



Dairy Produce Amendment Regulations 2009 (No. 1)¹

Select Legislative Instrument 2009 No. 252

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Dairy Produce Act 1986*.

Dated 8 October 2009

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

TONY BURKE
Minister for Agriculture, Fisheries and Forestry

1 Name of Regulations

These Regulations are the *Dairy Produce Amendment Regulations 2009 (No. 1)*.

2 Commencement

These Regulations commence on the day after they are registered.

3 Amendment of *Dairy Produce Regulations 1986*

Schedule 1 amends the *Dairy Produce Regulations 1986*.

4 Application

The amendments made by Schedule 1 do not apply in relation to:

- (a) quota and entitlement to export allocated for 2009; or
- (b) consignments of regulated dairy produce that are to be imported into a regulated dairy market in 2009.

Schedule 1 Amendments

(regulation 3)

[1] Part 2

substitute

Part 2 Export control

Division 2.1 General

2.01 Interpretation

(1) In this Part:

annual quota means quota allocated under regulation 2.10, and includes quota that is subsequently transferred to another person under regulation 2.18.

application day means:

- (a) 1 November in any year; or
- (b) if 1 November in a year is not a working day — the next working day after 1 November.

category of dairy produce means a category of regulated dairy produce listed in regulation 2.05.

consignment means a single shipment of regulated dairy produce that is exported by sea or air to a single consignee.

dairy manufacturer means a person that, for commercial purposes:

- (a) collects milk from farms and processes it; or
- (b) purchases dairy produce and subjects it to a process that changes it from one kind of produce to another (for example, milk into yoghurt); or
- (c) owns dairy produce and sub-contracts for the produce to be processed or transformed in a plant the person does not own; or
- (d) purchases dairy produce and repackages it.

FCFS quota (or **first-come-first-served quota**) means quota allocated under regulation 2.21.

quota holder means a person that has been allocated annual quota or FCFS quota.

shipped weight, in relation to regulated dairy produce, means the weight, in kilograms, of the produce after it has been loaded for shipment.

total available quota, in relation to a category of dairy produce and a calendar year, means the total amount of produce that can be exported to the regulated dairy market at a reduced or zero tariff rate.

Note The total available quota is set by international agreement between Australia and the regulated dairy market.

working day means a day that is not a Saturday, Sunday or public holiday in the Australian Capital Territory.

- (2) In this Part, a **significant change** takes place in relation to a quota holder if:
- (a) the quota holder changes any of the following:
 - (i) its name, or the registered business name under which it carries on business;
 - (ii) its business address or other contact details;
 - (iii) the kind of business it undertakes; or
 - (b) for a quota holder that is a corporation — the quota holder becomes an externally administered body corporate (within the meaning of the *Corporations Act 2001*); or
 - (c) for a quota holder that is a sole trader — the quota holder becomes bankrupt.
- (3) In this Part:
- (a) an amount of quota is **attached** to a consignment when an approval to export the consignment is granted under Division 2.5; and
 - (b) the quota is **used** when the consignment is accepted for import by the regulated dairy market as part of the total available quota.
- (4) An amount of quota ceases to be attached to a consignment if the approval to export the consignment ceases to have effect.

2.02 Object

The object of this Part is to establish a system of export control that:

- (a) facilitates the orderly export of regulated dairy produce to regulated dairy markets in respect of that produce; and
- (b) enables the Commonwealth to administer Australia's entitlements to export dairy produce at reduced, or special, tariff rates to particular dairy markets.

2.03 Regulated dairy produce and markets — European Union

- (1) For paragraph 52 (a) of the Act, dairy produce described in Part 2 of Schedule 1A is declared to be regulated dairy produce.
- (2) For paragraph 52 (b) of the Act, the European Union is declared to be a regulated dairy market in respect of the regulated dairy produce.

2.04 Regulated dairy produce and markets — United States of America

- (1) For paragraph 52 (a) of the Act, dairy produce described in Part 3 or 4 of Schedule 1A is declared to be regulated dairy produce.
- (2) For paragraph 52 (b) of the Act, the United States of America is declared to be a regulated dairy market in respect of the regulated dairy produce.

2.05 Categories of regulated dairy produce

- (1) In this Part, an *EU category* means a type of regulated produce for export to the European Union, described in Part 2 of Schedule 1A and listed in Table 1.

Table 1

Item	Category
1	EU Cheese for Processing
2	EU Whole Cheddar Cheese

Note Each item in Table 1 corresponds to an item in Part 2 of Schedule 1A.

- (2) In this Part, a *US WTO category* means a type of regulated produce for export to the United States of America, described in Part 3 of Schedule 1A and listed in Table 2.

Table 2

Item	Category
1	US WTO American-type Cheese
2	US WTO Cheddar Cheese
3	US WTO Other Unspecified Cheese
4	US WTO Swiss and Emmentaler Cheese

Note Each item in Table 2 corresponds to an item in Part 3 of Schedule 1A.

- (3) In this Part, a *US FTA category* means a type of regulated produce for export to the United States of America, described in Part 4 of Schedule 1A and listed in Table 3.

Table 3

Item	Category
1	US FTA American Cheese
2	US FTA Butter
3	US FTA Cheddar Cheese

Item	Category
4	US FTA Condensed Milk
5	US FTA Creams and Ice Cream
6	US FTA European-type Cheese
7	US FTA Goya Cheese
8	US FTA Non-fat Dried Milk Powder and Skim Milk Powder
9	US FTA Other Cheese
10	US FTA Other Dairy Products
11	US FTA Other Milk Powder
12	US FTA Swiss-type Cheese

Note Each item in Table 3 corresponds to an item in Part 4 of Schedule 1A.

2.06 US FTA Creams and Ice Cream — references to weight

- (1) This regulation applies to the category of dairy produce US FTA Creams and Ice Cream.
- (2) In this Part:
 - (a) a reference to the weight of dairy produce is to be read as referring to the volume of dairy produce; and
 - (b) a reference to kilograms is to be read as referring to litres; and
 - (c) a reference to an amount per kilogram is to be read as referring to an amount per litre; and
 - (d) a reference to tonnes is to be read as referring to kilolitres; and
 - (e) a reference to shipped weight is to be read as referring to the volume, in litres, of the regulated dairy produce after it has been loaded for shipment.

2.07 Fee payable on quantity of quota

- (1) This regulation applies if a provision in this Part sets a fee that is expressed as an amount per kilogram of quota (the *fee rate*).

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- (2) The fee that is payable is calculated by multiplying the fee rate by the number of kilograms of quota, and rounding the result to the nearest cent, with 0.5 of a cent to be rounded up.

Note For US FTA Creams and Ice Cream, the fee will be per litre of quota and multiplied by the number of litres of quota — see regulation 2.06.

Division 2.2 Allocation of annual quota

2.08 Application for annual quota

- (1) A dairy manufacturer may apply to the Secretary for an allocation of annual quota for a calendar year in relation to a category of dairy produce.
- (2) An application for an allocation of quota in relation to a US WTO category must be received by the Secretary:
- (a) for 2010 — no later than 16 October 2009; and
 - (b) for a later year — no later than 1 October in the previous year.
- (3) An application for an allocation of quota in relation to an EU category or US FTA category must be received by the Secretary:
- (a) for 2010 — no later than 23 October 2009; and
 - (b) for a later year — no later than 12 October in the previous year.
- (4) The application must:
- (a) be made in a form approved by the Secretary; and
 - (b) include the following information:
 - (i) the name of the dairy manufacturer;
 - (ii) the dairy manufacturer's business address;
 - (iii) the dairy manufacturer's contact phone number;
 - (iv) the category of dairy produce;
 - (v) the amount of quota applied for;
 - (vi) if the category is a US WTO category — the name of the US importer to which the produce will be shipped; and

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- (c) be accompanied by an application fee of \$200 for each category.
 - (5) For subparagraph (4) (b) (v), an application for quota in a US WTO category must be for a minimum of 10 tonnes.
 - (6) An application that does not meet the requirements in subregulations (4) and (5) is not a valid application.

2.09 Secretary may ask for further information

- (1) For the purpose of verifying that an applicant is a dairy manufacturer, or has made a valid application, the Secretary may ask the applicant to provide further information.
- (2) The request must:
 - (a) be made in writing; and
 - (b) identify the information required; and
 - (c) state the date by which the applicant must give the information to the Secretary.
- (3) The date stated for paragraph (2) (c) must not be earlier than 7 days after the date of the request.
- (4) Despite subregulation 2.08 (6), the applicant is taken not to have made a valid application unless:
 - (a) the applicant gives the Secretary the required information by the date stated in the request; and
 - (b) the application then meets the requirements in subregulations 2.08 (4) and (5).

2.10 Allocation of annual quota

- (1) If the Secretary makes a request for information under regulation 2.09 about 1 or more applications for annual quota in relation to a category of dairy produce, the Secretary may allocate quota for that category after the due dates for all the requests have passed and the closing date for applications under regulation 2.08 has passed.

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- (2) If the Secretary does not request information about any of the applications in relation to a category of dairy produce, the Secretary may allocate quota for that category after the closing date for applications.
 - (3) If the total quota applied for in all valid applications for a category is less than or equal to the total available quota, then the Secretary must allocate each applicant the amount of quota applied for.
 - (4) If the total quota applied for in all valid applications for a category is more than the total available quota, then the Secretary must allocate each applicant the amount of quota worked out according to regulation 2.11.
 - (5) This regulation does not require the Secretary to allocate quota to a particular applicant, or to any applicant, if the Secretary considers that it would not be in the best interests of the dairy industry to make the allocation.
 - (6) If the Secretary does not allocate quota to an applicant because of subregulation (5), the Secretary must, within 7 days after making the decision:
 - (a) give to the dairy manufacturer a written notice that sets out the reasons for the decision; and
 - (b) include a statement advising that, if the dairy manufacturer is dissatisfied with the Secretary's decision, the dairy manufacturer may apply to the Administrative Appeals Tribunal for review of the decision.

Note 1 See regulation 2.41 concerning review of decisions.

Note 2 Regulation 2.14 provides for the refund of the application fee.

2.11 Allocation of annual quota if applications for category exceed total available quota

- (1) In this regulation:

requested allocation, in relation to an applicant, means the amount of quota that the applicant applied for under regulation 2.08 in the category being allocated.

set-aside amount means:

- (a) 2% of the total available quota for all categories of dairy produce other than US FTA Non-fat Dried Milk Powder and Skim Milk Powder; and
- (b) zero for the category US FTA Non-fat Dried Milk Powder and Skim Milk Powder.

Allocation if set-aside amount is not zero

- (2) If the set-aside amount for a category is not zero, the following steps show how to work out the amount of annual quota allocated to each applicant.

Preliminary allocation

- Step 1** For each applicant, work out the *preliminary allocation* of quota using the formula:

$$\text{Generally available quota} \times \left(\left(\frac{\text{ARME}}{\text{TRME}} + \frac{\text{AGE}}{\text{TGE}} \right) \div 2 \right)$$

where:

generally available quota means the amount of quota remaining when the set-aside amount is withdrawn from the total available quota.

ARME (or *applicant's regulated market exports*), in relation to a category of dairy produce, means the weight of produce, matching the physical description of produce in the category, that was exported by the applicant to the regulated market during the 3 financial years immediately preceding the current financial year.

Example

For the category US WTO Cheddar Cheese, the ARME includes all of the applicant's exports of cheddar cheese to the United States of America, regardless of the tariff rate that applied to the cheese when it entered that country.

TRME (or **total regulated market exports**), in relation to a category of dairy produce, means the weight of produce, matching the physical description of produce in the category, that was exported by all applicants to the regulated market during the 3 financial years immediately preceding the current financial year.

AGE (or **applicant's global exports**), in relation to a category of dairy produce, means the weight of produce, matching the physical description of produce in the category, that was exported by the applicant to anywhere in the world (including the regulated market) during the 3 financial years immediately preceding the current financial year.

TGE (or **total global exports**) in relation to a category of dairy produce, means the weight of produce, matching the physical description of produce in the category, that was exported by all applicants to anywhere in the world (including the regulated market) during the 3 financial years immediately preceding the current financial year.

Note For the category US FTA Creams and Ice Cream, the amounts of produce and quota will be measured by volume in litres and kilolitres — see regulation 2.06.

Step 2 If the preliminary allocation for any applicant is greater than the applicant's requested allocation, withdraw from that applicant the quota in excess of the requested allocation.

The total amount of quota withdrawn from these applicants is the **additional amount**.

Allocate all of the additional amount as extra quota to the applicants that have less than their requested allocation (the **eligible applicants**), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Repeat this step if any applicant has more than the applicant's requested allocation as a result of being allocated extra quota.

Step 3 If no applicant's allocation after step 2 was less than 60 tonnes, repeat steps 1 and 2, recalculating the preliminary allocation using the total available quota instead of the generally available quota.

When steps 1 and 2 have been repeated, the next step to use is step 8.

Each applicant's **maximum allocation** is equal to the applicant's requested allocation.

Distribution of set-aside amount

Step 4 If any applicant's allocation after step 2 was less than 60 tonnes, that applicant is a ***small applicant***.

For each applicant that is not a small applicant, the ***maximum allocation*** is equal to the applicant's requested allocation.

For each small applicant, the ***maximum allocation*** is equal to the lesser of:

- (a) 60 tonnes; and
- (b) the applicant's requested allocation.

The small applicants that have less than their maximum allocation are the ***eligible applicants***.

If there are no eligible applicants, the next step to use is step 6.

If there is at least 1 eligible applicant, divide the set-aside amount by the number of eligible applicants and add the result to each eligible applicant's allocation.

Step 5 If, after step 4, any small applicant's allocation is more than the applicant's maximum allocation, withdraw from that applicant the quota in excess of the maximum allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

The small applicants that have less than their maximum allocation are the ***eligible applicants***.

If there are no eligible applicants, go to step 6.

If there is at least 1 eligible applicant, divide the additional amount by the number of eligible applicants and add the result to each eligible applicant's allocation.

Repeat this step if any small applicant has more than the applicant's maximum allocation as a result of being allocated extra quota.

Step 6 If any of the total available quota is unallocated after step 5, allocate all of the unallocated quota to the applicants that are not small applicants and that have less than their maximum allocation (the ***eligible applicants***), so that each eligible applicant receives a proportion of the unallocated quota equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Step 7 If, as a result of being allocated extra quota in step 6, any applicant now has more than the applicant's maximum allocation, withdraw from that applicant the quota in excess of the maximum allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

Allocate all of the additional amount as extra quota to the applicants that are not small applicants and that have less than their maximum allocation (the ***eligible applicants***), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Repeat this step if any applicant has more than the applicant's maximum allocation as a result of being allocated extra quota.

Deduction of penalties

Step 8 If a penalty has been imposed on an applicant by regulation 2.19, withdraw the amount of the penalty from the applicant's allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

Allocate all of the additional amount as extra quota to the applicants that have less than their maximum allocation and that have not had a penalty withdrawn (the ***eligible applicants***), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Step 9 If, as a result of being allocated extra quota in step 8, any applicant now has more than the applicant's maximum allocation, withdraw from that applicant the quota in excess of the maximum allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

Allocate all of the additional amount as extra quota to the applicants that have less than their maximum allocation and that have not had a penalty withdrawn (the ***eligible applicants***), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Repeat this step if any applicant has more than the applicant's maximum allocation as a result of being allocated extra quota.

US WTO quota minimums

Step 10 If the category is a US WTO category and any applicant has an allocation of less than 10 tonnes, withdraw that applicant's allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

Allocate all of the additional amount as extra quota to the applicants that have an allocation of at least 10 tonnes and less than their maximum allocation (the ***eligible applicants***), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Step 11 If, as a result of being allocated extra quota in step 10, any applicant now has more than the applicant's maximum allocation, withdraw from that applicant the quota in excess of the maximum allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

Allocate all of the additional amount as extra quota to the applicants that have an allocation of at least 10 tonnes and less than their maximum allocation (the ***eligible applicants***), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Repeat this step if any applicant has more than the applicant's maximum allocation as a result of being allocated extra quota.

Rounding

Step 12 Round all allocations as they stand after step 11 to the nearest kilogram, with 0.5 of a kilogram to be rounded up.

If this rounding makes the sum of all allocations greater than the total available quota, round all allocations as they stand after step 11 down to the nearest kilogram instead.

Allocation if set-aside amount is zero

- (3) If the set-aside amount for a category is zero, the following steps show how to work out the amount of annual quota to be allocated to each applicant.

Preliminary allocation

Step 1 For each applicant, the *preliminary allocation* of quota is:

$$\text{Total available quota} \times \left(\left(\frac{\text{ARME}}{\text{TRME}} + \frac{\text{AGE}}{\text{TGE}} \right) \div 2 \right)$$

where:

total available quota has the meaning given by regulation 2.01.

ARME (or *applicant's regulated market exports*), in relation to a category of dairy produce, means the weight of produce, matching the physical description of produce in the category, that was exported by the applicant to the regulated market during the 3 financial years immediately preceding the current financial year.

TRME (or *total regulated market exports*), in relation to a category of dairy produce, means the weight of produce, matching the physical description of produce in the category, that was exported by all applicants to the regulated market during the 3 financial years immediately preceding the current financial year.

AGE (or *applicant's global exports*), in relation to a category of dairy produce, means the weight of produce, matching the physical description of produce in the category, that was exported by the applicant to anywhere in the world (including the regulated market) during the 3 financial years immediately preceding the current financial year.

TGE (or *total global exports*) in relation to a category of dairy produce, means the weight of produce, matching the physical description of produce in the category, that was exported by all applicants to anywhere in the world (including the regulated market) during the 3 financial years immediately preceding the current financial year.

Step 2 If the preliminary allocation for any applicant is greater than the applicant's requested allocation, withdraw from that applicant the quota in excess of the requested allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

Allocate all of the additional amount as extra quota to the applicants that have less than their requested allocation (the ***eligible applicants***), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Repeat this step if any applicant has more than the applicant's requested allocation as a result of being allocated extra quota.

Deduction of penalties

Step 3 If a penalty has been imposed on an applicant by regulation 2.19, withdraw the amount of the penalty from the applicant's allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

Allocate all of the additional amount as extra quota to the applicants that have less than their requested allocation and that have not had a penalty withdrawn (the ***eligible applicants***), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Step 4 If, as a result of being allocated extra quota in step 3, any applicant now has more than the applicant's requested allocation, withdraw from that applicant the quota in excess of the requested allocation.

The total amount of quota withdrawn from these applicants is the ***additional amount***.

Allocate all of the additional amount as extra quota to the applicants that have less than their requested allocation and that have not had a penalty withdrawn (the ***eligible applicants***), so that each eligible applicant receives a proportion of the additional amount equal to the applicant's proportion of the total preliminary allocations to all eligible applicants.

Repeat this step if any applicant has more than the applicant's maximum allocation as a result of being allocated extra quota.

Rounding

Step 5 Round all allocations as they stand after step 4 to the nearest kilogram, with 0.5 of a kilogram to be rounded up.

If this rounding makes the sum of all allocations greater than the total available quota, round all allocations as they stand after step 4 down to the nearest kilogram instead.

2.12 Notification of allocation

- (1) If annual quota is allocated to a dairy manufacturer under regulation 2.10, the Secretary must give the dairy manufacturer a written notice of the allocation as soon as practicable.
- (2) The notice must include:
 - (a) the category of dairy produce to which the quota relates; and
 - (b) the amount of quota allocated; and
 - (c) the fee that the dairy manufacturer must pay under regulation 2.13; and
 - (d) the due date for payment of the fee; and
 - (e) the conditions to which the allocation is subject.

2.13 Payment of fee for allocated annual quota

- (1) If a dairy manufacturer is allocated annual quota under regulation 2.10, the dairy manufacturer must pay a fee for the exclusive right to use that quota in relation to consignments.
- (2) The fee for each kilogram of quota is 0.7 of a cent.

Note For US FTA Creams and Ice Cream, the fee is 0.7 of a cent per litre of quota — see regulation 2.06.
- (3) The fee must be paid by the due date specified in the notice issued by the Secretary under subregulation 2.12 (1).
- (4) If all or part of the fee is not paid by the due date, the Secretary must withdraw so much of the dairy manufacturer's allocated quota as has not been paid for.
- (5) The dairy manufacturer may voluntarily return all or part of the allocated quota under regulation 2.17 before the due date.

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- (6) The dairy manufacturer may not transfer quota under regulation 2.18 if the fee for that amount of quota has not been paid.

Note Allocated quota will not be able to be used in relation to consignments under Division 2.5 (Export approvals) until the fee has been paid.

2.14 Refund of application fee

- (1) If a dairy manufacturer pays the application fee under paragraph 2.08 (4) (c), but is not allocated any annual quota under regulation 2.10, the Secretary must refund the application fee.

Note This provision applies whether or not the dairy manufacturer's application was a valid application.

- (2) The fee is not refundable if the dairy manufacturer is allocated quota and the quota is later withdrawn.

2.15 Conditions on allocation

The allocation of annual quota is subject to the following conditions:

- (a) the quota holder must, within 14 days after a significant change occurs, tell the Secretary in writing of the change;
- (b) any other condition the Secretary considers appropriate.

Division 2.3 Return, loss or transfer of annual quota

2.16 Forfeiture of annual quota

The Secretary must withdraw any unattached amount of annual quota for a calendar year if the quota holder does not tell the Secretary, in writing, on or before 15 June in that year, how the quota holder intends to deal with the unattached quota.

Note Before 5 June each year, the Secretary will send a notice about the requirement in this regulation to each quota holder.

2.17 Voluntary return of annual quota

- (1) At any time on or before the end of a calendar year, a holder of annual quota for the year may notify the Secretary in writing that the holder wishes to return an amount of unattached quota.
- (2) The Secretary must withdraw the amount of quota from the holder's allocation.

Note If the Secretary is notified of a return of quota after 15 June, the quota will be counted in determining a penalty under regulation 2.19.

2.18 Transfer of annual quota

- (1) A holder of unattached annual quota for a calendar year (the *transferor*) may transfer some or all of the quota to another person (the *transferee*).
- (2) It is not a transfer of quota if a quota holder authorises an agent to export dairy produce on behalf of the holder.
- (3) A transfer is not validly made unless the transferor sends the Secretary a notice that includes the following:
 - (a) the name of the transferor and the transferee;
 - (b) the category of dairy produce;
 - (c) the amount of quota being transferred;
 - (d) whether the transferee is a dairy manufacturer.

Note If the transferee is not a dairy manufacturer, and the transferred quota is unused at the end of the calendar year, then the transferred quota will still be counted against the transferor in determining a penalty under regulation 2.19.

- (4) If the Secretary receives a notice under subregulation (3), the Secretary must:
 - (a) withdraw the transferred amount from the transferor's annual quota; and
 - (b) allocate that amount to the transferee.
- (5) Annual quota that is transferred under this regulation is subject to the same conditions that applied to the quota before it was transferred.

2.19 Penalty on future allocation if annual quota remains unused

(1) In this regulation:

surplus quota, in relation to a dairy manufacturer, means the sum of the following amounts:

- (a) unused annual quota for a calendar year that the dairy manufacturer holds as at the end of 31 December;
- (b) annual quota for a calendar year that the dairy manufacturer returned under regulation 2.17 after 15 June;
- (c) an amount of annual quota for a calendar year to which the following apply:
 - (i) the dairy manufacturer was the transferor of the quota under regulation 2.18;
 - (ii) the transferee was not a dairy manufacturer;
 - (iii) as at the end of 31 December, the quota is unused quota that is held by the transferee.

(2) For paragraph (1) (c), if:

- (a) annual quota for a calendar year was transferred to a transferee by more than one dairy manufacturer; and
- (b) as at the end of 31 December, the transferee holds unused annual quota;

the unused quota is to be distributed between the surplus quotas of the dairy manufacturers in proportion to the amount of quota that each dairy manufacturer transferred to the transferee.

(3) A penalty is imposed on a dairy manufacturer in relation to a category of dairy produce if:

- (a) the total available quota for a calendar year in relation to the category is less than 3 000 tonnes; and
- (b) the dairy manufacturer's surplus quota for the year is more than 2% of the sum of:
 - (i) the amount of quota that the dairy manufacturer paid for under regulation 2.13; and
 - (ii) any quota transferred to the dairy manufacturer under regulation 2.18.

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- (4) A penalty is imposed on a dairy manufacturer in relation to a category of dairy produce if:
- (a) the total available quota for a calendar year in relation to the category is at least 3 000 tonnes; and
 - (b) the dairy manufacturer's surplus quota for the year is more than 1% of the sum of:
 - (i) the amount of quota that the dairy manufacturer paid for under regulation 2.13; and
 - (ii) any quota transferred to the dairy manufacturer under regulation 2.18.

Note For the category US FTA Creams and Ice Cream, quota will be measured in litres and kilolitres rather than kilograms and tonnes — see regulation 2.06.

- (5) The amount of the penalty imposed is equal to the surplus quota.
- (6) A penalty imposed on a dairy manufacturer by this regulation applies to the next allocation of annual quota to the dairy manufacturer under regulation 2.10.

Note Because a penalty is imposed at the end of a calendar year, the next allocation will relate to quota that is for use no earlier than the year after next. For example, surplus quota remaining at the end of 2010 will result in a penalty applying to the allocation of quota for use in 2012 at the earliest. If no quota is allocated to the dairy manufacturer for 2012, the penalty would apply to the allocation for 2013.

- (7) The penalty expires:
- (a) after the dairy manufacturer has been allocated annual quota under either subregulation 2.10 (3) or subregulation 2.10 (4); or
 - (b) if the dairy manufacturer has not been allocated annual quota in that way — 5 years after the end of the calendar year to which it relates.

Note 1 Subregulation 2.10 (3) provides for allocation of annual quota when the total quota applied for in all valid applications is less than or equal to the total available quota. In those circumstances, the penalty will not reduce the dairy manufacturer's allocation, but will expire under paragraph (a) of this provision.

Note 2 A penalty imposed because of surplus quota in 2010 will expire at the end of 2015. This will occur if the dairy manufacturer has not received any allocations for the years 2012 to 2016 inclusive.

Division 2.4 Allocation of FCFS quota

2.20 Application for FCFS quota

- (1) A person may apply to the Secretary, in writing, for an allocation of FCFS quota in relation to a category of dairy produce for which not all of the total available quota has been allocated.
- (2) An application for quota in relation to a particular calendar year may be made on or after the application day in the previous year.
- (3) The application must:
 - (a) be in a form approved by the Secretary; and
 - (b) include the following information:
 - (i) the name of the applicant;
 - (ii) the applicant's business address;
 - (iii) the applicant's contact phone number;
 - (iv) the category of dairy produce;
 - (v) the date or dates on which the applicant intends to export produce in that category;
 - (vi) the amount of quota applied for; and
 - (c) be accompanied by an application fee of \$200.
- (4) If more than one date is listed under subparagraph (3) (b) (v), the application must indicate how much of the quota applied for the applicant intends to attach to each consignment.

2.21 Allocation of FCFS quota

- (1) The Secretary must deal with applications made under regulation 2.20 on a first-come-first-served basis.
- (2) If the amount of unallocated quota in relation to a category of dairy produce is greater than or equal to the amount of FCFS quota applied for, the Secretary must allocate to the applicant the amount of quota applied for.

- (3) If the amount of unallocated quota in relation to a category of dairy produce is less than the amount of FCFS quota applied for, the Secretary may either:
 - (a) allocate the unallocated quota to the applicant; or
 - (b) notify the applicant and refund the application fee.
- (4) If there is no unallocated quota in relation to a category of dairy produce, the Secretary must notify the applicant and refund the application fee.
- (5) This regulation does not require the Secretary to allocate quota to an applicant if the Secretary considers that it would not be in the best interests of the dairy industry to make the allocation.
- (6) If the Secretary does not allocate quota to an applicant because of subregulation (5), the Secretary must, within 7 days after making the decision:
 - (a) give to the applicant a written notice that sets out the reasons for the decision; and
 - (b) include a statement advising that, if the applicant is dissatisfied with the Secretary's decision, the applicant may apply to the Administrative Appeals Tribunal for review of the decision; and
 - (c) refund the application fee.

Note See regulation 2.41 concerning review of decisions.

2.22 Notification of allocation

- (1) If FCFS quota is allocated to a person under regulation 2.21, the Secretary must give the person a written notice of the allocation.
- (2) The notice must include:
 - (a) the category of dairy produce to which the allocation relates; and
 - (b) the amount of quota allocated; and
 - (c) the fee that the person must pay under regulation 2.23; and
 - (d) the conditions to which the allocation is subject.

2.23 Payment of fee for allocated FCFS quota

- (1) If a person is allocated FCFS quota under regulation 2.21, the person must pay a fee for the exclusive right to use that quota in relation to consignments.
- (2) The fee for each kilogram of quota is 0.7 of a cent.

Note 1 For US FTA Creams and Ice Cream, the fee is 0.7 of a cent per litre of quota — see regulation 2.06.

Note 2 Allocated quota will not be able to be used in relation to consignments under Division 2.5 (Export approvals) until the fee has been paid.

2.24 Conditions on allocation

The allocation of FCFS quota is subject to the following conditions:

- (a) the quota holder must, within 14 days after a significant change occurs, tell the Secretary in writing of the change;
- (b) any other condition the Secretary considers appropriate.

2.25 Withdrawal of allocation

The Secretary must withdraw an amount of FCFS quota allocated under regulation 2.21 when either of the following occurs:

- (a) 28 days pass after the date listed in the application for the quota as the date on which a consignment was to be exported with the quota attached, and the quota has not been attached;
- (b) an approval to export a consignment with the quota attached ceases to have effect.

Division 2.5 Export approvals

Subdivision 2.5.1 Export of regulated dairy produce to European Union

2.26 Definitions for Subdivision 2.5.1

In this Subdivision:

consignment quota means unallocated quota that is attached to a consignment under subparagraph 2.28 (1) (b) (ii).

exporter's available quota, in relation to a category of dairy produce, means the sum of quota held by an exporter that is either:

- (a) unattached annual quota that has been paid for under regulation 2.13 (whether by the exporter or by a previous holder of the quota); or
- (b) unattached FCFS quota that has been paid for under regulation 2.23.

IMA 1 certificate means the inward monitoring arrangements certificate required by the European Commission for dairy produce imported into the European Union at a reduced tariff rate.

2.27 Application for approval to export

- (1) Before a consignment of produce in an EU category is exported, the exporter of the produce must obtain an approval from the Secretary to export the consignment.
- (2) An application for approval to export a consignment must be made in a manner approved by the Secretary.
- (3) An application for approval to export a consignment in a particular year may be made on or after the application day in the previous year.

2.28 Grant of approval to export

- (1) The Secretary must grant an approval to export a consignment of regulated dairy produce if:
 - (a) an application is made by the exporter under regulation 2.27; and
 - (b) either:
 - (i) the exporter's available quota for the relevant category of dairy produce is equal to or greater than the shipped weight of the consignment; or
 - (ii) the unallocated quota available for the relevant category of dairy produce is equal to or greater than the shipped weight of the consignment, and the exporter has paid the fee set out in subregulation (2) to attach quota to the consignment; and
 - (c) the Secretary has no reason to believe that the total shipped weight of regulated dairy produce that, under the law of the European Union, may be imported into the European Union from Australia will be exceeded as a result of the export.
- (2) For subparagraph (1) (b) (ii), the fee is 0.7 of a cent per kilogram of consignment quota.

2.29 Notice of approval to export

- (1) If the Secretary grants an approval to export, the Secretary must give the exporter a written notice of approval that sets out:
 - (a) the shipped weight of regulated dairy produce that may be exported in the consignment; and
 - (b) the day the approval takes effect; and
 - (c) the conditions to which the approval is subject.
- (2) An approval to export is not transferable.

Note Under subsection 53 (1) of the Act, a person is guilty of an offence if the person exports regulated dairy produce to a regulated dairy market and the person does not hold an approval in relation to that export.

2.30 Conditions of approval to export

- (1) An approval to export is subject to the following conditions:
 - (a) the exporter must obtain an IMA 1 certificate for the consignment before the consignment is accepted for entry into the European Union;
 - (b) the exporter must notify the Secretary in writing if it becomes likely that the consignment will not be accepted for entry into the European Union;
 - (c) any other condition that the Secretary considers appropriate.
- (2) If the shipped weight of produce in the consignment (the *actual shipped weight*) is less than the shipped weight stated in the notice of approval under regulation 2.29 (the *approved shipped weight*), the exporter will be taken to have exported the approved shipped weight unless the exporter tells the Secretary in writing, within 28 days after the produce is loaded for shipment, the actual shipped weight.

Note Under subsection 53 (2) of the Act, a person that holds an approval in relation to an export of regulated dairy produce to a regulated dairy market is guilty of an offence if the export is not in accordance with the conditions of the approval.

2.31 Period of approval to export

- (1) An approval to export a consignment takes effect on the date specified for that purpose in the notice of approval given under subregulation 2.29 (1).
- (2) An approval to export a consignment ceases to have effect:
 - (a) if an IMA 1 certificate is not obtained for the consignment within 28 days after the day the approval takes effect — at the end of the 28th day after the day the approval takes effect; or
 - (b) if paragraph (a) does not apply — on the earlier of:
 - (i) 3 months after the day the approval takes effect; and
 - (ii) the end of 31 December in the year for which the approval of export was granted.

2.32 Surrender of approval to export

- (1) The holder of an approval to export may surrender the approval at any time by giving notice in writing to the Secretary.
- (2) When the approval is surrendered, the approval ceases to have effect.

Subdivision 2.5.2 Export of regulated produce to United States of America**2.33 Definitions for Subdivision 2.5.2**

In this Subdivision:

consignment quota means unallocated quota that is attached to a consignment under subparagraph 2.35 (1) (b) (ii).

exporter's available quota, in relation to a category of dairy produce, means the sum of quota held by an exporter that is either:

- (a) unattached annual quota that has been paid for under regulation 2.13 (whether by the exporter or by a previous holder of the quota); or
- (b) unattached FCFS quota that has been paid for under regulation 2.23.

2.34 Application for approval to export

- (1) Before a consignment of produce in a US WTO category or US FTA category is exported, the exporter of the produce must obtain an approval from the Secretary to export the consignment.
- (2) An application for approval to export a consignment must be made in a manner approved by the Secretary.
- (3) An application for approval to export a consignment in a particular year may be made on or after the application day in the previous year.

2.35 Grant of approval to export

- (1) The Secretary must grant an approval to export a consignment of regulated dairy produce if:
 - (a) an application is made by the exporter under regulation 2.34; and
 - (b) either:
 - (i) the exporter's available quota for the relevant category of dairy produce is equal to or greater than the shipped weight of the consignment; or
 - (ii) the unallocated quota available for the relevant category of dairy produce is equal to or greater than the shipped weight of the consignment, and the exporter has paid the fee set out in subregulation (2) to attach quota to the consignment; and
 - (c) the Secretary has no reason to believe that the total shipped weight of eligible produce that, under the law of the United States of America, may be imported into the United States of America from Australia will be exceeded as a result of the export.
- (2) For subparagraph (1) (b) (ii), the fee is 0.7 of a cent per kilogram of consignment quota.

Note For the category US FTA Creams and Ice Cream, references to 'shipped weight' are to be read as referring to the shipped volume (in litres) and the fee is 0.7 of a cent per litre of quota — see regulation 2.06.

2.36 Notice of approval to export

- (1) If the Secretary grants an approval to export, the Secretary must give the exporter a written notice of approval that sets out:
 - (a) the shipped weight of regulated dairy produce that may be exported in the consignment; and
 - (b) the day the approval takes effect; and
 - (c) the conditions to which the approval is subject.
- (2) An approval to export is not transferable.

Note Under subsection 53 (1) of the Act, a person is guilty of an offence if the person exports regulated dairy produce to a regulated dairy market and the person does not hold an approval in relation to that export.

2.37 Conditions of approval to export

- (1) An approval to export is subject to the following conditions:
 - (a) the exporter must notify the Secretary in writing if it becomes likely that the consignment will not be accepted for entry into the United States of America;
 - (b) any other condition that the Secretary considers appropriate.
- (2) If the shipped weight of produce in the consignment (the *actual shipped weight*) is less than the shipped weight stated in the notice of approval under regulation 2.36 (the *approved shipped weight*), the exporter will be taken to have exported the approved shipped weight unless the exporter tells the Secretary in writing, within 28 days after the produce is loaded for shipment, the actual shipped weight.

Note Under subsection 53 (2) of the Act, a person that holds an approval in relation to an export of regulated dairy produce to a regulated dairy market is guilty of an offence if the export is not in accordance with the conditions of the approval.

2.38 Period of approval to export

An approval to export a consignment:

- (a) takes effect on the date specified for that purpose in the notice of approval given under subregulation 2.36 (1); and
- (b) ceases to have effect on the earlier of:
 - (i) 3 months after the day the approval takes effect; and
 - (ii) the end of 31 December in the year for which the approval of export was granted.

2.39 Surrender of approval to export

- (1) The holder of an approval to export may surrender the approval at any time by giving notice in writing to the Secretary.
- (2) When the approval is surrendered, the approval ceases to have effect.

Division 2.6 Miscellaneous

2.40 Variation and revocation of allocation or approval

- (1) The Secretary may, at any time, vary or revoke an allocation of quota made or transferred, or an approval to export granted, under this Part if:
 - (a) the Secretary is satisfied that the allocation or approval is no longer consistent with the object of this Part; or
 - (b) the Secretary considers that it is in the best interests of the dairy industry to make the variation or revocation.
- (2) The holder of allocated quota or an approval to export may ask the Secretary, in writing, for a variation to be made to the allocation or approval.
- (3) The Secretary may vary an allocation of quota or an approval to export:
 - (a) by adding, varying or revoking a condition of the allocation or approval; or
 - (b) by varying the period of the allocation or approval.
- (4) If the Secretary makes a variation or revocation under this regulation, the Secretary must give the holder of the allocation or approval a written notice of the decision that states:
 - (a) the reasons for the decision; and
 - (b) the day on which the variation or revocation takes effect; and
 - (c) that the person may apply to the Administrative Appeals Tribunal for a review of the decision.

2.41 Review of decisions

An application may be made to the Administrative Appeals Tribunal for review of a decision:

- (a) to impose a condition, under paragraph 2.15 (b) or 2.24 (b), on an allocation of quota; or
- (b) to impose a condition, under paragraph 2.30 (1) (c) or 2.37 (1) (b), on an approval to export a consignment; or

- (c) not to allocate quota because of subregulation 2.10 (5) or 2.21 (5); or
- (d) to vary or revoke an allocation or approval under regulation 2.40.

2.42 Delegation by Secretary

- (1) The Secretary may, in writing, delegate to an SES employee, or acting SES employee, of the Department all or any of the Secretary's powers and functions under this Part (except this power of delegation).
- (2) In exercising powers or functions under a delegation, the delegate must comply with any directions of the Secretary.

[2] Schedule 1B

omit

Note

- 1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.