

EXPLANATORY STATEMENT

Issued by Authority of the Secretary of the Department of Agriculture, Fisheries and Forestry

Export Control Act 2020

Export Control Legislation Amendment (2024 Measures No. 1) Rules 2024

Legislative Authority

The *Export Control Legislation Amendment (2024 Measures No. 1) Rules 2024* (the Amendment Rules) are made by the Secretary of the Department of Agriculture, Fisheries and Forestry (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.

A number of provisions in the Act set the parameters of the Secretary's rule-making power and either:

- provide examples of the kinds of things for which the Secretary may make provision in the rules; or
- set out the default matters for the provision and allow the Secretary to give further detail, or set out additional requirements, in 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.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Purpose

The Amendment Rules amend various provisions of the following instruments:

- *Export Control (Animals) Rules 2021* (Animals Rules); and
- *Export Control (Miscellaneous) Rules 2021* (Miscellaneous Rules).

The Amendment Rules amend the Miscellaneous Rules for the purposes of providing analysts, appointed under subsection 413(1) of the Act, with the same authority to use and disclose 'relevant information' for the purposes of their functions, duties and powers, as is the case in respect of the various persons referred to in subsection 388(2) of the Act, as amended

by Schedule 1 of the *Export Control Amendment (Streamlining Administrative Processes) Act 2023* (SAP Act).

Minor consequential amendments to the Miscellaneous Rules and Animal Rules ensure that, in light of the amendments made by the SAP Act to the Act, the rules appropriately refer to ‘relevant information’.

The Amendment Rules also amend the Miscellaneous Rules for the purposes of removing the now unnecessary references to the *Primary Industries Levies and Charges Collection Act 1991* and the *Recycling and Waste Reduction Act 2020* (RWR Act).

Background

Amendments to the Act made by the SAP Act, which commenced on 1 February 2024, improve the operation of information management provisions under the Act. The amendments distinguish ‘relevant information’ from ‘protected information’, providing specific authorisations for the use and disclosure of the former, while ensuring that appropriate safeguards are in place for the latter.

‘Protected information’ refers to certain specified kinds of information of which an unauthorised use or disclosure would be likely to cause harm. An offence provision applies where ‘protected information’ is used or disclosed in a manner that is not required or authorised by a Commonwealth law or prescribed State or Territory law.

‘Relevant information’ refers to information obtained or generated by a person in relation to activities undertaken in connection with the Act. The proper, effective and efficient performance of functions or duties, or the exercise of powers, under the Act will often involve the use or disclosure of relevant information. People occupying certain positions or undertaking certain activities as part of the export regulatory framework are specifically authorised to use or disclose ‘relevant information’ in certain circumstances.

Section 397E of the Act authorises the use and disclosure of relevant information in accordance with the rules. The Amendment Rules include rules made for the purposes of this power that prescribe analysts as a class of persons who may use or disclose relevant information for prescribed purposes.

Other amendments made by the Amendment Rules are consequential to the SAP Act and Machinery of Government changes that occurred in 2022.

Impact and Effect

Authorising analysts, appointed under section 413 of the Act, to use and disclose ‘relevant information’ for certain purposes will ensure that they have the same authority in relation to information management as is the case with respect to the various persons referred to in subsection 388(2) of the Act, as amended by Schedule 1 of the SAP Act. The amendments will facilitate an analyst performing their function under the Act of giving a written certificate stating certain matters to be used in court proceedings.

The repeal of Part 4 of the Miscellaneous Rules, which prescribes certain legislation to which the Secretary must have regard in considering the fit and proper person test, would have the

effect that convictions of offences against or pecuniary penalties under the RWR Act are no longer mandatory considerations in determining whether a person is a fit and proper person under the Act.

Other amendments made by the Amendment Rules are consequential amendments that are technical in nature.

The Office of Impact Analysis has advised that an Impact Analysis is not required as the proposal would result in minor regulatory impact, as detailed in cases OIA23-05425 and OIA23-06099.

Consultation

Consultation was undertaken with other Commonwealth agencies in relation to the information management amendments in Schedule 1 to the originating Bill for the SAP Act.

Details/ Operation

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

The Amendment Rules commence on the day after the instrument is registered.

Details of the Amendment Rules are set out in Attachment A.

Other

The Amendment Rules are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2022*. A full Statement of Compatibility with Human Rights is set out in Attachment B.

Details of the *Export Control Legislation Amendment (2024 Measures No. 1) Rules 2024*

Section 1 – Name

This section provides that the name of the instrument is the *Export Control Legislation Amendment (2024 Measures No. 1) Rules 2024* (the Amendment Rules).

Section 2 – Commencement

This section provides that the Amendment Rules commence on the day after the instrument is registered.

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 (Animals) Rules 2021* (Animals Rules) and the *Export Control (Miscellaneous) Rules 2021* (Miscellaneous Rules) (see Schedule 1 below).

Schedule 1 – Amendments

Export Control (Animals) Rules 2021

Item [1] – Section 11-16 (note 2)

This item omits the reference to the word ‘protected’ in section 11-16 (note 2) and substitutes the word ‘relevant’. This is a consequential amendment that reflects the changes to the Act made by Schedule 1 to the SAP Act. The amendments made by the SAP Act provide new definitions for ‘relevant information’ and ‘protected information’. As the definition of ‘protected information’ has been amended, the reference to ‘protected information’ is substituted with ‘relevant information’ to retain the meaning of note 2 under section 11-16 of the Animals Rules.

Export Control (Miscellaneous) Rules 2021

Item [2] – Section 1-4 (at the end of the note)

This item adds a reference to ‘relevant information’ to a note that identifies expressions used in the Miscellaneous Rules that are defined in the Act.

This amendment is consequential to amendments made to the Act by Schedule 1 to the SAP Act. Item 6 of Schedule 1 to the SAP Act inserts into section 12 of the Act, a new definition for the term ‘relevant information’.

Item [3] – Part 3 (heading)

This item repeals the current heading to Part 3 of the Miscellaneous Rules, ‘Part 3—Publication of Information’ and substitutes a new heading, ‘Part 3—Information Management’. This new heading more appropriately reflects the contents of this Part, as amended by the Amendment Rules.

Item [4] – At the end of Part 3

This item adds new section 3-2 to Chapter 3 of the Miscellaneous Rules. Subsection 3-2(1) provides that new section 3-2 prescribes, for the purposes of section 397E of the Act, matters relevant to the use or disclosure of relevant information by analysts.

Subsections 397E(1) and 397E(2) the Act, as inserted by the SAP Act, provide that a person may, respectively, use or disclose relevant information, if:

- the person is included in a class of persons prescribed by rules made for the purposes of paragraph 397E(1)(a) or 397E(2)(a), and
- the use or disclosure is for a purpose prescribed by rules made for the purposes of paragraph 397E(1)(b) or 397E(2)(b), and
- the information is of a kind prescribed by rules made for the purposes of paragraph 397E(1)(c) or 397E(2)(c), and
- the disclosure complies with any conditions prescribed by rules made for the purposes of paragraph 397E(1)(d) or 397E(2)(d).

Subsection 3-2(2) provides that, for the purposes of paragraphs 397E(1)(a) and (2)(a) of the Act, analysts appointed under subsection 413(1) of the Act are a prescribed class of persons. Before an analyst can be appointed, the Secretary must be satisfied that the person satisfies training and qualification requirements or that the person will satisfy those requirements before they exercise any powers as an analyst for the purposes of the Act.

Subsection 3-2(3) provides that certain purposes are prescribed for the purposes of paragraphs 397E(1)(b) and (2)(b) of the Act. Those purposes are:

- performing functions or duties, or exercising powers, under the Act; and
- assisting another person to perform functions or duties, or to exercise powers, under the Act.

“Act” is defined in section 1-4 of the Miscellaneous Rules to include legislative instruments made under the Act and the Regulatory Powers Act as it applies in relation to the Act.

Subsection 3-2(4) provides that, for the purposes of paragraphs 397E(1)(c) and (2)(c) of the Act, the kind of information that is prescribed is relevant information. ‘Relevant information’ is defined by section 12 of the Act, as amended by the SAP Act, as information obtained or generated by a person in the course of or for the purposes of performing functions or duties, or exercising powers, under the Act, or assisting another person to perform functions or duties, or exercise powers, under this Act.

Subsection 3-2(5) provides that for the purposes of subsection 397E(3) of the Act, the powers of the Parliament to make laws with respect to the following are specified:

- trade and commerce with other countries, and among the States (within the meaning of paragraph 51(i) of the Constitution);
- matters incidental to the execution of any of the legislative powers of the Parliament (within the meaning of paragraph 51(xxxix) of the Constitution).

Subsection 397E(3) of the Act provides that rules made for the purposes of section 397E must specify the legislative power or powers of the Parliament in respect of which the rules are made. New subsection 3-2(5) complies with the requirement as set out under subsection 397E(3).

For the reasons set out below, it is appropriate to provide analysts, appointed under subsection 413(1) of the Act as a class of persons who may use or disclose relevant information for the purpose of:

- performing functions or duties, or exercising powers, under the Act; and
- assisting another person to perform functions or duties, or to exercise powers, under the Act.

Relevantly, section 414 of the Act provides that if a person is alleged to have contravened the Act in relation to goods or any other thing, an analyst appointed under section 413 may give a written certificate stating certain matters, such as when the goods or other thing was tested or analysed, the description of the method of testing or analysis, and the result of the testing or analysis. Section 415 of the Act provides that a certificate given by an analyst under section 414 is admissible in any proceedings in relation to a contravention of the Act, as prima facie evidence of the matters in the certificate, and the correctness of the result of the analysis to

which the certificate relates. As such, it is appropriate and necessary for analysts to use and disclose relevant information in the performance of their functions and exercise of their powers under the Act, that is, in order to give a written certificate stating the matters set out above.

This amendment provides analysts with the same authority to use and disclose relevant information as is the case in respect of the various persons referred to in subsection 388(2) of the Act, as amended by Schedule 1 of the SAP Act. As with section 388 of the Act, there must be a clear connection between the use or disclosure of relevant information and the person's function, duty or power, which has the effect of limiting the scope of the authorisation, including the persons to whom the information may be disclosed.

Item [5] – Part 4

This item repeals Part 4 of the Miscellaneous Rules. Currently, Part 4 of the Miscellaneous Rules prescribes certain Acts for the purposes of subparagraph 372(2)(a)(vi) of the Act, namely, the *Primary Industries Levies and Charges Collection Act 1991* (PILCC Act) and the *Recycling and Waste Reduction Act 2020* (RWR Act).

Subparagraph 372(2)(a)(vi) of the Act provides 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, an Act prescribed by the rules.

Amendments to the Act made by the SAP Act have the effect that fit and proper person assessments under the Act must take into account 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. Consequently, there is no need for the Miscellaneous Rules to specify the PILCC Act to have the same effect.

At the time that current Part 4 was inserted into the Miscellaneous Rules by the *Export Control Legislation Amendment (2022 Measures No. 1) Rules 2022* (commenced 1 April 2022), both the Act and the RWR Act were administered by the responsible Minister for the portfolio of Agriculture, Water and the Environment (see the Administrative Arrangements Order that commenced on 18 March 2021). Since that time, a new Administrative Arrangements Order has been made, commencing 1 June 2022, that provides that the Act is under the portfolio of Agriculture, Fisheries and Forestry, while the RWR Act is under the portfolio of Climate Change, Energy and the Environment. This arrangement is maintained in the current Administrative Arrangements Order (commencing 1 July 2022), as in force at the time that the Amendment Rules are made.

Because of this change in arrangements, it is no longer necessary or appropriate to require matters under the RWR Act to be taken into account when considering whether a person is a fit and proper person for the purposes of provisions of the Act. The repeal of Part 4 of the Miscellaneous Rules will have the effect of no longer requiring matters under the RWR Act to be considered.

Item [6] – At the end of the instrument

This item adds new Part 5 to the Miscellaneous Rules. New Part 5 provides for the application, savings and transitional arrangements for the amendments made by this instrument.

Subsection 5-1(1) provides that new section 3-2, as inserted by the Amendment Rules, applies in relation to information obtained or generated before, on or after the commencement day. This subsection makes clear that new section 3-2 has prospective application to allow the use or disclosure of information on or after the commencement day, regardless of whether the information was obtained or generated before, on or after the commencement day, and is in line with the relevant application provision of the SAP Act (subsection 13(1)).

Subsection 5-1(2) provides that the repeal of Part 4 by the Amendment Rules, applies on or after commencement day in relation to applications made under certain sections of the Act, but not yet determined before the commencement day. In such cases there will no longer be an obligation to take into account the PILCC Act and the RWR Act where an application has not yet been determined. This subsection makes clear that new Part 4 has prospective application.

Statement of Compatibility with Human Rights

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

Export Control Legislation Amendment (2024 Measures No. 1) Rules 2024

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 (2024 Measures No. 1) Rules 2024* (the Legislative Instrument) is made under the *Export Control Act 2020* (the Act) and amends the following rules:

- *Export Control (Animals) Rules 2021* (the Animals Rules); and
- *Export Control (Miscellaneous) Rules 2021* (the Miscellaneous Rules).

The Legislative Instrument amends the Miscellaneous Rules for the purposes of providing analysts, appointed under subsection 413(1) of the Act, with the same authority to use and disclose ‘relevant information’ as is the case in respect of the various persons referred to in subsection 388(2) of the Act, as amended by Schedule 1 of the *Export Control Amendment (Streamlining Administrative Processes) Act 2023* (SAP Act).

The Legislative Instrument amends the Animals Rules and the Miscellaneous Rules to make changes consequential to other amendments intended to improve the operation of the Act’s information management provisions.

The Legislative Instrument also amends the Miscellaneous Rules for the purposes of removing now unnecessary references to certain legislation, for the purpose of specifying mandatory considerations in fit and proper person assessments under the Act.

Human rights implications

This Legislative Instrument may engage the right to the protection from arbitrary interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

Prohibition on 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. This right may be subject to permissible limitations where those limitations are provided by law and are non-arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to this purpose.

New section 3-2 inserted by the Amendment Rules prescribes an additional class of persons who may use or disclose relevant information under the Act. Relevant information may

include personal information, and therefore, the use and disclosure of relevant information by this additional class of persons may engage the prohibition on arbitrary interference with privacy.

In line with authorisations under Division 2 of Part 3 of Chapter 11 of the Act, as inserted by the SAP Act, the authorisation for analysts to use or disclose relevant information implemented by the Amendment Rules is clearly defined. It is aimed at the legitimate objective of supporting the management of the export control framework and for the effective operation and enforcement of the Act. In particular, the use or disclosure of relevant information is for the purposes of the performance of functions or duties, or the exercise of powers under the Act.

It is appropriate that analysts be provided with the same authorisation as other persons provided under subsection 388(2) of the Act, such as authorised officers and approved auditors and assessors, because they also fulfill important functions under the Act that are necessary to ensure the effective operation and enforcement of the Act. In particular, section 414 of the Act provides that analysts appointed under the Act may give written certificates where a person is alleged to have contravened the Act in relation to goods or any other thing. The certificate may state matters such as when the goods or other thing was tested or analysed, the description of the method of testing or analysis, and the result of the testing or analysis. Section 415 of the Act provides that a certificate given by an analyst under section 414 is admissible in any proceedings in relation to a contravention of the Act, as prima facie evidence of the matters in the certificate, and the correctness of the result of the analysis to which the certificate relates. These functions, duties and powers require the use or disclosure of relevant information to be able to prepare and give the written certificate in accordance with section 414 of the Act.

The kinds of personal information that may be used and disclosed pursuant to the authorisation may include, and is unlikely to go beyond, the name of a person who is alleged to have contravened the Act (the defendant), and the names of any person to whom any retained quantity of the goods was given after handling by the analyst, as required by section 414 of the Act. A certificate given by an analyst under section 414 can be used in court proceedings and may be given to the defendant's legal practitioner if required by the defendant.

To the extent that any of the personal information is also protected information, then it would be afforded additional protections under section 397G of the Act. Under new section 397G, a fault-based offence, civil penalty provision and strict liability offence would apply to the unauthorised use or disclosure of protected information which is obtained or generated under the Act. This will afford appropriate protection for the use or disclosure of certain personal information.

Analysts are required to meet training and qualification requirements before they can be appointed as an analyst under section 414 of the Act. In addition, the department maintains robust policies and procedures to protect any personal information which it holds, as documented in the department's Privacy Policy at agriculture.gov.au/about/commitment/privacy. As part of these processes, personal information is held in accordance with the collection and security requirements of the Australian Privacy Principles, the department's policies and procedures and the Australian Government Protective Security Policy Framework. Should personal information held by the department be subject to unauthorised access or disclosure, the department has procedures in

place to assess the incident and mitigate any harm that may have been caused and considers the incident in accordance with its responsibilities under the Privacy Act and requirements under the Notifiable Data Breach Scheme to notify the Office of the Australian Information Commissioner of any potential eligible data breaches.

Other relevant departmental policies and procedures, which can be implemented on a case-by-case basis, include the following:

- application of additional restrictions, including via protective marking, to limit the clearance level for access of personal information;
- notifying particular affected parties of a particular disclosure or use, if appropriate;
- entering into agreements with other parties, which as noted above is required for certain authorisations, will set out use, handling and storage requirements of personal information; and
- ensuring the storage of personal information meets best practice protocols and is in line with Commonwealth record-keeping obligations.

To the extent that the rules limit the right to privacy, this limitation is reasonable, necessary and proportionate to achieving legitimate objectives and is consistent with the right to privacy in Article 17 of the ICCPR.

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.

Adam Phillip Fennessy PSM
Secretary of the Department of Agriculture, Fisheries and Forestry