

EXPLANATORY STATEMENT

Issued by Authority of the Minister for Regional Services, Sport, Local Government and Decentralisation

Tobacco Plain Packaging Act 2011

Tobacco Plain Packaging Amendment (Track and Trace Identifiers) Regulations 2018

Legislative Authority

Section 109 of the *Tobacco Plain Packaging Act 2011* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Purpose

The purpose of the *Tobacco Plain Packaging Amendment (Track and Trace Identifiers) Regulations 2018* (the Amendment Regulations) is to ensure the Act is facilitating and not hampering the European Union's (EU) efforts to combat illicit tobacco under a multilateral tobacco control agreement.

Currently, Section 20 of the Act prohibits the placing of markings on the retail packaging of tobacco products unless they are expressly permitted by the *Tobacco Plain Packaging Regulations 2011* (the Principal Regulations).

The Amendment Regulations will amend the Principal Regulations to permit tobacco products imported into Australia from the EU to include track and trace unique identification markings on retail packaging. The Amendment Regulations maintain the integrity of Australia's plain packaging regulatory regime.

The Amendment Regulations would allow:

- the unique identifier to appear only once on all forms of tobacco products;
- for cigarette packs and cartons, allow the placement of the track and trace unique identifier to appear once only on the outer surface of the packaging that does not bear a health warning;
- for tobacco products other than cigarette packs and cartons (for example roll-your-own, loose leaf and cigars) the placement of the track and trace unique identifier may appear once on the side or outer surface of the packaging that bears a health warning but must not wholly or partly obscure the health warning;
- for non-cigarette tobacco products and cigarette carton packaging it would be permitted that the track and trace unique identifier may be printed on the packaging or affixed on an adhesive label, in line with the language in the new EU law;
- for the adhesive label to be fastened and not easily removable and be transparent or the colour known as Pantone 448C; and
- for all forms of tobacco product packaging:
 - the alphanumeric code component of the unique identifier to be printed on packaging only in normal weighted font in black, white or grey on a Pantone 448C background; and

- the machine readable code component of the unique identifier to be printed in black, white or grey on a Pantone 448C background.

Background

To implement the World Health Organization Framework Convention on Tobacco Control's 'Protocol to Eliminate Illicit Trade in Tobacco Products' (the Protocol) the EU have introduced a new law. The new EU law provides for EU wide systems of traceability to track tobacco product movement through supply chains.

From 20 May 2019, this new EU law will require cigarettes and roll-your-own tobacco products manufactured in or imported into the EU to be marked with a track and trace unique identifier. For traceability, this identification will apply to the primary and secondary retail packaging of tobacco products. This requirement will also apply to tobacco products exported from the EU, including into Australia.

The EU track and trace unique identifier will comprise both a human readable and a machine readable code. The human readable code is an alphanumeric code subject to required EU specifications. The machine readable code is an optical code representing data in a form that is only readable with the aid of an optical scanner. The machine readable code can be one of the following types: QR code, Data Matrix or Dot Code, Code 128 or barcodes subject to EU specifications.

The new EU law will also require that tobacco products placed on the market in the EU carry a security feature for the purpose of verifying whether or not tobacco products are authentic. This requirement is not applicable to products exported from the EU and therefore is not covered by the Amendment Regulation.

Consultation

Consultation on the proposed Amendment Regulation was undertaken with tobacco companies and importers who may be affected (24 entities). The European Commission, Commonwealth agencies including the National Measurement Institute, Department of Home Affairs, Australian Taxation Office and Australian Competition and Consumer Commission, jurisdictional representatives on the National Expert Reference Group on Tobacco and key tobacco non-government organisation stakeholders were also consulted.

Tobacco importers were supportive of the proposed amendment. Consultation highlighted some technical concerns about the application and placement of the identifier on varying formats of tobacco product packaging. These were considered and addressed where this facilitated application of the identifier whilst maintaining the integrity of the plain packaging regulations.

Stakeholders also requested that the Amendment Regulation allow for all further track and trace identifiers required by other countries implementing the Protocol and related new laws. The Amendment Regulation only addresses the new EU law at this time as it is not possible by regulations to allow for new laws that have not come into force in other countries.

The Principal Regulations are due to sunset on 1 April 2022 and are subject to thematic review prior to that time. It is anticipated that through this review there may be amendments to the Act to allow track and trace identifiers from other countries and an opportunity for refinement of the regulations to address any further technical considerations.

Details of the Amendment Regulation is set out in Attachment A.

The Amendment Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*.

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

Authority: Subsection 109 of the *Tobacco Plain Packaging Act 2011*

Details of the Tobacco Plain Packaging Amendment (Track and Trace Identifiers) Regulations 2018

Section 1 – Name of Regulations

This section provides that the title of the Regulations is the *Tobacco Plain Packaging Amendment (Track and Trace Identifiers) Regulations 2018*.

Section 2 – Commencement

This section would provide for the Regulations to commence the day after the Instrument is registered.

Section 3 – Authority

This section provides that the *Tobacco Plain Packaging Amendment (Track and Trace Identifiers) Regulations 2018* is made under Section 109 of the *Tobacco Plain Packaging Act 2011*.

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 – Amendments

Item 1 – After the heading to Regulation 1.1.3

Item 1 adds a note after the heading of Regulation 1.1.3 of the Principal Regulations. The purpose of this note is to provide for a number of expressions used in the Principal Regulations that are defined in the Act.

Item 2 – Regulation 1.1.3

Item 2 adds definitions to Regulation 1.1.3 of the Principal Regulations for machine readable code. The purpose of this Regulation is to provide meaning for the format of one of the forms of the track and trace identifier that would be allowed on retail tobacco packaging.

Item 2 also adds definition for the primary packaging track and trace identifier and for secondary packaging track and trace identifier. The purpose of this Regulation is to provide meaning for the retail tobacco packaging the track and trace identifier is required to appear on.

Item 2 incorporates by reference Articles 6 and 10 of the Commission Implementing Regulation (EU) 2018/574 of 15 December 2017, as existing on the day this definition commences. The Regulation could in 2018 viewed on the European Union website (<http://europa.eu>)

Item 3 – Regulation 1.1.3

Item 3 repeals the note in Regulation 1.1.3 of the Principal Regulations.

Item 4 – After subregulation 2.3.1(2)

Item 4 adds a subregulation to Regulation 2.3.1 of the Principal Regulations. The purpose of this subregulation is to provide for the circumstances for track and trace identifier marks appearing on retail packaging.

Item 5 – Subregulation 2.3.1(5)

Item 5 adds a subregulation to Regulation 2.3.1(5) of the Principal Regulations. The purpose of this subregulation is to provide for track and trace identifier marks that do not obscure any relevant legislative requirement, constitute tobacco advertising and promotion, or provide access to tobacco advertising and promotion.

Item 6 – At the end of Division 2.3

Item 6 adds Regulation 2.3.10 and 2.3.11 to the Principal Regulations. The purpose of this Regulation is to provide for track and trace identifier marks on retail packaging and prescribes requirements for placement and adherence that is consistent with the Act and Principal Regulations.

Statement of Compatibility with Human Rights

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

Tobacco Plain Packaging Amendment (Track and Trace Identifiers) Regulations 2018

This Disallowable 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 *Tobacco Plain Packaging Amendment (Track and Trace Identifiers) Regulations 2018* (the Amendment Regulations) amends the *Tobacco Plain Packaging Regulations 2011* (the Principal Regulations) to allow tobacco products imported into Australia from the European Union's (EU) to include track and trace unique identification markings on retail packaging.

The Amendment Regulations ensure the *Tobacco Plain Packaging Act 2011* is facilitating and not hampering the EU efforts to combat illicit tobacco under a multilateral tobacco control agreement.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- The right to health: Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- The right to life: Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

Right to health; right to life

The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and includes an obligation to take reasonable measures within available resources to progressively secure broader enjoyment of the right.

Permitting the EU track and trace unique identifier on imported tobacco products helps to promote the right to health. This is because the measure enhances efforts to combat the global illicit tobacco trade. Combatting illicit tobacco ensures that consumers are provided with a full suite of Government strategies, aimed at reducing tobacco consumption rates in Australia. This is important because the illicit tobacco trade:

- impacts directly on the effectiveness of price-based public health policies aimed at decreasing smoking rates; and
- smokers accessing illicit products may not benefit from other public health measures including tobacco plain packaging and graphic health warnings.

By facilitating efforts to combat the global illicit tobacco trade this measure contributes to work to reduce smoking prevalence rates. By reducing the incidence of smoking and thereby reducing the risk of smoking-related deaths, the measure also promotes the right to life. Tobacco use is a leading cause of preventable and premature death and disability and contributes to and compounds existing health and social inequalities. In 2011, tobacco use killed almost 19,000 people in Australia and was responsible for nine per cent of the total burden of disease and injury, making it the most burdensome risk factor.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.

Senator the Hon Bridget McKenzie
Minister for Regional Services, Sport, Local Government and Decentralisation