Regulatory Impact Statement

Customs and Excise Act Review: Valuation of imported goods and Customs Rulings

Agency Disclosure Statement

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

This RIS builds on previous decisions made by Cabinet in September 2015 on the review of the Customs and Excise Act (the Act), to introduce a process in the legislation to allow importers, in certain circumstances, to declare a provisional value for imported goods to Customs, and require a reassessment of goods within a prescribed timeframe [CAB-15-MIN-0114 refers].

It provides an analysis of options to address further issues about the requirements for importers to declare to Customs the value of goods imported into New Zealand, and the service Customs provides traders through issuing binding rulings.

The following are constraints on the analysis:

- There is a lack of quantitative information in some areas. For example, it is difficult to assess the total number of importers that will use the new legislative process to update the value of goods after importation of goods into New Zealand. This RIS therefore makes assumptions and uses anecdotal evidence and comparative information in some areas where data is not available.
- The impacts, including the financial impacts, of some options in this RIS are estimated based on assumptions about the proportion of imported goods or importers that may be affected by the change.

The impacts discussed in this paper are primarily on importers, customs brokers, and Customs in its role of managing risks and revenue collection at the border while facilitating trade.

Signed by Michael Papesch on 9 March 2016

Michael Papesch
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Executive summary

1. This Regulatory Impact Statement (RIS) provides an analysis of options in order to:

    - make Customs' processes more flexible for importers when this is justified, while ensuring that information about the value of imported goods is provided to Customs as soon as possible

    - incentivise importers to use a new process for declaring and updating information about the value of imported goods, while also having sufficient deterrents in place for non-compliance

    - modernise the legislation so that it is in line with best practice and give traders and businesses greater certainty about Customs' requirements.

2. Importers are required to declare the value of goods coming into New Zealand. It is important that the value declared to Customs is accurate. The value of goods declared by importers is used to identify risks at the border, collect revenue, and is collated by Statistics New Zealand and used for trade statistics, and key economic indicators such as the Balance of Payments and Gross Domestic Product.

3. The Customs and Excise Act (the Act) already contains a range of sanctions aimed at encouraging importers and customs brokers to provide accurate, timely information to Customs.

4. The recommendations in this RIS are:

    - **Section 1: Declaring and adjusting the value of imported goods:** To limit availability of a new process for importers to declare a provisional value for goods and update the information later, but also provide Customs with discretion to change availability of the process.

    - **Section 2: Sanctions for providing incorrect information about the value of goods**:

        - The range of sanctions available for Customs to respond to incorrect information being provided by importers or brokers is consistent despite whether the information is provisional, and despite how the information is provided to Customs.

        - Customs can revoke an importer's ability to use the process.

    - **Section 3: Customs Rulings:** The legislation sets out criteria for Customs to take into consideration when deciding whether to publish information contained in a Customs ruling.

5. Businesses have been consulted on the proposals. Relevant feedback from businesses and industry representatives are reflected in comments on these proposals.

1 Declaring and adjusting the value of imported goods

Background

6. Anyone who imports goods into New Zealand is required to declare the value of the goods to Customs. For goods valued $1,000 or more[1] an import entry is required to be submitted to Customs. An import entry contains information about the goods including, amongst other details, the value, volume, origin, and tariff classification of the goods. This RIS focuses on issues and recommendations about declaring and updating the value of goods when the value of goods is $1,000 or more.

7. Importers must establish the value of imported goods according to the methods prescribed by the Act that comply with New Zealand's obligations under the World Trade Organization Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the WTO Customs Valuation Agreement (WTO CVA)). The WTO CVA sets out several prescribed methods for valuing imported goods, to promote uniformity of the valuation of trade by WTO members.

8. In some situations an importer will know that the value of goods declared on an import entry is likely to change, but will not know the final value until after importation (some examples are described below). The legislation does not explicitly allow an importer to make a provisional assessment of the value of goods on a standard import entry. In other words, the current legislation does not clearly facilitate certain adjustments to the value of imported goods.

Status Quo

9. In practice, Customs accepts adjustments to the value of goods declared by importers using the 'voluntary disclosure' process, as long as the adjusted value meets WTO CVA requirements. Operationally this scheme is referred to by Customs as the 'Uplift Programme'. The main two types of adjustments Customs accepts under the Uplift Programme relate to royalty payments and transfer pricing practices.

Royalty payments

10. The main method used to determine the value of imported goods for Customs purposes is the Transaction Value method. The Transaction Value is the price paid for the goods when sold for export to New Zealand, subject to certain adjustments which are set out in clause 3 of Schedule 2 of the Act.

11. Under the Transaction Value method and according to the WTO CVA, the value of royalty payments between the buyer (the importer) and the seller needs to be included in the total value of the goods. Goods that are usually subject to royalties are branded goods. Examples include footwear, clothing, and movie merchandise.

12. Often when an import entry is required, an importer will not know the actual value of the royalty payment. This is because the amount of royalties owed by an importer to a seller will often depend on the volume of the goods sold in New Zealand, after

1 For goods below $1,000 but above the de minimis, importers need to submit a Simplified Import Declaration (SID). A SID requires the value of the good to be declared.

an import entry is due to be made. In these circumstances an importer will generally make an informed estimate of the royalties for import entry purposes, and provide updated information to Customs later if necessary.

Transfer pricing adjustments

13. Transfer pricing is the setting of prices for the transfer of goods, services and intangibles between related branches in a multi-national entity (MNE).

14. For tax purposes, Inland Revenue and an MNE may come to agreed methods for the treatment of transactions between related branches of the MNE, to ensure that the value or price of goods and services bought and sold between related branches of a multi-national entity are at an 'arms-length'. In New Zealand these are called 'Advance Pricing Agreements' (APAs). APAs represent a co-operative approach to addressing transfer pricing and tax compliance.

15. When an importer has an APA with Inland Revenue, an MNE might periodically adjust the value of goods bought and sold between related branches in the global company, in order to meet the methods agreed under the APA. This can affect the value of goods that have been declared previously to Customs. These changes usually are identified on an annual basis, and sometimes on a quarterly basis, following a business' accounting cycles.

Data indicating the number of importers that may use the new process

16. From 1 July 2014 to 30 June 2015, 54 companies made adjustments under Customs' Uplift Programme, that were neither errors nor omissions, but that affected the value of goods as declared on import entries during that year. Most of these companies are large commercial importers.

Data indicating the amount of revenue that may be collected using the new process

17. Changes to the value of imported goods tend to result in an increase in Crown revenue rather than refunds, due to the nature of the value adjustments (additional costs that are added to the total value of the goods).

18. The amount of extra Crown revenue collected due to changes to the value of imported goods is very minor compared with the total duty collected by Customs. In 2014/2015 Customs collected approximately $270,000 in extra tariff duty, $13.5 million in extra GST, and $13.5 million in extra excise-equivalent duty as a result of changes to import entry information that increased the value of imported goods. Overall for the same time period Customs collected a total of $12.486 billion in revenue on behalf of the Crown.[2]

Previous Cabinet decisions

19. The Act allows importers to make voluntary disclosures about errors or omissions concerning information they have provided to Customs. But the Act does not clearly set out the process importers should follow when declaring changes that were

2 Customs collects Crown revenue by way of customs duty and GST on imports together with excise duty on domestically manufactured alcohol, tobacco, and petroleum products, and excise equivalent duty on the same products imported into New Zealand.

expected at the time importers lodged their import entry. For example, changes due to royalty payments or transfer pricing practices.

20. Although adjustments to value are currently accepted by Customs using the voluntary disclosure process, this is not transparent for importers because the voluntary disclosure process refers explicitly to errors or omissions.[3] To address this problem, on 23 September 2015 the Cabinet Economic Growth and Infrastructure Committee (EGI) decided that the Bill will allow importers, in some circumstances, to declare a provisional value for goods, and provide updated information (a reassessment) to Customs [EGI-15-MIN-0088 refers].

21. EGI also agreed that the Bill should enable the circumstances when a provisional value can be declared for imported goods to be prescribed by Regulations.

Problem

22. If the process was available to all importers, information received by Customs about imported goods would not be as final or as accurate as possible. This would potentially create the following issues:

- delay the collection of the correct amount of revenue by Customs (tariff duty, GST, excise-equivalent duty)
- information provided to Customs would not be as reliable for managing risks at the border
- information provided to Statistics New Zealand would not be as accurate or reliable as possible, which may affect trade statistics used to establish key economic indicators such as the Balance of Payments and Gross Domestic Product.

Objective

23. It is important that the process for declaring a provisional value and updates to Customs is only available in certain circumstances. In principle the most accurate and final information as possible should be declared on an import entry. Customs expects that the process will only need to be used by importers in some circumstances.

24. The overarching objective is that the Act takes modern business practice and the realities of trade into account, while balancing the need for Customs to obtain accurate and timely valuation information for revenue collection, risk management, and statistical purposes.

25. The more specific objective is for Customs' processes to be flexible for importers when this is justified.

Criteria

26. Customs used the following criteria to assess the options:

3 Section 130 of the Act states that a person is not liable to an administrative penalty if that person has voluntarily disclosed an *error* or *omission* to Customs, subject to certain conditions (emphasis added).

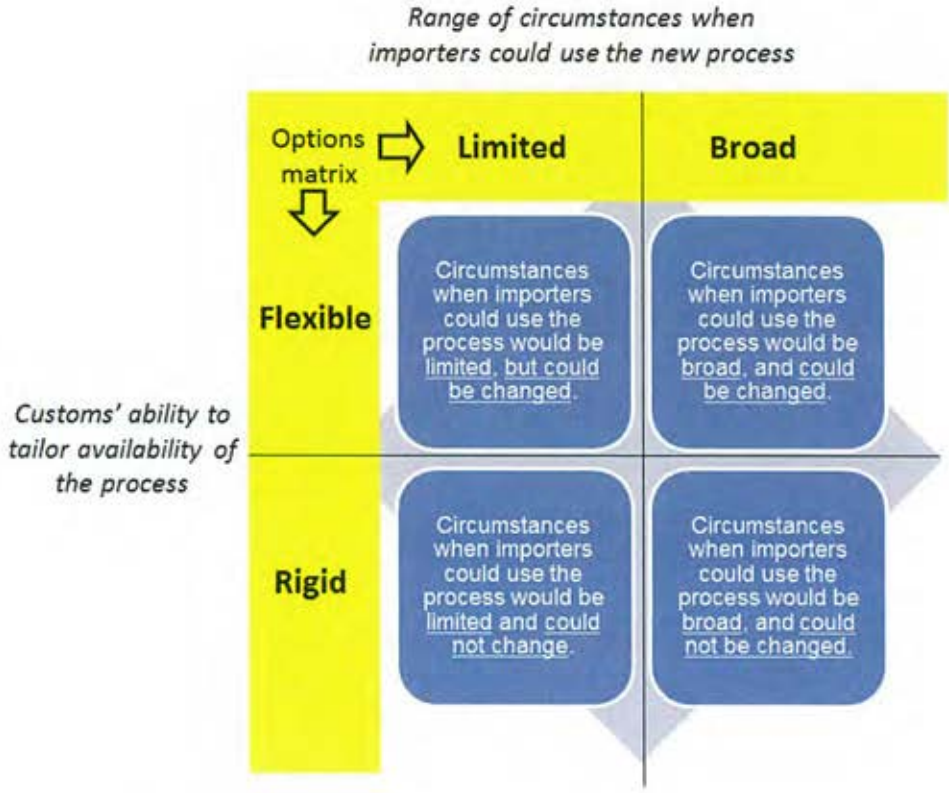
- **Reducing risks to Crown revenue:** Although provisional information about the value of goods is provided to Customs in some circumstances, the risks to collecting the accurate amount of revenue following importation of the goods are mitigated and minimised.
- **Flexibility for traders:** Customs processes are flexible and acknowledge modern business practice and the realities of trade.
- **Administrative burden for Customs:** Impacts on Customs' resources are proportionate to the benefits of the process.
- **Future-proofed:** Availability of the process is flexible, so it is future-proofed.

27. Options that meet these criteria are likely to address the problems that have been identified. The criteria have been accorded different weights when analysing the options. The criteria are listed in order of importance.

28. Customs gave the most important criterion, reducing risks to Crown revenue, a 40% weighting. Flexibility for traders, administrative burden for Customs, and future-proofing each have a 20% weighting.

Options and impact analysis

29. Customs considered a matrix of options, shown below (highlighted in yellow).



30. This led to the development of four specific options:

- **Option One:** The process is limited to importers in some circumstances, but Customs has discretion to allow other importers to use the process.

- **Option Two:** The process is available to a larger number of importers in a wider set of circumstances, and Customs has discretion to allow other importers to use the process.
- **Option Three:** The process is limited to importers in some circumstances, and Customs has no discretion to allow other importers to use the process.
- **Option Four:** The process is available to a larger number of importers in a wider set of circumstances but Customs has no discretion to allow other importers to use the process.

31. One of the overarching objectives of the Act Review is to deliver modern and flexible legislation. Accordingly, option three was not progressed because that option does not provide Customs with discretion to alter the availability of the process, meaning that the legislation would not be future-proofed.

Option One: The process is limited to importers in some circumstances, but Customs has discretion to allow other importers to use the process.

32. Under option one, the process would apply in the following circumstances:

    - when importers import goods that are subject to Advance Pricing Agreements with Inland Revenue
    - when importers import goods that are subject to regular post-import changes in purchase price of the type described in Clause 3 of Schedule 2 of the Act.[4]

33. The chief executive of Customs would also have the discretion to tailor availability of the process to allow other importers to use the process, to allow the process to apply to other goods, and to revoke the ability for an importer to use the process.

Option Two: The process is available to a larger number of importers in a wider set of circumstances, and Customs has discretion to allow other importers to use the process.

34. Under option two the process would apply in the following circumstances, these circumstances are the same as option one except for being broader (as shown by the text in bold):

    - importers importing goods that are subject to transfer pricing practices, **regardless of whether importers have an Advance Pricing Agreement with Inland Revenue.**
    - when importers import goods that are subject to regular post-import changes in purchase price of the type described in Clause 3 of Schedule 2 of the Act.

35. The chief executive of Customs would also have the discretion to tailor availability of the process to allow other importers to use the process, to allow the process to apply to other goods, and to revoke the ability for an importer to use the process.

4 Clause 3 of Schedule 2 of the Act lists amounts that must be added to, or taken away from, the price the importer paid for the goods in order to determine its goods according to WTO valuation methods. Examples are royalty fees, or packing costs incurred by the importer.

Option Four: The process is available to a larger number of importers in a wider set of circumstances but Customs has no discretion to allow other importers to use the process.

36. As option two, the process would apply in the following circumstances:

- importers importing goods that are subject to transfer pricing practices, **regardless of whether importers have an Advance Pricing Agreement with Inland Revenue.**
- when importers import goods that are subject to regular post-import changes in purchase price of the type described in Clause 3 of Schedule 2 of the Act.

37. However, the chief executive of Customs would not have the discretion to tailor availability of the process to allow other importers to use the process, and to revoke the ability for an importer to use the process.

Analysis

38. The following table sets out analysis of the regulatory options according to the criteria.

Key:

□□ **partially meets the criteria** □□ **meets the criteria** □□ **doesn't meet the criteria**

Criteria	Option one: The process is limited to importers in some circumstances, but Customs has discretion to allow other importers to use the process.	Option two: The process is available to a larger number of importers in a wider set of circumstances, and Customs has discretion to allow other importers to use the process.	Option Four: The process is available to a larger number of importers in a wider set of circumstances, but Customs has no discretion to allow other importers to use the process.
Reduces risks to Crown revenue: **Although provisional information about the value of goods is provided to Customs in some circumstances, the risks to collecting the accurate amount of revenue following importation of the goods are mitigated and minimised.**	□□ Due diligence has been undertaken by Inland Revenue in respect of the pricing strategies of companies that have Advance Pricing Agreements. From a tax perspective, these companies are required to use agreed methods to determine the value of assets transferred (sold) between related parties in a multinational company and confirm their compliance annually to Inland Revenue. This option provides the best balance between allowing for changes to the value of goods, while balancing the need for accurate and timely information to be provided to Customs.	□□ The same level of due diligence generally has not been undertaken by Inland Revenue in respect of the transfer pricing strategies of importing companies that do not have an Advance Pricing Agreement with Inland Revenue. There is potentially a greater need for revenue assurance by Customs in these circumstances.	□□ As with option two, the same level of due diligence has not been undertaken by Inland Revenue in respect of the transfer pricing strategies of importing companies that do not have an Advance Pricing Agreement with Inland Revenue. There is potentially a greater need for revenue assurance by Customs in these circumstances.
Flexibility for traders: **Customs processes are flexible and acknowledge modern business practice and the realities of trade.**	□□ Regulations will enable some importers that do not have final information about the value of goods to use the provisional value process. Customs will have flexibility to allow other importers to use the process if this is justified.	□□ Regulations will enable a large number of importers that do not have final information about the value of goods to use the provisional value process. Customs will have flexibility to allow other importers to use the process if this is justified.	□□ Although the process would be available to a larger number of importers as in option two, there are likely to be other circumstances when an importer may need to declare a provisional value to Customs. For example, one-off large scale imports (eg craft and helicopters) when the importer has a leasing arrangements (eg pay by the hour). This option would not provide flexibility for importers in these circumstances.
Administrative burden for Customs: **Impacts on Customs' resources**	□□ Under this option there is a potential for higher	□□ Wider availability of the process may	□□ As with option two, wider availability of the

are proportionate to the benefits of the process.	administrative costs for Customs than options two and three. If more importers (without APAs) declare adjustments to the value of goods due to transfer pricing, there will be a larger administrative burden for Customs. However, currently under the Uplift Programme most value changes are due to royalty payments as opposed to transfer pricing.	mean lower upfront implementation costs for Customs because a greater number of importers (than option one) would be able to use the process without seeking Customs' approval.	process may mean lower upfront implementation costs for Customs because a greater number of importers (than option one) would be able to use the process without seeking Customs' approval.
Future-proofed: **Availability of the process is flexible, so it is future-proofed.**	□□ Customs has discretion to alter the availability of the process.	□□ Customs has discretion to alter the availability of the process.	□□ Customs has no discretion to alter the availability of the process, but the option is partially future-proofed by being available to a larger number of importers (than option one).
Conclusion	The option meets most criteria. **This is the preferred option.**	The option partially meets the criteria.	The option partially meets the criteria.

Stakeholders' views

39. In April 2015 Customs held a workshop to discuss problems related to declaring and updating the value of imported goods. The purpose of the workshop was to understand the problems and develop and refine options. In late 2015, Customs held a further workshop to seek views from business and industry representatives about the circumstances when the process for declaring a provisional value and updated information should apply.

40. Views from some major accounting firms, customs brokers, and traders are that the process should apply to:

    - post-import changes in purchase price resulting from transfer pricing adjustments, royalty payments, 'assists',[5] importers using the 'Deductive method'[6] to value imported goods, freight and warehousing costs for offshore storage (eg freight consolidations)
    - bulk imports
    - one-off large scale imports (eg craft and helicopters) when the importer has a leasing arrangements (eg pay by the hour)
    - when multiple contracts are involved, which are complex to deal with at the time of importation when an import entry is required.

41. Some stakeholders thought the process should apply to all importers that conducted transfer pricing practices and made transfer pricing adjustments, regardless of whether an importer had an Advance Pricing Agreement with Inland Revenue. Customs considered this during options analysis, however this is not the preferred option. A company that has an Advance Pricing Agreement with Inland Revenue has had a higher level of due diligence undertaken over its transfer pricing activities by the government. In Customs' view it is appropriate that a distinction is drawn, and that the process for making adjustments is explicitly available when the government has undertaken due diligence regarding transfer pricing activities. The United States Customs and Border Protection takes a similar approach.

42. An importer without an Advance Pricing Agreement may still be able to make use of the facility to declare provisional value and update it later, subject to the discretion of the chief executive.

43. Some stakeholders thought that the process should apply in situations when a customs broker identifies a potentially erroneous value. Customs considered this during development of options. However, the rationale for using a provisional value to identify potentially incorrect information would be to prevent brokers from

5 'Assists' are materials or items that a buyer sends to a seller (usually a manufacturer) to incorporate into the goods. For example, buttons or labels to go into garments, patterns that the seller will follow to make the goods, or supplying raw materials that the goods will be made out of.

6 The 'Deductive method' is a method of valuing goods for customs purposes when, for some reason, the Transaction value method cannot be used. The Deductive method starts at the retail price the goods were sold for in New Zealand, with a series of allowable deductions made (some costs are not allowed to be deducted) until one arrives back at what is essentially the price of the goods when sold for export (excluding freight and insurance costs).

receiving a penalty if it turned out that the information was incorrect. In Customs' view there is already scope in the legislation to prevent the application of penalties when the person providing the information has taken reasonable care.[7]

44. Inland Revenue, Statistics New Zealand, the Ministry of Business, Innovation and Employment, and the Ministry of Foreign Affairs and Trade were consulted on the preferred option. Feedback received from these agencies has been incorporated into the analysis of the options, and in the recommended option.

Impacts

45. The preferred option would have the following impacts on importers, brokers and Customs.

	Option one: **The process is limited to importers in some circumstances, but Customs has discretion to allow other importers to use the process.**
Impact on importers and brokers	**Positive** The process for declaring and updating the value of imports is more transparent. This will make compliance with Customs' importation requirements more straightforward for the small number of importers (and their brokers) that will use the process.
Impact on Customs	**Neutral** Compared with the status quo, there is the potential for higher administrative costs for Customs. A larger number of importers may declare valuation changes as a result of the process becoming more transparent. There are approximately 60 importing companies on Customs current Uplift Programme. As at mid-2015 Inland Revenue had entered into 129 Advance Pricing Agreements, with 9 further Agreements being negotiated, however not all entities that have APAs will be importing goods.

Recommended option:

46. **Option One:** The process is limited to importers in some circumstances, but Customs has discretion to allow other importers to use the process. The process would apply in the following circumstances:

    - when importers import goods that are subject to Advance Pricing Agreements with Inland Revenue
    - when importers import goods that are subject to regular post-import changes in purchase price of the type described in Clause 3 of Schedule 2 of the Act

47. The chief executive of Customs would also have the discretion to tailor availability of the process to allow other importers to use the process, to allow the process to apply to other goods, and to revoke the ability for an importer to use the process.

7 Under section 130 of the Act, a person is not liable to an administrative penalty if they satisfy the chief executive that the person formed a view as to the relevant facts pertaining to the entry which, while incorrect, was reasonable having regard to the information available to that person when the entry was prepared.

2 Sanctions for providing incorrect information about the value of goods

Status quo and problem

48. The current legislation does not explicitly allow a provisional value to be declared and then updated. Some importers are uncertain about whether adjustments to the value of goods using the voluntary disclosure process under the Act are acceptable, or potentially subject to penalties.

Issues

49. Customs currently has a range of sanctions (penalties and offences) to respond to accidental and deliberate non-compliance with Customs' requirements at the border when people declare incorrect information about imported goods. These sanctions apply to all information that is required to be declared to Customs on an import entry, including the value of goods.

50. The table below sets out current sanctions in the Act that potentially apply when incorrect information is provided to Customs. The table includes improvements to the sanctions regime as agreed by EGI under the Act review to date but that have not yet been enacted (shown in the table as blue underlined text).

Status quo: Current sanctions in the Act that may apply when incorrect information is provided to Customs

Behaviour of an importer or broker	Sanctions in the Act for incorrect import entry information, including improvements agreed by Cabinet in 2015	Who the penalty or offence can apply to
Accidental non-compliance **(eg an error or an omission)**	**Administrative penalty** If an error does not involve a shortfall of duty, it will be subject to a flat penalty of $200. Penalties for incorrect values declared on an entry (that are not voluntarily disclosed) currently range from $200 to a maximum of $50,000: • if the error or omission occurred because the person did not take reasonable care: 20 percent of unpaid or undeclared duty to a maximum of $20,000; • if the error or omission occurred because the person was grossly careless: 40 percent of unpaid or undeclared duty to a maximum of $35,000.	Administrative penalties apply to the declarant; the person who makes the import entry. In practice this is primarily brokers.
	Prosecution under section 203(1) - offence in relation to entries (strict liability offence) 'Every person commits an offence who...makes an entry required under this Act that is erroneous or defective in a material particular.' • for an individual - a fine not exceeding $1,000 • for a body corporate - a fine not exceeding $5,000. 'Erroneous' is not defined in the legislation so has its common meaning. 'Material particular' is not defined in section 203. However 'materially incorrect' is defined under the administrative penalty provisions - there is a list of information details such as the value of goods, the importer's identity, the overseas supplier's identity, which if incorrect or incomplete would mean that an entry is 'materially incorrect'. This means that the value of goods can be regarded as a 'material particular'.	Any person who makes an entry.
	Forfeiture Goods in respect of which an incorrect declaration has been made are liable for forfeiture under section 225(1)(a)(ii).	Importers.
	Additional duty Note additional duty will not apply in every case when a mistake in the value declared on an import entry caused an underpayment of duty. Additional duty will only apply when the payment date has been deferred, or where a producer of excisable goods does not pay the full amount of duty due at the point that this is payable **and** the duty has not been paid.	Importers.

Intentional non-compliance (eg fraud)	**Administrative penalty** For deliberate errors or omissions: 100 percent of unpaid or undeclared duty to a maximum of $50,000.	Administrative penalties apply to the declarant; the person who makes the import entry. In practice this is primarily brokers.
	Prosecution under section 203(4): Offence in relation to entries 'Every person commits an offence who...is concerned in the making of an entry that the person knows is erroneous or defective in a material particular.' If the conduct was intentional: • in the case of an individual, to imprisonment for a term not exceeding 6 months or a fine not exceeding $10,000; or • in the case of a body corporate, to a fine not exceeding $50,000; or • in either case, to a fine of an amount not exceeding 3 times the value of the goods to which the offence relates.	Any person that makes an entry.
	Prosecution under section 211: Defrauding the revenue of Customs 'Every person commits an offence who does any act or omits to do any act for the purpose of– evading [...] payment of duty or full duty on goods.' Penalties • In the case of an individual, to a term of imprisonment not exceeding 6 months or to a fine not exceeding $10,000 • In the case of a body corporate, to a fine not exceeding $50,000; or • In either case, to a fine of an amount not exceeding three times the value of the goods to which the offence relates.	Any person that evades payment of duty on goods.
	Forfeiture Goods in respect of which a deliberately incorrect declaration has been made are liable for forfeiture under sections 225(1)(a)(ii) and 225(1)(a)(vii).	Importers.
	Additional duty Note additional duty will not apply in every case when an intentional undervaluation of goods declared on an import entry caused an underpayment of duty. Additional duty will only apply when the payment date has been deferred, or where a producer of excisable goods does not pay the full amount of duty due at the point that this is payable **and** the duty has not been paid.	Importers.

Objectives

51. The objective is to incentivise importers to use the process for declaring and updating information about the value of imported goods, while also having sufficient deterrents in place for misusing the process, or providing incorrect information.

52. Customs used the following criteria to assess the options:

- **Sanctions for non-compliance are sufficient and fair:** The sanctions are an appropriate response to non-compliance.
- **Consistency:** Consistency with sanctions in the Customs and Excise Act for similar behaviour, and other agencies' legislation where possible.
- **Encourage voluntary compliance and deter non-compliance:** Importers are encouraged to provide accurate, timely information about the value of goods to Customs, including updated information when values change.

53. Options that meet these criteria are likely to address the problem that has been identified.

Options and impact analysis

54. Customs considered two factors when designing the options. The first factor was whether current sanctions in the Act for the provision of incorrect information should apply to an incorrect value that is *provisional*.

55. The second factor was whether incorrect information should be subject to the same sanctions, regardless of how the information is provided (whether on an import entry or some other format).

56. In the Act there are some penalties and offences that specifically respond to incorrect information provided to Customs on an entry. In practice Customs does not receive information about aggregate changes to values in an entry. This information is usually provided in a letter from the relevant importer (or their agent, a law firm or accounting firm). This is because CusMod[8] processing works on a transaction by transaction basis, and the value across multiple entries cannot be updated simultaneously. For example, Customs may receive a letter from an importer outlining an increase in the total value of goods they have imported in the preceding 12 months.

Option One: Current sanctions in the Act should apply to incorrect information provided to Customs by importers using the new process

57. The spectrum of sanctions in the current Act that respond to incorrect information provided to Customs, including improvements to the sanctions regime agreed by Cabinet under the Act review, should apply to incorrect values provided through the new process. This would mean that depending on culpability, Customs could potentially issue an administrative penalty, prosecute, or forfeit the goods.

58. Loss of the use of money can result from importers or Customs incorrectly valuing goods, resulting in an underpayment or overpayment of duty. The Regulatory

8 CusMod is the collective name for the computer applications currently used by Customs.

Impact Statement: *Customs and Excise Act Review: Sanctions for incorrect payments* recommends replacing the current additional duty regime in the Act with an interest regime that compensates both business and the Crown for the loss of the use of money. If additional duty is replaced by an interest regime, a rate of interest could apply to compensate the government for underpayment of duty or to compensate importers for overpayment of duty if the difference between the provisional value and the updated value is over a certain threshold.

Option Two: Current sanctions in the Act should not apply to importers declaring an incorrect provisional value and a different sanction should apply if incorrect information is not provided to Customs on an import entry

59. The spectrum of sanctions in the current Act, including improvements to the sanctions regime agreed by Cabinet under the Act review, should apply to incorrect values declared to Customs using the new process.

60. The difference between option one and option two is that under option two:

- **no sanctions** apply to errors or omissions in relation to a *provisional* value declared to Customs, sanctions should only be applied to the final, updated value
- instead of administrative penalties, **an infringement notice fee** applies to incorrect updates provided to Customs **when the information is not provided on an import entry**.

61. The following table sets out analysis of the regulatory options according to the criteria.

Criteria	Option One: **The same spectrum of sanctions should apply to incorrect valuation information declared to Customs using the new process. Additional duty is replaced with compensation for use of money. Compensation should only apply if the difference between the provisional and updated values is over a certain threshold.**	Option Two: **The same spectrum of sanctions should apply to incorrect valuation information declared to Customs using the new process. Except:** • **no sanctions should apply to errors or omissions in relation to a *provisional* value declared to Customs** • **instead of administrative penalties, an infringement notice fee should apply to errors or omissions from information that is not provided in an import entry.**
Sanctions for non-compliance are sufficient and fair: **The sanctions are an appropriate response to non-compliance.**	◻◻ There are a range of sanctions under the Act so that Customs has the ability to respond to varying levels of culpability and severity.	◻◻ The purpose of administrative penalties is to encourage the submission of accurate information to Customs. If administrative penalties do not apply to a value declared on an import entry because the value is provisional, there may be less incentive for brokers and importers to have systems in place to ensure information provided to Customs is accurate.
Consistency: **Consistency with sanctions in the Customs and Excise Act for similar behaviour, and other agencies' legislation where possible.**	◻◻ The sanctions for providing incorrect information under the new process will be consistent with other sanctions in the Act. Introducing Use of Money Interest will mean that Customs' sanctions are more consistent with Inland Revenue.	◻◻ There would be different sanctions for the same type of behaviour – for example an administrative penalty could apply to a mistake on an import entry whereas an infringement notice fee could apply to a mistake in information provided to Customs in a letter.
Encourage voluntary compliance and deter non-compliance: **Importers are encouraged to provide accurate, timely information about the value of goods to Customs, including updated information when values change.**	◻◻ The sanctions for incorrect information are consistent whether an importers is declaring a value on an import entry that does not need to be updated, or whether an importer is declaring a provisional value then providing updated information to Customs. There is a larger compliance burden for importer that have to update information, but also an incentive to use this process if importers are unable to obtain final information prior to the importation of goods into New Zealand.	◻◻ This option does not specifically support voluntary compliance. There may be an incentive for importers to notify Customs that values are provisional, if there are no sanctions associated with providing incorrect provisional information.
Conclusion	The option meets the criteria. **This is the preferred option.**	The option partially meets the criteria.

Key: ◻◻ partially meets the criteria ◻◻meets the criteria ◻◻ doesn't meet the criteria

Stakeholders' views

62. Views from major accounting firms, some large traders, and brokers about penalties and offences for accidental and deliberate provision of incorrect valuation information were varied.

Feedback from stakeholders	How the feedback has been addressed
Customs needs to be clear about who is being penalised - the broker or the importer.	This was taken into consideration during the development of policy options.
Incentives need to be considered as well as the penalties/offences.	This will need to form part of a broader programme of work on Customs' compliance strategy. This RIS focuses on regulatory sanctions that respond to accidental or deliberate non-compliance.
There needs to be clarity about when an administrative penalty should apply instead of an infringement notice, and vice versa.	This is outside the scope of the issues discussed in this RIS. This will need to form part of a broader programme of work on a compliance strategy and associated training and awareness programmes.
Administrative penalties should not apply to a provisional value if an importer has been approved into the process.	This was considered (as part of Option Two), but is not recommended. It is reasonable to expect an importer or broker to take reasonable care when providing information to Customs, based on the information available to the importer or broker at that time, and to penalise a person that fails to do this. Administrative penalties encourage the provision of accurate information to Customs.
If the value is wrong over a certain threshold, Use of Money Interest should apply; if the value is wrong under the threshold, then no Use of Money Interest should apply.	This forms part of Option One. Further detail about the replacing the additional duty regime with a compensation regime is contained in the Regulatory Impact Statement *Customs and Excise Act Review: Sanctions for incorrect payments*.
The additional duty rates are too high.	Review of interest rates will form part of further design work to be done regarding the compensation regime.

63. The Ministry of Justice and Inland Revenue were consulted. Feedback was used to develop the options and the recommendation.

Impacts

64. The preferred option would have the following impacts on importers, brokers and Customs.

	Option One: **The same spectrum of sanctions should apply to incorrect valuation information declared to Customs using the new process. Additional duty replaced with compensation for use of money. Compensation should only apply if the difference between the provisional and updated values is over a certain threshold.**
Impact on importers and brokers	Neutral Importers and brokers would be sanctioned for providing incorrect information to Customs whether they are declaring final information on an import entry, or using the new process to provide a provisional value and an update to Customs. The incentive for importers to use the provisional value process is because it is efficient and provides certainty about how changes to information provided to Customs will be received. Because the potential sanctions for incorrect information are the same regardless of whether provisional of final information is provided, sanctions alone will not incentivise importers or brokers to use one process over the other. Introduction of an interest regime would compensate an importer for the government's use of money when goods are overvalued.
Impact on Customs	Neutral Introduction of an interest regime would compensate the government for an importer's use of money when goods are undervalued.

Recommended option:

- **Option One:** The same spectrum of sanctions should apply to incorrect valuation information declared to Customs using the new process. If additional duty is replaced with compensation for use of money, compensatory interest could apply if the difference between the provisional and updated values is over a certain threshold.

3 Customs Rulings

Status quo

65. Under the Act Customs is authorised to issue binding rulings on a range of specified matters. Rulings help traders to meet their Customs' obligations. A person can apply for a ruling on the origin of a good, the tariff or excise classification of a good, and whether a good is subject to a duty concession. On 23 September 2015 EGI decided that the Bill will provide for Customs to issue a new type of ruling, on the valuation of goods [EGI-15-MIN-0088].

66. The legislation does not currently require Customs to publish rulings, and in practice Customs does not currently publish rulings.

Opportunity

67. Rulings are currently not available to the public. Sometimes rulings can contain information or rationale that traders, other than the applicant of the ruling, may find useful to help them to meet Customs' requirements at the border. They can also contain commercially sensitive information.

68. The direction taken by international trade law is that customs administrations should endeavour to publish rulings. New Zealand's current legislation is silent on this issue, so the legislation in and of itself does not reflect the direction of international trade law. There is an opportunity for the legislation to better reflect what is considered best practice internationally.

Objective

69. The objective is to modernise the legislation so that it is in line with international best practice and to thereby facilitate trade, by making it easier for traders to understand Customs' requirements.

70. Customs used the following criteria to assess the options:

- **Commercially sensitive and private information is protected**
- **Makes compliance easier for importers:** Makes compliance with Customs' requirements easier for traders by providing certainty about how to meet their obligations.
- **International best practice:** Consistent with international best practice.

71. Options that meet these criteria are likely to address the opportunities that have been identified.

Options and impact analysis

72. Customs considered the following options:

- **Status quo (Option One):** The Bill is silent on whether Customs is required to publish rulings.

- **Option Two:** The Bill requires the publication of rulings pursuant to international obligations. When publication is not required under an international obligation, the Bill sets out criteria for Customs to consider when determining whether rulings, or parts thereof, should be published:
    - whether the applicant supports the view that the ruling, or part thereof, should be released
    - whether publication is in the public interest
    - whether publication is in accordance with information disclosure principles, including principles for withholding and protecting information in the Official Information Act and the Privacy Act (to ensure that commercially sensitive information is protected).
- **Option Three:** The Bill will enable regulations to be made to require *certain types of rulings* to be published. For example, regulations may require Customs to publish all rulings on the classification of goods, but other types of rulings would not need to be published, such as rulings on the valuation of goods.
- **Option Four:** The Bill requires Customs to publish all rulings it issues.

73. Option four was not progressed because it would not be appropriate for the Bill to require Customs to publish all of the rulings it issues. This is because there will be instances when rulings are only applicable to the applicant of the ruling, such as the goods a specific importer is bringing into New Zealand. Also, rulings may contain commercially sensitive information that cannot be separated from the rationale provided in the ruling. It would not be appropriate for the Bill to contradict other legislative principles for protecting commercially sensitive information.

74. The following table sets out analysis of the remaining options according to the criteria.

Key:
partially meets the criteria **meets the criteria** **doesn't meet the criteria**

Criteria	Status quo (Option One): The Bill is silent on whether Customs is required to publish rulings.	Option Two: The Bill requires the publication of rulings pursuant to international obligations. When publication is not required under an international obligation, the Bill sets out criteria for Customs to consider when determining whether rulings, or parts thereof, should be published: • whether the applicant supports the view that the ruling, or part thereof, should be released • whether publication is in the public interest • whether publication is in accordance with information disclosure principles, including principles for withholding and protecting information in the Official Information Act and the Privacy Act (to ensure that commercially sensitive information is protected).	Option Three: The Bill will enable regulations to be made to require *certain types of rulings* to be published.
Commercially sensitive and private information is protected: **Information that is private or commercially sensitive is not disclosed.**	 In practice Customs would use the principles for withholding information under the Official Information Act, and Privacy Act so private and commercially sensitive information would be protected.	 Explicit protection from disclosure of commercially sensitive and private information.	 No explicit protections against disclosure of commercially sensitive or private information. However, in practice principles for withholding information of this nature would be taken into account by Customs.
Makes compliance easier for importers: **Makes compliance with Customs' requirements easier for traders by providing certainty about how to meet their obligations. Reduces the frequency of requests for advice.**	 This option does not make compliance with Customs' requirements easier, but does not prevent Customs from publishing information in rulings.	 Compliance may be made easier for importers through the publication of rulings that are in the public interest. Impacts of this option will depend on Customs practice.	 Compliance may be made easier through the publication of rulings, but this will depend on whether regulations prescribe publication.

International best practice: **Consistent with international best practice.**	□□ Canadian and Australian legislation do not require rulings to be published.	□□ This option appears to be most aligned with the direction taken in the World Trade Organization Agreement on Trade Facilitation, GATT, [9] the Trans-Pacific Partnership Agreement text, and the United States Code of Federal Regulations. • The World Trade Organization Agreement on Trade Facilitation states that "Each Member shall endeavour to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information". • GATT requires rulings of general application to be published subject to confidentiality disclosure restrictions. • The Trans-Pacific Partnership Agreement states that each Party *shall endeavour* to make its advance rulings publicly available including online, subject to confidentiality requirements. • The Korea-New Zealand Free Trade Agreement (KNZFTA) states that subject to any confidentiality requirements in its domestic laws, each Party *shall* publish its advance rulings. KNZFTA requires each Party to issue rulings on tariff classification and the origin of goods. Rulings not explicitly required by KNZFTA, that New Zealand Customs issues, include rulings on duty concessions. • The United States Code of Federal Regulations requires interpretative decisions to be published subject to confidentiality disclosure restrictions.	□□ This option does not align with best practice.
Conclusion	Option partially meets the criteria.	**This is the preferred option.**	Option does not meet most criteria.

9 The General Agreement on Tariffs and Trade 1947 (GATT).

Stakeholders views

75. In April 2015 Customs held a workshop to discuss whether Customs should publish its rulings. Major accounting firms and some industry representatives and traders shared the view that commercially sensitive information must be protected, and that the applicant's consent to release information should be obtained.

76. The Ministry of Foreign Affairs and Trade was consulted and feedback was incorporated into development of the recommended option.

Impacts

77. Customs' preferred option (Option Two, the Bill sets criteria for Customs to consider when publishing rulings) may have a small positive impact for Customs. The legislation would set out clear principles for the chief executive of Customs to consider when deciding whether to publish rulings.

78. Option Three (regulations can require certain types of rulings to be published) may have a small positive impact for some importers, brokers and firms that would have access to more information on how to meet Customs' requirements. Wider availability of rulings may decrease errors and disputes. The negative impacts of Option Four have been described above.

Recommended option: Option Two: The Bill requires the publication of rulings pursuant to international obligations. When publication is not required under an international obligation, the Bill sets out criteria for Customs to consider when determining whether rulings, or parts thereof, should be published:

- whether the applicant supports the view that the ruling, or part thereof, should be released
- whether publication is in the public interest
- whether publication is in accordance with information disclosure principles, including principles for withholding and protecting information in the Official Information Act and the Privacy Act (to ensure that commercially sensitive information is protected).

Monitoring, evaluation and review

79. An evaluation and review process will be established by Customs after a period of implementation of the legislative amendments.

80. The following information would help to monitor and evaluate the outcomes of the recommendations in this RIS.

- Declaring and adjusting the value of imported goods:
  - the total number of importers making adjustments each year
  - the number of import entries affected by aggregate reassessments of the value of goods
  - asking importers for feedback about whether the legislation and Customs' processes are more transparent and consistent, and what the outcomes have been for business, including whether compliance cost or burden has decreased.
- Sanctions for providing incorrect information about the value of goods:
  - the number of importers and brokers that were issued penalties or prosecuted for providing incorrect information to Customs, and analysis of whether numbers increased or decreased following implementation of amendments to the Act
  - analysing the number of importers that use the new process for updating the value of imported goods to assess whether the number increased post-implementation of amendments to the Act.
- Customs rulings:
  - how many rulings are published by Customs, or how often information from rulings is published
  - asking traders for feedback about whether information that is published is helpful, and to what degree this information helps to make compliance with Customs' requirements easier for traders.