

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Customs Act 1901

Customs Legislation Amendment (Asbestos) Regulations 2019

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, 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 which are necessary or convenient to be prescribed for giving effect to the Act.

In addition, sections 50, 112 and 233BAA of the Act also set out the head of power under which the *Customs Legislation Amendment (Asbestos) Regulations 2019* (the Amendment Regulations) are made.

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.

Section 112 of the Act provides, in part, that the Governor-General may, by regulation, prohibit the exportation of goods from Australia and that the power may be exercised by prohibiting the exportation of goods absolutely or by prohibiting the exportation of goods unless specified conditions or restrictions are complied with.

Section 233BAA of the Act provides, in part, that the regulations may provide that specified goods constitute tier 1 goods.

The *Customs Regulation 2015* (the Customs Regulation), amongst other matters, sets out a list of goods (referred to as prescribed ‘tier 1 goods’). These goods, if exported or imported in contravention of the Act, will result in an offence punishable by imprisonment of five years and/or 1000 penalty units.

The *Customs (Prohibited Exports) Regulations 1958* (the Prohibited Exports Regulations) and the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations) control the exportation and importation, respectively, of goods specified in the various regulations and Schedules to those Regulations. Asbestos and goods containing asbestos are goods subject to such control.

The purpose of the Amendment Regulations is to:

- update and align the definition of asbestos under the Prohibited Exports Regulations and the Prohibited Imports Regulations with the definition under the *Work Health and Safety Regulations 2011* (the WHS Regulations);

- enable all categories of asbestos and goods containing asbestos to be imported from an external Territory for the purpose of disposal in a State or Territory;
- repeal spent provisions and exceptions to the prohibition on the exportation and importation of asbestos and goods containing asbestos that are no longer necessary;
- amend the process relating to document production requirements for the exportation and importation of asbestos and goods containing asbestos; and
- amend the list of tier 1 goods prescribed under Schedule 7 to the Customs Regulation to include asbestos and goods containing asbestos.

Australia has a deadly asbestos legacy, with the highest reported per capita incidence of asbestos-related disease in the world, including incidences of mesothelioma. The Australian Government is committed to ensuring new asbestos does not enter Australia to add to this deadly legacy. In support of this, the amendments have the effect of capturing automatically asbestiform varieties of asbestos banned under the WHS Regulations, making the document production requirement process more efficient and flexible, and further deterring the unlawful exportation and importation of such goods.

Details of the amendments contained in the Amendment Regulations are at [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 Amendment Regulations were formulated in collaboration with the Department of Jobs and Small Business, and through consultation with the relevant Commonwealth, State and Territory government authorities. Specific non-government and industry sectors were also consulted in the process in order to consider the expectations of affected stakeholders.

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

The Amendment Regulations commence on the day after registration on the Federal Register of Legislation.

OPC63799 – B

Details of the *Customs Legislation Amendment (Asbestos) Regulations 2019*

Section 1 Name

This section provides that the title of the instrument is the *Customs Legislation Amendment (Asbestos) Regulations 2019* (the Amendment Regulations).

Section 2 Commencement

This section sets out the date on which the amendments contained in the Amendment Regulations commence, which is the date after the Amendment Regulations are registered on the Federal Register of Legislation.

Section 3 Authority

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

Section 4 Schedules

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 for any other item in a Schedule to this instrument to have effect according to its own terms.

Schedule 1 to the Amendment Regulations amends the *Customs (Prohibited Exports) Regulations 1958* (the Prohibited Exports Regulations), the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations), and the *Customs Regulation 2015* (the Customs Regulation).

Schedule 1—Amendments

Customs (Prohibited Exports) Regulations 1958

Item 1 Subregulation 2(1) (definition of *asbestos*)

This item repeals the existing definition of ‘asbestos’ under subregulation 2(1) of the Prohibited Exports Regulations and substitutes with a new definition.

The new definition of asbestos has the same meaning as in the *Work Health and Safety Regulations 2011* (the WHS Regulations). Subregulation 5(1) of the WHS Regulations provides that asbestos mean the asbestiform varieties of mineral silicates belonging to the serpentine or amphibole groups of rock forming minerals including the following:

- (a) actinolite asbestos;
- (b) grunerite (or amosite) asbestos (brown);
- (c) anthophyllite asbestos;
- (d) chrysotile asbestos (white);
- (e) crocidolite asbestos (blue);
- (f) tremolite asbestos;
- (g) a mixture that contains one or more of the minerals referred to in paragraphs (a) to (f).

A ban on the domestic use of asbestos has been in place since 2003. The purpose of this amendment is to capture automatically any asbestiform varieties of asbestos banned under the WHS Regulations, such that the exportation of any asbestiform asbestos, and certain goods containing asbestiform asbestos, is prohibited under regulation 4 of the Prohibited Exports Regulations.

The effect of this new definition of asbestos in the Prohibited Exports Regulations is that the varieties of asbestos controlled is limited to those asbestiform varieties under the WHS Regulations noted above, that are recognised as posing a risk to human health. The current definition of asbestos also captures non-asbestiform varieties, which do not pose the same risk to human health as asbestiform varieties.

The notes below for item 21 explain the related penalties associated with the unlawful exportation of asbestos and goods containing asbestos.

Item 2 Subregulation 2(1)

This item amends subregulation 2(1) of the Prohibited Exports Regulations to insert a new definition of ‘Work Health and Safety Minister’.

The amendment in this item provides that a reference to the Work Health and Safety Minister is a reference to the Minister administering the *Work Health and Safety Act 2011* (the WHS Act). The WHS Act replaced the *Occupational Health and Safety Act 1991*, which was previously titled the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the OHS (Commonwealth Employment) Act).

This item supports the amendments in item 6, which amongst other matters, enables the Work Health and Safety Minister to grant a permission to a person to export asbestos and goods containing asbestos.

Item 3 Regulation 4 (heading)

This item repeals the existing heading for regulation 4 of the Prohibited Exports Regulations and substitutes with a new heading (Exportation of asbestos or certain goods containing asbestos).

Item 4 Subregulation 4(1)

This item amends subregulation 4(1) of the Prohibited Exports Regulation to omit the words 'Part 1 of'.

This amendment is consequential to the amendments by item 10, which repeals Part 2 of Schedule 1 to the Prohibited Exportation Regulations as the operation of that Part is spent and is redundant. Schedule 1 therefore no longer has two Parts.

Item 5 Paragraphs 4(1)(b) to (f)

This item repeals existing paragraphs 4(1)(b) to (f) of the Prohibited Exports Regulations, and substitutes with new paragraphs 4(1)(b), (c) and (d).

Exceptions under existing paragraphs 4(c) and (d)

Existing paragraphs 4(1)(c) and (d) relate to exceptions in respect of confirmations given by Safety, Rehabilitation and Compensation Commission and the Seafarers Safety, Rehabilitation and Compensation Authority, respectively. Applications for the purpose of either existing paragraph 4(1)(c) or (d) have not been made. The Australian Government considers that it is unlikely that an application would ever be made, and therefore considers the relevant exceptions to be no longer required. As such, the exceptions under existing paragraphs 4(1)(c) and (d) are repealed.

New paragraph 4(1)(b)

New paragraph 4(1)(b) amends the exception under existing paragraph 4(1)(b) to provide that, for the exportation:

- (i) a confirmation from an authority of a State or Territory is in force stating that the asbestos is, or goods are, for research, analysis or display; and
- (ii) a copy of the confirmation is produced to a Collector if the Collector requests; or

New subparagraph 4(1)(b)(i) replicates the confirmation of use to which the asbestos be put by a State or Territory as provided under existing paragraph 4(3)(b). The other requirements provided under existing paragraph 4(3)(a) are no longer required because the operation of Part 2 of Schedule 1 to the Prohibited Exports Regulations is spent and that Schedule is repealed by item 10.

New subparagraph 4(1)(b)(ii) changes the documentation production requirements under existing subregulation 4(5) such that, instead of requiring a copy of a confirmation to be

provided to a Collector every time that confirmation is relied upon, the copy of the confirmation is only required upon request by a Collector. This allows for flexibility of process, where a confirmation is given for a specified duration of time and where such confirmation was previously produced to a Collector, to allow a Collector to decide whether to request a further copy of the same confirmation for subsequent exportation of asbestos within the specified period.

New paragraph 4(1)(c)

New subparagraph 4(1)(c) replicates the exception under existing paragraph 4(1)(e), which relates to a permission granted by the Minister or a person authorised by the Minister, with modification that the requirement that a copy of a permission to be produced to a Collector only applies upon a request by a Collector.

For the same reasons above, the modified exception allows for flexibility of process, such that where a permission is given granted a specified duration of time and where such permission was previously produced to a Collector, a Collector could decide whether to request a further copy of the same permission for subsequent exportation of asbestos within the specified period.

New paragraph 4(1)(d)

New paragraph 4(1)(d) replicates the exception under existing paragraph 4(1)(f) that applies to goods that are raw materials that contain naturally occurring traces of asbestos.

Item 6 Subregulations 4(3), (4) and (5)

This item repeals existing subregulations 4(3), (4) and (5) of the Prohibited Exports Regulations and substitutes with new subregulations 4(3) and (4).

This amendment is consequential to the amendments by items 5 and 10, which repeal exceptions to the prohibition on the exportation of asbestos and goods containing asbestos under regulation 4 of the Prohibited Exportation Regulations that are no longer necessary. As a result, existing paragraphs 4(3)(b) and subregulation (5) of the Prohibited Exports Regulations are superfluous and are repealed.

Existing paragraph 4(3)(a) of the Prohibited Exports Regulations is redundant because the operation of Part 2 of Schedule 1 to the Prohibited Exports Regulations is spent and that Part is repealed by item 10.

New subregulation 4(3)

New subregulation 4(3) replicates the power of the Minister to grant an export permission under existing subregulation 4(4) of the Prohibited Exports Regulations, and provide for the Work Health and Safety Minister, or a person authorised by that Minister, to grant such permissions. As per the amendments in item 2, the Work Health and Safety Minister is the Minister administering the WHS Act.

New subregulation 4(4)

New subregulation 4(4) provides that a permission under subregulation 4(3) may be granted subject to conditions or requirements to be complied with by a person either before or after the exportation.

Item 7 In the appropriate position in Part 5

This item amends the Prohibited Exports Regulations to insert a new regulation 19 Transitional matters—effect of *Customs Legislation Amendment (Asbestos) Regulations 2019* on permission and confirmations.

New regulation 19 applies such that:

- a confirmation:
 - provided in accordance with subregulation 4(3) for the purposes of paragraph 4(1)(b); and
 - in force immediately before the commencement of the Amendment Regulations;continues in force (and may be dealt with) as if it were a confirmation for the purposes of paragraph 4(1)(b) as amended by the Amendment Regulations;
- a permission:
 - granted under subregulation 4(4); and
 - in force immediately before the commencement of the Amendment Regulations;continues in force (and may be dealt with) as if it had been granted under subregulation 4(3) as amended by the Amendment Regulations;

For example, if confirmation has been given under existing paragraph 4(1)(b) that goods are for research, analysis or display, the confirmation will be in force for new paragraph 4(1)(b).

Item 8 Schedule 1 (heading)

This item repeals the heading, but not including the note, of Schedule 1 to the Prohibited Exports Regulations and substitutes with a new heading: Schedule 1—Goods containing asbestos.

This amendment is consequential to the amendment in items 9 and 10, which repeal the heading for Part 1 of Schedule 1 to the Prohibited Exports Regulations, and repeal Part 2 of Schedule 1 in its entirety, respectively. As a result, Schedule 1 to the Prohibited Exports Regulations only concerns goods containing asbestos, and as such item 8 amends the heading of Schedule 1 to this effect.

Item 9 Part 1 of Schedule 1 (heading)

This item amends Schedule 1 to the Prohibited Exports Regulations to repeal the heading for Part 1.

This amendment is consequential to item 10, which repeals Part 2 of Schedule 1 to the Prohibited Exports Regulations as the operation of that Part is spent. As a result, Schedule 1

to the Prohibited Exports Regulations only concerns goods containing asbestos, and item 9 repeals the heading for Part 1 as it is superfluous.

Item 10 Part 2 of Schedule 1

This item amends Schedule 1 to the Prohibited Exports Regulations to repeal Part 2, which sets out permitted exportations of asbestos, and the dates before which the goods must be exported.

The last applicable deadline for the exportation of asbestos specified in Part 2 is 31 December 2007. As such, the operation of Part 2 is spent and that Part is repealed.

Customs (Prohibited Imports) Regulations 1956

Item 11 Subregulation 2(1) (definition of *amphibole asbestos*)

This item repeals the definition of ‘amphibole asbestos’ under subregulation 2(1) of the Prohibited Imports Regulations.

This amendment is consequential to the amendments in item 14, which amends the prohibition on the importation of asbestos under subregulation 4C(1) of the Prohibited Imports Regulations to omit all references to ‘amphibole’, resulting in that prohibition applying to all categories of asbestos and goods containing asbestos, instead of amphibole asbestos and goods containing amphibole asbestos. As a result, the definition of ‘amphibole asbestos’ is redundant and is repealed by item 11.

Item 12 Subregulation 2(1) (definition of *asbestos*)

This item repeals the existing definition of asbestos under subregulation 2(1) of the Prohibited Imports Regulations and substitutes with a new definition.

The new definition of asbestos has the same meaning as in the WHS Regulations. Subregulation 5(1) of the WHS Regulations provides that asbestos mean the asbestiform varieties of mineral silicates belonging to the serpentine or amphibole groups of rock forming minerals including the following:

- (a) actinolite asbestos;
- (b) grunerite (or amosite) asbestos (brown);
- (c) anthophyllite asbestos;
- (d) chrysotile asbestos (white);
- (e) crocidolite asbestos (blue);
- (f) tremolite asbestos;
- (g) a mixture that contains one or more of the minerals referred to in paragraphs (a) to (f).

A ban on the domestic use and the importation of asbestos have been in place since 2003. The purpose of this amendment is to capture automatically any asbestiform varieties of asbestos banned under the WHS Regulations, such that the importation of asbestiform asbestos, and goods containing asbestiform asbestos, is prohibited under regulation 4C of the Prohibited Imports Regulations.

The effect of this new definition of asbestos in the Prohibited Imports Regulation is that the varieties of asbestos controlled is limited to those asbestiform varieties under the WHS Regulations noted above that are recognised as posing a risk to human health. The current definition of asbestos also captures non-asbestiform varieties, which do not pose the same risk to human health as asbestiform varieties.

The notes below for item 21 explain the related penalties associated with the unlawful importation of asbestos and goods containing asbestos.

Item 13 Subregulation 2(1)

This item amends subregulation 2(1) of the Prohibited Imports Regulations to insert a new definition of ‘Work Health and Safety Minister’.

The amendment in this item provides that a reference to the Work Health and Safety Minister is a reference to the Minister administering the WHS Act. The WHS Act replaced the *Occupational Health and Safety Act 1991* (the OHS Act). This item supports the amendments in item 16, which amongst other matters, enables the Work Health and Safety Minister to grant a permission to a person to export asbestos and goods containing asbestos.

Item 14 Subregulation 4C(1)

This item amends subregulation 4C(1) of the Prohibited Imports Regulations to omit all references to the word ‘amphibole’.

As a result, the prohibition under subregulation 4C(1) is longer be limited to the importation of amphibole asbestos and goods containing amphibole asbestos. Instead, together with the amendment in item 12, subregulation 4C(1) prohibits the importation of asbestiform varieties of mineral silicates belonging to the serpentine or amphibole groups of rock forming minerals including the following (and goods containing these asbestos):

- (a) actinolite asbestos;
- (b) grunerite (or amosite) asbestos (brown);
- (c) anthophyllite asbestos;
- (d) chrysotile asbestos (white);
- (e) crocidolite asbestos (blue);
- (f) tremolite asbestos;
- (g) a mixture that contains one or more of the minerals referred to in paragraphs (a) to (f).

Therefore, if any of the listed varieties of asbestos are imported in contravention to the prohibition under subregulation 4C(1) of the Prohibited Imports Regulations, such goods will be prohibited imports and therefore able to be seized without a warrant at the border.

The purpose of this amendment is to remove the distinction between amphibole asbestos and chrysotile under regulation 4C. As a result, the majority of the exceptions that apply to the prohibition on the importation of chrysotile and goods containing chrysotile under existing subregulation 4C(3) is superfluous and are repealed by item 16. Relevantly, for those remaining exceptions that are still necessary under existing subregulation 4C(3), those exceptions are replicated and included as exceptions under subregulation 4C(1).

Item 15 Paragraph 4C(1)(b)

This item repeals existing paragraph 4C(1)(b) of the Prohibited Imports Regulations and substitutes with new paragraphs 4C(1)(b) and (ba).

New paragraph 4C(1)(b)

New paragraph 4C(1)(b) provides that, for the importation:

- (i) a permission is in force under new subregulation 4C(2); and
- (ii) a copy of the permission is produced to a Collector if the Collector requests.

New subparagraph 4C(1)(b)(i) replicates the requirement under existing paragraph 4C(1)(b). However, new subparagraph 4C(1)(b)(ii) changes the documentation production requirements under existing subparagraph 4C(1)(b) such that, instead of requiring a copy of a permission to be provided to a Collector every time that permission is relied upon, the copy of the permission is only required upon request by a Collector. This allows for flexibility of process, where a permission is given for a specified duration of time and where such permission was previously produced to a Collector, to allow a Collector to decide whether to request a further copy of the same permission for subsequent exportation of asbestos within the specified period.

New paragraph 4C(1)(ba)

New paragraph 4C(1)(ba) provides that, for the importation:

- (i) confirmation from an authority of a State or Territory is in force stating that the use of the asbestos or goods is research, analysis or display in accordance with the law of the State or Territory relating to work health and safety; and
- (ii) a copy of the confirmation is produced to a Collector if the Collector requests

New subparagraph 4C(1)(ba)(i) replicates requirements under existing paragraph 4C(5)(b), but extends it to all asbestos or goods containing asbestos. The other requirement under existing paragraph 4C(5)(a) is not replicated because the operation of Schedule 3B to the Prohibited Imports Regulations is spent and that Schedule is repealed by item 18.

However, new subparagraph 4C(1)(ba)(ii) changes the documentation production requirement under existing subregulation 4C(7) such that, instead of requiring a copy of a confirmation to be provided to a Collector every time that confirmation is relied upon, the copy of the confirmation is only required upon request by a Collector. This allows for flexibility of process, where a confirmation is given for a specified duration of time and where such confirmation was previously produced to a Collector, to allow a Collector to decide whether to request a further copy of the same confirmation for subsequent exportation of asbestos within the specified period.

Item 16 Subregulations 4C(2) to (7)

This item repeals existing subregulations 4C(2), (3), (5), (6) and (7) of the Prohibited Imports Regulations, and substitutes new subregulations 4C(2), (3) and (4).

This amendment is consequential to the amendments in items 12, 14 and 15, which results in the prohibition on importation under subregulation 4C(1) applying to all asbestos and goods

containing asbestos. As such, existing paragraphs 4C(3)(a), 4C(3)(b), 4C(3)(e), 4C(3)(g), 4C(3)(h) and 4C(5)(a), and subregulation 4C(7) are superfluous and are repealed.

Existing paragraphs 4C(3)(c) and (d) relate to exceptions in respect of confirmations given by the Safety, Rehabilitation and Compensation Commission and the Seafarers Safety, Rehabilitation and Compensation Authority, respectively. Applications for the purpose of either existing paragraph 4C(3)(c) or (d) have not been made. The Australian Government considers that it is unlikely that an application ever be made, and therefore considers the relevant exceptions to be no longer required. As such, the exceptions under existing paragraphs 4C(3)(c) and (d) are repealed.

Existing paragraph 4C(5)(a) is redundant because the operation of Schedule 3B to the Prohibited Imports Regulations is spent and that Schedule is repealed by item 18.

New subregulation 4C(2)

New subregulation 4C(2) replicates the power under existing subregulation 4C(2) and extend it to all asbestos, or goods containing asbestos, and provides for the Work Health and Safety Minister or a person authorised by that Minister to grant a permission for the importation of asbestos or goods containing asbestos. Because of the amendments in items 11 and 14, the permission that may be granted is for all asbestos rather than just for chrysotile.

Additionally, as per the notes above for item 13, the Work Health and Safety Minister is the Minister administering the WHS Act.

New subregulation 4C(3)

New subregulation 4C(3) modifies the exception under existing paragraph 4C(3)(f) and the requirement relating to the satisfaction of the Minister under existing subregulation 4C(6) such that:

- instead of chrysotile and goods containing chrysotile, allow all varieties of asbestos and goods containing asbestos to be imported for research, analysis or display; and
- for importation from an external Territory and not just the Australian Antarctic Territory, allow for asbestos and goods containing asbestos to also be imported for disposal in a State or Territory.

The effect of this amendment is that asbestos and goods containing asbestos can be imported for the purpose of research, analysis or display. However, where asbestos and goods containing asbestos are imported from an external Territory, the importation of such goods may also be for the purpose of disposal in a State or Territory.

“External Territory” under the *Acts Interpretation Act 1901* means Ashmore and Cartier Islands, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, the Australian Antarctic Territory, the Territory of the Heard and McDonald Islands and Norfolk Island.

Under existing paragraph 4C(3)(f), an exception to the prohibition on the importation of chrysotile and goods containing chrysotile is if such goods is imported from the Australian Antarctic Territory. As a result of new subregulation 4C(3), the importation of any varieties of asbestos and goods containing asbestos from the Australian Antarctic Territory is

prohibited unless a permission is granted by the Work Health and Safety Minister or a person authorised by the Minister to do so.

New subregulation 4C(4)

New subregulation 4C(4) provides that a permission under subregulation 4(2) may be granted subject to conditions or requirements to be complied with by a person either before or after the importation.

Item 17 After regulation 9

This item amends the Prohibited Imports Regulations to insert a new regulation 10 Transitional matters—effect of *Customs Legislation Amendment (Asbestos) Regulations 2019* on permissions and confirmations.

New regulation 10 applies such that:

- a permission:
 - granted under subregulation 4C(2); and
 - in force immediately before the commencement of the Amendment Regulations;continues in force (and may be dealt with) as if it had been granted under that subregulation as amended by the Amendment Regulations;
- a confirmation:
 - provided in accordance with paragraph 4C(3)(b); and
 - in force immediately before the commencement of the Amendment Regulations;continues in force (and may be dealt with) as if it were a copy of the permission for the purposes of paragraph 4C(1)(ba) as amended by the Amendment Regulations.

For example if permission has been given under existing subregulation 4C(2) that permit goods to be imported, that permission will continue to be in force for the amended subregulation 4C(2).

Item 18 Schedule 3B

This item amends the Prohibited Imports Regulations to repeal Schedule 3B, which sets out the permitted importations of chrysotile for existing paragraph 4C(5)(a) of the Prohibited Imports Regulations and the dates by which the goods must be imported.

As the last deadline for the importation of the permitted chrysotile is 31 December 2010, the application of Schedule 3B is spent and no longer necessary. The purpose of item 18 is to repeal this spent Schedule.

Item 19 Schedule 12 (table item 8)

This item amends Schedule 12 to the Prohibited Imports Regulations to repeal table item 8, which concerns gas masks that contain asbestos as goods the importation of which is prohibited without permission under regulation 4U of the Prohibited Imports Regulations. The importation of these goods is subject to the prohibition under amended regulation 4C of the Prohibited Imports Regulations.

This amendment is necessary to ensure that the importation of these goods is prohibited unless the Work Health and Safety Minister gives a permission to do so.

Customs Regulation 2015

Item 20 At the end of Part 18

This item amends the Customs Regulation to insert new section 156, which provides that the amendments of these Regulations made by the Amendment Regulations apply in relation to:

- (a) goods imported into Australia on or after the commencement of the Amendment Regulations; or
- (b) goods exported from Australia on or after the commencement of the Amendment Regulations.

This amendment is consequential to item 21.

Item 21 Subclause 1(1) of Schedule 7 (at the end of the table)

This item amends the table under subclause 1(1) of Schedule 7 to the Customs Regulations to insert new table item 24.

Section 233BAA of the Act concerns tier 1 goods and, in part, enables goods to be prescribed as tier 1 goods insofar as the importation or exportation of the goods so prescribed is prohibited, either absolutely or on condition, by the Prohibited Exports Regulations or the Prohibited Imports Regulations.

Under subsection 233BAA(4), a person commits an offence against this subsection if:

- (a) the person intentionally imported goods; and
- (b) the goods were tier 1 goods and the person was reckless as to that fact; and
- (c) their importation:
 - (i) was prohibited under the Act absolutely; or
 - (ii) was prohibited under the Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.

A person convicted of an offence under subsection 233BAA(4) is punishable by a fine not exceeding 1000 penalty units or imprisonment for up to five years, or both. An offence relating to the exportation of tier 1 goods set out under subsection 233BAA(5).

For the purpose of section 233BAA, tier 1 goods are those goods prescribed in the table under subclause 1(1) of Schedule 7 to the Customs Regulation.

New item 24 inserted into the table under subclause 1(1) of Schedule 7 concerns:

- (a) asbestos;
- (b) in the case of exportation—goods mentioned in Schedule 1 to the Prohibited Exports Regulations that contain asbestos;
- (c) in the case of importation—goods containing asbestos

The exportation and importation of asbestos and goods containing asbestos is prohibited under the Prohibited Exports Regulations and the Prohibited Imports Regulations, respectively.

Under section 233 and subsection 233AB(2) of the Act, the exportation of prohibited exports and the importation of prohibited imports are strict liability offences punishable by a fine not exceeding 1000 penalty units or 3 times the value of the goods whichever is the greater.

The amendment in item 21 has the effect of enabling proceedings, as an alternative to the strict liability offence under section 233, to be brought against a person under section 233BAA for unlawful exportation and importation of asbestos and goods containing asbestos. The purpose of this amendment is to provide greater deterrence to the unlawful importation and exportation of asbestos and goods containing asbestos.

Statement of Compatibility with Human Rights

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

Customs Legislation Amendment (Asbestos) Regulations 2019

The disallowable legislative instrument, titled the *Customs Legislation Amendment (Asbestos) Regulations 2019* (the 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 *Customs (Prohibited Exports) Regulations 1958* (the Prohibited Exports Regulations) and the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations) control the exportation and importation, respectively, of goods specified in the various regulations and Schedules to those Regulations. Asbestos and goods containing asbestos are goods subject to such control.

The *Customs Regulation 2015* (the Customs Regulation), amongst other matters, sets out a list of goods (referred to as prescribed ‘tier 1 goods’). These goods, if exported or imported in contravention of the Act, will result in an offence punishable by imprisonment of five years and/or 1000 penalty units.

The purpose of the legislative instrument is to:

- update and align the definition of asbestos under the Prohibited Exports Regulations and the Prohibited Imports Regulations with the definition under the *Work Health and Safety Regulations 2011* (WHS Regulations);
- enable all varieties of asbestos and goods containing asbestos to be imported from an external Territory for the purpose of disposal in a State or Territory;
- repeal spent provisions and exceptions to the prohibition on the exportation and importation of asbestos and goods containing asbestos that are no longer necessary;
- amend the requirement to produce a confirmation, or permission in respect of the exportation and importation of asbestos and goods containing asbestos, such that the production of such documents are only necessary upon request by a Collector; and
- amend the list of tier 1 goods prescribed under Schedule 7 to the Customs Regulation to include asbestos and goods containing asbestos. This would have the effect of enabling proceedings, as an alternative to the strict liability offence under section 233, to be brought against a person under section 233BAA for unlawful exportation and importation of asbestos and goods containing asbestos.

Australia has a deadly asbestos legacy, with the highest reported per capita incidence of asbestos-related disease in the world, including incidences of mesothelioma. The Australian Government is committed to ensuring new asbestos does not enter Australia to add to this deadly legacy. In support of this, the amendments will have the effect of capturing automatically all varieties of asbestos banned under the WHS Regulations, making the document production requirement more efficient and flexible, and further deterring the unlawful exportation and importation of such goods.

Background to the legislative instrument

On 1 January 2012, the *Occupational Health and Safety Act 1991* (the OHS Act) was repealed and replaced by the *Work Health and Safety Act 2011* (the WHS Act). Correspondingly, the OHS Regulations were repealed and replaced by the WHS Regulations.

The previous definition of asbestos and the provisions around the ban in the WHS Regulations differed slightly to those contained in the OHS Regulations. However, the Prohibited Imports and Prohibited Exports Regulations had not been updated to reflect the changes that were made to the definition. As a result, the Prohibited Imports and Prohibited Exports Regulations previously defined asbestos differently to the WHS Regulations, still directly referenced the OHS Regulations, and included expired transitional provisions.

Other provisions which gave the ability for the granting of exemptions to allow the importation/exportation of asbestos were removed.

The changes to the Prohibited Imports Regulations include:

- An amendment to change the definition of asbestos to align with definition within subregulation 5(1) of the WHS Regulations. That is, asbestos means the asbestiform varieties of mineral silicates belonging to the serpentine or amphibole groups of rock forming minerals including the following:
 - (a) actinolite asbestos;
 - (b) grunerite (or amosite) asbestos (brown);
 - (c) anthophyllite asbestos;
 - (d) chrysotile asbestos (white);
 - (e) crocidolite asbestos (blue);
 - (f) tremolite asbestos;
 - (g) a mixture that contains one or more of the minerals referred to in paragraphs (a) to (f).
- The new definition has the effect of prescribing asbestiform asbestos silicates only, as subject to the border control. Previously, the definition did not differentiate between asbestiform and non-asbestiform. The effect of this is that all asbestos silicates were controlled at the border, creating a barrier to trade. The changes also remove the differentiation of amphibole asbestos and chrysotile asbestos within the import prohibition.

A change to regulation 4C replaces reference to the OHS Act with the WHS Act such that the Minister administering the WHS Act can grant import permission for certain lawful purposes.

Further changes to regulation 4C include:

- A new provision added to change the Ministerial permission regime to in relation to the importation of asbestos, and goods containing asbestos, from Australian external territories for the purpose of disposal within the mainland.
 - The provision referencing the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Hazardous Waste Act) does not capture movements of asbestos from external territories to the mainland.

- This ensures consistency for provisions across all external Territories, and increases Commonwealth oversight of the lawful movement of asbestos into Australia.
- The exception allowing the importation of chrysotile asbestos, or goods containing chrysotile asbestos, if the authority of a State or Territory authority confirms that its proposed use is in accordance with that State or Territory's law and is for the purposes of research, analysis or display, remains, but is expanded to capture all varieties of asbestos in line with the new definition.
- The exceptions in respect of confirmations given by the Safety, Rehabilitation and Compensation Commission and the Seafarers Safety, Rehabilitation and Compensation Authority, respectively, are no longer required and are repealed.
- Schedule 3B is repealed as the operation of that Schedule is spent.
- Item 8 of Schedule 12, which relates to border control for gas masks that contain asbestos, is repealed as this is also captured by regulation 4C.

The changes to the Prohibited Exports Regulations include:

- The definition for asbestos has been amended to align with the WHS Regulations, consistent with the information provided for the Prohibited Imports Regulations above.
- The change in definition brings into effect the control of asbestiform asbestos silicates only, for the purposes of export.

A change to regulation 4 replaces reference to the OHS Act with the WHS Act such that Minister administering the WHS Act can grant export permission.

In addition, the exceptions in respect of confirmations given by the Safety, Rehabilitation and Compensation Commission and the Seafarers Safety, Rehabilitation and Compensation Authority, respectively, are no longer required and are repealed.

Schedule 1 - Asbestos

- Part 2 is repealed as the operation of that Part is spent.

The changes to the Customs Regulation include:

Part 1 of Schedule 7 – Tier 1 goods:

- Asbestos, and goods containing asbestos, are prescribed as a Tier 1 good with the effect that;
 - under subsection 233BAA(4), a person commits an offence against this subsection if:
 - (a) the person intentionally imported goods; and
 - (b) the goods were tier 1 goods and the person was reckless as to that fact; and
 - (c) their importation:
 - (i) was prohibited under the Act absolutely; or
 - (ii) was prohibited under the Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.
 - When a person is found guilty of the unlawful importation of asbestos, as an offence against subsection 233BAA(4), a court may impose a

maximum penalty of imprisonment for five years, or 1000 penalty units, or both;

- For the purposes of an offence against subsection 233BAA(4), strict liability applies to the physical element of circumstance of the offence that an approval had not been obtained at the time of the importation;
- An offence relating to the exportation of tier 1 goods is set out under subsection 233BAA(5). When a person is found guilty of the unlawful exportation of asbestos, as an offence against subsection 233BAA(5), a court may impose a maximum penalty of imprisonment for five years, or 1000 penalty units, or both;
 - For the purposes of an offence against subsection 233BAA(5), strict liability applies to the physical element of circumstance of the offence that an approval had not been obtained at the time of the exportation;
- Where a body corporate is convicted of the same offence, the court may impose a pecuniary penalty multiplied by five to that which may be imposed on an individual, under section 4B to the *Crimes Act 1914* (Cth).

Human rights implications

The fundamental principle of the border prohibition for asbestos is to protect human health in Australia. The changes to the Prohibited Imports Regulations and Prohibited Exports Regulations promote the right to enjoy the highest attainable standard of health as articulated under Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 7(b) of the ICESCR provides that all people have the right to safe and healthy working conditions, and Article 12(2)(c) requires states to take steps to ensure the prevention, treatment and control of epidemic, endemic, occupational and other diseases.

- Compatibility with these provisions of the ICESCR will be promoted by changes to strengthen the management of asbestos at the border consistent with the framework set-out under the WHS Regulations. The changes are aimed at better managing the lawful and unlawful importation of asbestos, to further protect human health;
- This will also ensure that border management better supports the provisions of Australia's ban on the domestic use of asbestos, which aims to prevent exposure to asbestos fibres and, as a result, asbestos-related diseases.

The changes also promote the right to health under the ICESCR, particularly for housing. The prevention of imported building materials containing asbestos and the removal of existing legacy asbestos in building infrastructure from the external Territories is a long-term investment in this regard.

- Updating and streamlining the framework of the border control, and strengthening its penalty options, is aimed at preventing asbestos entering the built environment in Australia;
- Options for the storage of asbestos on the external Territories are currently limited, and often subject to the uncertainty of severe climatic events;
- Protecting public health on the external Territories will be enhanced by reducing the risk of exposure to the local population where authorised disposal facilities do not

exist. The movement of asbestos will be facilitated from the external Territories to the mainland for disposal in accordance with the relevant laws of that state or territory.

Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR) states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. This legislative instrument may engage Article 14(2), given that prescribing asbestos as a Tier 1 good may result in the prosecution and potential imprisonment of persons found guilty of unlawfully importing or exporting asbestos and a higher maximum penalty may apply.

Currently, the pecuniary penalty for importing or exporting asbestos under paragraphs 233(1)(b) and (c) is a maximum of 1000 penalty units, or three times the value of the goods, if the value can be determined by the court, and it is a strict liability offence. The corporate multiplier available under subsection 4B(3) of the *Crimes Act 1914* (Cth) (the Crimes Act) is also applicable to pecuniary penalties for border asbestos offences, which provides for a court to impose a maximum of five times that applied to an individual. As a Tier 1 good, this offence has a *mens rea* element of intentionally importing the good and being reckless to it being asbestos. A court may impose a maximum penalty of imprisonment for five years, or 1000 penalty units, or both.

- Persons who may be charged with an offence against section 233BAA of the Customs Act for unlawful asbestos importation or exportation will, as with other offences related to the importation of prohibited goods, be afforded due process and the opportunity to respond to evidence put forward during prosecution.
- The maximum penalty includes imprisonment but there is an intention and reckless element which means that, other than the physical element, unlawful importation or exportation of asbestos will not be strict liability as it is under the current offence.
- While the physical element is strict liability, this relates to an approval not having been obtained at time of import or export.
- The intent of prescribing asbestos as a Tier 1 good is to provide the court with the discretion to impose a penalty of imprisonment for the most serious offending. It is expected that imprisonment would be considered for those cases of an egregious nature. For example, a proven intent to unlawfully import asbestos, blatant recidivism or recklessness in the face of a threat to human health. Providing the court with the discretion to impose these penalties for the most serious offences will enhance existing deterrent measures for the unlawful importation or exportation of asbestos. Given the serious risk to public health posed by asbestos it is appropriate for the most serious offences to be punishable by imprisonment.
- Anecdotal data for unlawful importations of goods containing asbestos shows that in a majority of cases, the asbestos content was present without the knowledge, or contrary to the intention, of the owner of the goods
- The strengthening of penalties is intended to:
 - Make appropriate sanctions available to a court for identified egregious asbestos-related border offences;
 - Increase the deterrence effect; and
 - Encourage voluntary compliance with the asbestos border control
- The increased penalty is necessary, reasonable, and proportionate to protect human health and reflects the seriousness of the offence. Australia has one of the highest incidence rates of mesothelioma in the world, with between 700 and 800 people

diagnosed each year (*source: Australian Institute of Health and Welfare - November 2018*).

The remaining administrative changes, as detailed in the overview above, to the Customs Regulation, Prohibited Imports and Prohibited Exports Regulations are technical in nature and do not impact members of the community and do not engage human rights.

Conclusion

This legislative instrument is compatible with human rights. The changes to the relevant regulations engage human rights considerations, but do not limit them and as outlined above, in some instances promote human rights.

The Hon. Peter Dutton MP
Minister for Home Affairs