THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY

POISONS AMENDMENT REGULATION 2007 (No 1)

SL2007-33

EXPLANATORY STATEMENT

Circulated by the authority of
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Acting Minister for Health

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OUTLINE

Pseudoephedrine-based products are legally available over the counter in pharmacies for the treatment of ailments such as colds and flu. However, a significant and growing problem within Australia is the diversion of pseudoephedrine for illegal manufacture into methamphetamines, such as 'speed' and 'ice'. Pseudoephedrine is the key chemical ingredient in the manufacture of methamphetamine.

Large quantities of Pseudoephedrine-based products are needed for use in the illegal manufacture of methamphetamines. As the purchase of large quantities from a single source is of itself naturally suspicious and likely to be reported to law enforcement authorities, a practice referred to as "pseudo running" has resulted. "Pseudo runners" travel from pharmacy to pharmacy accumulating enough pseudoephedrine-based products to manufacture a significant quantity of methamphetamines. By spreading out purchases, the volume of pseudoephedrine-based products being purchased by a single individual becomes extremely difficult to detect.

In response to the growing trend of "pseudo running" the Poisons Amendment Regulation 2007 (No 1) (the Regulation) has been developed to require ACT pharmacists to record sales of psuedoephedrine which will be accessible by law enforcement agencies to identify and track suspicious sales.

In addition to imposing this requirement on pharmacists, the Regulation will also give pharmacists the legal authority to request and record personal information, and to refuse sales of pseudoephedrine where required information is not provided. The provisions being inserted into the Poisons Regulation 1933 also specifically enable members of the public to access records relating to them, and to request corrections if necessary. This is supported by a review mechanism should the pharmacy that created the record refuse to change a record as requested by a member of the public. The review mechanism created empowers the Chief Health Officer to consider written positions from both the buyer and the seller, and to direct alterations to the record if the Chief Health Officer considers it appropriate to do so.

DETAILS

A detailed explanation of each clause of the Regulation follows.

CLAUSE 1 Name of regulation

The first section of the Regulation specifies that the name of the regulation is the Poisons Amendment Regulation 2007 (No 1). The Regulation amends the Poisons Regulation 1933, which is subordinate law to the *Poisons Act 1933.*

Clause 2 Commencement

This section establishes that the Regulation commences on 2 October 2007.

Clause 3 Legislation amended

This provision alerts the reader that this Regulation amends the Poisons Regulation 1933. Accordingly, upon commencement this Regulation will alter the Poisons Regulation 1933 in accordance with the provisions this Regulation contains, and will then be immediately repealed. Consequentially, on the date that this Regulation commences a new republication of the Poisons Regulation 1993 will operate that contains the alterations made by this Regulation.

Clause 4 Section 2

Prior to commencement of this Regulation, section 2 of the Poisons Regulation 1933 contained definitions for the Poisons Regulation 1933. This provision replaces that provision with a new section 2 about the operation of the Dictionary, and also inserts a section 3 into the Poisons Regulation 1933.

The replacement section 2 of the Poisons Regulation 1933 alerts the reader that the dictionary at the end of the Regulation forms part of the Regulation. Generally a definition of a word or phrase that appears in the dictionary applies throughout the Regulation. However, this is not the case if the dictionary definition limits the meaning to a specific section or part, or if a different meaning is specifically provided for within a section. Sections 155 and 156(1) of the *Legislation Act 2001* provide additional instruction on the application of dictionaries and definitions within legislation.

It is important to note that the Dictionary, to which the replacement section 2 refers, is inserted into the Poisons Regulation 1933 by Clause 6 of this Regulation. Furthermore, the content of the previous section 2, definitions of *prescriber* and *recipient* for the purposes of the Poisons Regulation 1933 are included in the new Dictionary created by clause 6.

This clause also inserts a section 3 into the Poisons Regulation 1933, which prior to this Regulation did not contain a section 3. The new section 3 informs the reader that notes appearing in the Regulation are explanatory only, and do not form part of the Regulation. Section 127 of the *Legislation Act 2001* provides additional instruction on material that does not form part of Acts or legislative instruments, such as notes.

Clause 5 New sections 5A to 5D

Clause 5 inserts into the Poisons Regulation 1933 new sections 5A through to 5E.

New section 5A

New section 5A applies if a seller proposes to sell, by retail, pseudoephedrine to a customer, referred to within the sections as the buyer. The section requires that before a sale can proceed the seller must inform the buyer of certain information. Under section 5A the buyer must be informed that the seller is required to make a record of the sale, and that if the buyer refuses to or cannot provide the required information, the seller cannot sell the customer pseudoephedrine. This requirement ensures that the customer knows that the seller is legally obligated to make a record and legally obligated not to sell pseudoephedrine unless the record is made.

Additionally, the customer must be informed that the record may be made available to a limited group of people, primarily law police officers, other pharmacists and the Chief Health Officer and his staff. Additionally, a customer must be informed that the Pharmacy Guild of Australia may also have access to the information recorded.

The Pharmacy Guild of Australia developed and administers the Project STOP database. Project STOP is a tool that pharmacies can elect to use to record sales of pseudoephedrine. However, a seller does not need to utilise the Project STOP system to comply with the requirements of this Regulation. Furthermore, this Regulation should not be read in such a way as to infer that it obligates or encourages the use of the Project STOP system. It is up to individual sellers to determine how best to comply with the requirements of this Regulation.

By informing the customer of these matters the customer is made aware of the reason behind the record being made, and also assured that the record cannot be used by any other persons or for any other reason. Finally, under section 5A, the customer must be advised that they have the right to access the record and have any mistake corrected.

A failure to inform the buyer of any of the matters contained within section 5A at the time of sale constitutes an offence. The offence applies if a person sells pseudoephedrine by retail and prior to the sale the person fails to inform the buyer of the matters in subsection 5A(2). Accordingly, a seller who wilfully chooses not to inform the buyer of the required information commits an offence, as does a seller who omits to inform the buyer of the required information. The offence is a strict liability offence that carries a maximum penalty of 10 penalty units.

Section 23 of the *Criminal Code 2002* provides that if an offence is a strict liability offence, there are no fault elements for any of the physical elements of the offence. Furthermore, pursuant to section 36 of the *Criminal Code 2002* the defence of mistake of fact under applies to strict liability offences in addition to other defences available under criminal law.

New section 5B

The required information to be recorded is stated in new section 5B. Records kept in accordance with this provision must be in English and in writing. The records must also be made in such a way that the records are easily retrievable. Under section 11 of the *Electronic Transactions Act 2001* records can be kept in an electronic format provided certain criteria can be met. Accordingly, the requirement for records to be in writing and the Project STOP system being an on-line system are not incompatible.

Information to be recorded includes the date of sale and the brand name, dosage form and quantity of pseudoephedrine sold. Information about the buyer must also be recorded, including the buyer's name and address, the kind of identification produced and the unique identification number from the identification shown. Through the range of information collected in the record of sale enforcement authorities should be able to identify persons who make, or attempt to make, an unusually high number of purchases or quantities of pseudoephedrine.

In addition to requiring that the record of the sale include the type of identification shown, the section also prescribes what types of identification can be lawfully accepted. In doing so the section distinguishes between a *photo identification document* and a *non-photo identification document*.

The provision permits a seller to accept only two types of non-photo identification. The first is a person's birth certificate provided that it identifies the issuing jurisdiction and the date it was issued. Provided it meets these criteria birth certificates issued by any Australian State or Territory can be accepted, as can any foreign issued birth certificate. The other form of non-photo identification that can be accepted is a seniors card issued by the ACT, the Northern Territory or another Australian State.

Section 5B also contains a strict liability offence with a maximum penalty of 10 penalty units. The offence applies if a person sells pseudoephedrine by retail and fails to make a record of the sale in accordance with the section. Accordingly, a seller who wilfully chooses not to make a record of a sale commits an offence, as does a seller who omits to make the record.

Section 23 of the *Criminal Code 2002* provides that if an offence is a strict liability offence, there are no fault elements for any of the physical elements of the offence. Furthermore, pursuant to section 36 of the *Criminal Code 2002* the defence of mistake of fact under applies to strict liability offences in addition to other defences available under criminal law.

New section 5C

A buyer has a right to see a record pertaining to them, which is provided for by new section 5C. Under this provision a buyer may request to see a record pertaining to them that was made by the seller. If such a request is made, the seller must allow the buyer to see the record within a reasonable period.

It is important to note that in order to see a record made about them a buyer must attend the seller's business that made the record. A seller is under no obligation to produce a record or to come to the buyer. Furthermore, a buyer can only see records of sales made from that business, and a seller cannot change a record made by a different seller.

What amounts to a reasonable period is not specified by the legislation. As such, determining what a reasonable period is will be dependent upon a common understanding of the phrase applied in the individual circumstances of each situation. This approach recognises that the nature of a seller's business will limit when it is reasonable to give a buyer access to a record. It would be an unreasonable imposition upon a seller's business if a buyer were entitled to immediate access to a record. To do so would make no allowance for requests made during peak periods of trade, or shortly before the close of trade for the business.

In determining what should amount to a reasonable period for the purposes of section 5C, regard should also be had to the availability of the buyer to return at a more appropriate time. In most circumstances a reasonable period will be the earliest opportunity that is manageable for both the seller and the buyer. To achieve this it is possible, as well as appropriate, for the seller and buyer to agree upon a suitable time to arrange for the buyer to see the record.

Having inspected a record a buyer may, if they believe the record to be incorrect, request that the seller change the record. If the seller agrees with the request, the seller can alter the record. If the change requested is not disputed by the seller, the seller should not refuse to alter the record. Possible examples could be minor spelling errors of a person's name or address. More often than not, a clear discrepancy between details on a receipt for purchase and on the record made concerning the purchase would warrant a correction of the record.

New section 5D

Section 5D applies if a buyer has requested a seller change a record under section 5C and the seller has refused the request. If this situation arises, a buyer can write to the ACT Chief Health Officer asking that the Chief Health Officer direct the seller to change the record. An application to the Chief Health Officer must be in writing, and should provide as much detail and supporting evidence as the buyer is able to provide. For example, if the date of sale or quantity of

pseudoephedrine purchased is disputed, the buyer should attach a copy of the sales receipt to support the application.

Having received a written application the Chief Health Officer must give a copy of the application to the seller identified in the application, and ask the seller for a written response. A seller must then provide a written response detailing why they believe the record should not be altered within 10 working days.

New section 5E

Following 10 working days the Chief Health Officer must consider the application received from the buyer and any response submitted by the seller, and then make a decision. Under section 5E the Chief Health Officer can direct the seller to change the record in accordance with the application, or refuse the application.

Crucially, the Chief Health Officer may also direct the seller to change the record in a way other than in accordance with the application. This enables the Chief Health Officer to determine that the information recorded about the sale should remain unchanged, but that a notation be added to the record that the buyer disputes all or part of the record. This approach may be necessary where a buyer disputes the quantity purchased, or even the sale itself, but cannot provide evidence that contradicts the record.

Psuedo runners may attempt to avoid detection through the use of fake or stolen identification. As a result, there is the possibility that a buyer may be able to show that they did not or could not have made a sale to which their details are recorded. In such circumstances it is possible that the buyer's identify, or an identifying document, has been stolen or reproduced by a psuedo runner. Should such a situation occur, it would be necessary for records to remain unaltered despite the provision of clear evidence by the buyer that they did not make the purchases recorded.

Clause 6 New Dictionary

This provision will insert into the Poisons Regulation 1933 a Dictionary. The Dictionary contains definitions of a number of terms used throughout the Regulation. The existing definitions of *prescriber* and *recipient* that were formerly the content of section 2 have been relocated, without alteration, to the Dictionary.

Definitions within the Dictionary include *Australian student identification card*, *birth certificate*, *proof of age card* and *psuedoephedrine*.

For the purposes of the Regulation, the Dictionary directs that an external driver licence has the same meaning is assigned to the term by the Dictionary of the *Road Transport (Driver Licensing) Act 1999*.

Under the *Road Transport (Driver Licensing) Act 1999* an external driver licence is one of two things. The first is a license to drive a motor vehicle issued under the law of a foreign country, referred to as a foreign driver licence. The other is a licence to drive a motor vehicle issued under the law of an external territory. An external territory is a Territory of the Commonwealth other than the ACT and the Northern Territory.