

EXPLANATORY STATEMENT

Issued by the authority of the Secretary of the Department of Agriculture, Water and the Environment

Export Control Act 2020

Export Control Legislation Amendment (2022 Measures No. 1) Rules 2022

Legislative Authority

The *Export Control Legislation Amendment (2022 Measures No. 1) Rules 2022* (the Amendment Rules) are made by the Secretary of the Department of Agriculture, Water and the Environment (the department) under section 432 of the *Export Control Act 2020* (the Act).

Section 432 of the Act relevantly provides that the Secretary of the department (the Secretary) may, by legislative instrument, make rules prescribing matters required or permitted by the Act, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 264(1) of the Act provides that the rules may make provision for, and in relation to, the establishment and administration of a system, or systems, of tariff rate quotas (TRQs) for the export of goods.

Subparagraph 372(2)(a)(vi) of the Act provides that, in determining whether the person is a fit and proper person, the Secretary must have regard to certain matters relating to another Act prescribed by the rules.

Under section 289 of the Act, the Minister may give directions to the Secretary about the performance of the Secretary's functions or the exercise of the Secretary's powers in making rules under section 432 of the Act. Directions made by the Minister to the Secretary are legislative instruments but are not subject to disallowance or sunset. At the time of commencement, a Ministerial direction has not been made under section 289 of the Act for the purposes of rules relating to the export of goods.

Purpose

The purpose of the Amendment Rules is to amend the *Export Control (Tariff Rate Quotas—General) Rules 2021* (Tariff Rate Quotas Rules) to:

- Facilitate revised splits of tariff rate quotas between Australia and the European Union (EU) and Australia and the United Kingdom (UK) in relation to high quality beef, cheddar and cheese for processing, following the UK's withdrawal from the EU; and
- Update the basis on which the quotas for export of bovine offal to Japan is administered.

The Amendment Rules will also amend the *Export Control (Miscellaneous) Rules 2021* (Miscellaneous Rules) to require the Secretary to consider certain matters relating to the

Primary Industries Levies and Charges Collection Act 1991 (PILCC Act) and the Recycling and Waste Reduction Act 2020 (RWR Act) for the purposes of the fit and proper person test.

Background

Amendments to Tariff Rate Quotas Rules – Exports to EU and UK

TRQs can be administered by an authority in either the importing country or exporting country. The Australian Government administers the TRQs in relation to high quality beef, cheddar and cheese for processing for export to the EU and UK, which includes issuing certification so that Australian exports can enter the EU and UK under more favourable tariff rates.

The *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)*, which entered into force at 11pm (Greenwich Mean Time) on 31 January 2020, established the terms of the UK's withdrawal from the EU, in accordance with Article 50 of the Treaty of the EU. As a consequence of the UK's withdrawal from the EU, Australia's TRQs to the EU have been split between the EU and UK.

Clause 6 of the *Regulation (EU) 2019/216 of the European Parliament and of the Council of 30 January 2019 on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union, and amending Council Regulation (EC) No 32/2000* (EU Regulation 2019/216) provided that to ensure legal certainty and the continuous smooth operation of imports under the TRQs to the EU and UK, it was necessary for the EU to be able to proceed unilaterally to the apportionment of the TRQs. The methodology for this apportionment was set out in Article 1 of EU Regulation 2019/216, with the EU's portion of TRQs for agricultural products set out in Part A of the Annex. In summary, the methodology provided that the total volume of a given TRQ would not be changed, so that EU-27 volume equals EU-28 volume minus the UK volume.

Part A of the Annex to EU Regulation 2019/216 relevantly sets out the EU's portion of TRQs in relation to the export of high quality beef, cheddar and cheese for processing to the EU. The relevant volumes are:

- Order number 094451 relates to “meat of bovine animals, fresh, chilled or frozen” and “edible offal of bovine animals, fresh, chilled or frozen” (collectively known as “high quality beef”). The total EU-28 volume was 7,150 tonnes, with the EU-27's apportionment being 2,481 tonnes. This means that the UK's apportionment was 4,669 tonnes.
- Order number 094521 relates to “cheddar”. The total EU-28 volume was 3,711 tonnes, with the EU-27's apportionment being 3,711 tonnes. This means that the UK's apportionment was nil.
- Order number 094522 relates to “cheese for processing”. The total EU-28 volume was 500 tonnes, with the EU-27's apportionment being 500 tonnes. This means that the UK's apportionment was nil.

In late 2020, the Australian Government reached agreement with the UK and the EU on modifying how TRQs were to be apportioned between the two destinations. These modified TRQs did not take effect at the end of the transition period for the UK's withdrawal from the EU, which ended on 31 December 2020.

The *Agreement in the form of an exchange of letters between the European Union and the Commonwealth of Australia pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions on all the tariff-rate quotas included in the EU Schedule CLXXV as a consequence of the United Kingdom's withdrawal from the European Union*, dated 26 February 2021, provides for the following revised TRQs for the export of high quality beef, cheddar and cheese for processing to the EU:

- For “meat of bovine animals, fresh, chilled or frozen” and “edible offal of bovine animals, fresh, chilled or frozen” (collectively known as “high quality beef”), the EU volume of the Australian country specific part will be adjusted to 3,389 tonnes.
- For “cheddar”, the EU volume of the Australian country specific part will be adjusted to 1,113 tonnes.
- For “cheese for processing”, the EU volume of the Australian country specific part will be adjusted to 150 tonnes.

It is necessary to amend the Tariff Rate Quotas Rules to facilitate the revised splits of TRQs between Australia and the EU and Australia and the UK for the 2022 quota year.

Amendments to Tariff Rate Quotas Rules – Exports to Japan

On 15 January 2015, the *Japan-Australia Economic Partnership Agreement* (JAEPA) entered into force. The annual quota for bovine offal was heavily utilised by exporters when the JAEPA first came into force. As a result, the Australian Government decided to administer the quota on a quarterly basis to ensure continuity of product supply and ensure the quota was not used up early in the quota year.

Following introduction of new agreements, including the Trans-Pacific Partnership Agreement, utilisation of the bovine offal quota has reduced, and there is no longer the need for the quota to be administered on a quarterly basis. It is necessary to amend the Tariff Rate Quotas Rules to provide for the bovine offal quota to be administered on an annual basis, with an annual access amount for bovine offal export to Japan.

Amendments to Miscellaneous Rules

Section 372 of the Act provides for the fit and proper person test, which applies in relation to decisions in relation to registered establishments, approved arrangements or export licences, and any other provisions of the Act. Currently, the Secretary is not required to consider certain matters relating to the PILCC Act and RWR Act for the purposes of the fit and proper person test. As the department also administers the PILCC Act and RWR Act, it is considered appropriate that such matters would be considered by the Secretary in making relevant decisions under the Act relating to the fit and proper person test.

Impact and Effect

Revised access amounts are anticipated to be implemented in EU legislation soon and the amendments to the Tariff Rate Quotas Rules facilitate the revised splits of TRQs between Australia and the EU and Australia and the UK for the 2022 quota year. The changes to the internal administration of the access amount for bovine offal export to Japan, from a quarterly basis to an annual basis, are procedural in nature. The Office of Best Practice Regulation

(OBPR) has advised that a Regulation Impact Statement is not required for these amendments (ref: OBPR22-01967).

Amendments to the Miscellaneous Rules will require the Secretary in determining whether a person is a fit and proper person, to consider certain matters under the PILCC Act and RWR Act. OBPR has also advised that a Regulation Impact Statement is not required for these amendments (ref: OBPR22-01965).

Consultation

In relation to the amendments to the Tariff Rate Quotas Rules for exports to the EU and UK and the administration of the bovine offal quota to Japan, the department has undertaken targeted consultation with the Australian Meat Industry Council, the Australian Dairy Products Federation, and meat and dairy exporters who have utilised the relevant TRQs. The current round of consultation is further to ongoing discussions held with industry related to the revised splits of tariff rate quotas between Australia and the EU, and Australia and the UK following the UK's withdrawal from the EU. The broader consultation around these changes has been ongoing since January 2022. Consultation has also occurred with the Department of Foreign Affairs and Trade.

The fit and proper person test is an internal assessment undertaken by the department and therefore no external consultation was considered necessary in relation to these amendments.

Details and Operation

Details of the Amendment Rules are set out in [Attachment A](#).

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

The amendments to the Tariff Rate Quotas Rules commence on the later of 1 April 2022, or the day after registration. The amendments to the Miscellaneous Rules commence on the day after registration.

Other

The Amendment Rules are compatible with 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](#).

Details of the *Export Control Legislation Amendment (2022 Measures No. 1) Rules 2022*

Section 1 – Name

This section provides that the name of the instrument is the *Export Control Legislation Amendment (2022 Measures No. 1) Rules 2022* (the Amendment Rules).

Section 2 – Commencement

This section provides for the commencement details for the Amendment Rules.

The table in subsection 2(1) provides that Schedule 1 to the Amendment Rules commences on the later of 1 April 2022 and the day after the instrument is registered on the Federal Register of Legislation. Sections 1 to 4, Schedule 2 and any other provision of the Amendment Rules commence on the day after the instrument is registered on the Federal Register of Legislation.

The note below the table provides that the table relates only to the provisions of the Amendment Rules as originally made. It would not be amended to deal with later amendments of the Amendment Rules. The purpose of this note is to clarify that the commencement of any subsequent amendments would not be reflected in this table.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Amendment Rules. This clarifies that information may be inserted in column 3 of the table, or information in it may be edited, in any published version of the Amendment Rules.

Section 3 – Authority

This section provides that the Amendment Rules are made under the *Export Control Act 2020* (the Act).

Section 4 – Schedules

This section provides for the amendment or repeal of instruments as set out in a Schedule to the Amendment Rules. This enables the amendment of the *Export Control (Tariff Rate Quotas—General) Rules 2021* (the Tariff Rate Quotas Rules) (see Schedule 1 below) and the *Export Control (Miscellaneous) Rules 2021* (the Miscellaneous Rules) (see Schedule 2 below).

Schedule 1—Amendments of the *Export Control (Tariff Rate Quotas—General) Rules 2021*

Export Control (Tariff Rate Quotas—General) Rules 2021

Division 2 of Part 4 of Chapter 8 of the Act relates to tariff rate quota systems. Subsection 264(1) of the Act relevantly provides that the rules may make provision for, and in relation to, the establishment and administration of a system, or systems, of tariff rate quotas (TRQs) for the export of goods.

The items in this Schedule are made for the purposes of subsection 264(1) of the Act.

A number of the below amendments to the *Export Control (Tariff Rate Quotas—General) Rules 2021* (Tariff Rate Quotas Rules) prescribe rules that refer to relevant regulations of the European Union (EU) and the United Kingdom (UK). Specifically, section 6 of the Tariff Rate Quotas Rules provides definitions for the following:

- ***EU Tariff Quota Regulation*** means the Commission Implementing Regulation (EU) No 2020/761, as in force from time to time. In 2021, this Regulation could be viewed on the EUR-Lex website at <https://eur-lex.europa.eu>; and
- ***UK Tariff Quota Regulations*** means the *Customs (Tariff Quotas) (EU Exit) Regulations 2020* (UK), as in force from time to time. In 2021, this Regulation could be viewed on the UK legislation website at <https://legislation.gov.uk>.

Paragraph 432(3)(g) of the Act provides that, despite subsection 14(2) of the *Legislation Act 2003*, the rules may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any instrument or writing, as in force or existing from time to time, that:

- sets out, or provides a method for calculating, the tariff rate quota for the importation of a kind of goods into a country; and
- is made by the authority or body that is responsible for regulating the importation of goods of that kind into that country.

The EU Tariff Quota Regulation and the UK Tariff Quota Regulations set out, and provide a method for calculating, the tariff rate quota for the importation of a kind of goods into the EU and UK respectively. These regulations are also made by an authority or body that is responsible for regulating the importation of goods of that kind into the EU and UK, being the European Parliament and UK Parliament respectively. These documents are publicly available on the EUR-Lex website and UK legislation website respectively.

Item [1] – Section 6

Section 6 of the Tariff Rate Quotas Rules provides definitions of various terms.

This item inserts a signpost definition for ***UK WTO dairy goods*** in section 6 of the Tariff Rate Quotas Rules, to draw the reader's attention to section 89R. This amendment is consequential to the amendment made by item [7] of this Schedule, which inserts section 89R.

Item [2] – Section 63

Section 63 of the Tariff Rate Quotas Rules provides the annual access amount for *EU high quality beef* for export to the EU in relation to a quota year.

EU high quality beef is defined in section 60 of the Tariff Rate Quotas Rules as beef of the kind described under order number 09.4451 in Annex VIII to the EU Tariff Quota Regulation.

This item amends section 63 to provide that the annual access amount for EU high quality beef for export to the EU in relation to the quota year beginning on 1 July 2022 is 3,389 tonnes. In relation to any other quota year, the annual access amount for export to the EU is the weight of EU high quality beef that may, under order number 09.4451 in Annex VIII to the EU Tariff Quota Regulation, be exported from Australia to the EU in the quota year at the *ad valorem* customs duty set out in that order number.

This amendment reflects the agreement that was reached by the Australian Government with the UK and the EU in late 2020 on modifying how TRQs for high quality beef were to be apportioned between the two destinations as a consequence of the UK’s withdrawal from the EU.

Item [3] – Section 74

Section 74 of the Tariff Rate Quotas Rules provides the annual access amount for a kind of *EU WTO dairy goods* for export to the EU in relation to a quota year.

EU WTO dairy goods are defined in section 71 of the Tariff Rate Quotas Rules as goods referred to in column 2 of an item of the table in section 71 and are of the kind referred to in column 1 of that item. Specifically, *EU WTO dairy goods* are classified as “cheese for processing” (goods described under order number 09.4522 in Annex IX to the EU Tariff Quota Regulation) and “whole cheddar cheese” (goods described under order number 09.4521 in Annex IX to the EU Tariff Quota Regulation).

This item amends section 74 to provide that the annual access amount for cheese for processing for export to the EU in relation to the quota year beginning on 1 January 2022 is 150 tonnes. The annual access amount for whole cheddar cheese to the EU in relation to the quota year beginning on 1 January 2022 is 1,113 tonnes. In relation to any other quota year, the annual access amount for a kind of EU WTO dairy goods for export to the EU is the weight of goods of that kind that may, under the EU Tariff Quota Regulation, be exported from Australia to the EU in the quota year at a reduced tariff rate.

This amendment reflects the agreement that was reached by the Australian Government with the UK and the EU in late 2020 on modifying how TRQs for cheese for processing and whole cheddar cheese were to be apportioned between the two destinations as a consequence of the UK’s withdrawal from the EU.

Item [4] – Section 87

Section 87 of the Tariff Rate Quotas Rules sets out a “quota year” and a “quarter of a quota year” for a kind of *Japan quota goods* for export to Japan.

Relevantly, *Japan quota goods* are defined in subsection 86(1) as including *bovine offal*. Subsection 86(2) specifically defines *bovine offal* as edible offal of bovine animals that may be exported from Australia to Japan at a reduced tariff rate under the *Japan-Australia Economic Partnership Agreement* (JAEPA).

This item repeals and substitutes section 87 to provide that a “quota year” for a kind of Japan quota goods for export to Japan is a period of 12 months beginning on 1 April.

This amendment removes references to a “quarter of a quota year” from section 87 of the Tariff Rate Quotas Rules. When read with the amendment to section 89, made by item [5] of this Schedule, there will no longer be a “quarter of a quota year” or “quarterly access amount” for bovine offal for export to Japan. This will have the effect of requiring the bovine offal quota to be administered on an annual basis, with an annual access amount for bovine offal export to Japan. Other references to a “quarter of a quota year” in the Tariff Rate Quotas Rules remain unchanged, as there may be future occasions in which other quotas are administered on a quarterly basis.

Item [5] – Section 89

Section 89 of the Tariff Rate Quotas Rules sets out access amounts for a kind of Japan quota goods for export to Japan.

This item repeals and substitutes section 89 to provide that the annual access amount for a kind of Japan quota goods for export to Japan in relation to a quota year is the weight of goods of that kind that may, under the JAEPA, be exported from Australia to Japan in the quota year at a reduced tariff rate.

This amendment removes references to a “quarterly access amount” from section 89 of the Tariff Rate Quotas Rules. When read with the amendment to section 87, made by item [4] of this Schedule, there will no longer be a “quarter of a quota year” or “quarterly access amount” for bovine offal for export to Japan. This will have the effect of requiring the bovine offal quota to be administered on an annual basis, with an annual access amount for bovine offal export to Japan. Other references to a “quarterly access amount” in the Tariff Rate Quotas Rules remain unchanged, as there may be future occasions in which other quotas are administered on a quarterly basis.

Item [6] – Section 89H

Section 89H of the Tariff Rate Quotas Rules provides the annual access amount for *UK high quality beef* for export to the UK in relation to a quota year.

UK high quality beef is defined in section 89E of the Tariff Rate Quotas Rules as meat of a kind that may, under the UK Tariff Quota Regulations, be exported from Australia to the UK under quota number 05.4451. *UK Quota Table* is defined as the Quota Table within the meaning of the UK Tariff Quota Regulations (see section 6 of the Tariff Rate Quotas Rules).

This item amends section 89H to provide that the annual access amount for UK high quality beef for export to the UK in relation to the quota year beginning on 1 July 2022 is 3,761 tonnes. In relation to any other quota year, the annual access amount for export to the

UK is the weight of UK high quality beef that may, as set out in the UK Quota Table, be exported from Australia to the UK in the quota year at the quota duty rate for quota number 05.4451 in the UK Quota Table.

This amendment reflects the agreement that was reached by the Australian Government with the UK and the EU in late 2020 on modifying how TRQs for high quality beef were to be apportioned between the two destinations as a consequence of the UK's withdrawal from the EU.

Item [7] – At the end of Part 3A of Chapter 3

This item adds a new Division 3 into Part 3A of Chapter 3 of the Tariff Rate Quotas Rules. Part 3A of Chapter 3 relates to exports to the UK. New Division 3 relates to UK WTO dairy goods.

New section 89R defines *UK WTO dairy goods* as goods referred to in column 2 of an item of the table in new section 89R and are of the kind referred to in column 1 of that item. Specifically, *UK WTO dairy goods* are classified as “cheese for processing” (goods of a kind that may, under the UK Tariff Quota Regulations, be exported from Australia to the UK under quota number 05.4521) and “whole cheddar cheese” (goods of a kind that may, under the UK Tariff Quota Regulations, be exported from Australia to the UK under quota number 05.4522).

New section 89S provides that a “quota year” for a kind of *UK WTO dairy goods* for export to the UK is a period of 12 months beginning on 1 January.

New section 89T sets out the method for issuing TRQs certificates in relation to a consignment of a kind of *UK WTO dairy goods* for export to the UK in a quota year beginning on or after 1 January 2022. The relevant method is the “first come, first served method”, which is set out in Part 1 of Chapter 2 of the Tariff Rate Quotas Rules. Under this Part, the Secretary must deal with applications for TRQs certificates in the order in which the applications are received, and the Secretary must issue the certificate if, at the time of dealing with the application, the uncommitted annual or quarterly access amount (as relevant) for the quota type and the quota year is greater than zero.

New section 89U provides the annual access amount for a kind of *UK WTO dairy goods* for export to the UK in relation to a quota year.

The annual access amount for cheese for processing for export to the UK in relation to the quota year beginning on 1 January 2022 is 350 tonnes. The annual access amount for whole cheddar cheese to the UK in relation to the quota year beginning on 1 January 2022 is 2,598 tonnes.

In relation to a later quota year:

- The annual access amount for cheese for processing for export to the UK is the weight of goods of that kind that may, as set out in the UK Quota Table, be exported from Australia to the UK in the quota year at the quota duty rate for quota number 05.4521 in the UK Quota Table; and
- The annual access amount for whole cheddar cheese for export to the UK is the weight of goods of that kind that may, as set out in the UK Quota Table, be exported

from Australia to the UK in the quota year at the quota duty rate for quota number 05.4522 in the UK Quota Table.

This amendment reflects the agreement that was reached by the Australian Government with the UK and the EU in late 2020 on modifying how TRQs for cheese for processing and whole cheddar cheese were to be apportioned between the two destinations as a consequence of the UK's withdrawal from the EU.

Item [8] – Paragraph 135(7)(a)

Section 135 of the Tariff Rate Quotas Rules sets out the method for determining, for certain purposes, a person's total weight of eligible past exports of EU high quality beef for export to the EU and UK high quality beef for export to the UK in certain quota years. Subsection 135(7) sets out the calculation for a person's total weight of eligible past exports for EU high quality beef for export to the EU in the quota year beginning on 1 July 2022, where the person is an applicant for such a TRQ entitlement.

This item amends paragraph 135(7)(a) to provide that 47.3986% of the person's combined past exports amount for 2022 will be considered when calculating the person's total weight of eligible past exports for EU high quality beef for export to the EU in the quota year beginning on 1 July 2022. The percentage of 47.3986% is derived from the revised splits of TRQs for EU high quality beef (3,389 tonnes) expressed as a proportion of the combined volume of TRQs for EU high quality beef and UK high quality beef (7,150 tonnes).

This amendment is consequential to the amendment made by item [2] of this Schedule, which amends section 63.

Item [9] – Paragraph 135(8)(a)

Subsection 135(8) sets out the calculation for a person's total weight of eligible past exports for UK high quality beef for export to the UK in the quota year beginning on 1 July 2022, where the person is an applicant for such a TRQ entitlement.

This item amends paragraph 135(8)(a) to provide that 52.6014% of the person's combined past exports amount for 2022 will be considered when calculating the person's total weight of eligible past exports for UK high quality beef for export to the UK in the quota year beginning on 1 July 2022. The percentage of 52.6014% is derived from the revised splits of TRQs for UK high quality beef (3,761 tonnes) expressed as a proportion of the combined volume of TRQs for EU high quality beef and UK high quality beef (7,150 tonnes).

This amendment is consequential to the amendment made by item [6] of this Schedule, which amends section 89H.

Item [10] – Paragraph 135(10)(a)

Subsection 135(10) sets out the calculation for a person's total weight of eligible past exports for EU high quality beef for export to the EU in the quota year beginning on 1 July 2023, where the person is an applicant for such a TRQ entitlement.

This item amends paragraph 135(10)(a) to provide that 47.3986% of the person's combined past exports amount for 2023 will be considered when calculating the person's total weight of eligible past exports for EU high quality beef for export to the EU in the quota year beginning on 1 July 2023. The percentage of 47.3986% is derived from the revised splits of TRQs for EU high quality beef (3,389 tonnes) expressed as a proportion of the combined volume of TRQs for EU high quality beef and UK high quality beef (7,150 tonnes).

This amendment is consequential to the amendment made by item [2] of this Schedule, which amends section 63.

Item [11] – Paragraph 135(11)(a)

Subsection 135(11) sets out the calculation for a person's total weight of eligible past exports for UK high quality beef for export to the UK in the quota year beginning on 1 July 2023, where the person is an applicant for such a TRQ entitlement.

This item amends paragraph 135(11)(a) to provide that 52.6014% of the person's combined past exports amount for 2023 will be considered when calculating the person's total weight of eligible past exports for UK high quality beef for export to the UK in the quota year beginning on 1 July 2023. The percentage of 52.6014% is derived from the revised splits of TRQs for UK high quality beef (3,761 tonnes) expressed as a proportion of the combined volume of TRQs for EU high quality beef and UK high quality beef (7,150 tonnes).

This amendment is consequential to the amendment made by item [6] of this Schedule, which amends section 89H.

Schedule 2—Amendments of the *Export Control (Miscellaneous) Rules 2021*

Export Control (Miscellaneous) Rules 2021

Item [1] – At the end of the instrument

Division 5 of Part 11 of Chapter 10 of the Act provides for the fit and proper person test. Subsection 372(1) of the Act provides that the fit and proper person test applies for the purposes of decisions in relation to registered establishments, approved arrangements and export licences, and any other provision of the Act prescribed by the rules. Subsection 372(2) provides the matters to which the Secretary must have regard in deciding whether a person is a fit and proper person.

Paragraph 372(2)(a) of the Act provides that a matter to which the Secretary must have regard in determining whether a person is a fit and proper person, is whether the person, or an associate of the person, has been convicted of an offence against, or ordered to pay a pecuniary penalty under certain Acts. Subparagraph 372(2)(a)(vi) allows the rules to prescribe another Act for the purposes of paragraph 372(2)(a).

This item inserts new Part 4 at the end of the Miscellaneous Rules. New Part 4 relates to the fit and proper person test.

New section 4-1 is made for the purposes of subparagraph 372(2)(a)(vi) of the Act and provides for additional matters to which the Secretary must have regard when determining whether a person or an associate of the person is a fit and proper person. New section 4-1 provides that the *Primary Industries Levies and Charges Collection Act 1991* (PILCC Act) and the *Recycling Waste Reduction Act 2020* (RWR Act) are prescribed for the purposes of subparagraph 372(2)(a)(vi) of the Act.

The effect of new section 4-1 is that in determining whether a person is a fit and proper person, the Secretary must have regard to whether the person or an associate of the person, has been convicted of an offence against, or ordered to pay a pecuniary penalty under the PILCC Act or RWR Act.

Additionally, the effect of paragraphs 372(2)(b) and (d) of the Act is that in determining whether a person is a fit and proper person, the Secretary is required to have regard to whether a debt is due and payable by the person, or an associate of the person, to the Commonwealth under the PILCC Act or RWR Act and whether the person, or an associate of the person, has contravened the PILCC Act or RWR Act.

The meaning of “associate” is set out in section 13 of the Act and includes, for example, a person who is or was a consultant, employer or employee, a family member or any other person who is concerned in, or in a position to control or influence the conduct of, a business or undertaking of the person.

As the department also administers the PILCC Act and RWR Act, it is considered appropriate that such matters would be considered by the Secretary in making relevant decisions under the Act relating to the fit and proper person test.

The decisions to which the fit and proper person test is relevant are set out under section 372 of the Act. Part 2 of Chapter 11 of the Act makes provision for internal review or review by the Administrative Appeals Tribunal in relation to decisions made under the Act.

Statement of Compatibility with Human Rights

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

Export Control Legislation Amendment (2022 Measures No. 1) Rules 2022

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 *Export Control Legislation Amendment (2022 Measures No. 1) Rules 2022* (the Amendment Rules) is made under the *Export Control Act 2020* (the Act). The Amendment Rules amends the *Export Control (Tariff Quotas—General) Rules 2021* (the Tariff Rate Quotas Rules) and the *Export Control (Miscellaneous) Rules 2021* (the Miscellaneous Rules).

Amendments to Tariff Rate Quotas Rules

The amendments to the Tariff Rate Quotas Rules facilitate revised splits of tariff rate quotas (TRQs) between Australia and the European Union (EU) and Australia and the United Kingdom (UK) in relation to high quality beef, cheddar and cheese for processing, following the UK's withdrawal from the EU at 11pm (Greenwich Mean Time) on 31 January 2020. The amendments reflect the agreement that was reached by the Australian Government with the UK and the EU in late 2020 on modifying how TRQs for such goods would be apportioned between the two destinations.

Due to the reduction in the utilisation of the quota for exports of bovine offal to Japan under the *Japan-Australia Economic Partnership Agreement*, there is no longer the need for the quota to be administered on a quarterly basis. The amendments to the Tariff Rate Quotas Rules will allow the bovine offal quota to be administered on an annual basis, with an annual access amount.

Amendments to Miscellaneous Rules

The Amendment Rules amend the Miscellaneous Rules to prescribe additional matters to which the Secretary must have regard when considering whether a person is a fit and proper person.

Division 5 of Part 11 of Chapter 10 of the Act provides for the fit and proper person test and where it applies. Subsection 372(1) of the Act provides that the fit and proper person test applies in relation to decisions relating to registered establishments, approved arrangements, export licences and any other provision of the Act prescribed by the rules.

Subsection 372(2) of the Act provides for the matters to which the Secretary must have regard in determining whether a person is a fit and proper person. This includes whether the person, or an associate of the person, has been convicted of an offence against, or ordered to

pay a pecuniary penalty under Acts prescribed by the rules (subparagraph 372(2)(a)(vi) of the Act).

The amendments to the Miscellaneous Rules prescribe the *Primary Industries Levies and Charges Collection Act 1991* (the PILCC Act) and the *Recycling and Waste Reduction Act 2020* (the RWR Act) for the purposes of subparagraph 372(2)(a)(vi) of the Act. The effect of the amendments is that in determining whether a person is a fit and proper person, the Secretary must have regard to whether the person or an associate of the person has been convicted of an offence against, or ordered to pay a pecuniary penalty under, the PILCC Act or the RWR Act. Due to paragraphs 372(2)(b) and (d) of the Act, the Secretary is also required to consider whether a debt is due and payable by the person, or an associate of the person, to the Commonwealth under the PILCC Act or RWR Act, and whether the person, or an associate of the person, has contravened the PILCC Act or RWR Act.

Assessment of Compatibility with Human Rights

Amendments to Tariff Rate Quotas Rules

These amendments support and give effect to various international agreements and do not engage any of the applicable rights or freedoms.

Amendments to Miscellaneous Rules

These amendments may engage the following rights:

- Right to protection from arbitrary interference with privacy (Article 17 of the International Covenant on Civil and Political Rights (ICCPR));
- Right to freedom of association (Article 22 of the ICCPR);
- Right to work (Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)).

Right to protection from arbitrary interference with privacy (Article 17 of the ICCPR)

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. The right to privacy can be limited to achieve a legitimate objective where the limitations are lawful and not arbitrary. For an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' as implying that any interference with privacy must be proportionate to a legitimate end and be necessary in the circumstances. While the United Nations Human Rights Committee has not defined 'privacy', the term is generally understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

Under the Act, certain persons are required to provide information or documents for the purposes of the Secretary determining whether the person is a fit and proper person. Requiring persons to provide information or documents may incidentally require the provision of personal information. The collection, use, storage, and disclosure of personal

information may engage the right to freedom from arbitrary or unlawful interference with privacy.

Participation in Australia's agricultural export markets is not a right; it is a privilege granted by the Australian Government to suitable persons. A person seeking the benefits of participating in those markets does so in the knowledge that the existence of certain prior conduct or associations may result in the rejection of an application, or suspension, variation or revocation of a registration or other approval (if prescribed by the rules).

The amendments to the Miscellaneous Rules require the Secretary to have regard to certain matters relating to the PILCC Act or RAWR Act (discussed in detail above) in determining whether a person is a fit and proper person.

A fit and proper person test can be used to consider a person's history of compliance with legislation and then deny approval to register an establishment, or to suspend, revoke or alter the conditions on an existing approved arrangement. This ensures that persons or companies are suitable entities to be responsible for the appropriate management of relevant risks.

Requiring the Secretary to take into account whether the person (or an associate of the person) has been convicted of an offence against, or ordered to pay a pecuniary penalty under the PILCC Act or the RWR Act is important when considering whether a person is a fit and proper person because such a person might be involved in the export of a wide range of goods, with varying degrees of risk. For similar reasons, whether a debt is due and payable by the person (or an associate of the person) to the Commonwealth under the PILCC Act or RWR Act, and whether the person (or an associate of the person) has contravened those Acts are also important considerations for this assessment. This ensures that the integrity of the regulatory framework is not compromised by limiting conduct that can be considered in this context. As the agricultural export sector is regularly changing and evolving, this is reasonable and proportionate and ensures that the current level of market access can be maintained and possibly even increased in future.

Australia's access to markets and the ability to export agricultural goods depends on its trading reputation and the confidence of its trading partners. To the extent these requirements engage Article 17 of the ICCPR, any interference with privacy is not arbitrary as the requirement to provide information, including for the fit and proper person test, is necessary, reasonable and proportionate for the legitimate objective of ensuring that persons who are involved in exporting goods from Australian territory are trustworthy and demonstrate the required integrity necessary to uphold Australian law and protect our trading reputation. In addition, any information collected under the Act is protected from unauthorised disclosure by the confidentiality provisions in sections 388 to 397 of the Act.

Right to freedom of association (Article 22 of the ICCPR)

Article 22(1) of the ICCPR protects the right to freedom of association with others. Article 22(2) permits limitations which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This right may be engaged by the requirement to be a fit and proper person which incorporates an assessment of a person's associates.

The amendments to the Miscellaneous Rules require the Secretary in determining whether a person is a fit and proper person, to have regard to certain matters relevant to the PILCC Act or RWR Act (discussed in detail above) in relation to an associate of the person.

Business associates and others may have influence over the primary person such that they may be able to compel them to undertake illegal activities on their behalf, through inducement or other means. The amendments will require the Secretary to consider, as part of the ‘fit and proper test’, whether an associate of the primary person has been convicted of an offence against, or ordered to pay a pecuniary penalty under the PILCC Act or the RWR Act, has a debt that is due and payable to the Commonwealth under those Acts or has contravened those Acts, and therefore may pose such a risk. Allowing the Secretary to take this into account when deciding whether a person is a ‘fit and proper person’ for the purposes of certain decisions will ensure Australia’s agricultural exports are not compromised.

The fit and proper person test does not prevent or prohibit a person from holding any particular associations. Rather, holding certain associations where risks have been identified in relation to the PILCC Act or the RWR Act may mean that a person’s circumstances are not compatible with participation in Australia’s agricultural export markets, which are underpinned by trust. Consideration of a person’s associations is necessary because associates may leverage their personal relationship with the primary person to engage in non-compliant export activities.

Importing country requirements relating to agricultural goods will often relate to the preservation of public health. This may pose a risk to public health and safety. Therefore, to the extent that the fit and proper person test limits the right to freedom of association, it is permissible under Article 22(2) as it is for the purpose of protecting public health.

Right to work (Article 6 of the ICESCR)

Article 6(1) of the ICESCR protects the right of everyone to the opportunity to gain the person’s living by work that he or she freely chooses or accepts. The United Nations Committee on Economic, Social and Cultural Rights (the UNCESCR) has stated that the right to work also encompasses the right not to be unjustly deprived of work. This right may be subject only to such limitations “as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.

The amendments to the Miscellaneous Rules may limit the right to work by further regulating the persons who can participate in the export supply chain for prescribed goods. This is because the amendments require the Secretary to consider whether a person (or an associate of the person) has been convicted of an offence against, or ordered to pay a pecuniary penalty under the PILCC Act or the RWR Act, has a debt that is due and payable to the Commonwealth under those Acts or has contravened those Acts.

The integrity of Australia’s agricultural export framework is underpinned by appropriate regulatory controls, including who is permitted to perform certain roles within it and who should be granted with certain privileges. Consideration of such matters relating to the PILCC Act and the RWR Act is necessary for the legitimate objective of ensuring that persons who are approved to export goods from Australia are persons who are trustworthy

and have demonstrated the required attributes necessary to uphold Australia's trading reputation.

The amendments achieve this by ensuring that persons or companies exporting Australian goods are suitable entities to be responsible for the appropriate management of relevant risks. This will uphold the integrity of our agricultural export framework and ensure the integrity of goods proposed for export across the entire supply chain. The high standards required of the entities participating in the export process places certain limitations on the right to work, however it does so in a way that is not arbitrary, and is necessary and proportionate for our trading partners' continued confidence.

Conclusion

This Legislative Instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary, and proportionate.

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Secretary of the Department of Agriculture, Water and the Environment