

EXPLANATORY STATEMENT

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

Export Control Act 2020

Export Control (Miscellaneous) Rules 2021

Legislative Authority

The *Export Control Act 2020* (the Act) sets out the overarching legislative framework for the regulation of exported goods, including food and agricultural products, from Australian territory, and enables the Secretary of the Department of Agriculture, Water and the Environment (the Secretary) to make rules that detail the requirements and establish conditions relating to the export of certain goods. The Act provides provisions for the application of the Act and how the Act interacts with State and Territory laws.

The *Export Control (Miscellaneous) Rules 2021* (the Miscellaneous Rules) support the implementation of the new export control framework. These Rules authorise the Secretary to arrange for a computer program to issue a government certificate for non-prescribed goods.

The Miscellaneous Rules are made by the Secretary under section 432 of the Act.

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

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 of the purposes of rules relating to non-prescribed goods.

Purpose

The purpose of the Miscellaneous Rules is to enable the Secretary to arrange for government certificates for non-prescribed goods to be issued in a timely and efficient manner by using a computer program. Government certificates are issued to demonstrate the compliance of Australian territory exported non-prescribed goods with applicable importing country requirements, which supports and maintains overseas market access and trade of Australian agricultural and food products.

Background

In 2015 the then Department of Agriculture (now the Department of Agriculture, Water and the Environment (the Department)) conducted a comprehensive review of the export of agricultural products through the *Agricultural Export Regulation Review* (the Review). The Review found most stakeholders accepted the current level of regulation and understood the need for it to be maintained to protect market access and Australia's reputation. However, it

also recognised that there was scope for improvement, including increasing flexibility and opportunities for government-industry cooperation, reducing complexity and duplication, and strengthening compliance and enforcement arrangements.

Based on these findings, two regulatory options were considered:

- option one: maintain the existing regulatory arrangements
- option two: consolidate and improve the legislative framework.

On considering the findings of the Review, the Australian Government agreed to improve the legislative framework to address the issues identified by the Review. As part of that process, existing export-related requirements were streamlined and consolidated into an improved legislative framework comprising of the Act and commodity specific rules, which will support the Act. These improvements reduce duplication as well as make it easier to understand and comply with export requirements.

The improvements to the legislative framework are not intended to make significant changes to export policy or the current baseline of regulation. It is intended to provide a more consistent and clear framework that is flexible and responsive to emerging issues.

Impact and Effect

The Miscellaneous Rules, along with the Act, impose regulatory controls on non-prescribed goods that are to be exported from Australian territory, where the goods may need to comply with requirements as specified by an importing country.

Part 1 deals with formal and preliminary matters and sets out the special meanings of words and phrases used in the Miscellaneous Rules.

Part 2 deals with matters relating to decisions that may be made by operation of a computer program. These include outlining the kinds of decisions that may be made by the operation of a computer program, and the people who may use the computer program. Part 2 also sets out the conditions of use of the computer program.

Consultation

In accordance with the requirement for consultation under section 17 of the *Legislation Act 2003*, an exposure draft of the Miscellaneous Rules was published on the Department website from 9 December 2020 to 24 January 2021 for public comment. No written submissions were received in relation to the Miscellaneous Rules.

The Office of Best Practice Regulation within the Department of the Prime Minister and Cabinet (PMC) was consulted in the development of the Act and the subsequent Miscellaneous Rules. The Act established a new regulatory framework, supported by subordinate legislative instruments, which aims to improve Australia's agriculture export legislation; a key initiative to support the export of Australian goods and products.

A Regulatory Impact Statement *Improvements to agriculture export legislation* [OBPR ID: 19535] was previously developed under this framework, with stakeholders included in the consideration of commodity specific rules and the mandatory obligations on Australian businesses and the relevant industries. A copy of the Regulation Impact Statement was previously provided with the explanatory memorandum to the Export Control Bill 2019.

Details and Operation

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

The Miscellaneous Rules is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Miscellaneous Rules commence at the same time as section 3 of the Act commences.

Other

The Miscellaneous Rules is 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 in Attachment B.

Details of the *Export Control (Miscellaneous) Rules 2021*

Part 1—Preliminary

1-1 Name

Section 1-1 provides that the name of the instrument is the *Export Control (Miscellaneous) Rules 2021* (the Miscellaneous Rules).

1-2 Commencement

Section 1-2 provides for the Miscellaneous Rules to commence at the same time as section 3 of the *Export Control Act 2020* (the Act).

Section 2 of the Act provides for section 3 of the Act to commence at a single time to be fixed by Proclamation. However, if section 3 of the Act does not commence before 3 am on 28 March 2021 (in the Australian Capital Territory), then it will commence at that time (item 2 of the table in section 2 of the Act).

1-3 Authority

Section 1-3 provides that the Miscellaneous Rules are made under the Act.

1-4 Definitions

Section 1-4 contains the definition of *Act* in the Miscellaneous Rules, which means the *Export Control Act 2020*, including any legislative instruments made under the Act and the *Regulatory Powers (Standard Provisions) Act 2014* as it applies in relation to the Act.

The note at the start of this section lists terms used in the Miscellaneous Rules, which are defined in section 12 of the Act. These terms include government certificate, non-prescribed goods and Regulatory Powers Act. Such terms will have the same meaning in the Miscellaneous Rules as they have in the Act.

Part 2—Decisions that may be made by computer program

2-1 Decisions that may be made by operation of computer program

Subsection 286(1) of the Act allows the Secretary to arrange for the use, under the Secretary's control, of computer programs for making certain decisions under the Act.

Paragraph 286(2)(a) allows the rules to prescribe the kinds of decisions that may be made by the operation of a computer program under an arrangement made under subsection 286(1).

Subsection 2-1(1) is made for the purposes of paragraph 286(2)(a) of the Act and prescribes that a decision under paragraph 67(1)(a) of the Act, to issue a government certificate in relation to a kind of non-prescribed goods, may be made by the operation of a computer program (***an authorised computer program***) under an arrangement made under subsection 286(1) of the Act.

Subsection 2-1(1) is subject to subsection 2-1(2), which prescribes that subsection 2-1(1) applies in relation to a decision only if no other rules prescribed for the purposes of paragraph 286(2)(a) of the Act apply in relation to the decision.

The example following subsection 2-1(2) explains that a situation where section 2-1 does not apply would be where a decision is made under paragraph 67(1)(a) of the Act to issue a government certificate in relation to non-prescribed plants or plant products because that decision is prescribed by section 9-17 of the *Export Control (Plants and Plant Products) Rules 2021*.

Enabling the Secretary to arrange for a computer program to make decisions to issue government certificates in relation to a kind of non-prescribed goods will also provide administrative efficiency for exporters and the Secretary. An advantage of allowing a computer program to issue government certificates is that decisions are made more efficiently, are not limited to being made during business hours, and are more consistent.

It is appropriate to enable a computer program to issue a government certificate because the decision under paragraph 67(1)(a) of the Act is based on objective criteria and would not require the computer program to weigh up discretionary factors. Only a decision to issue a certificate is prescribed for the purposes of the Miscellaneous Rules, and any decision to refuse to issue a certificate in relation to a kind of non-prescribed goods, including the consideration of any discretionary factors, would be made by a decision maker.

Under subsection 286(3) of the Act, the Secretary is required to take all reasonable steps to ensure decisions made by a computer program under the arrangement are correct. If the Secretary is satisfied that the decision made by the operation of the computer program is incorrect, the Secretary may make a decision in substitution for the decision made by the computer program (subsection 286(5)).

Paragraph 286(2)(b) of the Act allows the rules to prescribe the persons or bodies that may use computer programs under an arrangement in subsection 286(1).

Subsection 2-1(3) is made for the purposes of paragraph 286(2)(b) of the Act and details who may use an authorised computer program if the Secretary has given them a unique identifier to access the computer program. These persons are:

- person applying for a government certificate in relation to a kind of non-prescribed goods under subsection 65(1) of the Act;
- an APS employee in the Department; and
- a person performing services for the Department under a contract.

This ensures access to the computer program is only by those who require access to apply for a government certificate or to perform their functions.

Paragraph 286(2)(c) of the Act allows the rules to prescribe the conditions of the use of computer programs under an arrangement in subsection 286(1).

Subsection 2-1(4) is made for the purposes of paragraph 286(2)(c) of the Act and sets the conditions for use of the computer program by the persons listed under subsection 2-1(3). It provides that a person who has access to and uses the authorised computer program must be satisfied on reasonable grounds that the information entered into the computer program is true and correct and is accurately entered. This is to avoid, as far as practicable, incorrect or incomplete information being entered into the computer program which may result in an incorrect decision.

A person may commit an offence or be liable to a civil penalty if the person makes a false or misleading statement in an application or provides false or misleading information or documents (see sections 136.1, 137.1 and 137.2 of the *Criminal Code* and sections 367, 368 and 369 of the Act).

Statement of Compatibility with Human Rights

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

Export Control (Miscellaneous) Rules 2021

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* (Cth).

Overview of the legislative instrument

The *Export Control (Miscellaneous) Rules 2021* (the ***Miscellaneous Rules***) has the following purposes:

- It supports the implementation of the new export control framework by authorising the Secretary to arrange for a computer program to issue a government certificate in relation to a kind of non-prescribed goods; and
- It means government certificates for non-prescribed goods can be issued in a timely manner providing administrative efficiency for exporters and the Department and supporting market access and trade for Australian agriculture and food products.

Assessment of Compatibility with Human Rights

Human rights implications

Section 2-1 of the *Miscellaneous Rules* allows the Secretary, for the purposes of subsection 286(2) of the *Export Control Act 2020* (the Act), to arrange for the use of an authorised computer program to make decisions under paragraph 67(1)(a) of the Act to issue government certificates in relation to a kind of non-prescribed goods. The *Miscellaneous Rules* does not engage any human rights. The measures under section 2-1 enable a computer program to make decisions to issue government certificates in relation to a kind of non-prescribed goods, which is a decision that would otherwise be able to be made by the Secretary. Section 2-1 does not affect the collection or disclosure of information used to make the decision, or the framework for using a computer program to make decisions, which are dealt with in the Act.

Conclusion

The *Miscellaneous Rules* are compatible with human rights as it does not raise any human rights issues.

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Secretary of the Department of Agriculture, Water and the Environment