

EXPLANATORY STATEMENT

Select Legislative Instrument No. 271, 2013

Issued by the Authority of the Minister for Immigration and Border Protection

Customs Act 1901

Customs Amendment (Infringement Notices) Regulation 2013

Subsection 270(1) of the *Customs Act 1901* (the Act) provides, in part, that the Governor-General may make regulations not inconsistent with the Act prescribing all matters which by the Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to the Act or for the conduct of any business relating to Customs.

The *Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013* (the Organised Crime Act) in part, made amendments to the Act to replace the infringement notice scheme within the Australian Customs and Border Protection Service (ACBPS).

Subsection 243X(1) of the Act, was inserted by the Organised Crime Act and provides that a regulation may make provision enabling a person who is alleged to have committed an offence of strict liability or of absolute liability against the Act to pay to the Commonwealth a penalty specified in an infringement notice as an alternative to prosecution.

This Regulation amends the *Customs Regulations 1926* to prescribe matters for the purposes of section 243X to implement the new infringement notice scheme. The Regulation creates a framework for the use of infringement notices where an infringement officer has reasonable grounds to believe that a provision of the Act has been contravened.

The Regulation sets out when an infringement notice can be issued, the offences for which an infringement notice may be issued, what matters must be included in an infringement notice, the effect of paying an infringement notice, the process for seeking withdrawal of an infringement notice, and the process for seeking to extend the period for payment of the penalty. The timeframe to issue an infringement notice for all prescribed offences will now be within 12 months of the offence being detected or four years of the offence being committed, whichever period ends first.

Details of the Regulation are set out in the [Attachment](#).

On 18 October 2013, ACBPS released an exposure draft of the Regulation and an associated draft infringement notice scheme guide for industry comment on the ACBPS website. ACBPS received numerous comments from a diverse range of industry participants, mostly regarding aspects of the draft guide. The draft guide explains ACBPS' approach to issuing an infringement notice and will be published on

the ACBPS website once finalised. The guide will be updated to reflect aspects of the feedback received from industry and published prior to the commencement of the Regulation.

Some of the industry comments were regarding the proposed Regulation, particularly the time period for issuing an infringement notice penalty. We have provided further detail in the explanatory material supporting the Regulation to address these concerns.

The Regulation commences on 1 February 2014.

Statement of Compatibility with Human Rights

(Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*)

Customs Amendment (Infringement Notices) Regulation 2013

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulation

Subsection 243X(1) of the Act, was inserted by the *Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013* (the Organised Crime Act) and provides that a regulation may make provision enabling a person who is alleged to have committed an offence of strict liability or of absolute liability against the Act to pay to the Commonwealth a penalty specified in an infringement notice as an alternative to prosecution.

This Regulation prescribes matters to implement the new infringement notice scheme within the ACBPS for the purposes of section 243X of the Act.

Human Rights implications

Right to Privacy

This Regulation engages the right to privacy contained in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy. It provides that persons have the right to the protection of the law against each interference. An interference with privacy will not be arbitrary if it is not inconsistent with the provisions, aims and objectives of the ICCPR and is reasonable in the circumstances. Reasonableness in this context, incorporates notions of proportionality, appropriateness and necessity.

This Regulation engages the right to privacy contained in Article 17 of the ICCPR because it requires the collection of personal information in order to issue an infringement notice.

The collection of personal information is protected under Australian Law and this instrument does not seek to affect or restrict any of the existing protections. It should also be noted that Customs officers are bound by the Privacy Principles in the *Privacy Act 1988* when dealing with personal information.

To the extent that an individual's right to privacy is affected by the Regulation, the impact is not arbitrary. It is reasonable, necessary and proportionate to the achievement of the legitimate objectives of implementing a new infringement notice scheme.

Conclusion

This legislative instrument is compatible with human rights as, although it engages the right to privacy, the instrument maintains all existing protections contained in Australian law and does not seek to limit the right to privacy in any way.

Minister for Immigration and Border Protection

ATTACHMENT

Details of the Customs Amendment (Infringement Notices) Regulation 2013

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Customs Amendment (Infringement Notices) Regulation 2013*.

Section 2 – Commencement

This section provides that the Regulation commences on 1 February 2014.

Section 3 – Authority

This section provides that the Regulation is made under the *Customs Act 1901*.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

SCHEDULE 1 - AMENDMENTS

Customs Regulations 1926

Item 1 – After regulation 179AB

Item 1 inserts a new regulation 179ABA (Infringement notices). This new regulation provides that Schedule 1ABA is made for subsection 243X(1) of the *Customs Act 1901* (the Act).

Item 2 – After Schedule 1AB

Item 2 inserts a new Schedule 1ABA – Infringement notices:

Schedule 1ABA – Infringement Notices

Part 1 - Preliminary

Clause 1 – Simplified outline of this Schedule

New clause 1 explains that this Schedule creates a framework for the use of infringement notices where an infringement officer believes on reasonable grounds that a provision of the Act has been contravened.

It provides that a person can be given an infringement notice in relation to a contravention of a provision of the Act that is subject to an infringement notice under this Schedule.

It also provides that a person who is given an infringement notice can choose to pay an amount as an alternative to having court proceedings brought against the person for a contravention of a provision subject to an infringement notice under this Schedule. If a person does not choose to pay the amount, proceedings can be brought against the person in relation to the contravention.

Clause 2 – Definitions

New clause 2 inserts the following definition for the purposes of this Schedule:

Payment period means:

- (a) for an infringement notice given to a person under this Schedule in a section 234AA place in relation to an alleged contravention of paragraph 233(1)(b) or (c) or subsection 234A(1) or 234AB(3) of the Act – the period that ends when the person leaves the place for the first time after the notice is given; or
- (b) for an infringement notice given to a person under this Schedule in relation to an alleged contravention of subsection 243T(1) of the Act – the period that ends 28 days after the day the notice is given to the person, unless subclause 7(8) applies; or
- (c) for any other infringement notice given to a person under this Schedule – the period that ends 28 days after the day the notice is given to the person.

Clause 3 – Meaning of *infringement officer*

New subclause 3(1) provides that a person is an *infringement officer* for the purposes of this Schedule if:

- (a) the person is an officer of Customs; and
- (b) the CEO authorises the person to exercise the powers or perform the functions of an infringement officer under this Schedule.

New subclause 3(2) provides that a person who is an infringement officer for the purpose of exercising powers mentioned in subclause (1) is also an *infringement officer* for the purposes of:

- (a) exercising other powers under this Schedule; or
- (b) performing functions or duties under this Schedule;

that are incidental to the powers mentioned in subclause (1).

Clause 4 – Provisions subject to infringement notices

New clause 4 inserts a table which prescribes provisions of the Act that are subject to an infringement notice under this Schedule. The provisions listed in the table relate to strict liability offences in the Act.

Part 2 – Infringement notices

Clause 5 – When an infringement notice may be given

New clause 5 allows an infringement officer who has reasonable grounds to believe that a person has contravened a provision subject to an infringement notice under this Schedule, to give the person an infringement notice for the alleged contravention.

New subclause 5(2) requires an infringement notice to be issued by the end of the earlier of four years after the day the contravention is alleged to have taken place and 12 months after the day the alleged contravention is detected.

The *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* recommends that infringement notices should be issued within 12 months of the alleged offence. However, to increase ACBPS's ability to effectively deal with non-compliance in a manner that is proportionate to the risk, ACBPS requires that the time for serving an infringement notice for any offence covered by the infringement notice scheme be within one year of the offence being detected or four years of the offence being committed, whichever period ends first. If ACBPS is not able to apply infringement notices to the prescribed offences in that period, then ACBPS would be left with two options only in many cases – prosecute or do nothing.

Previously under section 243Y of the Act, if an infringement notice was served for an offence against subsection 243T(1) or 243U(1) (which relate to false or misleading statements), it had no effect unless it was served within four years after the day on which the offence occurred or one year after the day on which the offence was detected, whichever period ended first. For all other offences infringement notices had to be served within one year after the day on which the offence was alleged to have been committed. The timeframe was different for subsection 243T(1) and 243U(1) offences because these were offences which were often detected during audit activity.

It is the case however that many alleged offences are detected through audit activity, not just false and misleading statement offences. For ACBPS audit purposes, the Act requires a person (including a key industry participant) who makes a communication to ACBPS under the Act to keep records verifying the content of the communication for five years. ACBPS regularly detects offences that have occurred more than one year prior to the audit, including importation of prohibited goods and movement of goods without authority. For this reason, to improve the effectiveness of the infringement notice scheme, the timeframe to issue an infringement notice for all prescribed offences will now be within 12 months of the offence being detected or four years of the offence being committed, whichever period ends first.

The time period for issuing an infringement notice scheme does not limit in any way the application of section 15B of the *Crimes Act 1914*. This means for example that where section 15B imposes a 12 month limitation on commencing prosecution for an offence, then it would not be practical to issue an infringement notice for that offence 12 months or more after the alleged contravention occurred.

New clause 5 also requires that a single infringement notice relate to a single contravention of a single provision unless:

- the provision requires the person to do a thing within a particular period or before a particular time; and
- the person fails or refuses to do that thing within that period or before that time; and
- the failure or refusal occurs on more than one day; and
- each contravention is constituted by the failure or refusal on one of those days, in which case an infringement officer may give a person a single infringement notice relating to multiple contraventions of a single provision.

Clause 6 – Matters to be included in an infringement notice - general

New clause 6 prescribes items which must be included in an infringement notice.

New subclause 6(1) requires that an infringement notice:

- be identified by a unique number; and
- state the day the notice is issued; and
- state the name of the person to whom the notice is given; and
- state the name of the person who gave the notice, and that the person is an infringement officer for the purposes of issuing the infringement notice; and
- give brief details of the alleged contravention, including:
 - o the provision that was allegedly contravened; and
 - o the maximum penalty that a court could impose if the provision were contravened; and
 - o the time (if known) and day of, and the place of, the alleged contravention; and
- state the amount that is payable under the notice; and
- give an explanation of:
 - o how payment of the amount is to be made; and
 - o how Customs can be contacted.

New subclauses 6(2) and (3) require an infringement notice to state that:

- if the person pays the amount within the payment period then, unless the notice is withdrawn, the person will not be liable to be prosecuted in a court for the alleged contravention; and
- the person may apply to the CEO to have the period extended; and
- payment of the amount is not an admission of guilt or liability.

New subclauses 6(4) and (5) require an infringement notice to state:

- that the person may choose not to pay the amount and, if the person does so, the person may be prosecuted in a court for the alleged contravention; and
- how the notice can be withdrawn; and
- that if the notice is withdrawn, the person may be prosecuted in a court for the alleged contravention; and

- that the person may make written representations to the CEO seeking the withdrawal of the notice.

New subclause 6(6) allows an infringement officer to include any other matters in the infringement notice that they consider necessary.

Clause 7 – Matters to be included in an infringement notice – subsection 243T(1) infringement notice

New clause 7 prescribes items which must be included in an infringement notice relating to an alleged contravention of subsection 243T(1) of the Act (false or misleading statements resulting in loss of duty). This requires that an infringement notice:

- state that the obligation of the person to pay the duty or repay the refund or drawback mentioned in paragraph 243T(1)(b) of the Act (the *obligation*) continues despite the person being given the notice; and
- include the matters mentioned in subclause 6(1); and
- state that if the person pays the amount within the payment period and discharges the obligation then, unless the notice is withdrawn, the person will not be liable to be prosecuted in a court for the alleged contravention; and
- state that the person may apply to the CEO to have the period extended; and
- state that payment of the amount and discharge of the obligation are not an admission of guilt or liability; and
- include the matters mentioned in subclauses 6(4) and (5).

New subclause 7(7) allows an infringement officer to include any other matters in the infringement notice that they consider necessary.

New subclause 7(8) ensures that if a person applies under subsection 273GA(2) of the Act for a review of the amount of duty, refund or drawback, the period that begins on the making of the application, and ends on the day a final determination of the amount is made, must not be included in the payment period.

Subsection 273GA(2) of the Act allows an application to be made to the Administrative Appeals Tribunal for review of a decision by a Collector to make a demand for payment and any other decision forming part of that process, where:

- a dispute in subsection 167(1) of the Act has arisen; and
- the owner of the goods has, in accordance with that subsection, paid under protest the sum demanded by the Collector.

Subsection 167(1) of the Act provides that if a dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff or any Customs Tariff alteration proposed in the Parliament (not being duty imposed under the *Customs Tariff (Anti-Dumping) Act 1975*), then the owner of the goods may pay under protest the sum demanded by the Collector as the duty payable in respect of the goods. The sum so paid, as against the owner of the goods, shall be deemed to be proper duty payable in respect of the goods, unless the contrary is determined in an action brought in pursuance of this section.

Clause 8 – Extension of a payment period

New subclause 8(1) allows a person to whom an infringement notice has been given to apply to the CEO, in writing, for an extension of the payment period.

New subclauses 8(2) and (3) allow the CEO, in writing, to extend a payment period before or after the end of that period if:

- an application is made before the end of that period; or
- if no application is made, if the CEO considers it appropriate to do so.

New subclause 8(6) allows the CEO to extend the payment period more than once under subclause (2) or (3).

New subclause 8(4) provides that if the CEO extends the payment period, then a reference to the payment period in this Schedule, or in a notice or other instrument under this Schedule, is taken to be a reference to that period so extended.

Subclause 8(5) provides that if the CEO does not extend the payment period, then a reference to the payment period in this Schedule, or in a notice or other instrument under this Schedule, is taken to be a reference:

- to the end of the payment period for an alleged contravention of:
 - o paragraph 233(1)(b) (importing prohibited imports); or
 - o paragraph 233(1) (c) (exporting prohibited exports); or
 - o subsection 234A(1) (unauthorised entry to places on ships, aircraft or wharves); or
 - o 234AB(3) of the Act (failure to comply with a direction of an officer in accordance with subsection 234AB(1)); or
- in any other case – to the period that ends on the later of the following days:
 - o the day that is the last day of the payment period;
 - o the day that is seven days after the day the person was given notice of the CEO's decision not to extend.

Clause 9 – Withdrawal of an infringement notice

New subclause 9(1) allows a person to whom an infringement notice has been given to make written representations to the CEO seeking withdrawal of the notice.

New subclause 9(2) requires representations to be made:

- within 28 days after the end of the payment period if the notice relates to an alleged contravention of:
 - o paragraph 233(1)(b) (importing prohibited imports); or
 - o paragraph 233(1) (c) (exporting prohibited exports); or
 - o subsection 234A(1) (unauthorised entry to places on ships, aircraft or wharves); or
 - o subsection 234AB(3) of the Act (failure to comply with a direction of an officer in accordance with subsection 234AB(1)); or
- before the end of the payment period in any other case.

New subclause 9(3) allows the CEO to withdraw an infringement notice given to a person whether or not the person has made written representations seeking the withdrawal.

New subclause 9(4) requires the CEO, when deciding whether or not to withdraw an infringement notice, to take into account any written representations seeking the withdrawal that were given by the person to the CEO. It is not possible to predict and prescribe in legislation all matters that could be relevant to determining whether to withdraw an infringement notice. Accordingly, this subclause allows the CEO to take into account any other matter the CEO considers relevant.

New subclauses 9(5) and (6) require notice of the withdrawal to be given to the person and require that the withdrawal notice state:

- the person's name and address; and
- the day the infringement notice was issued; and
- the identifying number of the infringement notice; and
- that the infringement notice is withdrawn; and
- that the person may be prosecuted in a court for the alleged contravention.

New subclause 9(7) requires the Commonwealth to refund to the person an amount equal to the amount paid if:

- the CEO withdraws the infringement notice; and
- the person has already paid the amount stated in the notice.

Clause 10 – Effect of payment of an amount

New clause 10 provides that if a person to whom an infringement notice is given pays the amount specified in the notice before the end of the payment period, and the infringement notice has not been withdrawn, then:

- any liability of the person for the alleged contravention would be discharged; and
- the person may not be prosecuted in a court for the alleged contravention; and
- the person would not be regarded as having admitted guilt or liability for the alleged contravention; and
- the person would not be regarded as having been convicted of the alleged offence.

Clause 11 – Prohibited imports

New clause 11 prescribes, for the purposes of paragraph 243Y(1)(a) of the Act, prohibited imports under the *Customs (Prohibited Imports) Regulations 1956*.

Pursuant to subsection 243Y(1) of the Act, goods are taken to be condemned as forfeited to the Crown if:

- the goods are prohibited imports of a kind prescribed by a regulation for the purposes of this section; and

- a person pays a penalty to the Commonwealth under an infringement notice as an alternative to prosecution for an offence for a contravention of paragraph 233(1)(b) (importing prohibited imports) in relation to the goods; and
- the infringement notice has not been withdrawn.

Clause 12 – Effect of this Schedule

New clause 12 provides that this Schedule does not:

- require an infringement notice to be given to a person for an alleged contravention of a provision subject to an infringement notice under this Schedule; or
- affect the liability of a person for an alleged contravention of a provision subject to an infringement notice under this Schedule if:
 - o the person does not comply with an infringement notice given to the person for the contravention; or
 - o an infringement notice is not given to the person for the contravention; or
 - o an infringement notice is given to the person for the contravention and is subsequently withdrawn; or
- prevent the giving of two or more infringement notices to a person for an alleged contravention of a provision subject to an infringement notice under this Schedule; or
- limit a court's discretion to determine the amount of a penalty to be imposed on a person who is found to have contravened a provision subject to an infringement notice under this Schedule.