



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 91

Forfeiture under the
Customs and Excise Act 1996

January 2006
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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25 January 2006

The Hon Mark Burton
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

I am pleased to present to you Report 91 of the Law Commission *Forfeiture under the Customs and Excise Act 1996*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in black ink, reading "Geoffrey Palmer". The signature is written in a cursive style. Below the signature is a horizontal line.

Sir Geoffrey Palmer
President

Foreword

SINCE 11 September 2001 border security has become a worldwide government priority. Between 2002 and 2004, New Zealand legislative provisions which started life in the Border Security Bill have been incorporated into the Customs and Excise Act 1996, strengthening powers for the New Zealand Customs Service. Customs now has legislative power to detain property suspected to be “tainted” and to seize, as forfeited to the Crown, boats when there is a reasonable suspicion they have been used for “people smuggling”. In the context of these amendments, discussion arose about the appropriateness of the current forfeiture and seizure regime in Part XIV of the Customs and Excise Act 1996. As a result, the Law Commission was asked to review Part XIV, generally and in comparison with similar overseas provisions.

Part XIV is aimed at securing the border against unwanted and harmful imports, preventing unlawful exportation of certain items and enforcing revenue collection, while complying with international obligations and facilitating international trade. Substantial powers are needed to achieve these objectives.

The Law Commission has attempted to assess whether, in the unique context of border protection, the balance between the interests of the State in national self-protection and the rights of individuals is appropriately struck in Part XIV of the Customs and Excise Act 1996. The Commission has concluded that the statutory regime, to the extent that it provides for automatic forfeiture of items with limited rights of review, is not the least intrusive response to achieve legitimate border protection aims. A more transparent and less draconian legislative framework could be established without jeopardising the essential requirements of border protection.

The Commission proposes a regime in which Customs can detain suspect items at the border or inland, but the items would not automatically and immediately become the property of the Crown by forfeiture. Forfeiture should remain the almost inevitable outcome for goods that are considered harmful and pose a risk to New Zealand’s citizens, environment or trade, with an opportunity to challenge the classification. But there should be alternatives to forfeiture in cases where the items are not considered harmful in themselves, and where, even allowing for deterrence aims, other responses would be more proportionate. There should also be an opportunity for a review of the appropriateness of a proposed response.

Our recommendations, and draft legislation, reflect and draw upon the actual practices of the New Zealand Customs Service, as expressed in their current guidelines, and also draw upon customs legislation and practices internationally.

We considered the applicability of the New Zealand Bill of Rights Act 1990 in the context of border protection, as requested in the Terms of Reference. We found that although New Zealand courts have discussed section 21 of the Bill of Rights Act in some customs cases, overseas authority has questioned whether

similar provisions, for example in the Canadian Charter, are applicable to search and seizure outside criminal investigation and law enforcement. The issue has not been considered by the Court of Appeal here. Given the uncertainty about the applicability of the Bill of Rights Act, we therefore decided that little would be achieved by a detailed analysis of the extent to which the existing legislation complies with it.

We have focused upon developing a framework that best achieves an appropriate balance between the necessary powers of the executive and fairness to individuals involved in importing or exporting goods. In doing so the concepts of “reasonableness” and “reasonable limits”, which are the tests to consider under the Bill of Rights Act, have been encompassed in our consideration although they are not explicitly analysed in terms of rights jurisprudence. Although we have not subjected the proposals to a full Bill of Rights analysis, we are reasonably confident that the proposals are Bill of Rights compliant.

This report was prepared under the guidance of the Hon Justice J Bruce Robertson, President of the Law Commission until June 2005, and of Warren Young. The principal researcher was Janet November, assisted by Margaret Thompson.

Sir Geoffrey Palmer
President

Terms of Reference

THE Law Commission is to review the forfeiture provisions under Part XIV of the Customs and Excise Act 1996, having regard to any analogous border control practices in comparable jurisdictions, and in particular consider:

- (a) the adequacy of any limits and safeguards in respect of the forfeiture provisions to protect any person having an interest in goods seized or forfeited;
 - (b) whether conviction should be a necessary precondition for forfeiture in any or all cases;
 - (c) the applicability of the New Zealand Bill of Rights Act 1990 in this context and the extent to which the Part XIV provisions comply with it; and
 - (d) rights of appeal and ministerial review.
-

Acknowledgements

THE Law Commission acknowledges the positive engagement of the New Zealand Customs Service during the period when this report was being prepared. In particular we are grateful for their considerable assistance in providing information and data on the current operation of Part XIV of the Customs and Excise Act 1996, and for their constructive comment on earlier drafts of this report and of the proposed legislation.

We also thank Renato Guzman, Parliamentary Counsel, for his patient and thorough work on the draft legislation included in this report. We note that the draft represents the policy approach of the Law Commission, not of the Government.

The Commission contacted over 40 organisations, agencies and people during 2004 with a view to consultation about the Terms of Reference for this report. We are particularly grateful to the following for their helpful comment either in consultation or by written submissions to an early draft of this report:

Auckland Employers' and Manufacturers' Association (Garth Wyllie)

Australian Customs Service (Paul Hill, Director, Law Enforcement Policy)

The Board of Airlines Representatives of New Zealand (Stewart Milne, Director)

Customs Brokers' Federation (Rosemary Dawson)

Crown Law (Val Sim and Grant Liddell, Crown Counsel Team Leaders)

Dr Rodney Harrison QC

Canterbury Manufacturers' Association (John Walley, CEO)

Carole Curtis, Barrister

Department of Conservation (Peter Younger)

End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (Denise Ritchie)

New Zealand Council of Civil Liberties (Tony Ellis, President)

HM Customs and Excise (now HM Customs and Excise and Inland Revenue) (Kevin O'Sullivan and Nigel Pearce)

Human Rights Commission (Diana Pickard)

Institute of Importers (Daniel Silva, President)

Institute of Policy Studies, Victoria University of Wellington (Dr Andrew Ladley, Director, and Nicola White)

Mike Ruffin, Partner, Meredith Connell

Ministry of Justice Bill of Rights team (Margaret Dugdale, Stewart Beresford and Mark Devereux)

Ministry of Agriculture and Forestry (Georges Capes)

New Zealand Law Society (Criminal Law Committee)

New Zealand Police (Inspectors Scott Spackman and Bill Peoples)

Ports of Auckland (Mike Ladman)

World Customs Organization, Brussels

Their views and assessments have been of particular assistance in the preparation of this report, but the Law Commission accepts full responsibility for the recommendations made.

Executive summary

WE are satisfied that the State is justified in prohibiting the entry and exit of certain categories of goods in order to protect its citizens, the environment, its heritage and fair trading, as well as to comply with international obligations, especially in the climate of security since 11 September 2001. The State also has the right to obtain and enforce payment of revenue for public utility reasons. Special regimes at the border are therefore justified to achieve these purposes, balanced by avenues of appeal or challenge, and the fullest possible recognition of rights.

Our assessment is that the present statutory regime in Part XIV of the Customs and Excise Act 1996 is unclear as to timing of forfeiture; that forfeiture of prohibited,¹ dutiable, uncustomed and other goods involved in a violation of customs law can be a disproportionate penalty for some violations; and that rights of review and appeal are unsatisfactory, in particular for innocent third parties who may have their property confiscated.

Forfeiture (by way of transfer of title to the Crown) is at present considered to take effect either immediately upon the violation of customs law or when Customs seizes the goods that are the subject of the violation. In our view, neither of these views should prevail; there should always be an opportunity to contest a proposed forfeiture before title is transferred to the Crown.

While there can be little problem about the Crown confiscating property crossing the border which is considered harmful (such as illegal controlled drugs and pornography), forfeiture of goods where the issue is non-payment of revenue may well be a disproportionate and inappropriate penalty. Cases can range from planned frauds and repeated offences of duty avoidance to a single violation where there may have been a genuine mistake. Nor is there necessarily justification for forfeiture of craft that have carried prohibited goods or other goods unlawfully crossing or across the border. At present the same statutory regime applies to all types of goods.² We are satisfied that there is no justification for the same approach in all cases.

We therefore propose a regime at the border³ that is based on a categorisation of property unlawfully crossing or across the border, into four types:

¹ These are goods designated as prohibited imports or exports, either by the First Schedule of the Customs and Excise Act 1996, or by Order in Council pursuant to ss 54 and 56 of the Act, or by other legislation. See chapter 3.

² It should be noted that the New Zealand Customs Service internal policy guidelines modify and ameliorate the harshness of the statutory regime, but these are subject to regular amendment and do not have the force of legislation.

³ The proposed regime would apply equally to goods that have moved, or are located, inland contrary to customs law and currently “shall be forfeited” to the Crown. A warrant would be required (as now) for their detention – unless they are in a Customs place. See Customs and Excise Act 1996, Part II.

- (a) “Forbidden goods”. This category will be those goods considered to be harmful in themselves (for example, controlled drugs, pornography, dangerous goods, pirated goods).
- (b) “Restricted goods”. This category will include goods that were the subject of duty avoidance, and goods that, although prohibited, are not harmful in themselves.
- (c) Craft or vehicles and other things used in the commission of Customs violations. This includes both craft used with knowledge of the owner and those used without the owner’s complicity.
- (d) Apparatus used to manufacture excisable goods unlawfully.

In respect of all categories there should be a power to immediately take and detain the items (but without forfeiture) for a period. A notice of the detention and proposed consequences should be given to affected persons.⁴

The notices should therefore advise, as appropriate, that there is to be:

- a prosecution;
- confiscation (forfeiture);
- an administrative monetary penalty, and in some cases a monetary penalty in addition to confiscation.

Owners or persons with an interest in the items should have an opportunity to respond to the notice before any confiscation or monetary penalty by:

- agreeing to the proposed consequences;
- contesting the status of goods which have been detained as “forbidden”;
- applying to the Chief Executive of the New Zealand Customs Service (Customs) for review of proposed consequences for other categories of goods;
- applying to the Chief Executive for “redeemable restricted goods” to be “redeemed”.

Some prohibited goods may be “redeemed” upon application, subject to specified conditions. This would mean they could be relabelled or a permit acquired for their importation, for example, so that they are not longer in the prohibited category. These “redeemable restricted goods” would include those with certain incorrect trade descriptions (often harmful in their present state to consumers and others), and those which require a permit to import (such as certain firearms) or export.

Any affected person who is dissatisfied with the outcome of an internal Customs’ review should be entitled to appeal to the Customs Appeal Authority. The Authority hearing the challenge to the review (by way of rehearing) should determine whether Customs’ decision is, in all the circumstances, reasonable and proportionate to the wrongdoing. There should be specific provisions to protect the interest of third parties who are applicants in a review or who may be affected by prosecution.

⁴ This would include offenders, owners and persons with an interest in the goods. There would be some exceptions to notice of detention; for example, where it would jeopardise an investigation.

If there is no response to the notice of detention within the period specified, or if a challenge fails or is withdrawn, the proposed consequences should be imposed – that is, the goods confiscated and/or a monetary penalty imposed.

We recommend that the term “detention” be used when an item is held temporarily by Customs, and the term “confiscation” be used when an item is transferred permanently to the Crown. Throughout this report, however, the traditional terms “forfeiture” and “seizure” are used when discussing current legislation and the present legal environment, and “confiscation” and “detention” used mainly in relation to the Commission’s recommendations.

1

Introduction

ORIGINS OF THE REFERENCE

- 1 **S**INCE 2001, there has been growing concern about international crime, including “people smuggling”, becoming a serious problem for New Zealand. This concern led Parliament to increase powers for the New Zealand Customs Service (Customs), in particular their powers to detain and seize ships carrying “smuggled” immigrants.
- 2 An amendment to section 143 of the Customs and Excise Act 1996 (the Act) in 2002 provides for the detention of a craft in certain circumstances, including where a Customs officer has reasonable cause to believe that:
 - an offence has been, is being or is about to be committed on or in respect of the craft while in New Zealand; or
 - there is a person carried into New Zealand on the craft and that carriage constitutes an offence against section 98C(1) of the Crimes Act 1961. Section 98C(1) makes it an offence to smuggle migrants into this country.⁵
- 3 The amendment was originally part of the Transnational Organised Crime Bill. At the second reading of this Bill on 30 May 2002, the Minister of Justice, Hon Phil Goff said:⁶

There have been persistent rumours of boats with a capacity of up to 300 people being prepared in Indonesia for departure to New Zealand. The length of such a journey, and the risks of the high seas, may seem to be daunting, but people-smugglers are interested only in profit, not in the safety or well-being of their human cargoes. In the interests of the people being smuggled, as well as in the interests of New Zealand maintaining control over its borders, maximum effort is needed to stop those departures. This bill supplements steps that the New Zealand Government is already taking on the ground in Indonesia, and in conjunction with Australia and countries in the region, to make it increasingly harder for people-smugglers and traffickers to continue to operate.
- 4 In July 2004 a further series of sections (sections 166A–F of the Customs and Excise Act 1996) were enacted to increase Customs officers’ powers of detention, in order to assist in combating international crime. Section 166A authorises seizure and temporary detention of goods suspected to be tainted property.⁷

⁵ Crimes Act 1961, s 98C(1) provides: “Every one is liable to the penalty stated in subsection (3) who arranges for an unauthorised migrant to enter New Zealand or any other state if he or she (a) does so for material benefit; and (b) either knows that the person is, or is reckless as to whether the person is, an unauthorised migrant”.

⁶ (30 May 2002) 601 NZPD 16726–7.

⁷ As defined in the Proceeds of Crime Act 1991, s 2(1); this includes property used to commit a serious offence or the proceeds of an offence.

- 5 The 2004 amendments also included a new section 225(6) providing for forfeiture of a craft where various offences have been committed involving non-compliance with reporting requirements or Customs' directions on arrival, and non-compliance with presenting baggage by persons arriving by a craft from outside New Zealand. The subsection is intended to combat illegal immigrant smuggling by permitting Customs to confiscate the craft in which such immigrants have been brought to New Zealand.
- 6 These amendments started life in the Border Security Bill, which aimed to enhance border security against terrorism as a result of the concern by international organisations to tighten border controls after 11 September 2001. This led to internationally agreed standards, including early sharing of information for the purpose of managing the risk that incoming people, planes and ships pose.⁸
- 7 During discussions prior to the enactment of these amendments, issues were raised about the wide power given to Customs officers in Part XIV of the Customs and Excise Act 1996. As a result, the Law Commission was asked to undertake a review of the forfeiture provisions in the Act, focusing particularly on the adequacy of any safeguards, and the practice in comparable overseas jurisdictions.

PURPOSES OF CUSTOMS LEGISLATION: REVENUE AND BORDER SECURITY

- 8 Customs legislation generally has two main purposes: revenue collection and border security.⁹ Acts of terrorism, particularly since those of 11 September 2001, have led to an increased worldwide emphasis on issues of community safety and border security.¹⁰ The New Zealand Customs Service recognises these priorities:¹¹

The New Zealand Customs Service protects and enhances the interests of New Zealand by managing security and community risks associated with the flows of people, goods and craft into and out of New Zealand, and by collecting customs and excise revenue.

The new security focused international environment means that border security to ensure the safety and security of New Zealand, its people and its economy has become Customs' priority.

⁸ See (1 July 2003) 609, NZPD 6823–38, debate on first reading of the Border Security Bill.

⁹ The collection of revenue is still an important function of the New Zealand Customs Service. In the 2002/03 financial year over \$7.2 billion was collected (including GST). For its history, see David McGill *The Guardians at the Gate: The History of the New Zealand Customs Department* (Silver Owl Press, Wellington, 1991).

¹⁰ The customs programme in Canada is now part of the new Canada Border Security Agency, separate from the Canada Revenue Agency: See CT Cherniak "The Dawn of a New Era: The Department of Public Security and Emergency Preparedness, the Canada Border Services Agency and the Canada Revenue Agency" (19 March 2004) <<http://www.goodmans.ca/site/home.cfm>> (last accessed 26 January 2005) who says: "The streamlining of border functions under the Department of PSEP signifies a shift from revenue generation, in the form of tariff collection at the border, to protect against terrorist and other threats".

¹¹ New Zealand Customs Service *New and Enhanced Cargo Inspection Capability – Enhanced Border Security through Use of Mobile-Non-Invasive Inspection Technologies* (Wellington, 2004), 6.

9 At the same time, Customs has other important goals, which need to be balanced against securing the border, protecting the community and revenue collection. These include trade support and travel facilitation. The Minister of Customs has said:¹²

The challenge for Customs is to balance the two objectives: facilitating legitimate trade and travel while protecting both this country and our trading partners from the risks inherent in the movement of people and cargo across international borders.

10 The Act provides (amongst other things) for the administration and enforcement of Customs control at the New Zealand border. To this end Part XII authorises certain powers for Customs officers: for example, surveillance; boarding, searching and detaining craft, or securing goods on craft; searching vehicles; questioning and detaining persons; searching records; and obtaining a warrant to search for and seize goods in premises.

11 Part XIV of the Act authorises seizure of goods that are, or are suspected to be, forfeited to the Crown (and craft or conveyances carrying such goods). The Act also authorises condemnation of those goods.

12 It is this regime – of forfeiture, seizure and condemnation of goods – that is the subject of this review.

BACKGROUND TO FORFEITURE

13 For centuries customs authorities have had power to seize forfeited contraband and conveyances used in smuggling.¹³ There is a lengthy history behind the State's present powers to seize and forfeit prohibited goods or products on which duty has not been paid, or property connected with a breach of customs law.¹⁴ Forfeiture of property is one of the oldest sanctions of Anglo-American law. In early days there were three types: forfeiture consequent to attainder (the complete forfeiture of all personal and real property of felons and traitors); statutory forfeiture for lesser violations; and the common law "deodand", forfeiting the instrument of a man's death.¹⁵ Forfeiture provided the Crown with substantial estates and revenue, and consequently cases were heard in the Court of the Exchequer.

14 In the mid-seventeenth century, the English Parliament enacted the Navigation Acts, violations of which resulted in forfeiture of both illegally carried goods

¹² Hon Rick Barker, *New Zealand Customs Service Statement of Intent 2004–2006*, 5. In Australia the importance of a focus on trade and industry facilitation has been emphasised also: Committee of the Review into the Australian Customs Service Chair FJ Conroy *Review of the Australian Customs Service: The Turning Point* (Australian Government Publishing Service, Canberra, 1993), 5.1.

¹³ Smuggling here refers to the importing or exporting of goods illegally. In the Australian Customs Act 1901 (Cth), smuggling is defined as any importation, exportation or introduction of goods, or attempted importation, exportation or introduction of goods, with intent to defraud the revenue. In this report "smuggling" extends to the importing or exporting of prohibited goods and any goods crossing the border unlawfully. It also includes the bringing of illegal immigrants to New Zealand.

¹⁴ See Sir Derek Hodgson *The Profits of Crime and Their Recovery: Report of a Committee Chaired by Sir Derek Hodgson* (Heinemann, London, 1984), ch 2.

¹⁵ See James R Maxeiner "Bane of American Forfeiture Law – Banished at Last?" [1977] 62 Cornell L Rev 768 for a summary of the history.

and the ships transporting them.¹⁶ Forfeiture remained a civil remedy and applicable even when, for example, the owner of a forfeited ship was innocent of any wrongdoing. This was justified by the personification fiction – that the goods or vessel were the guilty instrument to which the forfeiture attached. Hence, as Justice Field said in 1871:¹⁷

The thing is the instrument of wrong, and is forfeited by reason of the unlawful use made of it, or the unlawful condition in which it is placed. And generally the thing, thus subject to seizure, itself furnishes the evidence for its own condemnation. Thus goods found smuggled . . . prove of themselves nearly all that is desired to establish the right of the government to demand their confiscation.

THE NATURE OF FORFEITURE, SEIZURE AND CONDEMNATION

Forfeiture

- 15 Forfeiture in the Customs context refers to the confiscation process whereby the owners of items involved in violations specified in Part XIV of the Act lose title to those goods. Title vests in the Crown upon forfeiture. In theory, forfeiture operates *in rem* (against the thing forfeited)¹⁸ and not *in personam* (against the person responsible) and is a civil remedy. However, the effect is essentially punitive, in that a person or persons suffer a loss of title to goods unless they successfully appeal or obtain a waiver of forfeiture.

Seizure

- 16 In jurisdictions researched for this report, usually both goods that are forfeited and goods that an officer has reasonable cause to suspect are forfeited (pursuant to Customs legislation) can be seized, often without a warrant, at the border. A warrant is generally required for an inland seizure.

Condemnation

- 17 After a period during which the seizure may be contested, the goods can be restored in some cases but will often become condemned. Condemnation proceedings (which are instigated in some jurisdictions by Customs as a result

¹⁶ But see *Mitchell qui tam v Torup* (1766) 145 ER 764, cited in Maxeiner, above n 15, 775, fn 44. The stringency of these provisions was ameliorated to some extent by the Court of the Exchequer's ruling that if the quantity of contraband was so small that the master of the ship could not have discovered it by reasonable search, there would be no forfeiture.

¹⁷ *Miller v US* (1871) 78 US (11 Wall) 268, 321–322, in dissent, cited in Maxeiner, above n 15, 784.

¹⁸ Titles to cases make this clear, for example *In the Matter of an Information in Rem and one 1977 Chevrolet Camaro Z28 imported by Hutton* (13 October 1981, High Court Auckland, M 1698/80, Vautier J); *In the Matter of an Information in Rem under the Customs Act 1966 and one Minolta XD 7 Camera complete with lens imported by Harper* (3 December 1981, High Court Auckland, M 1447/80, Sinclair J); *Collector of Customs v 144 Packs of Playing Cards* (20 February 1991, District Court Auckland, MA 2080/89, Rushton DCJ); *Collector of Customs v One Harley Davidson Motorcycle imported by Glavish* (29 April 1993, High Court Auckland, M 1431/91, Hillyer J); see also *US v 1960 Bags of Coffee* 12 US 398; (1814) (8 Cranch) 398; *US v 422 Casks of Wine* (1828) 26 US (1 Pet) 547; *US v A Lot of Jewelry* (1894) 59 F 684 (EDNY); *US v Three Tons of Coal* (1875) 28 F Cas 149; *US v One 1986 Ford Pickup* 56 F 3d 1181 (9th Cir 1995); *US v One 48 Ft. White Colored Sailboat* (1999) 59 F Supp 2d 362 (DPR).

of a person's claim to forfeited goods) are civil proceedings which determine whether former acts or omissions were such as to attract the forfeiture provisions. If so, the court will hold that title to the forfeited goods had vested in the Crown at the time of the contravention. This is the "relation back" concept.¹⁹

- 18 If the court decides that the former acts or omissions were not sufficient to attract forfeiture, the claimant will recover the goods.²⁰ In New Zealand condemnation is deemed if a claim is dismissed or discontinued, or if there is no claim.
- 19 This regime has been described as "draconian", no doubt because forfeiture can potentially severely affect a person's livelihood and be a disproportionate penalty for the violation concerned. The Law Commission has found no evidence that the Customs Service exercises its power to seize forfeited goods other than reasonably, but the question is whether there is an unacceptable level of potential for the abuse of that power. To what extent is the present regime necessary for the purposes of the legislation, and to what extent is it the least severe regime consistent with those purposes and with human rights?

¹⁹ See Customs and Excise Act 1996, s 228.

²⁰ See explanation in *Whim Creek v Colgan* (1991) 103 ALR 204.

PART I
The Present Law

2

New Zealand provisions for forfeiture and seizure

20 THE current New Zealand provisions for forfeiture and seizure are in Part XIV of the Customs and Excise Act 1996.

FORFEITURE

21 Section 225 of the Act lists classes of goods which “shall be forfeited” to the Crown, generally where there is non-compliance with certain provisions of the Act. The classes of goods are:

- (a) goods in respect of which certain offences have been committed (such as defrauding Customs, or the possession or custody of uncustomed goods or prohibited imports, or submitting erroneous import and export documentation);
- (b) goods dealt with in contravention of sections 41, 43, 46 or 47 of the Act (dealing with importation requirements);
- (c) dutiable or prohibited goods found in the possession of any person who denied or failed to disclose the possession on being questioned;
- (d) dutiable or prohibited goods found in the course of a search pursuant to sections 144 or 149 of the Act;
- (da) dangerous items seized under section 149C(1A)(a);
- (e) goods in respect of which an erroneous statement, certificate or claim has been made as to the country where they were produced;
- (f) dutiable or prohibited goods found on or in any craft or bulk cargo container or similar device that is unlawfully in any place;
- (g) dutiable or prohibited goods found in or on any craft, bulk cargo container or similar device after arrival in any Customs place that have not been accounted for to the satisfaction of Customs;
- (h) dutiable or prohibited goods found concealed in or on any craft, vehicle, bulk cargo container, pallet or similar device;
- (i) goods in any package where those goods are not fully accounted for in the entry or declaration;
- (j) dutiable or prohibited goods so packed as to deceive Customs;
- (k) uncustomed goods that are found in any place;
- (l) goods imported into New Zealand that have been acquired from a country outside New Zealand by an act that if committed in New Zealand would

have amounted to a crime involving dishonesty within the meaning of section 2(1) of the Crimes Act 1961;

- (la) goods exported, or in respect of which an attempt to export has been made, that have been acquired in New Zealand by a crime involving dishonesty within the meaning of section 2(1) of the Crimes Act 1961;²¹
 - (m) all goods unlawfully exported or in respect of which an attempt to export has been made;
 - (n) all goods that have been unlawfully imported into New Zealand;
 - (o) any goods, equipment or apparatus used or intended for use in manufacturing excisable goods in contravention of section 68, and any goods manufactured wholly or partly using such goods, equipment or apparatus. (This mostly relates to manufacture of alcoholic drinks and tobacco.)
- 22 Forfeiture extends to the case or covering or other enclosure of goods forfeited. It also extends to the bulk cargo or similar container in which the goods were contained if adapted for the purpose of concealing goods (section 225(3) and (4)).
- 23 In addition, every craft, vehicle or other thing or animal used for the carriage, handling, or concealment of the forfeited goods, whether at or after the time of any alleged offence in relation to those goods, also “shall be forfeited” to the Crown (section 225(5)).
- 24 Section 225(6) provides for forfeiture of a craft where an offence has been committed under section 191(1)(a)–(d).²² The offence must have been committed to facilitate non-compliance with a requirement in any of sections 27–29²³ by anyone arriving in New Zealand, having been brought in by that craft or any other craft, from a point outside New Zealand.

Categories of goods that are subject to forfeiture and seizure

- 25 Section 225 of the Act lists goods and categories of goods that “shall be forfeited” in a variety of situations. “Goods” are defined in section 2 of the Act to mean “all kinds of moveable personal property including animals”. Section 225 refers to:
- “prohibited goods”: those listed in the First Schedule of the Act and goods the importation or exportation of which is prohibited by Order in Council (pursuant to sections 54 and 56 of the Act);²⁴ and imports and exports deemed prohibited by other Acts which utilise the Part XIV regime;

²¹ Sections 225(1) and (1a) could cover a series of new credit cards suspected to be counterfeit, for example.

²² The Customs and Excise Act 1996, s 191(1)(a), creates an offence where a person in charge of a craft fails to comply with section 21(1) of the Act (relating to advice of arrival) or other direction given by a Customs officer; section 191(1)(d) creates an offence where a person in charge of a craft fails to comply with section 24(1) (relating to arrival of a craft at a nominated place).

²³ Sections 27–29 relate to persons arriving in New Zealand reporting to Customs or a police station on arrival, complying with Customs directions on disembarkation, presenting baggage to Customs officers and complying with any directions with regard to that baggage.

²⁴ Examples are given in chapter 3. Prohibited imports include pornography, counterfeit coins, flick knives, cars with wound back odometers, and trout.

- “dutiabale goods”: those subject to duty within the meaning of the Act;
 - “uncustomed goods”: those on which duty has become due but is unpaid.
- 26 Section 225 lists a number of situations in which these categories of goods, or other goods in respect of which there has been some contravention of Customs law “shall be forfeited”. Some situations are very wide (for example, “all goods which have been unlawfully imported into New Zealand”) and some are specific (for example, goods dealt with in contravention of sections 41, 43, 46 or 47: section 225(1)(b)).²⁵
- 27 Forfeiture can apply to all types of items and situations listed in section 225, whatever the degree of seriousness or harmful consequence of the violation.
- 28 So, for example, dangerous items (as defined in section 149B, such as ammunition or explosives) “shall be” forfeited. But also an undeclared bottle of brandy found hidden in a suitcase and/or an undeclared consignment of cameras concealed in part of a ship “shall be forfeited”; and indeed the suitcase and the ship “shall be forfeited” because they were used for the carriage of concealed dutiable goods.

Alternatives to forfeiture

- 29 New Zealand also has a limited monetary penalty regime for errors or omissions in entries leading to incorrect payment of duty, under sections 128–130 of the Customs and Excise Act 1996. The penalty is \$50, or an amount equal to 20 per cent of the unpaid duty up to a maximum of \$10,000 whichever is the greater; or if Goods and Services Tax was not paid, \$50 for each materially incorrect entry. This monetary penalty is in lieu of prosecution and of liability to seizure under the Act. We understand from the New Zealand Customs Service that this regime was designed to encourage accuracy in making entries by customs’ brokers. It is used mostly where commercial goods are no longer in Customs’ control.²⁶
- 30 Under section 223 of the Act, the Chief Executive may accept payment of up to \$500 in full satisfaction of a fine or “other penalty” to which the person would otherwise be liable,²⁷ but this is limited to petty offences where the customs value of the goods or duty payable or evaded does not exceed \$1000. Nor is it specifically in lieu of forfeiture, and there is a Customs’ view that forfeiture is still a possibility after a payment under section 223 has been made.

SEIZURE

- 31 Section 226 of the Act gives Customs officers or the Police power to seize forfeited goods or goods that they have “reasonable cause to suspect are forfeited” at any time within two years after the forfeiture has arisen, or, if the goods were prohibited, at any time.

²⁵ The subsection has been interpreted as not requiring a conviction for those offences: *Kryuchkov v Comptroller of Customs* (27 September 2002, District Court Wellington, MA 72/02, Ongley DCJ) para 11.

²⁶ It is administered by the Audit section of Customs who scrutinise entries and assess such things as tariff classification.

²⁷ Customs and Excise Act 1996, s 223. The offender must admit the offence in writing.

- 32 Where goods are “seized as forfeited” the forfeiture “relates back” to the time of the contravention. This is the “relation back” doctrine, set out in section 228, and no subsequent act or proceeding is necessary to effect the forfeiture.²⁸
- 33 New subsections were added to section 226 of the New Zealand Act in 1996, modelled on section 103 of the Canadian Customs Act 1985. New Zealand Customs may leave goods (including craft and vehicles and animals) in the custody of either the person from whom they have been seized or another person authorised by Customs. These custodians must keep the goods safely, without charge to the Crown, and in accordance with any conditions imposed by Customs, until a final decision is made as to whether they are to remain forfeited (section 226(7) and (8) of the Act).
- 34 There is no specific provision imposing a duty of care on Customs to look after forfeited goods in cases where forfeiture is contested. However, in *Williams v Attorney-General*²⁹ the Court of Appeal held (by a majority) that the Crown had a duty of care to look after forfeited goods, at least where Customs had knowledge from the outset that the innocent owner of a vessel used to import drugs (which was damaged during a period of forfeiture) disputed forfeiture, and there was the possibility of its restoration to the owner who was concerned that the boat be made secure.³⁰
- 35 Section 226 does not require a search warrant at the border; nor does it specifically provide for a search warrant where goods are inland. However, this is provided for in section 167 of the Act.³¹

Search warrants for inland seizures

- 36 Pursuant to section 167, once goods have gone inland³² for home consumption, a Customs officer may obtain a search warrant issued by the District Court. The officer must swear there are reasonable grounds to believe there is in or on any place or thing:
- any thing that there are reasonable grounds to believe may be evidence of the commission of an offence against the Customs and Excise Act 1996 or regulations, or the unlawful exportation or importation of goods; or
 - any thing that there are reasonable grounds to believe is intended to be used for the purpose of committing such an offence or unlawful importation or exportation; or
 - any thing that is liable to seizure under the Act.

²⁸ The expression “seized as forfeited” was given a different connotation in *Alwen Industries Ltd v Comptroller of Customs* (1993) 1 HRNZ 574, 583, where the High Court held it was intended to apply to the “limbo” situation where goods have been seized on suspicion but there remains a doubt about whether they have actually been forfeited.

²⁹ *Williams v Attorney-General* [1990] 1 NZLR 646.

³⁰ This approach, as Richardson J in dissent put it, has changed the historical character of customs legislation – and its rationale – because it suggests that title has not absolutely vested in the Crown upon forfeiture.

³¹ In addition, the Customs and Excise Act 1996, s 166, provides for retention of documents or goods during a lawful search where there is reasonable cause to believe they are evidence of the commission of an offence, and ss 166A–F provide for detention of property for a limited period, where there is good cause to suspect it is “tainted”.

³² This does not include goods in Customs places or Customs controlled areas or Customs approved areas for storing exports: see Customs and Excise Act 1996, Part II.

- 37 Search warrants are for one occasion only and must be executed within 10 working days at any time that is reasonable in the circumstances. There is provision for “emergency warrants”.³³

Notice of seizure

- 38 Customs must give written notice of the seizure to any persons known or believed to have an interest in the goods as soon as reasonably practicable (section 227 of the Act), or to his or her agent if the person is overseas. A person found in possession of a controlled drug is not entitled to a notice of seizure.³⁴

Release of goods on security

- 39 Following their seizure, a provision allows release of goods upon deposit of a sum of money. Section 229 of the Customs and Excise Act 1996 provides that where goods have been “seized as forfeited” the Chief Executive may, before condemnation, deliver the goods to their owner or the person from whom they were seized, on deposit of a sum equal to the customs value of imported goods, or the excise value of goods manufactured in a Customs controlled area, together with any duty to which the goods may be liable. The equivalent section in the earlier Customs Act had been interpreted as requiring the Collector to act reasonably and consider the security offered where it is appropriate and authorised, on the basis that seizure must not be continued in an unreasonable manner.³⁵

APPEALS AGAINST SEIZURE AND WAIVERS OF FORFEITURE

- 40 There are two parallel statutory avenues of review in the Customs and Excise Act 1996: under section 231 (application to a court for an order disallowing seizure) and under section 235 (application for waiver of forfeiture to the Minister). Each avenue offers some protection against the potential harshness of forfeiture and seizure.

Section 231 application to disallow forfeiture

- 41 Section 231 provides that any person claiming an interest in the goods seized may apply to the District Court (or to the High Court if the goods exceed \$200,000 in value) within 20 working days of notice (or such further time as the court may allow) for an order to disallow the seizure and return the goods, and for compensation for any depreciation in value of the goods resulting from their seizure and any transport or storage costs, as the court thinks fit.
- 42 If a person has not received notice of seizure, however, any person claiming an interest in the goods seized as forfeit has six months within which to apply to the court for a disallowance of seizure (section 233), unless the goods have already been condemned due to dismissal of an application for disallowance

³³ See Customs and Excise Act 1996, s 171. It is still necessary for the Customs officer to apply to the District Court. Similarly, a warrant is not necessary in Canada if it would be impractical to obtain one, due to “exigent circumstances”. See Customs Act RS C 1985 c C1, (2nd Supp), s 111.

³⁴ The statutory regime in the Customs and Excise Act 1996, ss 227–230, does not apply to illicit controlled drugs: see the Misuse of Drugs Act 1975, s 36.

³⁵ *Alwen v Comptroller of Customs*, above n 28.

or discontinuance of such application (sections 232 and 234A). If goods have been disposed of, compensation may be paid.

- 43 In proceedings, there is a presumption in favour of the Crown that allegations in its pleadings relating to the identity of any goods, the country or time of exportation of the goods, the fact or time of importation of any goods, the place of manufacture, production or origin of the goods or the payment of any duty on goods, are true, unless the contrary is proved (section 239). In other words, there is an onus of proof on the claimant for many facts.
- 44 The claimant also bears the burden of proving (on the balance of probabilities) that no reasonable cause existed for Customs to seize the goods and to continue to detain them.³⁶ The court cannot disallow seizure if this burden is not discharged, nor can it take a lack of proportionality between the forfeiture and the violation into account.
- 45 No order for disallowance may be made if there are proceedings pending that may result in condemnation. No compensation will be ordered unless the goods were seized or detained without reasonable cause.³⁷

Section 235 application for waiver of forfeiture

- 46 The second avenue of review (section 235) is to the Minister for a waiver of forfeiture, by a person who “but for the forfeiture would be entitled to the goods”. Here the period within which the person may apply is again 20 working days, but only 30 working days if they have had no notice of seizure. Unlike under section 231, there is no provision for an extension of time. The Minister may, where he or she considers it equitable to do so, waive the forfeiture in whole or in part, subject to any terms or conditions, and direct the return of the property. In practice it appears that a person contesting forfeiture may often apply both to the court under section 231 (or 233) and to the Minister under section 235.³⁸ There is no timeframe within which the Minister must respond, and no further appeal to a court.

Restoration of forfeited or seized goods at the discretion of the court

- 47 Where goods have been forfeited because a defendant has been convicted of an offence, the court may order the restoration of the goods to the person from whom they were seized, in which case the conviction does not have effect as condemnation of the goods.³⁹ This is the case whether or not the goods have been already condemned by force of the Act.⁴⁰

³⁶ *Woodland Apparels New Zealand Ltd v NZ Customs Service* (2 October 2000, High Court Auckland, M868/IM00, Potter J) approving *Ross Autos v NZCS* [1998] DCR 323, not following *Bathurst Developments v NZCS* [1998] DCR 300. See also *Kryuchkov v Comptroller of Customs* (27 September 2002, District Court Wellington, MA 72/02, Ongley DCJ).

³⁷ Customs and Excise Act 1996, ss 231–232, and see *Wilson v New Zealand Customs Service* (1999) 5 HRNZ 134.

³⁸ Discussion with New Zealand Customs Service, 7 September 2004. But it seems that s 231 is not much used. We have been told that for the last two years there has been an average of 10–12 applications per year, all involving small shipments: discussion with Crown Counsel, Auckland, November 2004. Section 235 is more utilised. On average over the last few years there have been 160 applications per year, see data in chapter 3.

³⁹ Customs and Excise Act 1996, s 236(2).

⁴⁰ See *New Zealand Customs Service v Wong* [1999] NZAR 1 (CA).

CONDEMNATION

- 48 Under existing law in New Zealand title passes to the Crown on the occurrence of specified circumstances,⁴¹ but whether or not those circumstances have occurred (if they are questioned by a claimant) is not finally determined until there are condemnation proceedings in a court or until condemnation is deemed to occur. If the application by a claimant to the District Court is dismissed, the goods are deemed condemned as forfeited to the Crown, as they are where there is no application (section 234), or the application is discontinued (section 234A), or upon conviction (section 236).

CONCLUSION

- 49 The Part XIV regime of forfeiture and seizure is on the face of it a strict one permitting automatic forfeiture of a variety of classes of items, including prohibited goods whether harmful or not, others unlawfully crossing or across the border, and the means of conveyance of those goods (section 225). Conveyances of such goods “shall be forfeited”, whether or not the owner is complicit in the violation. There is no protection for innocent third parties. There is a wide discretion to seize such goods (section 226). In the past, too, the regime has been narrowly interpreted by the courts.⁴² It is possible to appeal to a court but the appeal is limited to disallowance of seizure, and the ministerial “waiver of forfeiture” review is discretionary and not subject to court appeal.

⁴¹ This is probably upon a customs violation. But, as discussed in chapter 6, one interpretation is that forfeiture may not be activated until seizure. The uncertainty is problematic.

⁴² *De Keyser v British Railway Traffic and Electric Co* [1936] 1 KB 224 followed in *Attorney-General v Graham* [1966] NZLR 807. See too, *Little's Victory Cab Co Pty Ltd v Carroll* (1948) VLR 249.

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Operation of the Part XIV provisions

50 **H**OW do the provisions of Part XIV of the Customs and Excise Act 1996 operate in practice? The Customs Service has wide powers given to it by the Act but has detailed policy documents (called guidelines in this report) fettering the operation of those powers and protecting rights.

NEW ZEALAND CUSTOMS SERVICE SEIZURE GUIDELINES

51 The guidelines note that forfeiture of goods is automatic as a consequence of some acts or omissions and is one of the most severe penalties in Customs law, but that seizure is discretionary.⁴³ They stress that all seizures must be:

- (a) sustainable in law;
- (b) in keeping with the spirit and/or intent of the relevant statute;
- (c) consistent with the provisions of the New Zealand Bill of Rights Act 1990.

52 The Customs Service has acknowledged that the New Zealand Bill of Rights Act applies to individual decisions to seize and requires reasonableness.⁴⁴ Internal guidelines refer to the Act and take into account its jurisprudence.⁴⁵ The General Investigations Group's guidelines⁴⁶ quote section 21 of the Bill of Rights Act and the importance of "reasonableness". They state, for example,

⁴³ New Zealand Customs Service, National Manager Investigations, IV POL 02 "Seizure and Waiver of Forfeiture", 1 July 2004, 1.0. See also National Manager Goods Management, GM PRO 03 "Seizure, Waiver of Forfeiture and Disposal Procedure" 1 July 2002, 1.0.

⁴⁴ The New Zealand Bill of Rights Act 1990, s 3, provides that the Act applies to acts done by any person or body in the performance of any power imposed upon them. The courts have held that where a person or company is in possession of property, the New Zealand Bill of Rights Act 1990, s 21, provides that government agents asserting and maintaining possession and control over property must do so reasonably: *R v Grayson and Taylor* [1997] 1 NZLR 399 is the leading case. See also, *Alwen v Comptroller of Customs*, above n 28; *Attorney General v PF Sugrue Ltd* (2003) 7 HRNZ 137; P Rishworth, G Huscroft, S Optican, R Mahoney *The New Zealand Bill of Rights* (Oxford University Press, 2003) 428–429.

⁴⁵ For High Court cases on Customs' duty to exercise their powers reasonably see, for example, *Alwen v Comptroller of Customs*, above n 28, where Blanchard J held that an ongoing seizure would be unreasonable if, and to the extent that, the Comptroller did not act reasonably on the applicant's request for release of goods on the giving of security; and *Wilson v New Zealand Customs Service*, above n 37: a seizure includes both the initial taking and the continued detention of property. Although there may have been reasonable cause for the original seizure, circumstances and further investigations may later demonstrate there is no reasonable cause for the continued detention.

⁴⁶ New Zealand Customs Service: IV POL 02, above n 43, 3.14, has a page-long section on the application of the Bill of Rights Act 1990.

that “it may also be unreasonable to seize goods which have become subject to forfeiture by way of unintentional error and thereby liable to seizure”; and that a case-by-case careful assessment is needed before seizure, taking into account several factors such as the impact on the importer’s business, whether goods have been disposed to an innocent third party, and the nature of the goods – prohibited or otherwise. Further, “It cannot be overemphasised that persons found to be importing/exporting forfeited goods are to be dealt with in a fair, consistent and equitable manner.”

Guidelines for goods other than prohibited goods

- 53 According to guidelines produced by the National Manager of Investigations,⁴⁷ the general policy for goods other than prohibited goods is not to seize them, unless there has been fraud or a deliberate breach of the Act. The guidelines state:
- 3.2.2 Voluntary disclosure of errors. As part of the objective of encouraging voluntary disclosure of errors on entries, where an importer or broker voluntarily discloses an error on an entry and the element of mens rea (intent) is not present, seizure of the goods should not be authorised [unless disclosure was prompted by inspection, audit or investigation] . . .
 - 3.2.3 Fraud and other deliberate breaches . . . it is expected that seizure will normally be effected for fraud and other deliberate breaches. Notwithstanding that such goods should normally be seized, the reasonableness or otherwise of such action must be addressed prior to seizure. This is particularly so where the goods have passed to an innocent third party or those goods are covered by [s 225(5) – craft, vehicles etc used for carrying, concealment of goods etc] . . . Where the viability of a company, employing a significant number of persons, will be put in jeopardy if seizure of goods is effected such action must, prior to execution, be discussed with a level 3 Manager . . .
 - 3.2.4 Lack of reasonable care . . . Negligent entry preparation is potentially the greatest area of revenue leakage at the border. Decisions as to whether or not to seize in cases where there is a demonstrable lack of care must take into account all the circumstances including the previous record of the importer and broker concerned, the interests of the third party and complicity between the importer and broker.
- 54 Total fraud seizures (recorded by the Fraud Investigations Group which is located in Auckland) from August 2001 to September 2004 included jewellery, garments, cigarettes, dried food, alcohol, and electronic goods. Some involved significant quantities – for example, 9969 cartons of cigarettes (200 cigarettes per carton), and 16,680 packets of vermicelli packed with 2040 bottles of sorghum wine. Of all the fraud seizures recorded by this group during that time period (31 incidents), there was only one application to disallow seizure under section 231 of the Customs and Excise Act 1996 (for a digital camera), and it was settled out of court.
- 55 Non-prohibited goods seized also included goods from crimes involving dishonesty (pursuant to an amendment to section 225 in 2002). This covers seizure of chequebooks, credit cards, wallets, and stolen computers.⁴⁸ Stolen goods can sometimes be restored to owners.

⁴⁷ New Zealand Customs Service: IV POL 02, above n 43.

⁴⁸ This seems to be a growing problem: 9 in 2002, 17 in 2003 and 24 in the year to 1 September 2004.

Seizure of prohibited goods

- 56 Anecdotally, about 90 per cent of seized goods are prohibited imports, particularly goods deemed harmful such as controlled drugs, objectionable material and, increasingly, goods breaching intellectual property.⁴⁹ The main aims of such seizures are protection of the community and security.
- 57 Some prohibitions are listed in the First Schedule of the Customs and Excise Act 1996, referring to objectionable material (for example pornography) within the Films, Videos, and Publications Classification Act 1993, and counterfeit coins and banknotes. Controlled drugs listed in the schedules to the Misuse of Drugs Act 1975 (with some exceptions) are deemed prohibited imports by section 36 of that Act.
- 58 Many prohibited imports are listed in Customs Import Prohibition Orders in Council,⁵⁰ including:
- offensive weapons like flick knives, bayonets and knuckledusters;
 - motor vehicles with incorrectly recording odometers or without odometers;
 - goods with misleading trade descriptions;
 - certain asbestos products;
 - trout and trout products.
- 59 Prohibited exports listed in the Customs Export Prohibition Orders in Council⁵¹ include pounamu in its natural state or partly processed, greenshell mussels, hazardous waste, and certain toothfish.
- 60 In the financial years 2000/01 to 2002/03 there was an average of 535 seizures of drugs per annum by Customs. This did not include seizures of precursor products such as pseudoephedrine; seizures of these numbered 433 incidents in 2003 and 239 incidents up to 22 June 2004.⁵² In December 2004 the Minister of Customs said that seizures of crystal methamphetamine at the border had increased 16-fold compared with the previous year. Numbers of precursor pills seized had risen from 830,320 in 2003 to 1,369,588 in 2004.⁵³
- 61 Total numbers of seizures of prohibited goods recorded by the Auckland General Investigations Group, apart from drugs, have been increasing annually (53 in 2001/02, 138 in 2002/03, 203 in 2003/04 and 138 from July to 1 September 2004).⁵⁴ Items seized include objectionable material, which is a growing

⁴⁹ National Manager, Investigations, New Zealand Customs Service, conversation with Law Commission, 25 August 2004. Goods breaching intellectual property are seized under the Trade Marks Act 2002, not under the Customs and Excise Act 1996.

⁵⁰ These are made pursuant to the Customs and Excise Act 1996, s 54.

⁵¹ These are made pursuant to the Customs and Excise Act 1996, s 56.

⁵² See, for example, a report of huge seizures of pseudoephedrine pills (used to make methamphetamine) "Police Issue Warning after Large Drug Seizure" (3 December 2004) *The New Zealand Herald* A03.

⁵³ Hon Rick Barker, Minister of Customs "Government Vigilant against Community Wreckers" (17 December 2004), Press Release.

⁵⁴ Total seizures of all goods rose in the years from 1997 to 2002 (1997: 521; 1998: 1345; 1999: 1654; 2000: 1954; 2001: 2175) fell in 2002: 2137; rose in 2003: 2459; and in the year to July 2004 had reached: 1757.

problem;⁵⁵ restricted and specially dangerous airguns; cannabis utensils; and cigarette lighters contravening product safety standards. Goods seized in breach of the trade descriptions prohibitions in the Customs Import Prohibition Order in Council 2002 also represent an increasing problem.⁵⁶

- 62 One reason for the increase in numbers of seizures is the improved technology used to scan containers, which is fast and accurate.⁵⁷ Often containers arriving on the wharves are scanned to pick up inconsistencies with documentation, and inspections will focus on any alerts from the scanning and also on profiling and other intelligence. The container can be brought to a Customs “controlled area” and its contents unloaded and passed down conveyor belts through X-ray machines.
- 63 All incoming mail is X-rayed on conveyor belts. Some suspect packages will be sniffed by dogs and may then be opened. Seizure of goods forfeited pursuant to section 225 (or of goods that there is reasonable cause to suspect are forfeited) may then follow.⁵⁸ The aim of scanning is to locate prohibited, concealed, or uncustomed goods and enforce the law at the border in the limited time available, without obstructing the flow of incoming and outgoing passengers and goods at the border.

Prohibited goods which can be “redeemed” or re-exported

- 64 The general rule is that prohibited goods should be seized in accordance with the intention of Parliament that they should not be imported or exported, but there are some exceptions. For example, tins of cat food containing trout (which are prohibited in New Zealand) can be exported back to the source – such goods would not be prohibited in the country of origin and have been exported to New Zealand probably by mistake. In cases where goods require a permit or consent for importation it is possible to grant time to obtain such a permit, thereby enabling waivers of forfeiture.⁵⁹ In some cases a condition of waiver may be that an importer relabel goods where labels are in breach of prohibited trade descriptions; this would then allow importation.

WAIVERS OF FORFEITURE

- 65 While detections and seizures of prohibited goods are rising, waivers of forfeiture applications have remained relatively static in recent years.⁶⁰

⁵⁵ Twenty-two seizures in 2001/02, 70 in 2002/03, 60 in 2003/04 and 41 from 1 July to 1 September 2004.

⁵⁶ Eighteen seizures in 2001/02, 39 in 2002/03, 84 in 2003/04 and 36 from July to 1 September 2004.

⁵⁷ Manager, Auckland Inspections, New Zealand Customs Service, comment made to Law Commission, Wellington, 25 August 2004. See also New Zealand Customs Service “New and Enhanced Cargo Inspection Capability” (2004) and “Customs Buys Big Scanners” (15 February 2005) *The Press*, Christchurch 3C.

⁵⁸ Outgoing mail is scanned by Aviation Security.

⁵⁹ There is an amendment in the Arms Amendment Bill 2005, No. 3 that would enable Customs to detain firearms while the importer (private importer) has 20 working days to apply for a firearms licence and a Police permit to import firearms. See proposed clause 19A of the Bill.

⁶⁰ About two decades ago, in the 1986/87 financial year, there were 2500 seizures by Customs, 217 waiver applications of which 143 were approved, mainly subject to conditions: *Williams v Attorney-General*, above n 29, per Richardson J, 680.

- 66 In 2001 there were 171 waivers of forfeiture applications;⁶¹ in 2002: 172; in 2003: 151; and to August 2004: 68. This gives an average of 164 applications annually in the period from 2001–2003. Applications are commonly for cars, also for cannabis utensils, with some for jewellery, firearms, computers, clothing (for example, 2340 pairs of sandals with misleading country of origin labels), cigarettes and alcohol. Outcomes for waiver applications were not generally obtainable by us, but a sample of waiver applications indicated the range of outcomes.
- 67 In this group, outcomes included:
- approvals without conditions;
 - conditional approvals (for example, for importing of a firearm pending the obtaining of a licence or barrel removal, or a laptop computer pending the removal of its hard drive);
 - part approvals (for some goods in a consignment but not for others);
 - a few deferrals pending the outcomes of criminal proceedings or an ownership dispute.
- 68 About half the applications for waiver in this group were declined per annum, although in 2004 less than a quarter had been declined to August 2004. Of those applications declined, many were for misleading commercial goods.

Vehicle seizures, detentions, waiver applications, releases and disposals

- 69 Imported vehicles are examined in accordance with information received or on a random basis, and as a result some may then be detained for further examination.
- 70 Detention in this context refers to an examination process under section 151 of the Customs and Excise Act 1996, whereby specialist odometer technicians examine the cars within 24 hours and report within a further 24 hours. Those vehicles then detained are examined a second time by a specialist engineer, the whole process taking about five days at the end of which a percentage are “seized”. In the 2001/02 year, for example, 25,432 vehicles were initially examined, 399 were detained for further examination, 343 were seized and 69 released. There were 139 waiver of forfeiture applications (about 40 per cent of those seized) and 33 vehicles were released.

CO-OPERATION WITH OTHER AGENCIES AT THE BORDER

- 71 Customs acts on behalf of other departments, or works in conjunction with other agencies at the border (such as the Department of Immigration and Ministry of Agriculture and Forestry), saving duplication. This is known as “horizontal integration at the border”.

⁶¹ Note that these are numbers of applications – an application could include a number of items, for example, it could include 80 vehicles.

- 72 There are a number of other Acts that import Part XIV of the Customs and Excise Act 1996 or part thereof. They include the Misuse of Drugs Act 1975,⁶² Antiquities Act 1975,⁶³ Fair Trading Act 1986,⁶⁴ and Hazardous Substances and New Organisms Act 1996.⁶⁵ Others, such as the Food Act 1981, Trade in Endangered Species Act 1989, Copyright Act 1994 and Trade Marks Act 2002, have their own forfeiture and seizure regimes at the border.
- 73 Customs belongs to joint working parties with other departments, which work together on areas of common interest, sharing information and intelligence.
- 74 The Police and Customs have co-operated for some years to combat drug trafficking, for example, to put into action the Government's methamphetamine plan to control the supply of precursor substances from international sources. The current Memorandum of Understanding between Customs and the Police recognises the role and competence of the Police as the principal law enforcement agency in New Zealand, and the role and competence of Customs as the Government's principal border agency responsible for managing the movement of persons, goods and craft across the border and minimising the associated risks.
- 75 Customs acts either on prior information from overseas, for example, that a certain passenger is a suspected drug courier, or from their own "profiling" of passengers or scanning of containers or mail, and then either alerts the Police to any consequent seizure of drugs or acts jointly with the Police to carry out an investigation and seizure. Areas of potential future co-operation between the Police and Customs include dealing with the possible mass arrival of illegal seaborne immigrants (not yet a problem in New Zealand, but forfeiture and seizure of boats in such circumstances is now authorised as noted in chapter 2) and possible cross-border terrorist financing.
- 76 Customs also liaises with the Ministry of Transport and the Aviation Security Service in relation to security at airports and with port authorities concerning port security. The Service also meets with the Joint Industry Consulting Group in order to liaise with industry representatives. The emphasis is on a "whole of

⁶² The Misuse of Drugs Act 1975, s 36, says that various sections of the Customs and Excise Act 1996, including ss 225–226, shall apply in relation to the importation and exportation of controlled drugs, except those in Part VI of Schedule 3 of the Misuse of Drugs Act 1975. Note, however, that Schedule 5 of the Customs and Excise Act 1996 exempts those in Part IV, V and VI of Schedule 3 of the Misuse of Drugs Act 1975.

⁶³ The Antiquities Act 1975, s 10, provides that any antiquity exported or attempted to be exported under the Antiquities Act 1975 shall be forfeited to the Crown, and the provisions of the Customs and Excise Act 1996 (other than s 235) relating to forfeited goods shall apply to such antiquities. However, the Protected Objects Amendment Bill 2004 would retitle and modify this Act, and exempt ss 229, 235, 236(2)–(4) and 237 of the Customs and Excise Act 1996 and also specifically provide that forfeiture of an object is not dependent on seizure.

⁶⁴ The Fair Trading Act 1986, s 26, deems goods imported under false trade descriptions to be prohibited imports under the Customs and Excise Act 1996.

⁶⁵ The Hazardous Substances and New Organisms Act 1996, s 121, is amended in the Hazardous Substances and New Organisms (Approvals and Enforcement) Amendment Bill to make it clear that all the provisions of the Customs and Excise Act 1996 apply to hazardous substances. Section 122 gives power to refuse entry to hazardous substances and is being amended to give Customs officers authority, where they have reasonable cause to believe a hazardous substance has been unloaded from a ship or aircraft, to direct importers to export it.

government” approach, avoiding duplication and disruption of the movement of people and cargos, while detecting dangerous and prohibited goods.

CONCLUSION

- 77 The potential severity of the Part XIV provisions of the Customs and Excise Act 1996 is ameliorated in practice by the New Zealand Customs Service internal guidelines, in which it is stressed in particular that decisions must be made consistently with the New Zealand Bill of Rights Act 1990, and that the interests of innocent third parties must be taken into account. Customs aims to operate the Customs and Excise Act 1996 provisions in a fair and reasonable manner and with due process.⁶⁶
- 78 Seizures are mainly of prohibited goods, and even in this class not all such goods are finally forfeited, as forfeiture may be waived on condition that goods are re-exported, relabelled, or approved for importation pending the obtaining of a permit, especially where it is a first-time non-commercial violation. Reasonable and non-arbitrary decisions are made; the Commission has received no suggestion that there is any abuse of power in practice.
- 79 Compliance with the New Zealand Bill of Rights Act 1990 and the manner of the exercise of the provisions using the guidelines should ensure a non-arbitrary and reasonable use of the seizure powers, and sensible, proportionate decisions. But this relies to some extent on the current guidelines (which lack the status of legislation)⁶⁷ and the good sense of the decision-makers, rather than the statutory provisions themselves.
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⁶⁶ See New Zealand Customs Service “Regulatory Philosophy” Key Principles (internal unpublished document, Wellington 2003).

⁶⁷ In 1990 the Australian Law Reform Commission noted that rulings set out in the Australian Customs Service Manual had an uncertain legislative foundation and their existence indicated the need for clear legislative backing: Australian Law Reform Commission *Customs and Excise: Seizure and Forfeiture* (Discussion Paper 43, Sydney, 1990), para 51. Australian legislation concerning seizure is now much more detailed.

4

Comparison with overseas customs legislation

80 **T**HE Terms of Reference require us to have regard to analogous border control practices in comparable jurisdictions. Currently the provisions for forfeiture and seizure in Part XIV of the Customs and Excise Act 1996 are broadly similar to those in Australian, English and Canadian legislation.⁶⁸ Alignment of New Zealand customs legislation with our trading and international partners is important to preserve alliances and support New Zealand’s trade, and reputation as a safe and secure country.

81 The following table shows a summarised and simplified comparison of customs *in rem* forfeiture legislation for the main jurisdictions studied in this report. The text then concentrates on the legislative distinctions between these jurisdictions.

FORFEITURE

82 Things that “shall be forfeited” are listed in one section in the New Zealand legislation (section 225 of the Customs and Excise Act 1996) and in a group of sections in the Australian Act. In the Canadian legislation there is no list; forfeiture simply arises where the Act or regulations have been contravened. In England things are only “liable to forfeiture” initially and such things are to be found in various sections throughout the legislation.

Australia

83 In Australia, similarly to New Zealand, section 229 of the Customs Act 1901 (Cth) lists 18 types of goods that “shall be forfeited to the Crown” in certain circumstances of customs non-compliance. This list includes simple categories such as “all prohibited goods” and concealed dutiable goods, and also more specific categories such as “all prohibited exports put on any ship, boat or aircraft for export or brought to any wharf or place for the purpose of export”.

84 There are also separate provisions for the proceeds of drug trafficking (section 229A). Separate sections also provide for forfeiture of ships and aircraft that “shall be forfeited” in six circumstances, including where they were:

- used in smuggling, or knowingly used in the unlawful importation, exportation or conveyance of any prohibited imports or prohibited exports;
- found to be constructed or adapted for the purpose of concealing goods.

⁶⁸ The forfeiture and seizure regimes of these countries were researched for this report as being those most comparable with that in New Zealand. The regime in the United States was also covered to some extent as the United States is an important trading partner, but a full comparison is not included in this chapter.

TABLE: COMPARATIVE SUMMARY OF CUSTOMS FORFEITURE LEGISLATION

	New Zealand Customs and Excise Act 1996	Australia Customs Act 1901 (Cth)	England Customs and Excise Management Act 1979	Canada Customs Act 1985
Forfeiture	<p>Goods “shall be forfeited”: s 225 where there is a violation</p> <p>Also craft and packages involved in violation</p>	<p>Goods “shall be forfeit”: s 229 where there is a violation</p> <p>Also packages, craft, (some exempt) proceeds of drug trafficking</p>	<p>Things are “liable to forfeiture”: s 139 – title does not pass until condemnation</p> <p>Also things mixed/packed. Ships of over 250 tons exempt unless adapted to conceal goods</p>	<p>Forfeiture “from contravention”: s 122. Ascertained forfeiture: s 124 – value of goods plus duty</p> <p>Also conveyances</p>
Administrative monetary penalty	<p>For document irregularities: ss 128–130; where duty is less than \$1000: s 223</p>	<p>Impoundment where duty is less than \$5000: s 209</p>		<p>Administrative monetary penalty scheme for technical infractions – civil penalty – according to culpability</p>
Seizure	<p>Officers may seize forfeited goods or if reasonable cause to suspect forfeited: s 226 (without a warrant at a Customs place)</p>	<p>May seize prohibited goods without warrant at a Customs place and narcotics anywhere: ss 203B and 203C. Otherwise warrant required: s 203</p>	<p>Detention or seizure of things if liable to forfeiture: s 139</p>	<p>Officers may seize where belief that Act or regulations contravened in respect of those goods: s 110</p>
Custody of seized goods	<p>Can be left in custody of person from whom seized: ss 226(7)–(8)</p>	<p>At an approved place: s 204</p>	<p>In custody of Customs office or Police: s 139</p>	<p>Can be left in custody of person from whom seized</p>

TABLE: COMPARATIVE SUMMARY OF CUSTOMS FORFEITURE LEGISLATION CONT'D

	New Zealand Customs and Excise Act 1996	Australia Customs Act 1901 (Cth)	England Customs and Excise Management Act 1979	Canada Customs Act 1985
Search or seizure warrant	Only if goods inland: s 167	Seizure warrant for other than "special forfeited goods" at a Customs place (see above): s 203		Only if goods inland: s 111 – unless exigent circumstances
Notice of seizure	Notice to be given to persons known or believed to have an interest: s 227	Notice to "owner" (widely defined): s 205	Notice to be given to persons known or believed to have interest: Schedule 3 para 1 and s 139(6)	Notice to be given to owners or holders of interest: ss 110(4) and 129
Release of seized goods on security	Customs may deliver goods on deposit of value plus duty: s 229 (after seizure)	Owner of goods seized may apply for release on security: but not "special forfeited goods": s 208	Commissioners may deliver on payment of sum up to value of goods plus duty (after seizure): Schedule 3	Goods may be returned on receipt of value of goods/craft plus duty: s 117
Condemnation	Goods condemned as forfeited if no application or dismissed or conviction: s 234	Customs apply for condemnation (except drugs, perishables) if a claim by owner: s 205B	Customs apply for condemnation if a claim for goods by owner: s 145	No condemnation
Appeals	Persons with an interest may apply for disallowance of forfeiture: s 231	Owner can apply for restoration: s 209F		See ministerial review, below
Ministerial review/restoration	Persons who would be entitled to goods may apply for waiver of forfeiture: s 235	No ministerial waiver	Restoration possible after commissioners' review: s 152 (no ministerial review)	Persons in possession or owners may apply to Minister including third parties re their interest. Appeal to court

- 85 Forfeiture of goods extends to their packaging (section 230), and the forfeiture of any packaging extends to all goods in the package, as in England. In New Zealand, bulk cargo containers are specifically excluded unless adapted to conceal goods.
- 86 If draft legislation drawn up by the Australian Law Reform Commission in 1992⁶⁹ had been implemented, it would have changed the time of forfeiture in Australia and meant it was no longer automatic upon the violation.⁷⁰ However, although that is the approach in England (see below), it has not yet been adopted in Australia.

England

- 87 In England, section 139 of the Customs and Excise Management Act 1979⁷¹ states that things “liable to forfeiture” under customs and excise Acts may be seized or detained from the time of contravention. Provision for things to be liable to forfeiture is scattered throughout the Act. Liability to forfeiture extends to ships, aircraft, vehicles, animals and containers, or other things used for the carriage or concealment of things liable to forfeiture. Liability also extends to things mixed or packed with things so liable (section 141). But ships of more than 250 tons register are generally exempt from forfeiture,⁷² unless they were constructed, adapted or fitted for purposes of concealing goods (section 88).
- 88 The meaning of “liable to forfeiture” (as opposed to “shall be forfeited”) in the English legislation does not appear to have been canvassed recently by English courts. However, the Federal Court of Australia in *Whim Creek Consolidated NL v Colgan* said of the same phrase:⁷³
- Historically the word “forfeiture” and its derivatives has meant an immediate loss of all interest in property as well as a loss of the right of possession. On the other hand, to say that property is “liable to forfeiture” is different, for that merely imports a probability that may or may not eventuate.
- 89 So in England “liability to forfeiture” prevents immediate divesting of title in the goods to the Crown.

⁶⁹ Australian Law Reform Commission *Customs and Excise* vol I *Seizure, Impoundment and Forfeiture of Goods* (Report 60, Sydney, 1992), pt 31; draft Model Bill, 250. The relevant commentary is in vol III, 289.

⁷⁰ See discussion in chapter 6 as to the time of forfeiture. In New Zealand there is a view that forfeiture is not automatic upon violation, and does not take place until seizure: see *Attorney-General of New Zealand v Ortiz* [1984] 1 AC 1.

⁷¹ The Commissioners for Revenue and Customs Act 2005 was given royal assent on 7 April 2005, making some amendments to the 1979 Act but not altering the forfeiture and seizure regime. The merger between HM Customs and Excise and the Inland Revenue Department took effect from 18 April 2005.

⁷² A fine may be imposed on the responsible ship’s officer by Customs in lieu of forfeiture in this case.

⁷³ *Whim Creek v Colgan*, above n 20, 210. See also *The Annandale* (1877) 2 PD 218, 219 per James LJ, “The 103rd section of 17 & 18 Vict. C. 104, does not say that the ship shall be liable on conviction of the offence to be forfeited, but that the ship itself shall by reason of the offence be forfeited”. So in that case, the rightful owner was divested of title the moment the person had committed the offence.

Canada

- 90 In Canada, goods may be seized as forfeit where the officer believes on reasonable grounds that the Act or regulations have been contravened.⁷⁴ Section 110(2) of the Canadian Act provides that an officer may also “seize as forfeit” conveyances, where the officer believes on reasonable grounds that the Act or regulations have been contravened in respect of a conveyance, or in respect of persons transported by a conveyance. This subsection appears to cover the “people smuggling” problem (in a more general way than section 225(6) of the New Zealand Act). There is no listing of such goods or conveyances, unlike in New Zealand and Australia.
- 91 Where goods are “seized as forfeit”, they are forfeited from the time of the contravention.⁷⁵ As in Australia and probably in New Zealand also,⁷⁶ no subsequent act or proceeding is necessary to effect the forfeiture.

Alternatives to forfeiture: administrative monetary penalty

- 92 New Zealand has a limited administrative monetary penalty system as an alternative to forfeiture as discussed in chapter 2, as does Australia. Canada and the United States both have more comprehensive systems.
- 93 In Australia, an officer can impound dutiable (non-prohibited) goods if the duty sought to be evaded is less than \$5000. The owner can pay duty plus a penalty to receive back their goods, or, if the owner chooses not to pay, the goods are taken to be seized as forfeited.⁷⁷
- 94 In 2002, Canada introduced a civil monetary penalty regime called the Administrative Monetary Penalty System (AMPS) to replace forfeiture and seizure for certain types of customs infractions involving commercial goods.⁷⁸ Most penalties are graduated and take the compliance history of the importer or exporter into consideration.⁷⁹
- 95 The Canadian Federal Court has noted that seizure is intrusive and disruptive⁸⁰ and “ascertained forfeiture” is an alternative for those situations where seizure

⁷⁴ Customs Act RS C 1985 c C1, (2nd Supp), s 110(1).

⁷⁵ See *Mason v The King* [1935] 4 DLR 313 (forfeiture is the legal inescapable consequence of the commission of the offence) applied in *Smith v Goral* [1952] 3 DLR 328, 332, and see Customs Act RS C 1985 c C1, (2nd Supp), s 122.

⁷⁶ See our discussion in chapter 6.

⁷⁷ Customs Act 1901 (Cth), s 209. Undeclared revenue goods, where duty evaded is more than A\$5000, can be seized using a seizure warrant, and in such cases a prosecution would normally be initiated. Australia also has an infringement notice scheme in lieu of prosecution for strict liability offences, set out in Part XXX of the Customs Act 1901 (Cth), ss 243X–243ZE. If the amount specified in the notice and the relevant correct duty is paid within 28 days, liability is discharged. But there is no external merits review, except that if a person refuses to pay, Customs may still prosecute and the person can defend the matter in court.

⁷⁸ These include errors in documents. CB Todgham Cherniak *The Customs Administrative Monetary Penalty System: The Good, The Bad and The Ugly* (May 2003) <<http://www.goodmans.ca/site/home.cfm>> (last accessed 26 January 2005), describes and to some extent criticises the new system.

⁷⁹ See <<http://www.cbsa-asfc.gc.ca/general/amps>> (last accessed 12 April 2005). The site provides a link to the penalty regime.

⁸⁰ *Francoeur v Canada* (1994) 78 FTR 109 and the Customs Act RS C 1985 c C1, (2nd Supp), ss 124–126.

would be impractical or the goods or conveyance cannot be found or seized.⁸¹ Ascertained forfeiture operates by way of a demand for the value (for the purposes of duty) of the goods and the amount of duty levied.⁸² Details concerning determination of the value and the amount payable are set out in section 124 of the Canadian Customs Act 1985.

- 96 The United States also has a civil monetary penalty regime for all commercial customs violations where fraud or negligence is alleged.⁸³ Where the United States Customs Service has reasonable cause to believe that there has been such violation, and determines further proceedings are warranted, it shall issue to the person concerned a notice of its intention to issue a claim for a monetary penalty. Such notice shall:
- describe the merchandise;
 - state the details of entry or attempted entry or aiding or procuring;
 - specify the laws and regulations allegedly violated;
 - disclose all material facts that establish the alleged violation;
 - state whether fraud or gross negligence or negligence is alleged;
 - state the estimated loss of lawful duties, taxes, fees and, taking into account all the circumstances, the amount of proposed monetary penalty;
 - inform the person that he or she shall have a reasonable opportunity to make representations, oral and written, as to why a claim for a monetary penalty should not be issued.
- 97 Graded maximum penalties are set out in the section in terms of the value of the merchandise or multiples of the amount of duty owed. There are exceptions where the violation is non-commercial or the amount of penalty is \$1000 or less.

SEIZURE

Australia

- 98 In Australia, the statutory scheme for seizure is significantly different from that of other jurisdictions considered. Since 1995, a seizure warrant has been required for seizure of forfeited or suspected forfeited goods except in certain cases (section 203 of the Customs Act 1901 (Cth)).⁸⁴ Authorised officers

⁸¹ See Customs Act RS C 1985 c C1, (2nd Supp), s 124.

⁸² MA Prabhu *The 2003 Annotated Customs Act* (Thompson Carswell, Toronto, 2003) 187. Section 229 of the New Zealand Customs and Excise Act 1996 does give the Chief Executive a discretion to restore goods on payment of a deposit but this is after seizure, whereas “ascertained forfeiture” is instead of seizure.

⁸³ Tariff Act 1930, 19 USC § 1592 (2004). The legislation provides that no person may, by fraud, gross negligence or negligence enter or introduce (or attempt to enter or introduce) any merchandise into the commerce of the United States by means of a document or electronically transmitted information, written or oral statement, or act which is material and false, or an omission which is material; nor may any person aid or abet such conduct.

⁸⁴ The 1993 *Review of the Australian Customs Service*, above n 12, recommended seizure warrants except for prohibited goods and drugs, or goods from passengers and crew on aircraft. This has been substantially implemented.

(Customs officers or Police or members of the defence forces) must satisfy a judicial officer that:

- they have reasonable grounds for suspecting goods are forfeited; and
- they are or will be on the premises within 72 hours; and
- it is necessary in all the circumstances to seize the goods.

99 In considering whether seizure of the goods is necessary, the judicial officer may have regard to:

- the seriousness of the offence;
- the circumstances in which the offence was committed;
- the pecuniary or other penalty that may be imposed;
- the nature, quality, quantity and estimated value of the goods;
- the inconvenience or cost to any person (for example, the owner) having legal or equitable interest in the goods if they were seized (section 203(3)).

This final consideration should ensure that the judicial officer considers the broader effect of Customs acting to seize goods.

100 The Australian scheme provides for exceptions to the need for a seizure warrant. These include:

- goods suspected on reasonable grounds to be “special forfeited goods” (that is, all prohibited imports or exports, see section 183UA) at, or in a container at, a “Customs place” such as a port or airport (including in a conveyance at a Customs place: see section 203B); and
- narcotic goods at a place other than a Customs place (see section 203C).

Seized goods must be taken to a Customs “approved place”, unless they are narcotic related (section 204).⁸⁵

101 The Australian regime may not be very different in practice from that in New Zealand. Most goods seized are likely to be prohibited imports (and therefore “special forfeited goods”) and so seizable without a warrant at Customs places. This suggests there is no practical difference from the New Zealand situation at those locations.⁸⁶

England

102 There are no detailed provisions dealing with seizure in the Customs and Excise Management Act 1979 (UK). As noted, any thing liable to forfeiture may be seized by an officer or constable or member of the armed forces or coastguard.

⁸⁵ In New Zealand they are taken to a “secure place” but can be left with persons from whom they were seized: Customs and Excise Act 1996, s 226(6)–(8).

⁸⁶ Most forfeited goods accompanying luggage or on persons would be caught by the impoundment provision: the Customs Act 1901 (Cth), s 209, whereby Customs may impound until payment of duty or a penalty, for goods under \$5000. Compare Customs and Excise Act 1996 (NZ), s 223.

Canada

- 103 New Zealand seizure provisions are based in part on Canadian provisions. In Canada an officer may, where he or she believes on reasonable grounds that the Customs Act or regulations have been contravened in respect of goods, “seize as forfeit” those goods, or any conveyance the officer believes on reasonable grounds was made use of in respect of those goods (section 110(1)) of the Canadian Customs Act 1985). “Reasonable grounds to believe” connotes a higher standard than “reasonable cause to suspect” in the New Zealand legislation. The test, according to the Federal Court, would be: did the Customs officer objectively believe, beyond mere suspicion, in the existence of a set of circumstances that could lead to the conclusion that an offence had been committed?⁸⁷
- 104 The limitation period on seizure and on ascertained forfeiture is six years in Canada (section 113). Things seized must be placed in the custody of an officer who must report forthwith to the Deputy Minister.

NOTICE OF SEIZURE

- 105 Generally in customs legislation, notice of seizure must be given to the person known or believed to be the owner of the thing seized. The amount of detail in statutory provisions varies. New Zealand legislation currently is not detailed, in comparison to that of Australia for example.

Australia

- 106 Owners, or (if owners cannot be identified) persons in possession or control of the goods, are required to be served with notice within seven days of the seizure, specifying certain matters such as date and place of seizure, reasons for seizure, description of the goods, and to whom to make a claim (section 205A).⁸⁸ Notice can be served personally, by post or, if no relevant person can be located after reasonable inquiry, by publishing a copy of the notice in the local newspaper. A notice of seizure is to be served as soon as practicable (within seven days to a known owner). Whether they have been served with notice or not, claimants have 30 days to make a claim (sections 205B and C) after which goods will be condemned. “Owner” is defined in section 4 broadly to include agents and persons beneficially interested in the goods. The Australian provisions cover various scenarios; for example, where there is a dispute as to who is the true owner, a person can join proceedings.

England

- 107 The English provisions are not as comprehensive as those in Australia and are contained in Schedule 3 of the Customs and Excise Management Act 1979. In England, notice of seizure and of the grounds for seizure must be given to the person known to be an owner of the thing seized, except in some circumstances, for example, where seizure is made in the presence of the owner or owner’s agent

⁸⁷ *Francoeur v Canada*, above n 80. The Federal Court (Trial Division) noted that, at minimum, the power must be exercised in good faith and without improper motive.

⁸⁸ See also Australian Government Customs Service “Seizure of Goods” *Protecting our Borders* (National Standing Operating Procedure for Passengers Branch, [Canberra], 2004).

(Schedule 3, para 1). Notice must be delivered personally or to an appropriate address or published in the relevant area Gazette.

Canada

- 108 In Canada, similarly to New Zealand, an officer must take reasonable measures to give notice of the seizure to persons who the officer believes is entitled to make application as owner of, or holder of an interest in, the goods (section 110(4) of the Canadian Act).⁸⁹ The sorts of third parties who may have an interest are listed in section 138 (such as owners, mortgagees, lien-holders) and they have 90 days in which to make a claim to the Minister.

RELEASE OF SEIZED ITEMS UPON SECURITY

- 109 A mechanism for release of certain types of things seized, on payment of security, is common to the jurisdictions considered for this report, notwithstanding that the things are already forfeited (except in England). In New Zealand, authority lies with the Chief Executive of Customs (section 229 of the Customs and Excise Act 1996); in Australia, an owner must apply to court for release of goods on security; in England, the Commissioners have discretion to decide; and in Canada the discretion lies with Customs or the Minister. The security is then deemed to be substituted for the goods seized.⁹⁰

Australia

- 110 Under section 208 of the Australian Customs Act 1901 (Cth) the owner of goods seized may apply to court for an order that certain goods (not being “special forfeited goods”, that is prohibited goods) be released on security being given to the Chief Executive Officer of Customs. The court may have regard to:
- the impact that the continued retention of the goods would have on the economic interests of third parties; and
 - whether the continued retention of the goods would prevent the provision of services by third parties, which would place at risk the health, safety or welfare of the community.
- 111 In Australia, where a claim has been made for goods seized, the officer must return the goods unless they are perishables, live animals, unseaworthy vessels or narcotic goods, or unless a court has ordered condemnation or retention for a specific period.

England

- 112 The Commissioners may at any time before condemnation deliver up the thing, on payment of such sum as they think proper, to any person claiming the thing is not liable to forfeiture, notwithstanding proceedings for condemnation are

⁸⁹ In the United States of America, notice of seizure must also be published on three consecutive weeks: Tariff Act 1930, 19 USC § 1607 (2004).

⁹⁰ This would, in effect, avoid continuing forfeiture although the relevant sections do not state this.

in progress.⁹¹ If the thing seized is a living creature or of a perishable nature the Commissioners may sell or destroy it.

Canada

- 113 In Canada, similarly to New Zealand, an officer may return certain goods seized under the Act to the person from whom they were seized or to an authorised person, on receipt of an amount of money equal to the value of the duty on the goods and the amount of duties levied on them, or in certain cases such lesser amount as the Minister may direct, or security satisfactory to the Minister (section 117 of the Customs Act 1985). Conveyances seized may also be returned, on payment of the money value of the conveyance at the time of seizure, or such lesser amount as the Minister directs or on payment of security satisfactory to the Minister.

REVIEWS, APPEAL AND THIRD PARTIES

- 114 There is no equivalent in the jurisdictions studied for this report of the New Zealand provision in section 231 of the Customs and Excise Act 1996 allowing any person interested to appeal directly to a court for a disallowance of seizure. Nor is there provision in the Australian or English legislation for a Minister to review or waive forfeiture. In Canada, however, all reviews are by the Minister, with an appeal to the court.

Australia

- 115 In Australia an owner of property seized can apply to court to claim the property (section 209F of the Customs Act 1901 (Cth)). If the goods are not of a certain kind in transit (connected with a terrorist act, or likely to prejudice Australia's defence or security or international peace, or otherwise involved in the commission of an offence), and the person is the rightful owner of the goods, the court must order that they be returned to the owner.
- 116 Any other person who notifies their challenge to a Customs decision must await condemnation proceedings; they could no doubt also seek judicial review of the Customs decision in the Federal Court. Customs in Australia has 120 days to bring proceedings (after which the goods must be restored).⁹²

England

- 117 In England, there is wide power to restore seized or forfeited things or to mitigate penalties under the Customs and Excise Management Act 1979. Section 152 provides, in part, that the Commissioners may, as they see fit, restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under customs and excise Acts.
- 118 These powers, according to an English review in 1985, mean that the forfeiture, seizure and restoration provisions "constitute a system for recovering duty and

⁹¹ See the Customs and Excise Management Act 1979 (UK), schedule 3, paras 16–17.

⁹² The period is also related to the fact that the goods may be evidence of an offence (see the Customs Act 1901 (Cth), s 205E(2)). A 120-day period for retention of evidence is specified (s 203R).

what might be described as civil quasi-penalties, secured on the goods”.⁹³ At that time there were a substantial number of restorations – in the year ending 31 March 1981 about two-thirds of smuggled goods were restored. National figures are no longer available.⁹⁴

- 119 In England, a person contesting seizure must give notice, in the proper form, within one month of notice of seizure (or of the seizure where there has been no notice).⁹⁵ There is no time limit for Customs to then bring proceedings for condemnation, providing it is within a reasonable time.⁹⁶

Canada

- 120 In Canada, the only avenue of immediate appeal is to the Minister. Seizures, ascertained forfeitures and penalty assessments can be reviewed by the Minister where goods or a conveyance are seized from a person in possession or their owner, or alternatively, security has been received in respect of them (section 129 of the Canadian Customs Act 1985). Claimants have 90 days after service of notice of seizure to request a review, with the possibility of an extension of time. If the Minister dismisses the claim or 90 days have expired since the application was made, claimants may apply to the Federal Court. The Minister may cancel a seizure or reduce a penalty if satisfied there was no contravention or there was an error in assessment. An appeal to the court is then available (unlike in New Zealand).
- 121 The Canadian Customs Act 1985 (uniquely of the legislation covered in this report) has a part related specifically to third-party claims (sections 138–141). Section 138(1) provides:
- If goods or a conveyance is seized as forfeit under this Act or if a conveyance is detained under subsection 97.25(2), any person, other than the person in whose possession it was when seized or detained, who claims an interest in it as owner, mortgagee, hypothecary creditor, lien-holder or holder of any like interest⁹⁷ may, within ninety days after the seizure or detention, apply for a decision by the Minister under section 139.
- 122 The applicant under section 138 must supply evidence of their interest in the seized or detained goods or conveyance. The Minister must decide an application “without delay”. The Minister must make a determination that the applicant’s interest in the goods or conveyance is not affected by the seizure or

⁹³ See *Customs, Excise and Car Tax*, Cmnd 9440, 36.6.5 [Keith Report]. The *Keith Report* recommended that the restoration process should be more open and that Customs should publish guidelines, paras 36.6.7–36.6.10. The Report also recommended that larger craft should be protected from forfeiture.

⁹⁴ Strategy Unit, HM Customs and Excise, email to Law Commission, 7 October 2004.

⁹⁵ G McFarlane *Customs and Excise Law and Practice* (Longman, London, 1993) 124–125 says that legal advice is essential, and that even if judgment is given for a claimant, if the court certifies that the original seizure was reasonable, the claimant is not entitled to damages or costs.

⁹⁶ See McFarlane, above n 95, 127 citing *Moylan v CEE* (1972) *The Times*, 2 March 1972. In England it is possible to appeal to the Value Added Tax and Duties Tribunal for review of specified decisions of customs commissioners including a refusal to restore seized or forfeited goods. This would no doubt be cheaper and quicker than judicial review.

⁹⁷ “Holder of any like interest” has been widely interpreted: see *785072 Ontario Inc v Minister of National Revenue* [1995] 1 FC 22 (TD).

detention, and a determination as to the nature of that interest at the time of the contravention or use, if:

- the applicant acquired the interest in good faith before the contravention or use;
- the applicant is innocent of any complicity or collusion in the contravention or use; and
- the applicant exercised all reasonable care in respect of any person permitted to obtain possession of the goods or conveyance in order to satisfy the applicant that it was not likely to be used in a contravention or, if the applicant is a mortgagee, hypothecary creditor or lien-holder, the applicant exercised that care in relation to the mortgagor, hypothecary debtor or lien-giver.⁹⁸

123 An appeal to court from the Minister's decision is available (section 140).

CONDEMNATION

124 The onus is on Customs in Australia and England to bring condemnation proceedings where there is a claimant; whereas in New Zealand the burden is on the claimant to appeal to court. The Canadian Customs Act 1985 does not provide for condemnation.

Australia

125 In Australia, there is an onus on the Crown to lodge proceedings for condemnation of goods (except in certain cases, for example if they are perishable or narcotic goods) where a claim has been made. If after 30 days from service of a notice of seizure no one has claimed the goods, they will be automatically condemned under section 205C, as in New Zealand. An owner or person with an interest, who has failed to claim, can seek compensation from a court under section 205F, providing they have a reasonable explanation for not claiming within the time limit. This could be that they were not notified. No compensation is payable if the goods were "special forfeited goods" or otherwise used or involved in the commission of an offence.

England

126 In England, as in Australia, if the owner of seized goods gives notice that he or she disputes liability to forfeiture, the Commissioners must issue proceedings for condemnation to determine whether the goods are forfeited to the Crown.⁹⁹

127 If the owner fails to give notice within one month, the goods are deemed to be condemned, as in New Zealand and Australia.¹⁰⁰ If the goods are condemned,

⁹⁸ There is a body of case law on whether or not these conditions have been satisfied, in particular whether an applicant has taken all reasonable care. See, for example, *Coombs v Deputy Minister of National Revenue (Customs & Excise)* (1992) 10 TTR 235, and other cases noted in MA Prabhu *The 2003 Annotated Customs Act* (Thomson Carswell, Toronto, 2003), 201–206.

⁹⁹ Customs and Excise Management Act 1979 (UK), s 145 and sch 3, para 6.

¹⁰⁰ Customs and Excise Management Act 1979 (UK), sch 3, para 5; and Customs Act 1901 (Cth), ss 205C–D.

forfeiture then takes effect from when liability arose and extinguishes third-party interests.

WORLD CUSTOMS ORGANIZATION STANDARDS

- 128 The New Zealand Customs Service is a member of the World Customs Organization and a signatory to the World Customs Organization International Convention on the Simplification and Harmonization of Customs Procedures of 18 May 1973, in force since 25 September 1974 (“the Kyoto Convention”). This has since been amended, but the amendments are not all in force. One such is the Protocol of Amendment dated 26 June 1999 (Brussels) which includes standards and recommended practice for seizure and detention of goods or their means of transport.¹⁰¹ Standard 11 in Specific Annex H of the Protocol of Amendment states:
- The Customs shall seize goods and/or means of transport only when:
- they are liable to forfeiture or confiscation; or
 - they may be required to be produced as evidence at some later stage in the procedure.
- 129 Standard 12 states that if a Customs offence relates to part of a consignment, only that part shall be seized. Standard 13 states that where there has been a seizure or detention of goods and/or their means of transport, Customs must furnish the person concerned with notice describing the goods, the reasons for seizure and the nature of the offence. It is recommended practice that Customs release seized or detained goods against adequate security, provided that they are not subject to prohibitions or restricted or will not be needed as evidence later.
- 130 In New Zealand, the Customs and Excise Act 1996 provides for compliance with standards 12–14.

Recommended practices

- 131 Further, it is recommended practice (also in Specific Annex H) that Customs release from detention the means of transport used in the commission of an offence, where they are satisfied that the means of transport was not constructed, adopted, altered or fitted in any manner for the purpose of concealing the goods; and is not required to be produced as evidence at some later stage. It is also recommended practice that the means of transport be only confiscated or forfeited where:
- the owner, operator or person in charge was a consenting party to the offence or had not taken all reasonable steps to prevent the offence; or
 - the means of transport had been specially constructed, adapted or fitted to conceal goods.
- 132 In New Zealand, such practices relating to transport used in the commission of a customs violation are not set out in either the Customs and Excise Act 1996, or any regulations, or specifically in any current Customs Service guidelines.¹⁰²

¹⁰¹ The Protocol of Amendment comes into force on 3 February 2006. New Zealand signed the Instrument of Accession on 30 August 2005.

¹⁰² However, s 196 of the Act does provide for an offence of “adapting craft for smuggling”.

- 133 It is also recommended practice that goods not be disposed of until definitively condemned as forfeited or confiscated or abandoned (unless they are likely to deteriorate quickly).
- 134 Although none of the above standards and recommended practices of Specific Annex H are presently in force, they are a guide to the standards and practice which the World Customs Organization expects of its members. The New Zealand legislation already complies to a great extent, with the notable exception of the legislative provisions in Part XIV for the forfeiture of craft and conveyances.

CONCLUSION

- 135 Although there are a number of basic similarities in the forfeiture and seizure regimes of the New Zealand Customs and Excise Act 1996 and those of the overseas jurisdictions mentioned in this report, there are also a number of distinctions. Some of the main distinctions are:
- the concept of “liability for forfeiture” in England, whereby seized items are initially detained by Customs, but not forfeited to the Crown unless later condemned;
 - the “ascertained forfeiture” alternative and the administrative monetary penalty system in Canada for “revenue” goods;¹⁰³
 - some limitations on the forfeiture of ships in England and of ships and aircraft in Australia;
 - the Australian requirement for a seizure warrant for items other than “special forfeited goods”;
 - notice provisions that are more detailed and comprehensive in Australia and Canada than in the New Zealand statute;
 - no direct appeal to a court in England or Canada, and no ministerial discretion to waive forfeiture in Australia or England, whereas commissioners have the discretion to restore goods in England;
 - the burden on Customs in Australia and England to bring condemnation proceedings where there is a claimant, in contrast with the burden on the claimant to appeal to court in New Zealand;
 - persons in possession or owners or persons given notice or who have given security are able to apply to the Minister for review, with appeal to the Federal Court in Canada, whereas there is no appeal from ministerial review in New Zealand;
 - specific provisions for third-party owners and others to have their interest determined by the Minister and ordered by a court, with appeal to a court of appeal, in Canada, whereas owners of goods can apply to the court in Australia.
- 136 The overseas legislation reviewed for this report tends to provide more protection for the rights of claimants and more alternatives to forfeiture than the New Zealand statutory provisions in Part XIV of the Customs and Excise Act 1996.

¹⁰³ See also the United States system discussed above at paras 96–97.

PART II
The Issues

5

Justifications for a strong regime at the border

137 **A**UTOMATIC forfeiture¹⁰⁴ and a wide discretion to seize without a warrant at the border, as in the New Zealand legislation, has the potential to severely affect property rights. The seizure and forfeiture of goods, craft and other items can potentially be out of proportion to a Customs violation, and can lead to hardship for innocent third parties who own or have an interest in the items seized. The question is: are such powers and consequences justified? Are they necessary (in an international context) to control the movement of goods across the border,¹⁰⁵ and to guard the State from threats of terrorism, illegal immigration, prohibited and potentially dangerous goods?

JUSTIFICATIONS

- 138 General justifications for a strong regime at the border include the following:
- (a) The State is entitled to police the border in exercise of its sovereignty to protect the State and its citizens, its trade and industry and the environment.
 - (b) There are particular difficulties of law enforcement at the border, such as there being only a brief opportunity to prevent either the importation of unwanted or harmful goods or the exportation of protected New Zealand items.
 - (c) There is a need for deterrence in a regime that relies mainly on voluntary compliance with the rules.
 - (d) International commitments, trade and co-operation mean that New Zealand customs legislation needs to be consistent with that of its trading partners and with security concerns.
 - (e) Customs co-operates with other agencies at the border, so legislation should be consistent with other internal border regimes.

The State's exercise of sovereignty at the border to protect citizens

139 Views favouring strong Customs powers have been fortified with the recent emphasis on protection from threats of terrorism and organised transnational

¹⁰⁴ Forfeiture is upon violation in Australia and Canada and probably also in New Zealand, although it may be possible upon seizure: see discussion in chapter 6.

¹⁰⁵ The border, for the purposes of this discussion, includes goods in Customs places or Customs controlled areas or Customs approved areas for storing exports: see Customs and Excise Act 1996, Part II.

crime, illicit drug and immigrant trafficking, and protection from risks to ecosystems, agriculture and health. New Zealand should also be entitled to impose export controls to prevent illicit trade in endangered species or loss of heritage items such as greenstone, for example.

140 Border control authorities have a different role from police officers within a State. People seeking to cross the border or send goods across the border are not exercising their rights to freely engage in activities, inland, undisturbed by the State. They are seeking a right of entry into a State – a right that has always been controlled in order to prevent the entry of goods and people that pose a threat to sovereign nations.¹⁰⁶

141 The United States Supreme Court has recognised that being at the border with the consequential limitation on rights, is different from being within a State. In 1925 in *Carroll v US*¹⁰⁷ it noted:

Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.

142 The United States courts have long considered border searches and seizures to be an exception to the protection against search and seizure embodied in the Fourth Amendment of the constitution.¹⁰⁸ The Canadian Supreme Court has adopted a similar approach and accepted that the degree of personal privacy reasonably expected at Customs places is lower than in most other situations.¹⁰⁹ Dickson CJC cited Rehnquist J (as he then was) in *US v Ramsey*:¹¹⁰

That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.

143 The Canadian Chief Justice found that the dominant theme of the United States cases was that border searches, lacking proper authorisation and having a lower standard than probable cause, were justified by the national interests of sovereign States to prevent the entry of undesirable persons and prohibited goods and to protect tariff revenue.

144 The New Zealand Court of Appeal has likewise said:¹¹¹

It is a long and well recognised aspect of customs regulation that those who arrive at a country's border, and who are entitled or seek permission to enter, must establish that the belongings they have with them may lawfully be brought into the country.

¹⁰⁶ See A Ladley and N White *Conceptualising the Border*, (unpublished working paper, prepared for the New Zealand Customs Service by the Institute of Policy Studies, Victoria University, Wellington 2005).

¹⁰⁷ *Carroll v US* (1925) 267 US 132, 153–154 (quoted in *R v Simmons* 55 DLR (4th) 673, 688; [1988] 2 SCR 495, 515). However, the situation is different once goods are inland or no longer in a Customs place as the Court continued: “But those lawfully within the country ... have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.”

¹⁰⁸ *Doherty v US* (1974) 500 F 2d 540.

¹⁰⁹ *R v Simmons* 55 DLR (4th) 673, 688; *Carroll v US*, above n 107.

¹¹⁰ *US v Ramsey* (1977) 431 US 606, 616–617.

¹¹¹ *R v B* (2002) 1 NZCC 55-023, para 17.

Difficulties of enforcement at the border

- 145 The forfeiture provisions in England, Australia, the United States, Canada and New Zealand have been considered necessary to ensure the observance of customs laws, which are notoriously difficult to enforce in the absence of strong provisions supporting their administration.¹¹² This is partly because of the short period of time during which people and goods are crossing the border.
- 146 Once imported goods have passed into the home market, the chances of tracing them dissipate quickly. The nature of some goods (like illicit drugs, pornography and hazardous goods) or the circumstances in which they come to the attention of Customs (concealment of prohibited goods within legitimate imports or exports) may justify immediate seizure.¹¹³ Once people and goods have departed to other jurisdictions the practical difficulties of enforcement escalate.
- 147 The Customs Service aims to allow people, goods and craft to move into and out of New Zealand with minimal disruption and delay. Customs processing provides a brief, one-off opportunity to identify a risk, customs violation, or criminal activity. This means it is necessary to act decisively and detain things when a risk is identified.

Deterrence

- 148 The Keith Report in 1985 considered that immediate seizures (resulting in possible loss of goods or conveyances) are a substantial deterrent to would-be smugglers, especially where the offender is outside the jurisdiction, or where there is insufficient evidence to prosecute, but goods are clearly concealed or misdescribed.¹¹⁴ The English and the European courts have since endorsed the view that the rationale of seizure and forfeiture is to maximise their deterrent effect.¹¹⁵ If there is a clear understanding that goods and vehicles involved in irregularities are liable to be confiscated, this should act as a deterrent to both senders and receivers of such goods.
- 149 In the Canadian case of *Industrial Acceptance Corp v R*¹¹⁶ Rand J expressed this justification for forfeiture:
- The forfeiture of property used in violation of revenue laws has for several centuries been one of the characteristic features of their enforcement ... Smuggling, illegal manufacture of liquors, illegal sale of narcotics and like activities, because of their high profits and the demand, in certain sections of society, for them, take on the character of organized action against the forces of law ... the necessity to strike against not only the persons but everything that has enabled them to carry out their purposes has been universally recognized.
- 150 There is a perception from some members of the New Zealand business community that without strong deterrence at the border, pirated and illegal products would

¹¹² *Burton v Honan* (1952) 86 CLR 169, 179. See too *Keith Report*, above n 93, 36.6.11 (which concluded it would be harder to combat smuggling if powers of forfeiture and seizure were curtailed). See also *Williams v Attorney-General* [1990] 1 NZLR 646, 677 per Richardson J.

¹¹³ *Whim Creek v Colgan*, above n 20.

¹¹⁴ *Keith Report*, above n 93.

¹¹⁵ *Gora v Customs and Excise Commissioners* [2003] 3 WLR 160, 173 citing *AP v Switzerland* 26 EHRR 541. Note that the deterrent in England is immediate seizure and liability for forfeiture, not immediate forfeiture.

¹¹⁶ *Industrial Acceptance Corp v R* [1953] 2 SCR 273; 4 DLR 369 (SCC).

flow into New Zealand.¹¹⁷ New Zealand manufacturers believe there should be strong border surveillance and speedy action to seize and forfeit imports with false trade descriptions or goods contaminated in some way and without proper certification (for example, untreated wood containing fungus spores or hog's hair brushes containing anthrax). Release of such goods inland is environmentally damaging as well as damaging to New Zealand competitors and consumers.

- 151 Because of the huge volumes of people, craft and goods crossing the border, Customs relies largely on voluntary compliance or self-policing by importers, exporters and travellers. International mail can only be selectively policed because of the volume involved. The argument is that a strong deterrent is needed to encourage compliance by importers and exporters, and also because, without such penalties, drug and other smugglers will simply take the risk and pay the penalty if they are caught.
- 152 Deterrent penalties should prevent New Zealand being perceived internationally as a country into which it is easy to smuggle illegal imports.

International interests and co-operation

- 153 Since 2001, international border security has become a higher priority and there is an expectation that governments will act to address risks posed by the movement of people and goods across borders. Port, shipping and aircraft security is also being tightened.¹¹⁸ The international climate of heightened security and international co-operation means that New Zealand is expected to have strong border protection measures.
- 154 There has been a range of responses to the events of September 2001, including United Nations Security Council Resolution 1373 that imposes an obligation on nations to "fight terrorism". New Zealand's legislative responses include the Terrorism Suppression Act 2002, Maritime Security Act 2004, amendments to Customs and Excise Act 1996 and Immigration Act 1987, as well as to the Crimes Act 1961, Misuse of Drugs Amendment Act 1978, and New Zealand Security Intelligence Service Act 1969.¹¹⁹

Trade and security

- 155 The New Zealand Customs Service has noted that:¹²⁰
- The international trade environment has changed in the past two years, as governments worldwide seek to enhance the security of their citizens in the face

¹¹⁷ Comment from the Chief Executive of the Canterbury Manufacturers Association, November 2004.

¹¹⁸ As a result, the New Zealand Customs Service is putting in place enhanced systems for risk management at the border. See New Zealand Customs Service *Statement of Intent 2004–2006* ([Wellington, 2004]) 34, 45. See also the International Ship and Port Facility Security Code (ISPS Code), Certification Regulations (2003) Gdansk, describing the audit process of certification for compliance with the ISPS Code. See too, the Civil Aviation Act 1990 requiring checks for dangerous goods and unruly passengers.

¹¹⁹ Treasa Dunworth "Public International Law" noted in [2004] NZ Law Rev 411, 418–428. Dunworth has said that: "The changes being brought in regarding port security and border security seem pretty sensible and thought-through".

¹²⁰ New Zealand Customs Service "New and Enhanced Cargo Inspection Capability – Enhanced border security through use of mobile non-invasive inspection technologies" ([Wellington, 2004]) 5.

of terrorism and transnational crime. Terrorist organisations have signalled their intention to cause economic disruption, with legitimate trade channels among their targets.

- 156 The New Zealand economy is heavily dependent on global trade and highly vulnerable to any disruption of trade flows. It is important to preserve New Zealand's reputation of being a reliable trading partner and a safe travel destination, and to prevent New Zealand being seen as a haven for terrorists or illegal imports. The Customs Service needs to work collaboratively with the US Customs and Border Protection, for example, to identify and intercept security threats in United States-bound cargo originating from New Zealand sea and air ports. Customs stated in its 2003/04 Annual Report:¹²¹

New Zealand's major export destinations are increasingly taking steps to guard against the risk of terrorist attacks on their air and sea ports by way of bombs or other devices infiltrated into cargo in the country of origin/shipment. The US, for example, is introducing an approach that will put imports into either a "red lane" or a "green lane". To qualify for the green lane, the US must recognise the exporter as a trusted trader, and his or her country of origin will count in that assessment. Otherwise, the goods face automatic red lane security, with the likelihood of delays and added costs.

A number of customs administrations around the world, including APEC members and the European Union, are also working on trade security measures. The critical issue for a trading nation such as New Zealand is for its exporters to gain recognition in this new environment as a "trusted trader", to ensure the ongoing facilitation of its trade into export markets at all times, including during periods of heightened security alert.

- 157 Customs is working with a number of government agencies on security issues, aiming to ensure that export cargos, as well as imports, are "safe". As a result, security and screening requirements have increased. New powerful inspection equipment has been purchased for the screening of cargo, such as container inspection units which can scan up to 25 containers per hour. Seizures of prohibited goods have significantly increased since the advent of this new equipment.¹²²

Illegal immigrant smuggling

- 158 New Zealand is a signatory to the United Nations Convention against Transnational Organized Crime¹²³ including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The purposes of this Protocol are:

- (a) to prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) to promote co-operation among States Parties in order to meet those objectives.

¹²¹ New Zealand Customs Service *Annual Report 2003/2004*, [Wellington, 2004] 13.

¹²² New Zealand Customs Service "New and Enhanced Cargo Inspection Capability", above n 120.

¹²³ United Nations Convention against Transnational Organized Crime (15 November 2000) (2001) 40 ILM 335.

- 159 Article 11 of the Protocol concerns border measures and states that:
- Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.
- 160 New Zealand has also signed the Protocol against the Smuggling of Migrants by Land, Sea and Air and is thus obliged to co-operate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea. Article 11 again relates to border measures and begins:
- Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.
- Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with Article 6, paragraph 1(a), of this Protocol.
- 161 Some recent amendments to the Customs and Excise Act 1996, including those permitting detention and forfeiture of ships involved in people smuggling, have been enacted pursuant to New Zealand's obligations under this Protocol.¹²⁴
- 162 On the introduction into Parliament of the Transnational Organised Crime Bill in 2002, the Minister of Police noted the need for a concerted and co-ordinated international effort to counter the globalisation of crime, and continued:¹²⁵
- One significant aspect of this international effort is to target those people who profit from the smuggling and trafficking of people. People-smuggling and trafficking have become lucrative international activities for organised crime. Fifty percent of all illegal immigrants globally are assisted by such smugglers. Estimated profits from the trade amount to US\$10 billion annually. New Zealand, even with its relative geographic isolation is not immune from this trade.

Strategic alliances with international organisations

- 163 The New Zealand Customs Service participates in a number of international organisations such as the World Trade Organization, APEC and the World Customs Organization (WCO). During 2003 and 2004 New Zealand was the WCO Regional Vice-Chair for the Asia-Pacific region. In this role, Customs promoted regional initiatives designed to improve co-ordination within Asia and the Pacific, for example co-operating with Fiji to reduce risks from cargo and small craft movements. Customs is also a member of the Oceania Customs Organisation (South Pacific) which is affiliated to the WCO and must comply with its standards and conventions.
- 164 New Zealand is a member of the Financial Action Task Force, an international standard-setter in anti-money laundering and countering terrorist financing,

¹²⁴ See Customs and Excise Act 1996, ss 143 and 225(6). In *R v Chechelnitski* (1 September 2004, CA 160/04), a person involved in "people smuggling" in New Zealand was convicted and sentenced to 3.5 years imprisonment. Although there were no aggravating circumstances such as inhumane treatment of the migrants, the Court said the primary consideration must be deterrence. The case of *R v Feng Lin* (2001) 119 A Crim R 194 was referred to, where the offender had received US\$3000 for smuggling three migrants into Australia on a container boat and received a three-year prison sentence.

¹²⁵ Hon George Hawkins, Minister of Police (28 February 2002) 598 NZPD 14755.

which recently issued a Special Recommendation (IX) relating to cash couriers. This provides:¹²⁶

In developing measures to detect the physical cross-border transportation of currency and bearer negotiable instruments for terrorist financing or money laundering purposes, it is critical that countries conduct interdiction operations to disrupt this criminal activity. Countries should develop effective and feasible procedures to detect, stop or restrain, and where appropriate, confiscate such currency and bearer negotiable instruments.

Customs internal working groups with other agencies – need for consistency

- 165 Customs works with other government departments to protect the border. For example, the Wildlife Enforcement Group, consisting of a representative from each of Customs, Department of Conservation and Ministry of Agriculture and Forestry, works to prevent illegal importation and exportation under the Biosecurity Act 1993 and Trade in Endangered Species Act 1989. The group's members are all warranted Endangered Species Officers pursuant to section 35 of this Act. Seizure and forfeiture of endangered species traded in contravention of the Act, and found in or on any ship or aircraft or at any port, is immediate and mandatory (section 39(1)). On the other hand, where there is reasonable cause to believe a specimen is endangered and has been imported or is intended to be exported from New Zealand, an officer may seize that specimen and if doing so must deliver it to the Director-General (section 39(2) and (3)). In this case the specimen is not immediately forfeited, but there may be a prosecution (and forfeiture upon conviction). Any forfeiture on conviction is in addition to any other penalty (section 39D(4)).
- 166 It is important that there is reasonable consistency between border powers under Acts such as the Trade in Endangered Species Act 1989 and Part XIV of the Customs and Excise Act 1996.

CONCLUSION

- 167 International jurisprudence has long considered border control by a sovereign State to be significant and distinct from law enforcement within national boundaries.¹²⁷ A strong deterrence regime is necessary at the border, including a power to immediately detain items upon discovery of an alleged violation, because of the volumes of people, goods and other things crossing the border and the consequent reliance on voluntary compliance with export and import controls. Border control agencies need the ability to deal effectively and speedily with prohibited imports and exports and other items unlawfully crossing the border.
- 168 As a “good international State” New Zealand is obliged to comply with its international obligations, including those to increase security and protect trade, and to detect illegal immigrant smuggling and terrorist financing. New Zealand

¹²⁶ Financial Action Task Force on Money Laundering “Detecting and Preventing the Cross-border Transportation of Cash by Terrorists and other Criminals: International Best Practices: Special Recommendation IX” (12 February 2005), 3 <<http://www.fatf-gafi.org>> (last accessed 23 November 2005).

¹²⁷ *R v Simmons* citing *Carroll v US*, above n 107, and *US v Ramsey* (1977) 431 US 606 for example.

customs law should be in alignment with that of its allies and trading partners in particular.

- 169 We are satisfied that the public interest requires legislative powers and penalties that are strong enough to meet the objectives of national and international customs law, and international trade and other obligations. At the same time, the public interest also requires that safeguards be built into the border control process, in order to comply as far as possible with individual rights.
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6 Timing of forfeiture

- 170 **T**WO types of situation may give rise to forfeiture under New Zealand Customs legislation: either forfeiture flows from a conviction for certain offences against the Act, or, more usually, forfeiture is a consequence of a contravention of the Act but not necessarily of any conviction for an offence.¹²⁸
- 171 In the Customs and Excise Act 1996, prohibited goods or those unlawfully crossing or across the border in some way “shall be forfeited to the Crown”, without any requirement of prosecution and conviction¹²⁹ or even an opportunity to contest forfeiture before it happens. However, it is unclear in New Zealand when forfeiture happens, that is, exactly when title transfers to the Crown.
- 172 This chapter looks first at this issue, that is, the lack of clarity in New Zealand as to when forfeiture does take place. We then consider, in accordance with our Terms of Reference, whether a conviction should be required before forfeiture and also the situation of forfeiture following conviction.

THE TIMING OF FORFEITURE: WHEN IS TITLE TRANSFERRED TO THE CROWN?

- 173 There are several views as to the point in time when forfeiture actually occurs and thus when title to the goods is transferred to the Crown.

First view: forfeiture and transfer of title automatic upon violation of Customs legislation

- 174 Where the expression “the following goods shall be forfeited to the Crown” has been used in Customs legislation (as in New Zealand and Australia), it has been said that forfeiture arises by force of the statute upon the happening of certain prior events.¹³⁰ For example, the event could be the importation of a prohibited drug or concealed dutiable goods. The effect of a Customs forfeiture

¹²⁸ Customs find it is not often necessary or possible to pursue criminal liability. Between July 2004 and February 2005 there were 39 prosecutions commenced. Likewise in England, the *Keith Report*, above n 93, 36.2.7, found in practice prosecutions were only ever commenced in a very limited number of cases (mostly involving fraud) though there were numerous violations of the Customs and Excise Management Act 1979.

¹²⁹ Customs and Excise Act 1996 (NZ), s 225, as described in chapter 2. The issue of the potential disproportionality of forfeiture as a response to all situations listed in section 225 is discussed in chapter 7.

¹³⁰ *De Keyser*, above n 42, especially per Humphreys J, 232, and Singleton J, 234; *Burton v Honan* (1952) 86 CLR 169, 176 per Dixon CJ expressing the unanimous view of the High Court of Australia – “[P]rovided the facts exist which justify a forfeiture, the title to the goods vests in the Crown when the forfeiture takes place in consequence of the occurrence of the facts”.

is that title to the goods is transferred to the Crown at that point in time.¹³¹ This is the Australian view. As O'Connor J put it in *Lyons v Smart*:¹³²

The forfeiture effected by the operation of sec 229 vests the property in the goods in the Crown immediately on importation.

- 175 This is also the Canadian view¹³³ and, according to a number of authorities, is the New Zealand view. The Laking Review, published in 1989, noted:¹³⁴

For the purposes of the Customs Act the fact that goods are “forfeited” is accepted as meaning that the Crown assumes the right to title in the goods, but nothing happens automatically in relation to physical control over the goods themselves.

- 176 In *Williams v Attorney-General*¹³⁵ Richardson J noted: “All goods unlawfully imported are forfeited”; and “Any officer of Customs or member of the police may seize any such forfeited goods”. This interpretation was followed in *Wilson v New Zealand Customs Service* by Williams J.¹³⁶

- 177 On this view, following the violation of a Customs Act provision, goods are automatically forfeited to the Crown. Title is then vested in the Crown and the goods are subject to seizure. Seizure involves the making of a decision and is discretionary. However, no decision is required for forfeiture because it is an automatic consequence on unlawful entry or exit.¹³⁷

Second view: seizure and/or condemnation necessary to perfect the Crown’s title

- 178 On the second view, seizure and condemnation may be necessary either to perfect title, or to vindicate the title of the Crown or exclude the claim of some person asserting a right to the goods.¹³⁸ There has been a suggestion that where an owner of property gives notice of a claim “inchoate forfeiture” arises,¹³⁹ which would be completed by condemnation.

¹³¹ *Burton v Honan*, above n 130, followed in *Bert Needham Automotive Co Pty Ltd v Federal Commissioner of Taxation* (1976) 10 ALR 501, citing *The Annandale* (1877) 2 P 218. See too, *Pearce v Button* (1985) 60 ALR 537, 554.

¹³² *Lyons v Smart* (1908) 6 CLR 143, 161; and per Isaacs J at 166. See too, *Bert Needham*, above n 131, 507 and *Burton v Honan*, above n 130, 176.

¹³³ See *Mason v The King* [1935] 4 DLR 313 (SCC) (forfeiture is the legal unescapable consequence of the commission of the offence) applied in *Smith v Goral* [1952] 3 DLR 328 (CH Ont). See also *Allardice v The Queen* [1979] 1 FC 13 (FCTD); *Terrasse Jewellers Inc v Canada* (1988) 20 FTR 1 (FCTD); *HB Fenn & Co Ltd v R* (1992) 8 TTR 77 (FCTD); *Shayesteh v Minister of National Revenue* (1997) 93 BCAC 25; 151 WAC 25 (BC CA) and Customs Act RSC 1985 c C1, (2nd Supp), s 122: “. . . no act or proceedings subsequent to the contravention or use is necessary to effect the forfeiture of such goods or conveyances”.

¹³⁴ GR Laking, JR Martin, RC Dare *Review of the Customs Acts: A Discussion Paper on Border Protection Legislation* (Wellington, 1989) 14, para 58 [Laking Review].

¹³⁵ *Williams v Attorney-General*, above n 29, 675, per Richardson J (in dissent, but on the Customs’ duty of care issue).

¹³⁶ *Wilson v New Zealand Customs Service* (12 May 1999, High Court, Auckland, M411/98, Williams J) reported in part in *Wilson v New Zealand Customs Service*, above n 37.

¹³⁷ See *Whim Creek v Colgan* above n 20. Following *Pearce v Button* (1986) 65 ALR 83.

¹³⁸ *Bert Needham*, above n 131, 507 quoting Isaacs J in *Lyons v Smart*, above n 132, 166. This is also the approach in the United States of America: title does not finally pass to the Federal Government until after summary forfeiture (where there is no claim) or judicial condemnation where there is a court hearing.

¹³⁹ *De Keyser*, above n 42, 230, per Lord Hewart, cited in *Attorney-General v Graham*, above n 42, 812.

- 179 A variation on this view as to transfer of title was expressed by Lee J in *Whim Creek Consolidated NL v Colgan* at first instance, who said:¹⁴⁰

However, although customs may have had formal title to the goods pursuant to the statute upon the goods becoming forfeited goods, it was not an entire title and at least residual rights to the property remained vested in others under the Act.

Third view: seizure of the goods is required to operate forfeiture

- 180 *Attorney-General of New Zealand v Ortiz*¹⁴¹ was a case litigated in England where the New Zealand Government claimed a historic Māori carving as illegally exported from New Zealand. The House of Lords unanimously affirmed the English Court of Appeal's decision that under the Customs Act 1966 (NZ) forfeiture took place only upon seizure and not automatically once an article had been illegally exported.
- 181 The section providing that certain categories of goods "shall be forfeited" should be interpreted to read the goods were "liable to forfeiture", said the English court.¹⁴² Because New Zealand Customs had not seized the historic carving on export, title did not vest in the Crown in right of New Zealand but passed from the illegal exporter to a third party. So the New Zealand Government could not succeed in claiming the return of the carving.

The position under the Customs and Excise Act 1996

- 182 The legal position under current New Zealand law is not clear. New Zealand judicial dicta¹⁴³ favour the first view, as does the Laking Review.¹⁴⁴ The New Zealand Customs Service guidelines are ambiguous. On the one hand, several guidelines state, consistently with the first view above:¹⁴⁵

Forfeiture of goods is recognised as one of the most severe penalties under the Customs and Excise Act 1996. Although goods become forfeit to the Crown automatically as a consequence of unlawful acts or omissions, seizure of forfeited goods is discretionary.

¹⁴⁰ *Whim Creek*, above n 20, 219.

¹⁴¹ *Ortiz*, above n 70.

¹⁴² *Ortiz*, above n 70, 45, per Lord Brightman. "Liable to forfeiture" means goods are in a state where they could ultimately be confiscated by the Crown. This view was supported by the inclusion of the "relation back" clause in section 274 of the Customs Act 1966 (where goods are forfeited and seized under Customs Acts, the forfeiture shall relate back to the date of the event from which the forfeiture accrued), the definition of "forfeited goods" as "goods in respect of which a cause of forfeiture has arisen", and also the two year limit for seizure of goods.

¹⁴³ Notably Richardson J in *Williams*, above n 29, followed by Williams J in *Wilson*, above n 37.

¹⁴⁴ *Laking Review*, above n 134, 15, para 58.

¹⁴⁵ New Zealand Customs Service National Manager Air and Marine, AM PRO 27 "Forfeiture and Seizure", 1 May 2002, 1.0. See also National Manager Goods Management GM PRO 03, "Seizure, Waiver of Forfeiture and Disposal Procedure", 1 July 2002, 1.0; National Manager Investigations IV PRO 02, "Seizure and Waiver of Forfeiture", 1 July 2004, 1.0.

183 On the other hand, one guideline includes the *Ortiz* view (the third view above):¹⁴⁶

Although goods shall be “forfeited to the Crown” pursuant to section 225 the Courts have interpreted this in a broader sense to mean that rather than the goods being forfeit per se, they are in fact only liable for forfeiture, and until seized do not acquire the full status of forfeited goods (see House of Lords decision re *Ortiz v AG*). It therefore follows that ownership in the goods does not pass to the Crown until any “forfeited goods” are physically seized.

184 The House of Lords decision in *Ortiz* is not binding on New Zealand courts, and interpreted the previous Act, the Customs Act 1966.

185 The wording of the 1996 Act seems to imply that forfeiture is automatic upon violation.¹⁴⁷ The 1996 Act defines forfeited goods as “goods that are forfeited to the Crown under section 225 of this Act”. If goods are prohibited, they may be seized at any time “after the forfeiture has arisen”. There is a two year limitation on seizure of other forfeited goods, but again “after the forfeiture has arisen” as section 226 specifically says.

A clear and fair solution

186 The question of the timing of forfeiture needs resolution in the interests of clarity and justice. In our view, none of the present views (that forfeiture is automatic either upon violation or upon seizure) is consistent with individual rights. The main issue is whether forfeiture should ever occur before an opportunity for a hearing.

187 Suspect imports and exports can be immediately detained and held securely without the necessity for immediate transfer of title to the Crown. For instance, Customs may decide not to seize a yacht with a small amount of cannabis found hidden in the Captain’s cabin, whereas Customs may well seize as forfeited a yacht bringing in a substantial quantity of drugs that is then abandoned by its crew. Yet in neither case is there reason or need for immediate forfeiture. The yachts in both cases could be detained for a period without forfeiture, pending investigation, notice of detention and an opportunity to contest and register an interest.

188 The Australian Law Reform Commission (ALRC) in 1990 said that “liability to forfeiture” (as in the English legislation) would allow appropriate procedures to be instigated, and claims to be made and heard before the owner of the goods was divested of title, whilst at the same time protecting the Crown’s interest.¹⁴⁸

189 In 1992, the ALRC proposed forfeiture only where a seizure or impoundment notice had been issued and there was no claim at the end of the time allowed

¹⁴⁶ New Zealand Customs Service National Manager Investigations, IV POL 02, “Seizure and Waiver of Forfeiture”, 1 July 2004, 3.4.2. The different views reflect the uncertainty as to which prevails. Customs is presently considering review of its policy documentation.

¹⁴⁷ Section 228 of the Customs and Excise Act 1996, which is the equivalent provision to section 274 of the 1966 Act (the “relation back” section) is not helpful: “Where, pursuant to section 225 of this Act, goods are forfeited and the goods are seized the forfeiture relates back to the date of the act or event from which the forfeiture arose.”

¹⁴⁸ See Australian Law Reform Commission Discussion Paper, *Customs and Excise*, above n 67, para 33. The Laking Review in New Zealand recommended the terminology “liable to be seized as forfeit to the Crown”, but this was not adopted: above n 134, para 59, draft legislation, s 138.

or the Comptroller had applied successfully to court for a declaration of forfeiture.¹⁴⁹

190 We agree with the concept underlying the English legislation and the Australian proposals. In our view there is no justification for the concept of automatic forfeiture by force of statute upon an alleged customs violation.¹⁵⁰ This is because:

- There should be an opportunity to contest liability for forfeiture before title is transferred to the Crown, as a matter of fairness.
- If Customs decides not to seize goods at the border, title will remain with the Crown although the owner may retain possession. An innocent third party may purchase the goods from the possessor in ignorance of the Crown's title.
- If there is a prosecution and conviction, forfeiture in addition to any other penalty may breach the totality principle in sentencing.

SHOULD A CONVICTION BE NECESSARY BEFORE FORFEITURE?

191 Our Terms of Reference specifically direct attention to whether a conviction should be required prior to any forfeiture. Ordinary principles of criminal law permit the imposition of a penalty only where an offence has been proved or admitted. As the Australian Law Reform Commission has said, there needs to be specific justification for forfeiture and seizure regimes where they depart from these principles.¹⁵¹

192 Parliament has enacted exceptions to the principle of no forfeiture without conviction for, or admission of, an offence. The Trade in Endangered Species Act 1989, Copyright Act 1994, Trade Marks Act 2002 and Terrorism Suppression Act 2002 do not require a conviction before forfeiture. The Misuse of Drugs Act 1975 and Fair Trading Act 1986, insofar as they are linked to Part XIV of the Customs and Excise Act 1996, also do not require a conviction for forfeiture. The proposed Criminal Proceeds and Instruments Bill will also not require a conviction in some circumstances.

193 Exceptions need to be justified in terms of the public good and the objectives of the legislation. Where the objective is border protection and revenue collection at the border, is forfeiture without conviction necessary to prevent harm or defrauding the revenue or to obtain evidence?

194 The concerns of a penalty without conviction apply essentially to non-prohibited goods that are crossing (or are across) the border unlawfully. It has been argued that a civil forfeiture provision creates a strict liability criminal offence for which the penalty is loss of the property concerned, and that in reality civil

¹⁴⁹ Australian Law Reform Commission Report *Customs and Excise*, above n 69, pt 31, draft Model Bill, ss 429 and 437; the relevant commentary is in vol III, 289.

¹⁵⁰ Nor is forfeiture upon seizure justified if that is how the current legislation is interpreted following *Ortiz*, above n 70.

¹⁵¹ Australian Law Reform Commission Report, *Customs and Excise*, above n 69, vol II, 15.6.

forfeiture rests on a finding of personal guilt, so the owner of the property should be entitled to the due process granted to a criminal defendant.¹⁵²

Departure from principle of conviction as a prerequisite to forfeiture

- 195 Justifications for departing from the principle of conviction as a prerequisite for forfeiture (and thus the constitutional rights of a criminal trial) include the following:
- (a) Forfeiture orders to remove items that the State has designated prohibited or dangerous or harmful are in the public interest, whether or not the offender has been convicted.
 - (b) Offenders may be out of the jurisdiction and cannot be easily prosecuted. There may be no evidence other than the illegal import or export.
 - (c) Prosecution is unnecessarily costly and a conviction overly punitive in some circumstances.

Prohibited or dangerous items

- 196 Forfeiture without conviction of goods that are prohibited imports or exports, or are dangerous or hazardous items or substances, can be contrasted with forfeiture of dutiable goods that are improperly or erroneously declared (sometimes unintentionally) or with forfeiture of conveyances used for a violation.
- 197 While it is recognised that forfeiture to remove inherently dangerous or harmful goods is in the public interest, it has also been suggested that the owner should have the right to insist on a criminal trial rather than merely contesting the forfeiture proceedings.¹⁵³ However, if the purpose of forfeiture is to prevent entry of, or take out of circulation, goods that are harmful and that it is unlawful to possess, there is a clear justification for their removal to protect society before any criminal trial.
- 198 Organisations such as End Child Prostitution Pornography and Trafficking for Sexual Purposes (ECPAT)¹⁵⁴ support forfeiture of objectionable material (particularly child pornography) and Customs' powers to seize and to obtain vital evidence against paedophiles. There is no reason why a person should not be deprived of unlawful pornography (and computers or other equipment providing storage in electronic form), and such things as illegal drugs, counterfeit money or sawn-off shotguns, if they are being brought into the country where they are prohibited, whether or not that person is guilty of an offence. As has been said:¹⁵⁵

The state's interest in keeping dangerous items out of the hands of the public is properly fulfilled by forbidding their use by all persons, whether or not those persons

¹⁵² B Clarke "A Man's Home is his Castle – Or Is It? How to Take Houses from People Without Convicting Them of Anything: The Criminal Property Confiscation Act 2000 (WA)" (2004) 28 Crim LJ 263. See also, *Hodgson Report*, above n 14, 96–97.

¹⁵³ *Hodgson Report*, above n 14, 98.

¹⁵⁴ New Zealand is part of a global effort to solve the problem of child sex offending and ECPAT works with both Customs and the Police to combat child pornography.

¹⁵⁵ J Morris Clark "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis" (1976) 60 Minn L Rev 379, 479.

have committed offenses, and whether or not the forbidden items have been used to commit offenses.

- 199 Allowing such goods to pass into home consumption could be seriously harmful to the community. We agree that in those cases, once it is established (or not challenged) that such goods are prohibited or dangerous items and they are not “redeemable”,¹⁵⁶ they should be confiscated, whether or not there is a criminal conviction.

Offenders out of jurisdiction

- 200 The real culprit (for example, the sender of cigarettes smuggled inside mattresses) may be overseas, and not easily prosecuted, with much evidence out of reach. Or the importer may be a shell company and the people involved in arranging the importation may disappear overseas.¹⁵⁷ There may be no evidence other than undeclared bottles of wine detected in a container, for example.
- 201 Forfeiture without conviction can be justified in these cases as the objectives of customs law would not be met if there was no penalty at all. For these sorts of reasons the Keith Report found that forfeiture *in rem* was an essential part of the armoury in dealing with situations at the border.¹⁵⁸

Prosecution unnecessary for minor violation

- 202 In many cases the person concerned may prefer that the property is forfeited rather than criminal proceedings be instituted, with the consequent stress, expense and damage to him or her. From Customs’ point of view too, the cost of a prosecution may not be justifiable in minor cases.

FORFEITURE FOLLOWING CONVICTION

- 203 In 1990, the Australian Law Reform Commission noted that many circumstances giving rise to forfeiture also constituted offences (for example, smuggled goods shall be forfeited and smuggling is an offence).¹⁵⁹ This is the case under New Zealand legislation also. In Australia, civil forfeiture *in rem* is not relevant to the imposition of a penalty for the offence: section 239 of the Customs Act 1901 (Cth) specifies that: “All penalties shall be in addition to any forfeiture”.
- 204 The New Zealand Court of Appeal in *R v Reid* had a similar view.¹⁶⁰ The Court said:
- [F]orfeiture under the Act cannot carry significant weight in determining penalty and there is a need for deterrence in sentences where convictions are entered; the cost of detection and prosecution of offences of this kind is significant.
- 205 Our report is not strictly concerned with the criminal offence provisions in Part XIII of the Customs and Excise Act 1996, but we consider that in determining

¹⁵⁶ “Redeemable” means they could be relabelled or a permit acquired, for example, so they are no longer prohibited. These would not include “pirated” goods, that is, those in breach of Copyright Act 1994.

¹⁵⁷ There can also be a non-identified offender inland: see *Collector of Customs v Dave’s Discount Disasters* (11 July 1995, High Court, Auckland, M 674/92, Fisher J).

¹⁵⁸ *Keith Report*, above n 93, 190.

¹⁵⁹ Australian Law Reform Commission Discussion Paper 43, *Customs and Excise*, above n 67, para 11.

¹⁶⁰ *R v Reid* (5 March 2001, CA 264/00), 10.

a penalty, the judge should consider forfeiture as part of the total sentence appropriate for the offending. This is in accordance with the totality principle in sentencing.

CONCLUSION

- 206 The concept of automatic forfeiture has an unreality about it, the timing of transfer of title is unclear and immediate forfeiture is not necessary to achieve the aims of the legislation. In our view, power to detain and hold all items, including prohibited goods, pending an opportunity to contest their status before any confiscation by the Crown, would be more consistent with individual rights and as effective for border protection purposes.
- 207 Our view is that forfeiture is often a penalty imposed on the owner (despite the *in rem* “personification” of the goods) for reasons we amplify in the next chapter. However, we conclude that, because of the objectives of Customs legislation, particularly in preventing the importation or exportation of prohibited items, and because of the difficulties of tracing offenders, conviction should not be a necessary prerequisite to forfeiture in the enforcement of Customs law. Where a prosecution does follow, the judge should consider forfeiture as part of the total penalty.
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Proportionality and protection for third parties

PROPORTIONALITY

- 208 SECTION 225 of the Customs and Excise Act 1996 lists goods that “shall be forfeited to the Crown” in a number of situations. There is no discretion; section 225 provides that forfeiture is the mandatory penalty where all such situations are concerned.
- 209 The mandatory nature of forfeiture arises from the fact that traditionally it has been viewed as *in rem* rather than *in personam*; that is, it is an action directed against the goods (because of their unlawful or uncustomed status) rather than against the person or persons with an interest in them. For this reason the courts have interpreted provisions similar to section 225 strictly.¹⁶¹ For example, the New Zealand Court of Appeal upheld fines of \$40,000 in addition to confiscation of three motor vehicles worth over \$60,000 for evasion of full duty and making erroneous entries.¹⁶² The Canadian courts have similarly taken a consistently strict approach, sometimes with harsh results,¹⁶³ even in cases, for example, where there was clearly an error by a customs broker¹⁶⁴ or there was a non-commercial importation of jewellery.¹⁶⁵
- 210 However, we think that it is artificial to view all Customs’ forfeiture as in the nature of an *in rem* action. Clearly it is of that nature where the goods being forfeited are classified as illegal. For example, the forfeiture of illegal drugs is

¹⁶¹ *De Keyser*, above n 42. See too, the High Court of Australia in *Burton v Honan*, above n 112 and the New Zealand Supreme Court in *Attorney-General v Graham*, above n 42, and the Canadian Federal Court cases *Francoeur v Canada*, above n 80, and *Porter v R* (1989) 3 FC 403. Compare a more liberal approach in some recent New Zealand case such as *Williams v Attorney-General*, above n 29.

¹⁶² See *R v Reid*, above n 160.

¹⁶³ See, for example, *Shayesteh v Minister of National Revenue*, above n 133.

¹⁶⁴ See *Raymond Lanctot Ltee v R* (1990) 22 ACWS (3d) 168, 3 TCT 5244 (FCTD), where the customs broker had erroneously indicated that goods sought to be released consisted of 10 sunglasses and 9044 plastic frames when in fact there were 10 frames and 9044 sunglasses. Because of the misdescription the inspector seized all the goods which were later released but on payment of a penalty of around \$9000. Compare *Signature Plaza Sport Inc v Canada* (1994) 54 CPR (3d) 526 regarding fraudulent intent required for imposition of a fine.

¹⁶⁵ *Glisic v R* (1983) 3 DLR (4th) 90. In this case the court came to the conclusion “with reluctance” that the seizure was correct in law where there was a failure to declare 10 items of jewellery (three of which were seized) which the plaintiff swore he had owned for 13 years since immigration to Canada. Taken literally the section meant that a person entering or re-entering Canada should declare every item of personal property he or she was carrying or wearing. “That the law is not administered in this way is a tribute to the good sense of the customs officers, but it does leave in their hands and that of the Minister an arbitrary power of decision as to what goods are forfeited for non-declaration” (94). But see now section 12(7) of the Customs Act RS C 1985.

directed at their status, and the person with an interest in them is being deprived of nothing to which they would otherwise be entitled.

- 211 However, not all goods liable to Customs forfeiture fall into this category. The confiscation of dutiable goods, in addition to the payment of any duty, deprives the person with an interest in the goods of their lawful property, and should properly be seen as in the nature of a penalty. For example, where dutiable goods have been incorrectly declared or a craft has been used to carry contraband, any forfeiture may seriously affect a person's livelihood, or deprive him or her of significant assets. In our view, any such confiscation should be proportionate and should take into account the nature and seriousness of the conduct, for example, whether a failure to declare duty was the result of genuine error and whether the amount of contraband in the craft was small, or its carriage was a first-time violation, or the result of negligence rather than deliberate wrongdoing.
- 212 This principle of proportionality has been recognised by the English Court of Appeal and the European Court of Human Rights in their recent consideration of customs' cases regarding seizure and restoration of property.¹⁶⁶ So, for example, in *Lindsay v Customs and Excise Commissioners*¹⁶⁷ the English Court of Appeal held that a policy that required seizure of cars (except for rented vehicles) used for smuggling excise goods (such as tobacco) from Europe into England, unless in exceptional circumstances, involved deprivation of possession within Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁶⁸ It would thus only be justified if:
- it was in the public interest;
 - there was proportionality between the means employed and the aim pursued;¹⁶⁹ and
 - regard was had to individual cases (such as whether the smuggling was for profit making).
- 213 Mr Lindsay attempted to import about £2000 worth of tobacco products which were seized together with his car. The Court held that the principle of proportionality meant that each case should be considered on its facts, including the scale of importation, attempt at concealment, the value of the vehicle and the degree of hardship caused by forfeiture. The Court upheld the Value Added Tax and Duties Tribunal's conclusion that the decision not to restore the car to Mr Lindsay was disproportionate to the contravention.

¹⁶⁶ For a European Court of Human Rights decision on when forfeiture by the State is justified see *Agosi v UK* (1987) 9 EHRR 1, para 54.

¹⁶⁷ *Lindsay v Customs & Excise Commissioners* [2002] EWCA Civ 267; [2002] 3 All ER 118; 1 WLR 1766.

¹⁶⁸ Protocol 1, article 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

¹⁶⁹ See *Air Canada v UK* (1995) 20 EHRR 150, discussed below.

- 214 In New Zealand, this principle of proportionality has been recognised to some degree in the Customs Service guidelines.¹⁷⁰ However, it is not reflected in the legislative framework of Part XIV of the Act.¹⁷¹ We do not think this is satisfactory. The proportionality of penalty should not be a matter for the unregulated discretion of the Customs Service, no matter how fairly that discretion may be exercised in practice. It ought to be a statutory requirement and it needs to be given effect by a greater range of penalty options in Part XIV, in particular providing for monetary penalties as alternatives to forfeiture in some cases, so that responses to violations can be more readily tailored to individual cases.

INNOCENT THIRD PARTIES

- 215 Those most affected by the “one size fits all” regime in section 225 of the Customs and Excise Act 1996 are innocent third parties. In 1920 the Colorado Supreme Court noted:¹⁷²

I forfeit title to my automobile if I overtake, on the road, a man with a bottle of whiskey in his pocket, invite him to ride and he accepts the invitation. He is using my automobile to transport whiskey unlawfully. I have not consented to it and do not know it – but ... that will not avail me ... Is this result absurd? It surely is; but it is a conclusion inevitable from the argument that is put before us in this case.

- 216 There are two main situations where innocent third parties can become involved in Customs law forfeiture. The first is where the person who infringes a customs provision and causes goods to be forfeited is not the owner of the goods or of the conveyance responsible for transport of the goods. The owner (as in the Colorado Supreme Court case cited above) may have no knowledge of the contravention and have been in no way negligent with regard to the goods or conveyance.
- 217 The second situation is where goods that have been forfeited to the Crown are not seized immediately and pass into domestic consumption, and so into the hands of a bona fide purchaser for value without notice of the forfeiture. On the view that property in the goods passes to the Crown upon the customs violation, or at least passes subject to any residual rights, the bona fide purchaser is at risk.

The courts’ approach to third parties

- 218 In respect of the second situation (the bona fide purchaser), once goods have been forfeited to the Crown (assuming this is automatically on violation under current law), Customs officials may seize goods even though they have passed

¹⁷⁰ For example, Customs seizure guidelines do take into account the viability of a company employing a significant number of persons being put in jeopardy. See New Zealand Customs Service National Manager Investigations IV POL 02 Seizure and Waiver of Forfeiture, 1 July 2004, 3.2.3.

¹⁷¹ See chapter 2 of this report for references to the administrative monetary penalty regime in Part X of the Act and chapter 4 for alternatives to forfeiture in Canada and the United States, particularly for revenue or fraud violations.

¹⁷² *Hoover v People* (1920) 68 Colo 249, 254–255, 187 P 531, 533 cited in Maxeiner, above n 15, 792. The United States Supreme Court adopted the “absurd” result in *JW Goldsmith, Jr-Grant Co v United States* (1921) 254 US 505.

into the hands of an innocent purchaser for value.¹⁷³ The purchaser may sue the seller who is in breach of the implied condition as to good title, but has no remedy against the Crown as true owner of the goods.¹⁷⁴ However, as noted, New Zealand Customs does have a discretion not to seize goods and has a guideline expressly in favour of third parties.

- 219 In respect of the innocent owner of goods or conveyances, in the past the courts have adopted a strict approach.¹⁷⁵ In England, *Customs and Excise Commissioners v Air Canada*¹⁷⁶ is an example of this approach. A commercial aircraft was seized under the Customs and Excise Management Act 1979 as liable to forfeiture because one of the containers in its cargo had been opened and found to contain cannabis resin. It was, however, later delivered to the defendants on payment of £50,000. The defendants challenged the liability to forfeiture. The judge at first instance held that it was necessary for the Commissioners to prove that the defendant knew or ought to have known that the prohibited goods had been placed on the aircraft.
- 220 Allowing the appeal, the Court of Appeal held that section 141¹⁷⁷ provided a process *in rem* against any vehicle or object used for the carriage of prohibited goods; that liability to forfeiture under section 141 was absolute and knowledge on the part of any person whether as user or owner was not a requirement of liability; and that accordingly the aircraft, having been used for the carriage of cannabis resin, was liable to forfeiture (following *De Keyser v British Railway Traffic and Electric Co Ltd*).¹⁷⁸ Two of the judges noted that there was a case for excluding larger aircraft from the operation of section 141. The European Human Rights Court, on application by Air Canada, held that there were no violations of either Article 1 of Protocol 1 (right to peaceful enjoyment of property) of the European Convention, or of Article 6(1) (access to justice).¹⁷⁹ The Court held that the seizure was a measure taken in furtherance of a general interest policy of seeking to prevent carriers from bringing prohibited drugs into England. It was a temporary restriction on use and the penalty was not disproportionate to the aim pursued.
- 221 New Zealand cases until recently have also strictly interpreted the forfeiture provisions to the detriment of third parties. In *Attorney-General v Graham*,¹⁸⁰ a finance company claimed an interest in a car that had been imported, without an import licence, into New Zealand without the company's knowledge and consent. The Supreme Court held that it was the whole property in the goods that was transferred to the Crown, not merely the interest of the person whose

¹⁷³ *Burton v Honan*, above n 130.

¹⁷⁴ *Margolin v EA Wright PL* (1959) VR 455.

¹⁷⁵ See *Little's Victory Cab Co Pty Ltd v Carroll* (1948) VLR 249 where a taxicab was forfeited to the Crown because it contained smuggled cigarettes.

¹⁷⁶ *Customs and Excise Commissioners v Air Canada* [1991] 2 WLR 344. This was not the first time Air Canada cargo had been found to contain drugs.

¹⁷⁷ Customs and Excise Management Act 1979 (Eng), s 141 provides for liability for forfeiture of craft used in connection with goods liable to forfeiture.

¹⁷⁸ *De Keyser*, above n 42.

¹⁷⁹ *Air Canada v UK* (1995) 20 EHRR 150. The Court held that the seizure of the aircraft amounted to a temporary restriction on its use and did not involve a transfer of ownership so there was no deprivation of ownership and the release of the aircraft subject to the payment of a sum of money was, in effect, a measure taken in furtherance of a policy of seeking to prevent carriers from bringing prohibited drugs into the United Kingdom.

¹⁸⁰ *Attorney-General v Graham*, above n 42.

acts rendered the goods subject to forfeiture. So an innocent third-party owner would lose title to the goods. The Court cited Lord Hewart in *De Keyser*.¹⁸¹

[All that is open to the claimant is] to contend, and, if need be, to offer evidence to prove, that . . . the conveyance in question does not come within the classes of thing which . . . are forfeited. But once it is established that the conveyance does come within that class, this undoubtedly rigorous statute gives the claimant no opportunity of asking the Court to take into consideration mitigating circumstances with the effect of removing the conveyance from that class.

- 222 Despite the automatic transfer of title to the Crown, New Zealand courts more recently have interpreted customs legislation to allow some amelioration of the stringent provisions of forfeiture and seizure, in favour of innocent third parties. In *Williams v Attorney-General*¹⁸² the plaintiff was the builder and owner of a boat which he had agreed to sell to C. C took possession and paid a deposit but the property in the boat had not passed to him. Customs suspected the boat was being used to smuggle drugs into New Zealand. They searched it causing considerable damage, and the boat was seized as forfeited to the Crown. Mr Williams applied for a waiver of forfeiture as was his right and notified Customs of his interest in the boat. There was acceptance that Mr Williams was a completely innocent third party and that the boat was damaged while in the custody of the Crown.
- 223 The Court of Appeal held (by a majority) that the Crown owed a duty of care to Mr Williams during the period in which the boat was under seizure. Section 275(3) of the Customs Act 1966 required the Crown to place seized goods in a secure place, which they had clearly not done, and section 228A relieved officers from liability only in respect of actions taken with reasonable care.
- 224 In *Wilson v New Zealand Customs*¹⁸³ Williams J held that it was not difficult to accept that deprivation of a person's right to use their property or reduction of their property rights might amount to a detrimental effect on the owner's privacy interest in that property, and so potentially fall within section 21 of the New Zealand Bill of Rights Act 1990. Though the initial taking of property may be reasonable, the continued detention may not be. In the case, the first plaintiff's (Ms Wilson's) car had been seized reasonably as part of a seizure relating to an investigation of evasion of duty on a consignment of cars imported by her father's company from Japan. But Ms Wilson had paid duty in full on her car, so it was held that the continued forfeiture of her car was unreasonable once Customs had evidence of her duty payment.
- 225 The Judge suggested that, if Customs had considered Ms Wilson's case in a disinterested way, it should have been obvious to them that she was an innocent third party who had purchased her 1988 Corolla in good faith and paid full duty on her car, which was entirely independent of the import transactions.

¹⁸¹ Above n 42, 812.

¹⁸² *Williams*, above n 29.

¹⁸³ *Wilson*, above n 37. Compare the Canadian case of *144096 Canada Ltd (USA) v Attorney General of Canada (AG)* 222 DLR (4th) 577, (2003) 63 OR (3d) 172 where the plaintiffs brought an action for damage to its airplanes that were wrongfully seized, and the action was dismissed on the grounds that it was brought outside the limitation period.

- 226 The English courts have also adopted a more rights-oriented approach in recent cases. In *Hoverspeed v Customs and Excise Commissioners*¹⁸⁴ the High Court held, amongst other things, that the power to stop and search travellers had been exercised without giving reasons and thereby invalidated the subsequent seizures, and that Customs officers must follow the principle of proportionality when determining whether or not to restore goods and vehicles they have seized. The refusal to return a car belonging to a third party, without even considering whether it might be restored on payment of an appropriate sum, represented a disproportionate response. This part of the judgment was not appealed and the car was restored.¹⁸⁵

Current protections for third parties

- 227 Customs statutes often provide for remission or waiver and return of goods.¹⁸⁶ In New Zealand, the exercise of that administrative jurisdiction to respond to hardship was vested in the Governor under the early legislation as a matter for the Crown's "merciful consideration"¹⁸⁷ and latterly by the Minister of Customs as "an act of clemency".¹⁸⁸ The Minister has been said to be acting as the guardian of the public interest.

Waiver of forfeiture and rights of appeal

- 228 Third parties with an interest in forfeited items can apply to the Minister under section 235 of the Customs and Excise Act 1996, for a waiver of forfeiture and thus restoration of their item, but only after it has been seized as forfeited. Third parties can also claim an interest in goods seized by applying to court pursuant to section 231 of the Act for disallowance of seizure, but the courts have no clear power to assist innocent third parties under this section, unless there was no reasonable cause for the seizure or continued detention.

New Zealand Customs Service guidelines

- 229 In relation to third parties specifically, Customs Service guidelines state:¹⁸⁹
- 3.1.1 It is not generally the policy of the Customs Service to seize goods off innocent third parties who have purchased goods in good faith and who are independent of the import transaction. However, this policy does not apply in the case of prohibited goods or where the third party should have been aware that the price paid for the goods is significantly less than that ordinarily payable for similar goods. Each case is, however, to be considered on its merits before a final decision is made.

¹⁸⁴ *R (Hoverspeed Ltd) v Customs and Excise Commissioners* [2002] EWHC 1630 (Admin). The High Court decision was discussed in G Macfarlane "Chaos in Excise Control: *Hoverspeed* Undermines Customs and Excise" (2002) Scots LT 251.

¹⁸⁵ However, the Court of Appeal allowed Customs' appeal to the extent that the power to seize goods liable to forfeiture was not dependent upon the exercise of any power to stop and search, so the High Court's decision to quash the seizures of the dutiable goods was set aside (though without prejudice to an individual's claims for damages). *R (Hoverspeed Ltd) v Customs and Excise Commissioners* [2003] QB 1041.

¹⁸⁶ See the discussion at chapter 8.

¹⁸⁷ Following *The Annandale* above n 73. See too, *Sandness v The King* (1933) 60 CCC 220, 225.

¹⁸⁸ (25 September 1970) 368 NZPD 3534.

¹⁸⁹ New Zealand Customs Service, National Manager Investigations, IV POL 2 "Seizure and Waiver of Forfeiture", 1 July 2004 3.1.1.

- 230 This guideline offers some protection to the bona fide purchaser who has no knowledge of the importation violation, but not specifically to the owner of goods or a conveyance involved in a violation without his or her knowledge. In addition, as noted before, the guidelines are an administrative means of protection and lack the binding force of statutory provision to safeguard the interests of third parties. In times of increased concern about border security there is the risk that individual rights (for example of innocent third-party owners) may become less of a priority.

Further safeguards for third parties

- 231 Present guidelines, recent jurisprudence, and rights of appeal offer some protection for third parties with an interest in forfeited items but not enough. It is quite possible, for example, for the innocent owner of a yacht or aircraft, used by a crew member or passenger for smuggling drugs, to have their craft forfeited and have to rely on the ministerial discretion to waive forfeiture in order to have the yacht restored. As the minority judges hearing *Air Canada's* application to the European Court of Human Rights held, “innocent owners” should not be subjected to a penalty, and however weighty may be the general interest in preventing illegal imports, an air carrier should not be responsible automatically if illicit drugs are found concealed in their cargo.¹⁹⁰ We have considered two legislative models providing more protection for third parties.

Canada – third-party claims

- 232 The Canadian Customs Act 1985 includes provisions specifically for third-party claims (sections 138–141). The applicant must supply evidence of their interest in the seized or detained goods or conveyance, and the Minister must decide an application “without delay”. The applicant’s interest in the goods or conveyance is not affected by the seizure or detention, if it was acquired in good faith before the contravention and the applicant is innocent of any complicity and exercised reasonable care in respect of any other persons involved. An appeal to court is available.¹⁹¹

New Zealand proceeds of crime regime

- 233 Under the Proceeds of Crime Act 1991, third parties can apply to the court for relief where there is a conviction-based forfeiture. Section 17 of the 1991 Act provides that third parties (persons who claim an interest in property that is the subject of a forfeiture order application) may apply for an order granting relief before the forfeiture order is made, or up to six months from the date of the forfeiture order (or such further period as a court allows). If the court is satisfied that the applicant has a valid interest, section 18 provides that it shall make an order declaring the nature and extent of the interest, and directing the Crown to transfer the interest or an amount equal to the value of the interest to the applicant, or directing that the interest be not included in the forfeiture order.

¹⁹⁰ See the dissenting opinion of Judge Martens joined by Judge Russo in *Air Canada v UK*, above n 179.

¹⁹¹ See chapter 4 for more detail of the Canadian and Australian provisions.

- 234 The court may refuse to make such an order if satisfied that the applicant was in any way involved in the commission of the offence in respect of which forfeiture of property is sought, or the applicant did not acquire the interest in the property in good faith and for value without knowledge or reasons to believe the property was tainted.
- 235 In addition, when considering whether or not to make a forfeiture order, the court may have regard to:
- the use that is ordinarily made, or intended to be made, of the property;
 - any undue hardship that is reasonably likely to be caused to any person;
 - the nature and extent of the offender's interest in the property and the interest of any other person;
 - matters relating to the nature and circumstances of the offence.
- 236 Similar relief provisions have been inserted in the Criminal Proceeds and Instruments Bill, which was introduced in Parliament before the 2005 election, to allow the forfeiture of the proceeds of crime without the need for a prior conviction.

CONCLUSION

- 237 In our view, forfeiture is not necessarily appropriate to all violations caught by section 225 of the Customs and Excise Act 1996. The decision to confiscate goods should involve consideration of the proportionality of that outcome to the circumstances of the violation. To achieve this, there needs to be a greater range of penalty options in response to customs violations. In particular we propose the expansion of monetary penalty options, so that the "one size fits all" approach of section 225 can be avoided.
- 238 As a matter of both principle and consistency with other statutory regimes, there ought to be statutory provision for third-party relief under the Customs and Excise Act 1996. Forfeiture is not generally justified where the owner of the goods is innocent of any wrongdoing in respect of the customs violation, and there should be an explicit procedure that enables such a person to claim his or her interest or monetary compensation to the value of that interest.
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8

Rights of notice, review
and appeal

239 **I**N a regime where there is potential for forfeiture without conviction and power to immediately seize property at the border, it is important that there are safeguards by way of adequate notice, rights of review and ultimately an appeal to a court. Such safeguards should ensure that no one is arbitrarily deprived of their property.¹⁹²

NOTICE OF SEIZURE

240 The present statutory provision for notice of seizure “as soon thereafter as is reasonably practicable” (section 227 of the Customs and Excise Act 1996) permits a delay in giving notice by not stating a time limit, and does not specifically provide for notice of consequences or for notice of opportunities for appeals. However, some deficiencies of the notice section are remedied by the New Zealand Customs Service guidelines.

241 The Customs Service guidelines require a full record of seizure, including documentation of the reasonable grounds to suspect the goods were forfeited and a notice of seizure containing:¹⁹³

As full a description as is reasonably possible of the factual background on which Customs has relied in seizing the goods under section 226; and

As full a description as is reasonably possible as to how that background is said to constitute reasonable cause for suspicion that the goods are forfeited, including reference to the relevant sections of the Customs and Excise Act; and

If more than one item has been seized, which statutory provision and which cause for suspicion of forfeiture applies to which item; and

A description of the remedies available to addressees including reference to the relevant sections of the Customs and Excise Act; and

References to the relevant sections of Customs’ policy on forfeiture and seizure and either a recital of those provisions or a reference to where copies of the policy can be obtained.

242 The Notice of Seizure has contained these comprehensive details since the ruling in *Wilson v New Zealand Customs* by Williams J.¹⁹⁴

¹⁹² See the Universal Declaration of Human Rights, UNGA Resolution 217A (III) (10 December 1948) article 17, which provides that: “No one shall be arbitrarily deprived of his property”.

¹⁹³ New Zealand Customs Service National Manager Investigations, IV PRO 02 “Seizure and Waiver of Forfeiture”, 1 July 2004, 4.2.3. See similarly, National Manager Air and Marine, AM PRO 27 “Forfeiture and Seizure”, 1 May 2002, paras 5.2.1–5.2.2.

¹⁹⁴ *Wilson*, above n 37. The Notice of Seizure explains in reasonably plain English what goods are seized and why, the seizure procedure and consequences, the appeal and waiver procedure, the possibility of applying for delivery of goods seized on payment of a deposit

- 243 The guidelines state that officers must provide a copy of the Notice of Seizure to the person from whom the goods were taken, where practicable, and request that they sign it, and also must provide such Notice, authorised and signed by the manager or team leader, to any person known or believed to have an interest in the goods. Officers may seize prohibited goods immediately after a cause for forfeiture has arisen; but should allow an importer or exporter the opportunity to consult with the relevant approval agency where applicable. They must maintain and store goods in the best possible condition to avoid deterioration and diminution in value. At the time of seizure or forfeiture, they are to advise the person of his or her right to appeal either the seizure or the forfeiture under the provisions of sections 231 or 235 of the Customs and Excise Act 1996.
- 244 Thus the present New Zealand guidelines require detailed information to be given to people wishing to contest seizure or forfeiture, including their appeal and review rights. We endorse this approach but consider that details of the contents of notices should be in statutory form.

REVIEW AND APPEAL RIGHTS

- 245 Persons with an interest in goods seized as forfeited may claim their interest and apply to court for disallowance of the seizure and the return of the goods, (section 231). Persons who would be entitled to the goods but for their forfeiture may also apply to the Minister for waiver of forfeiture (section 235).
- 246 The dual system of appeal to a court and ministerial review has a number of limitations. In particular, grounds of appeal and review are limited, the burden of proof is on the claimant and there is no statutory provision for an appeal from a ministerial review to a court.

Limitations of section 231: application to disallow forfeiture

- 247 On the face of it, sections 231–233 of the Act seem to provide a reasonable avenue of appeal for persons claiming an interest in items seized as forfeited. The limitation period of 20 days under section 231 is extendable, or if there has been no notice, the six month period under section 233 is quite generous.
- 248 However, an interpretation of section 231 is that appeals can only be advanced on the grounds that seizure was not authorised under the Act (that is, that section 225 was not satisfied).¹⁹⁵ This is a limited basis for appeal and does not allow forfeiture to be challenged as unreasonable in the circumstances. Continued detention and forfeiture has been held to be a basis for challenge,¹⁹⁶ but there is a compelling argument for an appeal on grounds of disproportionality of penalty, at least for non-prohibited items.

(the Customs value of the goods plus any duty payable), with an accompanying letter advising rights and courses of action.

¹⁹⁵ In a case under the Customs Act 1966, the High Court said that the Court's function in *in rem* proceedings was essentially declaratory as to the status of the goods: *Collector of Customs v Kilburn Car Sales Ltd & ors* (18 November 1996, High Court Auckland, M20/95, M 1157/954, M 18 and 19/95, Fisher J). This would preclude any decision as to whether or not a seizure was unreasonable in terms of section 21 of the Bill of Rights Act 1990 in such proceedings. However, Justice Fisher did state that, at least theoretically, unreasonableness of the seizure could give rise to a remedy in some other type of proceedings, for example in a claim for damages.

¹⁹⁶ See *Alwen v Comptroller of Customs*, above n 28, as confirmed in *Wilson*, above n 37.

Burden of proof on claimant in appeals

- 249 In New Zealand, the burden is on the person contesting the seizure pursuant to section 231 of the Act to make an application and to support his or her case, whereas in Australia and England for example, the burden is on Customs to bring proceedings for condemnation where there is a claim, as it was previously under the Customs Act 1966 (NZ).
- 250 However, the Australian and English process is not necessarily in the interests of the person who contests a seizure. Customs in Australia has 120 days to bring proceedings.¹⁹⁷ This means there is a long period of time during which claimants (other than owners) are not able to act unless they bring a civil action to recover their goods or seek judicial review in the Federal Court.
- 251 In England, there is no time limit for Customs to bring proceedings providing it is within a reasonable time.¹⁹⁸ Further, even if judgment is given for a claimant, if the court certifies that the original seizure was reasonable the claimant is not entitled to damages or costs.
- 252 The advantage of the current section 231 of the Customs and Excise Act 1996 (NZ) is that the claimant can take action and progress their case, without waiting for the State to act or the need to take judicial review proceedings. In practice both parties will marshal their facts to prove their cases, and the onus is similar to other regulatory statutes, for example tax statutes, where the claimant has the relevant knowledge to support a claim.
- 253 We are of the view that, once given notice of detention of their goods, it should continue to be the claimants who instigate any review.

Limitations of section 235 application: waiver of forfeiture

- 254 The second, parallel, avenue of review under the New Zealand Act (section 235) is to the Minister for a waiver of forfeiture, by a person who “but for the forfeiture, would be entitled to the goods”. The period within which the person may apply, 20 working days or 30 working days if they have had no notice of seizure, seems reasonable. But unlike under section 231 there is no provision for an extension of time, no timeframe within which the Minister must respond and no appeal to a court as an independent adjudicator.

ALTERNATIVE REVIEW AND APPEAL PROCESS: CUSTOMS APPEAL AUTHORITY

- 255 The dual system of court appeal and ministerial review has the disadvantage that if there is an appeal to court pending, the Minister will most likely await the outcome before making a decision whether to waive forfeiture. Further, we consider that it is inappropriate for a Minister to be determining anything in the nature of a penalty or making decisions in individual cases, as there is the potential that political considerations may influence the decisions.

¹⁹⁷ See our discussion on this at chapter 4.

¹⁹⁸ See McFarlane, above n 95, 127.

- 256 As noted, section 231 is not much used;¹⁹⁹ a possible reason for the low usage could be the cost and inherent delays of court processes.²⁰⁰ We are of the view that an inexpensive, internal review process should be available for claimants, with an appeal to a court or tribunal.
- 257 Provision for the establishment of Customs Appeal Authorities is made under section 244 of the Act. Each Authority consists of one person, being a District Court judge or a barrister or solicitor of not less than seven years' practice. The function of the Authority is to sit as a judicial authority for hearing and deciding such appeals as are authorised by the Act or any other Act, against assessments, rulings, determinations and directions of the Chief Executive.²⁰¹
- 258 Appeals are by way of a hearing de novo and the Authority has all the powers, duties, functions and discretions of the Chief Executive in making the assessment, decision or determination appealed from. Sections 254–274 of the Act provide for the procedure. The Authority may decide without oral hearing if both parties consent. Evidence may be given orally or by affidavit or by any statement or document, whether or not it would be admissible in a court. The Authority has investigative powers and powers to summon witnesses. There is an appeal to the High Court, and thence to the Court of Appeal on a question of law.

CONCLUSIONS

- 259 We do not support the parallel systems of court appeal and ministerial waiver of forfeiture for the reasons given above. Where a person wants to claim an interest in goods seized, or contest appropriateness of penalty, ideally this should be done by an independent tribunal sitting in review of the administrative decision, or determining where property interests should lie. However, court processes can be slow and expensive and stressful. It should be possible to challenge the decision of a Customs officer (who has seized a person's property) by an initial internal review process, conducted by a person with customs expertise, such as the Customs Comptroller (or his or her delegate) rather than by the Minister.²⁰² Such a process should involve little or no expense to the challenger and should be able to be accomplished without delay.
- 260 We favour such a process, with an appeal to a court or tribunal, and suggest that the Customs Appeal Authority would be an appropriate tribunal for such appeals.

¹⁹⁹ See above n 38.

²⁰⁰ Delay was mentioned as a concern by defence counsel during discussions with the Law Commission in December 2004.

²⁰¹ See Customs and Excise Act 1996, s 253. There is currently no appeal to the Customs Appeal Authority against seizure or forfeiture.

²⁰² *Laking Review*, above n 134, 73, likewise recommended that review should be by the Chief Executive rather than the Minister and that the decision should be within 30 days of the application being received.

PART III
Recommendations

9

The framework for reform

- 261 **T**HE concerns discussed in the preceding chapters have led us to conclude that the forfeiture and seizure provisions in Part XIV of the Customs and Excise Act 1996 provide a regime with some potential for unjustified interference with rights. In particular there is no justification for immediate forfeiture by force of statute, or forfeiture upon seizure,²⁰³ without an opportunity for a hearing. Forfeiture, as an inevitable statutory consequence, can be a disproportionate response to less serious violations of customs law, or where an innocent third party is involved, or where a penalty has been imposed following a conviction.
- 262 There should be alternative consequences to forfeiture, which should be applied by Customs with transparency and consistency and as appropriate for the individual circumstances of the violation, and there should be opportunities to review and appeal Customs' decisions as to the proposed consequences. The current dual system of court appeal and ministerial review is both limited and unsatisfactory.
- 263 The following principles have been applied in developing our framework for reform:
- (a) A penalty should only be imposed after a violation has been proved or admitted, or there has been an opportunity to be heard in relation to the alleged violation.
 - (b) Any penalty should be in proportion to the seriousness of the violation, the actual culpability of individuals involved and the objectives of the legislation.
 - (c) There should be an opportunity to challenge the status of the goods and proposed administrative penalties before they are imposed, with an appeal to an independent tribunal or court.
- 264 We propose a new legislative framework that meets these standards while leaving Customs with appropriate powers to deal effectively with goods crossing the border in contravention of Customs law. The proposed legislative amendment to Part XIV of the Customs and Excise Act 1996 follows this chapter. In describing our proposals, the term Chief Executive refers to the Chief Executive of the New Zealand Customs Service, as is also the case in the draft legislation.

²⁰³ *Ortiz*, above n 70.

- 265 The proposed draft legislation for an amended Part XIV²⁰⁴ provides for:
- a regime allowing immediate detention of goods listed in section 225 of the Act, before confiscation and transfer of title to the Crown with the term “confiscation” to replace “forfeiture”;
 - a decision as to confiscation to be deferred until the conclusion of court proceedings if a prosecution is brought;
 - statutory designation of goods as “restricted” or “forbidden” to enable the consequences of a violation to be tailored according to those two categories;
 - forbidden goods being those denoted as intrinsically harmful and restricted goods being those where duty has been avoided and those that are prohibited but not forbidden;
 - the availability of an administrative monetary penalty for both forbidden and restricted goods, either as an additional consequence or, in relation to restricted goods, as a stand-alone penalty in lieu of confiscation;
 - the possibility of “redeeming” some restricted goods as a more proportionate and appropriate alternative to confiscation;
 - a detailed notice of detention and of proposed consequences to persons with an interest in the detained goods and persons who had possession or control of them;
 - an opportunity to be heard before confiscation or another penalty is imposed;
 - internal administrative review provisions, with an appeal to the Customs Appeal Authority, and abolition of the ministerial waiver provision;
 - specific provisions for third parties claiming an interest in detained items.

DETENTION AND CONFISCATION

- 266 We accept that the Customs Service needs power to secure the border against unwanted and harmful imports, in order to protect the community, especially in the current security environment, and to comply with international obligations and support international trade. Immediate seizure and forfeiture is necessary as a deterrent penalty for the public good where there is reliance on self-policing but, in our view, the deterrence would be no less effective if the goods were detained in the first place, with confiscation (or other penalty) occurring only after persons affected have had an opportunity to be heard and pursue any available avenues of review and appeal.

²⁰⁴ Note that in the section heading of the proposed draft legislation, Arabic numerals are used (as in Part 14) to replace the Roman numerals (as in Part XIV), as this is the modern practice for legislation. In the draft legislation and in this chapter the term “detention” is used when an item is held temporarily by Customs, and the term “confiscation” is used when an item is transferred permanently to the Crown.

Need for a search warrant

- 267 It is our view that, as now, it should not be necessary to obtain a warrant to detain items that are unlawfully crossing the border, where these are in a Customs place, at a Customs controlled area or in a Customs approved area for storing exports.²⁰⁵ Nor should it be necessary to obtain a warrant to detain forbidden goods found elsewhere since it is in the public interest to take immediate steps to prevent the circulation of such goods within the community. In both these instances, a requirement to obtain a warrant would create undue delay and impede effective border control.²⁰⁶ But this relates only to the detention of goods; it does not empower Customs officers to enter premises and search for goods without a warrant.
- 268 In all other circumstances a warrant should be required in order to effect an entry, search and seizure. We propose that this is achieved by cross-reference to section 167 of the Act, which provides for a search warrant to be obtained to enter and search any place or thing if a Customs officer has reasonable grounds to believe there may be goods liable to detention under the Act or evidence of the unlawful importation or exportation of goods.

Grounds for detention without warrant

- 269 At present Customs may seize forfeited goods or those where there is “reasonable cause to suspect” they are forfeited. We have considered whether the threshold for detention of goods should be raised, to allow an officer to detain only where he or she has reasonable grounds for belief that an item is liable to detention as in Canada.²⁰⁷ However, Customs’ view is that it is very difficult to have a reasonable belief that something is a prohibited item (for example, a car with a wound-back odometer, or a cannabis utensil, or children’s nightwear that does not comply with the labelling) without further investigation, and that therefore it is undesirable to let suspected items of this sort cross the border and enter New Zealand until that further investigation has occurred. We find that persuasive.
- 270 Despite the use of a higher threshold in the Canadian legislation, we propose retaining “reasonable cause to suspect” as the threshold for detention. The other alterations we recommend are a more effective means of achieving the appropriate balance in this area.

Duty of care during detention

- 271 While items are detained, Customs should have a statutory obligation to care for them and should pay for storage costs as they do at present. Specific arrangements should be made for perishable goods, including their sale, subject to protecting the owners’ interests. The cost of storage can ultimately be charged to the person in violation.

²⁰⁵ See the Customs and Excise Act 1996, ss 9–10, 18, 19A–H and 20 for descriptions of such places. Nor should it be necessary to obtain a warrant to detain goods found on any craft which Customs is authorised to search, or on an aircraft landing strip or in buildings thereon, pursuant to the Customs and Excise Act 1996, s 137 and 140.

²⁰⁶ There should continue to be provision for a person claiming an interest to retain or obtain custody on payment of security or on other reasonable conditions.

²⁰⁷ See our discussion at chapter 4.

Confiscation

- 272 After detention, but before confiscation, there should be time for the category of the goods and their liability for confiscation to be fully investigated, and for anyone with an interest in the goods to be advised of the decision to confiscate those goods and have an opportunity to challenge that decision. Title should pass to the Crown on confiscation.

RECOMMENDATIONS

Detention and confiscation

- R1 There should be a two-stage statutory regime allowing immediate detention of goods where there is reasonable cause to suspect the goods are liable to detention followed, where appropriate, by confiscation.
- R2 There should be a power for Customs to immediately detain goods without a warrant where:
- (a) there is reasonable cause to suspect the goods are liable to detention; and
 - (b) the goods are either forbidden or in a Customs place, a Customs controlled area or a Customs approved area for storing exports.
- R3 In all other circumstances, a warrant should be required in order to effect an entry, search and seizure, to be achieved by cross-reference to section 167 of the Act.
- R4 Customs should have the power to hold detained goods, with an obligation to care for them or, in the case of live or perishable things, to sell the item subject to protecting the owners' interests.
- R5 There should be a power for Customs to confiscate goods when satisfied that the goods fall into a category liable to confiscation and that the required notification, review and appeal processes have been completed.
- R6 Title in the goods should pass to the Crown on confiscation.

CATEGORISATION OF ITEMS

- 273 Although all the goods currently listed in section 225 of Part XIV of the Act should be liable to detention and confiscation,²⁰⁸ our view is that ultimate confiscation will only be appropriate for some goods and in some circumstances. The statute currently provides that all goods listed in section 225 of the Act are treated in the same way, even though the nature of the goods and seriousness of the violations concerning the goods vary considerably.

²⁰⁸ It may be advisable to review the list to remove any duplication or anomalies.

- 274 In practice, the potential harshness of this one-size-fits-all approach is ameliorated by Customs guidelines that distinguish between prohibited and non-prohibited goods.²⁰⁹ However, the failure of the existing statutory regime to distinguish between different categories of goods and circumstances in determining the consequences of a violation remains problematic. It means there is insufficient legislative guidance as to effective and proportionate responses to violations.
- 275 Some other jurisdictions use categorisation as the basis for determining particular consequences. For example, Australian legislation has a subcategory of “special forfeited goods” seizable without warrant,²¹⁰ and United States customs legislation has a civil monetary penalty regime for all commercial customs violations where fraud or negligence is involved.
- 276 In our view the relevant distinction in Part XIV is between goods considered so harmful (to people or the environment or the market) that they should not be in circulation, and goods that it is unlawful to import or export under certain circumstances (usually if duty has not been correctly paid). For those goods considered to be harmful, confiscation should always be the appropriate response, with or without some other penalty. For most other goods, provided the violation can be corrected or the potential for harm averted, there is probably no need for confiscation. Imposition of a monetary penalty is more appropriate, especially for revenue violations.
- 277 We recommend that any of the goods listed in section 225 should be able to be designated as “forbidden” by Order in Council if deemed to be intrinsically harmful in the form in which they are crossing, or have crossed, the border or are prohibited as a result of international conventions or sanctions imposed on the country of origin. Most of these items are included within the existing category of “prohibited goods”. There are also some things such as dangerous items seized under section 149C(1A), and perhaps counterfeit seals referred to in section 225(1)(a)(i) and section 179 of the Act, not currently in the prohibited category but which might be designated as forbidden.
- 278 All other goods listed in section 225 are subject to restrictions and should therefore be liable to be detained while the nature of the restriction and suspected violation are investigated. These items include:
- goods where incorrect or no duty has been paid;
 - restricted goods that may be able to be redeemed;²¹¹
 - goods in respect of which there has been a false or incomplete declaration or entry;
 - goods in respect of which some other offence under the Customs and Excise Act 1996 has been committed;
 - craft or conveyances or instruments involved in a customs violation, to which considerations such as collusion in the offence may apply in deciding the penalty.

²⁰⁹ See chapter 3 of this report.

²¹⁰ These are all suspected prohibited imports and exports located at a Customs place and narcotic goods anywhere: see Customs Act 1901 (Cth), ss 203B and C. A warrant is required for seizure of all other forfeited or suspected forfeited goods.

²¹¹ For discussion of redeemable goods see paras 281–286.

RECOMMENDATIONS

Categorisation

- R7 Goods subject to the regime in the amended Part XIV of the Customs and Excise Act 1996 should be those currently listed in section 225.
- R8 There should be a distinction between goods designated as “forbidden” and the remainder of goods listed in the present section 225 where movement across the border may be restricted.
- R9 Goods should be able to be designated as “forbidden” by Order in Council if deemed to be intrinsically harmful in the form in which they are crossing, or have crossed, the border or are prohibited as a result of international conventions or sanctions imposed on the country of origin.
- R10 Forbidden goods should always be confiscated but the confiscation of restricted goods should be discretionary. A monetary penalty alone should often suffice for restricted goods, particularly for revenue violations.

CONSEQUENCES FOR VIOLATIONS OF CUSTOMS LAW

- 279 Introducing a two-stage process of detention and possible confiscation, together with creating a distinction between forbidden and restricted goods, paves the way for a more flexible and varied response to violations.
- 280 Under our proposals, the category of the goods (whether forbidden, restricted, a means of conveyance or equipment used in the manufacture of excisable goods) would determine the options available, and various combinations of the options could be appropriate. The options in Part XIV available to the Chief Executive in response to a violation of customs law, in order of increasing severity, would be:
- granting an application to apply for goods to be redeemed;
 - imposition of an administrative monetary penalty;
 - confiscation of the goods;
 - prosecution for an offence.

Restricted “redeemable” goods

- 281 There are some goods for which forfeiture is presently waived by the Minister or his or her delegates, subject to compliance with certain requirements. The items may be able to be reclassified after rectification so that they are no longer in a prohibited category. For example, fungus-infected furniture might be decontaminated at an importer’s expense, shirts labelled wrongly as to country of origin might be relabelled with the correct trade description, or a permit may be obtained for a firearm.

- 282 These are the goods we call “redeemable”. Unless the option of redeeming the goods is invoked, the goods would usually be confiscated and lost to the owner. The option can only apply to restricted goods, as forbidden goods cannot be imported or exported under any circumstances.
- 283 There is currently no statutory provision for this process under Part XIV apart from ministerial waiver of forfeiture, although in practice an opportunity for rectification might be given. We recommend there is specific provision for a more accessible and transparent process²¹² in relation to redemption of restricted goods. We propose that notice to persons affected by the detention of restricted goods should include information about their option, where appropriate, to admit the violation and apply for permission to redeem the goods. Since a violation has occurred, whether this option will be granted is a discretionary matter for the Chief Executive. In considering whether to grant permission, the Chief Executive should be required to take into account the statutorily listed factors for determining a proportionate response to a violation.²¹³
- 284 If the Chief Executive grants permission to apply to the relevant government department to redeem the goods, and if this authority is granted and the goods redeemed, the Chief Executive should be required to return the goods. Return would be subject to any conditions imposed by the relevant department or the Chief Executive, which could include payment of a sum (in addition to any administrative monetary penalty proposed in the notice of consequences) not greater than the equivalent of the value of the goods, any costs incurred and any duty liable.
- 285 Granting redemption means that it is appropriate in the circumstances to allow rectification of the goods. It does not indicate that a proposed monetary penalty is disproportionate. A further monetary penalty instead of the confiscation may sometimes be appropriate. If the goods had been confiscated, as proposed in the notice of consequences, goods of this value would have passed to the Crown, and a penalty up to this level when the goods are redeemed may be appropriate.
- 286 The Australian Law Reform Commission in 1992 recommended a procedure of “rectification” for such goods.²¹⁴ This was not adopted but there is a procedure in Australia to allow re-export of declared prohibited goods in the case of international passengers.²¹⁵

Administrative monetary penalty

- 287 There is no ability under Part XIV at present to impose a monetary penalty as an alternative to, or in addition to, forfeiture. A combination of penalties can be achieved for serious violations through prosecution if an offence exists; a process that may be cumbersome, prolonged and disproportionate to the seriousness of the conduct.
- 288 A limited monetary penalty regime exists in Part X of the Act for errors or omissions on entry that result in unpaid duty or a materially incorrect entry (usually in the description of the goods), with the Chief Executive able to impose

²¹² For example, see above n 59.

²¹³ The factors for assessing consequences are discussed in paras 311–313, below.

²¹⁴ The draft legislation is set out in Australian Law Reform Commission Report *Customs and Excise*, above n 69, pt 31.

²¹⁵ See Australian Government Customs Service, above n 12.

finer up to \$10,000.²¹⁶ This penalty could also be imposed in relation to goods forfeited under Part XIV.²¹⁷ In addition, under Part XIII the Chief Executive may accept payment of up to \$500 in full satisfaction of a fine or “other penalty” in relation to offences concerning goods with a value up to \$1000. The offender must admit the offence in writing.²¹⁸

- 289 We recommend that administrative monetary penalties should be able to be imposed as a response to all violations that come to notice under Part XIV. Imposition of a monetary penalty would be an alternative to confiscation where confiscation might be disproportionate or inappropriate, particularly for revenue infractions. There are also situations where confiscation is inappropriate because the person in breach is not the person who owns the goods. A monetary penalty might be imposed in addition to confiscation, if confiscation on its own would provide insufficient response but prosecution would be unduly harsh. In relation to forbidden goods, a monetary penalty would always be additional to confiscation.
- 290 We suggest that the administrative monetary penalty regimes in Parts X, XIII and XIV should be aligned. Although two independent regimes for administrative monetary penalties could be retained in the statute, possibly dealing with the less serious and more serious categories of breaches, an integrated framework seems preferable.
- 291 Provision of a wider administrative monetary penalty regime would follow the practice in some overseas jurisdictions, although it has mainly been introduced in relation to dutiable goods.²¹⁹

Maximum levels for administrative monetary penalties

- 292 Imposition of a monetary penalty should be additional to any duty that may be payable for the goods, and also to any costs or expenses incurred by Customs, which may also be claimed by the Chief Executive.
- 293 Where a breach is very serious, involves repeat or deliberate offences, or involves forbidden goods, a prosecution is likely to be laid and the court will determine penalty. Where there is no prosecution, we consider the upper level of penalty that the Chief Executive can impose should be prescribed to ensure the discretion is exercised with transparency and consistency. In addition, we consider that substantial discretion to impose monetary penalties should not be exercised outside of court without the availability of court review.²²⁰
- 294 We suggest that the maximum levels could be contained in regulations because the issues are likely to be technical, complex, subject to change and will need to cover a very wide range of conduct. The regulations might, for example, prescribe the maximum level the Chief Executive can impose in relation to importing pornographic material or for boats used to smuggle goods into New Zealand. In relation to dutiable goods, there might be a sliding scale depending on the value of the goods, or as a percentage of the total value. The existing

²¹⁶ Customs and Excise Act 1996, ss 128–130.

²¹⁷ Customs and Excise Act 1996, s 128(5) and (6).

²¹⁸ Customs and Excise Act 1996, s 223.

²¹⁹ See our discussion at chapter 4.

²²⁰ See also New Zealand Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, Wellington, 2005).

provisions in Part X, which set monetary penalties in relation to errors and omissions relating to dutiable goods at either \$50 for each error or 20 per cent of the unpaid duty up to \$10,000, whichever is the higher, might need to be reconsidered in light of the levels set in these regulations.

- 295 When determining the amount of an individual administrative monetary penalty, the Chief Executive should also take account of the statutorily listed factors for determining a proportionate response to a violation.²²¹

Prosecution

- 296 At present criminal prosecution and automatic forfeiture can occur at the same time, independently of each other. This is because if there is a relevant offence provision in the Act, Customs may prosecute persons who have imported or exported goods already subject to forfeiture under the Part XIV regime.
- 297 For example, an importer may inadvertently make a defective entry concerning a consignment of clothing from China, an offence for which a fine, not exceeding \$5000 for a company, can be imposed following conviction. The clothes will be automatically forfeited and the ship in which they were carried is also forfeited by operation of law.²²² Yet the court is not required to take the fact of any forfeiture into account when determining the fine.
- 298 This dual process has potential to impose double punishment and is inappropriate. If Customs decides to prosecute, the court should determine the outcome at the conclusion of the proceedings. Customs should not also be able to confiscate or impose a monetary penalty.
- 299 In the event of a conviction, the court might impose a monetary penalty by way of a fine and/or order confiscation. An order for confiscation should be taken into account by the court as part of the total penalty imposed.²²³ The court should also order confiscation, even without conviction, if the defendant has failed to prove on the balance of probabilities that the goods are not forbidden.²²⁴ The court should also have power to order confiscation of goods without conviction, if satisfied on the balance of probabilities that they are restricted goods or equipment used in the manufacture of excisable goods; and to order confiscation of the means of conveyance unless satisfied on the balance of probabilities that it was not altered to conceal such goods and that the owner or person in control was innocent of complicity or collusion in the alleged offence.

²²¹ The factors are discussed at paras 311–313, below.

²²² The clothes could be restored by the court later, and in practice Customs would be unlikely to seize the ship.

²²³ Compare the Criminal Proceeds and Instruments Bill, currently before Parliament, which incorporates the forfeiture of instruments of crime within the sentencing process, thus requiring that any such forfeiture is taken into account in determining the total penalty and would not have a disproportionately harsh effect (as would forfeiture of a family farm where there was a conviction for cultivating a small amount of cannabis, for example).

²²⁴ There may not be sufficient evidence to establish the defendant's liability for the offence, even though the court is satisfied that the item is in the forbidden category.

Factors to be taken into account in determining the response to a violation

- 300 In deciding on the appropriate action, the Chief Executive needs to determine a response that is fair and proportionate in all the circumstances. We propose that the statute should list the factors that must be taken into account when deciding what action to take in response to a violation. The examples below illustrate the sorts of issues that may arise.
- 301 For forbidden goods, Customs may not be able to prosecute because, for example, there is no traceable offender within the jurisdiction or the apparent importer was a “shell” company and confiscation would be the only option. In cases where there is an identifiable offender, Customs could choose not to prosecute but might consider a monetary penalty appropriate in addition to confiscation, especially with a serious or repeat violation.
- 302 For other goods, Customs would have a range of options, for example:
- Some restricted goods may be “redeemable”.
 - Prosecution should generally be initiated for a serious and deliberate violation involving goods of substantial value or a repetition of deliberate conduct, so long as there is a traceable offender within the jurisdiction. If there is no such offender, confiscation is the only practicable option.
 - In commercial cases where confiscation could affect persons not involved in the violation, such as third parties or the employees of a company, a monetary penalty could be preferable to confiscation.
 - With revenue violations, a monetary penalty could vary according to whether it is a first or subsequent violation. In serious cases, both a monetary penalty and confiscation could be imposed and might be sufficient without prosecution.
- 303 If there are two parties involved, such as a carrier of goods and an owner of the craft, it may be appropriate to impose a monetary penalty on the carrier and to confiscate the goods from the owner if he or she is complicit in the violation (for example, had adapted the craft for concealment of goods) or it is a repeat violation. But this would be inappropriate if the owner of the craft (or a person with an interest in it) is innocent of any wrongdoing by the carrier.
- 304 With respect to craft and conveyances involved in violations, our recommendations are in accordance with the recommendations of the World Customs Organization’s Kyoto Convention proposed Protocol of Amendment 1999,²²⁵ which would prevent confiscation from innocent third parties. However, we do not agree with an approach that would require the owner of the craft or conveyance to have taken all reasonable steps to prevent a violation. In our view this would be too onerous a test. The means of transport may be confiscated unless the owner, operator, or person in charge can show they are innocent of any complicity or collusion in the breach of customs law, and that the means of transport was not specially adapted to conceal the goods.

²²⁵ See chapter 4, para 128.

- 305 We propose that Customs should be required to take into account defined factors in assessing which action to take in response to violations.²²⁶ The factors should include the value and nature of the goods, the seriousness and circumstances of the violation (including the existence of past violations), culpability of the person involved and the potential impact on any third parties. The total impact of any combination of penalties should be considered to ensure it is proportionate to the breach and the culpability of the person committing it.
- 306 These factors would also be relevant on review and subsequent appeal.

RECOMMENDATIONS

Redeemable goods

- R11 An accessible and transparent process should exist to allow persons claiming an interest in restricted goods to apply to the Chief Executive, within 20 working days of receipt of the notice, for permission to seek approval from the relevant person or agency for their goods to be redeemed.
- R12 If approval is granted and the goods are redeemed, the Chief Executive must return the goods, subject to any terms and conditions imposed by the relevant person or agency or Chief Executive.
- R13 Conditions for return of the goods may include payment of a sum not greater than the equivalent of the value of the goods as determined by the Chief Executive, together with any costs incurred and duty liable.

Administrative monetary penalty

- R14 An administrative monetary penalty regime should exist for all goods listed in the present section 225, as an alternative, and in some cases as an addition to confiscation.
- R15 Maximum levels of the administrative monetary penalties for specified goods or violations would be prescribed in regulations made under the Customs and Excise Act 1996, and the Chief Executive would determine the level of an individual monetary penalty in accordance with the regulations.
- R16 In addition to imposing a monetary penalty, the Chief Executive should require payment of any duty that may be payable for the goods and may also require payment of any costs or expenses incurred by Customs.

²²⁶ See Customs Act 1901 (Cth), s 203(3) for the factors which judicial officers must take into account in deciding whether a seizure warrant should be issued for items other than special forfeited goods in Australia.

Confiscation of conveyances and craft

R17 There should be modified statutory endorsement of the recommended practice of the World Customs Organization's Kyoto Convention Protocol of Amendment in 1999, such that the means of transport may be confiscated unless the owner, operator or person in charge can show they are innocent of any complicity or collusion in the alleged breach of customs law, and that the means of transport has not been specially constructed, adapted or fitted to conceal the goods.

Prosecution

R18 Prosecution should be an alternative to administrative penalties imposed by Customs, where there is provision for an offence in the Customs and Excise Act 1996.

R19 If a prosecution is initiated, Customs should not also be able to confiscate items or impose an administrative monetary penalty.

R20 If a prosecution results in a conviction, the court should be able to confiscate the goods, but this should be taken into account as part of the penalty.

R21 Even if a prosecution does not result in conviction, the court must order confiscation of goods if the defendant fails to prove on the balance of probabilities that the goods are not forbidden goods; and should have power to order confiscation of goods without a conviction if satisfied on the balance of probabilities that they are restricted goods or equipment used in the manufacture of excisable goods; and to order confiscation without conviction of a means of conveyance, unless satisfied on the balance of probabilities that it was not altered to conceal such goods and that the owner or person in control was innocent of complicity or collusion in the alleged offence.

Proportionality of penalty

R22 The following factors should be taken into account by the Chief Executive, in deciding the reasonable and proportionate penalty for a customs violation, or whether to prosecute and also in any review or appeal:

- the seriousness of the alleged violation;
- the circumstances in which the violation was committed;
- the level of culpability of the person or persons who committed the breach of customs law;
- whether it was a first or repeat violation;
- whether the goods were for commercial purposes or personal use, and the extent of commercial gain from the breach;

- the nature, quality, quantity and estimated value of the goods;
- the inconvenience or cost to any person having an interest in the goods if they were confiscated;
- the cumulative effect of any combination of actions that the Chief Executive proposes to take in relation to the alleged breach.

NOTICE TO PERSONS AFFECTED BY DETENTION

Notice of detention

- 307 Persons who had possession or control of the detained goods, and any other persons reasonably believed to have an interest in them, should be given a notice of detention, including the reason for detention, as soon as possible. They should also be given a notice of the proposed consequences and of their rights in relation to the detention, including an opportunity to respond and be heard.
- 308 Customs has expressed concern about the additional resources that would be required to give two notices. However, in the majority of cases one form containing both the prescribed notice of detention and the proposed penalty should suffice. Only in a minority of cases will Customs need time to consider the appropriate penalty and therefore serve the notice of proposed consequences separately.
- 309 Customs should take all reasonable steps to serve notice in person or by post, or by any practical means acceptable to the person including electronic transmittal or, as a last resort, by public notice. Public notice is a feature of most of the jurisdictions considered for this report,²²⁷ although not provided for in Part XIV of the Customs and Excise Act 1996.
- 310 The notice of detention should be served immediately or, if this is not practicable, within five days of the date of detention, unless Customs has reasonable grounds to believe that notice might interfere with an ongoing investigation or prosecution, such as where the investigation needs to be undercover.²²⁸

Notice of consequences and the response to it

- 311 If the notice of proposed consequences is not served at the same time as the notice, it should be served within 10 working days of the notice of detention. It should specify the action or actions the Chief Executive proposes to take in respect of the alleged violation. It should also contain a summary of the person's rights and information about applying for permission to redeem restricted goods,

²²⁷ See our discussion at chapter 4.

²²⁸ See chapter 3, where we note that there is presently an exception in the case of prohibited controlled drugs, since the Misuse of Drugs Act 1978, s 36, imports only ss 225–226 of Part XIV of the Customs and Excise Act 1996, and not the notice or subsequent provisions. We anticipate that section 36 would be consequentially amended so that prohibited drugs would continue to be immediately forfeited and notice would not be required.

if relevant, and be accompanied by a prescribed form on which the person can indicate their response.

- 312 Where Customs has reasonable grounds to believe that this notice might interfere with an ongoing investigation or prosecution, we propose that it need not be served for up to 12 months, while there are such grounds. Customs has told us that 12 months may be required for investigation; if more time is required, an application to court could be made for an extension of time.
- 313 Customs should take all reasonable steps to serve this notice on the relevant persons – in person, by post or any other reasonably practicable means acceptable to the person, including electronic means. In response to this notice, a person: may accept the proposed action; may deny the goods are liable to confiscation;²²⁹ may admit the goods are liable to confiscation but deny their responsibility for the breach of customs law; or may challenge the appropriateness of the proposed consequences.

RECOMMENDATIONS

Notice of detention

R23 When an item has been detained, Customs should serve a notice of detention on persons reasonably believed to have an interest in the goods and persons who had possession or control of the goods.

R24 This notice should include the nature of the goods, reasons for detention, and a contact for inquiries.

R25 The notice should be served immediately or within five working days of the detention, unless there are reasonable grounds to believe that such a notice would be likely to interfere with an ongoing investigation or prosecution.

R26 The notice should be served in person or by post or any other practical means acceptable to the person, including electronic means or, as a last resort, by public notice.

Notice of consequences

R27 At the same time as notice of detention, or within 10 working days, Customs should serve a notice of the actions the Chief Executive proposes to take on persons who had possession or control of the goods and/or those who are reasonably believed to have an interest in the goods.

R28 Service of this notice may be postponed if Customs has reasonable grounds to believe that it would be likely to interfere with an ongoing investigation or prosecution, for as long as the reasonable grounds exist up to a maximum of 12 months, or for any longer period approved by a court.

²²⁹ Liability to confiscation means that the goods fall within one of the categories currently listed in the Customs and Excise Act 1996, s 225.

R29 The notice should be served in person or by post or any other reasonably practicable means acceptable to the person, including electronic means.

R30 This notice should include:

- the category of the goods detained and the action which Customs proposes to take, including details of any administrative monetary penalty or a prosecution for any offence;
- advice that, if confiscation is proposed, confiscation will vest title in the Crown unconditionally;
- advice about the ability to apply for permission to redeem restricted goods;
- advice as to rights of review;
- advice that if there is no response to the notice within a fixed time, the proposed action will be taken.

R31 There should be a prescribed form attached to the notice of consequences for a person's response to the notice, such response to be within 20 working days of receipt of the notice or within such further time as Customs permits.

R32 In response to the notice of consequences, unless there is to be a prosecution, a person may:

- accept the action that the Chief Executive proposes to take;
- apply for a review on the basis that the goods are not liable for confiscation;
- apply to the Chief Executive for permission to redeem the goods;
- apply for a review of proposed consequences.

REVIEW PROCESSES

Replacement of ministerial waiver of forfeiture

314 In our view it is inappropriate for the ministerial waiver of forfeiture to continue, as a Minister should not determine the nature of penalties to be imposed or make decisions in individual cases because of the perception that political considerations may have influenced the decisions. However, the current alternative of court processes can be slow, expensive and stressful. It should be possible, as a first step, to challenge the decision of a Customs officer, who has detained goods, by an internal review process with minimal expense and without delay.

315 We propose the abolition of the current dual system of appeal to the court for disallowance of seizure and to the Minister for waiver of forfeiture. Instead there should be an opportunity for internal review by the Chief Executive or his or her

delegate, followed by appeal to an independent tribunal, the Customs Appeal Authority. These options should be available to any person with an interest in the detained goods who wishes to challenge the actions Customs proposes to take, apart from prosecution.

Internal review

- 316 In theory, internal review means the Chief Executive would be reviewing his or her own administrative decision. However, in fact, he or she would not handle either the original decision or the review personally, but rather be accountable for ensuring an appropriate process was followed. The review should be delegated to a reviewer with no previous involvement in the case, whether inside or outside the agency, and with relevant expertise and operational experience.
- 317 We anticipate that internal review would generally be “on the papers”, thus incurring little or no cost for the challenger. The reviewer should take into consideration those factors that the Customs officer, making the initial decision as to consequences, was required to take into account.²³⁰ The reviewer should have power to vary or cancel the proposed consequences, decline the application, or direct delivery of the goods to the applicant on any terms or conditions.
- 318 An application for review could be made on two grounds. A person could dispute the categorisation of the goods by Customs and deny that the goods are liable for confiscation, or they could challenge the proposed penalty (or combination of penalties) on the grounds of lack of proportionality, not including a decision to prosecute. A review of the proposed penalty in relation to forbidden goods could only relate to the imposition or amount of an administrative monetary penalty. A review of the proposed penalty in relation to restricted goods could relate to both confiscation and monetary penalty.
- 319 In respect of a Chief Executive’s decision to decline an application for permission to redeem goods, our view is that there should not be a further internal review. This is because an application to Customs for permission to redeem restricted goods is equivalent to a review of the original decision to confiscate the goods. If such an application is declined, it would be both cumbersome and inappropriate to require the person to seek a further internal review as that would involve Customs considering its decision three times: the initial determination; the decision to decline permission; and a review of the decision to decline. Instead there should be an appeal from the Chief Executive’s decision directly to the Customs Appeal Authority.

Appeal to Customs Appeal Authority

- 320 A challenge should be available from an internal review decision to an independent tribunal and we recommend that appeals are to the Customs Appeal Authority, as a tribunal having expertise in Customs law. The Authority has provision for appeals “on the papers”, its procedure has a degree of informality, and it is generally less cumbersome and costly than court procedure.²³¹
- 321 Some provisions, however, may need to be explicitly excluded. For example, pursuant to section 267 of the Act, grounds of appeal to the Authority are

²³⁰ The factors are listed in R22 above.

²³¹ Filing fees have recently been increased from \$50 to \$400.

limited to those stated in the appellant's notice of appeal and the burden of proof is on the appellant. Burdens of proof are not relevant to the review of an exercise of a discretion concerning a proposed penalty, although they will be relevant to questions of fact, including those that give rise to third-party relief. The Authority should have wide powers to dismiss, modify or quash the reviewer's decision.

Third-party applicants for review

- 322 Persons claiming an interest and requesting a review may be third parties not involved in the alleged customs violation. Providing the goods are not designated as forbidden, they should be able to claim their interest. They will need to demonstrate both their interest and their "clean hands". As with the Canadian Customs Act 1985, they will need to prove that they:
- acquired the interest in good faith for value; and
 - are innocent of any complicity or collusion in the violation.
- 323 If the applicant proves, on the balance of probabilities, that there has been no complicity or collusion, and the decision-maker is satisfied that the applicant has a valid interest, the third party should be able to take possession of the item unless it has already been confiscated. If the item has been confiscated or the third party's interest is non-severable, the third party should receive a sum commensurate with his or her established interest from the sale of the goods.
- 324 Similarly, where a prosecution is instigated, a person other than the defendant who claims an interest in the detained item should be able to apply to court for restoration of the item, or an order for compensation from the sale of the goods proportionate to their interest.
- 325 Our proposals are influenced by overseas provisions for third-party owners. For example, the Canadian provisions specifically provide for third-party claims.²³² We have also taken into account the provisions of the New Zealand Criminal Proceeds and Instruments Bill, currently before Parliament, in respect of third parties. In this draft legislation, the third party would be entitled to delivery of the detained item (or an amount proportional to his or her interest in it), if the court is satisfied that the applicant was not in any way involved in the relevant offending and acquired the interest in good faith and for value.
- 326 Even if the court considers the applicant was complicit or colluded in the alleged offence, we recommend it should consider whether or not to make a confiscation order having regard to:
- any undue hardship that is reasonably likely to be caused to any person;
 - the nature and extent of the offender's interest in the property and the interest of any other person; and
 - matters relating to the nature and circumstances of the offence.
- 327 There may be cases where the applicant is entitled to the item, but the court requires it for evidential purposes. In such cases the court should be empowered to postpone making the order for delivery until such time as the item is no longer needed as evidence.

²³² See chapter 4.

RECOMMENDATIONS

Internal review

- R33 A person with an interest in detained goods should have an opportunity for an internal review by Customs, on the basis that the goods are not liable to confiscation and/or that the proposed consequences are not reasonable and proportionate.
- R34 A review of the proposed consequences should only be available in relation to forbidden goods if an administrative monetary penalty has been imposed.
- R35 The application for review should be in writing, within 20 working days from the notice of proposed consequences or such further time as the Chief Executive allows.
- R36 In reviewing the proposed consequences, the reviewer should consider the matter afresh on the basis of the factors that must be taken into account in deciding the proposed consequences.
- R37 The reviewer should be able to:
- recategorise the goods;
 - vary or cancel an administrative monetary penalty;
 - direct the delivery of the goods to the applicant, on any terms and conditions;
 - decline the application.
- R38 Internal review should not be available in relation to the Chief Executive's decision to decline an application to seek approval to redeem restricted goods. This decision should be appealed directly to the Customs Appeal Authority.

Customs Appeal Authority

- R39 If an application for review is declined or the applicant challenges the decision of the internal reviewer, or if there is a challenge to the Chief Executive's decision in relation to redeemable restricted goods, the applicant should have a right of appeal to the Customs Appeal Authority.
- R40 An appeal should be lodged within 20 working days of the decision being notified, or such further time as the Authority allows.
- R41 The procedure for the Customs Appeal Authority provided for in Part XVI of the Customs and Excise Act 1996 should be followed, excluding section 267. The Authority should have wide powers to dismiss, modify or quash the reviewer's decision.

R42 The grounds of appeal should be limited to challenging liability for confiscation and/or the appropriateness of the proposed consequences.

R43 The Authority should have powers to dismiss, modify or quash the reviewer's decision.

Third parties

R44 Where an internal review is sought, third parties with an interest in the detained goods (other than forbidden goods) are entitled to delivery of the goods, or to be paid an amount proportionate to their interest in the goods from the proceeds of their sale, if it is proved on the balance of probabilities that they:

- acquired the goods or an interest in them in good faith and for value; and
- are innocent of any complicity or collusion in the alleged violation.

R45 Where Customs prosecutes an alleged offender, third parties with an interest in the detained item (other than forbidden goods) are entitled to delivery of the detained item, or to an order for payment of an amount proportionate to their interest in the goods from the proceeds of their sale, if they prove on the balance of probabilities that they:

- acquired the goods in good faith and for value; and
- are innocent of any complicity or collusion in the alleged offence.

R46 If a third party acquired an item in good faith and for value but the court finds they were complicit or colluded in the alleged offence, the court may still make an order for delivery of the detained item to him or her, having regard to:

- any undue hardship reasonably likely to be caused to any person by the confiscation of the item;
- the nature and extent of the offender's and any other person's interest in the item; and
- matters relating to the nature and circumstances of the offence.

R47 If the item claimed is required as evidence during the prosecution, the court may postpone making an order for delivery of the item.

CONSEQUENTIAL AMENDMENTS

328 The draft legislation does not include consequential amendments to the Customs and Excise Act 1996 nor to other legislation, nor has it provided for repeals, revocations and savings.

- 329 It is beyond the scope of our project to attempt to ensure alignment of all provisions in the current statute with our amended Part XIV. We recommend that, if our proposals are accepted, the Act should be reviewed to ensure consistency and coherence.
- 330 The proposed regime would affect legislation that incorporates Part XIV of the Customs and Excise Act 1996, but it is not intended to alter legislation operating at the border under its own forfeiture and seizure regime, such as the Trade in Endangered Species Act 1989, Trade Marks Act 2002 and Copyright Act 1994. Nor is it intended to alter legislative provisions that currently incorporate only some of Part XIV, such as section 36 of the Misuse of Drugs Act 1975 and the Antiquities Act 1975.²³³
- 331 Some legislation provides for offences of importation and exportation but does not provide a specific link to the Customs and Excise Act 1996 (for example, the Radiation Protection Act 1965 and Animal Products Act 1999). The Customs Service enforces these provisions at the border on behalf of the relevant authority using section 225(1)(m) and (n) of the Customs and Excise Act 1996. It will be important to ensure that all goods covered by such offences are included in the lists of forbidden and restricted goods created by Order in Council, either specifically or by way of a general provision along the lines of the present section 225(1)(a) and (b).

RECOMMENDATION

Consequential amendments

- R48 If our proposals are advanced, the Customs and Excise Act 1996 should be reviewed to identify any consequential amendments required to ensure consistency and coherence.

SUPPORT FOR STATUTORY CHANGE

- 332 A regime of temporary detention without immediate confiscation would enable appropriate procedures to be invoked, claims to be made and proceedings to be concluded before the owner of the goods was divested of title, whilst at the same time protecting the Crown's interest.²³⁴
- 333 In setting out the above proposals, we are encouraged by the knowledge that the Laking Review in New Zealand in 1989 recommended "liability to be seized as forfeit" as a means of avoiding the abstract concept of immediate forfeiture to the Crown, and also recommended review by the Chief Executive of Customs rather

²³³ The Antiquities Act 1975 provides that any antiquity exported or attempted to be exported in breach of the Act shall be forfeited to the Crown and that the provisions of the Customs and Excise Act 1996 (other than s 235) relating to forfeited goods shall apply to goods forfeited under the Antiquities Act 1975. This Act is being amended and replaced by the Protected Objects Amendment Bill 2004, which will provide for Part XIV of the Customs and Excise Act 1996 to apply, except for sections 229, 235, 236(2)–(4) and 237, and provide that the forfeiture of an object is not dependent on the seizure of that object.

²³⁴ As the Australian Law Reform Commission in 1990 said of the concept of "liability to forfeiture". See Australian Law Reform Commission Discussion Paper *Customs and Excise* above n 67, para 33.

than by the Minister. Further, the Australian Law Reform Commission in 1992 proposed draft legislation that is even more conceptually similar to our proposals. The Australian Law Reform Commission proposed forfeiture only where a seizure or impoundment notice had been issued and there was no claim at the end of the time allowed or the Comptroller had applied successfully to court for a declaration of forfeiture.²³⁵ Thus condemnation would become redundant, as in our proposals. They also distinguished between prohibited imports and exports, and various other categories of goods (broadly those involved in the production of illicit spirits and those involved in a fraud on the revenue).

- 334 Finally, we believe that our proposals to some extent reflect and draw upon the actual current practices of the New Zealand Customs Service, as expressed in their guidelines and policies, which ameliorate the harshness of the legislation and require application of New Zealand Bill of Rights jurisprudence in customs cases and protection of innocent third parties. The Customs Service also distinguishes between prohibited goods and non-prohibited goods (mainly “fraud goods”), allows some “redemption” of prohibited goods, and requires reasonableness and certain factors to be taken into account in deciding whether to seize fraud goods.²³⁶ The Law Commission commends these policies and practices, which our proposals for statutory changes aim to endorse.

²³⁵ Australian Law Reform Commission Report *Customs and Excise*, above n 69, pt 31, in the drafted model Bill, ss 429 and 437.

²³⁶ Such as the viability of a company employing a significant number of persons being put in jeopardy: see New Zealand Customs Service National Manager Investigations IV POL 02 “Seizure and Waiver of Forfeiture” 1 July 2004, 3.2.3.