**EXPLANATORY STATEMENT**

Issued by authority of the Minister for Home Affairs

*Customs Act 1901*

*Customs Legislation Amendment (Drugs Scheduling) Regulations 2024*

**Legislative Authority**

The *Customs Act 1901* (‘the Act’) concerns customs-related functions. It is the legislative authority that sets out the customs requirements for the importation to and exportation from Australia.

Subsection 270(1) of the Act provides that the Governor-General may make regulations not inconsistent with the Act prescribing all matters, which by the Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to the Act.

Subsection 50(1) of the Act provides that the Governor-General may, by regulation, prohibit the importation of goods into Australia. Subsection 50(2) of the Act provides that the Governor-General may exercise this power by prohibiting the importation of goods absolutely, in specified circumstances or from a specified place, or 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 in accordance with section 50.

Subsection 112(1) of the Act provides that the Governor‑General may make regulations prohibiting the exportation of goods from Australia. Subsection 112(2) provides that the Governor-General may exercise this power by prohibiting the exportation of goods absolutely, in specified circumstances or in specified places, or unless specified conditions or restrictions are complied with. The *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) control the exportation of certain goods from Australia in accordance with section 112.

**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.

As at 19 January 2024, these treaties may be found on the United Nations Office of Drugs and Crime (UNODC) website.

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 Single Convention 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.

The Convention on Psychotropic Substances 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.

During its 66th Session over 13-17 March 2023, the United Nations Commission on Narcotic Drugs (the Commission) made resolutions to add four drugs to Schedule I of the Single Convention on Narcotic Drugs and three drugs to Schedule II of the Convention on Psychotropic Substances.

The Commission made resolutions to:

* add four drugs to Schedule I of the Single Convention on Narcotic Drugs, namely Etazene, Etonitazepyne, 2-methyl-AP-237, and Protonitazene; and
* three drugs to Schedule II of the Convention on Psychotropic Substances, namely ADB-BUTINACA, alpha-PiHP, and 3-methylmethcathinone.

As a signatory to these conventions, Australia is obligated to control the import and export of drugs listed in the conventions’ respective Schedules. 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. Similarly, 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 drugs listed in these Schedules accord with the drugs identified in the Conventions.

The *Customs Legislation Amendment (Drugs Scheduling) Regulations 2024* (the Amendment Regulations) amends the Prohibited Exports Regulations and Prohibited Imports Regulations to add the new drugs included in the Single Convention and the Convention on Psychotropic Substances at the CND’s 66th session.

**Impact and effect**

The Amendment Regulations, under the recommendation of the Assistant Minister for Health and Aged Care, will ensure Australia’s continuing compliance with the relevant treaties by adding the newly listed drugs to Parts 1 and 2 of Schedule 8 to the Prohibited Exports Regulations and Schedule 4 to the Prohibited Imports Regulations. The amendments also support the Australian Government’s National Drug Strategy.

**Consultation**

The Amendment Regulations were initiated by the Office of Drug Control, within the Department of Health and Aged Care, in consultation with the Department of Home Affairs. No public consultation was undertaken, as the amendments implement the existing treaty arrangements by adding new drugs to the schedules to the Prohibited Exports Regulations and Prohibited Imports regulations. The Amendment Regulations fulfil existing international obligations and do not alter the underlying controls in the import or export of listed drugs.

**Details and operations**

The Customs Act does not impose any conditions that need to be satisfied before the power to make the Amendment Regulations may be exercised.

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.

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

**Other**

As a Disallowable Legislative Instrument, 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 theLegislation Act operates to automatically repeal a legislative instrument that has the sole purpose of amending or repealing another instrument. That Division has the effect of 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. This is consistent with paragraph 54(2)(b) of the Legislation Act, which provides that a legislative instrument prescribed by regulation is exempt from the sunsetting requirement.

Item 21 of the table under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* prescribes thefollowing instruments made under the Customs Act as being exempt from sunsetting for the purposes of paragraph 54(2)(b) of the Legislation Act:

* a regulation made solely for the purposes of section 50 or 112 of the Customs Act;
* a determination made under paragraph 153L(1)(c), 153P(2)(c) or 153Q(1)(c) or subsection 153ZIH(2) of that Act, or
* a tariff concession order made under Part XVA of that Act.

Sections 50 and 112 of the Customs Act provide for the making of regulations in relation to prohibited exports and prohibited imports. The majority of regulations made under these sections are exempt from sunsetting because they relate to intergovernmental schemes or have the sole or primary purpose of giving effect to an international obligation of Australia. Subjecting these regulations to sunsetting may conflict with Australia’s international obligations and with ongoing intergovernmental arrangements.

**ATTACHMENT A**

**Details of the proposed *Customs Legislation Amendment (Drugs Scheduling) Regulations 2024***

Section 1 – Name

This section provides that the title of the Regulations is the *Customs Legislation Amendment (Drugs Scheduling) Regulations 2024* (Amendment Regulations).

Section 2 – Commencement

This section provides that the Amendment Regulations commence on the day after registration.

Section 3 - Authority

This section provides that the Amendment Regulations are made under section 270(1) of the *Customs Act 1901*.

Section 4 - Schedules

This section provides that the instruments specified in the Schedule to this amending instrument, being the *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) and the *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations), are amended according to the Schedule. This section will also provide that any other item in the Schedule to this amending instrument has effect according to its terms.

Schedule 1—Amendments

***Customs (Prohibited Exports) Regulations 1958***

**Part 1—Amendments**

**Items [1] to [7]**

Regulation 10 of the Prohibited Exports Regulations prohibits the exportation of Schedule 8 drugs from Australia, with some exceptions. Regulation 9A of the Prohibited Exports Regulations defines ‘Schedule 8 Drug’ as ‘a drug mentioned in Schedule 8’ of the Prohibited Exports Regulations. Items [1] to [7] of the Amendment Regulations amend Schedule 8 to implement the scheduling decisions of the United Nations Commission on Narcotic Drugs, made at the 66th session.

Items [1] – [4] make the following amendments to Part 1 of Schedule 8 to the Prohibited Exports Regulations:

* item [1] inserts the drug known as Etazene as table item 43A of Part 1 of Schedule 8;
* item [2] inserts the drug known as Etonitazepyne as table item 46A of Part 1 of Schedule 8;
* item [3] inserts the drug known as 2-methyl-AP-237 as table item 67A of Part 1 of Schedule 8;
* item [4] inserts the drug known as Protonitazene as table item 109A of Part 1 of Schedule 8.

Items [5] – [7] make the following amendments to Part 2 to Schedule 8 to the Prohibited Exports Regulations:

* item [5] inserts the drug known as ADB-BUTINACA as table item 1ABA of Part 2 of Schedule 8;
* item [6] inserts the drug known as alpha-PiHP as table item 1ADA of Part 2 of Schedule 8;
* item [7] inserts the drug known as 3-methylmethcathinone as table item 27BB of Part 2 of Schedule 8.

The amendments in items [1] – [7] ensure these drugs are subject to export controls, except where relevant exceptions in Regulation 10 apply. The drugs included under Schedule 8 do not have known therapeutic use in Australia. However, they are drugs that may be abused, or may be used to manufacture other illicit drugs.

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

***Customs (Prohibited Imports) Regulations 1956***

**Items [8] to [13]**

Items [8] to [13] 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 in March 2023 at the 66th session.

Specifically, these items provide for the following amendments to Schedule 4 to the Prohibited Imports Regulations:

* item [8] inserts the drug known as ADB-BUTINACA as table item 4CA;
* item [9] inserts the drug known as alpha-PiHP as table item 4EA;
* item [10] inserts the drug known as Etazene as table item 80AA;
* item [11] inserts the drug known as Etonitazepyne as table item 88A;
* item [12] inserts the drug known as 2-methyl-AP-237 as table item 142AA;
* item [13] inserts the drug known as Protonitazene as table item 211A.

To avoid ambiguity, 3-methylmethcathinone is already included at item 147AA of Schedule 4 to the Prohibited Imports regulations. Therefore, no further amendments are required to the Prohibited Imports Regulations for Australia to control the importation of 3-methylmethcathinone as required under the Convention on Psychotropic Substances.

Regulation 5 of the Prohibited Imports Regulations generally prohibits the importation of drugs into Australia other than in particular circumstances. It provides for exemptions to the general prohibition in specified circumstances, and when specified conditions and restrictions are complied with. The definition of ‘Drug’ in subregulation 5(20) includes ‘a chemical, compound, or other substance or thing, that is included in Schedule 4’. 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.

The effect of the proposed amendments to Schedule 4 is to subject these drugs import control, which limits the importation of these drugs unless the importation satisfies a specified entry requirement under regulation 5 of the Prohibited Imports Regulations. The amendments also support the Australian Government’s National Drug Strategy. The drugs included under Schedule 4 do not have known therapeutic use in Australia. However, they are drugs that may be abused, or may be used to manufacture other illicit drugs.

Amending the Prohibited Imports Regulations to include these drugs ensures that the regulations correspond with the changes to the Single Convention and the Convention on Psychotropic Substances.

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

**Part 2–Application and transitional provisions**

***Customs (Prohibited Exports) Regulations 1958***

**Item 14 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 25. New regulation 25 has the effect that the amendments to the Prohibited Exports Regulations made by Part 1 of Schedule 1 to the Amendment Regulations applies in relation to drugs exported from Australia on or after the commencement of the Amendment Regulations.

***Customs (Prohibited Imports) Regulations 1956***

**Item 15 In the appropriate position before Schedule 1**

This item of the Amendment Regulations will amend the Prohibited Imports regulations to insert new regulation 19.

New regulation 19 has the effect that the amendments to the Prohibited Imports Regulations made by Part 1 of Schedule 1 to the Amendment Regulations will apply in relation to drugs imported into Australia on or after the commencement of the Amendment Regulations.

**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 (Drugs Scheduling) Regulations 2024***

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 (Drugs Scheduling) Regulations 2024* (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 66th Session 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.

In effect, the 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.

**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 will be permissible with approval from the relevant authority (in this case the Department of Health and Aged Care), but the illicit movement of goods will 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 Hon Clare O’Neil MP**

**Minister for Home Affairs**