

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Agriculture, Fisheries and Forestry

Export Control Act 1982

Export Control (Prescribed Goods – General) Order 2005

Section 3 of the Export Control Act 1982 (the Act) provides that the expression “prescribed goods” means goods, or goods included in a class of goods, that are declared by the regulations to be prescribed goods for the purposes of the Act. Section 7 of the Act provides that the regulations may prohibit the export of prescribed goods from Australia absolutely; to a specified place; unless specified conditions or restrictions are complied with; or to a specified place unless conditions or restrictions are complied with.

Sub-section 25(1) of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed; or necessary or convenient to be prescribed for carrying out or for giving effect to the Act. The matters that the regulations may make provision for include:

- under paragraph 25(2)(f) of the Act, the prescribing of penalties not exceeding 50 penalty units for offences against the regulations; and
- under paragraph 25(2)(g) of the Act, subject to subsection 25(3) of the Act, empowering the Minister to make orders, not inconsistent with the regulations, with respect to any matter for or in relation to which provision may be made by the regulations.

Subsection 25(3) of the Act states that an order shall not be made prescribing any penalty for an offence.

Regulation 3 of the Export Control (Orders) Regulations 1982 (“the Regulations”) provides that the Minister may, by instrument in writing, make orders, not inconsistent with regulations made under the Act, with respect to any matter for or in relation to which provision may be made by regulations made under the Act.

Regulation 4 of the Regulations provides that if an order provides that the order, or a provision of it, is a penal provision, a person who fails to comply with the order or provision is guilty of an offence against the Regulations punishable by a fine of 10 penalty units; or if the order or provision specifies that it is a penal provision of a particular level, a fine of the number of penalty units specified for a penal provision of that level set out in the table in regulation 4. Under section 4AA of the *Crimes Act 1914* a penalty unit means \$110.

The table in regulation 4 specifies five levels of penal provision from 1 to 5. A “level 1” penalty provision attracts a penalty of 10 penalty units and the penalty increases by 10 penalty units for each succeeding level. The highest penalty is 50 penalty units for a “level 5” penalty. Regulation 4 also provides that an offence created in an order is an offence of strict liability.

The orders made by the Minister under regulation 3 of the Regulations form, together with the Act, the legislative scheme (“the scheme”) for the regulation of the export of

prescribed goods, comprising food and agricultural products, from Australia. The scheme imposes controls within Australia that are essential to the maintenance of export markets for prescribed goods. The scheme arose from the meat substitution scandal of the early 1980s where some exporters jeopardised Australia's export trade in food and agricultural products by exporting product unfit for human consumption misrepresented as fit product.

Orders made by the Minister under regulation 3 of the Regulations can be divided into two broad categories. One category consists of a number of sets of orders (“the Commodity Orders”). Each set of orders within this category deals with matters that are specific to a particular prescribed good or class of prescribed goods. The other category consists of one set of common use orders (“the General Order”) that complements the Commodity Orders by dealing with matters that are common to most, if not all, prescribed goods, such as the registration of establishments for the preparation of prescribed goods for export and the reconsideration of decisions.

The purpose of the *Export Control (Prescribed Goods – General) Order 2005* (“the new General Order”) is to revoke the General Order known as the *Prescribed Goods (General) Orders 1985* (“the 1985 General Order”) and to replace it with the new General Order. The new General Order was developed because of the need to clarify the role of the 1985 General Order and its relationship with the Commodity Orders. With many amendments over the years to both the 1985 General Order and the Commodity Orders to which it was linked, the role of the 1985 General Order became less clear and the relationship between it and the Commodity Orders was complicated by duplication and inconsistency.

The development of the new General Order has occurred in conjunction with the reviews of the Commodity Orders that deal with animals, meat, processed food and plants. The reviews of these commodity orders have been undertaken to give effect to, amongst other things, the Government’s response to the recommendations made by the National Competition Policy Review of the Act.

The new General Order is a more focussed version of the 1985 General Order. As with the 1985 General Order, the main purpose of the new General Order is to deal with administrative matters that are common to most, if not all, prescribed goods. In particular, the new General Order substantially adopts from the 1985 General Order the provisions that deal with the following matters:

- exemptions for prescribed goods if particular circumstances apply;
- exclusion of specified prescribed goods from the application of any Orders;
- granting, variation, suspension and revocation of registration of establishments;
- requirements for certain persons to be fit and proper and for certain amounts owing to the Commonwealth to be paid;
- the power to enter into arrangements for certain amounts owing to the Commonwealth, notification requirements;
- export permits;
- certificates for non-prescribed goods;
- declaring of official marks;
- sampling and analysis;
- reconsideration and review of decisions; and
- services of authorised officers and other miscellaneous provisions set out in Part 17 of the new General Order.

The new General Order is different from the 1985 General Order in the following ways:

- it contains a set of objectives;
- it is structured and drafted to conform with modern drafting techniques;
- it does not deal with a range of matters that are more properly dealt with by the Commodity Orders such as the declaring of prescribed goods, exemptions for the export of game, rabbit and poultry meat from non-export registered establishments, the imposition of conditions and restrictions on the export of prescribed goods, the requirement for notice of intention to export and the requirements for trade descriptions, hygiene and use of chemicals;
- it does not deal with a range of matters that are considered to be unnecessary such as assignment of registration because assignment is effectively a new registration and delegation powers because these powers merely duplicate provisions in the Act; and
- it contains new provisions based on existing arrangements that prescribe specifications for the electronic transmission of information and documents for the purposes of section 24A of the Act and provide for the issue of a certificate in relation to prescribed goods to be exported from Australia for the purposes of section 23 of the Act.

Consultation was not undertaken for the making of the new General Order because the amendments are of a minor or machinery nature and do not substantially alter existing arrangements. For the same reason, the Office of Regulation Review advised that a regulation impact statement is not required.

Details of the new General Order are set out below:

Part 1 Preliminary

Section 1.01

1. This section provides that the new Order is named the *Export Control (Prescribed Goods – General) Order 2005* (“the new General Order”).

Section 1.02

2. This section provides that the new General Order commences on 1 July 2005. This date is chosen to allow adequate time for the identification and making of consequential changes to at least eight sets of orders that deal with matters that are specific to a particular prescribed good or class of prescribed goods (“the Commodity Orders”) that are affected by the new General Order. The consequential changes that are required range from the insertion into commodity orders of matters that were dealt with by the *Prescribed Goods (General) Orders 1985* (“the 1985 General Order”) but that are no longer dealt with by the new General Order such as the declaration of prescribed goods and the conditions and restrictions on the export of prescribed goods to the updating of cross references contained in the Commodity Orders so that they reflect the numbering in the new General Order.

Section 1.03

3. This section sets out the relationship that the new General Order has with other

Orders made under regulation 3 of the *Export Control (Orders) Regulations 1982* (“the Regulations”). In particular, this section states that, unless a contrary intention appears, the new General Order is to be read as one with each other Order made under the regulations.

Section 1.04

4. This section describes the purpose of the new General Order. The inclusion of a purpose provision is consistent with modern drafting techniques and provides the reader with a clear outline of the scope of the new General Order.

Section 1.05

5. This section contains definitions for the purposes of the new General Order.

Section 1.06

6. This section explains how obligations, liabilities and offence provisions under an Order operate in respect of a partnership. This section is necessary because a partnership is not a legal entity.

Section 1.07

7. This section declares animal food and pharmaceutical material to be prescribed goods. Goods are normally declared by the relevant Commodity Orders. However, in the case of animal food and pharmaceutical material, there is no Commodity Order applicable to them. This section also specifies the provisions that apply to these goods.

Part 2 Application of Export Control Orders

Section 2.01

8. This section excludes certain types of prescribed goods from the operation of the new General Order and any other Export Control Order. The effect of this section is to allow the goods identified in the section to be treated as though they are not prescribed goods on the basis that because of the quantity, the destination or the purpose for which the goods are to be used, they are not considered to pose a threat to Australia’s international trading reputation.

Section 2.02

9. This section excludes all prescribed goods (except grain, and plant and plant products for which a certificate is required by or under New Zealand law) from the operation of the new General Order and any other Export Control Order if they are being exported to New Zealand. The effect of this section is to allow the goods to be exported to New Zealand without any regulatory barriers in accordance with the Trans-Tasman Mutual Recognition Arrangement that came into force in May 1998 but maintains the capacity to for the Secretary to issue certificates for these goods if required by or under a New Zealand law.

10. The removal of regulatory barriers does not extend to grain, and plant and plant products for which a certificate is required because there is a difference in the plant pest status between New Zealand and Australia.

Part 3 Exemptions

Section 3.01

11. This section provides the Secretary with the power to exempt prescribed goods from specified provisions or all provisions of the new General Order or of any other Export Control Order in certain specified circumstances. This exemption power provides flexibility for one-off situations where the full application of the new General Order or any other Export Control Order is not required.

Section 3.02

12. This section sets out the requirement for an application for an exemption for the purposes of subsection 3.01.

Section 3.03

13. The section requires the Secretary to give a written instrument to the applicant setting out the terms of the exemption. The section also explains that the effect of the instrument of exemption is that the provisions of the new General Order or any other Export Control Order specified in the instrument do not apply to the goods specified in the instrument.

Part 4 Registered Establishments

Section 4.01

14. This section contains a definition of the expression “liability undertaking” for the purposes of the Part 4. The definition includes an undertaking entered into under order 19A of the *Prescribed Goods (General) Orders 1985*. An undertaking under order 19A is a written undertaking to the Secretary from a proposed occupier of an establishment to pay an amount outstanding to the Department. The inclusion of an undertaking under order 19A means that, for instance, compliance with the terms of the undertaking can be enforced as a condition of registration under subsection 4.07 of the new General Order.

Section 4.02

15. This section provides that Part 4 does not apply to a ship that is used for the carriage of prescribed goods that are being exported from Australia or transported between Australia ports.

Section 4.03

16. This section allows the occupier of an establishment to apply in writing for the registration of an establishment and specifies the information that must be included in the application. The information required in the application is relevant to the criteria,

which must be met before the Secretary can make a decision under section 4.04 to register an establishment.

Order 4.04

17. This section imposes an obligation on the Secretary to register an establishment if the criteria specified in the section are met. The criteria include requirements for the payment of any relevant Commonwealth liability and for the suitability of both the construction and facilities at the establishment and the people who will be running the operations.

18. The expression “relevant Commonwealth liability” is defined in section 1.5 and means a fee, charge or levy that has arisen under specified legislation in relation to the establishment. The effect of this definition is to attach the fee, charge or levy to the establishment rather than to the occupier. The effect of the criterion that “any relevant Commonwealth liability has been paid” is to allow the Secretary to refuse to register an establishment if there are unpaid fees, charges or levies attached to the establishment when it was previously registered. This criterion was developed in response to situations where occupiers would attempt to avoid their debts by, for instance, going into liquidation and forming another company, often with similar directors or shareholders to the first company, to take over the establishment.

19. In relation the suitability of both the construction and facilities at the establishment and the people who will be running the operations, these aspects are considered to be crucial to generating confidence in the safety and integrity of Australian food in overseas markets.

20. The suitability of the people who will be running the operations is assessed by reference to a “fit and proper” test. The “fit and proper” test is set out in section 4.05. The need for the “fit and proper” test arose from concerns about the integrity of some participants in the export trade following an incident involving the labelling of kangaroo and horsemeat as beef in the early 1980’s. This substitution activity posed a serious threat to the future of Australian food exports to the United States and United Kingdom and resulted in the enactment of the Act in 1982.

21. The ‘fit and proper’ requirement as set out in the 1985 Order (the requirement is retained in substantially the same form in the new General Order) was considered by the Administrative Appeal Tribunal (“the Tribunal”) in *Re Wilco Meats Pty Ltd and Secretary, Department of Agriculture, Fisheries and Forestry* (1999) 59 ALD 214 at 222. In its decision the Tribunal said:

"The expression 'fit and proper' has been the subject of considerable past judicial and Tribunal considerations. As Toohey and Gaudron JJ pointed out in *Australian Broadcasting Tribunal v Bond* (1990) [170 CLR 321](#) at 380 the expression ... takes its meaning from the context, from the activities in which the person is or will be engaged and the ends to be served by those activities. ...

In the instant case whether a person is fit and proper is to be determined by reference to whether the applicant and those associated with it will, or will be likely to, properly conduct their business in relation to the preparation of meat for the Australian export industry. It is clear that the Australian community has an interest in ensuring that those operating registered premises have the knowledge and ability to carry out the functions

necessary to prepare and present the meat for export and will act honestly in the conduct of their business"

Section 4.05

22. In this section, subsection 4.05(1) sets out the matters to which the Secretary may have regard in deciding whether a person is "fit and proper", subsection 4.05(2) identifies the circumstances in which the Secretary may postpone making a decision about whether a person is "fit and proper", and subsections 4.05(3) and (4) provide definitions for the expressions "associate" and "relevant date" respectively.

23. Subsection 4.05(1) lists seven matters. The Secretary does not have to consider all of the seven matters in this subsection before deciding that a person is not fit and proper. The Secretary may determine that a person is "fit and proper" by having regard to only one or any number of the matters specified in subsection 4.05(1).

24. Included among the seven matters to which the Secretary may have regard in deciding whether a person is "fit and proper" is whether an "associate" of the person is not a fit and proper person. The definition of "associate" in subsection 4.05(3) is a broad one encompassing both personal and business relationships. A broad definition is necessary to prevent frustration of the legislative scheme. For example, if the "fit and proper" test did not encompass both personal and business relationships, a person who is not a "fit and proper" person would be able to rely on an associate to apply for and obtain registration effectively on his/her behalf.

Section 4.06

25. This section is linked to the registration requirements in subsection 4.04(1). In particular, it is linked to the requirement that "any relevant Commonwealth liability has been paid". This section sets out the circumstances in which the amount is taken to have been paid.

26. The section provides that the amount is taken to have been paid if a proposed occupier gives a written undertaking to the Secretary to pay the amount, on terms agreed with the Secretary and provided the Secretary considers that it is appropriate to accept the undertaking in the circumstances.

27. However, the undertaking does not affect the liability of the original debtor. Furthermore, the section provides a number of protections for the proposed occupier, including a requirement that the undertaking must include a term that the amount payable by the proposed occupier is to be reduced by any amounts paid by the original debtor.

Section 4.07

28. This section specifies certain conditions as conditions of registration of an establishment and in addition, grants the Secretary power to impose a condition on the registration of an establishment. Failure to comply with a condition of registration is a ground for suspension under paragraph 4.25 (b) or revocation of registration under subparagraph 4.29(g) (ii).

Section 4.08

29. This section describes how the commencement and cessation dates for the period of registration of an establishment are ascertained. This section provides a necessary level of certainty about the period of registration so that the Secretary can take administrative action in the security of knowing that the establishment is, or is not, registered on a particular day.

30. Serious consequences may flow from the preparation of prescribed goods in an unregistered establishment. For example, a set of Commodity Orders may make the export of prescribed goods conditional on their preparation in a registered establishment. Subsection 8(3) of the Act makes it an offence to export prescribed goods in contravention of a condition or restriction that applies to the goods. The penalty for an offence against subsection 8(3) is punishable by imprisonment for a period not exceeding 5 years.

Section 4.09

31. This section requires the Secretary, on registration of the establishment, to allot a number to the establishment and to issue a certificate of registration to the occupier which identifies the export operations for which the establishment is registered, the number allotted to it and the period for which the establishment is registered. This section, together with section 4.10 below, provides a necessary level of certainty about the fact of registration of the establishment for the administrators of the legislative scheme, the occupier, exporters and overseas inspectors who visit registered establishments on behalf of importing countries.

Section 4.10

32. This section imposes an obligation on the occupier of a registered establishment to prominently display the current certificate of registration in the establishment. The failure to do so attracts a level 1 penalty. This level of penalty is sufficient to encourage compliance and is commensurate with the ease with which the non-compliance can be rectified.

Sections 4.11 to 4.13

33. These sections deal with the process of renewal of the registration of an establishment. The process is similar to that which applies to a new registration.

Section 4.14

34. Section 4.14 imposes a requirement on a person who ceases to be an occupier of a registered establishment to notify the Secretary in writing within 7 days of the date on which the person ceased to be the occupier. Under section 22 of the *Acts Interpretation Act 1901* the expression “person” includes a body politic or corporate as well as an individual. The cessation of occupancy has a direct effect on the registration of an establishment (see section 4.15 below).

Section 4.15

35. This section provides for the lapsing of registration at the times specified if a person ceases to be the occupier of the establishment. The purpose of this section is to require any individual, partnership or corporation who proposes to be the new occupier to apply for registration afresh so that the Secretary can be satisfied that all the requirements set out in section 4.04 are satisfied.

Section 4.16

36. Section 4.16 requires a corporation that is the occupier of a registered establishment to notify the Secretary within 7 days of a change to any person who manages or controls the operations carried on at the establishment and a partnership that is the occupier of a registered establishment to notify the Secretary within 7 days if there is a change in the membership of the partnership. Failure to notify the Secretary under this section is a ground for suspension or revocation of the registration of an establishment. The power to revoke in these circumstances reflects the high value given by the legislative scheme to the integrity of persons who run registered establishments.

Section 4.17

37. This section provides that if notification is provided under section 4.16 and the Secretary is satisfied that the new person in management or control in the case of a corporation or the new member in the case of a partnership is “fit and proper” the registration of the establishment continues. If, however, the Secretary finds that the new person is not “fit and proper”, the Secretary may vary the registration under section 4.23, suspend the registration under section 4.25 or revoke the registration under section 4.29.

Section 4.18

38. This section specifies other events of which the occupier must give notice to the Secretary. The section requires notification of these events because they are likely to have an adverse impact on the integrity of the export operations. Failure to notify the Secretary under this section is a ground for revocation. In addition, the Secretary may suspend or revoke the registration of an establishment if the occupier or a person who manages or controls the operations carried out at the establishment is convicted of a serious offence.

Section 4.19

39. This section requires the occupier to notify the Secretary if there is a change in the name or business address of the occupier. The failure to do so attracts a level 1 penalty as an incentive to occupiers to keep the Secretary informed of their contact details and reflects the importance to the legislative scheme of occupiers being accessible and responsive to the regulator. Failure to notify the Secretary under this section is also a ground for suspension or revocation of the registration of the establishment.

Section 4.20

40. This section imposes an obligation on an occupier or proposed occupier to seek the approval of the Secretary for all but minor alterations and additions to a registered establishment. The purpose of this section is to ensure that the alteration or addition will not compromise the ability of the establishment to comply with any Export Control Order that applies to it, including any hygiene requirements.

41. It is in the interests of the occupier to ensure that prior approval is obtained because the Secretary may vary registration under section 4.23 if there are reasonable grounds to believe that the suitability of the registered establishment for the operations for which it has been registered has changed or suspend or revoke the registration if alterations or additions have been made otherwise than in accordance with any Export Control Order that applies to the establishment or equipment.

Section 4.21

42. This section states that an occupier must not carry out in the establishment an operation for which the establishment is not registered. Non-compliance with this section attracts a level 3 penalty. The relative severity of this penalty is commensurate with the serious nature of the infringement. The registration process is aimed at ensuring that an establishment is suitable for particular operations. The carrying out of non-approved operations would defeat the purpose of the registration process.

Section 4.22

43. This section requires an occupier to apply in writing for approval for additional operations by submitting an application in accordance with section 4.03. However, the occupier is not required to duplicate information or documents that the Secretary already has.

Section 4.23

44. This section allows the Secretary to vary the registration of an establishment in certain circumstances, including if the occupier ceases to be “fit and proper”. The purpose of this power is to enable the Secretary to take action that deals with shortcomings relating to the establishment arising, for instance, from the occupier ceasing to be a “fit and proper” person, without suspending or revoking the registration. The power to vary the registration provides a mechanism for keeping a business operating, albeit in a more restricted way (by varying the conditions on registration or reducing the number of operations). The power also provides the flexibility to adopt a graduated approach to dealing with non-compliance. For example, a variation to registration may be followed by suspension or revocation of registration if the variation does not achieve the necessary level of compliance.

Section 4.24

45. This section imposes an obligation on the Secretary to issue a new certificate of registration if a variation requires an alteration to the establishment’s certificate of registration. The purpose of this section is to ensure that the certificate, which must be

displayed prominently (see section 4.10 above), is an accurate reflection of the registration status of the establishment.

Section 4.25

46. This section sets out the grounds on which the Secretary may, by notice in writing, suspend the registration of an establishment in respect of 1 or more operations. A ground for suspension includes that there are grounds for the revocation of the registration of the establishment.

Section 4.26

47. This section provides that the suspension remains in force for the period specified in the notice of suspension and that the period of suspension must not exceed 2 months. This limitation on the period of suspension ensures that the occupier has certainty as the maximum duration of a suspension and prevents the use of suspension as an indirect way of achieving the same outcome that revocation would achieve.

Section 4.27

48. This section empowers the Secretary to suspend the registration of an establishment for non-payment of a relevant Commonwealth liability as defined. The purpose of this provision is to prevent occupiers from continuing to operate with impunity if the occupier owes certain fees, charges or levies to the Commonwealth.

Section 4.28

49. This section clarifies that the effect of suspension is that for the period of the suspension the establishment is taken not to be registered for the purposes of carrying out the operations to which the suspension applies. This provision prevents prescribed goods being eligible for export if they are prepared at the establishment during the period of the suspension.

Section 4.29

50. This section provides the Secretary with a discretion to revoke the registration of an establishment in respect of 1 or more of the operations for which it is registered provided any one of the grounds specified in the section are met. The grounds largely mirror the requirements that must be met for registration under section 4.04 and in addition include revocation for failure to pay an amount under order 4.27 within 90 days and revocation on the conviction of the occupier or a person who manages or controls the operations of a “serious offence”.

51. The ability to revoke the registration of an establishment on the conviction of the occupier or a person who manages or controls the operations of a serious offence addresses the doubt raised in the decision of the Administrative Appeals Tribunal in *Young and Anor and Secretary, Department of Agriculture Fisheries and Forestry* [2004] AATA 59 about whether a conviction for a criminal offence would alone provide a sufficient ground for a finding that a person is not ‘fit and proper’. In order to overcome this doubt, a conviction for a serious offence was included as a sufficient ground in itself to form the basis for a decision to revoke registration in the 1985

General Order and this ground is retained in the new General Order.

Section 4.30

52. This section requires the Secretary to provide notice of revocation, in writing, to the occupier of the establishment and specifies that the revocation has effect when the notice is given to the occupier or on a later day specified in the notice. This section, in the interests of fairness, prevents a notice from taking effect before the notice is given to occupier.

Section 4.31

53. This section provides an authorised officer with the power to direct the occupier of the establishment to suspend, wholly or partly, 1 or more operations in certain specified circumstances until the problems giving rise to the direction are rectified. If the occupier is likely to take more than 2 hours to comply with the direction, the authorised officer must give the direction in writing. The purpose of this power is to enable an authorised officer to take immediate action to prevent prescribed goods being prepared in a non-compliant way or to prevent the ill treatment of animals from which prescribed goods are derived.

Section 4.32

54. This section allows the Secretary to suspend operations at an establishment at the request of the occupier for such period and on such conditions as the Secretary thinks fit. This power is relevant in situations where, for instance, due to supply difficulties, it is not economical for a registered establishment to continue its operations all year.

Part 5 Electronic transmission of information and documents

Sections 5.01 and 5.02

55. These two sections provide specifications for the electronic transmission of information and documents for the purposes of section 24A of the Act. The sections do not mandate the giving of information or documents electronically but merely specify how information or documents are to be given if they are given electronically.

56. Section 24A provides, inter alia, that the regulations may prescribe specifications for the transmission of information and documents from a person to another person for the purposes of any provision of the Act that requires the information or documents to be given to that other person. Section 24A further provides that information or a document transmitted to a person in accordance with the prescribed specifications is taken to have been given to that person for the purposes of any provision of the Act that requires the information or document to be given to the person.

57. Section 5.01 specifies a range of documents that, if given electronically, must be given using a system known as EXDOC before the documents will be taken to be given for the purposes of the Act. EXDOC has been in operation since 1992. Section 5.02 prescribes the use of identifying codes to authenticate the transmission of documents using the EXDOC system.

Part 6 Export permits and related matters

Section 6.01

58. This section provides a definition for the meaning of the expression “application” in the context of an application for an export permit. This definition is necessary because of the different approaches taken by the various Export Control Orders to the way in which an application for an export permit is made.

Section 6.02

59. This section sets out the basis on which the Secretary may issue an export permit.

Section 6.03

60. This section sets out the basis on which the Secretary may vary an export permit and requires the Secretary to notify the exporter in writing of the variation.

Section 6.04

61. This section provides that an export permit is valid for 28 days after it is issued. The permit has a limited period of validity because the suitability of the goods for export may change over time.

Section 6.05

62. This section empowers the Secretary to reject goods for export and revoke any export permit issued for the goods on a ground specified in the section.

Section 6.06

63. This section imposes an obligation on the exporter to surrender the permit that has been revoked to an authorised officer within in certain time. The purpose of this provision is to ensure that that the revoked permit is not used to support the unauthorised export of prescribed goods. The failure to do so attracts a level 1 penalty.

64. This level of penalty is sufficient to encourage compliance and is commensurate with the ease with which the non-compliance can be rectified. If in fact the failure to surrender the permit has resulted in the permit being used in an illegal way, offences with more serious penalties under the Act and the *Criminal Code Act 1995* are likely to apply to offender.

Section 6.07

65. This section imposes an obligation on the person named as the exporter in the application for permit to be responsible for ensuring that the goods continue to comply with any Export Control Order that applies to them until they are exported.

Section 6.08

66. This section empowers an authorised officer to inspect prescribed goods in respect of which an application for export permit has been made and to endorse the application if satisfied that any Export Control Orders that apply to the goods have been complied with.

Section 6.09

67. This section empowers an authorised officer to inspect prescribed goods, and if an export permit has been issued, suspend the permit until the inspection and any analysis is completed, if there are reasonable grounds to believe that an Export Control Order that applies to the goods has not been complied with or the condition of the goods has changed.

Section 6.10

68. This section requires an occupier to notify the Secretary if the intention to export goods that have been inspected and passed for human consumption is abandoned and to not remove the goods until all the requirements in any Export Control Order that applies to the goods have been complied with. The purpose of this provision is to ensure that the goods do not enter the domestic market until they are properly removed from the export system.

Section 6.11

69. This section empowers an authorised officer to retain prescribed goods that he or she has reasonable grounds to believe are not fit for export and inspect them in accordance with any Export Control Order that applies to them.

Part 7 Automated issue of permits

70. This Part is reserved for future use.

Part 8 Government Certificates

Section 8.01

71. This section explains the purpose of Part 8 is to deal with government certificates for the purposes of section 23 of the Act. Section 23 authorises the regulations to provide for the issue of certificates in relation to goods to be exported from Australia. The expression “government certificate” is defined in section 1.05 above.

Section 8.02

72. This section provides for the making of applications for government certificates for goods that are to be imported into a country.

Section 8.03

73. This section provides the Secretary with a discretion to issue a government certificate in relation to prescribed goods provided certain specified requirements are met.

Section 8.04

74. This section sets out the circumstances in which the Secretary must not issue a government certificate for prescribed goods.

Section 8.05

75. This section is a trade facilitation provision. It gives the Secretary a discretion to issue a government certificate for goods other than prescribed goods. The section also sets out how a person who is exporting goods that are not prescribed goods and therefore not regulated under the Act may apply for a government certificate from the Secretary.

76. The section empowers the Secretary to give a direction as to the procedures and requirements for the issue of the certificate. The purpose of this directions power is to ensure that the Secretary can be satisfied that the goods meet the standards required by the importing country before issuing the government certificate.

Parts 9 to 12

77. These Parts are reserved for future use.

Part 13 Official marks and official marking devices

Section 13.01

78. This section specifies the tolerances allowed for an official mark.

Sections 13.02 to 13.16

79. These sections declare official marks for the purposes of section 3 of the Act. An official mark is defined in section 3 of the Act as “any stamp, seal, label or mark that is declared by the regulations to be an official mark”. Official marks are applied to prescribed goods and provide assurances from the Australian Government to the government of the importing country about the origin, integrity and (food) safety of the goods.

Section 13.17

80. This section declares an official marking device for the purposes of section 3 of the Act. An official marking device is a device that can apply an official mark.

Section 13.18

81. This section prohibits the manufacture, possession and application of official marks and the manufacture or possession of an official marking devices unless specified approvals are obtained. The doing of any of these acts without a specified approval is a “contravention of the regulations” for the purposes of section 14 of the Act. Section 14 creates an offence provision the maximum penalty for which is imprisonment for 5 years.

Sections 13.19 to 13.21

82. These sections ensure that official marks and marking devices are stored securely, that a record is kept of their whereabouts and that damaged official marking devices are returned to an authorised officer. The purpose of these provisions is to ensure that official marks and official marking devices are accounted for in a systematic way to minimise the risk of misuse. Official marks and official marking devices warrant high levels of protection because of their role in the provision of government-to-government assurances of origin, integrity and food safety.

Part 14 Sampling and analysis

Section 14.01

83. This section imposes requirements about how sampling and analysis of prescribed goods must be done.

Section 14.02

84. This section specifies who may analyse, inspect or examine a sample that an authorised officer has taken under Part III of the Act. Part III of the Act deals with enforcement.

Section 14.03

85. This section provides that a certificate by a person or laboratory referred to in section 14.02 is evidence of the facts stated in it in proceedings in respect of an offence against the Act or an Export Control Order.

Section 14.04

86. The section specifies when an analyst, if goods have been analysed for the purposes of an Export Control Order, may provide a copy of the certificate of analysis to the occupier or exporter.

Part 15

87. This Part is reserved for future use.

Part 16

Reconsideration and review of decisions

Section 16.01

88. This section provides definitions for Part 16 and in particular, defines an initial decision to mean a decision made under an Export Control Order by the Secretary or a delegate of the Secretary but does not include a decision to grant an export permit or a government certificate. The decision to grant an export permit and the decision to grant a government certificate have been excluded from the definition, and thus from the merits review process because of the broad implications of these decisions. In particular, decisions on export permits and government certificates are essentially about maintaining international confidence in Australia's food and agricultural exports in the interests of a whole export industry or a segment of that industry rather than about the merits of a particular exporter's case.

Section 16.02

89. This section permits a person whose interests are affected by an initial decision to apply to the Secretary to reconsider the decision and provides details about the application.

Section 16.03

90. This section imposes an obligation on the Secretary to reconsider the initial decision on receipt of an application. The Secretary is empowered to make any decision that he or she might have made in the first instance.

Section 16.04

91. This section explains that if the Secretary makes a decision on reconsideration, the initial decision ceases to have effect. The Secretary is required to give the applicant written notice of the decision, setting out the reasons, within 45 days after the day on which the application was received.

Section 16.05

92. This section allows an application to be made to the Administrative Appeals Tribunal for review of a decision of the Secretary under section 16.03 by or on behalf of a person whose interests are affected by the decision.

Part 17

Miscellaneous

Section 17.01

93. This section allows an authorised officer to identify a thing, area, premises or vehicle for the purpose of inspection, analysis, treatment or disposition or a similar purpose by attaching a tag or similar means of identification. It is an offence for a person other than an authorised officer to remove the tag or means of identification so attached unless the person is acting under the direction of an authorised officer. The offence attracts a level 1 penalty. This level of penalty is considered sufficient to

encourage compliance in this situation.

Section 17.02

94. This section restricts the use, interference with or processing of anything that an authorised officer has identified in section 17.01 except in accordance with section 17.02. The offence attracts a level 1 penalty. This level of penalty is considered sufficient to encourage compliance in this situation.

Section 17.03

95. Section 17.03 is substantially the same as the provisions that were in the 1985 General Order. The provisions were inserted in the 1985 General Order in response to the decision of the Full Federal Court in *Mudginberri Station Pty Ltd v Langhorne and another* (1985) 68 ALR 613.

96. The Mudginberri case was one in which the Department did not make inspectors available to an export establishment (an abattoir and meat processing works) near Jabiru, approximately 250 kilometres east of Darwin. The Court held that there was a duty (not merely a discretionary power) under the Act to provide inspectors.

97. The Court found that there was a duty to provide inspectors unless it was impossible to do so. The Court also acknowledged that there may be other circumstances justifying the non-provision of inspectors but did not say what those circumstances might be. As a result of the Court's decision, the Department was left with an almost unqualified duty to provide inspectors.

98. Following the Mudginberri case, the Department sought to qualify the nature of its duty to provide inspectors by allowing regard to be had to:

- the availability of authorised officers, and good management practices in best satisfying the requirements of all applications within applicable budgetary limits.
- the need to protect each authorised officer from risk to occupational health and/or safety while carrying out his or her duties in or around the establishment.

Section 17.04

99. This section provides that establishment the registration of which has been suspended or revoked an establishment is taken to continue to be registered for 28 days after the suspension or revocation for the purposes of complying with a direction given by an authorised officer under an Export Control Order. The purpose of this section is to ensure that prescribed goods at the establishment are properly dealt with in a way that will not compromise the integrity of the export system.

Section 17.05

100. This section explains the meaning of the words "Penal provision" or "Level x penal provision" at the foot of a provision.

Part 18 Transitional, savings and repeals

Section 18.01

101. This section repeals all of the Export control Orders that comprise the 1985 Order.

Section 18.02

102. This section puts in place transitional arrangements. Subsection 18.02 provides that if a person under the Orders mentioned in section 18.01 took an administrative action and if a corresponding action may be taken under the new General Order then the action continues to have effect as if it had been taken under the new General Order. The purpose of this provision is to ensure, for instance, that a person who applied for a reconsideration of a decision under Part 20 of the 1985 General Order is able to continue that process under the equivalent part in the new General Order, that is, under Part 16 of the new General Order.

103. Subsection 18.02(2) provides for the continuation of specified instruments made under the 1985 General Order and as well, provides that the instruments may be revoked, varied, suspended or amended as if the 1985 General Order were still in force.