

EXPLANATORY STATEMENT

Issued by Authority of the Minister for Agriculture, Drought and Emergency Management

Biosecurity Act 2015

Biosecurity Amendment (Infringement Notices) Regulations 2020

Legislative Authority

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

Section 645 of the Biosecurity Act provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Biosecurity Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Biosecurity Act.

Section 524 of the Biosecurity Act modifies the operation of Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) in relation to matters to be included in an infringement notice. Subsection 524(5) provides that the regulations for the purposes of paragraph 524(4)(c) may prescribe different numbers of penalty units for different kinds of contraventions of provisions mentioned in subsection 523(1) of the Biosecurity Act, including, but not limited to, prescribing different numbers of penalty units depending on the kind or class of goods to which an alleged contravention relates. Subsection 524(3) of the Biosecurity Act provides that the regulations made for the purposes of paragraph 524(2)(b) may prescribe different periods for different contraventions of provisions mentioned in subsection 523(1), including, but not limited to, prescribing different periods depending on the kind of goods or class of goods to which an alleged contravention relates.

Purpose

The *Biosecurity Amendment (Infringement Notices) Regulations 2020* (the Regulations) amend the *Biosecurity Regulation 2016* (the 2016 Regulation) to:

- insert new definitions of *category 1 goods* and *category 2 goods*;
- prescribe different penalty amounts for infringement notices given for different kinds of alleged contraventions of provisions of the Biosecurity Act;
- clarify the circumstances in which the prescribed period for paying an infringement notice in subsection 87(2) of the 2016 Regulation applies;
- clarify the amounts payable under certain infringement notices given to an individual at a first point of entry (for contraventions relating to category 2 goods and contraventions relating to goods other than category 1 goods or category 2 goods).

Background

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

Where the person produces a document to another person in compliance or purported compliance with the Biosecurity Act and does so knowing that the document is false or misleading, the person is liable to a civil penalty of 60 penalty units. A person is also liable to

a civil penalty of 60 penalty units if the person gives information in compliance or purported compliance with the Biosecurity Act and does so knowing that the information is false or misleading, or omits any matter or thing without which the information is misleading.

Similarly, a person who does not answer questions, or provide information in writing, in a response to a requirement of a biosecurity officer to do so where the biosecurity officer suspects, on reasonable grounds, that the person has information to answer questions or provide information in writing in relation to the goods, is liable to a civil penalty of 120 penalty units. A person who does not comply with a direction of a biosecurity officer not to move, deal with or interfere with goods, a direction to move the goods to a place specified by the biosecurity officer as soon as practicable, or any other direction relating to the movement of the goods is also liable to a civil penalty of 120 penalty units.

Subsection 523(1) of the Biosecurity Act provides that these provisions are subject to an infringement notice under Part 5 of the Regulatory Powers Act. If a biosecurity officer (who has the power to issue an infringement notice) is satisfied on reasonable grounds that the person has contravened a provision subject to an infringement notice, the officer may give the person an infringement notice for the alleged contravention.

Currently, section 88 of the 2016 Regulation provides that for paragraph 524(4)(c) of the Act (concerning the amount payable under the infringement notice) 2 penalty units are prescribed for an alleged contravention of subsection 125(2), 128(2), 532(1) or 533(1) of the Act. This is regardless of the relative biosecurity risks posed by undeclared goods.

There are continuing issues with individuals failing to declare goods when arriving in Australia, either when completing their incoming passenger card or crew declaration and/or in response to questioning by a biosecurity officer. Many goods carry the risk of introducing devastating pests and diseases into Australia, putting animal, plant and human health, and the environment, at risk. A current example might be pork products, which carry the risk of African Swine Fever.

Consultation

Throughout the development of the Traveller Declarations Act, the Department of Agriculture, Water and the Environment consulted with Commonwealth agencies including the Department of Health, the Attorney-General's Department, the Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, AusTrade, the Department of Home Affairs and the Australian Border Force.

The Office of Best Practice Regulation (OBPR) was consulted regarding the Regulations (consultation reference 42589). The OBPR advised that the proposal does not change the scope of the regulation as it increases non-compliance penalties in the existing regulation. A Regulation Impact Statement is not required.

Impact and Effect

The Regulations will allow a differentiated, proportionate approach to setting the amount payable under infringement notices depending on the relative biosecurity risk posed by certain undeclared goods. They will enable infringement notices to state amounts payable that are linked to the kind of goods or class of goods associated with the alleged contravention, applying a risk-based compliance response to biosecurity risk consistent with good regulatory practice.

The Regulations will enhance deterrence and are designed protect Australia's biosecurity status by encouraging individuals to provide the required information when arriving in

Australian territory at a first point of entry to ensure biosecurity risk can be adequately assessed and managed.

Details/Operation

Details of the instrument are set out at Attachment A.

Other

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

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

The Regulations commence on 1 January 2021.

Matter incorporated by reference

These Regulations incorporate by reference a determination made by the Director of Biosecurity under subsection 524A(1) of the Biosecurity Act for the purposes of section 524 of the Biosecurity Act.

Under subsection 524A(1), the Director of Biosecurity may, in writing, determine a list of goods, or class of goods, for the purposes of section 524 of the Act only if reasonably satisfied that there is a high level of biosecurity risk associated with the goods or the class of goods. Subsection 524(7) of the Biosecurity Act permits the Regulations to make provision in relation to a matter by applying, adopting or incorporating any matter contained in that Determination as in force from time to time.

As the Determination will be a legislative instrument under subsection 524A(4) of the Biosecurity Act, it will be registered as a legislative instrument on the Federal Register of Legislation in accordance with section 15H of the *Legislation Act 2003*. The Determination will also be published on the website of the Department of Agriculture, Water and the Environment. The Determination will be able to be freely accessed and used by members of the public through both the Federal Register of Legislation and the Department's website.

Details of the *Biosecurity Amendment (Infringement Notices) Regulations 2020*

Section 1 – Name

Section 1 provides that the name of these regulations is the *Biosecurity Amendment (Infringement Notices) Regulations 2020* (the Regulations).

Section 2 – Commencement

Section 2 provides that the Regulations commence on 1 January 2021.

Section 3 – Authority

Section 3 provides that this instrument is made under the *Biosecurity Act 2015* (Biosecurity Act).

Section 4 – Schedules

Section 4 provides that an instrument specified in a Schedule to this instrument is amended or repealed as set out in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

Schedule 1 – Amendments

Item 1 – Section 5

Item 1 inserts definitions of “category 1 goods” and “category 2 goods” into section 5 of the *Biosecurity Regulation 2016* (2016 Regulation).

This is a consequential amendment to new section 524A of the Biosecurity Act (inserted by the Traveller Declarations Act) which provides that the Director of Biosecurity may, in writing, determine a list of goods, or classes of goods, for the purposes of section 524. The Director of Biosecurity may do so only if the Director of Biosecurity is reasonably satisfied that there is a high level of biosecurity risk associated with the goods or the class of goods.

Item 2 – Subsection 87(1)

Item 2 repeals subsection 87(1) of the 2016 Regulation and substitutes a new subsection 87(1).

Subsection 87(2) prescribes the periods within which individuals must pay amounts under infringement notices given at first points of entry (such as an airport or seaport).

New subsection 87(1) provides that subsection 87(2) applies to infringement notices issued for the following alleged contraventions of the Biosecurity Act:

- subsection 126(2), 127(3) or 128(2);
- subsection 533(1) when the individual produces a document in compliance, or purported compliance, with a requirement under subsection 127(1); and
- subsection 532(1) or 533(1) when the individual provides information or produces a document in compliance, or purported compliance, with a requirement under

subsection 126(1) or 196(2) and the contravention relates to goods that are not category 1 goods or category 2 goods.

Item 3 – Subsection 87(2)

Item 3 amends subsection 87(2) to substitute the word “individual” for “person” wherever occurring. This is to clarify that the subsection does not apply to a body corporate.

Item 4 – Section 88

Item 4 repeals section 88 of the 2016 Regulation and substitutes a new section 88. Current section 88 prescribes 2 penalty units as the amount payable under infringement notices given to an individual for an alleged contravention of certain specified sections of the Biosecurity Act at a first point of entry.

New section 88 provides for different penalty unit amounts for the purposes of section 524(4)(c) of the Biosecurity Act that are proportionate to the type of contravention.

Subsection 88(1) provides that 2 penalty units are prescribed for an infringement notice for an alleged contravention of subsection 126(2), 127(3) or 128(2) of the Biosecurity Act. Further, 2 penalty units are prescribed for an alleged contravention of subsection 533(1) of the Biosecurity Act when an individual produces a document in compliance, or purported compliance, with a requirement under subsection 127(1).

Subsection 88(2) provides for different penalty unit amounts to be applied to infringement notices given to an individual who gives information or produces a document in compliance or purported compliance with a requirement under subsection 126(1) or 196(2) of the Biosecurity Act and in doing so allegedly contravenes subsection 532(1) or 533(1) of the Biosecurity Act (concerning the giving of false or misleading information and the giving of a document that the person knows is false or misleading).

Subsection 88(2) prescribes two different penalty unit amounts: 2 penalty units if the contravention relates to goods that are not category 1 or category 2 goods; and 6 penalty units if the contravention relates to category 2 goods.

The note to subsection 88(2) confirms that where an alleged contravention of the provisions mentioned in subsection 88(2) relates to category 1 goods, the amount is 12 penalty units in accordance with subsection 524(4) of the Biosecurity Act. It is therefore unnecessary to prescribe penalty units for contraventions that relate to category 1 goods in the Regulations.

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

Statement of Compatibility with Human Rights

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

Biosecurity Amendment (Infringement Notices) Regulations 2020

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 *Biosecurity Amendment (Infringement Notices) Regulations 2020* (the Regulations) amend the *Biosecurity Regulation 2016* (the 2016 Regulation) to prescribe different penalty amounts for infringement notices given for different kinds of alleged contraventions of provisions of the Biosecurity Act, as provided for by the *Biosecurity Amendment (Traveller Declarations and Other Measures) Act 2020* (the Traveller Declarations Act).

The Regulations also clarify that section 87 of the 2016 Regulation (prescribing the period for paying an amount under certain infringement notices given at a first point of entry) only applies when the infringement notice is for two penalty units and section 88 (prescribing the amount payable under certain infringement notices) applies only when an infringement notice is issued at a first point of entry to an individual for an alleged contravention of subsection 126(2), 128(2), 532(1) or 533(1) of the Biosecurity Act.

Human rights implications

The Regulations engages, or has potential to engage, the following rights:

- Right to be free from self-incrimination (Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR)).

Right to be free from self-incrimination

Article 14(3)(g) of the ICCPR protects the right of an individual to be free from self-incrimination in the determination of a criminal charge by providing that a person may not be compelled to testify against him or herself or confess guilt. Common law also recognises the privilege against self-incrimination which applies unless expressly or impliedly overridden by statute. The privilege against self-incrimination may be subject to permissible limits. Any limitations must be for a legitimate objective and be reasonable, necessary and proportionate to that objective.

The measures contained in the *Biosecurity Amendment (Traveller Declarations and Other Measures) Act 2020*, to which the Regulations give effect, do not themselves directly interfere with the right to be free from self-incrimination in certain circumstances: it is section 635 of the Biosecurity Act that expressly removes the privilege against self-incrimination in certain circumstances. Specifically, a person is not entitled to refuse to answer questions, provide information or produce documents under the provisions of the Biosecurity Act listed in subsection 635(1) on the ground that the answer, the information or

the production of the document might tend to incriminate the person or make the person liable to a penalty.

In particular, the Regulations will support the operation of subsection 196(2) of the Biosecurity Act by specifying higher infringement notice amounts than currently set for incoming passengers and crew who provide false or misleading information about goods or classes of goods listed in a determination made for the purposes of section 524 and may therefore be in breach of section 532(1) or 533(1) of the Biosecurity Act. Currently, section 88 of the Regulations provides for an infringement notice in the amount of two penalty units for contraventions of these sections. The Regulations prescribe two different penalty unit amounts: 2 penalty units if the contravention relates to goods that are not category 1 or category 2 goods; and 6 penalty units if the contravention relates to category 2 goods. The note to subsection 88(2) in the Regulations confirms that 12 penalty units will apply if the alleged contravention relates to category 1 goods as determined by subsection 524(4) of the Biosecurity Act.

Removing the privilege against self-incrimination for passengers and crew entering Australia is necessary to achieve the legitimate objective of effective assessment and management of biosecurity risks to human, plant and animal health, the environment and the economy in Australia.

Upholding the privilege against self-incrimination in relation to passengers and crew who have information regarding a potential biosecurity risk could have significant consequences such as reduced agriculture, fisheries or forestry productivity, serious environmental damage or increased costs associated with controlling pests and diseases. An animal disease outbreak (such as FMD) has the potential to cause significant and long-term damage to Australian industries and the reputation of Australia as a reliable producer of quality food and fibre.

Where incoming passengers and crew provide false and misleading information about goods in their possession, an increased penalty amount will apply if the alleged contravention of the Act relates to goods listed in the new determination. The current infringement notice amount will increase from two penalty units to 12 penalty units, for goods listed in a determination made under section 524A as category 1 goods, and 6 penalty units for goods listed in the same determination as category 2 goods.

Without the limitation of the right to be free from self-incrimination, the Commonwealth's ability to manage biosecurity risks at international passenger terminals will be significantly reduced. Removal of the privilege against self-incrimination ensures that the assessment of biosecurity risk and application of response measures can occur as urgently as is required in international passenger terminals and reflects the magnitude of the potential biosecurity risks. Once a passenger or crew member leaves the international passenger terminal, any biosecurity risk enters Australia's wider environment.

These limitations are reasonable and proportionate to achieving the objective, as section 635 of the Biosecurity Act also provides that self-incriminatory disclosures cannot be used against the person who made the disclosure either directly in court (use immunity) or indirectly to gather other evidence against the person (derivative use immunity). The only exception to the use and derivative use immunity are in relation to proceedings arising out of sections 137.1 and 137.2 of the *Criminal Code* (in relation to false and misleading information and

documents) and proceedings for the contravention of sections 532 and 533 of the Biosecurity Act (in relation to false and misleading information and documents).

Summary

These limitations of the right to be free from self-incrimination under Article 14(3)(g) of the ICCPR are permissible as protections such as those in section 635 of the Biosecurity Act apply to ensure the exercise of these powers is reasonable and proportionate to achieving the legitimate objective and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

Conclusion

The Regulations are compatible with human rights to the extent that where they may limit human rights, those limitations are reasonable, necessary and proportionate.