EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

Customs Act 1901

Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2023

Legislative Authority

The *Customs Act 1901* (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 that the Governor-General may make regulations not inconsistent with the Customs Act prescribing all matters, which by the Customs Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to the Customs 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 *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations) control the importation into Australia of certain goods by prohibiting importation absolutely, or by making importation subject to a permission or licence.

Section 112 of the Customs 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.

The *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) control the exportation out of into Australia of certain goods by prohibiting importation absolutely, or by making importation subject to a permission or licence.

Background

Australia is a signatory to the following treaties (relevant treaties) and, as such, is obliged to impose import and export controls on substances scheduled in those treaties.

- Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs 1961;
- Convention on Psychotropic Substances of 1971; and
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

The schedules of drugs that can be found in the relevant treaties provide a list of drugs that are under international control. These schedules are generally arranged starting with drugs which require the most control to those requiring the least control. The relevant treaties were

amended by the United Nations Commission on Narcotic Drugs in their 54th and 55th Sessions to update the list of drugs under international control.

The *Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2023* (Amendment Regulations) amend the Prohibited Exports Regulations and Prohibited Imports Regulations to list new drugs subject to import and export control.

The Amendment Regulations are made under the recommendation of the Minister for Health and Aged Care to ensure Australia's continuing compliance with the relevant treaties by adding the newly listed drugs to Schedule 8 to the Prohibited Exports Regulations and Schedule 4 to the Prohibited Imports Regulations.

The Amendment Regulations also amend the Prohibited Imports Regulations to:

- remove a redundant inscription process as part of the importation of goods;
- update the definition of kava food product; and
- clarify the class of individual that the Secretary to the Department administered by the Minister administering the *Therapeutic Goods Act 1989* may authorise for purposes of issuing a permission to import goods covered by regulations 5F, 5G and 5H of the Prohibited Imports Regulations to allow the Norfolk Island Administrator to consider, grant or refuse application for permission or revoke a permission to import goods covered by those provisions.

Impact and effect

The Amendment Regulations have the effect of ensuring Australia's compliance with its obligations under the relevant treaties by inserting new import and export controls over drugs subject to international control under those treaties. The other amendments made by the Amendment Regulations have the effect of ensuring import controls under the Prohibited Imports Regulations reflect modern practices and enable sufficient class of persons to consider, grant or refuse application for permission to import certain goods.

Consultation

The Amendment Regulations were developed in consultation with the Department of Health and Aged Care and the Office of Drug Control, who consulted with Department of Infrastructure, Transport, Regional Development, Communication and the Arts, as the responsible Department for the Administration of Norfolk Island, who supported the amendments. No public consultation was undertaken as the amendments are technical in nature and do not substantially alter existing arrangements.

Details and operations

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

The Amendment Regulations commence on the day after those Regulations are registered on the Federal Register of Legislation.

Details of the Amendment Regulations are set out in **Attachment A**.

Other

The Amendment Regulations are compatible with the human rights and freedoms recognised or declared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full Statement of Compatibility with Human Rights is set out in **Attachment B**.

Division 1 of Part 3 of Chapter 3 of the Legislation Act operates to automatically repeal a legislative instrument that has the sole purpose of amending or repealing another instrument. That Division applies to automatically repeal the Amendment Regulations. As the Amendment Regulations will be automatically repealed, the sunsetting framework under Part 4 of the Legislation Act is not engaged.

ATTACHMENT A

Details of the *Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2023*

Section 1 – Name

This section provides that the title of the Regulations is the *Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2023* (Amendment Regulations).

Section 2 – Commencement

This section sets out, in a table, the date on which each of the provisions contained in the Amendment Regulations commence.

Table item 1 has effect that the Amendment Regulations commence on the day after that instrument is registered on the Federal Register of Legislation.

The note below the table provides that the table relates only to the provisions of the Amendment Regulations as originally made. It will not be amended to deal with later amendments of the Amendment Regulations. The purpose of this note clarifies that the commencement of any subsequent amendments will not be reflected in this table.

Section 3 – Authority

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

Section 4 – Schedules

This section is the 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 Schedules to this instrument has effect according to its terms.

The *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) and *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations) are amended.

Schedule 1—Amendments

Customs (Prohibited Exports) Regulations 1958

Part 1—Amendments

Items 1 to 14

Regulation 10 of the Prohibited Exports Regulations provides that the exportation from Australia of a Schedule 8 drug is prohibited unless certain circumstances apply. The term

‘Schedule 8 drug’ is defined under regulation 9A of the Prohibited Exports Regulations to mean a drug mentioned in Schedule 8 to those Regulations.

Regulation 10A of the Prohibited Exports Regulations sets out the requirements for making an application to be a licenced exporter of a drug described in Schedule 8 drug.

Schedule 8 sets out the description of the drugs which are prohibited for exportation if specified conditions, restrictions or requirements are not complied with.

Items 1 to 14 of the Amendment Regulations amend the relevant parts of Schedule 8 to the Prohibited Exports Regulations to implement the scheduling decisions of the United Nations Commission on Narcotic Drugs made between 2021 and 2022.

Specifically, those items make all of the following amendments to Schedule 8 to the Prohibited Exports Regulations:

(a) item 1 inserts the drug known as ‘Brorphine’ as table item 22B of Part 1 of Schedule 8;
(b) item 2 inserts the drug known as ‘Isotonitazene’ as table item 56A of Part 1 of Schedule 8;
(c) item 3 inserts the drug known as ‘Metonitazene’ as table item 69A of Part 1 of Schedule 8;
(d) item 4 inserts the drug known as ‘CUMYL-PEGACLONE’ as table item 6B of Part 2 of Schedule 8;
(e) item 5 inserts the drug known as ‘Diphenidine’ as table item 10A of Part 2 of Schedule 8;
(f) item 6 inserts the drug known as ‘Eutylone’ as table item 12B of Part 2 of Schedule 8;
(g) item 7 inserts the drug known as ‘MDMB-4en-PINACA’ as table item 18C of Part 2 of Schedule 8;
(h) item 8 inserts the drug known as ‘3-methoxyphencyclidine’ as table item 23AC of Part 2 of Schedule 8;
(i) item 9 inserts the drug known as ‘4-AP (N-Phenyl-4-piperidinamine)’ as table item 2B of Part 3 of Schedule 8;
(j) item 10 inserts the drug known as ‘1-boc-4-AP (tert-Butyl 4-(phenylamino)piperidine-1-carboxylate)’ as table item 3AA of Part 3 of Schedule 8;
(k) item 11 inserts the drug known as ‘Norfentanyl’ as table item 19A of Part 3 of Schedule 8;
(l) item 12 inserts the drug known as ‘Clonazolam’ as table item 7A of Part 4 of Schedule 8;
(m) item 13 inserts the drug known as ‘Diclazepam’ as table item 12A of Part 4 of Schedule 8;
(n) item 14 inserts the drug known as ‘Flubromazolam’ as table item 16B of Part 4 of Schedule 8.

Australia is a signatory to three key drug treaties:

(1) the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs 1961 (Single Convention on Narcotic Drugs).
(2) the Convention on Psychotropic Substances of 1971, and
(3) the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention).

In 2023, the text of the treaties can be found on the United Nations Office on Drugs and Crime website https://www.unodc.org/unodc/treaties/.

The Single Convention on Narcotic Drugs aims to combat drug abuse by coordinated international action. It seeks to limit the possession, use, trade, distribution, import, export, manufacture and production of drugs exclusively to medical and scientific purposes. It also combats drug trafficking through international cooperation to deter and discourage drug traffickers. As a signatory to the Single Convention on Narcotic Drugs, Australia is obliged to control the import and export of drugs listed in a Schedule to that Convention.

The Convention on Psychotropic Substances of 1971 establishes an international control system for psychotropic substances. It responded to the diversification and expansion of the spectrum of drugs of abuse and introduced controls over a number of synthetic drugs according to their abuse potential on the one hand and their therapeutic value on the other. As a signatory, Australia is obligated to control the import and export of drugs listed in the Schedule to this Convention.

The 1988 Convention provides comprehensive measures against drug trafficking, including provisions against money laundering and the diversion of precursor chemicals. It provides for international cooperation through, for example, extradition of drug traffickers, controlled deliveries and transfer of proceedings. As a signatory, Australia is obligated to support international efforts against drug trafficking by controlling for import and export drugs listed in the Schedule to this Convention.

The name of the drugs inserted into Schedule 8 to the Prohibited Exports Regulations corresponds with the drugs of the same name added to the Schedules of the three drug treaties. The effect of the inserting the new drugs into Schedule 8 of the Prohibited Exported Regulations is that the exportation of those drugs is also subject to export control unless specified requirements under regulation 10 or 10A of the Prohibited Exports Regulations are satisfied.

The amendments are required to maintain the currency of drug control measures on export from Australia in line with Single Convention on Narcotic Drugs and are necessary to support the Australian Government's National Drug Strategy and Australia's commitment under that Convention by minimising the diversion and misuse of these substances of not known therapeutic value; for instance, in clandestine drug manufacture.

The amendments apply to these drugs exported from Australia on or after the commencement of the Amendment Regulations.

Customs (Prohibited Imports) Regulations 1956

Item 15 Subregulation 5(14)

Item 15 of the Amendment Regulations repeals subregulation 5(14) of the Prohibited Imports Regulations.

Under subparagraph 5(1)(a)(ii) of the Prohibited Imports Regulations, a requirement that must be satisfied for the importation of drugs listed in Schedule 4 to those Regulations is that the person importing the drug is the holder of a permission (permitting the person to import

the drug) granted by the Secretary or an authorised person. The permission is produced to the Collector under paragraph 5(1)(b) of the Prohibited Imports Regulations.

Where a drug is imported in pursuance of a permission granted under regulation 5 of the Prohibited Imports Regulations, subregulation 5(14) requires the Collector to inscribe in writing on the permission the quantity of drugs imported and the date of importation.

Subregulation 5(14) was previously relevant when customs processes were manual and the importations of legitimate suppliers were all routinely inspected. An officer of Customs would physically inspect the goods and count them; physically stamp the permit; and write the quantity of drugs counted on the permit. Customs processes have since become electronic and compliance activities more sophisticated. Physical inspections are risk-based and shipments of drugs by legitimate suppliers with import permissions are not physically inspected as a matter of routine. It is inefficient and slows down the clearance process for legitimate goods having an officer of Customs inscribe a quantity of drugs derived from looking at computer system onto a permission.

The inscription process is redundant. Subregulation 5(14) of the Prohibited Imports Regulations is no longer required and is repealed.

Item 16 Subregulation 5F(8) (definition of *authorised person*)

This item of the Amendment Regulations repeals and substitutes the definition of *authorised person* in subregulation 5F(8) of the Prohibited Imports Regulations.

The new definition provides that *authorised person* means a person who is authorised by the Secretary under subregulation (9) to be an authorised person. This amendment is made consequent to the amendments made by items 18 of the Amendment Regulations, which changes the scope of persons that may be authorised as authorised persons for the purpose of deciding applications for permission to import kava food products, or revoking such a permission.

Item 17 Subregulation 5F(8) (definition of *kava food product*)

This item of the Amendment Regulations omits the words "this regulation" from the definition of *kava food product* and substitutes with "*Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2023*".

Regulation 5F of the Prohibited Imports Regulations sets out import controls that applies to kava food products and has effect that the importation of such goods is prohibited unless the person importing the goods is a holder of a permission to import such goods, the permission is produced to a Collector and the importation of the goods is not via post.

The term "kava food product" is defined under subregulation 5F(8) of the Prohibited Imports Regulations to mean a food mentioned in section 2.6.3—3 of the Australia New Zealand Food Standards Code (Code), as in force at the commencement of the Amendment Regulations. That version of the Code is captured by subregulation 5F(8) of the Prohibited Imports Regulations because the Code is not a disallowable instrument.

Since the introduction of regulation 5F of the Prohibited Imports Regulations, the Code has been amended to require that kava be prohibited from being used as a food additive or as a processing aid.

The purpose of this amendment is to capture, in regulation 5F of the Prohibited Imports Regulations, the revised meaning of *kava food product*. The amendment achieves this by amending the definition of *kava food product* to mean a food mentioned in section 2.6.3—3 of the Code, as in force at the commencement of the Amendment Regulations.

Item 18 At the end of regulation 5F

This item of the Amendment Regulations adds new subregulation 5F(9) into the Prohibited Imports Regulations for the purposes of the new definition of *authorised persons* inserted by item 16 of the Amendment Regulations.

New subregulation 5F(9) provides that, for the purposes of clarifying that the definition of *authorised person* in subregulation (8), the Secretary may in writing, authorise the following to be an authorised person for the purposes of this regulation:
(a) to be an officer of the Department;
(b) the Administrator of Norfolk Island.

The purpose of this amendment is to expand on the class of individuals that the Secretary may authorise to be an authorised person for the purpose of deciding applications for permission to import kava food products, or to revoke such a permission, to include the Administrator of Norfolk Island.

The Administrator of Norfolk Island is appointed by the Governor-General under the Norfolk *Island Administrator Ordinance 2016* and is the most senior Australian Government representative on Norfolk Island, exercising all powers, and performing all functions, that are conferred on him or her by or under a law in force in the Territory in accordance with such written directions as are given to him or her by the responsible Commonwealth Minister under this subsection.

In recognition of the role of the Administrator of Norfolk Island, the amendment has effect that the Administrator can be conferred powers and functions to consider, grant or refuse applications for permission to import kava food products into Norfolk Island, and to revoking such permissions.

Item 19 Paragraph 5G(1)(a)

This item of the Amendment Regulations amends paragraph 5G(1)(a) of the Prohibited Imports Regulations to omit “officer” and substitute with “person”. As a result, paragraph 5G(1)(a) requires a person seeking to implement substances listed under Schedule 7A of the Prohibited Imports Regulations to be a holder of a permission granted by an “authorised person”.

This is a technical amendment that is necessary and made consequent to the amendments made by items 20 and 21 of the Amendment Regulations, which repeal the definition of *authorised officer*, and insert the definition of *authorised person*, respectively. This amendment does not otherwise change the scope of paragraph 5G(1)(a).

Items 20 to 23

These items of the Amendment Regulations amend regulation 5G of the Prohibited Imports Regulations to explicitly clarify the persons that may be authorised by the Secretary of the Department administered by the Minister administering the *Therapeutic Goods Act 1989* (being the Secretary to the Department of Health and Aged Care) for deciding applications for permission to import a substance mentioned in Schedule 7A to the Prohibited Imports Regulations (including invoking such permissions) and to expand on the class of persons.

Regulation 5G of the Prohibited Imports Regulations sets out import controls that apply to the list of substances (relevant substances) under Schedule 7A to those Regulations and has effect that the importation of relevant substances are prohibited unless the person importing the goods is a holder of a permission to import such goods, and the permission is produced to a Collector.

Authorised officer and authorised person

Previously, persons that may decide an application for permission to import relevant substances and revoke permissions granted are officer authorised in writing by the Secretary to the Department of Health and Aged Care to be an authorised officer.

Item 20 of the Amendment Regulations repeals the definition *authorised officer* under subregulation 5G(6) of the Prohibited Imports Regulations. This definition is replaced by the definition of *authorised person*, which is one of two definitions inserted into subregulation 5G(6) by item 21 of the Amendment Regulations.

The term *authorised person* is defined to mean a person who is authorised by the Secretary under new subregulation 5G(7) of the Prohibited Imports Regulations to be an authorised person. New subregulation 5G(7) is inserted by item 23 of the Amendment Regulations and includes an "officer of the Department", which is an officer of the Department administered by the Minister administering the *Therapeutic Goods Act 1989*.

The purpose of these amendments to change from "authorised officer" to "authorised person" is to clarify the policy intent that officers of the Department administered by the Minister administering the *Therapeutic Goods Act 1989* are the officers that may be authorised by the Secretary to the Department of Health and Aged Care.

Expanding the class of persons that may be authorised as authorised persons

Item 23 of the Amendment Regulations adds new subregulation 5G(7) to the end of regulation 5G of the Prohibited Imports Regulations.

New subregulation 5G(7) provides that, for the purposes of the definition of authorised person in subregulation (6), the Secretary may, in writing, authorise the following to be an authorised person for the purposes of this regulation:
(a) an officer of the Department;
(b) the Administrator of Norfolk Island.

This new subregulation retains the existing ability to authorised officers of the Department administered by the Minister administering the *Therapeutic Goods Act 1989*, but also expands on the persons that may be authorised to consider an application for permission and to revoke permission in connection with the importation of substances listed under Schedule 7A to the Prohibited Imports Regulations to include the Administrator of Norfolk Island.

The Administrator of Norfolk Island is appointed by the Governor-General under the Norfolk *Island Administrator Ordinance 2016* and is the most senior Australian Government representative on Norfolk Island, exercising all powers, and performing all functions, that are conferred on him or her by or under a law in force in the Territory in accordance with such written directions as are given to him or her by the responsible Commonwealth Minister under this subsection.

In recognition of the role of the Administrator of Norfolk Island, the amendment has effect that the Administrator can be conferred powers and functions to consider, grant or refuse applications for permission to import kava food products into Norfolk Island, and to revoking such permissions.

Technical amendments

Item 21 of the Amendment Regulations also inserts into subregulation 5G(6) of the Prohibited Imports Regulations a new definition of *Department*. The new definition provides for *Department*, for the purposes of regulation 5G, to mean the Department administered by the Minister administering the *Therapeutic Goods Act 1989*.

Item 22 of the Amendment Regulations complement the amendment made by item 21 of the Amendment Regulations by omitting "administered by the Minister administering the *Therapeutic Goods Act 1989*" from the definition of *Secretary*.

These amendments are technical in nature and do not change the scope of the definition of Secretary. Rather the amendments are made for consistency of drafting.

Items 24 to 27

Items 24 to 27 of the Amendment Regulations make amendments similar to those made by items 20 to 23 of those Regulations.

These amendments amend regulation 5H of the Prohibited Imports Regulations to explicitly clarify the persons that may be authorised by the Secretary of the Department administered by the Minister administering the *Therapeutic Goods Act 1989* (being the Secretary to the Department of Health and Aged Care) for deciding applications for permission to import a good listed under Schedule 8 to the Prohibited Imports Regulations (including invoking such permissions) and to expand on the class of persons.

Regulation 5H of the Prohibited Imports Regulations sets out import controls that applies to the list of goods (relevant goods) under Schedule 8 to those Regulations and has effect that the importation of relevant substances are prohibited unless the person importing the goods has been a granted permission to import such goods, and the permission is produced to a Collector.

Authorised officer and authorised person

Previously, persons that may decide an application for permission to import relevant goods and revoke permissions granted are officers authorised in writing by the Secretary to the Department of Health and Aged Care to be an authorised officer.

Item 24 of the Amendment Regulations repeals the definition *authorised officer* under subregulation 5H(1) of the Prohibited Imports Regulations. This definition is replaced by the definition of *authorised person*, which is one of two definitions inserted into subregulation 5H(1) by item 25 of the Amendment Regulations.

The term *authorised person* is defined to mean a person who is authorised by the Secretary under new subregulation 5H(1A) of the Prohibited Imports Regulations to be an authorised person. New subregulation 5H(1A) is inserted by item 27 of the Amendment Regulations and includes an "officer of the Department", which is an officer of the Department administered by the Minister administering the *Therapeutic Goods Act 1989*.

The purpose of omitting "authorised officer" and substituting with "authorised person" is to clarify the policy intent that officers of the Department administered by the Minister administering the *Therapeutic Goods Act 1989* are the officers that may be authorised by the Secretary to the Department of Health and Aged Care.

Expanding the class of persons that may be authorised as authorised persons

Item 27 of the Amendment Regulations adds new subregulation 5H(1A) into the Prohibited Imports Regulations.

New subregulation 5H(1A) provides that, for the purposes of the definition of authorised person in subregulation (1), the Secretary may, in writing, authorise the following to be an authorised person for the purposes of this regulation:
(c) an officer of the Department;
(d) the Administrator of Norfolk Island.

This new subregulation retains the existing ability to authorised officers of the Department administered by the Minister administering the *Therapeutic Goods Act 1989*, but also expands on the persons that may be authorised to consider an application for permission and to revoke permission in connection with the importation of goods listed under Schedule 8 to the Prohibited Imports Regulations to include the Administrator of Norfolk Island.

The Administrator of Norfolk Island is appointed by the Governor-General under the Norfolk *Island Administrator Ordinance 2016* and is the most senior Australian Government representative on Norfolk Island, exercising all powers, and performing all functions, that are conferred on him or her by or under a law in force in the Territory in accordance with such written directions as are given to him or her by the responsible Commonwealth Minister under this subsection.

In recognition of the role of the Administrator of Norfolk Island, the amendment has effect that the Administrator can be conferred powers and functions to consider, grant or refuse applications for permission to import kava food products into Norfolk Island, and to revoking such permissions.

Technical amendments

Item 25 of the Amendment Regulations also inserts into subregulation 5H(1) of the Prohibited Imports Regulations a new definition of *Department*. The new definition provides for *Department*, for the purposes of regulation 5H, to mean the Department administered by the Minister administering the *Therapeutic Goods Act 1989*.

Item 26 of the Amendment Regulations complement the amendment made by item 25 of the Amendment Regulations by omitting "administered by the Minister administering the *Therapeutic Goods Act 1989*" from the definition of *Secretary*.

These amendments are technical in nature and do not change the scope of the definition of Secretary. Rather the amendments are made for consistency of drafting.

Items [28] to [29]

These items of the Amendment Regulations amend subregulations 5H(2) and (3) of the Prohibited Imports Regulations to omit "officer" and substitute with "person".

As a result:

(a) subregulation 5H(2) provides that the importation into Australia of goods specified in Schedule 8 to the Prohibited Imports Regulations is prohibited unless the Secretary or an authorised person has, by instrument in writing, granted permission to import the goods and the instrument is produced to the Collector;

(b) subregulation 5H(3) provides that a permission under this regulation shall be subject to such conditions imposing requirements or prohibitions on the person to whom the permission is granted with respect to the custody, use, disposal or destruction of the goods, as the Secretary or authorised person, as the case may be, thinks necessary to ensure that the goods are not used otherwise than for the purpose for which the permission is granted.

These amendments are technical amendments, made consequent to the amendments made by items 24 and 25 of the Amendment Regulations, which repeal the definition of *authorised officer*, and insert the definition of *authorised person*, respectively. These amendments do not otherwise change the scope of subregulations 5H(2) and (3).

Item 30 Subregulation 5HA(1) (paragraphs (ab) and (b) of the definition of *Initial decision*)

Regulation 5HA of the Prohibited Imports Regulations provides a review mechanism for a person whose interests are affected by an initial decision, set out at subregulation 5HA(1), to request the Minister to reconsider the decision. Subregulations 5HA(3), (4) and (5) amongst other matters, provides that the Minister may confirm, revoke or substitute the initial decision and the person must receive a notice in writing stating the result of the reconsideration of the *initial decision* and the person may apply for a statement of reasons.

Where the person is dissatisfied with the reconsidered decision, they may make an application for review to the Administrative Appeals Tribunal pursuant to subregulations 5HA(6) and (8).

This item of the Amendment Regulations amends paragraphs (ab) and (b) of the definition of *initial decision* under subregulation 5HA(1) of the Prohibited Imports Regulations to omit "officer" and substitute "person".

As a result:
(a) paragraph (ab) of the definition of *initial decision* covers a decision of the Secretary, or an authorised person, under subregulation 5G(1) or (5) of the Prohibited Imports Regulations;
(b) paragraph (b) of the definition of *initial decision* covers a decision of the Secretary, or an authorised person, under subregulation 5H(2) or (4).

These amendments are technical amendments, made consequent to the amendments made by items 20, 21, 24 and 25 of the Amendment Regulations, which repeal the definition of *authorised officer*, and insert the definition of *authorised person*. These amendments do not otherwise change the scope of the definition of *initial decision*.

Items 31 to 41

Regulation 5 of the Prohibited Imports Regulations has the effect that, amongst other matters, the importation of a drug listed in Schedule 4 to those Regulations is prohibited unless the requirements under that regulation are satisfied or otherwise not applicable. Similar to the drugs described in Schedule 8 of the Prohibited Exports Regulations, the drugs described in Schedule 4 to the Prohibited Imports Regulations also accord with the import control under the Single Convention on Narcotic Drugs.

Items 31 to 41 of the Amendment Regulations amend Schedule 4 of the Prohibited Imports Regulations to implement the scheduling decisions of the United Nations Commission on Narcotic Drugs made between 2021 and 2022.

Specifically, these items make all of the following amendments to Schedule 4 to the Prohibited Imports Regulations:
(a) item 31 inserts the drug known as '4-AP (N-Phenyl-4-piperidinamine)' as table item 17B;
(b) item 32 inserts the drug known as '1-boc-4-AP (tert-Butyl 4-(phenylamino)piperidine-1-carboxylate)' as table item 28A;
(c) item 33 inserts the drug known as 'Brorphine' as table item 30AA;
(d) item 34 inserts the drug known as 'CUMYL-PEGACLONE' as table item 49FB;
(e) item 35 inserts the drug known as 'Diphenidine' as table item 71A;
(f) item 36 inserts the drug known as 'Eutylone' as table item 90B;
(g) item 37 inserts the drug known as 'Isotonitazene' as table item 112AA;
(h) item 38 inserts the drug known as 'MDMB-4en-PINACA' as table item 127AC;
(i) item 39 inserts the drug known as '3-methoxyphencyclidine' as table item 140AA;
(j) item 40 inserts the drug known as 'Metonitazene' as table item 151A;
(k) item 41 inserts the drug known as 'Norfentanyl' as table item 168A.

The name of the drugs inserted by those items into Schedule 4 to the Prohibited Imports Regulations corresponds with the drugs of the same name added to the three drug treaties. The effect of the insertion the new drugs into Schedule 4 of the Prohibited Imported

Regulations is that the importation of those drugs is also subject to import control unless specified requirements under regulation 5 of the Prohibited Imports Regulations are satisfied.

For the same reason as the amendments made by items 1 to 14 of the Amendment Regulations, the amendments made by items 31 to 41 of the Amendment Regulations are required to maintain the currency of drug control measures on import to Australia in line with Single Convention on Narcotic Drugs and are necessary to support the Australian Government's National Drug Strategy and Australia's commitment under that Convention by minimising the diversion and misuse of these substances of not known therapeutic value; for instance, in clandestine drug manufacture.

The amendments apply to these drugs imported to Australia on or after the commencement of the Amendment Regulations.

Part 2—Application and transitional provisions

Customs (Prohibited Exports) Regulations 1958

Item 42 In the appropriate position in Part 5

This item of the Amendment Regulations amends Part 5 of the Prohibited Exports Regulations to insert new regulation 24 to deal with transitional matters that arise from Part 1 of Schedule 1 to the Amendment Regulations.

New regulation 24 has the effect that the amendments to the Prohibited Exports Regulations made by Part 1 of Schedule 1 to the Amendment Regulations apply in relation to drugs exported from Australia on or after the commencement of Part 1 of Schedule 1 to the Amendment Regulations.

Customs (Prohibited Imports) Regulations 1956

Item 43 In the appropriate position before Schedule 1

This item of the Amendment Regulations amends the Prohibited Imports Regulations to insert new regulation 17 to deal with transitional matters that arise from Part 2 of Schedule 1 to the Amendment Regulations.

New subregulation 17(1) defines the term ***amending regulations*** for regulation 17 to mean the Amendment Regulations.

New subregulation 17(2) has the effect that amendments to Schedule 4 to the Prohibited Imports Regulations made by Part 1 of Schedule 1 to the Amendment Regulations apply in relation to drugs imported into Australia on or after the commencement of Part 1 of Schedule 1 of the Amendment Regulations.

New subregulation 17(3) is a deeming provision that has the effect that a person who was an authorised person for the purposes of regulation 5F of the Prohibited Imports Regulations immediately before the commencement of Part 1 of Schedule 1 to the Amendment Regulations is, on and after that commencement, taken to be an authorised person for the purposes of that regulation as in force immediately after the commencement of that Part.

New subregulation 17(4) is a deeming provision that has the effect that a person who was an authorised officer for the purposes of regulation 5G or 5H of the Prohibited Imports Regulations immediately before the commencement of Part 1 of Schedule 1 to the Amendment Regulations is, on and after that commencement, taken to be an authorised person for the purposes of that regulation as in force immediately after the commencement of that Part.

New subregulation 17(5) is a deeming provision that has the effect that a permission in that was in force under regulation 5F, 5G or 5H of the Prohibited Imports Regulations immediately before the commencement of Part 1 of Schedule 1 to the Amendment Regulations continues in force on and after that commencement (and may be dealt with) as if it had been granted under that regulation as in force immediately after the commencement of that Part.

Attachment B

Statement of Compatibility with Human Rights

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

Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2023

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 Disallowable Legislative Instrument

The *Customs Legislation Amendment (Prohibited Exports and Imports) Regulations 2023* (Disallowable Legislative Instrument) amends the *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) and *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations) to list new drugs subject to import and export control.

Australia is a signatory to the following treaties (relevant treaties) and, as such, is obliged to impose import and export controls on substances scheduled in those treaties.

- Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs 1961;
- Convention on Psychotropic Substances of 1971; and
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

The schedules of drugs that can be found in the relevant treaties provide a list of drugs that are under international control. These schedules are generally arranged starting with drugs which require the most control to those requiring the least control. The relevant treaties were amended by the United Nations Commission on Narcotic Drugs in their 54th and 55th Sessions to update the list of drugs under international control.

Australia as a Party to the relevant treaties is obliged to impose import and export controls on substances scheduled in these treaties.

The Disallowable Legislative Instrument also amends the Prohibited Imports Regulations to:

- remove a redundant inscription process as part of the importation of goods;
- update the definition of *kava food product*; and
- clarify the class of individual that the Secretary to the Department administered by the Minister administering the *Therapeutic Goods Act 1989* may authorise for purposes of issuing a permission to import goods covered by regulations 5F, 5G and 5H of the Prohibited Imports Regulations to allow the Norfolk Island Administrator to consider, grant or refuse application for permission or revoke a permission to import goods covered by those provisions.

In effect, Disallowable Legislative Instrument ensures Australia's compliance with its obligations under the relevant treaties by inserting new import and export controls over drugs subject to international control under those treaties.

The amendments made by the Disallowable Legislative Instrument also have effect of ensuring import controls under the Prohibited Imports Regulations reflect modern practices and enable sufficient class of persons to consider, grant or refuse application for permission to import certain goods.

Human rights implications

The Disallowable Legislative Instrument promotes the right to the enjoyment of the highest attainable standard of physical and mental health in Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The addition of import and export controls over new substances reflects Australia's implementation of international obligations under the relevant treaties. The restriction of access to these substances promotes the right to health in Article 12(1) of the ICESR by preventing a danger to general health and welfare of the Australian community posed by the uncontrolled importation of these substances.

Where a legitimate need for the substances arises (such as for medical purposes), the Prohibited Imports Regulations allow a person to obtain a licence or a permission to import those substances. The outcome of these amendments is that the importation of listed goods would be permissible with approval from the relevant authority (in this case the Department of Health and Aged Care), but the illicit movement of goods would be an offence.

To the extent that these substances are required for medical purposes, this amendment may limit Article 12(1) of the ICESCR but any limitation is reasonable and necessary to achieving the legitimate objective of protecting the Australian community from the uncontrolled importation of these substances. The measures are proportionate as persons with a legitimate need for the substances are still able to import them with a licence or permission to import obtained from the relevant authority.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes Article 12 of the ICESCR by protecting the general health and welfare of the Australian community and to the extent that it may limit the right, it is reasonable, necessary and proportionate in achieving a legitimate objective.

The Honourable Clare O'Neil MP
Minister for Home Affairs