, but allow individuals to grow small quantities for their personal use similar to the personal use exemption for manufacture. Such a variation could, however, also be abused. Individuals could grow tobacco for friends rather than just themselves, and several small plots could be used to supply tobacco to an illegal manufacturing operation at a central point.

A ban on cultivation would ensure that any cultivation of tobacco could immediately be identified as being illegal. As tobacco plants are difficult to hide, policing could occur while the crop was still in the field. There are unlikely to be any additional enforcement costs associated with a total ban.

This would greatly reduce the level of illegal manufacturing and limit the undesirable fiscal and social consequences of illegal tobacco. A ban would also send a strong signal that Government is concerned about the health and other issues associated with illegal manufacturing and supply.

A total ban could be seen as being a heavy-handed approach given the small number of offenders. Small-scale growers (common in the Golden Bay and Marlborough areas) may view a total ban as an encroachment of personal freedom. In addition, it would remove any future opportunity to legally grow tobacco for economic gain.

Option 3—Introducing licensing regime for cultivation of tobacco

A licensing regime to grow tobacco could be developed in addition to the current licensing regime targeting the illicit manufacture of tobacco products. Such a regime would provide authorities with a greater degree of control over cultivation and manufacture. For example, a licence could be conditional on the applicant stating how they intend to use their crop and licences might only be valid for 1 growing season. Alternatively, if licences were valid for a number of years then administrative costs would be lower.

A possible variation could be to provide an exemption from the licence requirement for growing a small amount or area of tobacco for personal use. Such an exemption would reduce Customs' administrative costs, as well as enforcement costs.

An exemption for growing tobacco for personal use might be abused through numerous parties separately growing small areas for illegal manufacturing at a central point. However, this risk could be reduced by linking the growing exemption to the personal use exemption for manufacturing, and tightening up on the personal use exemption for manufacturing.

There would be some administrative costs for Customs and compliance costs for those wishing to obtain a licence to grow tobacco (although the number of individuals or organisations affected is likely to be very small). In addition, a licensing regime for tobacco

growing might again be considered a heavy-handed approach (although less so than a total ban).

Preferred option

The preferred option is to clarify the personal use exemption for manufacture of tobacco by adding more specific criteria to regulation 7. These would include:

- that the personal use exemption would only apply to tobacco that is both grown and manufactured on a person's property.
- that this exemption would only be related to tobacco for that person's own personal use and not include sale or supply to anyone else.
- that it would only be applicable for persons aged 18 and over.
- in addition it would involve introducing a limit of 8 kilograms of tobacco per person per year. This equates to 31 to 54 roll-your-own cigarettes (at 0.4 to 0.7 grams per cigarette).

This would be accompanied by an increase in the penalties associated for non-compliance with these provisions.

A clarification of the personal use exemption will make it easier to identify and demonstrate that tobacco being cultivated and stored in unlicensed areas is outside the terms of the personal use exemption. This will facilitate enforcement action taken by Customs in respect of illicit manufacture.

A clarified personal use exemption would be seen as a less intrusive measure than licensing or banning tobacco growing and enables backyard growing and manufacture for personal use. It also retains the possibility of legal growing of tobacco for economic gain should commercial circumstances change.

This option does maintain the current situation where in theory unlimited quantities of tobacco may be grown with no legitimate end use. However, this does need to be balanced against the tightening of the personal use exemption criteria and also the deterrence provided by increased penalties.

In view of the fact that this builds on the existing regime and the current absence of any commercial cultivation, this approach is unlikely to create any additional costs associated with administering the licensing regime. It is not expected to involve any additional enforcement costs particularly assuming that the level of non-compliance decreases.

The increase in penalties is consistent with penalties associated with other highly regulated social harms (such as gambling) and provides a more consistent approach across the illicit tobacco supply chain. These penalties also back up the Government's decision to address this issue with a relatively light-handed regulatory approach by providing the deterrent of increased sanctions for cases of non-compliance.

Implementation and review

If Government supports this proposal it can be introduced within a relatively short time frame since it builds on current arrangements. Publicity could be targeted towards the previous growing areas.

Consultation

The following government departments and agencies have been consulted during the policy development stages of this Bill: the Department of Conservation, the Ministry for Culture and Heritage, the Ministry of Agriculture and Forestry, the Ministry of Foreign Affairs and Trade, the Ministry of Health, the New Zealand Food Safety Authority, the Ministry of Justice, the Ministry of Transport, the Ministry for the Environment, the Ministry of Fisheries, New Zealand Police, the Department of Labour (Immigration Service), the Ministry of Social Development, the Ministry of Economic Development, the Environmental Risk Management Authority New Zealand, the Department of Internal Affairs, the Security Intelligence Service, the Ministry of Consumer Affairs, Inland Revenue, the Ministry of Youth Affairs, the Law Commission, and the Privacy Commissioner.

The following government departments have an interest in the proposals and have been informed: Treasury, Department of Prime Minister and Cabinet, State Services Commission, Government Communications Security Bureau and Te Puni Kōkiri.

Hon Nanaia Mahuta

Customs and Excise Amendment Bill (No 3)

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Customs and Excise Amendment Act **(No 3) 2007**.

2 Commencement

This Act comes into force on a day to be appointed by the Governor-General by Order in Council, and 1 or more orders may be made bringing different provisions into force on different dates.

Part 1
Amendments to principal Act

3 Principal Act amended

This Act amends the Customs and Excise Act 1996.

4 Craft arriving at place other than nominated Customs place

(1) Section 25 is amended by repealing subsection (1) and substituting the following subsections:

"(1) Nothing in section 24 applies to a craft—

"(a) that is required or compelled to berth, land, anchor, or otherwise arrive at a place other than a Customs place, nominated in accordance with section 21(1)(a), if this arrival—

"(i) is required by any statutory or other requirement relating to navigation; or

"(ii) is compelled by accident, stress of weather, or other necessity; or

"(b) that is authorised to berth, land, anchor, or otherwise arrive at a place other than a Customs place by the Chief Executive.

"(1A) An authorisation given under **subsection (1)(b)** may be granted subject to any conditions the Chief Executive considers appropriate (for example, conditions about the passengers and goods that may be carried on the craft).

"(1B) The Chief Executive may not grant any authorisation under **subsection (1)(b)** without consulting the chief executive of—

"(a) the Ministry of Agriculture and Forestry; and

"(b) the Ministry of Health; and

"(c) the New Zealand Police; and

"(d) the Civil Aviation Authority; and

"(e) the authority known as Maritime New Zealand; and

"(f) every other department of State whose operations may, in the Chief Executive's opinion, be affected by the granting of an authorisation under **subsection (1)(b)**.

"(1C) If any craft berths, lands, anchors, or otherwise arrives at a place other than a Customs place by reason of an authorisation under **subsection (1)(b)**,—

"(a) the same powers may be exercised under this Act in relation to that craft as if it had arrived at a Customs place in accordance with Part 3, and the same obligations apply; and

"(b) the same powers may be exercised under this Act in relation to persons and goods on that craft as if those persons or goods were in a Customs controlled area, following arrival of the craft in accordance with Part 3, and the same obligations apply."

5 Persons departing from New Zealand to depart from Customs place

Section 30 is amended by inserting "**section 37** and to" after "Subject to".

6 Departure to be from Customs place only

Section 37 is amended by repealing subsection (2) and substituting the following subsections:

"(2) Nothing in subsection (1) applies to a craft—

"(a) that is required to berth, land, anchor, or otherwise return to a place in New Zealand that is not a Customs place, if this return—

"(i) is required by any statutory or other requirement relating to navigation; or

"(ii) is compelled by accident, stress of weather, or other necessity; or

"(b) that is authorised to depart for a point outside New Zealand from a place in New Zealand other than a Customs place, by the Chief Executive.

"(3) The provisions of **section 25(1A) to (1C)** apply with any necessary modifications in respect of—

"(a) any authorisation given by the Chief Executive under **subsection (2)(b)**; and

"(b) any departure from a place in New Zealand (other than a Customs place) in reliance on such an authorisation."

7 Detention of persons committing or about to commit certain offences

Section 148B(1) is amended by inserting "or 191(1)(e)" after "section 180".

8 Offences in relation to manufacture, movement, and storage of goods

(1) Section 200(2) is amended by inserting "(other than an offence under paragraphs (b) to (d) involving goods that are tobacco)" before "is liable".

(2) Section 200 is amended by inserting the following subsection after subsection (2):

"(2A) Every person who commits an offence against subsection (1)(b), (c), or (d) involving goods that are tobacco is liable on conviction,—

"(a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding $20,000, or to both; or

"(b) in the case of a body corporate, to a fine not exceeding $100,000."

(3) Section 200(3) is amended by inserting "(other than an offence relating to goods that are tobacco)" before "is liable".

(4) Section 200 is amended by adding the following subsections:

"(4) Every person who commits an offence against subsection (1)(e) involving goods that are tobacco is liable on conviction,—

"(a) in the case of an individual, to a term of imprisonment not exceeding 6 months or to a fine not exceeding $20,000, or to both; or

"(b) in the case of a body corporate, to a fine not exceeding $100,000.

"(5) To avoid doubt, in this section, **tobacco** means all tobacco (as defined in section 2(1)), whether manufactured or not manufactured."

9 Offences in relation to importation or exportation of prohibited goods

Section 209 is amended by repealing subsection (1A) and substituting the following subsection:

"(1A) Every person commits an offence who—

"(a) is knowingly concerned in any importation, exportation, transportation, shipment, unshipment, or landing of an objectionable publication; or

"(b) is knowingly concerned in the removal from a Customs controlled area of an objectionable publication or conspires to remove an objectionable publication from a Customs controlled area."

10 Defrauding revenue of Customs

(1) Section 211(2) is amended by inserting "(other than an offence involving goods that are tobacco)" before "is liable".

(2) Section 211 is amended by adding the following subsections:

"(3) Every person who commits an offence against this section involving goods that are tobacco is liable on conviction,—

"(a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding $20,000, or to both; or

"(b) in the case of a body corporate, to a fine not exceeding $100,000.

"(4) To avoid doubt, in this section and **sections 212 and 213**, **tobacco** means all tobacco (as defined in section 2(1)), whether manufactured or not manufactured."

11 Possession or custody of uncustomed goods or prohibited exports

(1) Section 212(2) is amended by inserting "(other than an offence involving goods that are tobacco)" before "is liable".

(2) Section 212 is amended by adding the following subsection:

"(3) Every person who commits an offence against this section involving goods that are tobacco is liable on conviction,—

"(a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding $20,000, or to both; or

"(b) in the case of a body corporate, to a fine not exceeding $100,000."

12 Purchase, sale, exchange, etc, of uncustomed goods or prohibited imports

(1) Section 213(2) is amended by inserting "(other than an offence involving goods that are tobacco)" before "is liable".

(2) Section 213 is amended by adding the following subsection:

"(3) Every person who commits an offence against this section involving goods that are tobacco is liable on conviction,—

"(a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding $20,000, or to both; or

"(b) in the case of a body corporate, to a fine not exceeding $100,000."

13 New heading and sections 231 to 235C substituted

The heading above section 231 and sections 231 to 235 are repealed and the following heading and sections substituted:

"Applications to review seizure of goods

"231 Application for review of seizure

"(1) Any person who has an interest in goods that have been seized under section 226 may, within the time specified in **subsection (2)**, apply in writing to the Chief Executive for a review of the seizure.

"(2) The time is—

"(a) 20 working days after the date on which the notice of seizure is given to the applicant; or

"(b) any further time allowed by the Chief Executive if satisfied that the applicant did not receive the notice of seizure or that a further period is otherwise required in the interests of justice.

"(3) An application under this section may be made on either or both of the following grounds:

"(a) that there was no legal basis for the seizure of the goods:

"(b) that the applicant should, in all the circumstances, be granted relief.

"(4) The application must—

"(a) state the ground or grounds on which it is made; and

"(b) give an address at which the applicant wishes to receive correspondence relating to the application; and

"(c) be sent to the Chief Executive.

"232 Conduct of review

"(1) On receipt of an application under **section 231**, the Chief Executive must conduct the review on the papers unless the Chief Executive otherwise directs.

"(2) In undertaking the review, the Chief Executive—

"(a) must consider the application and any written submissions made by the applicant; and

"(b) may consider any statement, document, information, or matter that in the Chief Executive's opinion may assist the Chief Executive to deal effectively with the subject of the review, whether or not it would be admissible in a court of law.

"(3) The Chief Executive may ask the applicant for supplementary information and have regard to that supplementary information.

"(4) The applicant must establish, on the balance of probabilities, that the applicant has an interest in the seized goods and acquired that interest in good faith.

"**233 Decision on review**

"(1) The Chief Executive must dispose of the application for review by making 1 of the following decisions:

"(a) to dismiss the application for review:

"(b) if satisfied that there was no legal basis for the seizure of all or any of the goods, to disallow the seizure (in whole or in part) and to direct that the goods be given (in whole or in part) to—

"(i) the person from whom the goods were seized; or

"(ii) if the goods were not seized from a particular person, the person who, in the opinion of the Chief Executive, is entitled to possess the goods:

"(c) to grant relief by making any of the determinations described in **section 235** (either unconditionally or subject to any conditions described in that section), if satisfied that it is equitable to do so, having regard to the matters specified in **section 234**.

"(2) The Chief Executive must make his or her decision on the application within 20 working days after the day on which the Chief Executive receives the application.

"(3) If, in the opinion of the Chief Executive, the circumstances of the case do not permit a decision to be made within the period specified in **subsection (2)**, the Chief Executive may extend that period by a further period that is reasonable in the circumstances.

"(4) As soon as practicable after making a decision on the application, the Chief Executive must give written notice of the decision to—

"(a) the applicant; and

"(b) any other person on whom the notice of seizure was served under section 227; and

"(c) any person, other than a person referred to in **paragraph (b)**, who claims an interest in the goods.

"(5) If the application for review is dismissed, the written notice must contain the reasons for the decision.

"(6) The written notice must state that a person who is dissatisfied with the decision of the Chief Executive has a right to appeal to a Customs Appeal Authority against the decision.

"234 Matters concerning grant of relief

The matters the Chief Executive may take into account when deciding whether or not to grant relief include, without limitation:

"(a) the seriousness and nature of any act or omission giving rise to the seizure:

"(b) whether or not the person who is alleged to have done any act or omitted to do any act giving rise to the seizure has previously engaged in any similar conduct:

"(c) whether the seizure has arisen from, or is related to, a deliberate breach of the law:

"(d) the nature, quality, quantity, and estimated value of the seized goods:

"(e) the nature and extent of any loss or damage suffered by any person as a consequence of the seizure:

"(f) whether or not granting relief would undermine the purpose or objective of any import or export prohibition or restriction imposed by this Act:

"(g) the effect of any other action that has been taken or is proposed to be taken in respect of any offending related to the seizure.

"235 Determinations where relief granted

"(1) If the Chief Executive decides, under **section 233(1)(c)**, to grant relief, the Chief Executive may do so by making any of the following determinations:

"(a) that the goods be given to the applicant or to another person who, but for the seizure, is entitled to their possession:

"(b) that the goods be sold and that 1 or more of the following persons be paid the part or parts of the proceeds that the Chief Executive specifies:

"(i) the applicant:

"(ii) any other person who has an interest in the goods:

"(iii) the Crown.

"(2) The Chief Executive may make a determination described in this section subject to any conditions that the Chief Executive thinks just.

"(3) Without limiting **subsection (2)**, the Chief Executive may impose any of the following conditions:

"(a) that there be paid to the Crown in respect of the seized goods a sum equal to the whole or any part of 1 or more of the following:

"(i) any costs or expenses incurred by the Customs in transporting, storing, or disposing of the goods (including returning or giving the goods to any person), or any incidental costs or expenses relating to their detention:

"(ii) any duty not already paid:

"(iii) any duty already refunded:

"(iv) the value of the detained goods, as determined by the Chief Executive:

"(b) that the goods be modified, in a manner directed by the Chief Executive, so as to render them inoperable for unlawful purposes:

"(c) that the costs or expenses incurred by the Customs in modifying the goods in accordance with a direction under **paragraph (b)** be paid to the Crown.

"(4) The Chief Executive must not make a determination described in this section if he or she is of the opinion that all or any of the goods may be required to be produced in evidence in any criminal proceedings.

"235A Condemnation of seized goods

"(1) If the Chief Executive dismisses an application for review, the dismissal is deemed to be an order for condemnation of the goods to the Crown.

"(2) The order for condemnation of the goods takes effect on the close of the 20th working day after the Chief Executive gives his or her decision on the application unless an appeal against the decision on the application is lodged before then.

"(3) If no application for review is made within the time specified by **section 231(2)**, or if such an application is discontinued, the seized goods are condemned to the Crown.

"Appeal from review

"235B Right of appeal to Customs Appeal Authority from decision on review

"(1) A person who is dissatisfied with a decision of the Chief Executive made under **section 233** (including any determination or condition described in **section 235**) may appeal to a Customs Appeal Authority against the decision or any part of the decision.

"(2) The appeal must be brought within 20 working days after the date on which notice of the decision under **section 233** is given.

"235C Condemnation of goods subject to appeal

The goods that are the subject of an appeal under **section 235B** are condemned to the Crown if—

"(a) the appeal is discontinued; or

"(b) the decision of the Customs Appeal Authority on the appeal does not—

"(i) disallow the seizure of the goods under **section 233(1)(b)** (as applied by section 255(1)); or

"(ii) grant relief under **section 233(1)(c)** (as applied by section 255(1))."

14 Regulations

Section 286 is amended by inserting the following subsection after subsection (1):

"(1A) Without limiting subsection (1)(a), any regulations made under that provision prescribing areas used for the manufacture or processing of goods that are exempted from the requirement of section 10 to be licensed as a Customs controlled area may impose conditions—

"(a) as to the nature of the goods being manufactured or processed:

"(b) as to the source of the product being manufactured or processed:

"(c) limiting the use that may be made of the goods (for example, permitting personal use only):

"(d) limiting the age of any person involved in the manufacture or use of the goods:

"(e) limiting the quantity of goods that may be produced by any measure or other form of description."

15 Chief Executive may make rules for certain purposes

Section 288(1)(a) is amended by inserting "or outward reports" after "inward reports".

Part 2
Consequential amendments and transitional provisions

16 Protected Objects Act 1975 amended

Section 10(1), (1A), and (3) of the Protected Objects Act 1975 are amended by omitting "235" and substituting in each case "**231(3)(b), 233(1)(c), 234, 235, 235C(b)(ii)**".

17 Misuse of Drugs (Prohibition of Cannabis Utensils and Methamphetamine Utensils) Notice 2003 amended

The definition of **prohibited goods power, function, or duty** in clause 3 of the Misuse of Drugs (Prohibition of Cannabis Utensils and Methamphetamine Utensils) Notice 2003 is amended by revoking paragraph (a) and substituting the following paragraph:

"(a) the power under **section 233(1)(c)** of that Act to grant relief in respect of seized goods; and"

18 United Nations (Iraq) Reconstruction Regulations 2003 amended

Regulation 12(1) and (2) of the United Nations (Iraq) Reconstruction Regulations 2003 are amended by omitting "235" and substituting in each case "**231(3)(b), 233(1)(c), 234, 235, 235C(b)(ii)**".

Transitional provision

19 Transitional provision

Sections 231 to 235 of the principal Act, as in force before the commencement of this Act, continue to apply in respect of goods seized, under section 226 of the principal Act, before the commencement of this Act.

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