

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Assistant Treasurer**

*Taxation Administration Act 1953*

*Treasury Laws Amendment (Illicit Tobacco Offences) Regulations 2018*

The *Taxation Administration Act 1953* (the Act) provides the administrative framework for the taxation law. This includes the collection and recovery of income tax and other liabilities, objection, review and appeal processes, charges and penalties, rulings and other tax administration matters.

Section 18 of the Act provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Treasury Laws Amendment (Illicit Tobacco Offences) Regulations 2018* (the Regulations) is to prescribe how to work out the amount of duty that would be payable on an amount of tobacco leaf for offences relating to illicit tobacco to which the Act applies.

The *Treasury Laws Amendment (Illicit Tobacco Offences) Act 2018* amended the taxation law to establish a comprehensive set of offences for illicit tobacco in Division 308 in Schedule 1 to the Act. These new offences apply in similar circumstances as the prior offences under the *Excise Act 1901*, but do not require proof of origin of tobacco and impose tiered penalties that appropriately reflect the significance of the relevant offences.

Similar to the prior offences, some of the new offences can apply in relation to unprocessed tobacco leaf as well as processed tobacco. As excise duty does not generally apply to unprocessed tobacco, special rules are needed to prescribe how to calculate the amount of duty that would be payable on tobacco leaf were it processed.

The Regulations amend the *Taxation Administration Regulations 2017* to provide that, for the purposes of determining the amount of penalties relating to specific illicit tobacco offences in Division 308 in Schedule 1 to the Act, the amount of duty payable on tobacco leaf is calculated using the methodologies specified in section 21 of the *Excise Regulation 2015* for similar offences under that Act involving tobacco leaf.

No public consultation was undertaken on the Regulations as they are minor and machinery in nature, merely adopting existing calculation methodologies in the taxation law. However, consultation was undertaken with affected agencies (the Australian Taxation Office and the Department of Home Affairs).

Further details of the Regulations are set out in [Attachment A](#).

The Act does not specify any conditions that were required to be met before the power to make the Regulations was exercised.

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

The Regulations commenced on the day after it was registered on the Federal Register of Legislation.

As the Regulations are a minor and machinery change required as a consequence of the introduction of the new illicit tobacco offences, their financial and compliance cost impacts were considered in the context of this wider measure and are detailed in the Explanatory Memorandum to the *Treasury Laws Amendment (Illicit Tobacco Offences) Act 2018*.

A Statement of Compatibility with Human Rights is at [Attachment C](#). The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Details of the *Treasury Laws Amendment (Illicit Tobacco Offences) Regulations 2018***

**Section 1 – Name of Regulations**

This section provides that the title of the Regulations is the *Treasury Laws Amendment (Illicit Tobacco Offences) Regulations 2018* (the Regulations).

**Section 2 – Commencement**

This section provides that each provision of the Regulations specified in column 1 of the table commenced, or is taken to have commenced, in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms.

Schedule 1 to the Regulations commenced on the day after the Regulations were registered.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Taxation Administration Act 1953*.

**Section 4 – Schedule**

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 — Penalties for illicit tobacco offences**

This Attachment sets out further details of the Regulations.

In the 2016-17 Budget, the Government announced a range of measures to combat illicit tobacco, including new offences with appropriate tiered penalties.

The *Treasury Laws Amendment (Illicit Tobacco Offences) Act 2018* amended the taxation law to establish a comprehensive set of offences for illicit tobacco in Division 308 in Schedule 1 to the Act. These new offences apply in the same circumstances as the prior offences under Part X of the *Excise Act 1901*, but do not require proof of origin of tobacco and apply tiered penalties that appropriately reflect the significance of the relevant offence.

Similar to the prior offences, the new offences can apply in relation to unprocessed tobacco leaf as well as processed tobacco. As excise does not generally apply to unprocessed tobacco, special rules are needed to prescribe how to calculate the amount of duty that would be payable on tobacco leaf were it processed. The provisions establishing the new offences provide for these rules to be prescribed by regulation (the specific paragraphs permitting this prescription in relation to each offence are set out in [Attachment B](#)).

The Regulations prescribe that, for the purposes of working out penalties for those illicit tobacco offences in Division 308 in Schedule 1 to the *Taxation Administration Act 1953*, the amount of duty payable on tobacco leaf should be calculated in the

manner specified in section 21 of the *Excise Regulation 2015* for the purposes of the offences under Part X of the *Excise Act 1901*.

Broadly, under this approach, the amount of duty payable is to be worked out assuming that the applicable rate of excise was the rate that would have applied to a kilogram of tobacco manufactured on that day and that the weight of the tobacco was worked out in a specified way, depending on whether the tobacco leaf was baled or unbaled and whether the Australian Taxation Office had seized the tobacco.

Adopting the same methodologies ensures that the duty that would be payable on tobacco leaf is worked out in a consistent way across the taxation law.

As there are some small mechanical differences between the offences under Division 308 of Schedule 1 to the Act and under Part X of the *Excise Act 1901*, the Regulations make two minor modifications to the operation of these methodologies to ensure consistent outcomes.

First, some of the offences under Part X of the *Excise Act 1901* have penalties based on the duty payable on the ‘penalty day’ – either the first day on which the offence was committed, or if it is not known when the offence was committed, the day on which the prosecution for the offence was commenced. The defined term ‘penalty day’ is therefore used in the *Excise Regulation 2015*.

The offences under Division 308 in Schedule 1 to the Act also have penalties based on the duty payable either on the first day on which the offence was committed, or if it is not known when the offence was committed, the day on which the prosecution for the offence was commenced. However, these offences do not use the term ‘penalty day’.

To address this difference, the Regulations provide that, for the purposes of determining the duty that would have been payable on tobacco leaf for offences under Division 308 in Schedule 1 to the Act, references to penalty day are treated as references to either the first day on which the offence was committed, or if it is not known when the offence was committed, the day on which the prosecution for the offence was commenced.

Secondly, the methodology set out in section 21 of the *Excise Regulation 2015* for baled tobacco that is not seized applies to a quantity of tobacco in a single bale with an assumed standard weight of 100 kilograms. In contrast, the offences under Division 308 in Schedule 1 to the Act impose tiered penalties based on the total quantity of tobacco and so apply to this total amount, which could include multiple bales.

To ensure clarity, the Regulations specify that, for the purposes of the offences under Division 308 in Schedule 1 to the Act, an amount of unseized illicit tobacco may include amounts in one or more bales and the weight of such tobacco is treated as being 100 kilograms multiplied by the number of bales that are shown to exist by the available evidence.

The Regulations commenced on the day after they were registered on the Federal Register of Legislation.

## **ATTACHMENT B**

The following paragraphs in Schedule 1 to the *Taxation Administration Act 1953* provide for regulations to prescribe how to determine the duty payable in relation to tobacco leaf:

- paragraph 308-10(2)(b);
- paragraph 308-15(2)(b);
- paragraph 308-20(2)(b);
- paragraph 308-25(2)(b);
- paragraph 308-30(2)(b);
- paragraph 308-35(2)(b);
- paragraph 308-40(2)(b);
- paragraph 308-45(2)(b);
- paragraph 308-50(2)(b);
- paragraph 308-110(2)(b);
- paragraph 308-115(2)(b);
- paragraph 308-120(2)(b);
- paragraph 308-125(2)(b);
- paragraph 308-130(2)(b);
- paragraph 308-135(2)(b).

## **Statement of Compatibility with Human Rights**

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

### ***Treasury Laws Amendment (Illicit Tobacco Offences) Regulations 2018***

This Legislative Instrument is 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 Legislative Instrument**

The purpose of the *Treasury Laws Amendment (Illicit Tobacco Offences) Regulations 2018* (the Regulations) is to prescribe how to work out the amount of duty that would be payable on an amount of tobacco leaf for offences relating to illicit tobacco under the *Taxation Administration Act 1953*.

The *Treasury Laws Amendment (Illicit Tobacco Offences) Act 2018* amended the taxation law to establish a comprehensive set of offences for illicit tobacco in Division 308 in Schedule 1 to the *Taxation Administration Act 1953*. These new offences apply in the same circumstances as the prior offences under the *Excise Act 1901*, but do not require proof of origin of tobacco and impose tiered penalties that appropriately reflect the significance of the relevant offence.

Similar to the prior offences, some of the new offences can apply in relation to unprocessed tobacco leaf as well as processed tobacco. As excise duty does not generally apply to unprocessed tobacco, special rules are needed to prescribe how to calculate the amount of duty that would be payable on tobacco leaf were it processed.

The Regulations amend the *Taxation Administration Regulations 2017* to provide that, for the purposes of determining the amount of penalty relating to specific illicit tobacco offences in Division 308 in Schedule 1 to the *Taxation Administration Act 1953*, the amount of duty payable on tobacco leaf should be calculated using the methodologies specified in section 21 of the *Excise Regulation 2015* for similar offences under that Act involving tobacco leaf.

### **Human rights implications**

The Regulations do not engage any of the applicable rights or freedoms. The Regulations involve a minor and machinery change required as a consequence of the introduction of the new illicit tobacco offences. The human rights implications of the broader reforms are detailed in the Explanatory Memorandum to the *Treasury Laws Amendment (Illicit Tobacco Offences) Act 2018*.

## **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.