**EXPLANATORY STATEMENT**

Issued by Authority of the Director of Biosecurity

*Biosecurity Act 2015*

***Biosecurity (2021 Infringement Notices) Determination 2020***

**Legislative Authority**

The *Biosecurity Act 2015* (Biosecurity Act) provides the Commonwealth with powers to assess and manage the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health, or the environment.

Section 524A of the Biosecurity Act was inserted by the *Biosecurity Amendment (Traveller Declarations and Other Measures) Act 2020* (the Amendment Act)*,* which commenced on 1 January 2021.

Subsection 524A(1) provides that the Director of Biosecurity may make a determination listing goods, or classes of goods, for the purposes of section 524 of the Biosecurity Act. Section 524 of the Biosecurity Act makes provision for the issuing of infringement notices under the Act and subsection 523(1) lists provisions of the Biosecurity Act that are subject to an infringement notice.

Under subsection 524A(2), the Director of Biosecurity may only make the determination if the Director is reasonably satisfied that there is a high level of biosecurity risk associated with the goods or the class of goods.

A determination made under subsection 524A(1) must specify the period during which the determination is to be in force, but the period must not be longer than 12 months. A determination made under subsection 524A(1) is a legislative instrument but is not subject to disallowance.

**Purpose**

The *Biosecurity (2021 Infringement Notices) Determination 2020* (the Determination) lists goods, and classes of goods, that the Director of Biosecurity is satisfied have a high level of biosecurity risk associated with them. The Determination lists goods and classes of goods which are ‘category 1 goods’ or ‘category 2 goods’.

Under subsection 88(2) of the Biosecurity Regulation 2016 (Biosecurity Regulation), when an infringement notice is issued to an individual at a first point of entry (such as an airport or seaport) for an alleged contravention of subsection 532(1) or 533(1) of the Biosecurity Act when giving information or producing a document in compliance or purported compliance with a requirement under subsection 126(1) or 196(2).

The Biosecurity Regulation prescribes different penalty unit amounts for infringement notices by reference to the goods and classes of goods listed in the Determination, and so allows for infringement notice amounts to reflect the relative biosecurity risk of the goods to which the alleged contravention relates.

**Background**

All passengers, crew and persons in charge of an aircraft or vessel must provide information for the purposes of assessing the level of biosecurity risk associated with the person and any goods the person has with them when arriving in Australian territory at a first point of entry. ***First point of entry***is defined by section 18 of the Biosecurity Act.

There are exotic pests and pathogens commonly associated with certain goods that have a high likelihood of surviving, establishing and spreading in Australia. Where travellers knowingly fail to declare goods of a sort known to pose biosecurity risks (particularly conditionally non-prohibited goods) on arrival at a first point of entry, they deny biosecurity officers the opportunity to identify, assess and manage biosecurity risks. They also deny biosecurity officers the opportunity to determine if specified import conditions have been met and/or direct the goods to undergo regulatory requirements that must be undertaken upon the goods arriving into Australia, such as post-entry quarantine disease screening and/or testing. In these circumstances, it is only when goods of a sort known to pose biosecurity risks are detected and intercepted through other means (such as automated profiling of travellers, detector dogs or x-rays) that biosecurity risks can be identified, assessed and managed in accordance with Australian biosecurity law.

Under subsections 532(1) and 533(3) of the Biosecurity Act, where the person gives false or misleading information (or produces a false or misleading document) in compliance or purported compliance with a requirement under the Biosecurity Act, the person is likely to contravene the Biosecurity Act. Similarly, if the person fails to comply with a requirement to answer questions or provide information in writing about goods under subsection 126(1) or 196(2) of the Biosecurity Act, the person is also likely to contravene the Biosecurity Act.

If a biosecurity officer (who has the power to issue an infringement notice) believes on reasonable grounds that the person has contravened a provision subject to an infringement notice, the officer may give the person an infringement notice for the alleged contravention. Under subsection 523(1) of the Biosecurity Act, subsections 532(1) and 533(1) are provisions of the Biosecurity Act that are subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act).

The Determination reflects the policy position that goods that are assessed as posing a high level of biosecurity risk when travellers fail to declare them upon arrival in Australia should attract a higher infringement notice amount. Category 1 goods are the classes of goods that the Director of Biosecurity has determined, based on a risk assessment, pose the highest level of biosecurity risk in this context, while category 2 classes of goods pose a high level of biosecurity risk but not as high a biosecurity risk as category 1 goods.

It is appropriate that this Determination is exempt from disallowance due to the technical and scientific nature of the risk assessments used to determine the high level of biosecurity risk associated with the goods and classes of goods.

**Consultation**

The Office of Best Practice Regulation (OBPR) was consulted regarding the *Biosecurity Amendment (Infringement Notices) Regulations 2020* (OBPR reference 42589). The OBPR advised that the proposal does not change the scope of the regulation as it increases non-compliance penalties in the existing regulation. A Regulation Impact Statement is not required. The Determination sets out the necessary detail for the proper administration of the matters set out in those Regulations. Further consultation was not required as the category 1 goods and category 2 goods listed in the Determination are based on technical and scientific assessments conducted by experts within the Department of Agriculture, Water and the Environment.

**Impact and Effect**

The Amendment Act inserted subsections 524(6) and 524(7) into the Biosecurity Act. Subsection 524(6) permits regulations to be made to prescribe different numbers of penalty units that may be stated in an infringement notice for different kinds of alleged contraventions of provisions of the Biosecurity Act. Subsection 524(6) also allows amounts to be prescribed by reference to the kinds of goods or class of goods to which an alleged contravention relates. Subsection 524(7) permits regulations made for this purpose to apply, adopt or incorporate matters referred to in a determination made by the Director of Biosecurity under subsection 524A(1), as in force from time to time.

The *Biosecurity Amendment (Infringement Notices) Regulation 2020* (Amendment Regulation)which commenced on 1 January 2021, amended section 88 of the Biosecurity Regulation to prescribe different penalty amounts for infringement notices given for different kinds of alleged contraventions of the Biosecurity Act.

Subsection 88(2) of the Biosecurity Regulation prescribes different infringement notice amounts where an individual who is at a first point of entry allegedly contravenes subsection 532(1) or 533(1) of the Biosecurity Act when giving information or producing a document in compliance or purported compliance with a requirement under subsection 126(1) or 196(2) of the Biosecurity Act.

Subsection 88(2) prescribes these amounts by reference to ***category 1 goods*** and ***category 2 goods***, which are defined in section 5 of the Biosecurity Regulation as those goods or classes of goods listed as such in a determination made under subsection 524A(1) of the Biosecurity Act.

Category 1 goods are listed in section 6 of the Determination as the following:

* Live plants
* Whole unprocessed seeds
* Meat and meat products, except meat or meat products that have been retorted
* Prawns that are raw or partially raw (that is, not sufficiently cooked to coagulate all of the protein in the prawn meat)
* Live animals, and the remains of animals that have died in transit before arriving in Australian territory or on arrival in Australian territory
* Eggs of a bird or reptile that are intended for hatching
* Veterinary vaccines.

Category 2 goods are listed in section 7 of the Determination as the following:

* Fresh fruit
* Fresh vegetables
* Fresh fungi
* Fresh leaves
* Fresh herbs

Subsection 524(4) of the Biosecurity Act provides that the amount to be stated in an infringement notice for the purposes of paragraph 104(1)(f) of the Regulatory Powers Act is the least of: one fifth of the maximum penalty that a court could impose for that contravention; 12 penalty units where the person is an individual; and, if the regulations prescribe a different number of penalty units for the alleged contravention, that number of penalty units.

Previously, 2 penalty units was prescribed as the amount payable under infringement notices issued to an individual for an alleged contravention of specified sections of the Biosecurity Act at a first point of entry, regardless of the relative biosecurity risk of goods involved.

Paragraph 88(2)(b) of the Biosecurity Regulation, which was amended by the Amendment Regulation, provides that, the infringement notice amount is 6 penalty units where the contravention relates to category 2 goods.

The note to subsection 88(2) confirms that where an alleged contravention relates to category 1 goods, the amount is 12 penalty units, in accordance with subsection 524(4) of the Biosecurity Act. This is one fifth of the maximum penalty that a court could impose for a contravention of subsection 532(1) or 533(1) of the Biosecurity Act.

All other goods will continue to attract an infringement notice in the amount of 2 penalty units where they are not declared, in accordance with paragraph 88(2)(a) of the Biosecurity Regulation.

In allowing infringement notices to be issued that carry different penalties that reflect the goods in question and their level of biosecurity risk, the Determination promotes deterrence and the protection of Australia’s biosecurity status. It does this by encouraging individuals to provide the required information relating to goods or classes of goods that have a high level of biosecurity risk associated with them, when arriving in Australian territory at a first point of entry. This will ensure biosecurity risk can be adequately identified, assessed and managed.

The Determination will remain in force for 12 months, beginning on 1 January 2021. This is the maximum period permitted under subsection 524A(3) of the Biosecurity Act.

**Details/Operation**

Details of the instrument are set out at Attachment A.

**Other**

The Determination is a legislative instrument but, under subsection 524A(4) of the *Biosecurity Act 2015*, section 42 (disallowance) of the *Legislation Act 2003* does not apply to the Determination. Consequently, a Statement of Compatibility with Human Rights is not required.

**ATTACHMENT A**

**Details of the *Biosecurity (2021 Infringement Notices) Determination 2020***

Section 1 – Name

Section 1 provides that the name of this instrument is the *Biosecurity (2021 Infringement Notices) Determination 2020* (the Determination).

 (the Determination).

Section 2 – Commencement

Section 2 provides that the whole of the Determination commences on 1 January 2021.

Section 3 – Authority

Section 3 provides that this instrument is made under subsection 524A(1) of the *Biosecurity Act 2015* (Biosecurity Act).

The note to this section explains that the Determination lists classes of goods for the purposes of infringement notices for alleged contraventions of certain provisions of the Biosecurity Act. An infringement notice may state 12 penalty units if the contravention relates to category 1 goods and 6 penalty units for category 2 goods in accordance with subsection 524(4) of the Biosecurity Act and the regulations made for the purpose of that subsection. Subsection 524(4) of the Biosecurity Act prescribes the amount to be stated in an infringement notice for the purposes of paragraph 104(1)(f) of the Regulatory Powers Act.

Section 4 – Period in force

Section 4 provides that the Determination is in force for 12 months beginning on 1 January 2021.

Section 5 – Definitions

Section 5 provides for definitions of ***meat***, ***meat product*** and ***retorted***.

This section defines ***meat*** as a part of an animal (other than a fish, cetacean, mollusc, crustacean, cnidarian, echinoderm or a tunicate) that is intended or able to be used as food by a human being or an animal (whether or not it is cooked, dried or otherwise processed). This definition includes blood, bone-meal, meat meal, tallow and fat.

A ***meat product*** is defined in section 5 as a product that contains meat or of which meat is an ingredient.

The term ***retorted*** is also defined in section 5 as heated in a hermetically-sealed contained to a minimum core temperature of 100°C, obtaining an F0 value of at least 2.8.

These definitions are required because meat or meat products that have been retorted are excluded from the class of goods known as ’meat and meat products’ that is listed as a class of category 1 goods in section 6.

Section 6 – Category 1 goods

Section 6 provides a list of classes of goods and goods that have been assessed to be category 1 goods for the purposes of the Determination. This section allows infringement notice amounts prescribed by subsection 524(4) of the Biosecurity Act and regulations made for the purposes of that subsection to reflect the goods and classes of goods that have been listed as category 1 goods in the Determination. Category 1 goods pose a high biosecurity risk when travellers fail to declare them upon arrival in Australia.

Paragraph (a) in section 6 provides that live plants are a class of category 1 goods. The term ‘live plants’ includes all live plants (other than seeds) that are imported for the purposes of growth and/or propagation. They often carry exotic pests and diseases such as arthropods, bacteria, fungi and viruses, such as *Xylella* which is Australia’s number one national priority plant pest. This class of goods is also sometimes referred to as “nursery stock” and includes, but is not limited to: budwood, bulbils, bulbs, corms, cuttings, grafting wood, plants, rhizomes, roots, seedlings, slips, stems, tissue cultures, tubers. Declaring live plants allows biosecurity officers to determine if the species of live plant is permitted entry into Australia and if any treatment requirements apply.

Paragraph (b) in section 6 provides that whole unprocessed seeds are a class of category 1 goods. The class covers all whole seeds of plants that have not been processed (for example, roasted, ground in to a powder etc). Whole unprocessed seeds often carry exotic diseases and pests such as khapra beetle. When declared, a biosecurity officer can determine if the seed species is permitted entry into Australia and if any other regulatory requirements, such as purity testing, apply.

Paragraph (c) in section 6, provides that meat and meat products, except meat or meat products that have been retorted, are a class of category 1 goods. The terms ***meat***, ***meat products*** and ***retorted*** are defined in section 5. There are several significant biosecurity risks associated with uncontrolled entry of meat and meat products into Australia including, but not limited to, foot-and-mouth disease, African swine fever, bovine spongiform encephalopathy, and infectious bursal disease.

Meat and meat products include blood, bone meal, meat meal, tallow, fat, jerky and biltong from any species of animal, unless that animal has been excluded by this Determination.

The listed class in paragraph (c) expressly excludes retorted meat and meat products as the biosecurity risk is significantly reduced if the meat or meat products have been retorted. Retorted meat and meat products must be heated in an unopened, hermetically sealed container for a time, and to a temperature beyond 100 °C, obtaining an F0 value of at least 2.8, sufficient to render the contents commercially sterile. To meet Australia’s import requirements, retorted products must not require freezing or refrigeration to maintain quality. For example, salami, while preserved, is not retorted and is a category 1 good.

Fish, cetaceans, molluscs, crustaceans, cnidarians, echinoderms or tunicates are excluded from the class of goods in paragraph (c) of section 6. This means meat or meat products from aquatic animals such as sharks, dolphins, whales, lobsters and jellyfish are not classified as category 1 goods. Smoked salmon is an example of a meat product that is not a category 1 good.

Declaring meat and meat products allows biosecurity officers to determine if the goods meet Australia’s requirements, which often include documentation such as a veterinary certificate from the country of export providing evidence of the sourcing and disease status of the exporting country.

Paragraph (d) in section 6 provides that prawns that are raw or partially raw are a class of category 1 goods. Raw prawns or partially raw prawns can be infected with exotic pathogenic agents including bacteria, parasites, fungi and viruses such as white spot syndrome virus and yellowhead virus genotype 1.

The class of goods in paragraph (d) includes prawns that are uncooked (that is, prawns that have not been cooked until all the protein in the prawn meat has coagulated and no raw prawn meat remains). Breaded, battered and crumbed prawns, and uncooked highly processed prawns such as dumpling, dim sum or spring roll type products, are not intended to be included in this class of goods.

If travellers fail to declare raw prawns, it is unlikely that biosecurity officers can ascertain if the goods meet all regulatory requirements and manage biosecurity risk.

Paragraph (e) in section 6 lists live animals, and the remains of animals that have died in transit before arriving in Australian territory or on arrival in Australian territory as a class of category 1 goods. Live animals and the remains of animals that have died in transit before arriving in Australian territory or on arrival in Australian territory can carry exotic pests and diseases, including arthropods, nematodes, bacteria, fungi, viruses and viroids, as well as pose a risk of becoming an invasive species themselves while alive.

The class of goods covered by paragraph (e) does not include humans, dead or alive. Humans are expressly excluded from the definition of ‘animal’, as defined in section 9 of the Biosecurity Act, as they do not pose the same biosecurity risk. Animals that were dead before the journey to Australia commenced are also excluded from paragraph (e) and are not considered category 1 goods. This includes animals that have undergone a taxidermy process to be prepared, preserved, stuffed or mounted. Animal parts, animal reproductive material and animal products are also not covered by the class of goods provided for by paragraph (e).

Paragraph (f) in section 6 provides that eggs of a bird or reptile that are intended for hatching are a class of category 1 goods. Eggs of a bird or reptile that are intended for hatching can carry many diseases of biosecurity concern to Australia. Reptile eggs could harbour togaviruses and herpesviruses while avian eggs can harbour Newcastle disease virus, avian influenza and many other potential pathogens, all of which if introduced could have serious negative consequences for Australia’s unique fauna and the environment. Eggs of a bird or reptile for hatching include whole eggs for breeding purposes through a commercial industry and hobby breeders. The legal import of these goods requires mandatory pre-export certification, inspection and testing, and post-arrival quarantine, inspection and testing.

Eggs intended for human consumption are not considered to be category 1 goods for the purposes of this determination. This is because eggs of a bird or reptile for hatching are more likely to come into contact with animals and the environment within Australia and risk spreading pests and disease of biosecurity concern, and therefore pose a higher biosecurity risk.

Paragraph (g) in section 6 provides that veterinary vaccines are a class of category 1 goods. Veterinary vaccines are products that when administered to the animal, provide, induce, or change an immune response to a target chemical or biological entity. Veterinary vaccines are prepared in a manner designed to maintain the immunobiological characteristics of the infectious agent used to generate the vaccine. This preserves the infectious agent used in the preparation of the vaccine, as well as any contaminating or extraneous agents which present additional biosecurity risks. As a fundamental component of their use, veterinary vaccines are delivered directly to susceptible animal species in the manner most likely to introduce efficient infection. This means there is a significantly high biosecurity risk associated with veterinary vaccines.

Section 7 – Category 2 goods

Section 7 provides for classes of goods that have been assessed to be category 2 goods for the purposes of determining infringement notice amounts under subsection 524(4) of the Biosecurity Act and regulations made for the purposes of that subsection. Category 2 goods pose a high biosecurity risk when travellers fail to declare them upon arrival in Australia.

Section 7 provides that the following classes of goods are category 2 goods:

(a) fresh fruit;

 (b) fresh vegetables;

 (c) fresh fungi;

 (d) fresh leaves;

 (e) fresh herbs.

Fresh fruit, fresh vegetables, fresh fungi, fresh leaves and fresh herbs can harbour a range of pests and diseases, including but not limited to exotic fruit flies, citrus canker, Plum pox virus, Panama disease, citrus greening, zebra chip and fire blight. Pests such as brown marmorated stink bug may also be present on these horticultural produce goods. Declaring these goods allows biosecurity officers to determine if the goods meet Australia’s requirements, which often include a phytosanitary certificate along with sampling and inspection.

These classes of goods cover whole, intact and unprocessed horticultural produce. Horticultural produce that has been partially processed, such as having been sliced or the peel removed, is not covered by these classes of goods for the purpose of this Determination.

Section 8 – Repeal

Section 8 provides that the Determination is repealed at the start of 1 January 2022.