

EXPLANATORY STATEMENT

Issued by the Minister for Customs, Community Safety and Multicultural Affairs

Customs Act 1901

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019

The *Customs Act 1901* (the Customs 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 Customs 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.

Section 50 of the Customs 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 purpose of the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019* (the Amendment Regulations) is to amend the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations) to prohibit the importation of tobacco products into Australia without a permit, with limited exemptions. The Prohibited Imports Regulations set out various goods the importation of which is prohibited absolutely or prohibited unless certain conditions, restrictions, requirements are complied with, such as the granting of a licence or permission.

The Amendment Regulations are part of a broader Commonwealth Government initiative to address recommendations of the October 2017 Black Economy Taskforce Final Report in which the Government announced a number of measures to combat illicit tobacco trade in Australia, including proposing a prohibition on the importation of tobacco without a permit into Australia from 1 July 2019.

The Prohibited Imports Regulations include two prohibited import controls for certain tobacco products. Regulation 4D provides that the importation of unmanufactured tobacco leaf is prohibited unless the person importing the tobacco holds the relevant dealer or manufacturer licence, or an import permission has been given by the Commissioner of Taxation. Regulation 4U and Schedule 12 prohibit the importation of chewing tobacco, and snuffs intended for oral use, in an amount weighing more than 1.5 kilograms, without the relevant permission. All other types of tobacco products currently can be imported into Australia without a permit.

The Amendment Regulations strengthen border controls by inserting a new regulation in the Prohibited Imports Regulations, to prohibit the importation of tobacco products into Australia without the relevant permission and subject to certain conditions. Tobacco products imported without a valid permit would be a prohibited import and able to be seized without a warrant at the border.

The Amendment Regulations will not affect the existing import controls for certain tobacco products under regulations 4D and 4U of the Prohibited Imports Regulations. Certain specialty tobacco products, including cigars, will also be exempt from the new prohibition as they are low risk goods for duty evasion.

The Department of Home Affairs developed the Amendment Regulations in consultation with the Department of Health, the Treasury, the Australian Taxation Office and the Australian Competition and Consumer Commission. The Department also held extensive consultation on the amendments with the tobacco industry and retailer bodies through the Illicit Tobacco Industry Group. There is broad support across government and industry for the prohibited import control created by the Amendment Regulations.

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

The Amendment Regulations commence on 1 July 2019.

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ATTACHMENT A

Details of the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019*

Section 1 – Name of Regulation

1. This section provides that the title of the Amendment Regulations is the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019* (the Amendment Regulations).

Section 2 – Commencement

2. This section sets out, in a table, the date on which each of the provisions contained in the Amendment Regulations commence.
3. Table item 1 would provide for the whole of the instrument to commence on 1 July 2019.

Section 3 – Authority

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

Section 4 - Schedules

5. This section is the formal 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 Schedule to this instrument has effect according to its terms.
6. The instrument being amended is the *Customs (Prohibited Imports) Regulations 1956*.

Schedule 1 - Amendments

Customs (Prohibited Imports) Regulations 1956

Item 1 After regulation 4D

7. This item inserts new regulation 4DA Importation of tobacco products after existing regulation 4D Importation of Unmanufactured tobacco leaf.
8. The purpose of this item is to insert a new regulation in the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations), to prohibit the importation of tobacco products without the relevant permission being granted prior to importation and subject to certain conditions.
9. Under new subregulation 4DA(1), subject to subregulation (9), the importation into Australia of tobacco products is prohibited, unless:
 - (a) a permission to import the tobacco products has been granted in writing by the Minister or an authorised person and the permission is produced to the Collector;
or
 - (b) the Minister has approved the importation under subregulation (9).
10. The term “tobacco products” is defined in subsection 4(1) of the Customs Act, as introduced by the *Customs Amendment (Collecting Tobacco Duties at the Border) Act 2018*. This definition provides that: **tobacco products** means goods classified to heading 2401, 2402 or 2403 of Schedule 3 to the *Customs Tariff Act 1995* (except goods classified to subheading 2402.90.00 or 2403.99.10 of that Schedule).
11. Subregulation 4DA(2) provides that certain tobacco products are exempt from the import prohibition imposed under subregulation 4DA(1). This subregulation ensures that the import prohibition on tobacco products does not apply to:
 - (a) tobacco of a kind specified in regulation 4D;
 - (b) chewing tobacco and snuffs intended for oral use;
 - (c) cigars;
 - (d) tobacco products:
 - (i) that are prescribed by by-law for the purposes of item 15 of Schedule 4 to the *Customs Tariff Act 1995*; and
 - (ii) that are imported by passengers, or members of the crew, of ships or aircraft; and
 - (iii) on which duty is not payable.
12. The purpose of the exemptions in paragraphs (a) and (b) is to carve out from the new import prohibition tobacco products the importation of which is currently controlled under the Prohibited Imports Regulations.
13. For the exemption in paragraph (a) note 1 to subregulation 4DA(2) explains that existing regulation 4D prohibits the importation of unmanufactured tobacco and certain tobacco refuse without permission from the Commissioner of Taxation. Regulation 4D of the

Prohibited Imports Regulations currently provides that the importation of unmanufactured tobacco leaf specified in tariff subheading 2401.10.00 of the *Customs Tariff Act 1995* is prohibited unless the person importing the tobacco holds the relevant dealer licence or a manufacturer licence or a permission to import the leaf has been given by the Commissioner of Taxation.

14. For the exemption in paragraph (b), Note 2 to subregulation 4DA(2) explains that existing regulation 4U prohibits the importation of certain chewing tobacco and snuffs intended for oral use without permission from the Minister. The importation of chewing tobacco, and snuffs intended for oral use, in an amount weighing more than 1.5 kilograms is prohibited by regulation 4U and Schedule 12 to the Prohibited Imports Regulations, without the relevant permission.
15. The exemption provided in paragraph (c) has the effect that the new import restriction does not apply to the importation any amount of cigars. Importers of cigars continue to be able to import this good via any legitimate means. Cigars are a speciality product that are not currently a source of revenue loss for the Commonwealth.
16. Subregulations 4DA(3) to 4DA(8) provides the details of the processes for applying for, and dealing with, import permissions for tobacco products the importation of which would otherwise be prohibited under subregulation 4DA(1).
17. Subregulation 4DA(3) provides that an applicant for a permission under subsection (1) to import tobacco products must:
 - (a) lodge a written application with the Minister or an authorised person; and
 - (b) give to the Minister or an authorised person any information that the Minister or authorised person reasonably requires for the purpose of making a decision on the application.
18. In these regulations the Minister means the Minister responsible for administering the Customs Act and “authorised officer” is defined for the purposes of this regulation in new subregulation 4DA(10).
19. Subregulation 4DA(4) to 4DA(6) details the process for dealing with an application for permission.
20. Subregulation 4DA(4) provides that in considering whether to grant a permission, the Minister or authorised person may consider any relevant matter.
21. Matters relevant to the consideration of whether or not to grant a permission may include, but are not be limited to information relating to the applicant’s identity, business information and other necessary information to facilitate internal and external checks, as occurs for other prohibited import permits administered by the Department of Home Affairs.
22. Subregulation 4DA(5) provides that the Minister or authorised person must not grant a permission unless the applicant gives all the information required by the Minister or authorised person under paragraph 4DA(3)(b).

23. Subregulation 4DA(6) provides that the Minister or authorised person may grant a permission subject to conditions or requirements specified in the permission, to be complied with by the holder of the permission.
24. Subregulation 4DA(7) addresses the revocation of permission to import tobacco products. This subregulation provides that the Minister or authorised person may, in writing, revoke a permission if:
- (a) the holder of the permission does not comply with a condition or requirement of the permission; or
 - (b) the Minister or authorised person is satisfied that revocation is necessary:
 - (i) for the protection of the revenue; or
 - (ii) for ensuring compliance with the Customs Acts.
25. The purpose of this subregulation is to provide a mechanism for a permission to be revoked in the prescribed circumstances.
26. Subregulation 4DA(8) addresses the notice of decision to refuse or revoke permission to import tobacco products. This subregulation provides that if the Minister or authorised person decides:
- (a) not to grant a permission; or
 - (b) to revoke a permission;
- the Minister or authorised person must give the applicant or holder of the permission written notice of the decision as soon as practicable after making the decision.
27. Under new subregulation 4DA(9) the Minister may the importation of specified tobacco products. This subregulation provides that the Minister may, by legislative instrument, approve the importation into Australia of a tobacco product that meets one or more of the following:
- (a) the tobacco product is specified in, or included in a class of tobacco products specified in, the approval;
 - (b) the tobacco product is imported by a person, or class of persons, specified in, the approval;
 - (c) the tobacco product does not exceed a value or amount specified in the approval;
 - (d) the tobacco product is imported in a way, or by a means, specified in the approval
28. The purpose of this instrument is to establish a mechanism for granting ongoing permissions for certain tobacco products where it is considered that applying for a case-by-case permission is not necessary.
29. For example, it is proposed that duty paid tobacco products imported by aircraft passengers or crew members arriving in Australia, who are aged 18 years or older would be listed on this instrument as approved tobacco products. The purpose of this approval would be to ensure that international travellers entering Australia can continue to import

into Australia duty paid tobacco without the need to apply for and obtain an import permit, which would be an unnecessary burden in this context.

30. This instrument also gives the Minister flexibility to add additional tobacco products to the instrument in the future, where certain tobacco products, such as emerging tobacco products, may be identified which should not be subject to the import prohibition introduced by new subregulation 4DA(1). This flexibility would also allow the Minister to quickly address changing patterns of illicit tobacco importation.
31. Subregulation 4DA(10) provides that in this regulation '*authorised person*' means an APS employee in the Department who is authorised in writing by the Minister to be an authorised person for the purposes of this regulation.
32. It is appropriate for the Minister to be able to authorise an APS employee in the Department as an authorised person due to the large volume of permissions that will need to be dealt with under this regulation. Decisions in relation to granting, revoking or refusing a permission will need to be made on a regular basis. Delegation to an APS level employee who is not an SES employee is necessary to ensure applications can be assessed in a timely manner.
33. APS employees who are expected to be authorised to exercise this power (being officers at the EL2 level) administer highly technical customs and border management schemes. These authorised officers possess the necessary experience and skills that are appropriate to the power being exercised. This level of authorisation is consistent with other authorisations under the Prohibited Imports Regulations, including goods such as firearms and non-firearms weapons.

Statement of Compatibility with Human Rights

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

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019

These Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulations

The purpose of the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019* (the proposed Regulations) is to amend the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations) to prohibit the importation of tobacco products into Australia without a permit, with limited exemptions. The Prohibited Imports Regulations set out various goods the importation of which is prohibited absolutely or prohibited unless certain conditions, restrictions, requirements are complied with, such as the granting of a licence or permission.

Background

The Australian Government announced in the 2018-19 Budget that it would tighten tobacco border controls by introducing a prohibited import control for tobacco products through the *Black Economy Package – Combatting Illicit Tobacco*.

The Prohibited Import Regulations currently include two prohibited import controls for certain tobacco products. Regulation 4D provides that the importation of unmanufactured tobacco leaf is prohibited unless the person importing the tobacco holds the relevant dealer or manufacturer licence, or an import permission has been given by the Commissioner of Taxation.

Regulation 4U and Schedule 12 prohibit the importation of chewing tobacco, and snuffs intended for oral use, in an amount weighing more than 1.5 kilograms, without the relevant permission granted by the Minister administering Division 1A of Part V of the *Trade Practices Act 1974*. All other types of tobacco products can be imported into Australia without a permit.

From 1 July 2019, the proposed Regulations will build on the two existing tobacco prohibited import controls, by making it a requirement that all tobacco products will be prohibited imports under the Prohibited Imports Regulations. As such, tobacco products will only be able to be imported into Australia with a valid import permit (except for international travellers using duty free allowances and specified tobacco items such as cigars and smokeless tobacco). Tobacco products imported without a valid permit would be a prohibited import and would be able to be seized at the border without a warrant.

Human rights implications

These proposed Regulations support the Government's commitment to improve health outcomes for Australians and combat illicit tobacco. It is consistent with the *Tobacco Strategy 2012-2018* (endorsed by all Australian Health Ministers) to reduce the affordability of tobacco products by combating illicit tobacco. It is also consistent with the World Health Organization's *Framework Convention on Tobacco Control*, which commits nations to implement policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.

The right to enjoy the highest standard of physical and mental health.

Article 12 of the International Covenant on Economic, Social and Cultural Rights serve to protect a person's right to the highest standards of physical and mental health.

Trade in illicit tobacco is extremely profitable, particularly as a result of ongoing excise increases. Once illicit tobacco has entered the domestic supply chain, there are few disincentives for those who engage in the illicit tobacco trade due to the difficulties in proving that an offence has been committed under current laws.

Illicit tobacco undermines public health measures to reduce the prevalence and uptake of smoking, bypassing important controls and standards relating to manufacturing, plain packaging and health labelling. Illicit tobacco can be manufactured in sub-standard processes, uses potentially poisonous ingredients, and inherently poses environmental and contamination risks.

Australian Border Force activities have detected poisons such as formaldehyde, and found rat faeces, inside illicit tobacco—posing a health and biosecurity risk to Australia.

By making all tobacco products a prohibited import, these proposed Regulations engage and enhance the right to enjoy the highest standard of physical and mental health. The measure will serve as a deterrent against the increasing illicit tobacco market, serving to further reduce the amount of illicit tobacco in Australia.

Further, the measure will improve physical and mental health outcomes, as the amount of illicit tobacco in Australia will be reduced, limiting public exposure to the potential harms associated with illicit tobacco. The measure will support the effectiveness of related health policies, such as tobacco plain packaging requirements.

Conclusion

These proposed Regulations are compatible with the applicable 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*. The proposed Regulations positively engage with the right to the highest standard of physical and mental health because they improve the health and safety standards in Australia by targeting the operability of the illicit tobacco trade.

The Hon Peter Dutton MP, Minister for Home Affairs