

# ***Excise guidelines for the tobacco industry***



# Excise guidelines for the tobacco industry

## **Relying on these Guidelines**

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and your obligations.

If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.

Some of the information in these Guidelines applies to a specific financial year. This is clearly marked. Make sure you have the information for the right year before making decisions based on that information.

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## **What these Guidelines are about**

This guide is intended to be a reference tool for the tobacco industry to assist its members to meet their excise obligations. It contains information about the excise system and how it applies to tobacco products (being plant, seed and leaf) and excisable tobacco goods that are produced or manufactured in Australia.

The guide will provide you with a broad outline of excise law, our administration of the law and your compliance obligations - it does not cover every aspect of how excise law applies to every situation.

Throughout this guide you will find important notes (look for the  symbol) that will help you with key information you should note.

You will also find 'more information' boxes (look for the  symbol) that will show any further steps you may need to take or supplementary information you may need to refer to.

The 'danger' notes (look for the  symbol) give prominence to information that is critical to compliance. They suggest the highest level of urgency or facts you must comply with.

If this guide does not fully cover your circumstances, please seek help from us or a professional adviser.

You can contact us as follows:

- the [Online Services for Business](#)
- phone **1300 137 290**
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au), or
- write to us at

**Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

We will ordinarily respond to electronic requests within 15 business days and finalise private rulings within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

A table of any major changes and updates we have made can be found within each chapter.

## **Terms we use in these Guidelines**

The technical terms used in these Guidelines are shown in **bold** when first used and are explained in [Terms we use in these Guidelines](#). Some of these definitions are from the excise legislation, others are not.

When we say **you** in these Guidelines, we mean you as a member of the tobacco industry, who is either registered or wishes to register for excise.

When we say **us** or **we** in these Guidelines, we mean the terms CEO, Collector or Commissioner as used in the excise legislation to refer to various officers.

The information in this publication is current at December 2021.

## CHAPTER 1 – Introduction to excise on tobacco

### Purpose

This chapter deals with:

- what is excise?
- overview of excise legislation relevant to tobacco
- who administers excise?
- when are you involved in the excise system?

It provides a general introduction to excise as it relates to tobacco and **tobacco goods**.

### 1.1 What is excise?

The *Commonwealth of Australia Constitution Act* (the Constitution) provides that only the Commonwealth can impose duties of excise.<sup>1</sup>

In *Ha & Anor v. State Of New South Wales & Ors; Walter Hammond & Associates Pty Limited v. State Of New South Wales & Ors*<sup>2</sup> (*Ha*), the High Court explained a duty of excise as follows:

... duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods.<sup>3</sup>

Excise imposed by the *Excise Tariff Act 1921* is imposed on the manufacture or production in Australia of specified goods. It can be seen that this clearly fits the definition of duty of excise as described by the High Court in the *Ha* case.

The Constitution also provides that laws imposing taxation (and excise is a tax) shall only deal with the imposition of tax. The *Excise Tariff Act 1921* imposes excise on relevant goods manufactured or produced in Australia and the *Excise Act 1901* deals with administrative arrangements applying to the excise system.

### 1.2 Overview of excise legislation

The principal legislative framework for the excise system, relating to tobacco, is contained in the:

- *Excise Tariff Act 1921* (Excise Tariff Act)
- *Excise Act 1901* (Excise Act), and
- Excise Regulation 2015 (Excise Regulations)
- *Taxation Administration Act 1953*.

To change the Excise Tariff Act requires an amending act to be passed by Parliament. However, there are parliamentary procedures which allow for the modification of the Excise Tariff Act so that

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<sup>1</sup> Section 90 of the Constitution.

<sup>2</sup> *Ha & Anor v. State Of New South Wales & Ors; Walter Hammond & Associates Pty Limited v. State Of New South Wales & Ors* 97 ATC 4674.

<sup>3</sup> *Ha & Anor v. State Of New South Wales & Ors; Walter Hammond & Associates Pty Limited v. State Of New South Wales & Ors* 97 ATC 4674 at page 4684 per Brennan CJ, McHugh, Gummow and Kirby JJ.

changes proposed to Parliament by the government can be implemented immediately. These procedures are known as Tariff Proposals.

➤ For more information on Tariff Proposals see Section 1.2.1 – Excise Tariff Act.

### 1.2.1 Excise Tariff Act

There are three key provisions in the Excise Tariff Act that operate to:

- impose excise duty
- identify excisable goods and the applicable duty rates (the Schedule), and
- index the duty rate.

#### ***Imposition of excise duty***

Section 5 of the Excise Tariff Act imposes excise duty on goods manufactured or produced in Australia that are listed in the Schedule to the Act. Excise duty is imposed at the time of manufacture or production of the relevant goods. The Schedule lists the various goods that are subject to excise and the rate of duty applicable. It is sometimes referred to as the Excise Tariff.

#### ***The Schedule of excisable goods and the duty rates***

The Schedule to the Excise Tariff Act is a table that lists the goods that are subject to excise duty (if those goods are manufactured or produced in Australia), it provides a description of the items and subitems and specifies the rate of duty applicable to each. The goods that are currently subject to excise fall within three broad groups:

- alcoholic beverages (other than wine) and spirits
- cigarettes and other tobacco goods, and
- fuel and oils.

The following is the tobacco goods section of the Schedule:

<b>Excise duties</b>			
<b>Item</b>	<b>Subitem</b>	<b>Description of goods</b>	<b>Rate of Duty</b>
<b>5</b>		<b>Tobacco, cigars, cigarettes and snuff</b>	
	5.1	In stick form not exceeding in weight 0.8 grams per stick actual tobacco content	*excise duty rate per stick
	5.5	Either: (a) not in stick form; or (b) in stick form exceeding in weight 0.8 grams per stick actual tobacco content	Applicable rate (see section 6AAB) per kilogram of tobacco content
	5.8	Blended tobacco goods	The amount of duty worked out under 6AAC

\* For the current rates of duty, refer to the table in the Tobacco excise page on our website. Use the following link: [ATO Excise rates for tobacco](#)

Tobacco, cigars and cigarettes are all classified to item 5 but only cigars and cigarettes are in stick form, so if the individual sticks do not exceed 0.8 grams in weight of tobacco (that is, not including filters or paper), they are classified to subitem 5.1. Products such as cigars and cigarettes with more than 0.8 grams of tobacco, pipe tobacco, ready rubbed tobacco and snuff are classified to subitem 5.5.

- ⊖ Although snuff is listed in the Schedule to the Excise Tariff Act, there is currently a permanent ban on its supply, along with chewing tobacco, under the *Trade Practices Act 1974* - Consumer Protection Notice No. 10 of 1991 - Permanent Ban on Goods.<sup>4</sup>

### *What is tobacco?*

It is necessary to understand what tobacco is and what plants produce tobacco leaf to determine whether a product is classified to item 5.

Tobacco is defined in the Excise Tariff Act<sup>5</sup> as 'tobacco leaf subjected to any process other than curing the leaf as stripped from the plant'.

This means that until tobacco leaf is subjected to processes after curing it is not excisable.

The Excise Act further clarifies that 'for the purposes of this Act, treat as tobacco any thing (including moisture) added to the tobacco leaf during manufacturing or processing'.

- ⊖ Although tobacco seed, plant or leaf (up to and including leaf that has been cured) are not *excisable goods*, they are subject to special provisions in the Excise Act which strictly control production and/or possession of these goods and provide for penalties.

The species of the *Nicotiana* genus that are generally used for smoking, chewing or snuff are considered to produce tobacco leaf. Those species are currently *Nicotiana tabacum*, *Nicotiana rusticum* and *Nicotiana sylvestris*.

Should other species of *Nicotiana* be developed where the leaves are generally used for smoking, chewing or as snuff then those species would also be considered to produce tobacco leaf.

### ***Indexation of the duty rate***

The rates of excise are set in the Schedule to the Excise Tariff Act. Both alcohol and fuel duty rates are indexed each six months by reference to the All Groups Consumer Price Index published quarterly by the Australian Bureau of Statistics, in accordance with section 6A of the Excise Tariff Act.

Tobacco is indexed by reference to the AWOTE (Average Weekly Ordinary Time Earnings) figures produced bi-annually by the Australian Bureau of Statistics in accordance with section 6AA of the Excise Tariff Act.

The AWOTE figure is published twice a year, in February and August. The indexation of duty rates for tobacco now occurs in March and September.

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<sup>4</sup> Gazette No. S144 of 4 June 1991.

<sup>5</sup> See the prefatory notes to the Schedule to the Excise Tariff Act.

Indexation increases also apply to rates which are set by a Tariff Proposal and not yet passed into law.

We publish these new rates in the Commonwealth Gazette and, for ease of reference, we provide a 'working tariff' which shows a table with up-to-date rates taking account of the indexation increases. Use the following link: [ATO Excise rates for tobacco](#)

### **Tariff Proposals**

The term 'Tariff Proposal' is a reference to the proposal in Parliament by the government of an Excise Tariff, or Excise Tariff alteration. A Tariff Proposal can lower or raise duty rates and add, remove or alter the description of goods which are subject to excise duty.

We immediately apply a Tariff Proposal put before Parliament by the government as if the law had already been amended.

If Parliament is not sitting, the Commissioner is empowered under section 160B of the Excise Act to publish a Notice in the Gazette of the intention of the government to put a Tariff Proposal within seven sitting days of Parliament.

Such a Notice is deemed to be a Tariff Proposal as described above and so we also apply such a Notice as though it was already law. You cannot commence proceedings against us for any action taken to collect the amount set by a Tariff Proposal during the periods specified in section 114 of the Excise Act.<sup>6</sup>

An amending Act must subsequently be made within 12 months to validate any excise duty collected by us pursuant to the particulars of a Tariff Proposal.

If an amending Act validating the changes outlined within the tariff proposal is not passed within the prescribed periods, then any additional amounts paid will be refunded to you.

### **1.2.2 Excise Act**

The Excise Act imposes controls in three main areas:

- grow, deal in, store and move tobacco seed, plant and leaf
- manufacture of **excisable tobacco goods**, and
- payment of duty for excisable tobacco goods.

The production of excisable tobacco goods such as cut tobacco and cigarettes is controlled by the granting (or refusal) of licenses to manufacture excisable tobacco goods on which the duty has not been paid and deliver them into home consumption.

Excise controls and powers are broadly applicable to goods which are excisable goods. Because tobacco seed, plant and leaf are not excisable goods, special provisions relating to them are contained in the Excise Act to allow similar control to be exercised over them as is exercised over other excisable goods.

The Excise Act imposes strict controls and has penalties for growing, dealing, possession and movement of tobacco seed, plant and leaf without authority.

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<sup>6</sup> For an explanation of customs and excise tariff proposals, see <http://parlinfoweb.aph.gov.au>

### ***Grow, deal in and move tobacco seed, plant or leaf***

Before you can grow tobacco seed, plant or leaf you need a producer licence granted under the Excise Act.<sup>7</sup>

Before you can deal in (that is, buy and sell) tobacco seed, plant or leaf you need a dealer licence granted under the Excise Act.<sup>8</sup>

Before you can move tobacco seed, plant or leaf you need permission granted under the Excise Act.<sup>9</sup>

### ***Manufacture of excisable tobacco goods***

Before you can manufacture tobacco goods you need a manufacturer licence granted under the Excise Act.<sup>10</sup>

Tobacco goods are deemed to have been entered and delivered into home consumption when they are manufactured.<sup>11</sup>

Unlike other excisable goods, a storage licence under the Excise Act<sup>12</sup> cannot be granted to store excisable tobacco goods

Consequently, you do not need a permission granted under the Excise Act<sup>13</sup> to remove excisable tobacco goods once manufactured.

➤ For more information about the excise licensing regime, refer to *Chapter 2 - Licensing: Applications*.

➤ For more information about movement permissions for tobacco seed, plant, or leaf, refer to *Chapter 5 - Movement permissions*.

### ***Payment of duty for excisable tobacco goods***

The Excise Tariff Act imposes duty when excisable tobacco goods are manufactured. The Excise Act specifies when the duty must be paid, how and what you must report to us, the relevant time to determine the rate of duty in force, and provides a mechanism to require payment where duty has not been correctly accounted for on excisable tobacco goods.

In general terms, duty must be paid on tobacco goods:

- at the time the goods are manufactured and deemed entered and delivered into home consumption.

➤ For more information about payment of duty refer to *Chapter 6 - Payment of duty*.

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<sup>7</sup> Section 28 of the Excise Act.

<sup>8</sup> Section 33 of the Excise Act.

<sup>9</sup> Section 44 of the Excise Act.

<sup>10</sup> Section 25 of the Excise Act.

<sup>11</sup> Subsection 66(7) of the Excise Act.

<sup>12</sup> Subsection 4(1) (definition of 'storage licence') and Part IV of the Excise Act.

<sup>13</sup> Section 61A of the Excise Act.



### 1.2.3 Excise Regulations

The Excise Regulations set out provisions in relation to tobacco such as:

- the circumstances allowing refunds, remissions and drawbacks
- the period for making refund applications
- amount of duty for tobacco leaf related penalties

The regulations also include rules specific to the tobacco industry in relation to delivering tobacco leaf for specific purposes.

➤ For more information about remissions, refunds and drawbacks refer to *Chapter 7 – Remissions, refunds, drawbacks and exemptions*.

### 1.3 Who administers excise?

The Commissioner of Taxation has the general administration of the Excise Act and the Excise Tariff Act.<sup>14</sup> This means you have to deal with us for Australian manufactured tobacco goods but also in relation to any tobacco seed, plant, or leaf whether it comes from Australia or elsewhere.

Imported tobacco goods are not subject to control under the Excise Act unless used in the further manufacture of excisable goods. Customs duty, under the *Customs Act 1901* (Customs Act) and *Customs Tariff Act 1995* (Customs Tariff Act), is applied to imported tobacco goods at rates equivalent to the excise duty applied to locally manufactured tobacco goods.

The Department of Home Affairs (Australian Border Force) is responsible for administration of the Customs Act and Customs Tariff Act.

Who you need to deal with is summarised in the following table.

	<b>Australian Border Force</b>	<b>Tax Office</b>
Australian tobacco seed, plant or leaf	No	Yes
Imported tobacco seed, plant or leaf	Yes	Yes (after it has been released from Australian Border Force control)
Australian manufactured tobacco goods	No	Yes
Imported tobacco goods not for further manufacture in Australia	Yes	No
Imported tobacco products for further manufacture in Australia	Yes	Yes

### 1.4 When am I involved in the excise system?

You are involved in the excise system if you:

- Produce tobacco seed, plant or leaf
- Deal in tobacco seed, plant or leaf

<sup>14</sup> Section 7 of the Excise Act and section 1A of the Excise Tariff Act.

- Manufacture tobacco goods (excisable goods).

## 1.5 What do I do if I need more information?

If you need more information on excise, as it relates to tobacco, contact us:

- the [Online Services for Business](#)
- phone **1300 137 290**
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au)
- write to us at

**Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

We will ordinarily respond to electronic requests within 15 business days and finalise private rulings within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

## CHAPTER 2 – Licensing: applications

### Purpose

This chapter deals with:

- why there is a licensing regime
- what a licence is
- different licence types
- responsibilities of a licence holder
- what we can do
- what records need to be kept
- how long a licence is valid for
- whether licences are transferable
- disclosure of your licensing information
- how to apply for a licence
- how to change your licence details
- penalties that can apply to offences in relation to licences.

## 2.1 Introduction

### 2.1.1 Why is there a licensing regime?

The *Excise Tariff Act 1921* (Excise Tariff Act) prescribes that excise duty applies to goods listed in the Schedule to the Excise Tariff Act that are manufactured or produced in Australia. The *Excise Act 1901* (Excise Act) stipulates that anyone wanting to produce, deal or store tobacco seed, plant or leaf or manufacture excisable tobacco goods must hold a licence issued under Part IV of the Excise Act.

Tobacco seed, plant or cured leaves are not excisable goods for the purposes of the Schedule to the Excise Tariff Act. However, the Excise Act imposes controls over the growing of tobacco plants, including the possession of tobacco seeds. The provisions relating to the control of tobacco seed, plant or leaf are contained in Divisions 2 and 3 of Part III of the Excise Act.

### 2.1.2 What is a licence?

A licence is an approval or authorisation to enable you to undertake activities as specified in the licence. If you undertake these activities without a licence you are committing an offence and may be prosecuted. A licence may impose a number of important conditions on the licence holder including limits to your activities.

A licence is issued to a specific entity and specifies the site or sites<sup>15</sup> where the activities may be undertaken. This may require you to have more than one licence.


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<sup>15</sup> ATO Interpretative Decision ATO ID 2011/48 *Excise and the number of premises specified in a licence to manufacture.*

Licences can be issued to:

- individuals
- partnerships and companies in their own right, and
- individuals and companies in their capacity as trustees.

There may be different licensing processes depending on the type of entity applying for the licence.

 A licence is not transferable.

## 2.2 Policy and practice

### 2.2.1 Different licence types

There are four licence types:

- Producer
- Dealer
- Manufacturer, and
- Storage

#### ***Producer licence***

A producer is a licensed grower of tobacco seed, plant or leaf. To be able to produce tobacco seed, plant or leaf, you must hold a valid producer licence. You cannot produce tobacco seed, plant or leaf at premises that are not specified in a licence. This requirement also applies to tobacco seed, plant or leaf grown for personal use as there is no exemption in the Excise Act for this activity.<sup>16</sup>

*Produce* includes all the activities of growing tobacco plants such as germinating seeds, growing seedlings, planting out, harvesting seeds for future seasons and harvesting the leaves, up to and including curing the leaf as stripped from the plant.<sup>17</sup>

You cannot grow or plant tobacco seed or plant, or hold tobacco seed, plant or leaf in anticipation of acquiring a producer licence. This means that you cannot produce samples to market to potential buyers if you do not hold a licence, nor can you store tobacco seed or seedlings.

A producer licence also allows you to sell tobacco seed, plant or leaf that you produce to:

- licensed dealers
- licensed manufacturers, or
- other licensed producers.

Conditions may be imposed on a producer's licence including requirements around storage and in relation to persons participating in the business.

Typically those who would require a producer licence include:

- farmers who grow tobacco leaf for sale to licensed manufacturers, and

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<sup>16</sup> Section 31 of the Excise Act.

<sup>17</sup> Section 68 of the Excise Act excludes the curing process from being manufacture and the Schedule to the Excise Tariff Act defines 'tobacco' as being tobacco leaf subjected to any process other than curing the leaf as stripped from the plant.

- nurseries growing tobacco seedlings for sale to licensed producers.

There are presently no licensed commercial producers or dealers in Australia. A decision in 2006 made by local tobacco manufacturers to stop sourcing domestic tobacco leaf saw the majority of producer licences surrendered and cancelled as part of a related government compensation scheme. There are also currently no producer licenses issued to grow tobacco for personal use.

Only a very small number of producer licenses are presently held for limited purposes such as for accredited agricultural testing/research laboratories.

### **Dealer licence**

To be able to deal in tobacco seed, plant or leaf, you must hold a valid dealer licence. You cannot deal in tobacco seed, plant or leaf at premises that are not specified in a licence.<sup>18</sup>

*Deal* includes buying, selling, storing, distributing and importing.

You may also need a dealer licence if you wish to display tobacco seed or plant; for example, if you operate a museum.

You cannot deal in tobacco seed, plant or leaf in anticipation of acquiring a dealer licence.


A dealer licence also allows you to buy from or sell tobacco seed, plant or leaf to:

- licensed producers
- licensed manufacturers, or
- other licensed dealers.

Conditions may be imposed on a dealer licence including requirements for storage and in relation to persons participating in the business.

 If you are a licensed producer you do not need a dealer licence to:

- buy tobacco seed or plant, or
- sell tobacco seed, plants or leaf.<sup>19</sup>

 If you are a licensed manufacturer you do not need a dealer licence to buy tobacco leaf from a producer or dealer or to import tobacco leaf.<sup>20</sup>

Dealer licences were also impacted by the 2006 decision that saw local tobacco manufacturers source all their tobacco leaf from overseas. The majority of dealer licences were cancelled with only a few remaining active.

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<sup>18</sup> Section 36 of the Excise Act.

<sup>19</sup> Note that the buyer or seller as applicable requires an appropriate licence

<sup>20</sup> Subdivision 308-A of Schedule 1 to the TAA make it an offence to sell or buy tobacco leaf from a person who is not licensed to manufacture or deal. Regulation 4D of the Customs (Prohibited Imports) Regulations 1956 prohibits the importation of tobacco leaf unless the importer holds a manufacturer or dealer licence.

## **Manufacturer licence**

To manufacture excisable tobacco goods, the Excise Act requires you to be a licensed manufacturer<sup>21</sup> and that the goods are manufactured at licensed premises in accordance with the conditions specified on your manufacturer licence.<sup>22</sup>

- For information on the Commissioner's view on manufacture for the purposes of the Excise Act use this link to [ER 2012/1](#) *Excise: the meaning of the expression 'manufactured or produced' for the purposes of the Excise Acts*.

In relation to tobacco, the Excise Act excludes merely curing tobacco leaf from being manufacture. The Schedule to the Excise Tariff Act defines 'tobacco' as being tobacco leaf subjected to any process other than curing the leaf as stripped from the plant.

We consider that these common activities in relation to tobacco are manufacture:

- threshing tobacco leaf
- conditioning
- blending
- cutting, and
- making tobacco goods.

### **The following activities are examples of processes that are 'excise manufacture':**

1. Threshed tobacco leaf is cut and treated with heat and moisture and combined with filters and paper to form cigarettes.
2. Cured tobacco leaves are cut to form 'roll your own' tobacco.
3. Cured tobacco leaf is threshed to separate the lamina from the stem. The lamina is called 'cut rag'.
4. Cured tobacco leaves are rolled together to form a cigar.

### **The following activities are examples of processes that are not 'excise manufacture':**

1. Tobacco leaf, as stripped from the plant, is cured to convert it into leaf tobacco.<sup>23</sup>
2. A person rolls a cigarette at home using papers and 'roll your own' tobacco on which duty has been paid.

You cannot commence manufacturing excisable tobacco goods without a licence. This means that you cannot test your manufacturing equipment or produce samples to market to potential buyers if you do not hold a licence.

Imported whole or threshed leaf is subject to customs duty at the same rate as loose manufactured tobacco. If you intend to use imported whole or threshed leaf in the manufacture of excisable

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<sup>21</sup> Section 4 of the Excise Act - The term 'licensed manufacturer' is defined to be 'a person or partnership who holds a manufacturer licence'.

<sup>22</sup> Section 39D of the Excise Act.

<sup>23</sup> Section 68 of the Excise Act.

products you can deduct the customs duty paid from your final excise liability. If you have any questions regarding this you should contact us or the Australian Border Force.

- ! If you use imported leaf, you require permission to import the leaf, as it is otherwise a prohibited import under the Customs Prohibited Import Regulations.<sup>24</sup> A tobacco leaf import permit is issued by us and can be signed by any officer in the course of carrying on their duties.

You can only manufacture goods at the premises specified on your licence.<sup>25</sup> We may also give you written directions in regard to what parts of your factory any manufacturing process is to be carried on and inputs used in manufacture, and excisable tobacco goods, respectively are to be kept.<sup>26</sup>

- ! If you hold a valid manufacturer licence, you do not need a separate dealer licence to store tobacco leaf at those premises. The storage of tobacco leaf, is a normal part of the chain of events in manufacturing goods.

A manufacturer licence allows you to sell tobacco leaf to a dealer or manufacturer who is also licensed under the Excise Act. You should confirm with the ATO that a person actually holds any licence they may claim to hold.

### ***Storage licence***

From 1 July 2019 all storage of underbond tobacco goods ceased.

Licensed customs warehouses and excise storage premises that permit the storage of underbond goods are restricted from storing tobacco goods on which duty has not been paid.

- ! You do not need a storage licence to store tobacco seed, plant and leaf as they do not become excisable until they have passed the first stage of manufacture. However you do need a producer, dealer or manufacturer licence to have tobacco seed, plant or leaf.

### **2.2.2 What are my responsibilities as a licence holder?**

You are responsible for the secure storage of all tobacco seed, plant and leaf and excisable tobacco goods held on your premises or under your control and must keep or store tobacco seed, plant or leaf and excisable tobacco goods only at premises that are specified in your licence.<sup>27</sup> If you are a manufacturer, this includes stalks, refuse, clippings or waste arising from the manufacturing process.

If you lose any tobacco leaf, you may be liable to pay an amount equivalent to the duty that would have been payable had that tobacco leaf been manufactured into tobacco goods.<sup>28</sup> The amount of such a liability can be substantial as the rate of excise duty per kilogram of tobacco content is significant when compared to the value of the finished cigarette. For the current rates of duty, refer

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<sup>24</sup> Regulation 4D of the Customs (Prohibited Imports) Regulations 1956.

<sup>25</sup> Section 27 of the Excise Act.

<sup>26</sup> Section 51 of the Excise Act.


<sup>27</sup> Sections 30, 35 and 53 of the Excise Act.

<sup>28</sup> Section 77AA of the Excise Act.


to the table in the Tobacco excise page on our website. Use the following link: [ATO Excise rates for tobacco](#)

You may be responsible for paying an amount equal to the excise duty that would have been payable on any stolen, missing or unaccounted for excisable tobacco goods.<sup>29</sup>


Where, after we take stock of excisable tobacco goods manufactured and the materials you use in the manufacturing process it appears to us, that not all the duty that should have been paid has been paid, you must pay the difference between the amount paid and the amount that should have been paid.<sup>30</sup>

 If you wish to destroy any duty paid tobacco goods and seek a refund, you must first obtain permission from us to do so.

You must not move tobacco seed, plant or leaf, without approval from us. This includes moving tobacco seed, plant or leaf from your licensed premises to any other location or for export.<sup>31</sup>

 For more information about obtaining permission to move tobacco seed, plant or leaf refer to *Chapter 5 - Movement permissions*.

If you are moving tobacco leaf away from the place specified on your licence, you must ensure that the tobacco leaf has a tobacco bale label attached at all times that the tobacco leaf is not at a licensed place, unless we approve otherwise in writing.<sup>32</sup>

 You must also obtain permission from us before moving tobacco leaf,<sup>33</sup> or stalks, refuse, clippings or waste arising from the manufacturing process,<sup>34</sup> for destruction.

You are also responsible for ensuring that you comply with the Excise Act and all conditions of your licence.<sup>35</sup>

You may deliver Australian tobacco leaf for a purpose such as medical, scientific, horticultural or agricultural use upon receipt of an approval from us.<sup>36</sup>

You must keep, retain and produce records in accordance with a direction under **section 50** of the Excise Act.

***If you are a manufacturer, you will also need to:***

- ensure tobacco goods are only delivered into the Australian domestic market with appropriate authority, as specified in your license<sup>37</sup>

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<sup>29</sup> Section 60 of the Excise Act.

<sup>30</sup> Section 62 of the Excise Act.

<sup>31</sup> Sections 44 and 61A of the Excise Act.

<sup>32</sup> Section 44 of the Excise Act.

<sup>33</sup> Section 44 of the Excise Act and section 20 of the Excise Regulation.

<sup>34</sup> Section 75 of the Excise Act.


<sup>35</sup> Sections 26, 29 and 34 of the Excise Act.

<sup>36</sup> Section 20 of the Excise Regulation.

<sup>37</sup> Sections 58 and 66 of the Excise Act.



- pay the correct amount of excise duty<sup>38</sup>
- provide all reasonable facilities to enable us to exercise our powers under the Excise Act<sup>39</sup>
- provide sufficient lights, correct weights and scales, and all labour necessary for
  - weighing material received into your factory
  - weighing all excisable goods manufactured in your factory, and
  - taking stock of all material and excisable goods contained in your factory<sup>40</sup>, and
  - have no more than 30% moisture content in the manufactured tobacco product,<sup>41</sup> which is determined by drying it at a temperature of 100 degrees Celsius.<sup>42</sup>

 For more information about duty liability and methods of payment refer to *Chapter 6 - Payment of duty*.

### 2.2.3 What can we do?

#### **Access**

We have the right to enter your licensed premises at any time and can examine and take account of all the goods at the premises.<sup>43</sup> Note: we will usually only seek to enter your premises during normal business hours.

#### **Stop vehicles**

We can stop any vehicle leaving your licensed premises and check that there is proper documentation for tobacco leaf or excisable tobacco goods leaving the premises. We can question the driver about any goods in the vehicle. We can direct that the vehicle be unloaded and goods taken to particular parts of the premises for further examination. We must not detain a vehicle for longer than is necessary to do the checking.<sup>44</sup>

#### **Search vehicles**

We can stop and search any vehicle (not just vehicles leaving a licensed premises) without a warrant if we have reasonable grounds for believing that the vehicle contains tobacco leaf or excisable tobacco goods and that the vehicle has been used, is being used or will be used in the commission of an offence under the Excise Act (and certain offences in the *Crimes Act 1914*<sup>45</sup> and *Criminal Code Act 1995* (Criminal Code)<sup>46</sup> relating to accessory after the fact, attempt to commit an offence, aid and abet someone to commit an offence and conspiracy to commit an offence).<sup>47</sup>

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<sup>38</sup> Section 54 of the Excise Act.

<sup>39</sup> Section 49 of the Excise Act.

<sup>40</sup> Section 52 of the Excise Act.

<sup>41</sup> Section 76 of the Excise Act.

<sup>42</sup> Section 77 of the Excise Act.

<sup>43</sup> Subsection 86(2) of the Excise Act.

<sup>44</sup> Section 87 of the Excise Act.

<sup>45</sup> Section 6 of the *Crimes Act 1914*.

<sup>46</sup> Sections 11.1, 11.2, 11.2A and 11.5 of the Criminal Code.

<sup>47</sup> Section 87AA of the Excise Act.

## ***Examine goods***

We can open packages and examine, weigh, mark and seal any excisable tobacco goods that are subject to **excise control** and, if you are a manufacturer, lock up, seal, mark or fasten any plant in or on your factory.<sup>48</sup>

We can also:

- supervise the manufacture of excisable tobacco goods<sup>49</sup>, and
- take samples of materials, partly manufactured excisable tobacco goods and excisable tobacco goods subject to excise control, and tobacco products that we have reasonable grounds for suspecting are excisable tobacco goods on which duty has not been paid.<sup>50</sup>

### **2.2.4 What records do I need to keep?**

Unlike other taxation laws the Excise Act does not have a general record keeping provision. The Excise Act does provide that a licence holder shall:

- (a) keep such records and furnish such returns as directed
- (b) keep these records for the period directed, and
- (c) on demand, produce those records to us.<sup>51</sup>

Any such direction will be in writing and included with your licence. We can amend this direction at any time and will provide written notification of this to you.

We can inspect and take copies of any records kept.

If you cease to hold an excise licence you must still keep all records of your previously licensed activities. Records must be kept for the period of time as directed which is generally five years unless otherwise specified.

The following are examples of the records that we may direct you to keep:

#### ***If you are a producer, details of:***

- number of hectares on which you grow tobacco leaf
- quantity of tobacco leaf you harvest
- packing dates
- kiln or barn numbers
- number of racks or clamps
- pick numbers
- date unloaded from the kiln or barn
- number of bales made
- Tax Office bale label number
- quantity (in kilos) of loose cured tobacco leaf in storage (in bags or slings)

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<sup>48</sup> Section 91 of the Excise Act.

<sup>49</sup> Section 46 of the Excise Act.

<sup>50</sup> Section 106 of the Excise Act.

<sup>51</sup> Section 50 of the Excise Act.

- number of bales entered into your storage shed
- number of bales sent to sale
- date bales are sent to sale
- total number of bales in storage, and
- any tobacco leaf lost, including
  - the date of the loss
  - the cause of the loss
  - the quantity of tobacco leaf lost
  - who the loss was reported to, and
  - the Tax Office comment/verification.

***If you are a dealer, details of:***

- all tobacco seed plant or leaf purchased
- all tobacco seed plant or leaf sold including to who and when the sale was made, and
- imported tobacco leaf.

***If you are a manufacturer, details of:***

- all tobacco leaf received at your licensed premises
- all tobacco leaf and excisable goods held in your licensed premises
- the amount of excisable tobacco goods produced showing all inputs, outputs and waste
- all deliveries from your licensed premises including to who and when the delivery was made including any exports
- all duty payments and **excise returns**
- any refunds and remissions, and
- destruction of any waste materials.

**2.2.5 How long is my licence valid for?**

Your licence will state its expiry date. When first issued, the licence is valid until the next 30 September two years after the anniversary of the day it is granted.<sup>52</sup>

**Example 2A**

If we grant a licence on 15 January 2020, it will expire on 30 September 2022.

If we grant a licence on 15 October 2020, it will expire on 30 September 2023.

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<sup>52</sup> Section 39E of the Excise Act.

Upon renewal a licence is valid for a further three years starting from the day after the date of expiry of the existing licence, that is, 1 October three years from the year the existing licence expires.

### 2.2.6 Is my licence transferable?

Generally, you cannot transfer your licence to another individual, business entity or premises. The proposed new licence holder must apply for a new licence. You must also request cancellation of your current licence if you are no longer carrying out an excise activity. It is important that you advise us of any change in advance of it taking effect.

The exception to the above rule arises when a licence holder dies. If this is the case, the licence is taken to be transferred to the person's legal personal representative. This allows for the finalisation of the affairs and, unless cancelled earlier, the licence is automatically cancelled three months after the licence holder died.<sup>53</sup>

- For more information about cancelling licences refer to *Chapter 4 – licensing: suspension & cancellation*.

### 2.2.7 Can my licensing information be disclosed?

As well as the protection provided by the *Privacy Act 1988* (the Privacy Act), the tax laws have secrecy provisions about using and disclosing taxpayer information. We can only look at, record, discuss or disclose information about you when it is a necessary part of our work, or where the law specifies that we may.

Section 355-50 of Schedule 1 to the *Tax Administration Act 1953* (the TAA) allows us to record or disclose information about you in certain circumstances.

In relation to licensing information, section 355-50 of Schedule 1 to the TAA allows us to disclose information about whether you hold a current excise licence or what conditions may apply to that licence if the information is required so that another person is able to understand or comply with the Excise Act.

#### Example 2B

You need to find out that the person you are supplying tobacco leaf to make cigarettes has an excise license to manufacture tobacco.

If we decide that the disclosure is necessary, we must provide the information in writing to the person who requires it. If the matter is urgent, we may advise by phone. However, we must later confirm the information by letter or electronically.

A disclosure may be initiated by us or by you when you request information.

Anyone who receives such information should use it only for the purpose for which it was given. Any other use may be unlawful.

**Note:** The Privacy Act imposes certain obligations on you concerning the privacy of information that you have received about an individual. Further information can be obtained from the Office of the Federal Privacy Commissioner at [www.privacy.gov.au](http://www.privacy.gov.au)

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<sup>53</sup> Section 390 of the Excise Act.

Our decision in relation to the disclosure of protected information is not a reviewable decision. However you have the right to make a complaint to the Commonwealth Ombudsman about a range of administrative actions we take or the Privacy Commissioner if you think we have breached the Privacy Act in dealing with your personal information.

 For information about your review rights refer to *Chapter 8 - Reviews and objections*.

## 2.3 Procedures

### 2.3.1 How do I apply for a licence?

If you would like to apply for a licence, you should:

- contact us, and
- lodge an application form together with all the required supporting documents.

To contact us phone **1300 137 290**

Our staff will:

- discuss your particular circumstances with you
- give you advice about the appropriate licence or licences
- explain how to apply
- explain your ongoing obligations as a licence holder, and
- provide you with a licence application form.

 There is no charge for an excise licence.


### ***How do I lodge an application?***

You need to complete the relevant form to apply for a producer, dealer or manufacturer licence.<sup>54</sup>

Before lodging your application form, make sure you have included the required supporting documents. Your application form contains information to help you work out which supporting documents you must provide. You may also need to complete other excise forms, depending upon your proposed activities.

Supporting documents can include:

- an accurate plan of the premises that clearly indicates the area for production, dealing, manufacture or storage
- a [Consent to obtain information – individual](#) (NAT 7112) form, or
- a [Consent to obtain information – company](#) (NAT 7106) form, and
- a [Consent to criminal history record check](#) (NAT 16358),

 You should contact our Licensing staff on **1300 137 290** for advice about the forms and supporting documents that you will need to lodge.



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<sup>54</sup> Section 39 of the Excise Act.

To lodge your completed application form and supporting documents:

- the [Online Services for Business](#)
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au), or
- write to us at

**Excise Licensing Group  
Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

-  You must not manufacture excisable tobacco, or produce, deal in or store tobacco seed, plant or leaf, before your licence has been granted.<sup>55</sup>
-  We will process your application within 28 days of the date we receive all required information. If we cannot process the application within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

### **2.3.2 How do I change my licence details?**

We can amend your licence for changes that do not involve a change of entity or physical location. This includes a change of:

- business name (that is your trading name)
- postal address, or
- street name or property address made by a relevant authority.

A change in composition of a partnership does not affect the continuity of that partnership. Any one or more of the partners may act on behalf of the partnership in notifying changes.<sup>56</sup>

You must advise us of any of these changes within 30 days. We will then provide you with an amended licence.

### **2.3.3 What do I do if I need more information?**

If you need more information on licensing matters contact us as follows:

- the [Online Services for Business](#)
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au)
- phone **1300 137 290**, or
- write to us at

**Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

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<sup>55</sup> Sections 25, 28, 33 and 117 of the Excise Act.

<sup>56</sup> Section 6A of the Excise Act.

We will ordinarily respond to written information requests within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

## 2.4 What penalties can apply to offences in relation to licences?

The following are the penalties that may apply after conviction for an offence.

### ***Produce***

If you intentionally produce tobacco seed or plant without a producer licence, the penalty is a maximum of two years in prison or 500 **penalty units**.<sup>57</sup>

If you intentionally produce tobacco leaf without a producer licence, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>58</sup>

If your production of tobacco seed, plant or leaf does not comply with the Excise Act and/or any conditions specified in your licence, the penalty is a maximum of two years in prison or 500 penalty units.<sup>59</sup>

If you intentionally produce tobacco seed or plant at premises that are not specified in your licence, the penalty is a maximum of two years in prison or up to 500 penalty units.<sup>60</sup>

If you intentionally produce tobacco leaf at premises that are not specified in your licence, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>61</sup>

A separate strict liability penalty of 100 penalty units can apply to all offences included in this section.<sup>62</sup>

### ***Deal in***

If you intentionally deal in tobacco seed or plant without a dealer licence, the penalty is a maximum of two years in prison or 500 penalty units.<sup>63</sup>

If you intentionally deal in tobacco leaf without a dealer licence, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>64</sup>

If your dealing in tobacco seed, plant or leaf intentionally does not comply with the Excise Act and any conditions specified in your licence, the penalty is a maximum of two years in prison or 500 penalty units.<sup>65</sup>

If you intentionally deal in tobacco seed, plant or leaf at premises that are not specified in your licence, the penalty is a maximum of two years in prison or 500 penalty units.<sup>66</sup>

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<sup>57</sup> Section 28 of the Excise Act.

<sup>58</sup> Section 28 of the Excise Act.

<sup>59</sup> Section 29 of the Excise Act.

<sup>60</sup> Section 31 of the Excise Act.

<sup>61</sup> Section 31 of the Excise Act.

<sup>62</sup> Sections 28, 29 and 31 of the Excise Act.

<sup>63</sup> Section 33 of the Excise Act.

<sup>64</sup> Section 33 of the Excise Act.

<sup>65</sup> Section 34 of the Excise Act.

<sup>66</sup> Section 36 of the Excise Act.

A strict separate liability penalty of 100 penalty units can apply to all offences included in this section.<sup>67</sup>

### **Manufacture**

If you intentionally manufacture excisable tobacco goods without a manufacturer licence, the maximum penalty is both 10 years in prison and the greater of the following:

- (a) 1500 penalty units,
- (b) 5 times the amount of duty on the excisable tobacco goods.<sup>68</sup>

If you intentionally manufacture excisable tobacco goods contrary to the Excise Act or any conditions specified in your licence, the penalty is a maximum of two years in prison or 500 penalty units.<sup>69</sup>

If you intentionally manufacture excisable tobacco goods at premises that are not specified in your licence, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty on the excisable tobacco goods.<sup>70</sup>

A separate strict liability penalty of 100 penalty units can apply to all offences included in this section.<sup>71</sup>

### **Keep or store**

If you are a licensed producer and you intentionally keep or store tobacco seed, or plant at premises that are not specified in your licence, the penalty is a maximum of two years in prison or 500 penalty units.<sup>72</sup>

If you are a licensed producer and you intentionally keep or store tobacco leaf at premises that are not specified in your licence, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>73</sup>

If you are a licensed dealer and you intentionally keep or store tobacco seed, or plant at premises that are not specified in your licence, the penalty is a maximum of two years in prison or 500 penalty units.<sup>74</sup>

If you are a licensed dealer and you intentionally keep or store tobacco leaf at premises that are not specified in your licence, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>75</sup>

If you intentionally possess or have custody or control of excisable tobacco goods without permission, the maximum penalty is 10 years in prison and the greater of the following:

- (a) 1500 penalty units
- (b) 5 times the amount of duty on the excisable tobacco goods.<sup>76</sup>

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<sup>67</sup> Sections 33, 34 and 36 of the Excise Act.

<sup>68</sup> Section 308-125 of Schedule 1 to the TAA.

<sup>69</sup> Section 26 of the Excise Act.

<sup>70</sup> Section 27 of the Excise Act.

<sup>71</sup> Sections 25, 26 and 27 of the Excise Act.

<sup>72</sup> Section 30 of the Excise Act.

<sup>73</sup> Section 30 of the Excise Act.

<sup>74</sup> Section 35 of the Excise Act.

<sup>75</sup> Section 35 of the Excise Act.

<sup>76</sup> Section 308-110 of Schedule 1 to the TAA.



If you intentionally possess or have custody or control of tobacco seed or plant without permission, the maximum penalty is 10 years in prison and the greater of the following:

- (a) 1500 penalty units
- (b) for tobacco plant, five times the potential weight of tobacco that could be produced from the plant if it were fully grown and it had been manufactured into excisable goods and entered for home consumption.<sup>77</sup>

If you intentionally possess or have custody or control of tobacco leaf without permission, the maximum penalty is 10 years in prison and the greater of the following:

- (a) 1500 penalty units
- (b) 5 times the amount of duty that would be payable if the leaf is manufactured into excisable tobacco goods and entered for home consumption.<sup>78</sup>

A separate strict liability penalty of 100 penalty units can apply to all offences under the Excise Act included in this section.<sup>79</sup>

### ***False or misleading statements***

A penalty not exceeding the sum of 50 penalty units and twice the amount of duty payable on those goods, applies if you intentionally make a false or misleading statement, or an omission from a statement to us, in respect of duty payable on particular goods.<sup>80</sup>

### ***Records***

If you do not keep, retain and produce records in accordance with a direction under section 50 of the Excise Act, the penalty is a maximum of 30 penalty units.

### ***Directions***

If you do not comply with a direction in regard to what parts of the factory can be used for various matters, the penalty is a maximum of 10 penalty units.<sup>81</sup>

### ***Counterfeit bale labels***

If you intentionally make and/or use counterfeit bale labels, the penalty is a maximum of 500 penalty units. A separate strict liability penalty of penalty 100 units can apply to this offence.<sup>82</sup>

### ***Facilities etc***

If you do not provide all reasonable facilities for enabling us to exercise our powers under the Excise Act, the penalty is a maximum of 10 penalty units.<sup>83</sup>

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<sup>77</sup> Section 308-110 of Schedule 1 to the TAA, section 64A of the Taxation Administration Regulations 2017, and section 21 of the Excise Regulation.

<sup>78</sup> Section 308-110 of Schedule 1 to the TAA, section 64A of the Taxation Administration Regulations 2017, and section 21 of the Excise Regulation.

<sup>79</sup> Sections 30, 35 and 117 of the Excise Act.

<sup>80</sup> Section 120 of the Excise Act.

<sup>81</sup> Section 51 of the Excise Act.

<sup>82</sup> Section 117I of the Excise Act.

<sup>83</sup> Section 49 of the Excise Act.

If you do not provide sufficient lights, correct weights and scales, and all labour necessary for weighing material received into, and all excisable tobacco goods manufactured in your factory and for taking stock of all material and excisable tobacco goods contained in your factory, the maximum penalty is 10 penalty units.<sup>84</sup>

### ***Marks and seals***

If we mark or seal excisable tobacco goods or fasten, lock or seal any plant in your factory and you alter, break or erase the mark, seal, fastening or lock, the maximum penalty is 50 penalty units.<sup>85</sup>

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<sup>84</sup> Section 52 of the Excise Act.

<sup>85</sup> Section 92 of the Excise Act.

## CHAPTER 3 – Licensing: assessing applications

### Purpose

This chapter deals with:

- licensing criteria
- records you need to keep
- licence conditions
- securities
- assessing your application to renew your licence
- what happens if your licence is not granted
- what will happen if your licence is granted
- how to renew your licence, and
- penalties that can apply to offences in relation to making an application.

### 3.1 Introduction

The Excise Act provides us with the discretion whether to grant or refuse a licence. We base the decision on the information you supply and other information we have access to that the Excise Act permits us to take into account.

However subsection 39A(2) provides that if we consider certain criteria exist they can be the basis for refusal.

In summary those criteria are:

- whether you or an associate are not 'fit and proper'
- whether you do not have, or have available to you, the skills and experience required to carry out the activity that would be authorised by the licence
- the physical security of the premises is not adequate
- the plant and equipment to be used at the premises is not suitable
- if you will have a market for the goods
- if you would not be able to keep proper books of account for audit purposes
- if the granting of a storage licence would delay liability for duty (not applicable for tobacco), or
- if it's necessary to refuse to grant the licence so as to protect the revenue.

These criteria are explained in more detail below.

How any of these criteria affects a particular licence application depends on the facts in each particular case. However, there are some criteria that are critical, for instance:

- you are not 'fit and proper'
- existence of a market, and
- protection of the revenue.

## 3.2 Licensing criteria

### 3.2.1 'Fit and proper' person or company

The nature of the entity applying for the licence will affect who is assessed as being fit and proper:

- if an individual, the individual is assessed
- if a partnership, each partner is assessed, and
- if a company, the company is assessed.

Persons other than the applicant can also be assessed as to whether they are fit and proper. These persons are:

- another person who would participate in the management or control of the premises that is the subject of the licence application<sup>86</sup>
- if the applicant is a company, then any director, officer, or shareholder of the company that would participate in the management or control of the company<sup>87</sup>, and
- certain associates of the applicant (associates can be people or companies).<sup>88</sup>

#### ***What does fit and proper mean?***

The term 'fit and proper'<sup>89</sup> is not defined in the Excise Act or Excise Regulations. In an Excise context we are assessing the suitability of the person applying for a licence to have access and control over **tobacco** seed, plant or leaf or **excisable tobacco goods**. In general, qualities of diligence, honesty and the likelihood of observance of the law are pivotal characteristics to be taken into account in considering fitness and propriety. Compliance with other laws also administered by the Commissioner of taxation will also be a factor.

The Excise Act provides a definitive list of factors that we will take into account in determining whether a person or company is fit and proper. These factors generally relate to:

- any prosecution history
- solvency
- the honesty of information provided by the applicant
- compliance with tax obligations, and
- licensing history (if applicable).

In assessing these factors we will consider whether your circumstances demonstrate that you will be diligent, honest, and likely to observe Excise laws.

Some relevant factors we consider apply to both individuals and companies; others are specific to individuals or to companies. These factors are:

- Individual or company<sup>90</sup>
  - whether, within a year of lodging the application, the person or company has been *charged with*
    - an offence under the excise legislation, or

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<sup>86</sup> Paragraph 39A(2)(d) of the Excise Act.

<sup>87</sup> Paragraph 39A(2)(c) of the Excise Act.

<sup>88</sup> Paragraph 39A(2)(f) of the Excise Act.

<sup>89</sup> Sections 39B and 39C of the Excise Act.

<sup>90</sup> Sections 39B and 39C of the Excise Act.

- an offence under Commonwealth, State or Territory law punishable by imprisonment for one year or longer (for an individual), or by a fine of 50 **penalty units** or more
- whether, within 10 years of lodging the application, the person or company has been *convicted of*:
  - an offence under the excise legislation, or
  - an offence under Commonwealth, State or Territory law punishable by imprisonment for one year or longer (for an individual), or by a fine of 50 penalty units or more
- the extent of the person’s or company’s compliance, within four years of lodging the application, with any law administered by us for example, income tax, GST)
- the person’s or company’s financial resources.
- Individual only<sup>91</sup>
  - whether the person has held an excise licence which has been cancelled or whether the person has participated in the management or control of a company that has had its excise licence cancelled
  - whether the person is an undischarged bankrupt
  - any misleading statement made in the application by the person, or
  - where any false statement was made in the application – whether the person knew it was false.

➤ False and misleading statements are discussed below in ‘*Where a person makes false or misleading statements in their application*’.

- Company only<sup>92</sup>
  - whether the company has held a licence that has been cancelled
  - whether a receiver has been appointed over the property, or part of the property of the company
  - whether the company is under administration under the *Corporations Act 2001* (Corporations Act)
  - whether there is a current deed of company arrangement in place under Part 5.3A of the Corporations Act, or
  - whether the company is being wound up.

***Where a person makes false or misleading statements in their application***<sup>93</sup>

It is important that you provide information that is accurate and complete. If your application (that is, your completed application form, any supporting documentation and any oral statements made),

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<sup>91</sup> Section 39B of the Excise Act.

<sup>92</sup> Section 39C of the Excise Act.

<sup>93</sup> Paragraphs 39B(e) and 39B(f) of the Excise Act.

contains false or misleading statements we will take this into account when considering your fitness and propriety.

### *Misleading statements*

With regard to this element, the term 'mislead' is not defined in the Excise Act. *The Australian Oxford Dictionary*, 2004, 2<sup>nd</sup> edn, Oxford University Press, Melbourne defines 'mislead' as follows:

1. cause (a person) to go wrong, in conduct, belief, etc.
2. lead astray or in the wrong direction.

A misleading statement does not have to successfully mislead us, but it can be taken into account if it was reasonably foreseeable that we could have been misled when assessing the application.

A statement may be misleading by omission as well as by what has been said.

### **Example 3A**

You advise us that you have installed a state of the art security system at your premises. While true, you failed to advise us that a design fault has resulted in repeated false alarms to the point where you have switched off the security system and have no intention of re-engaging it. The design fault cannot be remedied. The only security actually in operation at the premises is a rusty padlock.

The information you provided, whilst not false, could lead us to believe that your premises are secure. This is misleading.

### *False statements*

We can only take false statements into account if you knew they were false.<sup>94</sup>

In essence, a statement is false if it is not true. A false statement may be made expressly, or via omission. An example of the former is where you state you have no criminal convictions when in fact you have been convicted of a crime. An example of the latter would be to leave the question on your application form in relation to criminal convictions blank when in fact you have been convicted. In both instances, a false statement has been made.

### ***Who are the associates that can be assessed for fit and proper?***<sup>95</sup>

To avoid situations where people with a high risk of non-compliance are able to exercise control over licence holders, certain associates can be assessed under the fit and proper person test.

The word associate effectively takes its meaning from the *Income Tax Assessment Act 1936* and is summarised below:

- An associate of a natural person (otherwise than in the capacity of trustee) includes
  - a relative<sup>96</sup> of the individual, for example, their spouse, parent, sibling, uncle, aunt

<sup>94</sup> Paragraph 39B(f) of the Excise Act.

<sup>95</sup> Subsection 39A(2)(f) of the Excise Act; section 995-1 of the *Income Tax Assessment Act 1997*; subsection 318(1) of the *Income Tax Assessment Act 1936*.

<sup>96</sup> Section 995-1 of the *Income Tax Assessment Act 1997* for definition of Relative for this purpose.

- a partner of the individual or a partnership in which the individual is a partner
- if a partner of the individual is a natural person otherwise than in the capacity of trustee, the spouse or child of that partner
- a trustee of a trust under which the individual or their associate benefits, or
- a company under the control of the individual or their associate.<sup>97</sup>

Although an associate includes a spouse, a legally married spouse of a person who lives separately and apart on a permanent basis is not an associate.<sup>98</sup>

- An associate of a company includes
  - a partner of the company or a partnership in which the company is a partner
  - the spouse or child of the partner, if a partner of the company is an individual
  - a trustee of a trust under which the company or their associate benefits
  - another entity (a company, partnership, trustee or an individual), or its associate(s) who controls the company, or
  - another company which is under the control of the company or the company's associate.<sup>99</sup>

The control of a company looks to whether another entity (including individuals):

- has sufficient influence over the company, or
- holds a majority voting interest in the company.

An associate of a trustee includes an entity or an associate of the entity that benefits or is capable of benefiting either directly or indirectly under the trust.<sup>100</sup>

For a partnership an associate includes each partner of the partnership or associate of the partner.<sup>101</sup>

### 3.2.2 Skills and experience

Skills and experience<sup>102</sup> are not defined in the Excise Act or Excise Regulations. There is no Excise case law regarding skills and experience.

In forming an opinion as to whether you have the required skills and experience we will consider your ability to:

- carry out the activity requiring a licence
- conduct a business, and
- comply with excise obligations.

It is important to note that you, as the applicant, do not necessarily need to possess the skills and experience yourself, provided that you can demonstrate that you will use another person's skill and

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<sup>97</sup> Subsection 318(1) of the *Income Tax Assessment Act 1936*.

<sup>98</sup> Subsection 318(7) of the *Income Tax Assessment Act 1936*.

<sup>99</sup> Subsection 318(2) of the *Income Tax Assessment Act 1936*.

<sup>100</sup> Subsection 318(3) of the *Income Tax Assessment Act 1936*.

<sup>101</sup> Subsection 318(4) of the *Income Tax Assessment Act 1936*.

<sup>102</sup> Paragraph 39A(2)(fa) of the Excise Act.

experience, for example by hiring them or using a consultant. Should that be the case, we will assess the other person's skills or experience.

### **3.2.3 Physical security of the premises**

Physical security<sup>103</sup> relates to measures that prevent unauthorised access to tobacco leaf or other inputs in the manufacture of excisable tobacco goods and thus protects against theft or loss of goods and excise revenue.

In forming an opinion about the physical security at the premises or storage place for tobacco leaf, we will consider:

- the nature of the site
- the kinds and quantities of goods to be kept, and
- the procedures and methods adopted to ensure the security of goods.

Consideration of the nature of the site can include:

- construction (for example floor, walls, ceiling, windows and doors) and whether material is difficult to penetrate or remove
- barriers (for example fences or wire) to a standard that would prevent unauthorised access
- locks and bars
- alarms, security lighting, security guard patrols or closed-circuit TV cameras
- physical security of all warehouse facilities within the site, and
- fire alarms, smoke detectors, sprinklers etc.

Consideration of the kind and quantity of goods to be kept at the site can include:

- the ease with which goods can be handled, for example, cartons of cigarettes are easier to move than fuel in a large refinery tank
- the rate of excise duty applicable to the goods (goods that attract a greater rate of excise duty represent a greater revenue risk), and
- the greater the quantity of excisable goods to be dealt with, the higher the level of physical security that would be required.

Consideration of the security procedures and methods can include:

- gate security system that would identify all people entering and leaving the site, and confirm their right to do so
- gate security system that would identify the type and quantity of all goods entering and leaving the site
- surveillance system
- procedures to handle and retain information from any surveillance system
- access control, for example by limited distribution of keys and access swipe cards or codes

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<sup>103</sup> Paragraphs 39A(2)(g) and 39A(2)(h) of the Excise Act.



- security responses when breaches are detected, for example back to base system, and
- an independent security audit function to oversee all of the above.

### 3.2.4 Suitability of plant and equipment

This criterion is only considered in relation to manufacturer licences.<sup>104</sup>

Plant and equipment are considered suitable if they are capable of performing the intended tasks and will allow you to properly account for tobacco leaf and excisable tobacco goods and calculate the correct amount of excise duty.

Plant and equipment that are used in relation to goods at licensed premises include:

- manufacturing machines
- packing machines
- weighing equipment for determining tobacco content, and
- counting equipment to determine numbers of sticks/packs/cartons/shippers.

### 3.2.5 Market for the goods

In this criterion, we are primarily concerned with the presence of an available market<sup>105</sup> within Australia. That market must be legal. Licensing is concerned with minimising the risk of tobacco seed, plant or leaf, or excisable tobacco goods, entering an illicit market in Australia and the resultant loss of revenue.

You must provide sufficient information to identify your proposed market.

You may be able to demonstrate that you have a market by, for example, supplying:

- evidence of contracts (including 'in principle' contracts) you have negotiated, or
- a business plan which outlines the market you have identified.

A legitimate market may exist overseas for locally manufactured excisable tobacco goods, or tobacco seed, plant or leaf. Applications relating to overseas markets may be subject to additional scrutiny and you may be required to provide additional information or documentation as evidence of the legitimacy of your overseas market.

Therefore, market should be taken to mean that there exists a proven or demonstrated demand for a commodity, or an opportunity for (legally) buying or selling (trading in) a specified commodity. In such cases a market can be either in Australia or overseas.

If you intend to manufacture excisable goods and use them within the operation of your business, you do not need to meet the market test. An example of this situation is a tertiary education facility which grows tobacco for research purposes.

### 3.2.6 Ability to keep proper books of account

This criterion is whether you can keep 'proper accounts and records' that enable us to audit those records.<sup>106</sup> It is your ability to keep the required records that must be determined.

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<sup>104</sup> Paragraph 39A(2)(i) of the Excise Act.

<sup>105</sup> Paragraph 39A(2)(ia) of the Excise Act.

<sup>106</sup> Paragraph 39A(2)(j) of the Excise Act.

You may be asked to demonstrate:

- the recording systems you intend to use, whether they are manual or electronic
- where an electronic record keeping system is used, systems documentation showing details such as screens, reports available and security controls, and
- the internal documentation supporting the recording systems, ensuring that the recording systems will record sufficient detail.

### 3.2.7 Protect the Revenue

The term 'necessary to protect the revenue'<sup>107</sup> is not defined in the Excise Act.

The meaning of 'protect the revenue' was considered by Deputy President Forgie in *Martino v Australian Taxation Office*.<sup>108</sup> She said:

The expression "*protect the revenue*" is not defined in the Act and I am not aware of any authorities that have considered it. The word "*revenue*" has been considered in *Stephens v Abrahams* (1902) 27 VLR 753 by Hodges J. ...Hodges J took:

"... the 'revenue' to be moneys which belong to the Crown, or moneys to which the Crown has a right, or moneys which are due to the Crown,

The ordinary meanings of the word "*protect*" include "*keep safe, take care of*" ... and they would seem to be the sense in which the word is used in the expression "*protect the revenue*". Mr Martino's licence may only be cancelled if it is necessary to take care of the money belonging to the Crown in right of the Commonwealth. That has the aspect of ensuring that the Commonwealth receives all that it should in the form of any excise that is ultimately payable in respect of tobacco originally grown on Mr Martino's farm and keeps all that it receives. It also has the aspect of not spending more of the Commonwealth's money than need be spent in carrying out its supervisory duties and responsibilities under the Act and in ensuring that the tobacco is not marketed illegally in Australia, and so avoid the payment of excise duty, if it cannot be marketed legally.

What is meant by the word "*necessary*"? I have taken the view that the meaning adopted by Allen J in *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447:

"As to the word 'necessary' it does not have, in my judgment, the meaning of 'essential'. The word is to be subjected to the touchstone of reasonableness. The concept is one as to what reasonably is necessary in a common sense way.'

'Protect the revenue' therefore means ensuring that the Commonwealth receives the full amount of excise duty that is ultimately payable and we do not spend more Commonwealth funds than necessary to carry out our responsibilities.

## 3.3 What are licence conditions?

A license may be subject to specified conditions. They are restrictions, limitations or modifying circumstances which further define what you are licensed to do. They may define permissible activities and require you to take certain actions if defined circumstances arise. If you fail to comply with a condition, we may suspend or cancel your licence.<sup>109</sup>

All excise licences are subject to certain conditions imposed by:

- the Excise Act, and

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<sup>107</sup> Paragraph 39A(2)(l) of the Excise Act.

<sup>108</sup> *Re Martino and Australian Taxation Office (No 2)* [2002] AATA 1242.

<sup>109</sup> Paragraph 39G(1)(k) of the Excise Act.

- us ('special conditions').

We are able to add, vary or modify special conditions even after the licence has been granted.<sup>110</sup> We will notify you in writing if we do so and provide you with an amended licence that includes the amended conditions.

### 3.3.1 Conditions imposed under the Excise Act

You must advise us in writing within 30 days if<sup>111</sup>:

- you or any person participating in the management or control of a licensed company or premises is charged with or convicted of
  - an offence against a provision of the Excise Act, or
  - an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for a period of one year or longer or by a fine of 50 penalty units or more
- you become bankrupt
- a person not listed in the licence application starts to participate in the management or control of the licensed premises or company, as the case may be
- there is a change in the membership of a partnership that holds a licence
- a company that holds a licence comes under receivership, administration or begins to be wound up
- there is a change that substantially affects the physical security of the licensed premises or plant and equipment used in relation to excisable goods at the premises
- you hold a manufacturer licence and you cease to manufacture excisable goods at the licensed premises
- you hold a producer licence and you cease to produce tobacco seed, plant or leaf, or
- you hold a dealer licence and you cease to deal in tobacco seed, plant or leaf.

### 3.3.2 Special conditions

We can also impose special conditions on your licence if we find it necessary to protect the revenue or ensure compliance with the Excise Act.<sup>112</sup> Examples of conditions that have been imposed under this provision are:

- the trustee for a trust to notify the Collector of the appointment of a new trustee in writing and prior to the appointment of the new trustee
- restrict the quantity of excisable goods that a licensed manufacturer may manufacture.

The examples of special conditions given above are only for illustrative purposes. The decision to impose special conditions is considered on a case by case basis.

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<sup>110</sup> Subsection 39D(4) and section 39DA of the Excise Act.

<sup>111</sup> Subsection 39D(1) of the Excise Act.

<sup>112</sup> Subsection 39D(3) of the Excise Act.

You can apply to have these special conditions varied, revoked or added. We will consider and advise you of our decision.

If you are not satisfied with any decision we make about a special condition, you can ask for a review by lodging an objection.<sup>113</sup>

➤ For more information about your review rights refer to *Chapter 8 - Reviews and objections*.

### 3.4 What are securities?

We can use special conditions as a mechanism to increase the level of protection of the revenue or to ensure compliance with the Excise Act. However, prior to granting the licence we may also require you to provide a security to achieve the same result. Even if we don't require a security prior to the granting of the licence, we may ask for a security at a later time. We can also ask you to increase the value of any security you may already have given.<sup>114</sup>

A security can be a bond, guarantee, cash deposit or similar financial product for an amount of money which may be forfeited if there is a failure to comply with the Excise Act. It is not necessary for a liability to arise as a result of the failure to comply, for the security to be forfeit. There is no statutory limit to the amount of a security but the amount is generally set by reference to the level of revenue at risk.

We cannot apply these securities against other tax debts.

We review securities every three years, at which time they may be extended, revised or cancelled.

The decision to require a security is not a reviewable decision. However, there may be other avenues for review; for example, you may seek an informal review of our decision.

➤ For information about your review rights refer to *Chapter 8 - Reviews and objections*.

### 3.5 Assessing your application to renew your licence

Licences are only valid for a specified period which is generally three years. Renewal of a licence<sup>115</sup> is not automatic and you must apply to renew your licence before it expires. In assessing an application to renew a licence we consider the same criteria that exist for cancelling a licence. That is, if reasons exist for us to cancel your licence (assuming that it had not expired) then we might not renew your licence.

➤ For more information about the criteria for cancelling a licence refer to *Chapter 4 – Licensing: Suspension & cancellation*.

⚠ If you have applied for renewal before the date of expiration on your licence but we have not made a decision by this date, the licence remains in force until such time as we do make a decision.

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<sup>113</sup> Section 39Q of the Excise Act.

<sup>114</sup> Sections 16 to 22 of the Excise Act.


<sup>115</sup> Section 39F of the Excise Act.

If we refuse your licence renewal, you may object against the decision.

 For more information about your review rights refer to *Chapter 8 - Reviews and objections*

As an alternative to non-renewal of a licence, we may:

- alter existing conditions on your licence
- impose new conditions, or
- require you to provide a financial security.

 If you have not applied to renew your licence then the licence expires on 30 September of the relevant renewal year and you can no longer carry out excise related activities that were permitted under that licence.

## 3.6 Procedures

### 3.6.1 What happens if my licence is not granted?

If we do not grant a licence, we will notify you of the decision and provide you with an explanation for our decision.

If you are not satisfied with our decision, you can ask for a review by lodging an objection within 60 days of the day we notify you.<sup>116</sup>

 For more information about your review rights refer to *Chapter 8 - Reviews and objections*


### 3.6.2 What will happen if my licence is granted?

If we grant you a licence, we will issue (via post or email) you with a copy of the licence. All special conditions will form part of the licence. We will also provide you with an establishment number for the premises specified on your licence. This will be needed in some of your dealings with us.

You may receive a visit or phone call from us to see whether you understand your obligations or need further assistance to comply.

### 3.6.3 How do I renew my licence?

We will send you an invitation to renew your licence at least six weeks before the licence expires. We will also send an application form containing your details. You must verify the details on the application, provide any required information, sign and return it to us before your licence expires.

 Your existing licence will remain valid until we make a decision about your application for renewal.<sup>117</sup>

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<sup>116</sup> Section 39Q of the Excise Act.

<sup>117</sup> Subsection 39F(4) of the Excise Act.


Excise licences are renewed for a period of three years.

### **Example 3B**

Your licence is due to expire on 30 September 2021 (the expiry day). On 1 September 2021 you apply to renew the licence. We have not decided the application by the end of 30 September 2021.

The licence continues in force automatically past 30 September 2021 until we decide the application.

On 15 October 2021 we decide to renew the licence. The renewed licence expires on 30 September 2024.

-  If you wish to renew your licence but you have not received an invitation to renew within four weeks of the date of expiry you need to contact us.

### **3.6.4 What do I do if I need more information?**

If you need more information on licensing matters contact us as follows:

- the [Online Services for Business](#)
- phone **1300 137 290**
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au)
- write to us at

**Excise Licensing Group  
Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

We will ordinarily respond to written information requests within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

## **3.7 What penalties can apply for offences in relation to making an application?**

The following are the penalties that may apply after conviction for an offence.

### **3.7.1 False or misleading statements**

If you make a false or misleading statement or an omission from a statement in respect of an application for a licence or during a renewal process, a penalty not exceeding 50 penalty units can apply.<sup>118</sup>

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<sup>118</sup> Section 120 of the Excise Act.

## CHAPTER 4 – Licensing: suspension & cancellation

### Purpose

This chapter deals with:

- what happens when you cease your business
- when your licence can be suspended or cancelled
- service of notices, and
- penalties that can apply to offences in relation to suspensions and cancellations.

### 4.1 Introduction

Your licence remains in force until it expires or is cancelled. However, activities approved under your licence may be restricted if we suspend your licence. Suspension may be a temporary measure or may lead to the cancellation of your licence.

We can cancel your licence if:

- you ask us to do so (for example, where you intend to cease business), or
- we make a decision to do so because one or more of the following criteria are present
  - you or an associate are not ‘fit and proper’ as an individual or company
  - a director, officer or shareholder who participates in the management or control of the company is not a ‘fit and proper’ person
  - a person who participates in the management or control of the premises is not a ‘fit and proper’ person
  - you do not have, or have available to you, the skills and experience required to carry out the activity authorised by the licence
  - the physical security of the premises is inadequate
  - the plant and equipment used at the premises are such that there is inadequate protection of the revenue in relation to the goods at the premises
  - you have no market for the goods covered by the licence
  - you are not keeping proper books of account for audit purposes
  - you have breached a condition of your licence
  - you have made a false or misleading statement to us<sup>119</sup>
  - suspension is necessary for the protection of the revenue, or
  - if you are the holder of a manufacturer licence suspension is necessary to ensure you comply with excise law.

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<sup>119</sup> Note that this is different to the consideration for granting a licence. In granting a licence we can take into account any misleading statement, or if you knowingly made a false statement, in your application. For suspension or cancellation we can consider any statement you make to us in relation to excise matters.

## 4.2 Policy and practice

### 4.2.1 What happens if I cease my excise business?

Your licence conditions require you to notify us within 30 days if you permanently cease activities that require an excise licence. To finalise your excise obligations you must request cancellation of your licence in writing<sup>120</sup>.

Before we can cancel your licence we must be satisfied that any **tobacco** seed, plant or leaf, or **excisable tobacco goods** you had in your possession have been correctly dealt with. To be satisfied of this we will:

- arrange a final audit of goods at the licensed premises, and
- work out if you are liable to pay any excise duty.

Although your licence conditions require you to notify us within 30 days of cessation of activities, you are encouraged to notify us at the earliest opportunity. This will enable us to assist you to check your records and any stock on hand prior to closure of the site for excise purposes.

If you want to sell your business with the stock included, we can coordinate your licence cancellation with the licence approval for the new owner. (This does not mean that the new owner will automatically be granted a licence). This will ensure the premises and goods are covered by a licence at all times.

If you do not intend to sell the goods with your business, you can:

- pay any outstanding excise duty on goods held at the licensed premises and then dispose of them as you wish, or
- move goods to another licence holders premises, provided you have permission from us to move the goods to those premises.<sup>121</sup>

We will cancel your licence by giving you written notice.<sup>122</sup>

If you do not comply with the requirements of the notice, the goods will be sold or otherwise disposed of.<sup>123</sup>

### 4.2.2 When can my licence be suspended or cancelled?

#### *What is the difference between suspension and cancellation?*

Suspension of a licence is a temporary measure we may take that limits the activities you can undertake during the period of suspension. It could be followed by cancellation of the licence or revocation of the suspension. Cancellation is a permanent measure which has the effect of prohibiting you from undertaking the activities for which you were previously licensed.

#### *When can you suspend or cancel my licence?*

We can suspend or cancel your licence if we have reasonable grounds for believing<sup>124</sup>:

- you or an associate are not 'fit and proper' as an individual or company\*

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<sup>120</sup> Subsection 39L(2) of the Excise Act.

<sup>121</sup> Subsection 39L(4) of the Excise Act.

<sup>122</sup> Subsection 39L(3) of the Excise Act.

<sup>123</sup> Paragraph 39L(4)(b) of the Excise Act.

<sup>124</sup> Subsections 39G(1) and 39L(1) of the Excise Act.



- a director, officer or shareholder who participates in the management or control of the company is not a 'fit and proper' person\*
- a person who participates in the management or control of the premises is not a 'fit and proper' person\*
- you do not have, or have available to you, the skills and experience required to carry out the activity authorised by the licence\*
- the physical security of the premises is inadequate\*
- the plant and equipment used at the premises are such that there is inadequate protection of the revenue in relation to the goods at the premises\*
- you have no market for the goods covered by the licence\*
- you are not keeping proper books of account for audit purposes
- you have breached a condition of your licence
- you have made a false or misleading statement to us
- suspension is necessary for the protection of the revenue\*, or
- if you are the holder of a manufacturer licence suspension is necessary to ensure that you comply with excise law.

\* For an explanation of these criteria, please refer to section 3.2 – Licensing criteria in *Chapter 3 – Licensing: Assessing applications*.

The criteria which have not been the subject of previous description are covered below<sup>125</sup>:

- you are not keeping proper books of account for audit purposes. For this criterion, we are assessing your actual record keeping practices during the licence period and whether they are in an adequate state for an audit.
- you have breached a condition of your licence. A breach means you have not complied with a condition. In deciding whether or not to suspend we will take into account the following
  - (a) the condition breached
  - (b) the severity of the breach
  - (c) the relevant circumstances surrounding the breach
- you have made a false or misleading statement to us. In considering your initial application the false or misleading statements we take into account are in your application. Once you have been granted a licence we can take into account any statements (including for example in a return, letter or response to a question) you have made in relation to your excise activities.
- you are not complying with your obligations under the Excise Act, for example, if you have been manufacturing excisable tobacco goods in contravention of your manufacturer licence.<sup>126</sup>

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<sup>125</sup> Subsection 39G(1) of the Excise Act.

<sup>126</sup> Section 26 of the Excise Act.

### ***What happens if you suspend my licence?***

If we believe your conduct warrants consideration of suspension of your licence we will generally advise you of our concerns and provide you with an opportunity to explain and rectify the issues identified.

If we decide to suspend your licence, this will be done by serving a *Notice of suspension*. The Notice may be served on you, or given to a person who appears to participate in the management or control of the licensed premises.

A *Notice of suspension* will state that, if you want to stop the cancellation of your licence, you must provide us with a written statement, within seven days of the notice being served, giving reasons why your licence should not be cancelled. We will include our reasons for deciding to suspend your licence with the *Notice of suspension*.

The Notice will also state the date from which the suspension takes effect, which could be immediately.

When your licence is suspended, unless you have written permission from us, it is against the law to:

- produce or store tobacco seed, plant or leaf if you are the holder of a producer licence
- deal in or store tobacco seed, plant or leaf if you are the holder of a dealer licence
- manufacture excisable tobacco goods or keep or store tobacco leaf if you are the holder of a manufacturer licence.<sup>127</sup>

During the period of suspension we may give you written permission to<sup>128</sup>:


- keep or store goods at your licensed premises
- carry out a process at your premises, or
- move goods from your premises to another place.

As a result of a suspension, we may:

- require you, the owner of the tobacco seed, plant or leaf or excisable tobacco goods to move the goods from your premises to another place
- require payment of any costs incurred by us as a result of the suspension
- carry out a stocktake so that the total excise liability is known, and
- take control of your licensed premises and any tobacco seed, plant or leaf or excisable tobacco goods stored at these premises.

If we suspend your licence we have 28 days to cancel your licence. During this period we can revoke the suspension if you satisfactorily address the issues which led to the suspension. If we revoke a licence suspension we will do so in writing. We may impose additional conditions or allow you to resume your excise activities under the existing conditions.

All decisions relating to the suspension of a licence are reviewable by lodging an objection.<sup>129</sup>

 For more information about your review rights refer to *Chapter 8 - Reviews and objections*.

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<sup>127</sup> Section 39K of the Excise Act.

<sup>128</sup> Subsection 39K(6) of the Excise Act.

<sup>129</sup> Section 39Q of the Excise Act.

## ***What happens if you cancel my licence?***

We can cancel your licence for the same reasons we can suspend your licence.

- We can cancel your licence without previously suspending your licence. This may occur where we consider the issues require immediate action. For example systemic delivery of excisable tobacco goods without payment of required duty.

If we cancel your licence we will serve you with a *Notice of cancellation*. If we cancel your licence, you are not permitted to manufacture, store, produce or deal in excisable products or tobacco seed, plant or leaf. You are also not permitted to move excisable goods without our permission.

If we decide to cancel your licence, this will be done by serving a *Notice of cancellation*. The notice may be served on you, or given to a person who appears to participate in the management or control of the licensed premises. We will include our reasons for deciding to cancel your licence with the *Notice of cancellation*.

A direction notice, in writing will also be served requiring you to either<sup>130</sup>:

- pay the duty on the goods, or
- move the goods to another place in accordance with our permission.

- ! This notice is served in the same manner as the *Notice of cancellation*.

If the owner does not comply with the Notice to pay duty or move the goods, we may remove them from the owner's control. If, after six months, the owner has not:

- lodged a written claim for the goods, and
- paid the duty and other movement and storage related expenses

then we may sell or dispose of the excisable tobacco goods.<sup>131</sup>

## ***Dealing with tobacco seed, plant or leaf when a licence is cancelled***

If tobacco seed, plant or leaf remains on the premises after cancellation we can give you permission to move it to someone who does have a licence.<sup>132</sup> If you do not do so, we can seize the tobacco seed plant or leaf as forfeited goods.<sup>133</sup>

- If we cancel your licence, you must retain all records that you have been directed to keep, for the period you have been directed.

If you are not satisfied with our decision to cancel your licence or dispose of your excisable goods, you can request a review of our decision by lodging an objection.<sup>134</sup>

- ➔ For more information about your review rights refer to *Chapter 8 - Reviews and objections*

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<sup>130</sup> Subsection 39L(4) of the Excise Act.

<sup>131</sup> Subsection 39N(2) of the Excise Act.

<sup>132</sup> Section 39M of the Excise Act.

<sup>133</sup> Part IX, Division 1A Subdivision F of the Excise Act.

<sup>134</sup> Section 39Q of the Excise Act.

## Can I apply for another licence if I have had a licence cancelled?

Yes, you can apply for another licence. However we will take the reasons for the cancellation into account when considering any new application.

## 4.3 Procedures

### 4.3.1 Service of notices

Notices of suspension or cancellation and directions to deal with excisable tobacco goods will be served either:<sup>135</sup>

- personally or by post<sup>136</sup> on you, or
- personally on a person who, at the time the notice is served, appears to participate in the management or control of the licensed premises.

### 4.3.2 What do I do if I need more information?

If you need more information on suspension or cancellation of a licence contact us as follows:

- the [Online Services for Business](#)
- phone **1300 137 290**
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au)
- write to us at

**Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

We will ordinarily respond to written information requests within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

## 4.4 What penalties can apply to offences in relation to suspensions and cancellations

The following are the penalties that may apply after conviction for an offence.

### 4.4.1 Produce

If you intentionally produce tobacco seed or tobacco plant when your producer licence is suspended, the penalty is a maximum of two years in prison or up to 500 **penalty units**.<sup>137</sup>

If you intentionally produce tobacco leaf when your producer licence is suspended, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>138</sup>

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<sup>135</sup> Subsections 39J(2) and 39L(5) of the Excise Act.

<sup>136</sup> Section 39P of the Excise Act.

<sup>137</sup> Subsection 39K(2) of the Excise Act.

<sup>138</sup> Subsection 39K(2) of the Excise Act.

#### **4.4.2 Deal in**

If you intentionally deal in tobacco seed or plant when your dealer licence is suspended, the penalty is a maximum of two years in prison or 500 penalty units.<sup>139</sup>

If you intentionally deal in tobacco leaf when your dealer licence is suspended, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>140</sup>

#### **4.4.3 Manufacture**

If you intentionally manufacturer excisable tobacco goods when your manufacturer licence is suspended, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty on the excisable tobacco goods.<sup>141</sup>

#### **4.4.4 Keep or store**

If you intentionally keep or store tobacco leaf when your manufacturer licence, producer licence or dealer licence is suspended, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>142</sup>

#### **4.4.5 Remove**

If your licence has been cancelled or expired, you must not intentionally remove excisable tobacco goods on which duty has not been paid, from the premises specified in the licence. The penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty on the excisable tobacco goods.<sup>143</sup>

If your licence has been cancelled or expired, you must not intentionally remove tobacco seed or plant from the premises specified in the licence. The penalty is a maximum of two years in prison or 500 penalty units.<sup>144</sup>

If your licence has been cancelled or expired, you must not intentionally remove tobacco leaf from the premises specified in the licence. The penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>145</sup>

A strict liability penalty of 100 units can apply to all offences included in this section.<sup>146</sup>

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<sup>139</sup> Subsection 39K(2) of the Excise Act.

<sup>140</sup> Subsection 39K(2) of the Excise Act.

<sup>141</sup> Subsection 39K(1) of the Excise Act.

<sup>142</sup> Subsection 39K(3) of the Excise Act.

<sup>143</sup> Subsection 39M(1) of the Excise Act.

<sup>144</sup> Subsection 39M(2) of the Excise Act.

<sup>145</sup> Subsection 39M(2) of the Excise Act.

<sup>146</sup> Subsections 39K(4) and 39M(3) of the Excise Act.

## CHAPTER 5 – Movement permissions

### Purpose

This chapter deals with:

- why you need a movement permission
- different movement permission types
- whether you can get a movement permission
- what is included in a movement permission
- whether the receiving premises have to be licensed
- whether you will need to pay a security
- what happens when your movement permission is granted
- your responsibilities
- what happens if your application for a movement permission is not approved
- when and how a movement permission can be revoked or cancelled
- how to apply for a movement permission
- how to amend a continuing movement permission, and
- penalties that can apply to offences in relation to movement permissions.

### 5.1 Introduction

Under the excise system, control of goods from the time of creation to the point of authorised delivery of the goods into the Australian domestic market, or export, lies with the Commissioner. To maintain this control, the *Excise Act 1901* (Excise Act) requires that excisable goods are not to be moved without permission.

We refer to this form of permission as a movement permission. It is a permission we provide in writing that authorises you to move specified goods from one specified place to another or between a number of specified places that are licensed to one or more entity.<sup>147</sup> This permission may be subject to conditions.

The permission holder retains responsibility for any liability arising on the **tobacco** seed, plant or leaf until they are taken up into the stock of the receiving premises.

The legislation differentiates between tobacco seed, plant and leaf, all of which are not excisable goods, and manufactured tobacco products, which are excisable goods. You need permission to move tobacco seed, plant and leaf from one place to another place.<sup>148</sup>

Manufactured tobacco goods are deemed entered and delivered into the Australian domestic market at the time of manufacture. The manufacturer is liable for the duty at the point of manufacture which must be paid within seven days<sup>149</sup>. As such manufactured tobacco goods are

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<sup>147</sup> Sections 44 and 61A of the Excise Act.

<sup>148</sup> This does not mean movements within your licensed premises, rather movements from licensed premises to another place.

<sup>149</sup> Section 66 of the Excise Act.

no longer subject to the **CEO**'s control, and no further permissions or authorisations are required to deal with the goods.

**!** In this chapter, 'products' refers only to tobacco seed, plant and/or leaf, it does not refer to excisable tobacco goods.

## 5.2 Policy and practice

### 5.2.1 What different permission types are there?

Depending on your circumstances, you may apply for a permission to move specified products once (single permission) or products of a particular kind on a continuing basis (continuing permission). Continuing permissions are used where you have a need to move products in a regular pattern (for example, a delivery each week to the same premises). Continuing permissions can be issued at the establishment level where each licensed premises is specified or in some instances they can be issued at the client level. Client level continuing permissions allow for the movement of products between all sites licensed to one or more entity specified in the permission.

A single permission is used when movements are not to a continuing or regular pattern to the same premises or in some instances when we have new entrants into the excise system.

There are six types of movement permission:

- **Single movement permission (non-export)** – a permission to move specified products from one specified place to another specified place (effective for one movement)
- **Continuing movement permission (non-export) establishment level** – a permission to move products of a kind specified from one or more specified place/s to another specified place or places on a continuing basis
- **Continuing movement permission (non-export) client level** – a permission to move products of a kind specified from any specified place licensed to one or more entity to any other specified place licensed to that or any other entity on a continuing basis, or
- **Single movement permission (export)** – a permission to move specified products from one specified place to a place of export (effective for one movement)
- **Continuing movement permission (export) establishment level** – a permission to move products of a kind specified from one or more specified place/s to a place or places of export on a continuing basis
- **Continuing movement permission (export) client level** – a permission to move products of a kind specified from any specified place licensed to one or more entity to a place for export on a continuing basis.

**!** An export movement permission is **not** an authority to export, it only permits you to move the products to a place for export. You must obtain authority to export separately from the Australian Border Force.

### 5.2.2 Can I get a movement permission?

You can be granted a movement permission if you are **the owner** of the:

- licensed place from where the products are despatched

- licensed place where the products are received, or products to be moved, even if you do not hold a current excise licence for the despatching or receiving premises.

### 5.2.3 What is included in a movement permission?

Each movement permission we approve contains three parts:

1. The permission

This specifies:

- the permission holder

2. The conditions

Movement permissions can be subject to conditions that are necessary to protect the revenue or ensure compliance with the Excise Act. In general, the conditions listed below are considered necessary to do that.<sup>150</sup>

As a standard condition, you must provide to both the despatching and receiving premises a consecutively numbered document with each movement of goods that specifies:

- the despatching premises and destination
- the date of despatch
- the number and type of packages
- a description of the products
- a statement that the products are **controlled products under the Excise Act**, and
- any other information necessary to permit the products to be dealt with at the destination.

This document should be communicated to the receiving premises within 24 hours of the products being despatched.

A condition can also be included that limits the volume of products and type of products that can be moved within a specific period of time, or at any one time, although this detail can also be included in the schedule.

A condition that is imposed by the law on movement permissions for tobacco leaf requires each tobacco bale to have a tobacco bale label attached. The tobacco bale label must remain attached to the bale while the bale is not on premises specified in a manufacturer, producer or dealer licence. Tobacco bale labels are available from us and serve to uniquely identify each tobacco bale<sup>151</sup>.

The requirement for a tobacco bale label can be waived but we need to give you specific written permission. This would be considered where you can demonstrate reasons why the tobacco leaf cannot be put into bales.

3. The schedule

This specifies:

- the premises from which the products can be removed

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<sup>150</sup> Subsection 44(3) of the Excise Act.

<sup>151</sup> Subsection 44(2) of the Excise Act.



- the premises or port (air or ship) to which the products can be moved
- the quantity of products that can be moved and
- for single movement permissions, the period or dates within which the products may be moved.

Under a client level movement permission, the schedule may not specify all these details but only that any movement of products between premises licensed to you or another specified entity, is approved.

The type of products may be expressed generally (for example 'excise controlled goods', or 'excise controlled tobacco products') or specifically, by description.

A single movement permission will specify the kind and quantity of the goods that can be moved, for example 20 (bales) x 100kg = 2000kg cured leaf tobacco.

#### **5.2.4 Does the receiving premises have to be licensed?**

Generally, the receiving premises should be licensed. However, we may authorise underbond movement of products to an unlicensed 'specified place', for example a waste destruction facility.<sup>152</sup>

#### **5.2.5 Will I need to pay a security?**

Prior to granting a movement permission, we may also require you to provide a security to protect the revenue or ensure compliance with the Excise Act. Even if we don't require a security prior to the granting of the movement permission, we may ask for a security at a later time. We can also ask you to increase the value of any security you may already have given.<sup>153</sup>

A security can be a bond, guarantee, cash deposit or similar financial product for an amount of money which may be forfeited if there is a failure to comply with the Excise Act or any condition included in the movement permission. It is not necessary for a liability to arise as a result of the failure to comply, for the security to be forfeit. There is no statutory limit to the amount of a security but the amount is generally set by reference to the level of revenue at risk.

As part of assessing your application for a movement permission, we will decide whether you must provide a security. We may take into account:

- whether you currently hold an excise licence
- whether the despatching and receiving premises are licensed
- the type of goods involved
- the amount of the liability if the products were manufactured into excisable tobacco goods
- the tax compliance record of
  - the applicant for the permission
  - the despatching premises
  - the receiving premises, and

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<sup>152</sup> Section 75 of the Excise Act - this includes waste such as stalks and clippings arising from the manufacture of tobacco products.

<sup>153</sup> Sections 16 to 22 of the Excise Act.

- the susceptibility of the products to be lost or diverted into home consumption (that is, domestic market without the payment of duty).

We cannot apply these securities against other tax debts.

We review securities linked to continuous movement permissions every three years, at which time they may be extended, revised or cancelled. Compliance with a single movement permission is assessed on completion of the movement of the controlled products covered by the permission.

The decision to require a security is not reviewable under the objection process.

➤ For information about your review rights refer to *Chapter 8 - Reviews and objections*

### 5.2.6 What happens when my movement permission is granted?

When your movement permission is granted, it will be sent to you. You can then move your products in accordance with the schedule. You will need to keep appropriate records to track the movement of your products.

### 5.2.7 What are my responsibilities?

Where you have had possession, custody or control of products we may request you (the permission holder) to account for the products. If you are able to demonstrate that the products have been lawfully moved under a movement permission, this will be considered a satisfactory accounting. It is important that you keep good records of any movements of products from and to your premises or under a movement permission issued to you.

If you cannot satisfactorily account for the tobacco leaf, we may demand an amount equal to the duty that would have been payable if the leaf had been manufactured into excisable goods classified to subitem 5.5 of the Schedule to the Excise Tariff Act and entered for home consumption on the day of the demand.<sup>154</sup>

The permission holder is accountable for the products:

- from the time they are removed from the despatching premises, and
- until they are delivered to the receiving premises or the place for export.


The requirement to keep the products safely and to satisfactorily account for them when requested transfers to the receiving premises if the conditions of the movement permission are met and the products are taken up into the records of the receiver. If there is a discrepancy between the quantity shown in the delivery documentation and the physical quantity received you should contact us.

⚠ In the exceptional case where the products are moved to unlicensed premises, accountability for the goods remains with you, as the permission holder.

<sup>154</sup> Section 77AA of the Excise Act for tobacco leaf.

### 5.2.8 What happens if my application is not approved?

If we do not approve your application for a movement permission, or to amend your existing movement permission, we will notify you in writing. You will not be permitted to move the products from the place nominated in the application without our permission.

 Although a decision to refuse a permission application is not a reviewable decision under the Excise Act, if you are not satisfied you can ask us to conduct an internal review.

 For information about your review rights refer to *Chapter 8 - Reviews and objections*

### 5.2.9 When and how can a movement permission be revoked or cancelled?


A continuing permission remains in effect until it is cancelled.<sup>155</sup>

We can cancel your movement permission if:

- you ask us to do so
- we consider that there is a risk to the revenue,
- you are not complying with the requirements (including the conditions) of the permission or
- we have cancelled the licence of the receiving or despatching premises.

If we decide to cancel your movement permission, we will notify you in writing. The cancellation will take effect from the time:

- you are served with the cancellation notice, or
- specified on the cancellation notice.

 Although a decision to revoke or cancel a permission is not a reviewable decision under the Excise Act, if you are not satisfied you can ask us to conduct an internal review.

 For information about your review rights refer to *Chapter 8 - Reviews and objections*.

## 5.3 Procedures

### 5.3.1 How do I apply for a movement permission?

To apply for a movement permission, you should contact us.

If you do not have control of the proposed receiving premises (licensed or unlicensed), you will be required to obtain a letter from the operator of these premises stating that they will accept

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<sup>155</sup> While there is no specific provision in the Excise Act which allows permissions to be cancelled (unlike licences), in accordance with subsection 33(3) of the *Acts Interpretations Act 1901* the power to grant the permission provides the power to cancel the permission.

responsibility for the controlled products when received. The application forms contain details of the statement required from the operator of the receiving premises.

- ! If you need to deliver products to new premises within specified periods please ensure that you allow sufficient time for your application to be determined. Generally, we will make a decision on your application within 28 days unless we need further information.

### 5.3.2 How do I amend my continuing movement permission?

If you wish to amend your existing continuing movement permission (for example, change the schedule of receiving premises), you must send us either:

- a new application form with the amending details, or
- a letter including the permission number and details of the necessary changes.

If you wish to add new receiving premises to your existing permission, you must also provide us with a letter from the operator of the receiving premises accepting responsibility for the controlled products when received. The application form contains details of the statement required from an operator of the receiving premises.

We will consider your request and send you a new or amended permission if approved. In the meantime you cannot move products outside your current permission.

### 5.3.3 What do I do if I need more information?

If you need more information on movement permissions contact us as follows:

- the [Online Services for Business](#)
- phone **1300 137 290**
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au)
- write to us at

**Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

We will ordinarily respond to written information requests within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

## 5.4 What penalties can apply to offences in relation to movement permissions?

The following are the penalties that may apply after conviction for an offence.

### 5.4.1 Move

If you intentionally move tobacco seed or plant without a movement permission, the penalty is a maximum of two years in prison or up to 500 **penalty units**.<sup>156</sup>

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<sup>156</sup> Section 117D of the Excise Act.

If you intentionally move tobacco leaf without a movement permission, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>157</sup>

If you intentionally move tobacco seed or plant contrary to your movement permission, the penalty is a maximum of two years in prison or 500 penalty units.<sup>158</sup>

If you intentionally move tobacco leaf contrary to your movement permission, the penalty is a maximum of two years in prison or the greater of 500 penalty units and five times the amount of duty that would have been payable if tobacco leaf had been manufactured into excisable goods.<sup>159</sup>

A strict liability penalty of 100 units can apply to all offences included in this section.<sup>160</sup>

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<sup>157</sup> Section 117D of the Excise Act.

<sup>158</sup> Subsection 44(4) of the Excise Act.

<sup>159</sup> Subsection 44(4) of the Excise Act.

<sup>160</sup> Subsections 117D(2), 117A(2), 44(5) and 61A(6) of the Excise Act.

## CHAPTER 6 – Payment of duty

### Purpose

This chapter deals with:

- when duty is payable
- when duty is payable under your licence
- when duty is not payable
- how to work out the amount of duty you're liable to pay, including tariff proposals and quotas
- what to do if you have a dispute as to the duty
- whether you have to account for tobacco leaf and excisable tobacco goods
- how to get a seven-day recurring tobacco excise period
- what your licence will include
- how to lodge excise returns and pay excise duty
- what to do if you have made an error on your excise return, and
- penalties that can apply to offences in relation to payment of duty.

### 6.1 Introduction

Excise duty is imposed at the time **excisable tobacco goods** are manufactured.<sup>161</sup> However, the duty is not required to be physically paid at the time of manufacture.

This chapter focuses on the payment of duty and the factors that influence when and how much duty is payable.

To ensure the duty is ultimately acquitted excisable tobacco goods are deemed **entered and delivered for home consumption** (the Australian domestic market) when they are manufactured.<sup>162</sup>

The liability for duty, imposed at the time of manufacture, can be acquitted by:

- payment of the duty
- **remission**, or
- use in the manufacture of other excisable goods.

### 6.2 Policy and practice

#### 6.2.1 When is duty payable?

The liability for duty becomes payable when the excisable tobacco goods are entered and delivered into home consumption. As excisable tobacco goods are taken to be entered and delivered into home consumption at the time the goods are manufactured, the liability to pay duty arises at the point in time tobacco leaf is manufactured into an excisable tobacco good.

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<sup>161</sup> Subsection 5(1) of the Excise Tariff Act.

<sup>162</sup> Subsection 66(7) of the Excise Act.

## 6.2.2 When is duty payable under licence conditions?

Under a tobacco manufacturer licence the duty is paid weekly on all tobacco goods manufactured during that week.

A licence allows you to manufacture, enter and deliver specified goods for home consumption, subject to various conditions. In particular, you must report all the goods you have manufactured that week and pay the duty on a recurring seven-day basis.

When applying for your licence, it may cover any recurring seven-day reporting period (the tobacco excise period). You may specify in your application the seven-day period you wish to use, for example, Wednesday to Tuesday. The application must be made on the approved form.

A manufacturer licence and tobacco excise period is given in writing and includes:

- your name as the holder of the licence
- the kind of goods to which the licence applies
- the place from which the goods may be manufactured
- the start date of the licence and tobacco excise period, and
- any special requirements during the tobacco excise period.

In considering your application for a licence we will take into account various factors including compliance with all laws administered by the Commissioner of Taxation and the protection of the revenue. This includes whether you have complied with the requirements of any previous licences and permissions you have been given. If we refuse to give a licence we will issue you a notice in writing setting out the reasons for the refusal.

A decision we make in relation to the period of a licence or any condition for a licence is a reviewable decision.<sup>163</sup>

 For information about your review rights refer to *Chapter 8 - Reviews and objections*.

If you have a licence with a seven-day tobacco excise period for excisable tobacco goods you must:

- lodge an **excise return**, on the due date specified in your licence. The return details the goods you have manufactured during the tobacco excise period, and
- pay the duty, on the first business day following the end of the seven-day period, on the goods you have manufactured within the tobacco excise period.<sup>164</sup>

 A 'business day' is a day that is not a Saturday or Sunday or a public holiday in the place where you lodge your return.

If we determine a different tobacco excise period we will advise you in writing that your licence will be amended from the day specified in the notice. We will give you the amended licence stating the new seven-day tobacco excise period.

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<sup>163</sup> Paragraphs 162C(1)(d), 162C(1)(e) or 162C(1)(f) of the Excise Act.

<sup>164</sup> Subsection 66(3) of the Excise Act. ATO Interpretative Decision ATO ID 2004/114 (Withdrawn) *Payment of excise duty: lodgment of periodic settlement permissions – public holidays*. Paragraph 1.21 of the Explanatory Memorandum to the Excise Amendment (Reducing business Compliance Burden) Bill 2011.

If you advise us in writing that you wish to change the seven-day period of your tobacco excise period, we may, in writing, amend your current licence stating the new preferred period. We will notify you of the day the change comes into effect.

### Example 6A

Crown Tobacco Company (CTC) is licensed to manufacture excisable tobacco goods. The seven-day tobacco excise period is specified on their licence. CTC as the licensed manufacturer must pay the excise duty on all tobacco goods produced by them from the time of manufacture.

The tobacco excise period is for the period Monday to Sunday. Therefore CTC is able to manufacture excisable tobacco goods and defer payment of excise duty, on those goods, until after the end of period. On the first working day after the end of the period (that is, Monday, unless it is a public holiday in which case it will be due on Tuesday) CTC must lodge an excise return for any excisable tobacco goods manufactured during the period and pay the excise duty owing on those goods.

We will send CTC written confirmation, after the excise return has been processed.

### 6.2.3 When is duty not payable?

There are circumstances in which no duty will be payable. These include where:

- cured tobacco leaf is exported
- a remission circumstance applies, or
- within the seven day tobacco excise period any manufactured tobacco goods on which the duty has yet to be paid is used in the manufacture of other excisable tobacco goods

### 6.2.4 How do I work out the amount of duty to pay?

To work out how much duty you need to pay you will need to know the:

- tariff classification of the excisable tobacco goods
- quantity of the excisable tobacco goods you manufacture (that is deemed entered and delivered for home consumption), and
- rate of duty on the excisable tobacco goods.

### **Classification of excisable tobacco goods**

The Schedule to the Excise Tariff Act (the Schedule) lists those goods that, if manufactured in Australia, are subject to excise. The table also contains the rate of duty applicable to the goods. For the excisable tobacco goods the relevant part of the table is as follows:

Excise duties			
Item	Subitem	Description of goods	Rate of Duty
5		<b>Tobacco, cigars, cigarettes and snuff</b>	
	5.1	In stick form not exceeding in weight 0.8 grams per stick actual tobacco content	* *excise duty rate per stick



	5.5	Either: (a) not in stick form; or (b) in stick form exceeding in weight 0.8 grams per stick actual <a href="#">tobacco</a> content	** Applicable rate (see section 6AAB of the Excise Tariff Act) per kilogram of tobacco content
	5.8	Blended tobacco goods	The amount of duty worked out under section 6AAC

\* For the current rates of duty, refer to the table in the Tobacco excise page on our website. Use the following link: [ATO Excise rates for tobacco](#)

Tobacco, cigars and cigarettes are all classified to item 5 but only cigars and cigarettes are in stick form so, if the individual sticks do not exceed 0.8 grams in weight of tobacco (that is, not including filters or paper), they are classified to subitem 5.1. Products such as cigars and cigarettes with more than 0.8 grams of tobacco, pipe tobacco, ready rubbed tobacco, molasses tobacco and snuff are classified to subitem 5.5.

Where the manufacture of tobacco goods uses ingredients from other tobacco goods on which duty may have been paid (for example, imported tobacco leaf on which customs duty has been paid), the goods are classified to subitem 5.8 and the amount of duty payable on the 'blended tobacco goods' is worked out under section 6AAC of the Excise Tariff Act.

Although snuff is listed in the Schedule, there is currently a permanent ban on its supply, along with chewing tobacco, under the *Trade Practices Act 1974* - Consumer Protection Notice No. 10 of 1991 - Permanent Ban on Goods.

### **Quantity of excisable tobacco goods**


Duty for excisable tobacco goods is levied on the quantity of the products themselves.

Tobacco quantity is measured in sticks (for example, cigarettes) or kilograms of tobacco content which includes anything (including moisture and other additives) added to the tobacco leaf during manufacturing or processing. This includes such things as molasses added to tobacco for use in a hookah pipe. The molasses would be included when determining the quantity of tobacco.<sup>165</sup>

When calculating the quantity of tobacco content in kilograms you should calculate to two decimal places.

### **Rate of duty on excisable tobacco goods**

The rate of duty is set in the table in the Schedule. The rates of duty on excisable tobacco goods are subject to change. They are indexed twice a year in March and September<sup>166</sup> in accordance with increases in the AWOTE (average weekly ordinary time earnings) figures published bi-annually by the ABS (Australian Bureau of Statistics). They can also be subject to other changes resulting from government policy.

 For ease of reference we provide a 'working tariff', incorporating indexation changes, on our website. Use the following link: [ATO Excise rates for tobacco](#)

<sup>165</sup> Subsection 4(6) of the Excise Act.

<sup>166</sup> Section 6AA of the Excise Tariff Act.

The rate of duty you use is the rate contained in the working tariff for the subitem. It will also depend on the seven-day tobacco excise period on your licence. The rate applicable is at the time you manufacture the tobacco goods, as they are deemed to be entered for home consumption, and delivered for home consumption at that time.<sup>167</sup>

### Example 6B

When goods are manufactured during the tobacco excise period, the rate of duty that applies is the rate in force at the time the goods are taken to be entered and delivered for home consumption.

On 10 March 2021 a manufacturer produces one million cigarettes under its licence.

The cigarettes are classified to subitem 5.1 of the Excise tariff.

The rate of duty that applies is the rate in force on 10 March 2021 – \$1.10360 per stick, even though the duty will not be paid until the end of the tobacco excise period.

- ! The amount of duty payable is then calculated by multiplying the quantity of excisable tobacco goods by the applicable rate of duty.

### Example 6C

1,000,000 cigarettes are manufactured on 10 March 2021 under an excise manufacturer licence.

The cigarettes are classified to subitem 5.1 of the Excise tariff and have a duty rate of \$1.10360 per stick.

Therefore, the duty payable is 1,000,000 sticks x \$1.10360 = \$1,103,600.00

If you have manufactured cigarettes classified to subitem 5.1 and pouch tobacco classified to subitem 5.5 then you need to add more than one line onto the excise return and then calculate the total duty liability for both lines.

### ***What happens if the rate changes during my seven-day tobacco excise period?***

If the rates of duty change within your tobacco excise period, you may lodge two excise returns or, alternatively, include separate lines for the same product on one return; that is:

- one return or line for goods manufactured under the old rates, and
- one return or line for goods manufactured under the new rates.

### Example 6D

The rate of duty for tobacco in stick form not exceeding 0.8 g per stick actual tobacco content increased on and from 1 September 2020 (a Tuesday) from \$0.94964 to 1.10360 per stick.

Sovereign Tobacco holds an excise manufacturer licence specifying a weekly tobacco excise period commencing Monday.

Sovereign Tobacco manufactures one million cigarettes daily at its licensed factory premises.

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<sup>167</sup> Subsection 66(7) of the Excise Act.

In its excise return for Monday 7 September, Sovereign Tobacco uses separate line entries for product manufactured at the old rate and at the new rate:

Line	Tariff item	Quantity	Units	Duty rate	Excise amount
1	5.1	1,000,000	stick	\$0.94964	\$949,640.00
2	5.1	6,000,000	stick	\$1.10360	\$6,621,600.00

### ***How can the rate change?***

In addition to AWOTE increases, as described above, the applicable rate of excise duty can also be affected by:

- changes to the Excise Tariff Act (including tariff proposals), or
- quotas

### ***Changes to the Excise Tariff Act***

Where the Government decides to change the rate of excise applying to certain excisable goods, or to start applying excise to certain goods or stop applying excise to certain goods this requires an amendment to the Excise Tariff Act. The Government normally notifies the intention to do this with a tariff proposal.

### ***Tariff proposals***

Tariff proposals are a means of changing the Excise Tariff (rates can be adjusted up or down; products can be added or removed) so that it is effective from the time it is proposed rather than after the enactment of an Excise Tariff Amendment Act. Most of the processes relate to Parliamentary procedures however there are specific provisions in the Excise Act that provide for the making of tariff proposals when Parliament is not sitting.

Effectively changes to the Excise Tariff can be notified in the Parliament or, if the Parliament is not sitting, by Notice in the Gazette. We then apply the proposal as if it is law.

The tariff proposal is required to be validated by an Act within 12 months giving retrospective effect to the date of the proposal.

You cannot commence proceedings against us for any action taken to collect the amount set by the tariff proposal during the periods specified in section 114 of the Excise Act.<sup>168</sup>

Effectively this means you need to pay in line with a tariff proposal. Any increases in rates or introduction of new products through a tariff proposal technically does not impose excise but we will protect the revenue by collecting amounts in line with the proposal.

If an amending Act validating the changes outlined within the tariff proposal is not passed within the prescribed periods, then any additional amounts paid will be refunded to you.

### ***Quotas***

The Commissioner has the discretion to declare that a period is a declared period during which quotas can be imposed. During a declared period, the Commissioner has the discretion to make a quota order that specifies the amount of excisable goods that a person may enter for home consumption (or manufacture in the case of tobacco goods) at the prevailing rate of duty. If a

<sup>168</sup> For an explanation of customs and excise tariff proposals, see [www.parlinfoweb.aph.gov.au](http://www.parlinfoweb.aph.gov.au).

person exceeds their quota amount during a declared period, the duty rate applicable to the excess is the rate in force on the day after the end of the declared period.<sup>169</sup> If the excise rate increases, they become liable to pay the increased rate for the goods that are in excess of their quota amount (excess goods).

Where we believe that persons are anticipating an increase in the rate of duty, and as a result the clearances of excisable tobacco goods in a particular period is likely to be greater than it otherwise would be, we will publish a notice in the *Commonwealth Gazette*. This notice will state that a particular period is a 'declared period'.<sup>170</sup> Use this link to access [PS LA 2012/3 Determining and applying quotas under the Excise ACT 1901](#).

The 'declared period' is the period during which quotas will operate. To establish what your quota is we will consider the amounts of your past deliveries.<sup>171</sup>

Once we have established your quota we will give you a written quota order that specifies the maximum level (which can be nil)<sup>172</sup> of excisable tobacco goods that you can enter and deliver into home consumption (manufacture) at the applicable excise rate in force during the declared period.

If, at any time during the declared period, you exceed your quota you are required to pay the duty on the excess goods at the existing rate.

At the end of the declared period we will reconcile your deliveries with your quota. If you manufactured more than your quota, then the duty for the amount in excess of the quota is calculated at the rate in force the day after the declared period ends. Therefore, if the rate has gone up, you will pay the higher rate of duty on the amount in excess of your quota.

We can vary or revoke a quota order any time before the end of the declared period or 60 days after the making of the quota order whichever occurs last.

### **6.2.5 What do I do if I have a dispute as to the duty?**

If you dispute<sup>173</sup>:

- the amount of duty
- the rate of duty, or
- the liability of goods to duty (for example, whether the goods are excisable),

you may deposit with us the amount of duty demanded.

The deposit of this duty is to be made on an excise return. The excise return should be accompanied by a letter which sets out the details of the dispute. You have six months after making the deposit to commence court action. If that action is decided in your favour we are obliged to refund you the deposit along with interest of 5% p.a. If the action is not commenced within six months or the court does not find in your favour the amount deposited is taken to be the correct amount of duty.

However, you may not commence court action if you have a taxation objection under Part IVC of the *Taxation Administration Act 1953* (TAA) against a private ruling and the matter of the objections:

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<sup>169</sup> Subsections 59A(1) and (2) of the Excise Act.

<sup>170</sup> Subsections 59A(1) and (2) of the Excise Act.

<sup>171</sup> Subsection 59A(5) of the Excise Act.

<sup>172</sup> This allocation considers your normal delivery activity over a period of time. This period will take into account any aberrations and will be long enough to allow a representative average to be calculated.

<sup>173</sup> Section 154 of the Excise Act.

- relates to the amount or rate of duty, or
- the liability of the goods to duty, and
- the matter of the objection is also in dispute.<sup>174</sup>

➤ For more information on private rulings see section 8.4.1 – Private Rulings

⚠ These disputes do **not** apply to changes brought about by a tariff proposal.

➤ For more information on tariff proposals see section 6.2.4 - How do I work out the amount of duty to pay?

Generally, duty disputes under section 154 of the Excise Act only applies to goods that are delivered under pre-payment as entitlement to delivery of the goods is dependent on the deposit being paid and a proper entry being made.<sup>175</sup> However, section 154 also applies to all manufactured tobacco goods when the amount of duty demanded is paid within the tobacco excise period as a proper entry is deemed to have occurred at the time of manufacture.

Manufacture of the goods and payment of interest do not apply in cases where we are of the opinion that any evasion under the Excise Act has been committed or attempted.

### 6.2.6 Do I have to account for tobacco leaf and excisable tobacco goods?

Where you have or had possession, custody or control of any tobacco leaf<sup>176</sup> and/or excisable tobacco goods<sup>177</sup> (subject to our control) you have to be able to satisfactorily account for them when requested.

If we ask you to account for tobacco leaf or excisable tobacco goods, and you cannot satisfactorily do so, then you will generally be required to pay an amount equal to the excise duty which would have been payable. In the case of tobacco leaf, the amount payable is equal to the excise duty if it had been manufactured into excisable goods classified to subitem 5.5 of the Schedule to the Excise Tariff Act.<sup>178</sup>

If we require this payment you will be given a written demand. The amount you are required to pay is calculated using the rate in force on the day the demand is made. A payment of duty (or an amount equal to the duty) does not prevent the Commissioner from pursuing other liabilities arising under the Excise Act for the same goods.<sup>179</sup>

When requested to account for goods you must be able to show that:

- for tobacco leaf, the goods are still under **excise control**
- duty has been paid
- duty was not payable (for example, where a remission applied), or

<sup>174</sup> Section 155 of the Excise Act and section 359-60 of Schedule 1 to the TAA.

<sup>175</sup> Section 154 of the Excise Act.

<sup>176</sup> Section 77AA of the Excise Act.

<sup>177</sup> Section 60 of the Excise Act.

<sup>178</sup> Section 77AA of the Excise Act.

<sup>179</sup> Subsections 60(4) and 77AA(4) of the Excise Act.

- the goods have otherwise been dealt with in accordance with the law (for example, tobacco leaf was moved pursuant to the conditions of a movement permission and the goods, and responsibility to keep the goods safely and account for them when requested has been taken up by another person or the goods were exported).

Goods will not have been accounted for satisfactorily if they were:

- given away for promotional purposes<sup>180</sup>
- stolen from licensed premises,<sup>181</sup> or
- delivered into the Australian domestic market under the mistaken belief that they were not excisable.<sup>182</sup>

We may also demand payment from you if you have failed to keep excisable tobacco goods safely (for example, if you have a break-in and a theft occurs). Again you will generally have an opportunity to pay the excise duty. If the duty is not paid, we may demand that you pay an amount equal to the duty payable at the rate applicable on the day of the demand.<sup>183</sup> If we require this payment you will be given a written demand.

Our decision to demand payment is a reviewable decision.<sup>184</sup>

➤ For information about your review rights refer to *Chapter 8 - Reviews and objections*.

In determining whether you have accounted for the excisable tobacco goods, we may allow you to offset any stock shortages and surpluses.

### Example 6E

A licensed manufacturer of tobacco goods is asked to account for their excisable tobacco goods that were manufactured. As part of the audit, they carry out a stocktake of what is in the warehouse. There is a surplus of 4,000 sticks of Brand X and a shortage of 10,000 sticks of Brand Y compared to their book stock.

We will allow the manufacturer to offset the surplus and shortage and correct the book stock. Therefore, there are 6000 sticks that have not been accounted for.

A demand will be issued for an amount equal to the excise duty payable on the 6,000 sticks.

➤ For more information about refunds and remissions see *Chapter 7 – Remissions, refunds, drawbacks and exemptions*.

<sup>180</sup> ATO Interpretative Decision ATO ID 2004/61 *Excise: goods given away without payment of excise duty*; but see 'How do I deliver samples?' in *chapter 7 – Remissions, refunds, drawbacks and exemptions*.

<sup>181</sup> ATO Interpretative Decision ATO ID 2001/595 *Excise: Liability to pay an amount equal to the duty on excisable goods stolen from a licensed premise*.

<sup>182</sup> ATO Interpretative Decision ATO ID 2004/62 *Excise: goods sold without payment of excise duty*.

<sup>183</sup> For tobacco leaf, the amount is calculated by assuming the leaf had been manufactured into an equivalent amount of excisable tobacco goods.

<sup>184</sup> Section 162C of the Excise Act.

## 6.3 Procedures

### 6.3.1 How do I get a tobacco excise period?

If you apply for a manufacturer licence, you can use your application form to indicate when you want your recurring seven-day period (the tobacco excise period) for the licence to start and end. You do not need to complete a separate application.

If we approve your licence, we will notify you in writing within 28 days of receiving your completed application.

 A licence is not transferable to another person and remains in force until revoked.

### 6.3.2 What does my licence include?

Your licence in relation to excisable tobacco goods will include:

1. permission to manufacture excisable tobacco goods and deliver the products into home consumption
2. conditions, such as:
  - tobacco excise period – the period specified on which goods can be manufactured before an excise return and payment must be lodged<sup>185</sup>
  - the type of goods that may be manufactured from each premises
  - quantity limits (if any)
  - when you must pay the duty
  - how you must pay – permitted methods (for example, EFT, cheque, at a Post Office)
  - when and how to lodge your excise return,<sup>186</sup> and
  - record-keeping requirements
3. a schedule listing:
  - one or more premises from which you may manufacture tobacco goods or store tobacco leaf.

#### Example 6F

A licence specifies a tobacco excise period starting on Saturday and ending on Friday. It states that excise returns must be lodged by 4 pm on the first business day after the end of the tobacco excise period. It also says that the duty on tobacco goods manufactured during the tobacco excise period must be paid at the same time as the excise return is required to be lodged.

You must lodge an excise return and pay the duty by 4 pm on Monday for all goods manufactured during the tobacco excise period.

When a public holiday falls on a Monday, the excise return is due for lodgment and duty is to be paid by 4 pm on Tuesday, the next business day.

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<sup>185</sup> The settlement period usually specified in a licence is seven days with lodgment of your excise return required by 4:00 pm on the first working day after the end of your tobacco excise period.

<sup>186</sup> You are required to lodge a return even if you do not manufacture any excisable tobacco goods during the period.

Where you have deliveries in different states of Australia there may be different public holidays in those states. If your returns are prepared by an office in a state different from that in which the manufacture occurs, lodgment is due on the next business day in the state where the return is prepared.<sup>187</sup>

The TAA provides the Commissioner with the power to allow the payment of a tax related liability (including excise duty) and lodgment of an approved form (including an excise return) to be deferred in certain circumstances. Law Administration Practice Statement PSLA 2011/14 and 2011/15 provide details of when the Commissioner can exercise this power, with the main requirement being that the circumstance that led to the request to defer payment or lodgment is outside the control of the entity required to pay the liability and lodge the return.

Circumstances that are accepted as outside the control of a licence holder include natural disaster, serious illness or legal impediment, while an example of a circumstance that would not satisfy the requirements of the PSLA would be a licence holder closing down their operations for Christmas holidays (other than acknowledged public holidays).

### 6.3.3 What must I do to legally manufacture and deliver tobacco goods into home consumption?

- ! If we provide you with a licence, you must take the following steps when manufacturing excisable tobacco goods:
1. complete and submit your excise return in accordance with the timeframes in the licence, and
  2. pay the duty to us in accordance with the timeframes in the licence.

### 6.3.4 How do I lodge excise returns and pay excise duty?

To lodge your *excise return* (NAT 4285):

- use the [Online Services for Business](#), or
- post it to:

**Excise Returns Processing Unit  
PO Box 3007  
PENRITH NSW 2740**

You can pay excise duties:

- by electronic funds transfer, including direct credit and BPAY
- using a credit card
- in person at a Post Office, or
- by mail (cheque or money order).

- ! If you are required to pay your other tax debts electronically, you must also make your payment for excise duty by electronic funds transfer.

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<sup>187</sup> ATO Interpretative Decision ATO ID 2004/114 (Withdrawn) *Payment of excise duty: lodgment of periodic settlement permissions – public holidays*. Paragraph 1.21 of the Explanatory Memorandum to the Excise Amendment (Reducing Business Compliance Burden) Bill 2011.



If you pay the excise duty at a Post Office, you must use a payment advice. To obtain a payment advice booklet, phone us on **13 72 26** or, if you need further information, **1800 815 886** and supply us with your Australian business number (or Excise Identification Number) and client account number.

Lodgment of an excise return and payment of any duty must be made by the day and time stated on your licence. This means that we must receive the funds by that time.<sup>188</sup>

Failure to pay on time will result in a liability to pay the general interest charge on the amount of Excise duty unpaid<sup>189</sup> and may result in the cancellation of your licence.

- To obtain an *excise return* (NAT 4285):
  - visit our website at [www.ato.gov.au](http://www.ato.gov.au), or
  - phone **1300 137 290**.
  
- For more information about completing your excise return refer to the *Excise return instructions* (NAT 15436).

### 6.3.5 What do I do if I have made an error on my excise return?

You may correct errors in your excise return or add new lines by lodging an amending excise return and referencing the number of your original return.

If your amendment results in a shortfall in excise duty paid, you must pay the additional duty and any general interest charge when you lodge the amending return.

If your amendment results in an overpayment of excise duty, you may apply for a refund or treat the amount as a credit and offset it against the duty you are liable to pay in your next excise return.

An amending return can only be used to change product details such as tariff item, volume or rate of duty.

If you wish to change other information in your original excise return (for example client details or the tobacco excise period) you must lodge a new excise return form as the amending excise return form does not cater for changes to these sections. The new return must contain the amended details and refer to the original return. You should also request cancellation of the original return.

- To obtain an *Amending excise return* (NAT 4286):
  - visit our website at [www.ato.gov.au](http://www.ato.gov.au), or
  - phone **1300 137 290**.
  
- For more information about completing your *Amending excise return* refer to the:
  - *Amending excise return instructions* (NAT 15772)

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<sup>188</sup> ATO Interpretative Decision ATO ID 2004/113 (Withdrawn) *Payment of Excise Duty: Periodic settlement permission returns*.

<sup>189</sup> section 67 of the Excise Act.

### 6.3.6 What do I do if I need more information?

If you need more information on payment of duty contact us as follows:

- the [Online Services for Business](#)
- phone **1300 137 290**
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au), or
- write to us at

**Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

We will ordinarily respond to electronic requests within 15 business days and finalise private rulings within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

## 6.4 What penalties can apply to offences in relation to payment of duty?

The following are the penalties that may apply after conviction for an offence.

### 6.4.1 Move, alter or interfere

If you move, alter or interfere with excisable tobacco goods that are subject to excise control, without permission, the penalty is a maximum of two years in prison or the greater of 500 **penalty units** and five times the amount of duty on the excisable tobacco goods.<sup>190</sup>

### 6.4.2 Evade

If you evade payment of any duty which is payable, the maximum penalty is five times the amount of duty on the excisable tobacco goods, or where a court cannot determine the amount of that duty the penalty is a maximum of 500 penalty units.<sup>191</sup>

### 6.4.3 False or misleading statements

If you make a false or misleading statement, or an omission from a statement in respect of duty payable on particular goods, to us, a penalty not exceeding the sum of 50 penalty units and twice the amount of duty payable on those goods.<sup>192</sup>

In some cases these penalties can be in addition to the duty that is payable on the excisable tobacco goods as they have been delivered into home consumption.<sup>193</sup>

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<sup>190</sup> Section 61 of the Excise Act.

<sup>191</sup> Paragraphs 120(1)(iv) and 120(2)(b) of the Excise Act.

<sup>192</sup> Subsection 120(3) of the Excise Act.

<sup>193</sup> Section 54 of the Excise Act.

# CHAPTER 7 – Remissions, refunds, drawbacks and exemptions

## Purpose

This chapter deals with:

- when you can apply for a remission, refund or drawback of excise duty
- what happens if you are overpaid a refund or drawback of excise duty
- when tobacco goods are free from excise duty
- how to apply for a refund or drawback of excise duty, and
- penalties that can apply to offences in relation to remissions, refunds, drawbacks and exemptions.

## 7.1 Introduction

A remission of excise duty extinguishes the liability for duty that was created at the point of manufacture.

A refund is the repayment of duty that has already been paid.

A drawback is a repayment of duty already paid. It is similar to a refund, but applies where duty-paid goods are exported.

In some circumstances the duty you pay on goods may be subject to a complete or partial refund or drawback.<sup>194</sup>

## 7.2 Policy and practice

### 7.2.1 When can I apply for a remission of excise duty?

As excisable tobacco goods are deemed entered and delivered into home consumption at the point of manufacture, they are no longer subject to excise control and there are no circumstances under clause 1 of Schedule 1 to the Excise Regulation in which **an application** for remission can be made. Generally the circumstances will relate to an application for a refund of the duty paid.

#### ***When are excisable tobacco goods subject to remission without an application?***

Excisable tobacco goods are subject to remission without application **prior to the duty being paid** at the end of the seven-day excise tobacco period (this effectively means they are exempt from duty) when they are for official use but not for trade by<sup>195</sup>:

- parties that use tobacco for an approved medical, scientific, horticultural or agricultural purpose (the relevant approvals should be sought from us)<sup>196</sup>

#### **Example 7A**

Tobacco plants are grown and used by an approved educational facility for scientific purposes. The facility has a producer and manufacturer licence to grow and manufacture the tobacco goods. The facility has an automatic remission of duty on all tobacco goods that it uses. As part of the

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<sup>194</sup> Section 78 of the Excise Act.

<sup>195</sup> Clause 2 of Schedule 1 to the Excise Regulation.

<sup>196</sup> Item 1 of the table in clause 2 of Schedule 1 to the Excise Regulation.

conditions of the licence, the facility must also destroy, with approval all tobacco not used in their experiments and retains records of the destruction (for example, date, volume and type of goods destroyed).

- the Governor-General or any member of the Governor-General's family<sup>197</sup>
- State Governors or any member of a State Governor's family
- the Australian American Foundation (Australian-American Fulbright Commission)
- the Government of another country, under an agreement between that Government and the Australian Government
- persons covered by a Status of Forces Agreement<sup>198</sup>, and

### Example 7B

A manufacturer receives an order from the Australian Defence Force for supply of cigarettes to US defence personnel undertaking joint military training exercises in the Northern Territory. A remission of the excise payable can be applied to tobacco goods and will be reflected in the sale price.

- the personnel of sea-going vessels of the Royal Australian Navy (RAN) or Australian Military Forces (AMF) (see below for more detail).<sup>199</sup>

➤ If you are not certain whether someone falls into one of these categories, you should contact us by phone on **1300 137 290**.

Some restrictions apply to tobacco goods for the RAN and AMF. Tobacco, cigars and cigarettes may be supplied free of duty when:

- the goods are for consumption by the personnel of sea-going vessels of the RAN or the AMF when
  - such vessels are in full commission, and
  - the goods are consumed on such vessels.<sup>200</sup>

To supply tobacco goods under these circumstances, you must first ensure the receiver meets the relevant criteria. For example, you should only accept orders, stating that the goods are for official use, on the official stationery, or official order, of eligible people or organisations. You must keep a copy of this documentation.

⚠ You do not have to apply for a remission and you do not have to include these goods on your excise return, but you must keep sufficient records of each transaction

<sup>197</sup> Item 2 of the table in clause 2 of Schedule 1 to the Excise Regulation.

<sup>198</sup> Item 5 of the table in clause 2 of Schedule 1 to the Excise Regulation.

<sup>199</sup> Item 6 of the table in clause 2 of Schedule 1 to the Excise Regulation.

<sup>200</sup> Item 6(b) of the table in clause 2 of Schedule 1 to the Excise Regulation.

## 7.2.2 When can I apply for a refund of excise duty?

You can apply for a refund of excise duty paid on excisable tobacco goods if the following circumstances apply:

1. Duty has been paid through manifest error of fact or patent misconception of the law.<sup>201</sup>

This circumstance applies to an error that is evident, obvious or apparent and also in situations where duty has been paid in error for goods entering home consumption that are not excisable. In both cases a refund of the duty paid would be payable.

### Example 7C

A tobacco manufacturer calculates the excise on pouch tobacco on the basis that the packages contain 50 grams whereas they only contain 30 grams. Excess duty is paid through an obvious error of fact.

The manufacturer applies for a refund of the duty overpaid through manifest error of fact.

2. Duty-paid goods have been taken up as ship's or aircraft's stores.<sup>202</sup>

Ship's stores on overseas ships and aircraft's stores on international flights are not subject to excise duty.<sup>203</sup> Where duty has been paid and the excisable tobacco goods are subsequently re-directed for use on ships or aircraft travelling overseas, this refund circumstance may apply.

3. Duty paid tobacco goods are returned to an excise licensed premises, or a person authorised by the manufacturer of the goods to receive goods on behalf of the manufacturer, and the returned tobacco is destroyed or mixed with other tobacco goods of a similar kind, that is, loose tobacco with loose tobacco, cigarettes or cigars with tobacco that is to be used in the manufacture of cigarettes or cigars.<sup>204</sup>

⊖ Tobacco goods that are to be destroyed are to be returned to the manufacturer or can be returned to a person authorized by the manufacturer to receive the tobacco goods on their behalf. This is generally a place where the goods will be destroyed (furnace or council tip).

⊖ A refund will not be allowed for returned goods under this circumstance unless a notice of intention to destroy or mix the goods has been given to the Commissioner at least seven days before that event.<sup>205</sup>

### Example 7D

Cigarettes have gone stale at retailers' premises. The manufacturer's sales representative arranges for the return of the cigarettes to the manufacturer's distribution premises with a refund or credit to the retailer.

The manufacturer notifies us at least seven days before they destroy the cigarettes that they intend to destroy them. The manufacturer applies for a refund of duty on the returned cigarettes.

<sup>201</sup> Item 3 of the table in subclause 1(1) of Schedule 1 to the Excise Regulation.

<sup>202</sup> Item 5 of the table in subclause 1(1) of Schedule 1 to the Excise Regulation.

<sup>203</sup> Subsection 160A(1) of the Excise Act.

<sup>204</sup> Item 7 of the table in subclause 1(1) of Schedule 1 to the Excise Regulation.

<sup>205</sup> Subsection 10(2) of the Excise Regulation.

Note: Refund circumstance 1 does not apply in this instance because the goods have gone stale after they passed out of excise control.

Refunds for tobacco goods returned to the manufacturer for remixing or destruction are exclusively claimed by the manufacturer who paid the excise duty on manufacturing the tobacco goods.

The historical experience has been that manufacturers replace returned tobacco goods or provide equivalent compensation by credit note on a 'like for like' basis. That is, they also compensate the party returning their goods in respect of duty paid by that other party. This is done in the context of agreement and understanding between them in those circumstances that only the manufacturer can and will claim the relevant duty refund.

When calculating the amount of refund for tobacco goods returned to the manufacturer, we recognise that due to the nature of these returns (that is, usually stale product that may have been duty paid at different times it is sometimes unrealistic to expect you to identify the actual rate of duty paid on each product when the goods were originally manufactured and delivered into home consumption.

Therefore, when making claims in relation to returned tobacco goods pursuant to item 7 of the table in subclause 1(1) of Schedule 1 to the Excise Regulation a tobacco manufacturer may use the rate in force six months prior to the refund claim or where they have evidence of the excise duty paid on the returned goods then the claim can be calculated using that information.

4. Duty has been paid on excisable tobacco goods and they are sold to a diplomatic or consular mission.<sup>206</sup>

For refund circumstance 1 and 2 in section 7.2.2 above, your application must be submitted within 12 months of the date on which the excise duty was paid.<sup>207</sup> There are no time limitations for lodgment of a refund application under the other circumstances listed above.

### 7.2.3 When can I apply for a drawback of excise duty?

You can apply for a drawback if you export tobacco goods that have had excise duty paid on them.<sup>208</sup>

We will only pay a drawback if<sup>209</sup>:

- prior to the exportation, you advise us that you intend to claim a drawback (We can exempt you from this requirement, in writing, either on all claims for drawback or any particular claim<sup>210</sup>)
- before exportation of the excisable tobacco goods on which duty has been paid, the goods are available for inspection by us
- you have not claimed a refund of excise duty in relation to the exported excisable tobacco goods
- the excisable tobacco goods have not and are not intended to be returned to Australia after they have been exported

<sup>206</sup> Item 13 of the table in subclause 1(1) of Schedule 1 to the Excise Regulation.

<sup>207</sup> Section 11 of the Excise Regulation.

<sup>208</sup> Section 79 of the Excise Act and Part 3 of the Excise Regulation.

<sup>209</sup> Subsection 16(1) of the Excise Regulation.

<sup>210</sup> Subsection 16(2) of the Excise Regulation.

- you keep records showing
  - that duty was paid on the tobacco goods (for example invoice), and
  - the tobacco goods were exported (for example, an export declaration number or bill of lading and evidence such as payment by the buyer)
- you lodge a drawback claim in the approved form no later than 12 months after the tobacco goods were exported, and
- the amount of the claim is at least \$50.

The amount of the drawback will not exceed the amount of excise duty that was paid.<sup>211</sup>

### **Example 7E**

A cigarette distributor purchases a quantity of excise duty-paid cigarettes. The distributor notifies us that they intend to export the cigarettes and makes them available for inspection by us. They then export them to Fiji.

The cigarette distributor applies for a drawback of the excise duty component of the cigarettes. To support the application, the company provides us with copies of invoices of purchase and the Bills of Lading, which will include details of the export declaration notice (EDN) number.

### **7.2.4 What happens if I am overpaid a refund or drawback?**

If we overpay you by way of a refund or drawback then you must pay the overpaid amount back. We can require that you pay back the amount and if you do not repay the amount within the time we specify we can recover the amount through the courts as a debt due to the Commonwealth.<sup>212</sup>

### **7.2.5 When are excisable tobacco goods free from excise duty?**

Excisable tobacco goods are not liable for duty if they are:

- exported
- sold for use as ship's or aircraft's stores<sup>213</sup>
- with our approval, delivered as small samples<sup>214</sup>, or
- subject to remission without application.<sup>215</sup>

### ***What are ship's and aircraft's stores?***

Ship's and aircraft's stores are goods for the use of passengers or crew on international journeys (for example, cigarettes for sale to passengers on board a cruise liner).

There are limits on the quantities of excisable tobacco goods that are not liable to excise duty as ship's stores<sup>216</sup>:

- cigarettes must be sold to passengers or crew in individual packets or tins of not more than 50 sticks

<sup>211</sup> Subsection 16(3) of the Excise Regulation.

<sup>212</sup> Section 80 of the Excise Act.

<sup>213</sup> Section 160A of the Excise Act.

<sup>214</sup> Section 64 of the Excise Act.

<sup>215</sup> Clause 2 of Schedule 1 to the Excise Regulation.

<sup>216</sup> Section 55 of the Excise Regulation.


- loose tobacco (for example, pipe or cigarette tobacco) must be sold in quantities of not more than 120 grams, or
- Cigars must be sold in individual packets, tins, or boxes of not more than 25 cigars.

Ship's and aircraft's stores are goods for the use of the passengers or crew of an international aircraft or overseas ship. In the normal course of events such goods can be supplied to a ship or aircraft without an entry and without duty being paid; the authority for doing this being an approval granted under section 129 of the Customs Act.

### ***Can I deliver samples without payment of duty?***

Yes, you may be able to deliver small samples without payment of duty and without entry. You must apply to us for approval and your application must:

- be in writing
- specify who the sample is for
- specify the quantity for approval, and
- specify the purpose of the sample.

 You do not include approved samples in your **excise return**; however, you must keep records of any samples you deliver.

If you need more information on samples call us on:

- phone **1300 137 290**

Or to apply for approval, send your application to us by:

- the [Online Services for Business](#)
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au),
- or posting to

**Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

## **7.3 Procedures**

### **7.3.1 How do I apply for a refund?**

An application for a refund must be submitted in writing. Records to substantiate your claims must be maintained and produced when requested.<sup>217</sup>

For refund circumstance 1 and 2 in section 7.2.2 above, your application must be submitted within 12 months of payment depending on your circumstances.<sup>218</sup>



To ensure the excisable tobacco goods that are to be destroyed do not find their way into the Australian domestic market, we may wish to inspect or supervise the disposal of the goods. If excisable tobacco goods or tobacco leaf must be destroyed off site, you must submit an application

<sup>217</sup> Section 10 of the Excise Regulation.


<sup>218</sup> Section 11 of the Excise Regulation.



and it must be approved by us prior to moving them to the place of destruction. For tobacco leaf the approval will also include a movement permission.<sup>219</sup>

-  You should contact us before moving or destroying any tobacco products subject to remission or refund. We will provide you with direction and advise you if the goods are to be inspected or the destruction supervised.
  
-  For more information about movement permissions refer to *Chapter 4 - Movement permissions*.

You can elect to have a refund credited to your excise account or paid directly into your bank account.

-  To apply for a refund, send us a completed *Excise refund* (NAT 4287). You can use the *Excise refund instructions* (NAT 15771) to help you complete this form. Applications can also be made on company letterhead as long as all the relevant information is provided.

If you are not satisfied with our decision to refuse your refund or remission, you can request a review of our decision by lodging an objection within 60 days.

-  For more information about your review rights refer to *Chapter 8 - Reviews and objections*.

### **7.3.2 How do I apply for a drawback?**

An application for a drawback must be submitted in writing. Records to substantiate your claims must be maintained and produced when requested.<sup>220</sup>

Your drawback application must be submitted no later than 12 months after the goods are exported.<sup>221</sup>

To apply for a drawback of duty, send us a completed *Excise drawback* (NAT 4287) or an application on your business letterhead. You can use the *Excise drawback instructions* (NAT 15688) to help you complete NAT 4287.

If we refuse to pay your drawback and you are not satisfied with our decision you can request a review of our decision by lodging an objection within 60 days.

-  For more information about your review rights refer to *Chapter 8 - Reviews and objections*.

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<sup>219</sup> Section 20 of the Excise Regulation.

<sup>220</sup> Item 2 of the table in subsection 16(1) of the Excise Regulation.

<sup>221</sup> Item 3 of the table in subsection 16(1) of the Excise Regulation.

### 7.3.3 What do I do if I need more information?

If you need more information on remissions, refunds, drawbacks and exemptions contact us as follows:

- The [Online Services for Business](#)
- phone **1300 137 290**
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au) or
- write to us at

**Australian Taxation Office  
PO Box 3514  
ALBURY NSW 2640**

We will ordinarily respond to electronic requests within 15 business days and finalise private rulings within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

## 7.4 What penalties can apply to offences in relation to remissions, refunds, drawbacks and exemptions?

The following are the penalties that may apply after conviction for an offence.

### 7.4.1 Evade

If you evade payment of any duty which is payable the maximum penalty is five times the amount of duty on the excisable tobacco goods or where a court cannot determine the amount of that duty the penalty is a maximum of 500 units.<sup>222</sup>

### 7.4.2 False or misleading statements

If you make a false or misleading statement or an omission from a statement in respect of duty payable on particular goods, to us, the maximum penalty is a penalty not exceeding the sum of 50 **penalty units** and twice the amount of duty payable on those goods.<sup>223</sup>

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<sup>222</sup> Paragraph 120(1)(iv) and 120(2)(b) of the Excise Act.

<sup>223</sup> Paragraph 120(1)(vi) of the Excise Act.

## CHAPTER 8 – Reviews and objections and private rulings

### Purpose

This chapter deals with:

- the types of review you can ask for
- what decisions you can object to
- when you can seek an external review
- how to request an independent internal review
- how to lodge an objection
- how to request an external review, and
- private rulings.

### 8.1 Introduction

We will provide you with a clear explanation of any decision we make about your excise affairs. If you need more information about our decisions, contact us using the details we provide when we advise you of our decision.

If you're not satisfied with a decision we've made, you can ask for it to be reviewed by:

- independent internal review<sup>224</sup>
- objection<sup>225</sup>, or
- external review.<sup>226</sup>

Where there is more than one review option, we will explain how these differ. For example, some reviews look at questions of law and others involve checking that we followed the correct process in reaching our decision. Which review option is best will depend on your situation.

### 8.2 Policy and practice

#### 8.2.1 What are independent internal reviews?

Under the Taxpayers' Charter, you can seek an informal (internal) review where you believe that we have made a mistake, not complied with the law, interpreted or applied the law incorrectly.

Your dissatisfaction with our decision may be treated as an independent internal review both prior to or after:

- a notice of assessment issues, and/or
- you receiving notification of the decision in writing.

An independent internal review does not waive or defer your rights to object to the decision.

However, if you choose to pursue an independent internal review, awaiting the outcome of the independent internal review may prejudice your right to object to the decision and, ultimately, your

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<sup>224</sup> For example, a decision not to issue a movement permission under section 61A of the Excise Act.

<sup>225</sup> Objections are governed by Part IVC of the TAA.

<sup>226</sup> These are conducted in the Administrative Appeals Tribunal or the Federal Court.

right for external review. For example, the time allowed to lodge an objection may have expired by the time an independent internal review is finalised.

**!** This is particularly crucial if the original decision attracts only a 60-day objection period.

### 8.2.2 Can I object against any decision?

No, you can only lodge an objection against those decisions contained in sections 39Q and 162C of the Excise Act and section 14 of the Excise Regulation. These include decisions:

- made under the licensing provisions of the Excise Act<sup>227</sup> such as
  - refusal to grant a licence
  - imposing and varying conditions on a licence, or
  - suspension, cancellation or refusal to renew a licence
- to demand an amount in relation to excisable goods not kept safely or satisfactorily accounted for when requested<sup>228</sup>
- relating to a refund or remission of duty<sup>229</sup>
- not to approve payment of drawback.<sup>230</sup>

However, if you informally ask us to review a decision we will try to resolve any problems as quickly as possible. If we have made a mistake, we want to fix it at the least cost to both of us.

### 8.2.3 When can I seek an external review?

For decisions in relation to an objection, or where there is no right of objection, you may be able to apply to the Federal Court or Federal Magistrates Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

## 8.3 Procedures

### 8.3.1 How do I request an independent internal review?

To request an independent internal review, use the contact details we provide to contact the person or area of the Tax Office handling your case. The review will be conducted by a tax officer who was not involved in making the original decision.

We will advise you of the outcome of our review within 28 days of receiving all the information we need. If we cannot finalise the review within 28 days, or we need more information from you, we will contact you within 14 days to obtain the information we need or negotiate an extended reply date.

### 8.3.2 How do I lodge an objection?

You can lodge an objection by completing an objection form or writing your own objection document. Your objection must:

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<sup>227</sup> Section 39Q of the Excise Act.

<sup>228</sup> Paragraph 162C(1)(c) of the Excise Act.

<sup>229</sup> Paragraph 162C(1)(i) of the Excise Act.

<sup>230</sup> Paragraph 162C(1)(j) of the Excise Act. And subsection 14(3) of the Excise Regulation.

- be in writing
- lodged within 60 days after you receive the notice of the decision, and
- set out a full and detailed account of the grounds for the objection.<sup>231</sup>

If you are a registered user you can lodge your objection through the [Online Services for Business](#)

You can also lodge your objection:

- by email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au), or
- by posting it to

**Australian Taxation Office**  
**PO Box 3514**  
**ALBURY NSW 2640**

If you do not lodge your objection within 60 days we will not consider your objection, unless you provide the reasons for late lodgement. We will consider these reasons before continuing with the objection process.

We will make a decision about your objection within 56 days of receiving it. If we need more information or we cannot make a decision within 56 days, we will contact you within 14 days to obtain the information we need or to negotiate an extended reply date.

If we disallow your objection or if we will not consider your late objection, you can:

- apply to the Administrative Appeals Tribunal (AAT) for a review of the decision, or
- appeal against the decision to the Federal Court.

- To obtain a copy of our objection forms and for more information about how to lodge an objection, refer to *How to lodge an objection* on our website at [www.ato.gov.au](http://www.ato.gov.au)
- For more information about what to do if you believe your legal rights or the standards outlined in the Taxpayers' Charter have not been met, refer to Taxpayers Charter *What you need to know* (NAT 2548).

### 8.3.3 How do I request an external review?

We suggest you obtain legal advice if you are considering using external review options provided by the AAT or Federal Court.

### 8.3.4 What do I do if I need more information?

If you need more information on reviews and objections contact us as follows:

- the [Online Services for Business](#)
- email at [tobacco@ato.gov.au](mailto:tobacco@ato.gov.au)
- phone **13 28 66**, or

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<sup>231</sup> Section 14ZU of the TAA.

- write to us at  
**Australian Taxation Office**  
**PO Box 3514**  
**ALBURY NSW 2640**

We will ordinarily respond to electronic requests within 15 business days and finalise private rulings within 28 days. If we cannot respond within 28 days, we will contact you within 14 days to obtain more information or negotiate an extended response date.

## 8.4 Private rulings

A ruling is an expression of our opinion of the way a relevant provision applies or would apply to you in the administration or collection of excise duty.

We may, on application by you, make a written ruling on the way we consider a particular provision applies or would apply to in relation to a stipulated set of facts and in a particular circumstance.<sup>232</sup>

### 8.4.1 How do I apply for a private ruling?

You, your agent or legal personal representative may apply in the approved form for a private ruling. You, your agent or legal personal representative may also withdraw the application at any time before the private ruling is made.

We must confirm the withdrawal in writing for it to have effect.<sup>233</sup>

### 8.4.2 Can I rely on a private ruling?

A private ruling binds us if it applies to you and you act in accordance with it. If you act in accordance with the private ruling and the law turns out to be less favourable to you than the ruling provides, you are protected by the ruling from any adverse consequences.<sup>234</sup>

### 8.4.3 For what period can I rely on a private ruling?

Unless we specify in the private ruling when it begins and ceases to apply, you may rely on the private ruling from the time it is made.<sup>235</sup>

We may revise a private ruling we issue to you. The revised rules will apply from the date it is issued or such later time that we specify in the ruling. The original ruling will cease to apply from that time.<sup>236</sup>

### 8.4.4 Can I object to a private ruling?

You can object to a private ruling that applies to you if you are dissatisfied with it.

However you cannot object against a private ruling if:

- the ruling relates to excise duty, or another amount, payable in relation to the goods, and

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<sup>232</sup> Section 359-5 of Schedule 1 to the TAA.

<sup>233</sup> Section 359-10 of Schedule 1 to the TAA.

<sup>234</sup> Section 357-60 of Schedule 1 to the TAA.

<sup>235</sup> Section 359-25 of Schedule 1 to the TAA.

<sup>236</sup> Section 359-55 of Schedule 1 to the TAA.

- we have made a decision about the excise duty, or other amount, payable in relation to those goods, and
- the decision is reviewable.<sup>237</sup>

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<sup>237</sup> Section 359-60 of Schedule 1 to the TAA and section 155 of the Excise Act.

## CHAPTER 9 – Offences

### Purpose

This chapter deals with:

- offences under the Excise Act
- penalties
- infringement notices, and
- application of the Criminal Code.

### 9.1 Introduction

This chapter is a general discussion on offences. It is not meant as legal advice and you are encouraged to seek independent legal advice in relation to your own individual circumstances. There are a number of acts or omissions under the Excise Act that are offences.

A conviction for an offence may result in a penalty as provided for within the Excise Act. The penalty provided may be in the form of **penalty units**, a term of imprisonment or an amount of money calculated by a set formula.

### 9.2 Offences

Certain acts or omissions are offences under the Excise Act for which penalties are prescribed. For penalties to apply to an offence (except where an infringement notice has been issued), you must first be convicted of the offence in a court of law following prosecution.

Certain offences under the excise legislation are strict liability offences as defined in section 6.1 of the Schedule to the Criminal Code. Essentially, strict liability means that the offence consists of the physical act or omission only. It is not necessary for the court to find that you knowingly committed, or were reckless or negligent in relation to, the act or omission.

Some sections of the Excise Act prescribe the following two levels of offence for similar conduct a:

- higher penalty applies to an act or omission which was intentionally or recklessly committed, that is, there is a fault element, and
- lower penalty applies to the same act or omission on a strict liability basis, that is there is no fault element.

#### Example 9A

Section 26 of the Excise Act prescribes that licensed manufacturers are to manufacture in accordance with the Act and their licence.

1. A licensed manufacturer must not intentionally manufacture excisable goods knowing, or being reckless as to whether, the manufacture contravenes this Act or the manufacturer licence.

Penalty: two years imprisonment or 500 penalty units.



2. A licensed manufacturer must not manufacture excisable goods in contravention of this Act or the manufacturer licence.  
Penalty: 100 penalty units.
3. Strict liability applies to subsection (2).

**!** Section 107AA of the Excise Act codifies that the tobacco related offence provisions in Division 308 in Schedule 1 to the *Taxation Administration Act 1953* (TAA), are an offence under the Excise Act.

Maximum penalties under the TAA for the unlawful possession, sale or manufacture of tobacco goods (including tobacco seed, plant and leaf), whether domestic or imported, are much greater than for those in the Excise Act which encompasses all excisable goods (alcohol, tobacco, fuel and lubricants).

### 9.3 Penalties

The Excise Act contains many provisions that include a penalty at the foot of the section or subsection. This means that if you are convicted of an offence against the particular provision then you can receive a penalty not exceeding the penalty mentioned.<sup>238</sup> The penalty listed is thus the maximum penalty but the Courts can impose a lesser penalty.

#### Example 9B

A person manufactures excisable tobacco goods outside their licensed premises. This is a contravention of subsection 26(2) which says that a licensed manufacturer must not manufacture excisable goods in contravention of this Act or the manufacturer licence. The penalty at the foot of subsection 26(2) is 100 penalty units. We bring a court action against the person and the court convicts the person. The penalty cannot exceed 100 penalty units but it can be less.

As indicated above certain offences provide for alternative penalties, for example subsection 26(1) of the Excise Act provides for a penalty of two years imprisonment or 500 penalty units.

For some offences if a person is convicted of that offence then the courts can impose both penalties.<sup>239</sup>

**!** Where an offence also causes goods to be forfeited<sup>240</sup>, conviction by the courts results in the forfeited goods being condemned.<sup>241</sup> This means they are no longer your property and we can dispose of the goods as we see fit.

### 9.4 Infringement notices

We may issue an infringement notice<sup>242</sup> as an alternative to prosecution for unlawfully possessing, or unlawfully selling excisable goods.<sup>243</sup> An infringement notice imposes a penalty of 20 penalty units.

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<sup>238</sup> Section 5 of the Excise Act and section 4D of the *Crimes Act 1914*.

<sup>239</sup> Section 127A of the Excise Act.

<sup>240</sup> Section 116 of the Excise Act.

<sup>241</sup> Section 151 of the Excise Act.

<sup>242</sup> Section 129B of the Excise Act.

<sup>243</sup> Subsections 117(2) and 117B(2) of the Excise Act.

To issue an infringement notice, we must have a reasonable belief that you have committed the offence. Notices must be issued within 12 months of the commission of the offence.<sup>244</sup>


The penalty is payable on the day specified in the infringement notice which must be at least 28 days after the day the notice was issued.<sup>245</sup> In the event of non-payment, prosecution action may be brought against the person who committed the alleged offence.

You cannot be prosecuted for the same offence where an infringement notice has been issued unless the infringement notice is withdrawn.

We can withdraw an infringement notice and if we do so after you have paid the penalty we must refund that to you.<sup>246</sup>

## 9.5 Application of the Criminal Code

Chapter 2 of the Criminal Code applies to offences against the Excise Act. However, Parts 2.5 and 2.6, which are in Chapter 2 of the Criminal Code, do not apply.<sup>247</sup> In some courts, Excise prosecutions are able to be treated as criminal matters while in other courts they are treated as civil matters. This, obviously, has an effect on issues such as the burden and standard of proof required.

-  You are encouraged to seek independent legal advice in relation to your own individual circumstances.

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<sup>244</sup> Section 129B of the Excise Act.

<sup>245</sup> Section 129D of the Excise Act.

<sup>246</sup> Section 129F of the Excise Act.

<sup>247</sup> Section 6B of the Excise Act.

## Terms we use in these Guidelines

### CEO

CEO means the Commissioner of Taxation

### Deliver into home consumption

Deliver into home consumption<sup>248</sup> is the term used in these Guidelines and certain parts of the Excise Act to describe when excisable tobacco goods are released into the Australian domestic market for consumption. The term used in the legislation is 'deliver for home consumption' or 'deliver into home consumption'.

Normally this will be by delivering the goods away from licensed premises but includes consuming or using those goods yourself, or selling goods to your staff at your licensed premises.

The term 'home consumption' is not defined in the Excise Act. However, there are several cases<sup>249</sup> where issues closely related to it are considered, with the most appropriate one being *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951. In this case, held in the Victorian Federal Court, one of the questions Sunberg J dealt with was 'whether the residual oils were "delivered for home consumption" by Caltex for the purposes of ss 61, 61C and 59 of the Excise Act?'.

The findings of the Court on this particular issue were the:

- The taxpayer's liability for excise duty depended on whether it could be said that the taxpayer 'delivered' the residual oils for, or into, home consumption as that concept appears in the Excise Act.
- The Court found that the taxpayer delivered the residual oils for home consumption based on the finding that the Excise Act does not refer to delivery to a person but adopts the more ample language of delivery for or into home consumption.
- The Court held that the language of the Excise Act is sufficiently broad to apply to the consumption by a manufacturer at its own premises. The Court refuted the contention that 'delivery' required the physical removal of goods from one place to another, stating that in that scenario it would give the concept of delivery for home consumption a restricted meaning not warranted either by the breadth of the language used, or the purpose of the legislation.
- The conclusion drawn from these findings and those in the Southern Shipping case is that 'home consumption' refers to the destination of goods as being within Australia (as opposed to export) and that the goods did not need to be physically delivered from a premises but would include goods consumed within the premises.

### Excise control

Tobacco goods are no longer subject to excise control from the point of manufacture when they have been deemed entered and delivered into home consumption. Duty is payable by the manufacturer at the time the goods are manufactured.

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<sup>248</sup> Note the legislation uses the term 'delivered for home consumption' (see, for example, sections 61 and 61C of the Excise Act).

<sup>249</sup> See *R v Lyons* [1906] HCA 17; *Collector of Customs (NSW) v Southern Shipping Co Ltd* [1962] HCA 20 (*Southern Shipping*); *Carmody v FC Lovelock Pty Ltd* [1970] HCA 35; *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951.

Tobacco seed, plant and leaf are subject to excise control and cannot be moved, altered or interfered with except as authorised by the Excise Act.

### **Excise return**

An excise return<sup>250</sup> is the document that you use to advise us the volume of excisable tobacco goods that you have manufactured during the seven-day tobacco excise period designated on your licence.

### **Excisable tobacco products**

Excisable goods are goods on which excise duty is imposed. Excise duty is imposed on goods that are manufactured or produced in Australia and listed in the Schedule to the Excise Tariff Act.

These Guidelines deal with both controlled tobacco products (tobacco seed, plant and leaf) and excisable tobacco goods.

The term 'excisable tobacco goods include:

- pouch tobacco
- cigars
- cigarettes
- shisha/molasses tobacco, and
- snuff.

### **Penalty units**

The current value of a penalty unit is specified in section 4AA of the Crimes Act.

### **Remission**

A remission of excise duty extinguishes the liability for duty that was created at the point of manufacture, in prescribed circumstances.

- For more information about remissions see *Chapter 7 – Remissions, refunds, drawbacks and exemptions*.

### **Section 50 direction**

This is a written instruction issued under section 50 of the Excise Act to a licensed manufacturer, licensed producer, licensed dealer, or proprietor of licensed premises, to keep specified records, furnish specified returns, retain records for a specified period and produce those records on demand by us.

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<sup>250</sup> The term used in section 58 of the Excise Act is 'entry for home consumption'.

## **Tobacco**

Tobacco means tobacco leaf subjected to any process other than curing the leaf as stripped from the plant.<sup>251</sup> Tobacco includes any thing (including moisture) added to the tobacco leaf during manufacturing or processing.<sup>252</sup>

This means that until tobacco leaf is subjected to processes after curing it is not excisable. However tobacco seed and plant is a controlled substance and as such you need to hold an excise producer or dealer licence to be in possession of these goods.

The species of the *Nicotiana* genus that are generally used for smoking, chewing or snuff are considered to produce tobacco leaf. Those species are currently *Nicotiana tabacum*, *Nicotiana rusticum* and *Nicotiana sylvestris*.

## **Underbond**

This is an expression not found in excise legislation, but it is widely used to describe goods that are subject to excise control. Excisable goods that are subject to excise control are commonly referred to as 'underbond goods' or as being 'underbond'. This includes goods that have not yet been delivered into home consumption and goods moving between licensed premises under a movement permission.

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<sup>251</sup> Prefatory notes to the Schedule to the Excise Tariff Act.

<sup>252</sup> Subsection 4(6) of the Excise Act.