

EXPLANATORY STATEMENT

Issued by Assistant Minister for Customs, Community Safety and Multicultural Affairs,
Parliamentary Secretary to the Minister for Home Affairs

Customs Act 1901

Customs Legislation Amendment (Flags) Regulations 2022

The *Customs Act 1901* (the Act) concerns customs related functions and is the legislative authority that sets out the customs requirements for the importation, and exportation, of goods to and from Australia.

Subsection 270(1) of the Act provides 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.

Section 50 of the Act provides, in part, that the Governor General may, by regulation, prohibit the importation of goods into Australia and that the power may be exercised by prohibiting the importation of goods absolutely or by prohibiting the importation of goods unless specified conditions or restrictions are complied with.

The *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations) control the importation of the goods by prohibiting importation absolutely, or by making importation subject to a permission or licence. This includes goods bearing a Commonwealth, State or Territory's Arms, flag or seal (or a nearly resembling representation), except where permissions are granted subject to conditions, restrictions and requirements are met.

A different process for importation applies to Commonwealth Arms, flags or seals as compared with State or Territory Arms, flags or seals. For both processes, importation of the goods is allowed where the Department of the Prime Minister, Premier or Chief Minister of the relevant jurisdiction for the Arms, flag or seal has given design approval for the Arms, flag or seal or representation. For Commonwealth Arms, flags or seals, this is the single step required to allow importation (provided, on request, to the Australian Border Force). By contrast, for State or Territory Arms, flags or seals, a second step is required, being a permission from the Minister or an authorised person.

The purpose of the *Customs Legislation Amendment (Flags) Regulations 2022* (the Amendment Regulations) is to amend the PI Regulations to allow goods bearing a State or Territory's Arms, flag or seal (or a nearly resembling representation), to be imported through a single-step process, rather than the existing two-step process. This aligns the importation process with the process applying to Commonwealth Arms, flags or seals.

The Amendment Regulations also make consequential amendments to the *Customs Regulation 2015* (Customs Regulation) to ensure the ongoing application of the post-importation permission scheme to State or Territory Arms, flags and seals following the amendments made by the Amendment Regulations to the PI Regulations.

The post-importation permission scheme in the Act allows prohibited imports prescribed by the regulations to be detained upon import to Australia pending grant of a permission to import or fulfilment of a condition.

The Customs Regulation sets out those prohibited imports covered by the scheme, including goods bearing State and Territory Arms, flags and seals. This scheme continues, following consequential amendments to the Customs Regulation made by the Amendment Regulations, to act as an alternative to seizure of these goods. In particular, this allows importation of these kinds of goods detained under this scheme to proceed following grant of the design approval by the Department of the Premier or Chief Minister of the relevant State or Territory.

Details of the Amendment Regulations are set out in Attachment A.

A Statement of Compatibility with Human Rights has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at Attachment B.

The Australian Border Force (ABF) has consulted with the Department of Prime Minister and Cabinet, the Department of Premier and Cabinet and the Chief Minister's Department of the relevant States and Territories in the development of the Amendment Regulations. Public consultation was not undertaken on the Amendment Regulations due to the nature of the changes, and because importers benefit from streamlining the process to seek to import State or Territory Arms, flags or seals (or nearly resembling representations).

The Office of Best Practice Regulation (OBPR) has been consulted in relation to the amendments and has advised that the amendments are likely to have no more than minor regulatory impacts on business, individuals and organisations, and a Regulation Impact Statement is not required. The OBPR reference number is OBPR21-44806.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The PI Regulations, amended by the Amendment Regulations, are exempt from sunseting under paragraph (a) of item 21 of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. The majority of provisions of the PI Regulations relate to intergovernmental schemes or have the sole or primary purpose of giving effect to an international obligation of Australia. This includes the processes agreed between the Commonwealth, States and Territories for allowing the importation of goods bearing State and Territory Arms, flags and seals (and nearly resembling representations). The fitness for purpose of prohibitions on the importation of goods is regularly examined, with individual prohibitions being updated as required.

The Amendment Regulations commence on the later of 25 March 2022 and the day after registration on the Federal Register of Legislation.

Details of the *Customs Legislation Amendment (Flags) Regulations 2022*

Section 1 - Name

This section provides that the title of the Regulations is the *Customs Legislation Amendment (Flags) Regulations 2022* (the Amendment Regulations).

Section 2 - Commencement

This section sets out, in a table, the date on which each of the provisions contained in the Amendment Regulations commence.

Table item 1 provides for the whole instrument to commence on the later of 25 March 2022 and the day after registration on the Federal Register of Legislation.

Section 3 - Authority

This section sets out the authority under which the Amendment Regulations are made, which is the *Customs Act 1901* (the Act).

Section 4 - Schedules

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

The instruments amended are the *Customs (Prohibited Imports) Regulations 1956* and *Customs Regulation 2015*.

Schedule 1—Amendments

Customs (Prohibited Imports) Regulations 1956

Item [1] - In the appropriate position before Schedule 1

This item, in the appropriate position before Schedule 1 to the *Customs (Prohibited Imports) Regulations 1956* (PI Regulations), inserts a new regulation 14 into those Regulations. This is a transitional provision.

Regulation 14 Transitional matters—amendments made by the Customs Legislation Amendment (Flags) Regulations 2022

Goods imported after commencement generally need to satisfy the new conditions to allow importation

Subregulation 14(1) provides that the amendments to the PI Regulations made by the Amendment Regulations apply in relation to goods imported into Australia on or after the commencement of the Amendment Regulations.

This means the new conditions for importation of goods bearing a State or Territory's Arms, flag or seal (or a nearly resembling representation) apply where the goods are imported after commencement. However, this has effect subject to the transitional provision in subregulation 14(2) described below.

Goods imported after commencement can also still rely on permission granted by the Minister or authorised person given before commencement

Subregulation 14(2) provides for the transitional ongoing effect of existing permissions at the commencement of the Amendment Regulations to import goods bearing a State or Territory's Arms, flag or seal (or a nearly resembling representation). This provision ensures that, in the case that a permission is granted before the commencement of the Amendment Regulations, but the importation has not occurred until after that commencement, the goods can still be imported relying on that permission.

In these transitional cases, the importer could lawfully import the goods either with the prior permission of the Minister or authorised person, or by satisfying the new conditions in Schedule 3 to the PI Regulations.

Goods imported before commencement remain subject to requirement to have permission of the Minister or authorised person, including for post-importation permission scheme

In accordance with subregulation 14(1), whether goods imported before the regulation commences were imported lawfully continues to be determined in accordance with the process in place before that commencement—that is, whether the Minister or an authorised person has granted a permission.

This means any post-importation permissions for goods imported before the regulation commences continues to be able to be granted under subregulation 4(1) or (1AB), as provided for by section 161 of the Customs Regulation, which are inserted by item 7 of Schedule 1 to the Amendment Regulations (described further below).

Item [2] - Schedule 2 (table item 15)

This item repeals table item 15 from Schedule 2 to the PI Regulations. This is the current item that applies to State or Territory Arms, flags and seals (and nearly resembling representations). Items in Schedule 2 require a permission from the Minister or an authorised person under subregulation 4(1) or (1AB). This permission is the second step in the current two-step process, after being provided design approval from the Premier's or Chief Minister's Department for the relevant State or Territory. This is replaced by new item 10A

of Schedule 3, which will no longer require permission from the Minister to allow lawful importation.

Item [3] - Schedule 3 (table item 10, column headed “Conditions, restrictions and requirements”, paragraph (a))

The item makes a minor technical amendment to update item 10 of Schedule 3 to the PI Regulations to reflect modern drafting practice. This amendment is not intended to alter the effect of the provision.

Item [4] - Schedule 3 (after table item 10)

This item inserts new item 10A into Schedule 3 to the PI Regulations.

Subregulation 4(2) of the PI Regulations prohibits the importation of goods listed in Schedule 3 to the PI Regulations unless specified conditions, restrictions or requirements are complied with. Item 10A provides that goods to which, or the coverings to which, there is applied a representation of the Arms, a flag or a seal of a State or Territory, or a representation so nearly resembling such an Arms, flag or seal as to be likely to deceive, must not be imported unless conditions set out in the item are met.

These conditions are that:

- the design of the representation has been approved in writing by the head (however described) of the Department of the State or the Territory administered by the Premier of the State or the Chief Minister of the Territory, or an officer (however described) of that Department who is authorised by that head to give such an approval; and
- if the Collector (as officer of Customs) asks the importer to produce the approval—the importer produces it.

Currently, permission to import these kinds of goods is granted by the Minister or an authorised person where design approval of the representation as set out above has been given. The effect of this amendment and item 2 of Schedule 1 to the Amendment Regulations is to remove the requirement for the Minister or an authorised person to give this permission. Instead, the goods are allowed to be imported by virtue of that design approval being given by the Department of the relevant State or Territory.

The Amendment Regulations do not confer a power on State or Territory officials, rather item 10A refers to an approval given by the relevant State or Territory Department that operates independently of item 10A. Therefore, review under the PI Regulations is not available in relation to granting approval of the design of a representation by the State or Territory Department.

To ensure integrity of the measure, another condition of lawful import is that the design approval must be produced to the Collector by the importer upon request.

This amendment aligns the process for allowing importation of goods bearing a State or Territory Arms, flag or seal (or a nearly resembling representation) with the process for goods bearing a Commonwealth Arms, flag or seal (or a nearly resembling representation).

Customs Regulation 2015

Item [5] - Section 120 (table item 12, column headed “Kinds of prohibited imports”)

Item [6] - Section 120 (table item 13, column headed “Kinds of prohibited imports”)

Items 5 and 6 amend section 120 of the *Customs Regulation 2015* (Customs Regulation). Section 120 of the Customs Regulation provides for the kinds of prohibited imports that are covered by the post-importation permission scheme in Subdivision GC of Division 1 of Part XII of the Act. The amendments in items 5 and 6 ensure that goods bearing State or Territory Arms, flags or seals (or nearly resembling representations) continue to be covered by this scheme.

These kinds of prohibited imports are currently covered by item 15 of Schedule 2 to the PI Regulations, which is listed in table item 12 in section 120 of the Customs Regulation.

Items 2 and 4 of Schedule 1 to the Amendment Regulations, taken together, relocate the conditional prohibition on importing these goods to item 10A of Schedule 3 to the PI Regulations. Items 5 and 6 of Schedule 1 to the Amendment Regulations, taken together, make consequential amendments to update table item 13 in section 120 of the Customs Regulation to refer to item 10A of Schedule 3 to the PI Regulations.

Item [7] - In the appropriate position in Part 18

The item, in the appropriate position in Part 18 of the Customs Regulation, inserts a new section 161 into those Regulations. This is a transitional provision.

Section 161 Amendments made by the Customs Legislation Amendment (Flags) Regulations 2022

Section 161 provides that, the amendments of the Customs Regulation made by the Amendment Regulations apply in relation to goods imported into Australia on or after the commencement of the Amendment Regulations.

This ensures that goods bearing a State or Territory Arms, flag or seal (or a nearly resembling representation) imported *before* the Amendment Regulations commence remain subject to the post-importation permission scheme, including after that commencement. The post-importation permission required for those goods continues to be the permission of the Minister or an authorised person under subregulation 4(1) or (1AB). This works in conjunction with subregulation 14(1) of the PI Regulations, which is inserted by item 1 of Schedule 1 to the Amendment Regulations (described further above).

Statement of Compatibility with Human Rights

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

Customs Legislation Amendment (Flags) Regulations 2022

The *Customs Legislation Amendment (Flags) Regulations 2022* (the Amendment Regulations) is compatible with 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

The *Customs Act 1901* (the Act) concerns customs related functions and is the legislative authority that sets out the customs requirements for the importation, and exportation, of goods to and from Australia.

Section 50 of the Act provides, in part, that the Governor General may, by regulation, prohibit the importation of goods into Australia and that the power may be exercised by prohibiting the importation of goods absolutely or by prohibiting the importation of goods unless specified conditions or restrictions are complied with.

The *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations) control the importation of the goods specified in the various regulations and the Schedules to the PI Regulations, by prohibiting importation absolutely, or by making importation subject to a permission or licence. This currently includes goods bearing a Commonwealth, State or Territory's Arms, flag or seal (or a nearly resembling representation), except where conditions are complied with or permissions are granted.

The PI Regulations currently provide for a different process to allow the importation of Commonwealth Arms, flags or seals, as compared with the process for State or Territory Arms, flags or seals. For both processes, importation of the goods is allowed where the Department of the Prime Minister, Premier or Chief Minister of the relevant jurisdiction for the Arms, flag or seal has given design approval for the Arms, flag or seal or representation. For Commonwealth Arms, flags or seals, this is the single step required to allow importation (provided, on request, to the Australian Border Force). By contrast, for State or Territory Arms, flags or seals, a second step is required, being a permission from the Minister or an authorised person.

The purpose of the Amendment Regulations is to amend the PI Regulations and the *Customs Regulation 2015* to allow goods bearing a State or Territory's Arms, flag or seal (or a nearly resembling representation), to be imported through a single-step process, rather than the existing two-step process. This aligns the importation process of those goods to the current importation process for representations of the Arms, a flag or a seal of the Commonwealth.

The amendments are necessary to streamline the importation process for goods bearing a State or Territory's Arms, flag or seal (or a nearly resembling representation) thereby reducing regulatory burden on importers.

Human rights implications

The Amendment Regulations do not engage, impact on or limit in any way, the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Conclusion

The Amendment Regulations are compatible with human rights, as they do not raise any human rights issues.

Jason Wood, Assistant Minister for Customs, Community Safety and Multicultural Affairs, Parliamentary Secretary to the Minister for Home Affairs