

# **Customs and Excise Amendment Bill (No 3)**

Government Bill

As reported from the Foreign Affairs,  
Defence and Trade Committee

## **Commentary**

### **Recommendation**

The Foreign Affairs, Defence and Trade Committee has examined the Customs and Excise Amendment Bill (No 3) and recommends that it be passed with the amendments shown.

### **Introduction**

The bill makes a number of amendments to the Customs and Excise Act 1996 to enhance the statutory appeal and review rights in relation to the forfeiture and seizure regime contained in the Act, to provide more flexibility for Customs to deal with ad hoc arrivals and departures, and to give Customs better control over illegal tobacco manufacturing operations. A particular issue of interest to us in the examination of this bill was the personal use exemption on the growth and manufacture of tobacco.

### **Personal use exemptions on tobacco**

The majority of us recommend that new clause 6A be inserted in the bill. This new clause would bring an exemption, which allowed the manufacture of tobacco leaf into products that can be smoked, from delegated legislation into primary legislation.

Under the current regime for the control and manufacture of tobacco it is illegal to manufacture tobacco products outside of a licensed Customs Controlled Area. The only exception to this requirement is a “personal use” exemption, which allows the manufacture of tobacco leaf into products that can be smoked. It was envisaged in this bill that this exemption would be contained in delegated legislation.

The majority of us believe that this new clause is necessary, as this bill proposes to increase the maximum penalties relating to offences around the manufacture, movement, and storage of tobacco from fines to a fine or term of imprisonment.

The majority of us strongly support the principle that all offences, and their related exemptions, punishable by a term of imprisonment should be contained in primary legislation rather than delegated legislation. It is fundamental that individuals faced with possible imprisonment for breaching the law have the certainty of primary legislation. The flexibility and speed with which delegated legislation can be amended could create an uncertainty that is undesirable.

The majority of us note that in bringing the exemption for tobacco into primary legislation we will have created an anomaly in leaving a similar exemption for alcohol in delegated legislation. The majority of us therefore urge the House to consider correcting this anomaly by bringing all exemptions envisaged by this bill relating to offences punishable by imprisonment into primary legislation.

Further, this exemption sets a limit on the amount of tobacco a person may cultivate under the personal use exemption. The committee discussed this limit at length. The majority of us believe that 15 kilograms is a realistically enforceable figure, which would allow the Customs Service to control the growth and manufacture of tobacco in New Zealand effectively. This limit and scheme is based on the Canadian personal use exemption figure.

The majority of us also recommend a number of consequential amendments to the bill to reflect the changes in new clause 6A.

**Labour Party minority view**

The Labour Party members believe that the bill as introduced provided for stronger regulation making powers in the Act as one of a set of measures for better control of illegal tobacco manufacture. The conditions under which people could manufacture tobacco products for their personal use without being subject to Customs controls would be set out in regulations. The ability to create “personal use” exemptions by regulation gives flexibility and allows for relatively quick changes if exemptions are being missed. It would also be consistent with other exemptions from Customs controls (e.g. for home-brew of beer) which are created by regulations.

The option of putting the “personal use” exemption for tobacco into the Act itself, rather than in regulations, reduces flexibility in the ability to control the black-market illegal tobacco trade and is inconsistent with similar control arrangements. Such a mechanism might need to be revisited.

**Green Party minority view**

The Green Party member opposed writing into the legislation a limit of 15 kilograms for the personal use exemption as evidence received suggested that such a high limit was not appropriate.

**Minor amendments**

We recommend a number of minor and consequential amendments to the bill.

As clause 15 authorises the requirements for outward reports to be prescribed by rules, we propose inserting a new clause 14(1) to remove the same topic from the regulation-making power in the Act.

We recommend that new clause 18A be inserted into the bill to take account of the transitional arrangements necessary for the first year of the use of the legislation.

## **Appendix**

### **Committee process**

The Customs and Excise Amendment Bill (No 3) was referred to the committee on 11 December 2007. The closing date for submissions was 18 February 2008. We received and heard one submission from an interested group.

We received advice from the New Zealand Customs Service.

### **Committee membership**

Martin Gallagher (Chairperson)

Dr Wayne Mapp (Deputy Chairperson)

Taito Phillip Field

Tim Groser

John Hayes

Keith Locke

Hon Murray McCully

Jill Pettis (from 1 April 2008)

H V Ross Robertson

Dianne Yates (until 29 March 2008)

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted by a majority

text inserted unanimously

text deleted unanimously

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*Hon Nanaia Mahuta*

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Government Bill

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**The Parliament of New Zealand enacts as follows:**

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

**2 Commencement**

- (1) Sections 3, 7, and 9 come into force on the day after the date on which this Act receives the Royal assent.
- (2) Sections 3A, 6A, 6B, 16A, and 18A come into force on 1 August 2008. 5
- (3) ~~This~~ The rest of 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** 10

**Amendments to principal Act**

**3 Principal Act amended**

This Act amends the Customs and Excise Act 1996.

**3A Customs controlled areas**

Section 10 is amended by omitting “section 12(4)” and substituting “sections 12(4) and 68A”. 15

**4 Craft arriving at place other than nominated Customs place**

Section 25 is amended by repealing subsection (1) and substituting the following subsections: 20

- “(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— 25
    - “(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. 30
- “(1A) An authorisation given under **subsection (1)(b)** may be granted subject to any conditions the Chief Executive consid-

ers 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— 5
- “(a) the Ministry of Agriculture and Forestry; and
  - “(b) the Ministry of Health; and
  - “(c) the New Zealand Police; and
  - “(d) if the proposed authorisation relates to an aircraft, the Civil Aviation Authority; and 10
  - “(e) if the proposed authorisation relates to a ship, 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)**. 15
- “(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 20
  - “(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.” 25

## 5 Persons departing from New Zealand to depart from Customs place

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

## 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— 35

- “(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 5
  - “(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. 10
- “(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.” 15

**6A New section 68A inserted**

The following section is inserted after section 68:

**“68A Exemption for tobacco manufactured for personal use**

- “(1) Section 68 does not apply to the manufacture of tobacco in a private house or dwelling place, but only if and as long as the conditions specified in **subsection (2)** are met. 20
- “(2) The conditions are as follows:
  - “(a) the tobacco must be manufactured by an individual (the **individual**) who is 18 years or older; 25
  - “(b) the individual must manufacture the tobacco in the individual’s private house or dwelling place, for the individual’s personal use and not for sale to any other person;
  - “(c) the leaves or plants used in the manufacture of the tobacco must have been grown— 30
    - “(i) on the land on which the individual’s private house or dwelling place is located; and
    - “(ii) for the individual’s personal use and not for sale or other disposition to any other person; 35
  - “(d) the amount of manufactured tobacco that is manufactured in the individual’s private house or dwelling place,

in any year ending with 30 June, must not exceed 15 kilograms.”

- 6B Excise duty manufactured otherwise than in a manufacturing area**  
Section 74(2) is amended by adding “; or” and also by adding the following paragraph: 5  
“(c) that are manufactured in accordance with the conditions specified by **section 68A.**”
- 7 Detention of persons committing or about to commit certain offences** 10  
 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”. 15
- (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,— 20
- “(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 25
- “(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: 30
- “(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
- “(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 10**
- 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 15
- “(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.” 20
- 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,— 25
- “(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. 30
- “(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: 5
- “(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 10
- “(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”. 15
- (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 20
- “(b) in the case of a body corporate, to a fine not exceeding \$100,000.”
- 13 New heading and sections 231 to 235C substituted** 25
- 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. 30
- “(2) The time is—
- “(a) 20 working days after the date on which the notice of seizure is given to the applicant; or 35

- “(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: 5
- “(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— 10
- “(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** 15
- “(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 20
- “(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. 25
- “(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. 30
- “233 **Decision on review**
- “(1) The Chief Executive must dispose of the application for review by making 1 of the following decisions: 35
- “(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 5
  - “(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**. 10
- “(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. 15
- “(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. 20
- “(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 25
  - “(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. 30
- “(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: 5
- “(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: 10
- “(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: 15
- “(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. 20

**“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: 25
  - “(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: 30
    - “(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. 35

- “(3) Without limiting **subsection (2)**, the Chief Executive may impose any of the following conditions:
- “(a) that there be paid to the Crown Customs in respect of the seized goods a sum equal to the whole or any part of 1 or more of the following: 5
- “(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: 10
- “(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: 15
- “(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 Customs. 20
- “(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** 25
- “(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. 30
- “(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. 35

*“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. 5
- “(2) The appeal must be brought within 20 working days after the date on which notice of the decision under **section 233** is given. 10

**“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 15
- “(b) the decision of the Customs Appeal Authority on the appeal ~~does not~~ neither—
  - “(i) ~~disallows~~ the seizure of the goods under **section 233(1)(b)** (as applied by section 255(1)); ~~or nor~~ 20
  - “(ii) ~~grants~~ relief under **section 233(1)(c)** (as applied by section 255(1)).” 25

**14 Regulations**

- (1) Section 286(1) is amended by repealing paragraph (ga) and substituting the following paragraph: 25
  - “(ga) prescribing the time within which outward reports required by section 34 must be delivered to the Customs:” 25
- (2) 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 (other than tobacco) that are exempted from the requirement of section 10 to be licensed as a Customs controlled area may impose conditions— 30
    - “(a) as to the nature of the goods being manufactured or processed: 35

- “(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: 5
- “(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”. 10

**Part 2**

**Consequential amendments and transitional provisions**

**16 Protected Objects Act 1975 amended** 15

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)**”.

**16A Customs and Excise Regulations 1996 amended**

Regulation 7(a) of the Customs and Excise Regulations 1996 is revoked. 20

**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: 25

“(a) the power under **section 233(1)(c)** of that Act to grant relief in respect of seized goods; and”. 30

**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 provisions*

**18A Transitional provision relating to exemption for tobacco manufactured for personal use**

Until the close of 30 June 2009, **section 68A(2)(d)** of the principal Act, as inserted by **section 6A** of this Act, must be read as if for “any year ending with 30 June” there were substituted “the period commencing on 1 August 2008 and ending with the close of 30 June 2009”.

**19 Transitional provision relating to appeals against seizure**

Sections 231 to 235 of the principal Act, as in force before the commencement of **section 13** of this Act, continue to apply in respect of goods seized, under section 226 of the principal Act, before the commencement of **section 13** of this Act.

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**Legislative history**

4 December 2007	Introduction (Bill 186–1)
11 December 2007	First reading and referral to Foreign Affairs, Defence and Trade Committee

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