

EXPLANATORY STATEMENT

Select Legislative Instrument 2005 No. 16

Issued by the Authority of the Minister for Justice and Customs

Customs Act 1901

Customs (Prohibited Exports) Amendment Regulations 2005 (No. 1)

Customs (Prohibited Imports) Amendment Regulations 2005 (No. 1)

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 the Customs.

Sections 50 and 112 of the Act provide, in part, that the Governor-General may, by regulation, prohibit the importation or exportation, respectively, of goods into or from Australia and that the powers may be exercised by prohibiting the importation or exportation of goods absolutely or by prohibiting the importation or exportation of goods unless specified conditions or restrictions are complied with.

The *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations) and the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations) control the importation or exportation, respectively, of the goods specified in the various regulations and the Schedules to the Regulations.

The purpose of the amending Regulations is to amend the import and export prohibitions on certain objectionable material to ensure the prohibitions are consistent with amendments being made to the Act by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (the Amendment Act).

Paragraph 3(2)(b) of the PE Regulations and paragraph 4A(1A)(b) of the PI Regulations prohibit the exportation and importation of objectionable material including publications, that “describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not)”. Such goods may only be exported or imported with the permission of the Attorney-General or an authorised person.

Section 233BAB of the Act makes it an offence to intentionally import or export items of child pornography and items of child abuse material. Under subsection 233BAB(3) of the Act, an item is taken to be an item of child pornography if it is a document or other goods:

- (a) that depicts a person:
 - (i) who is, or who appears to be, under 16 years of age; and
 - (ii) who is involved in a sexual pose or in sexual activity, whether or not in the presence of other persons; and
- (b) that is likely to cause offence to a reasonable adult.

Under subsection 233BAB(4) of the Act, an item is taken to be an item of child abuse material if it is a document or other goods:

- (a) that depicts a person:
 - (i) who is, or who appears to be, under 16 years of age; and
 - (ii) who is a victim of torture, cruelty or physical abuse; and
- (b) that is likely to cause offence to a reasonable adult.

The maximum penalty for this offence is a fine not exceeding 2,500 penalty units or imprisonment for 10 years, or both.

On 1 March 2005, item 24 of Schedule 1 to the Amendment Act will replace the definitions of 'item of child pornography' and 'item of child abuse material'. These new definitions are more detailed and have also raised the relevant age of a person from under 16 to under 18. The Amendment Act will also insert definitions of 'child abuse material' and 'child pornography material' into the *Criminal Code 1995* (the Criminal Code). These new definitions will refer to a person who is, or appears to be, under 18 years of age.

The amending Regulations amend paragraph 4A(1A)(b) of the PI Regulations and paragraph 3(2)(b) of the PE Regulations to change the age specification from 16 to 18. The phrase 'looks like' is being changed to 'appears to be'. This will also ensure consistency with section 233BAB of the Act and the Criminal Code and is not intended to change the substance of the prohibition.

No consultation was undertaken in relation to the amending Regulations as they do not have an effect on business or restrict competition. Further, they are of a minor or machinery nature and do not substantially alter existing arrangements.

The amending Regulations commence on 1 March 2005.

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