

## Regulatory Impact Statement

### Customs and Excise Act Review: Managing and Disclosing Information

#### Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the New Zealand Customs Service (Customs). It analyses options to improve the legislative framework under which Customs manages and discloses personal and commercially confidential information. In particular options for a legislative framework that would enable greater disclosure of Customs' information are analysed.

The constraints on the analysis in this RIS are:

- Customs also discloses personal and commercial information under the provisions of the Privacy Act 1993 and the Official Information Act 1982. The scope of potential reform is limited to the Customs and Excise Act 1996. The options developed for analysis are designed to operate in conjunction with those pieces of legislation, and borrow extensively from the principles established therein.
- Non-legislative factors are also contributing to the problem as defined, such as fear of breaching privacy laws, and inconsistent decision making through assigning different weightings to privacy and competing interests. A revised legislative framework can only partially address these factors.
- The analysis is qualitative and considers the benefits and risks of the status quo and alternative options. Expected outcomes cannot be predicted with certainty or quantified. The alternative options, if adopted, would widen the potential opportunities for information disclosure, particularly within government, but the outcomes would depend on what agencies (ie other than Customs) choose to make of those opportunities.

The preferred option is not assessed as imposing any additional compliance costs on business or travellers – that is it would not require these parties to supply additional or new information. It may, however, increase costs to business of interacting with government agencies over proposals for information disclosure depending on what opportunities government agencies identify for new information disclosure. The preferred option will not impair competition or incentives to innovate or invest. It will, if adopted, require minor, one-off, changes to Customs' procedures and will require agencies who wish to receive any of Customs' information on an ongoing basis to incur costs to establish information disclosure agreements with Customs.

*Signed by Michael Papesch on 8 September 2015.*

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8 September 2015

## Status Quo and problem definition

### Existing legislative framework and Government decisions

1. The Customs and Excise Act 1996 (the Act) establishes the responsibilities of participants in the trade and travel supply chains to supply information to Customs which is then used by Customs to carry out its functions. The Act sets out how this information is to be specified and places certain duties, responsibilities or limitations around Customs' use of it.
2. The success of Customs' intelligence-led approach to border management depends on Customs having timely access to information about the cross-border movement of goods, persons and craft which enables Customs to protect the border while facilitating the movement of legitimate trade and travel.
3. Under the Act, Customs collects a large amount of data on all goods, people, and craft that cross New Zealand's border. Customs also generates a substantial amount of information in its own right from carrying out its functions, for example the results of interactions with passengers, inspections of goods consignments, and intelligence products and profiles. Customs' information holdings have value to a range of government law enforcement, regulatory and policy agencies and, potentially, the private sector. Customs' information holdings also have value in supporting New Zealand's participation in various international treaties and agreements.
4. The current Act is the result of a process of review and modernisation in the early 1990s, but is in many ways a re-enactment of the Customs Act 1966 (which itself borrowed heavily from the Customs Act 1913). Since 1996 the information-related parts of the Act have been extensively amended and added to. This includes amendments to give means to use Customs' data to achieve wider government outcomes. The Act has not been comprehensively updated since 1996 although information management principles, policy and practice have evolved considerably since that time.
5. On 13 November 2013 Cabinet approved a review of the Act [EGI Min (13) 27/13 refers]. Ministers noted that a review is required due to the Act's increasing inability to efficiently respond to changes in technology, business practices and government policy. Ministers noted that the Act is overly prescriptive and is becoming increasingly unworkable in an environment designed to enhance facilitation of low risk passengers, goods and craft through border processes.

### Problem definition - overview

6. Government expectations (eg Better Public Services) are that the efficiency and effectiveness of public services is improved through information sharing in ways that give New Zealanders trust and confidence that privacy and commercial confidentiality are respected.
7. The Act is having negative impacts on the efficiency and effectiveness of Customs' information disclosure, particularly for wider government purposes. It contains multiple disclosure regimes which can overlap, causing uncertainty about which

regime to apply. Different regimes also treat the same information in different ways. For example, it is simpler for Customs to disclose personal information to a customs agency overseas than to the New Zealand Police.

8. There are gaps in the disclosure regimes in the Act. Where the Act (or another Act) does not specify a particular duty, responsibility, limitation or process, Customs' management of its information holdings (including disclosure) is governed by the provisions of the Privacy Act 1992 and the Official Information Act 1982. Despite the prescriptive nature of the Act, many requests for Customs' information have to be considered against overarching legislation such as the Official Information Act or the Privacy Act.
9. The lack of transparency means that it is difficult for travellers and business to understand how the information they supply to Customs may be disclosed and for what purposes, which can negatively impact on the trust that has built up. Customs relies on accurate and complete data for effective risk management. It is therefore important that Customs maintains the trust and confidence of travellers and the business community so that they are not discouraged from providing complete and accurate information in the future.
10. Changes in technology and government priorities and expectations around information means that Customs must change its legislative status quo so that it can maintain and build trust in the way information is handled, while maximising value for New Zealand from the information that it holds. At the same time, the legislative framework must ensure that: information is only collected, accessed, used and disclosed for clear, legally-supported, purposes; the information collected is protected by appropriate security measures; and information is protected from inappropriate access or use by users of Customs' systems.

#### **The current Act leads to lost opportunities**

11. There is unmet demand within the public sector for ongoing access to certain classes of Customs' information. Customs has spoken to 15 different government agencies (including core public departments, crown agents and independent crown entities) and discovered unmet demand for Customs' information to support government functions, for example:
  - to support regulatory functions around product standards - access to import data by agencies such as the Commerce Commission and the Environmental Protection Agency
  - law enforcement and national security – ongoing sharing of information and intelligence to combat organised crime eg taskforces established under the Government's Whole of Government Action Plan to Minimise the Harm Caused by Adult Gangs in New Zealand
  - to deliver business prosperity – identifying businesses to be consulted by the Ministry of Foreign Affairs and Trade during Free Trade Agreement negotiations and for follow-up outreach programmes.

12. The Act limits Customs' ability to respond to new information disclosure requests and methods. Because there are very specific purposes in the Act for information disclosure, where disclosure does not fit these purposes Customs must rely on the Privacy and Official Information Acts to fill the gap. This does not provide a clear basis to support decision-making. For example, the principal issue in Customs disclosing trade information is that of commercial confidentiality (trade information generally only contains a small proportion of private information such as the names and addresses of sole trader importers) which the Privacy Act does not cover, and the Official Information Act only provides limited guidance.
13. Using the Official Information Act and Privacy Act means that each case for disclosure must be treated on a case by case basis. Except to border agencies, Customs has no ability under the Act to establish a process for regular, systematic disclosure of commercial information.
14. The specified functions of agencies which Customs can disclose to, do not cover agencies without border or law enforcement functions. This is to the detriment of the protection of the New Zealand border – the border is unable to be 'pushed out'. For example, the Act permits Customs to disclose passenger information to overseas agencies whose functions include protecting public health and safety. However, the Act does not permit us to share information other than passenger information with those same overseas agencies.
15. There are potential benefits from bringing together and standardising (as far as possible) information disclosure requirements, including duties and accountabilities, across the Act. These benefits would come from increased operational efficiency and means to support wider government outcomes, along with providing surety to commercial stakeholders about the management of commercially confidential information. This would support greater information disclosure while not undermining the voluntary provision of the information Customs needs to carry out its functions.

#### **The current Act leads to inefficiencies in information disclosure**

16. Direct access means allowing staff from an agency external to Customs to log directly into Customs IT systems (including remotely) to access information. Allowing direct access to certain classes of Customs' information is an efficient way to support information disclosure where there is a large volume of ongoing requests of a similar nature.
17. Currently, the Act allows Customs to grant direct access to its information holdings (within limits) to Police and the Security Intelligence Service for counter-terrorism purposes. Direct access to limited sets of Customs' information holdings may also be given to other border agencies to carry out their functions.
18. There is potential for greater efficiencies in Customs' information disclosure if the Act were to permit a greater range of purposes for which direct access may be granted. For example, Customs currently cannot provide direct access for general law enforcement purposes. Falling within this general law enforcement purpose, INTERPOL generates 500 requests per week but are unable to have these met

due to resource constraints in Customs. Allowing Police direct access for this purpose would enable this demand to be met at a fraction of the resource cost.

19. Direct access carries with it high risk for both personal and commercial information, and for this reason it needs to be enabled by primary legislation and be subject to specific accountabilities. An accepted legislative framework for direct access is contained in Section 280M of the Act. The option of extending the range of functions for which direct access may be granted to include law enforcement, national security, border protection and processing, and revenue assurance would potentially assist with information disclosure to improve public services.

**The Act does not have the elements expected of a modern legislative framework for information management and disclosure...**

20. The Act does not contain the accountabilities expected in today's environment of an agency dealing with substantial amounts of data which can (and could further) be disclosed for a range of purposes under appropriate limits and protections. Unless Customs expands its accountabilities it cannot expand its ability to disclose information to achieve its objectives and those of wider government. An appropriate balance must be struck.
21. The Act has no statement outlining Customs' purposes for collecting, using and disclosing information and little accountability for how Customs must treat that information. Best practice legislative frameworks include a purpose statement to provide clarity and guidance as to what an agency is accountable for, where other Acts apply, and to translate into legislation the goals for the legislative framework.
22. The Act does not define what makes up 'Customs' information' making it difficult to design a transparent regime for managing that information. The privacy and commercial risks from disclosure are larger if the exact information to be disclosed cannot be defined.

**...and lags behind international recommended practice**

23. The Act does not reflect international recommended practice for the management of certain categories of sensitive personal information, in particular airline Passenger Name Record (PNR) data.
24. The Act has become increasingly out of alignment with international recommended practice in respect of PNR through:
  - leaving matters that are arguably best dealt with in primary legislation to policy and practice
  - continuing to permit certain practices that do not align with International Civil Aviation Organisation (ICAO) recommended practice
  - containing provisions which will become redundant as the process for Customs obtaining PNR data changes in line with ICAO recommended practice.

25. A risk to New Zealand's reputation is that the Act continues to permit Customs to adopt practices that do not conform to ICAO recommended practice and which could involve costs for airlines and risks to the privacy of passengers.

## Goal and Objectives

26. To identify options, Customs has developed the following goal and objectives for a legislative framework for the management and disclosure of Customs' information holdings.
27. The goal is for Customs to operate under a coherent, transparent legislative framework for collecting, using, storing, disclosing and disposing of information. The objectives in achieving the goal are to:
- increase certainty about how Customs must manage its information, and the circumstances and conditions under which information may be disclosed
  - facilitate information disclosure where it would have net benefits
  - ensure that Customs receives accurate information at the right time, and that Customs collects the information it needs in the most efficient and effective way
  - ensure that personal and commercially confidential information receives appropriate levels of protection, particularly when disclosed by Customs to third parties
  - achieve closer alignment with international recommended practice
  - maintain the trust and confidence of travellers and the business community in the way that Customs collects, uses, stores, discloses and disposes of information so that they are not discouraged from providing complete and accurate information in the future
  - ensure Customs has the flexibility to respond to changes in its operating environment over time.
28. With the Ministry of Justice, Customs developed a model to help design a new legislative framework for information that ensures support for Customs' approach to voluntary compliance. The model aligns with the principles proposed by the New Zealand Data Futures Forum (and endorsed by Cabinet [EGI Min (15) 1/2]) and the New Zealand Data and Information Management principles.
29. The model's underlying principle is that the public must have trust and confidence in how the government looks after their information. To achieve this, the model is built on three core elements:
- transparency of the legislative framework for information, particularly the purposes for which Customs collects and discloses information
  - appropriate accountabilities for how information is managed and disclosed
  - clarity about when the public can participate in decisions about their information, and when public participation is not possible or can be done via a proxy, such as the Privacy Commissioner.

### A model for trust and confidence



30. To be considered feasible, options for a new legislative framework had to include appropriate provisions to address the delivery of each element of the above model.

### Regulatory Impact Analysis

31. Changes to the regulatory regime have to be made by legislative amendment. This RIS focuses on the extent to which identified gaps and problems in the current legislative framework can be addressed by a new legislative framework.
32. Non-legislative factors are also contributing to the problems as defined, such as fear of breaching privacy laws, and inconsistent decision making through assigning different weightings to privacy and competing interests. A revised legislative framework can only partially address these factors.
33. Two options for a revised and updated legislative framework were assessed as feasible and as meeting the objectives. An overview of each option is set out in the table below:

Option one - modernisation of information management and standardisation of information disclosure	Option two – modernisation of information management and expansion of information disclosure
Create a modern, simplified, consolidated legislative framework with new duties and accountabilities on Customs in its management of information	Create a modern, simplified, consolidated legislative framework with new duties and accountabilities on Customs in its management of information
Bring the Act into closer alignment with ICAO recommended practice for PNR	Bring the Act into closer alignment with ICAO recommended practice for PNR
Maintain the purposes for disclosing Customs' information within the limits specified by the current Act	Increase the ability under the legislative framework to disclose information: <ul style="list-style-type: none"> <li>• within government and internationally through adding additional functions.</li> <li>• With non-government entities</li> </ul>
Maintain the different processes for creating disclosure arrangements depending on the purpose of disclosure and to whom the information is disclosed	Increase the ability under the legislative framework to disclose information: <ul style="list-style-type: none"> <li>• within government and internationally through adding additional functions.</li> <li>• With non-government entities</li> </ul>
Direct access able to be granted for counter terrorism and border processing purposes only	Expand the ability to grant direct access with appropriate restrictions and controls, to include agencies with law enforcement, national security, border protection and processing, and revenue assurance functions



34. The two options were assessed against a range of criteria as summarised in the table below:

Relevant criteria		Option one	Option two
<b>Efficiency</b>	Support efficient use of administrative resources and information technology	<b>x</b>	✓
<b>Effectiveness</b>	Supports Customs' and wider government objectives with appropriate protections	<b>x</b>	✓
<b>Transparency</b>	The purposes for information disclosure are clear. Information disclosure agreements are publically available.	✓	✓
<b>Compliance impacts</b>	Does not impact on the compliance responsibilities of travellers and businesses to provide information.	✓	✓
<b>Consistency</b>	promotes consistent application of principles and decision marking	✓	✓
<b>Responsiveness</b>	adaptable to changes in the demand for information and how it is supplied.	<b>x</b>	✓
<b>International standards and practice</b>	achieves closer alignment with international standards and recommended practice	✓	✓
<b>Feasibility</b>	Information management processes are administratively feasible and are capable of being delivered through IT systems.	✓	✓
<b>Proportionality</b>	Processes and duties are proportionate to the risks being managed and the outcomes sought.	<b>x</b>	✓

35. Option two is assessed as better meeting the criteria than option one.
36. Option one would increase transparency and Customs' accountability in comparison to the status quo. It would simplify information disclosure by standardising the approach within the current limits of the legislation. However, it would perpetuate two principal limitations of the current legislative framework: the limited purposes and functions for which Customs may disclose information; and not supporting the best use of administrative resources and information technology through limiting the ways that information may be disclosed.
37. Option two would provide a means by which the potential demand for information disclosure could be met (with appropriate protections), and allow for information disclosure processes that promote more efficient use of Customs' and other agencies' resources. Option two is Customs' preferred option.

#### **Evaluation of options for a disclosure mechanism**

38. With information disclosure, the aspect of the legislative framework with the most influence on the relative incidence and quantum of compliance and administration costs is the process required to establish arrangements for the ongoing disclosure of information. The elements of this process are also critical to delivering appropriate levels of transparency and participation in decisions to disclose information. More prescriptive approaches tend to impose greater compliance costs on industry and travellers (costs of participating in decision-making) and higher administration costs on Customs and wider government compared to a framework which leaves more elements to administrative decision making. These higher costs need to be weighed against the benefits of better management over the risk of improper disclosure of personal or commercially confidential information that can come from higher levels of prescription.
39. The status quo is a mixture of approaches. There would be benefits from standardising the approach across all of Customs' information holdings.
40. Five options for the information disclosure regime are considered feasible:

Primary Legislation	Information disclosure arrangements for specified purposes are authorised only in primary legislation.
Regulation	The legislation sets a framework for information disclosure with regulations made under the primary Act required to implement specific information disclosure arrangements.
Approved Information Sharing Arrangement (AISA)	Use the existing mechanism contained in the Privacy Act for information disclosure.
By arrangement made under the Primary Act	The legislation sets a framework for information disclosure with an arrangement made under the primary Act required to implement specific information disclosure arrangements.
Administrative decision	The legislation sets a framework for information disclosure with information disclosure left to the administrative decision of Customs within this framework.

41. These options were evaluated against criteria as follows:

Criterion	Act	Regulation	AISA	Arrangement	Administrative decision
Effectiveness in meeting objectives for information disclosure	✓	✓	✗	✓	✓
Administration and compliance costs	High	Medium-high	Medium	Medium	Low
Transparency	✓	✓	✓	✓	✗
Consistency	✓	✓	✓	✓	✗
Responsiveness	✗	✗	✓	✓	✓

42. A greater weighting was given to criteria of effectiveness, transparency and consistency as these factors address principal problems with the status quo legislative framework. The AISA option was rejected under the effectiveness criterion as an AISA is designed for the disclosure of personal information, and does not meet stakeholders' expectations as an overarching framework to protect commercially confidential information. In other respects the AISA and "By Arrangement" options are very similar in approach and expected impacts. "By Arrangement" is an existing model that has been tested with stakeholders and Parliament – in the changes made to the Act (section 280M) for the Police and Security Intelligence Service for counter-terrorism purposes.
43. By Arrangement is Customs' preferred option for the disclosure mechanism. It is expected to provide a standardised, simplified approach, which delivers greater transparency for how Customs discloses information with consistent accountabilities. It will allow flexibility in developing bespoke requirements for different types of information users.

**Evaluation of the preferred option against the status quo**

44. As a package, the incidence of benefits, costs and risks that would be expected to result from implementation of a new legislative framework as specified is set out in the table below:

	Benefits over and above the status quo	Costs over and above the status quo
To Customs	<p>Reduced risk of breaches of privacy or commercial confidentiality</p> <p>More efficient use of administrative resources and IT systems</p> <p>Maintain international reputation</p> <p>Maintain the trust and confidence of business and the public that information is being used and managed within boundaries and protections</p>	<p>One-off costs of making changes to procedures</p> <p>Ongoing costs of creating and administering information disclosure arrangements</p>
To Wider Government	<p>More efficient means to use Customs' information for a range of government purposes</p> <p>Improved outcomes in law enforcement and regulatory oversight</p>	<p>Costs of developing information disclosure arrangements</p>
To Business and travellers	<p>Greater certainty and transparency in how information is being managed by Customs and disclosed to government and third parties</p> <p>Reduced risk of personal or commercially confidential information being disclosed without proper controls</p> <p>Closer alignment with international standards and recommended practice</p>	<p>Costs of interacting with government agencies over proposals for information disclosure may increase</p>

45. A limitation is that the benefits, costs and risks can only be analysed qualitatively. While a new legislative framework, if adopted, would widen the potential opportunities for information disclosure, particularly within government, the outcomes depend on what agencies (ie other than Customs) choose to make of those opportunities.

46. A new legislative framework is not assessed as imposing any additional compliance costs on business or travellers – that is it would not require these parties to supply additional or new information to Customs. It may, however increase costs to business of interacting with government agencies over proposals for information disclosure depending on what opportunities government agencies identify for new information disclosure. The new legislative framework will not impair competition or incentives to innovate or invest.
47. It will, if adopted, require minor, one-off, changes to Customs' procedures and will require agencies who wish to use Customs' information on an ongoing basis to incur costs to establish information disclosure arrangements with Customs.

## Consultation

48. The review of the Customs and Excise Act has been informed by public consultation over proposals contained in a Discussion Paper that was open for submissions from March to May 2015. Submissions were received from 89 individuals and organisations, of which 20 commented on the information framework and 14 on the information disclosure proposals.
49. Through the public consultation process, submissions on the information management aspect of the review emphasised that while they have a high level of trust in Customs, that there is a lack of transparency in how Customs manages and discloses information. Submitters sought more clarity in the legislation and evidence that the legislative framework encourages Customs to adopt international best practice. It was agreed that PNR needs particular protections given the sensitivities around it. Appropriate protections are needed for privacy and security expectations for collecting, storing and disclosing such information.
50. The submissions that commented on information disclosure had three common themes:
  - the commercial sector wants explicit protections for commercially sensitive information
  - concern about the enforceability of restrictions on further passing on of Customs' disclosed information, especially when disclosed to an overseas agency
  - concern that there were risks to competitiveness and commercial confidentiality from the potential to disclose information to the private sector.
51. These themes were considered in the development and analysis of options. Customs has subsequently undertaken more in-depth consultation with a Stakeholder Reference Group established for the review. The Group includes representatives from the Importer's Institute, NZ Shippers' Council Inc, Port CEO Forum, New Zealand Airports' Association, Business New Zealand/Export New Zealand, Board of Airline Representatives NZ Inc, International Container Lines Committee, Customs Brokers and Freight Forwarders Federation of NZ, and the Conference of Asia Pacific Express Carriers. The Group has assisted in developing and refining the specific proposals.

52. The Office of the Privacy Commissioner and the Ministry of Justice were closely involved in the development and analysis of the information management and disclosure options.
53. The following agencies were consulted over the Cabinet papers for the information framework and information disclosure regimes: Commerce Commission; Crown Law Office, Department of Internal Affairs; Energy Efficiency and Conservation Authority; Environmental Protection Agency; Inland Revenue; Ministry for Primary Industries; Ministry of Business, Innovation, and Employment; Ministry of Foreign Affairs and Trade; Ministry of Health; Ministry of Justice; Ministry of Transport; Ministry of Social Development; New Zealand Police; New Zealand Security Intelligence Service; New Zealand Trade and Enterprise; Office of the Ombudsman; Office of the Privacy Commissioner; Parliamentary Counsel Office; Statistics New Zealand; and the Treasury.

## **Implementation**

54. The recommended option, if agreed, will be given effect by new legislation replacing the Customs and Excise Act 1996. Customs is setting up a team dedicated to implementation of the new legislation across all fronts. The work of this team will feed into the areas of Customs' business that will undertake specific implementation functions.
55. The proposals in this paper will have minor financial implications for Customs in terms of one-off changes to procedures and development and ongoing administration of information disclosure. Existing information sharing arrangements will be reviewed on an "as needed" basis to achieve consistency with the new legislative framework.
56. Any financial implications resulting from the proposals in this paper will be considered in the context of Customs' implementation plan, and will be reported back to Cabinet prior to the introduction of the Bill, and incorporated in Customs' 2016 Four Year Plan and the 2016 Budget process.
57. The proposal to consult the Ombudsman over information disclosure arrangements between Customs and the private sector has possible financial implications for the Office of the Ombudsman. This impact will depend on the volume of private sector requests for disclosure arrangements. Customs does not anticipate a large volume of requests and considers the impact can be managed.
58. Government agencies who wish to use Customs' information on an ongoing basis will incur costs to establish information disclosure agreements with Customs. It is not anticipated that agencies will require additional funding for this purpose.

## **Monitoring, Evaluation and Review**

59. Customs will implement monitoring and evaluation mechanisms to ensure the benefits anticipated from the revised information management and disclosure framework are being realised. Under the legislative framework proposed, information disclosure arrangements must incorporate a review requirement to

establish that each arrangements is operating as intended as is achieving the desired outcomes.

## Conclusion

60. The antiquated and piecemeal nature of the current legislative framework has created uncertainty and is promoting inefficient responses to information disclosure opportunities, particularly within government. Potential opportunities are being missed to improve the delivery of public services. The current legislative framework also does not reflect international recommended practice for the management of certain types of information. This has risks to New Zealand's reputation, and may contribute to undermining the trust and confidence of travellers and the business community in Customs' management of their personal and commercially confidential information.
61. Compared to the status quo legislative framework, the preferred option for a revised and updated legislative framework will open up opportunities to disclose Customs' information in ways that increase efficiency and improve service delivery. It will give increased confidence to those who provide Customs with information and that when disclosed it is done so in a transparent means with appropriate controls. It is assessed to be superior to the status quo legislative framework against the objectives specified. It is Customs' preference.

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