



**Australian Government**

**Australian Customs and  
Border Protection Service**

## **AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE PRACTICE STATEMENT**

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**Title:** Compliance Powers and Penalty Schemes

**Purpose:** To provide an overview of the various powers and penalty schemes used by Australian Customs and Border Protection Service officers undertaking compliance activities.

**Owner:** National Director Trade and Compliance

**Category:** Law Administration

**Contact:** Director, Import/Export Compliance

### **Summary of main points**

Customs and Border Protection Practice Statements are endorsed policy and must be followed by all Customs and Border Protection employees. This Practice Statement outlines:

- The powers and penalty schemes available to Customs and Border Protection officers when they are undertaking Compliance activities.

The powers are:

- Monitoring Powers
- Export Examination Powers
- Production of Commercial Documents and Records
- Revenue Recovery

The penalty schemes are:

- The Infringement Notice Scheme
- Indirect Tax Administrative Penalties

**The electronic version published on the intranet is the current  
Practice Statement.**

## Introduction Statement

The Australian Customs and Border Protection Service Regulatory Philosophy serves as the framework within which all of its regulatory activities are undertaken.

When clients comply with customs-related laws, the need for intervention is minimised. Therefore, Customs and Border Protection has a direct interest in improving the compliance levels of the importing and exporting community and is committed to fostering an environment where Customs and Border Protection works cooperatively with clients to improve compliance.

Customs-related laws are not limited to the *Customs Act 1901* (Customs Act) and related regulations. The definition of customs-related law in section 4B of the Customs Act includes:

- the *Excise Act 1901* and *Excise Regulations 1925*;
- the *Criminal Code* (offences related to the import and export of border controlled drugs, plants and precursors and unmarked plastic explosives); and
- any other Act or Regulations in so far as they relate to the importation or exportation of goods, where the importation or exportation is subject to compliance with any condition or restriction or is subject to any tax, duty, levy or charge, however described.

This broad definition of customs-related law acknowledges that Customs and Border Protection performs compliance monitoring on behalf of other Commonwealth agencies such as the Australian Quarantine Inspection Service, the Australian Taxation Office and permit issuing agencies.

## **Powers**

The Customs Act contains a number of different powers that allow Customs and Border Protection officers to carry out a range of compliance activities to:

- verify if a person is complying with a customs-related law; or
- assess the correctness of information communicated to Customs.

These powers include Monitoring and Export Examination Powers and the power to require the production of commercial documents and records.

In addition, Customs and Border Protection has the power to, and is responsible for the recovery of duty under the Customs Act and recovery of short paid indirect tax payable on an importation of goods, under the *Tax Administration Act 1953*. Indirect tax includes Goods and Services Tax (GST), Wine Equalisation Tax (WET) and Luxury Car Tax (LCT).

## **Penalty schemes**

The response by Customs and Border Protection to non-compliant activity is determined by the extent and nature of the non-compliance. The Infringement Notice Scheme (INS) provides Customs and Border Protection the option to deal with non-compliance through a financial penalty, as an alternative to prosecution. Subdivision A of Division 5 of Part XIII of the Customs Act specifies the strict liability offences to

which the INS applies. In addition to the INS, Customs and Border Protection administers indirect tax administrative penalties (ITAP) on behalf of the Australian Taxation Office, in situations where there is a shortfall of indirect tax.

## Scope

This document provides a summary of the powers and penalty schemes that are used by Customs and Border Protection officers when undertaking activities related to compliance. The powers covered in this document are the general powers used across a range of compliance activities. This document does not extend to powers for specific activities, such as powers to examine goods and records in depots licensed under section 77G and warehouses licensed under section 79.

For each power and penalty scheme, there is a related Instruction and Guideline (I&G). Each I&G provides a comprehensive overview of the relevant legislation and the Customs and Border Protection policies in administering the legislation.

This Practice Statement applies to staff in the following areas:

- Compliance
- Cargo
- Passengers

## Policy Statement

### 1. **Monitoring Powers**

Monitoring powers are powers in the Customs Act that enable authorised officers to enter and search premises to assess:

- whether someone is complying with a Customs-related law; or
- whether a person's record-keeping, accounting, computing or other operating systems accurately record and generate information to enable compliance with a Customs-related law; or
- the correctness of information communicated to Customs.

Monitoring powers can only be exercised for the purpose of verifying compliance, they cannot be used to search for evidence of an offence.

Officers exercising monitoring powers must be authorised by the Chief Executive Officer (CEO) of Customs and must produce identification when doing so.

Monitoring powers can only be exercised with the written consent of the occupier or under a monitoring warrant. The occupier must be provided with written notice of their rights and obligations under the monitoring powers provisions before powers can be exercised. Consent to enter premises can be refused or, once given, withdrawn in writing at any time.

Monitoring powers apply to communicators of information to Customs, as well as to the owners of imported and exported goods.

### 2. **Export Examination Powers**

Export examination powers are powers in the Customs Act that enable authorised officers to enter premises and assess whether goods intended for export meet the requirements of a Customs-related law relating to exports. The authorised officer must have reasonable grounds to believe that there are, or have been, export goods on the premises before exercising powers.

Only goods that have not yet come under Customs control can be examined using these powers. Authorised officers may also search the premises for documents relating to the goods for export.

Officers exercising export examination powers must be authorised by the CEO of Customs and must produce an export examination powers identity card before entering the premises and exercising any powers.

Export examination powers can only be exercised with the written consent of the occupier. Consent to enter premises can be refused or, once given, withdrawn in writing at any time. There is no provision to obtain a warrant to enter premises for the purposes of exercising export examination powers.

Export examination powers apply to exporters, communicators of information to the Australian Customs and Border Protection Service, as well as to parties involved in the handling of cargo for export.

Export examination powers can only be exercised for the purpose of assessing compliance with the requirements of a Customs-related law relating to exports. These powers cannot be used to search for evidence of an offence.

### **3. Production of Commercial Documents and Records**

There are four sections of the Customs Act related to document and record retention and production:

- Section 240 – Commercial documents to be kept
- Section 240AA – Authorised officer may require person to produce commercial documents
- Section 240AB – Verifying communication to Customs
- Section 240AC – Authorised officer may require person to produce record

Section 240AA and 240AC provide that an authorised Australian Customs and Border Protection Service officer may request the production of documents and records that a person is required to keep. Officers exercising these powers must be authorised by the CEO.

An authorised officer must give written notice of the request. The request must identify where the inspection of documents will take place; either at the person's business premises in Australia or at a place in Australia specified in the notice, and within a period specified in the notice (not less than 14 days after the notice was given).

#### **Section 240AA**

An authorised officer may request the production of commercial documents from a person required to keep them under section 240 of the Customs Act. Persons required to keep commercial documents are those involved in the import and export of goods including the owner of the goods, those who receive goods and those who cause goods to be imported or exported. Relevant commercial documents are required to be kept for a period of five years.

'Commercial document' is defined in the Customs Act to mean a document prepared in the ordinary course of business for the purposes of a commercial transaction involving goods or their carriage but does not include electronic communications to or from Customs.

A relevant commercial document is one that enables an Australian Customs and Border Protection Service officer to be satisfied that information communicated to Customs is correct.

### Section 240AC

An authorised officer may request the production of records from a person required to keep them under section 240AB of the Customs Act. Persons required to keep records include those who make a communication to Customs and those who give information to another person to include in a communication to Customs. Relevant records are required to be kept for one year after the communication is made or information given.

## **4. Revenue Recovery**

The Australian Customs and Border Protection Service is responsible for the recovery of duty under the Customs Act and recovery of short paid indirect tax payable on an importation of goods, under the *Tax Administration Act 1953*.

### Recovery of customs duty

Section 165 of the Customs Act provides that:

- 1) An amount of duty that is due and payable in respect of goods, is a debt due to the Commonwealth and is payable by the owner of the goods;
- 2) An amount of a drawback, refund or rebate of duty that is overpaid to a person is a debt due to the Commonwealth and is payable by the person.

Under section 165 of the Customs Act, the CEO may make a written demand for the payment of an amount of duty that is a debt due to the Commonwealth. The demand must specify the amount of the duty or overpayment being demanded and must include an explanation of how the amount has been calculated.

Section 165 of the Customs Act limits the time for recovery of customs duty to four years, except in the case of fraud or evasion where no time limit will apply. For an amount of duty that is due and payable in respect of goods, a demand must be made within four years of the date the amount was to be paid under the Customs Act.

Section 165A of the Customs Act allows the CEO to apply the amount of a drawback, refund or rebate in respect of goods, against the duty payable on the same goods. For section 165A of the Customs Act to apply, the goods must have been delivered into home consumption.

If the amount of drawback, refund or rebate of duty on the goods is less than the amount of duty payable on the goods, the balance of the duty payable will still be a debt due to the Commonwealth.

### Recovery of indirect tax

Section 105-5 of Schedule 1 to the TAA provides that the Commissioner of the Australian Taxation Office (or delegate) may at any time make an assessment of the amount of indirect tax payable on an importation of goods.

A notice of assessment under section 105-5 of Schedule 1 to the TAA will identify the amount payable and the circumstances in which the debt arose will be explained.

A notice of an assessment of indirect tax payable on an importation of goods must be given to the owner within four years from the time the indirect tax became payable (section 105-50 of Schedule 1 to the TAA).

The exception to this is in circumstances where the Commissioner (or delegate) is satisfied that a payment of indirect tax was avoided by fraud or evasion. In these circumstances, there is no time limit for the recovery of indirect tax.

## **5. The Infringement Notice Scheme**

Subdivision A of Division 5 of Part XIII of the Customs Act contains an infringement notice scheme. The INS allows for a penalty to be imposed for strict liability offences. A strict liability offence is one where fault does not have to be proven – the person can be penalised for the action without the need to prove they acted intentionally, recklessly or otherwise. For offences subject to the INS, a penalty can be imposed as an alternative to prosecution.

There are 30 offences subject to the INS. These relate to:

- Making false and misleading statements
- Failure to report or to report on time
- Failure to comply with certain directions
- Moving, altering or interfering with goods without authority

Only a small number of very senior officers of the Australian Customs and Border Protection Service with delegated authority can issue infringement notices. When deciding what compliance action to undertake, these officers must have regard to the Infringement Notice Guidelines (the Guidelines), a public document tabled in, and approved by Parliament. The Guidelines set out the relevant considerations that need to be taken into account before issuing an infringement notice. This ensures that penalties are applied only after careful consideration of all the relevant facts and on a case-by-case basis.

The penalty provisions of the Customs Act do not impose an obligation on the Australian Customs and Border Protection Service to issue a penalty for every offence detected. Based on the individual circumstances of each case, an infringement notice may be issued or other compliance action recommended, such as a warning letter or education. Also, the decision-maker always retains the discretion to refer for prosecution a person for an alleged offence, either in the first instance, or following the withdrawal of an infringement notice.

When a person pays the penalty, any liability for the offence is taken to have been discharged. The Australian Customs and Border Protection Service cannot prosecute a person for the offence and the person is not regarded as being convicted of an offence.

A person who has been served with an infringement notice may write to the CEO seeking withdrawal of the notice. The CEO may also initiate the withdrawal of an infringement notice. A different decision-maker from the one who made the decision to serve the infringement notice will decide the merits of withdrawing the infringement notice.

## **6. Indirect Tax Administrative Penalties**

Part 4-25 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) sets out a penalty regime that applies to entities who fail to satisfy obligations under taxation laws. Goods imported into Australia are subject to indirect taxes including GST, LCT and WET. The Australian Customs and Border Protection Service assesses and collects the indirect tax payable on imported goods on behalf of the Tax Office.

The Commissioner of Taxation has delegated the power to make an assessment of the amount of an administrative penalty imposed to specified Australian Customs and Border Protection Service officers who undertake activities in relation to the administration of indirect taxes on imported goods.

Under the TAA, a penalty is imposed when an entity:

- makes a statement which is false or misleading in a material particular that results in a shortfall amount (subsection 284-75(1) of Schedule 1 to the TAA)
- fails to provide a document that is necessary to determine a tax liability, and the Commissioner determines the liability without that document (subsection 284-75(3) of Schedule 1 to the TAA).

Delegated Australian Customs and Border Protection Service officers are responsible for making decisions on the application of a penalty, or the remission of part or all of a penalty. The particular facts of each case will determine the liability to an administrative penalty, and whether or not the discretion to remit should be exercised.

In administering the legislation related to indirect tax administrative penalties, the Australian Customs and Border Protection Service acts in a manner consistent with the Taxpayer's Charter, Tax Office Compliance Model and policies detailed in Tax Office Practice Statements and public rulings on penalties.

## Related Instructions and Guidelines

- Infringement Notice Scheme – Policy Overview
- Monitoring Powers – Policy Overview
- Export Examination Powers – Policy Overview
- Production of Commercial Documents and Records – Policy Overview
- Revenue Recovery – Policy Overview

## Related policies and references

*Customs Act 1901*

Australian Customs and Border Protection Service Regulatory Philosophy

Infringement Notice Guidelines

*Taxation Administration Act 1953*

Australian Tax Office Taxpayer's Charter

Australian Tax Office Compliance Model

## Key roles and responsibilities

Import/Export Compliance in Customs Central Office provides policy advice and direction on compliance related powers and penalty schemes.

Regional Compliance Officers are responsible for the administration of compliance related powers and penalty schemes.

## Consultation

### External Consultation

Nil. This practice statement consists of content that has been consulted on previously. Relevant groups and agencies that have previously been consulted include the Customs National Consultative Committee and the Australian Taxation Office.

### Internal Consultation

Nil. This practice statement consists of content that has been consulted on previously. Relevant divisions that have previously been consulted include Trade, Industry Engagement and User Services, Passengers, Cargo, Enforcement Operations and regional Compliance areas.

## Approval

<b>Approved date</b>	23 July 2009	
<b>Approved by</b>	Sue Pitman National Director, Trade and Compliance	
<b>Endorsed date</b>	23 July 2009	
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