



Australian Government
Australian Taxation Office

Australian Taxation Office Submission

Parliamentary Joint Committee on Law
Enforcement - Inquiry into Illicit Tobacco

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Introduction

1. The ATO welcomes the opportunity to make an update to our March 2016 submission to this inquiry by the Parliamentary Joint Committee on Law Enforcement into Illicit Tobacco. This is an update of figures and proposed law reform, as well as a brief outline of the taxation of tobacco and its interaction with the customs regime.

The Regulatory Framework

2. The Commissioner of Taxation has the general administration of the *Excise Act 1901* and the *Excise Tariff Act 1921*. 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. The tobacco industry has undergone a significant restructure in the past 10 years. Licensed tobacco companies no longer grow or manufacture tobacco in Australia and therefore all legal tobacco products sold domestically are now imported.
3. Imported tobacco products are not subject to control under the *Excise Act 1901* unless they are used in the manufacture of excisable goods. Customs duty, under *the Customs Act 1901* and *Customs Tariff Act 1995*, is applied to imported tobacco products at rates equivalent to the excise duty applied to locally manufactured tobacco products. The Department of Immigration and Border Protection (DIBP) is responsible for administration of the *Customs Act 1901* and *Customs Tariff Act 1995*.
4. The Final Budget Outcome official figures¹ capture the size of the legal Australian tobacco market, with revenue obtained from customs and excise duties outlined below.

2013-14 \$8,498 Million

2014-15 \$8,848 Million

2015-16 \$9,150 Million (estimated revenue from Mid-Year Economic and Fiscal Outlook)

5. In addition to administering the collection of excise on tobacco products (alongside GST and income taxes), the ATO helps to ensure community confidence in the regulation of the legal tobacco industry by monitoring compliance with the licensing, storage, and movement of tobacco products.

Illicit tobacco

6. The DIBP is responsible for preventing illicit tobacco from being imported into Australia.

¹ www.budget.gov.au

7. The ATO is responsible for detecting, investigating and prosecuting illicit domestically grown or manufactured tobacco products. As no commercial production licences have been issued since 2006, it has been illegal to grow tobacco in Australia since that time.
8. Based on the low levels of domestic illicit tobacco seizures since 2006 the ATO considers that the overall domestic production of illicit tobacco products to be small. Further, based on reported cross-border seizures of illicit tobacco, the ATO considers that illegal importations are the major source for illicit tobacco products entering domestic retail markets.

Year	ATO seizures²	DIBP seizures³
2007-08	9.9 Tonnes	287 Tonnes
2008-09	0 Tonnes	180 Tonnes
2009-10	5.7 Tonnes	311 Tonnes
2010-11	31.1 Tonnes	258 Tonnes
2011-12	26 Tonnes	177 Tonnes
2012-13	0 Tonnes	183 Tonnes
2013-14	35 Tonnes	183 Tonnes
2014-15	16 Tonnes ⁴	150 Tonnes
2015-16	N/A ⁵	64 Tonnes

² Gross weight – may include wet and dry tobacco products

³ Australian Customs and Department of Immigration and Border Protection – relevant published Annual Reports 2006-2016

⁴ Two crops were seized but were ploughed in – estimated weight 16 tonnes.

⁵ In 2015/16 and 2016/17 crops are destroyed rather than weighed. Weight is estimated at 0.1kg per mature plant. This is multiplied by the number of plants and by excise payable (x \$763.20 Excise rate per kg from 1 September 2016) to calculate the potential excise loss.

Responses to the Terms of Reference

(a) the nature, prevalence and culture of illicit tobacco use in Australia, including in indigenous, regional and non-English speaking communities

9. The ATO's intelligence focus is on the growing and movement of domestically grown illicit tobacco. The ATO identifies illicit crops by using formal networks and community tip-off information and disseminations of intelligence from law enforcement agencies.
10. Low numbers of seizures of domestically grown or manufactured tobacco and intelligence indicates that domestic illicit tobacco currently presents a small revenue risk. However, this risk may grow over time if border controls become more effective. The number of illicit tobacco seizures made by the ATO and estimated excise avoided is outlined below:

Year	Seizures	Estimated excise avoided
2011-12	1	\$11.3 Million
2012-13	0	\$0
2013-14	2	\$13.4 Million
2014-15	2	\$8 Million
2015-16	5	\$36.6 Million
2016-17	1	\$10 Million

(b) the role of Commonwealth law enforcement agencies in responding to the importation, use, manufacture, distribution and domestic growth of illicit tobacco

11. For the limited amount of domestic cultivation and manufacture of illicit tobacco products detected by the ATO, we investigate and prosecute where possible. As part of this process we have seen an increasing degree of sophistication employed by the organised criminal groups who undertake this activity. For this reason there are often evidentiary difficulties in obtaining successful prosecution outcomes.

12. Having regard to the comparatively small scale of the cultivation or manufacture, the availability of evidence and the amount of resources required to achieve a successful prosecution, we may decide to seize and destroy the tobacco thereby disrupting criminal activity as an alternative to proceeding with an investigation.

13. Illicit tobacco seizures in the past year include:

- 8 Feb 2016 – Invergordon, VIC – 45 Acres of illicit tobacco crop was seized and destroyed on site following action by ATO, AFP and Victorian Police.
- 23 Mar 2016 – Dingwall, VIC – 55 Acres of illicit tobacco crop was seized and destroyed on site following action by ATO, AFP, Australian Border Force and Victorian Police. 5 large kilns and 24,000kg of tobacco leaf also seized during this action.
- 7 April 2016 – Goulburn, NSW – 4 acres of small illicit tobacco seedlings (15-20cm) were seized and destroyed on site following action by the ATO and NSW Police.
- 8 April 2016 – Kemps Creek, NSW – During a NSW Police local warrant action a room approximately 2.5m x 2.5m was observed to be half full of dried tobacco leaf. ATO attended and seized and destroyed the unknown quantity of tobacco leaf.
- 20 May 2016 – Binda, NSW – 3.4 acres of illicit tobacco was seized and destroyed on site following action by the ATO and NSW Police.
- 15 November 2016 – Eurobin, VIC – 123,000 seedlings of various sizes, ranging 10 to 20cm in height removed and destroyed following action by ATO and Vic Police. If manufactured these would cause a potential loss to the Commonwealth of \$10 million.

14. There have been no prosecutions, investigations or briefs to CDPP to date from the 2016 seizures.

15. In addition to tobacco seizures the ATO has successfully achieved a number of illicit tobacco related convictions. These include:

- 2014: A man from western Sydney was convicted under the Excise Act 1901 for possessing 2,000 kilograms of freshly cut tobacco leaf (equivalent to 250 kilograms of dried tobacco to which excise may be applied). He was sentenced to 9 months jail, fully suspended.
- 2015: A man from western Sydney was convicted of two offences under the Excise Act 1901 for growing 27,000 kilograms of tobacco (equivalent to 3,125 kilograms of dried tobacco to which excise may be applied). He was sentenced to 18 months jail, and released after serving 6 months.
- 2015: A man from Moorabool (near Geelong in Victoria) was convicted of two offences for possessing 35,000 kilograms of tobacco leaf (equivalent to 4,361 kilograms of dried tobacco to which excise may be applied). He was sentenced to 1 year in jail, and released after serving 6 months.

(c) the loss of revenue to the Commonwealth arising from the consumption of illicit tobacco products

16. We are working with the DIBP to develop a tax gap estimate. We anticipate that planned intelligence gathering and operational activities across both agencies will provide sufficiently increased and reliable data to provide a credible estimate. The estimation of the illicit market in products otherwise subject to tobacco excise or duty will be based on operational data and management accounts held by the ATO and the DIBP.

(d) the involvement of organised crime, including international organised crime, in the importation, distribution and use of illicit tobacco in Australia

17. Since commercial production licences for tobacco were withdrawn in 2006, organised criminal groups have continued to be involved in the production, manufacture and sale of illicit tobacco. However, seizures and intelligence point to this being comparatively small scale. The ATO continues to see small farm plots still being used to grow illicit tobacco (primarily in Victoria) as well as the emergence of use of green houses in non-traditional tobacco growing areas.

18. The ATO continues to work with DIBP, AFP and state law enforcement agencies to treat identified organised crime syndicates as part of the whole of government response. We do this by conducting criminal investigations, seizing tobacco products, sharing intelligence, raising tax assessments and by seconding ATO officers to joint task forces.

(e) the effectiveness of relevant Commonwealth legislation

Proof of origin

19. Under the current legislation, successful convictions relating to the production or manufacture of illicit tobacco are difficult to obtain. This is because the place of origin of the

illicit tobacco in question is required to be established in order to determine whether the offenders should be prosecuted for evasion of excise or customs duty.

Customs and Excise penalties

20. Under the Customs Act 1901, offences for smuggling tobacco products with the intention of avoiding paying revenue were increased in 2012, and now include up to 10 years jail or financial penalties up to five times the evaded duty. By contrast, under the Excise Act 1901 the penalties for offences relating to unlicensed domestic cultivation, manufacturing and selling of illicit tobacco have been in place since the year 20006 and attract a maximum penalty of up to 2 years imprisonment or a fine which is the greater of either \$90,000 or five times the excise evaded.

As part of the 2016-17 Budget the Government committed to correcting the situation by reforming the Customs and Excise Acts to provide enforcement officers with access to tiered offences and appropriate penalties, increasing the range of enforcement options available for illicit tobacco offences.

DIBP is leading this change with the ATO providing input to Treasury. Treasury is working towards an autumn bill.

The purpose is to create a single customs and excise tobacco post border offence regime:

- a single offence regime that applies to tobacco produced or manufactured in Australia or offences occurring after importation into Australia;
- harmonise other tobacco offence provisions to the extent practical in the customs law with the new offence regime; and
- resolve proof of origin issues for all tobacco offences so that current uncertainty about the origin of tobacco is removed.

(f) Other related issues

21. Australia is a party to the World Health Organisation (WHO) Framework Convention on Tobacco Control (WHO FCTC), the first treaty negotiated under the auspices of the WHO. A Protocol to Eliminate Illicit Trade in Tobacco Products (ITP) has been developed pursuant to the WHO FCTC, and if signed by Australia, would impose additional requirements to be added into Australia's regulatory framework. Some preliminary work has commenced to explore such additional requirements, for example a 'track and trace' technology used to

⁶ *Excise Amendment (Compliance Improvement) Act 2000*

identify and authenticate legal tobacco and track it through the supply chain from production to the point of sale. Given the preliminary nature of this work it is not detailed in this submission but further information can be provided to the PJCLE if requested.

