

23 January 2019

New Zealand Customs Service
Wellington

By email: warwick.bignell@customs.govt.nz

Draft Customs and Excise Amendment Regulations 2019 – Infringement Notice Scheme

Introduction

- 1 The New Zealand Law Society welcomes the opportunity to comment on the consultation draft of the Customs and Excise Amendment Regulations 2019 (Infringement Notice Scheme: draft Regulations) (draft Regulations).

‘Piggy-backing’ infringement offences onto existing statutory offences

- 2 The draft Regulations create infringement offences by applying infringement fees to existing statutory offences set out in the Customs and Excise Act 2018 (CEA).
- 3 This ‘piggy-backing’ of infringement fees onto existing statutory offences has significant drawbacks, which are discussed below. As the Legislation Design and Advisory Committee’s Legislation Guidelines note:

It is generally undesirable to have identical conduct specified to be both an infringement offence and a separate criminal offence. Wherever possible, some differentiation as to mens rea or the specific type of conduct should exist between infringement offences and other offences in the same legislation. If a low-level fixed fee is considered insufficient to punish or deter the prohibited conduct, the conduct is likely to be too serious to be dealt with as an infringement offence.¹

- 4 The CEA provides for statutory offences and corresponding penalties. The explanatory note to the draft Regulations states that the “regulations prescribe the offences against the Act that are infringement offences² and the infringement fees payable for the infringement offences”.
- 5 The difficulties with the approach taken in the draft Regulations – creating infringement offences by applying infringement fees to existing offences – are discussed below. The Law Society considers that the only way to remedy the consequences of this approach is to draft separate infringement offences in the Regulations.

¹ Legislation Design and Advisory Committee, *Legislation Guidelines 2018 edition*, at [25.1], available at <http://www.ldac.org.nz/assets/Uploads/Legislation-Guidelines-2018-edition.pdf>.

² Clause 4 of the draft Regulations: a breach of a provision of the Act specified in Schedule 3 of the Regulations is an infringement offence.

- 6 The difficulties stem from the statutory definition of “infringement offence” in the Summary Proceedings Act 1957 (SPA): once an infringement fee is specified for an offence, the offence becomes an “infringement offence” as a result of the definition of infringement offence in the SPA, even if the infringement fee is in addition to a statutory penalty.³ As a result, it does not matter whether the prosecution commences by charging document or by infringement notice: the offence is an “infringement offence” because it “may” be the subject of an infringement notice.
- 7 This causes two problems. No conviction can be recorded for the offence; and where the infringement fee is attached to more serious offences with escalating penalties for first/second/third convictions, the escalation is nullified. We expand on these issues below.

Inability to record a conviction

- 8 An important consequence – the inability to convict for offending – arises under section 375 of the Criminal Procedure Act 2011 (CPA). Section 375 provides that, whether an infringement notice has been issued or not, a defendant may not be convicted for an infringement offence.
- 9 Therefore, where there is serious, charge-worthy conduct, and the matter proceeds by way of charging document for a statutory offence, upon a finding of guilt (or the entry of a guilty plea) no conviction can be recorded. This is regardless of whether the offence was originally charged (i.e. by charging document) or was the subject of an infringement notice.
- 10 This inability to convict is at odds with Parliament’s intent in enacting the statutory offence regime in the CEA and providing for a conviction in these situations. (See for example section 356 of the CEA which expressly refers to “liable on conviction”).

Inappropriate application of infringement fees to more serious offences

- 11 A related problem is the inclusion of infringement fees for some of the more serious offences in the CEA.⁴ These offences carry fines of \$1,000 or more, and include ‘escalation’ provisions (higher fines for a second conviction, higher again for third convictions etc), that significantly exceed the infringement penalty stipulated in the draft Regulations.
- 12 For example, offences specified in section 356 of the CEA carry higher fines for a second and third conviction:

356 Offences in relation to records

- (1) A person commits an offence if the person, without reasonable excuse, fails to comply with section 354(1)(a).
- (2) A person who commits an offence under subsection (1) is liable on conviction,—
- (a) in the case of an individual,—
- (i) for a first conviction, to a fine not exceeding \$2,000:
- (ii) for a second conviction, to a fine not exceeding \$4,000:
- (iii) for any subsequent conviction, to a fine not exceeding \$6,000:

³ SPA, s2: “... infringement offence means any offence under any Act in respect of which a person **may** be issued with an infringement notice” [emphasis added]. Such offences are also “infringement offences” under section 5 of the Criminal Procedure Act 2011 (CPA), which refers to and adopts the SPA definition.

⁴ Including sections 356(1) and (3); 358(3); 359(1)(a)-(d); 361(2) and (4); 362(1)(a)-(d); 367(1); 369(2)(b); 383(1)(a)-(b); 386(1); 388(1)(a)-(e); 393(1)(a)-(b); 419(1), (2), (4) of the Customs and Excise Act.

- (b) in the case of a body corporate,—
 - (i) for a first conviction, to a fine not exceeding \$10,000:
 - (ii) for a second conviction, to a fine not exceeding \$20,000:
 - (iii) for any subsequent conviction, to a fine not exceeding \$30,000.
- (3) A person commits an offence if the person, without reasonable excuse, fails to comply with a direction under section 354(1)(b).
- (4) A person who commits an offence under subsection (3) is liable on conviction,—
 - (a) in the case of an individual,—
 - (i) for a first conviction, to a fine not exceeding \$2,000:
 - (ii) for a second conviction, to a fine not exceeding \$4,000: Part 6 s 355 Customs and Excise Act 2018 Reprinted as at 26 November 2018 226
 - (iii) for any subsequent conviction, to a fine not exceeding \$6,000:
 - (b) in the case of a body corporate,—
 - (i) for a first conviction, to a fine not exceeding \$10,000:
 - (ii) for a second conviction, to a fine not exceeding \$20,000:
 - (iii) for any subsequent conviction, to a fine not exceeding \$30,000

- 13 The offences in the CEA which include escalating provisions are more serious, despite the draft Regulations proposing to attach infringement fees to the same offending. Escalation is nullified because, as already noted, convictions cannot be entered for any infringement offence (whether pursued by infringement notice or not).
- 14 In addition, where serious offences specified in the CEA carry fines upwards of \$1,000, it is difficult to square such serious conduct with both the possibility of a significantly lower infringement fee, and the section 375 CPA bar on conviction (which would cover even the most serious offending).
- 15 To use section 356 of the CEA as an example, individuals and body corporates attract a fine of \$2,000 and \$10,000 respectively for first time offending, but infringement fees of only \$400 and \$800 respectively under the draft Regulations. The corporate figure, in particular, risks becoming a cost of doing business rather than a meaningful penalty. Even an offence which is prosecuted by laying a charge, and which should rightly receive a 'high end' fine, would no longer be capable of supporting a conviction if the draft Regulations and associated changes are made as currently proposed.

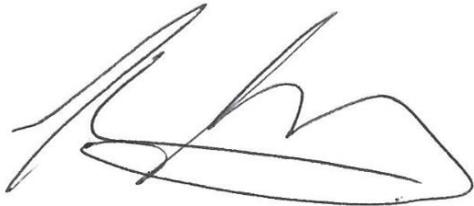
Recommendations

- 16 The consequences identified in this submission stem from the statutory definition of "infringement offence", which precludes a conviction being recorded for infringement offences. This can and should be remedied, by drafting separate infringement offences in the Regulations, rather than applying infringement fees to pre-existing statutory offences.
- 17 However, if that recommendation is not accepted, at a minimum the draft Regulations should be amended to remove any offences with escalating fines, indexed to previous convictions (thus not being made "infringement offences"). This would be an appropriate reflection of the seriousness of the offending and would enable a conviction to be recorded (removing the application of section 375 CPA).

Conclusion

18 If you wish to discuss these comments, please do not hesitate to contact the convenor of the Law Society's Criminal Law Committee, Steve Bonnar QC, via Law Reform Adviser Amanda Frank (04 463 2962, amanda.frank@lawsociety.org.nz).

Yours faithfully

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck
President