

## **EXPLANATORY STATEMENT**

Issued by Authority of the Minister for Agriculture

*Imported Food Control Act 1992*  
Imported Food Control Regulations 2019

### **Legislative Authority**

Subsection 43(1) of the *Imported Food Control Act 1992* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 16 of the Act permits regulations to be made which set out the particulars of a food inspection scheme and includes specific matters which the regulations setting out particulars of the scheme may deal with.

### **Purpose**

The purpose of the Imported Food Control Regulations 2019 (the Regulations) is to:

- replace the *Imported Food Control Regulations 1993* prior to sunseting on 1 October 2019;
- provide for the Imported Food Control Inspection Scheme (Scheme) to monitor the compliance of imported food through targeted and random inspection or inspection and analysis;
- impose obligations on importers of food subject to the Scheme, and provide for the cost recovery charges to maintain the Scheme;
- incorporate provisions permitted by sections inserted into the Act as a result of the *Imported Food Control Amendment Act 2018* (Amendment Act);
- make provisions arising from the public consultation and the sunseting review conducted by the Department of Agriculture (department).

### **Background**

The object of the Act is to provide for the compliance of food imported into Australia with the Australia New Zealand Food Standards Code and the requirements of public health and safety. Under the Act, food importers are required to comply with the Act to ensure the food is safe and suitable for its intended use.

### **Impact and Effect**

The provisions in the Regulations that have been included as a result of outcomes from the sunseting review:

- increase flexibility for industry to satisfy mandatory requirements for the importation of some risk-classified foods by permitting a recognised quality assurance certificate as an alternative to the mandatory foreign government certification.
- allow the movement of risk food subject to a holding order to an agreed location where that food is covered by a foreign government or quality assurance certificate.

- change weights and volumes of food taken to be private consumption for risk-classified foods and prohibited plants and fungi to account for contemporary commercial trade in food and to manage human health.
- provide a power for authorised officers to require a person to provide information about a food in order for that food to be efficiently and correctly inspected under a Scheme.

The provisions in the Regulations that have been included as a result of the passage of the Amendment Act:

- provide that foods of a particular kind require a food safety management certificate.
- provide that foods of a particular kind requiring a food safety management certificate when presented at the border without that certificate are failing foods.
- temporarily increase the rate of inspection or inspection and analysis where there is an emerging risk to human health,
- set the rate of inspection, or inspection and analysis for food imported from a country where there is recognition of that country's food safety system.

### **Consultation**

Consultation on the Regulations was undertaken as part of the sunset review and as part of the Amendment Act. There have been four consultations with trading partners as required under the World Trade Organisation Sanitary and Phytosanitary Agreement. No objections were raised to the Regulations by Trading Partners. Food importing businesses were consulted through the department's Imported Food Consultative Committee and in open industry roundtables in the major ports cities for imported food. Food importers support the Regulations. Public consultations were managed through the department's 'Have Your Say' website. No objections to the Regulations were raised through these public consultations. The Office of Best Practice Regulation (OBPR) reviewed the Regulations and determined the provisions included as a result of the sunset review did not require a Regulatory Impact Statement (RIS) (OBPR 22187). The parts of the Regulations arising from the Amendment Act were subject to a full RIS (OBPR 19384).

### **Details/Operations**

Details of the Regulation are set out in Attachment A.

### **Other**

The Regulations are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

**Details of the Imported Food Control Regulations 2019**

**PART 1 – PRELIMINARY**

**Section 1 – Name**

This section provides that the name of the Regulations is the Imported Food Control Regulations 2019 (the Regulations).

**Section 2 – Commencement**

This section provides for the Regulations to commence on 1 October 2019.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Imported Food Control Act 1992* (the Act).

**Section 4 – Schedules**

This section provides that each instrument specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule.

**Section 5 – Definitions**

This section provides definitions for key terms that are used throughout the Regulations. Those terms are set out below.

***Act***

This section provides that ‘Act’ means the *Imported Food Control Act 1992*.

***analyst***

This section provides that an ‘analyst’ means a person in respect of whom an appointment is in force under subsection 34(1) of the Act.

***batch***

This section provides that a ‘batch’ means food of a particular kind made or packed in a distinct manner which may include one or more lots.

***chargeable service***

This section provides that a ‘chargeable service’ has the meaning given by subsection 36(11) of the Act.

***compliance agreement food***

This section provides that ‘compliance agreement food’ means food of a particular kind that is classified as compliance agreement food in an order made under section 10.

***consignment***

This section provides that a ‘consignment’ means food of a particular kind that comprises one or more batches imported by the same owner at the same time and described by a single line in an import entry. A note will provide that there may be more than one consignment in the same import entry.

***import entry***

This section provides that an ‘import entry’ has the same meaning as in the *Customs Act 1901*.

***in-office***

This section provides that ‘in-office’ in relation to the provision of a chargeable service, means the provision of the service at a location where the services of an authorised officer are available on an ongoing basis.

***lot***

This section provides that a ‘lot’ means a quantity of food of a particular kind prepared or packed under essentially the same conditions (ordinarily from a particular preparation or package unit and during a particular time usually not exceeding 24 hours).

***ordinary hours of duty***

This section provides that the ‘ordinary hours of duty’ in relation to a business day, means the period that begins at 6.30 am and ends at 6.30 pm on that day.

***out-of-office***

This section provides that ‘out-of-office’ in relation to the provision of a chargeable service, means the provision of the service at a location where the services of an authorised officer are not available on an ongoing basis.

***package***

This section provides that a ‘package’ means a container of food that is not separated from the food by any intervening covering except lining material.

***particular source***

This section provides that a ‘particular source’ in relation to food, includes the overseas producer, manufacturer, packer and supplier of the food.

***prohibited plants and fungi***

This section provides that ‘prohibited plants and fungi’ means prohibited plants and fungi specified in Schedule 23 to the *Australia New Zealand Food Standards Code*, as in force at the commencement of this instrument.

***relevant documentation***

This section provides that ‘relevant documentation’ has the meaning given by subsection 36(11) of the Act.

***risk food***

This section provides that ‘risk food’ means food of a particular kind that is classified as risk food in an order made under section 10.

***scheme***

This section provides that the ‘Scheme’ means the Food Inspection Scheme established by Part 3.

***surveillance food***

This section provides that ‘surveillance food’ means food of a particular kind that is classified as surveillance food in an order made under section 10. A note provides that several terms that are used throughout the Regulations are defined in the Act. Those terms are set out below.

***applicable standard***

The Act provides that an ‘applicable standard’ means in relation to particular food, or a particular matter affecting food, at a particular time, means the national standard in force in relation to that food or matter at that time.

***Australian New Zealand Food Standards Code***

The Act provides that the ‘Australia New Zealand Food Standards Code’ has the same meaning as in the *Food Standards Australia New Zealand Act 1991*.

***authorised officer***

The Act provides that an ‘authorised officer’ means:

- the Secretary;
- an APS employee in the Department appointed by the Secretary under subsection 40(1); or
- a person appointed by the Secretary under subsection 40(2).

***compliance agreement***

The Act provides that a ‘compliance agreement’ means a compliance agreement entered into under section 35A.

***failing food***

The Act provides that ‘failing food’ means examinable food that:

- as a result of an inspection, or inspection and analysis, under the Food Inspection Scheme, is found to be:
  - food that does not meet the applicable standards for that food; or
  - food that poses a risk to human health; or
- is taken, under the provisions of the Scheme, to be such food.

***food***

The Act provides that ‘food’ has the meaning given by section 3A.

***food control certificate***

The Act provides that ‘food control certificate’ means a certificate issued under section 12.

***food inspection scheme***

The Act provides that ‘food inspection scheme’ means the inspection scheme established by regulations made under section 16.

***holding order***

The Act provides that ‘holding order’ means an order made by the Secretary under section 15.

***imported food inspection advice***

The Act provides that ‘imported food inspection advice’ means an advice issued under section 14.

***inspection***

The Act provides that ‘inspection’ includes the taking of samples.

***officer of Customs***

The Act provides that ‘officer of Customs’ has the same meaning as in the *Customs Act 1901*.

***owner***

The Act provides that ‘owner’ means in relation to food, includes any person (other than an officer of Customs or an authorised officer) being or holding himself or herself out to be the owner, importer, consignee, agent or person having control of, a beneficial interest in, or the power of disposition over, the food.

***recognised food safety management certificate***

From 21 September 2019, the Act provides that ‘recognised food safety management certificate’ means:

- a recognised foreign government certificate; or
- a certificate covered by a determination in force under subsection 18A(1)

***recognised foreign government certificate***

The Act provides that means ‘recognised foreign government certificate’ means a certificate covered by a determination in force under subsection 18(1)

***recognised quality assurance certificate***

The Act provides that ‘recognised quality assurance certificate’ means a certificate covered by a determination in force under subsection 19(2).

***treatment***

The Act provides that ‘treatment’ in relation to food, includes repackaging or relabelling.

**PART 2 – FOOD CONTROL****Section 6 – Food from New Zealand to which the Act does not apply**

This section provides that particular kinds of food that, for the purposes of paragraph 7(1)(aa) of the Act, is food that is imported from New Zealand and is a kind of food to which the Act does not apply. The Trans-Tasman Mutual Recognition Arrangement is maintained by this section. Food that is imported into, or is made or produced in, New Zealand and is food to which the Act does not apply.

**Section 7 – Food imported for private consumption to which the Act does not apply**

This section provides prescribed volumes and weights for food of a particular kind, taken to have been imported for private consumption, for the purposes of 7(2)(a) and 7(2)(b) of the Act, which as a result is food to which the Act does not apply. Paragraphs 7(2)(a) and 7(2)(b) of the Act allow the Regulations to prescribe volumes and weights in regard to food for private consumption that is in liquid form and that is not in liquid form. Subsection 7(1) of the Regulations prescribes the volume of 1 litre for food in liquid form. Subsection 7(2) prescribes a net weight of 0 kilograms for prohibited plants and fungi. Subsection 7(3) prescribes a net weight of 1 kilogram for food that is not in liquid form and is not covered by subsection 7(2).

### **Section 8 Application for food control certificate**

This section provides, for the purposes of paragraph 11(1)(a) of the Act, the manner in which an application for a food control certificate must be made. Subsection 8(1) provides that an application for a food certificate must be in the form approved by the Secretary. Subsection 8(2) provides, for the purposes of paragraph 11(1)(d) of the Act, the type of information required in the application for a food control certificate. Paragraph 8(2)(a) requires the following information about the importer and the importation of food:

- the name of the vessel on which the food is imported;
- details of the port of loading of the vessel;
- the date on which the food is, or is to be, landed in Australia;
- the name and address, and contact details, of the importer and the importer's agent (if any) in relation to the importation.

Paragraph 8(2)(b) requires the following information about the food:

- its description;
- its country of origin
- details of the producer, manufacturer or packer;
- its brand number;
- the number of consignments covered by the importation and the number of batches in each consignment;
- details of the lot or batch codes in relation to each consignment and the number of lots or packages in each batch;
- the total weight of each consignment;
- the weight of each lot or package in each batch;
- details of a place at which the applicant considers each consignment may be inspected or inspected and analysed.

Subsection 8(3) provides, for the purposes of subsection 11(2) of the Act (which permits the regulations to so prescribe), that an entry of goods covered by an application under section 71A or 71DH of the *Customs Act 1901* for home consumption or warehousing that is communicated to the Immigration and Border Protection Department by computer is taken to be an application for a food control certificate.

## **PART 3 – FOOD INSPECTION SCHEME**

### **DIVISION 1 – Establishment of the Food Inspection Scheme**

#### **Section 9 – Establishment of Food Inspection Scheme (the Scheme)**

This section provides that, for the purpose of subsection 16(1) of the Act, the Food Inspection Scheme (the Scheme) is established. The section further provides that Part 3 sets out the particulars of the Scheme.

## **DIVISION 2 – Ministerial orders**

### **Section 10 – Minister may make orders**

This section provides that the Minister, for the purposes of paragraph 16(2)(a) of the Act, may make orders identifying particular kinds of food that are required to be inspected, or inspected and analysed under the Scheme. The section further provides that the Minister may make orders identifying particular kinds of food to be covered by a recognised foreign government certificate or a recognised food safety management certificate. The section further provides that the Minister may make orders classifying particular kinds of food into particular categories.

Two notes are contained in this section:

Note 1 provides that the Minister must not make an order without first consulting Food Standards Australia New Zealand, under section 17 of the Act. This is to enable robust scientific evidence to be obtained and considered before Ministerial orders are made.

Note 2 refers the reader to section 35B of the Act for how an order may refer to a kind of food.

### **Section 11 – Risk food**

This section provides that the Minister may, in an order made under section 10, classify particular kinds of food as risk food only if Food Standards Australia New Zealand advises the Minister that food of that kind has the potential to pose a high or medium risk to public health.

### **Section 12 – Compliance agreement food**

This section provides that the Minister may, in an order made under section 10, classify particular kinds of food as compliance agreement food to the extent that a compliance agreement applies to food of that kind. Compliance agreements are provided for in section 35A of the Act.

### **Section 13 – Surveillance food**

This section provides that the Minister may, in an order made under section 10, classify particular kinds of food as surveillance food, if food of that kind is not risk food and is not compliance agreement food and is not the subject of a holding order.

## **DIVISION 3 – Referral of food by officers of Customs**

### **Section 14 – Risk food**

This section provides that an officer of Customs must refer 100% of consignments of risk food for inspection, or inspection and analysis, under the Scheme for the purposes of paragraph 16(2)(aa) of the Act.

### **Section 15 – Surveillance food**

This section provides for rates of referral of consignments of surveillance food for inspection, or inspection and analysis, under the Scheme by an officer of Customs. This section also provides that the rate of referral of surveillance food where there are emerging risks to human health, and provides the rate of referral of surveillance food from a country where there is recognition of a foreign country's food safety system.

Subsection 15(1) provides, for the purposes of subsection 16(2)(aa) of the Act, that 5% of consignments of surveillance food must be referred by an officer of Customs for inspection, or inspection and analysis, under the Scheme.

*Surveillance food where emerging risk to human health*

Subsection 15(2) provides for the purposes of paragraph 16(2)(ab), that the Secretary may make an order that 100% of consignments of a specified kind of surveillance food must be referred by an officer of Customs for inspection, or inspection and analysis under the Scheme.

Two notes are contained in this subsection:

Note 1 refers the reader to section 35B of the Act for how an order may refer to a kind of food.

Note 2 provides that the Secretary may, in the order, also specify rates of inspection, or inspection and analysis, and rates of sampling that are to apply to the food referred by an officer of Customs. The reader is referred to subsection 21(2) of the Regulations for further information.

Subsection 15(3) provides for the matters which the Secretary must be satisfied of in order to make an order under subsection 15(2) of the Regulations. Paragraphs 15(3)(a)-(c) provide that the Secretary may make such an order under only if the Secretary is satisfied in relation to food of that kind, that there may be an emerging risk to human health, that the best scientific evidence available to the Secretary is insufficient to enable the conduct of an accurate assessment of the risk posed by the food, and that the risk needs to be further investigated. These provisions are intended to ensure the safety of human health.

Subsection 15(4) provides that orders made under subsection 15(2) must specify the period during which the order is in force, which must not have a duration of more than six months after the day on which the order is made. This is intended to reflect the temporary nature of orders made under subsection 15(2) while scientific evidence to inform risk assessment is gathered.

Subsection 15(5) provides that an order made under subsection 15(2) ends at the earlier of the following times: either the end of the period specified in the order or the time when the order is revoked.

Subsection 15(6) provides that before an order ends under paragraph 15(5)(a), the Secretary must review the appropriateness of the order. Some of the matters that might be considered in the review of the order would be the ones provided in subsection 15(3).

*Surveillance food imported from a country where recognition of foreign country's food safety system*

Subsection 15(7) provides, for the purposes of paragraph 16(2)(ac) of the Act, that the Minister may make orders that for surveillance food imported from a specified country: a specified percentage of consignments must be referred by an officer of Customs for inspection, or inspection and analysis under the Scheme (paragraph 15(7)(a)); or a specified percentage of consignments of all such food, except food of a specified kind, must be referred by an officer of Customs for inspection, or inspection and analysis, under the Scheme (paragraph 15(7)(b)); or a specified percentage of consignments of food of a specified kind must be referred by an officer of Customs for inspection, or inspection and analysis, under the Scheme (paragraph 15(7)(c)).

This section contemplates situations where a mutual food safety system recognition agreement exists between Australia and that country.

Three notes are contained in this subsection:

Note 1 provides that the percentage specified in an order made under subsection 15(7) must be less than 5% (including zero) and refers the reader to subsection 16(2A) of the Act.

Note 2 refers the reader to subsection 16(2B) of the Act, which provides that the Minister may make an order in relation to a particular country only if the Minister is satisfied that there is in force an agreement between Australia and that country of the kind referred to in that subsection.

Note 3 refers the reader to section 35B of the Act for how an order may refer to a kind of food.

## **DIVISION 4 – Inspection and analysis of food**

### **Subdivision A – Risk food**

#### **Section 16 – Rates of inspection for risk food**

Subsection 16(1) provides that, for the purposes of paragraph 16(2)(b) of the Act, all risk food is subject to one of the rates of inspection or inspection and analysis provided in paragraphs 16(1)(a) – 16(1)(c) of the Regulations.

Paragraph 16(1)(a) prescribes a rate of inspection, or inspection and analysis, called ‘tightened’. Under this category, each consignment of risk food from a particular source is inspected or inspected and analysed. Paragraph 16(1)(b) prescribes a rate of inspection, or inspection and analysis called ‘normal’. Under this category, 25% of consignments from a particular source are selected randomly for inspection or inspection and analysis. Paragraph 16(1)(c) prescribes a rate of inspection, or inspection and analysis, called ‘reduced’. Under this category, 5% of consignments from a particular source are selected randomly for inspection or inspection and analysis.

#### ***Risk food where emerging risk to human health***

Subsection 16(2) provides, for the purposes of paragraph 16(2)(ba) of the Act, that the Secretary may make an order that, in respect of risk food of a specified kind, identifies a specified percentage of consignments of food of that kind must be inspected or inspected and analysed and a specified rate of samples must be taken for inspection from food of that kind.

A note in this subsection refers the reader to section 35B of the Act for how an order may refer to a kind of food.

Subsection 16(3) provides the matters that the Secretary must be satisfied of when making an order under subsection 16(2) of the Regulations. The subsection provides that the Secretary may make an order under subsection 16(2) only if the Secretary is satisfied in relation to food of that kind, that there may be an emerging risk to human health, that and the best scientific evidence available to the Secretary is insufficient to enable the conduct of an accurate assessment of the risk posed by the food, and that the risk needs to be further investigated to ensure the safety of human health.

Subsection 16(4) provides that orders made under subsection 16(2) must specify the period during which the order is in force, which must not have a duration of more than six months after the day on which the order is made. This is intended to reflect the temporary nature of orders made under subsection 16(2) and the time required to gather scientific evidence to inform risk assessment.

Subsection 16(5) provides that orders made under subsection 16(2) end at the earlier of the following times: either the end of the period specified in the order, or the time when the order is revoked.

Subsection 16(6) provides that before an order ends under paragraph (16)(5)(a), the Secretary must review the appropriateness of the order. Some of the factors that might be considered in the review of the order would be the ones provided in subsection 16(3).

*Risk food imported from a country where recognition of foreign country's food safety system*

Subsection 16(7) provides, for the purposes of paragraph 16(2)(bb) of the Act, that the Minister may make orders for risk food imported from a specified country: a specified percentage of consignments of all such food must be inspected or inspected and analysed (paragraph 16(7)(a)); or a specified percentage of consignments of all such food, except food of a specified kind must be inspected and analysed (paragraph 16(7)(b)); or a specified percentage of consignments of food of a specified kind must be inspected or inspected and analysed (paragraph 16(7)(c)).

This subsection contemplates situations where a mutual food safety systems recognition agreement exists between Australia and that country.

Three notes are provided in subsection 16(7):

Note 1 provides that the percentage specified in the order made under subsection 16(7) must be less than 5% (including zero) and directs the reader to subsection 16(2A) of the Act.

Note 2 describes that subsection 16(2B) of the Act provides that the Minister may make an order in relation to a particular country only if the Minister is satisfied that there is in force an agreement between Australia and that country of the kind referred to in that subsection.

Note 3 refers the reader to section 35B of the Act for how an order may refer to a kind of food.

**Section 17 – Rate at which risk food is first inspected**

This section provides that all risk food must be inspected, or inspected and analysed, at the tightened rate initially unless its rate of inspection or inspection and analysis has been lowered under section 18 of the Regulations, for the purposes of paragraph 16(2)(b) of the Act.

**Section 18 – When the rate of inspection for risk food may be varied**

Subsection 18(1) provides, for the purposes of paragraphs 16(2)(b) and 16(2)(i) of the Act, that the rate of inspection or inspection and analysis of risk food of a particular kind imported from a particular source may be varied in accordance with section 18.

Lowering from tightened rate to normal rate

Subsection 18(2) provides that the rate of inspection or inspection and analysis may be lowered from the tightened rate to the normal rate if five consecutive batches of the food have passed inspection or inspection and analysis.

Lowering from normal rate to reduced rate

Subsection 18(3) provides that the rate of inspection or inspection and analysis of food, may be lowered from the normal rate to the reduced rate, if all of the conditions in paragraph 18(3)(a) or paragraph 18(3)(b), described below, apply.

Paragraph 18(3)(a) provides the conditions that must apply are that the rate of inspection, or inspection and analysis has not been increased under section 18; and that 20 consecutive batches of the food have passed inspection or inspection and analysis; and that an authorised officer reasonably believes that the food complies with the applicable standard and does not pose a risk to human health.

Paragraph 18(3)(b) provides the conditions that must apply are the rate of inspection, or inspection and analysis has been increased under section 18, after that increase five consecutive batches of the food have passed inspection or inspection and analysis and an authorised officer reasonably believes that the food complies with the applicable standard and does not pose a risk to human health.

Raising from normal rate or reduced rate to tightened rate

Subsection 18(4) provides that the rate of inspection or inspection and analysis of food may be raised from normal rate, or the reduced rate, to the tightened rate if: one or more batches of the food, from which samples are taken, fail inspection or inspection and analysis or an authorised officer reasonably believes that the food does not comply with the applicable standard or poses a risk to human health.

Varying rate if recognised foreign government certificate or recognised quality assurance certificate

Subsection 18(5) provides that the rate of inspection, or inspection and analysis, of food may be varied if a recognised foreign government certificate or a recognised quality assurance certificate in relation to the food is provided to an authorised officer; and the authorised officer has no reason to doubt the authenticity or reliability of the certificate. This is intended to enable varied rates of inspection, or inspection and analysis for food where there is recognised certificate assuring the safety of the food provided.

**Section 19 – Holding risk food that is subject to inspection**

Subsection 19(1) provides, for the purposes of paragraph 16(2)(h) of the Act, that for a consignment of risk food in which a sample has been taken for inspection or inspection and analysis, the rest of the consignment must be held at a place that an authorised officer considers appropriate until the results of the inspection or inspection and analysis are known.

Exception – agreement or certificate

Subsection 19(2) provides that the rest of the consignment of risk food referred to in subsection 19(1) is not required to be held if that consignment is covered by: an agreement referred to in subsection 16(2B) of the Act; or a recognised foreign government certificate; or a recognised quality assurance certificate.

#### Exemption for perishable food

Subsection 19(3) would provide an exemption to subsection 19(1) for perishable food, where certain conditions have been met. The subsection would provide that if five previous consignments of risk food have been inspected, or inspected and analysed, and an imported food inspection advice has been issued in respect of each of those consignments and one of those advices identify any of the food as failing food and an authorised officer is satisfied that if the rest of the consignment were held under subsection 19(1) would perish or become unusable, an authorised officer may give the owner of the consignment approval to deal with rest of the consignment in the manner specified in the approval. The approval would be subject to conditions specified in the approval minimising any risk posed to human health by the food. This is intended to enable for high value, highly perishable foods to be released prior to the imported food advice being issued.

A note is provided in this subsection describing sections 9 and 9A of the Act, which contain offences and civil penalties relating to the dealing with food in a manner not approved by an authorised officer.

#### Offence

Subsection 19(4) provides that a person commits an offence if an authorised officer gives the person an approval under subsection 19(3) and the person does an act or omits to do an act and the act or omission breaches a condition specified in the approval. The section provides that the penalty for contravention of this subsection is 10 penalty units. Section 4AA of the *Crimes Act 1914* refers to penalty units.

### **Section 20 – Testing reliability of recognised foreign government certificate or recognised quality assurance certificate**

This section provides, for the purposes of 16(2)(j) of the Act, the circumstances and procedures for testing the reliability of a recognised foreign government certificate or a recognised quality assurance certificate that cover risk food of a particular kind. If an authorised officer has reason to doubt the authenticity or reliability of these certificates the food may be taken to be failing food under subsection 26(1) of the Regulations. The subsection provides that these circumstances and procedures include: considering the compliance history of food inspected or inspected and analysed; auditing of the system operated by the relevant instrumentality of the foreign government or the person conducting the relevant overseas food processing operation; and for a recognised foreign government certificate conducting document checks by requiring relevant instrumentalities of the foreign government to verify certificates.

### **Subdivision B – Surveillance food**

### **Section 21 – Rates of inspection for surveillance food**

#### Food referred by an officer of Customs

Subsection 21(1) provides subject to section 21, and for the purposes of paragraph 16(2)(b) of the Act, for each consignment of surveillance food that an officer of Customs refers for inspection, or inspection and analysis, under the Scheme must be inspected or inspected and analysis.

Subsection 21(2) provides that, for the purposes of paragraph 16(2)(ba) of the Act, the Secretary may specify in an order under subsection 15(2) of the Regulations: the percentage of consignments of food of the kind covered by the order that must be inspected or inspected and analysed and the rate of samples that must be taken for inspection from food of the kind covered by the order.

#### Food not referred by an officer of Customs

Subsection 21(3) provides, for the purposes of paragraph 16(2)(b) of the Act, if an authorised officer reasonably believes particular surveillance food does not comply with the applicable standard for the food, or poses a risk to human health (and this is food that an officer of Customs has not referred for inspection or inspection and analysis under the Scheme) an authorised officer must arrange for the inspection, or inspection and analysis of the food; and give the owner of the food a notice setting out the reasons why the food must be inspected or inspected and analysed.

### **Subdivision C – Food the subject of a holding order**

#### **Section 22 – Rates of inspection for food the subject of a holding order**

This section provides that, for the purposes of paragraph 16(2)(c) of the Act, each consignment of food that is the subject of a holding order must be inspected or inspected and analysed.

### **Subdivision D – Taking samples of food**

#### **Section 23 – Taking samples of food**

Subsection 23(1) provides that, for the purposes of paragraph 16(2)(b) of the Act, food may be inspected, or inspected and analysed, by taking samples of the food (including taking randomly selected samples of the food). Subsection 23(2) provides that the rate at which samples must be taken is set out in section 23, subject to this instrument.

#### Lots are provided

Subsection 23(3) provides a table to determine the rate of sampling for each batch in the consignment for which details of lots are provided if the food is risk food and the rate of inspection, or inspection and analysis, of the food is tightened or normal, or the food is surveillance food or the food is the subject of a holding order.

The table provides for the number of lots in a batch to be grouped in ascending order. The higher the number of lots in a batch, the greater the number of lots that will be sampled within the batch. The table provides six items ranging from one batch to 51 or more batches to determine the rate of sampling.

Subsection 23(4) provides a table to determine the rate of sampling for each batch in the consignment for which details of lots are provided if the food is risk food and the rate of inspection, or inspection and analysis, of the food is reduced.

The table provides for the number of lots in a batch to be grouped in ascending order. The higher the number of lots in a batch, the greater the number of lots that will be sampled within the batch. The table provides four items ranging from one batch to 51 or more batches to determine the rate of sampling.

### Lots are not provided

Subsection 23(5) provides a table to determine the rate of sampling for each batch in the consignment for which details of lots are not provided.

The table provides for the number of packages in a batch to be grouped in ascending order. The higher the number of packages in a batch, the greater the number of packages that will be sampled within the batch. The table provides eight items ranging from one to five packages; to 240,001 or more packages to determine the rate of sampling.

## **Subdivision E – Marking of food held for inspection**

### **Section 24 – Marking of food held for inspection**

Subsection 24(1) provides an authorised officer must mark batches of food held for inspection, or inspection and analysis, with the words “HOLD Imported Foods”, for the purposes of subsection 16(1) of the Act.

Subsection 24(2) provides that the markings must be clearly visible.

### Offence

Subsection 24(3) provides a person commits an offence if a batch of food is held for inspection or inspection and analysis and the batch of food is marked as mentioned in subsection 24(1) and the person interferes with the markings on the batch of food. The subsection further provides that the penalty for contravention is 10 penalty units. Section 4AA of the *Crimes Act 1914* refers to penalty units.

## **Subdivision F – Analysis of food**

### **Section 25 – Analysis of food**

Subsection 25(1) provides analysis of food under the Scheme must be performed by an analyst, for the purposes of subsection 16(1) of the Act. An analyst is appointed under subsection 34(1) of the Act.

Subsection 25(2) provides the analysis may be microbiological, chemical or physical analysis, or any other kind of analysis, necessary to determine whether: the food poses a risk to human health or the food complies with the applicable standard.

A note is provided in subsection 25(2) describing paragraph 29(e) of the Regulations, which allows an authorised officer to request that certain kinds of tests be carried out on food to be analysed under the Scheme.

## **DIVISION 5 – Failing Food**

### **Section 26 – When food is failing food**

This section will provide the conditions for when food is considered failing food for the purposes of paragraph 16(2)(fa) and 16(2)(g) of the Act.

### Food that must be covered by a recognised foreign government certificate or a recognised food safety management certificate

Subsection 26(1) provides that food is a failing food, if the food is identified in an order made under section 10 as food of a kind that must be covered by a recognised foreign government

certificate or a recognised food safety management certificate and either the food is not covered by a certificate or a certificate covering the food is given to an authorised officer but the officer has reason to doubt the authenticity or reliability of the certificate. This subsection is made for the purposes of paragraph 16(2)(fa) of the Act.

#### *Lots of food*

Subsection 26(2) provides, that if details of lots are provided for a batch of food, a particular lot of food from the batch (referred to as the ‘subject lot’) is taken to be failing food if another lot of the food from the batch fails inspection or inspection and analysis and the subject lot is not a lot that was selected for sampling. This subsection is made for the purposes of paragraph 16(2)(g) of the Act.

#### *Packages of food*

Subsection 26(3) provides that if details of lots are not provided for a batch of food, a particular package of food from the batch (referred to as the ‘subject package’) is taken to be failing food if another package of the food from the batch fails inspection or inspection and analysis and the subject package is not a package that was selected for sampling. This subsection is made for the purposes of paragraph 16(2)(g) of the Act.

### **Section 27 – Dealing with failing food – lots of food**

Subsection 27(1) provides the circumstances where the owner of food identified as failing food in an imported food inspection advice may apply to an authorised officer for the issue of a further imported food inspection advice with respect to part of that food. The subsection provides that the circumstances are that subsection 26(2) of the Regulations (described above) applies. Subsection 27(1) is made for the purposes of subsection 14(3) of the Act.

Subsection 27(2) provides that if the detail of lots are provided for a batch of food, and 2 or more lots of food from the batch are taken to be failing food under subsection 26(2) of the Regulations and the owner of the food presents some or all of those lots for inspection, or inspection and analysis, within a reasonable period after they were taken to be failing food, then samples of those lots may be taken at a rate that is higher than the rate set out in section 23 of the Regulations. Subsection 27(2) is made for the purposes of paragraph 16(2)(b) of the Act.

Subsection 27(2) provides that in regards to the particular lot of food, if it presented by the owner within a reasonable period after taken to be a failing food, it will be sampled, inspected or analysed at a more intensive rate than section 23 of the Regulations. The ‘intensive’ rate in this circumstance does not create another category of inspection that may be carried out upon risk food. The intensive rate refers to an increased number of samples that would be taken for analysis to ensure the food is compliant with food safety standards.

### **Section 28 – Presenting failing food for inspection again**

Subsection 28(1) provides that a lot or package of failing food from a batch has been inspected, or inspected and analysed, the lot or package must not be presented by the owner for inspection, or inspection and analysis, again unless treated in accordance with permission granted under paragraph 20(2)(a) of the Act. Paragraph 20(2)(a) of the Act grants an authorised officer power to provide, by written notice to an owner of failing food, to require the owner to treat the food in a specified manner agreed upon between the owner and authorised officer to enable the food to be brought into compliance with the Act.

Subsection 28(2) provides if, two or more lots or packages of food from a batch are presented for inspection or inspection and analysis in accordance with subsection 28(1), the lots or packages may be sampled, inspected or inspected and analysed at a more intensive rate than the rate set out in section 23 of the Regulations. The ‘intensive’ rate in this circumstances does not create another category of inspection that may be carried out upon risk food. The intensive rate refers to an increased number of samples that would be taken for analysis to ensure the food is compliant with food safety standards.

## **DIVISION 6 – Powers of authorised officers**

### **Section 29 – Powers of authorised officers**

This section provides, for the purposes of subsection 16(1) of the Act, that an authorised officer has certain powers to give effect to the inspection or inspection and analysis of food under the Scheme. The subsection provides that an authorised officer may:

- require a person involved in the importation of a of particular food to provide enough of the food for inspection to enable random samples to be taken for inspection or inspection and analysis; and
- require a person involved in the importation of particular food to provide details of lot or batch codes and quantities of the food to enable random samples to be taken for inspection or inspection and analysis; and
- require a person involved in the importation of particular food to provide information about the food to enable the officer to:
  - determine if the food is risk food, surveillance food or food that is the subject of a holding order to ensure that the food is inspected, or inspected and analysed, correctly; or
  - determine if the food is failing food; and
- take samples of food in a way that the officer considers appropriate, including taking the samples free of any charge and free of any liability for damage necessarily caused in the taking of the samples; and
- ask an analyst to analyse samples of food, whether or not requesting that specific tests, or tests for specific contaminants or matter, be carried out on the food.

A note is provided in section 29 describing section 149.1 of the *Criminal Code*, which deals with obstruction of Commonwealth public officials. The Criminal Code provides that the penalty for obstruction of a Commonwealth public official is imprisonment for two years.

## **PART 4 – CHARGEABLE SERVICES**

### **Section 30 – Payable amounts for chargeable services**

This section provides, for the purposes of subsection 36(1) of the Act, that the payable amount in respect of the provision of a chargeable service referred to in column 1 of an item in the table (provided in this section) is the amount set out in, or worked out in accordance with, column 2 of the item.

### **Section 31 – Reimbursement of amount paid for analysis of food**

This section provides that, for the purposes of subsection 36(4) of the Act, a person must reimburse the Commonwealth within 30 days after the day the demand for payment was made for the analysis of food.

### **Section 32 – Waiver of payable amounts**

Subsection 32(1) provides that the Secretary, for the purposes of subsection 36(5) of the Act, may waive a payable amount for a chargeable service if the Secretary considers it appropriate in the circumstances. Subsection 32(2) provides that the Secretary may waive the payable amount on the Secretary's own initiative or on written application by a person.

### **Section 33 – Prescribed chargeable services**

This section prescribes additional chargeable services (at the request of a person), for the purposes of paragraph 36(11)(e) of the Act. The section provides that these chargeable services are prescribed: an assessment or audit of whether the person is able to comply, or is complying, with the Act, the Regulations or any proposed compliance agreement between the Commonwealth and the person and training of the person in relation to matters covered by a compliance agreement between the Commonwealth and the person.

## **PART 5 – TRANSITIONAL PROVISIONS**

### **Section 34 – Ministerial orders**

This section provides the transitional provisions for ministerial orders after the repeal of the *Imported Food Control Regulations 1993* (which is provided for in Schedule 1 to the Regulations).

Subsection 34(1) provides that a ministerial order made under regulation 7 or 8 of the *Imported Food Control Regulations 1993* immediately before the commencement of this section has effect on and after that commencement as if it were an order in force under section 10 of the Regulations. Subsection 34(2) provides that subsection 34(1) does not prevent the variation or revocation of the order on or after the commencement of section 34.

### **Section 35 – Things done under the old regulations**

This section provides the transitional provisions for things done under the *Imported Food Control Regulations 1993* after the repeal of those regulations.

Section 35 provides that if a thing was done for a particular purposes under the *Imported Food Control Regulations 1993* as in force immediately before those regulations were repealed and the thing could be done for that purpose under the Regulations, the thing has effect for the purpose of the Regulations as if it has been done for that purpose under the Regulations.

## **SCHEDULE 1 – REPEALS**

Item 1 repeals the *Imported Food Control Regulations 1993*.

**Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

***Imported Food Control Regulations 2019***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The purpose of the Imported Food Control Regulations 2019 (the Regulations) is to provide for the Imported Food Control Inspection Scheme (Scheme) to the compliance of imported food through targeted and random inspection or inspection and analysis. In achieving this purpose, the Regulations promote the right to health contained in the International Covenant on Economic, Social and Cultural Rights (the ICESCR).

Globalisation of the food supply has driven increasingly complex supply chains and this, along with the growth in the amount of food imported to Australia, raises the risk of foodborne illness from imported food. Foodborne illness is a serious and costly public health and safety issue.

The Regulations:

- replace the *Imported Food Control Regulations 1993* prior to sunset on 1 October 2019;
- provide for the Imported Food Control Inspection Scheme (Scheme) to monitor the compliance of imported food through targeted and random inspection or inspection and analysis;
- impose obligations on importers of food subject to the Scheme, and provide for the cost recovery charges to maintain the Scheme;
- incorporate provisions permitted by sections inserted into the Act as a result of the *Imported Food Control Amendment Act 2018*;
- make provisions arising from the public consultation and the sunset review conducted by the Department of Agriculture.

The Regulations draw upon and support various international and domestic agreements and obligations. Internationally, these include:

- *Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement)
- *Agreement on Technical Barriers to Trade* (the TBT Agreement)
- *International Health Regulations 2005* (the International Health Regulations)
- *Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System*, and
- *Trans-Tasman Mutual Recognition Arrangement*.

Domestically, these include the Food Regulation Agreement and the National Health Security Agreement. The Australian Government continues to work collaboratively with state and territory governments to complement existing powers in the management of imported food safety risks.

### **Human rights implications**

This Regulations engage, or have the potential to engage, the following right:

- Article 12 of the ICESCR – Right to health

### **Part 1 - Preliminary**

Part 1 of the Regulations is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act* as it does not engage any human rights.

### **Part 2 – Food Control**

#### ***Right to health***

Article 12 of the ICESCR promotes the right of all individuals to enjoy the highest attainable standards of physical and mental health. In its General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (2000) (General Comment No 14), the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) stated that health is a ‘fundamental human right indispensable for the exercise of other human rights’, and that the right to health is not the right to be healthy, but rather a right to a system of health protection that provides equal opportunity for people to enjoy the highest attainable level of health. That document further states that health is defined as an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, which includes access to an adequate supply of safe food.

Article 4 of the ICESCR provides that countries may subject economic, social and cultural rights—such as the right to health—only to such limitations ‘as are determined by law in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting general welfare in a democratic society’. The United Nations Committee has stated that such limitations must be proportionate, and must be the least restrictive alternative where several types of limitations are available. Further, where such limitations are permitted, they should be of limited duration and should be subject to review.

The Regulations take positive steps to promote the right to health through measures which include:

- Providing the monitoring and inspection of food that may pose a risk to human health; and
- Imposing obligations on importers to promote accountability for food that may pose a risk to human health.

Part 2 of the Regulations impose obligations on importers of food to ensure that applications for food control certificates contain all information necessary to assess the level of risk food may pose to human health.

#### Summary

Part 2 to the Regulations is compatible with and promotes the right to health under Article 12 of the ICESCR.

### **Part 3 – Food Inspection Scheme**

#### ***Right to health***

Article 12 of the ICESCR promotes the right of all individuals to enjoy the highest attainable standards of physical and mental health. In its General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (2000) (General Comment No 14), the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) stated that health is a ‘fundamental human right indispensable for the exercise of other human rights’, and that the right to health is not the right to be healthy, but rather a right to a system of health protection that provides equal opportunity for people to enjoy the highest attainable level of health. That document further states that health is defined as an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, which includes access to an adequate supply of safe food.

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As noted above, the Regulations take positive steps to promote the right to health through measures which include:

- Providing the monitoring and inspection of food that may pose a risk to human health; and
- Imposing obligations on importers to promote accountability for food that may pose a risk to human health

Part 3 of the Regulations promotes the right to health by determining how food that may pose a risk to human health is monitored and inspected following importation into Australia.

#### Summary

Part 3 to the Regulations is compatible with and promotes the right to health under Article 12 of the ICESCR.

#### **Part 4 – Chargeable Services**

Part 4 of the Regulations is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act* as it does not engage any human rights.

#### **Part 5 – Transitional Provisions**

Part 5 of the Regulations is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act* as it does not engage any human rights.

#### **Conclusion**

This Regulations are compatible with human rights because they promote the right to human health contained in Article 12 of the ICESCR.

**Senator the Hon. Bridget McKenzie**  
**Minister for Agriculture**