

## **EXPLANATORY STATEMENT**

Issued by Authority of the Minister for Agriculture and Northern Australia

*Imported Food Control Legislation Amendment (Risk Foods) Order 2021*

### **Legislative Authority**

The *Imported Food Control Act 1992* (the Act) provides for the compliance of food imported into Australia with Australian food standards and the requirements of public health and safety.

Section 16 of the Act provides that the Minister may make regulations setting out particulars of a food inspection scheme. These regulations are the *Imported Food Control Regulations 2019* (the Regulations). Part 3 of the Regulations sets out the Imported Food Inspection Scheme (the Scheme). The Scheme is applicable to all food to which the Act applies.

The following provisions of the Act and Regulations provide authority for the amendments in the *Imported Food Control Legislation Amendment (Risk Foods) Order 2021* (the Amending Order):

- section 16(2)(a) of the Act provides that the regulations may empower the Minister, subject to section 17 of the Act, to make orders:
  - i. identifying food of a particular kind as food of a kind that is required to be inspected, or inspected and analysed, under the Scheme;
  - ii. identifying food of particular kinds as food that must be covered by a recognised foreign government certificate; or
  - iii. identifying food of particular kinds as food that must be covered by a recognised food safety management certificate; or
  - iv. classifying food of particular kinds into particular categories.
- section 17 of the Act provides that the Minister must not make an order for the purposes of paragraph 16(2)(a) without first consulting Food Standards Australia New Zealand (FSANZ).
- section 10 of the Regulations provides for the Minister to make orders for the purposes of section 16(2)(a) of the Act.
- section 11 of the Regulations provides that the Minister, in an order made under section 10 of the Regulations, may classify food of a particular kind as risk food only if FSANZ advises the Minister that food of that kind has the potential to pose a high or medium risk to public health.

## **Purpose**

The purpose of the Amending Order is to update the *Imported Food Control Order 2019* (the Principal Order) to:

- classify certain kava products as risk food;
- update the descriptions of ready-to-eat berries and pomegranate arils and seeds, to allow these foods to be regulated according to their characteristics and accompanying risk, and
- extend the commencement of the requirement for certain bivalve molluscs and bivalve mollusc products to be covered by a recognised foreign government certificate by 12 months, to 9 November 2023.

The Amending Order will ensure that the classification of food as risk food for the purposes of the Scheme is consistent with advice provided by FSANZ.

## **Background**

### The Scheme

The Department of Agriculture, Water and the Environment (the department) operates the Scheme to ensure compliance of food imported into Australia with Australian food standards and the requirements of public health and safety. FSANZ provides advice to the department on whether food has the potential to pose a high or medium risk to public health. The department uses this advice to inform administration of the Scheme.

### Bivalve molluscs and bivalve mollusc products covered by a recognised foreign government certificate

The *Imported Food Control Amendment (Risk Foods) Order 2020* (the 2020 Order) contains amendments that will, on commencement, introduce a requirement for bivalve molluscs and bivalve mollusc products to be covered by a ‘recognised foreign government certificate’, excluding those that are both retorted and shelf-stable, or dried.

A recognised foreign government certificate is a certificate issued by a foreign government stating that food of a specified kind meets applicable standards and does not pose a risk to human health. This kind of certificate is regularly used by importing countries to verify that certain requirements have been observed in the production of the food in an exporting country.

The Amending Order delays the commencement of this requirement by 12 months to 9 November 2023, to allow exporting countries further time to comply with the requirement following delays arising from the COVID-19 pandemic.

### Classification of kava products as a risk food

The Amending Order provides that ‘kava products’ are now listed as a risk food for the purposes of the Scheme. This will allow kava to be regulated as a risk food once kava-related import prohibitions to allow commercial imports of kava from 1 December 2021, as part of the Australian Government’s kava pilot program.

The department requested advice from FSANZ on the risk posed by kava to public health. FSANZ has provided risk advice to the department that certain forms of kava permitted by *Australia New Zealand Food Standards Code – Standard 2.6.3 – Kava* presents a potential medium to high risk to public health. Listing kava products as a risk food requires the department to target and inspect commercial imports of kava to verify compliance with Australian food standards and manage potential risks to public health.

### Amendments relating to berries and pomegranate arils and seeds

FSANZ has provided the department with revised risk advice that identifies berries that are ready-to-eat and pomegranate arils and seeds that are ready-to-eat as food that presents a potential high risk to public health when fresh or frozen, but a lesser medium risk to public health when dried.

The Amending Order updates the definitions of berries and pomegranate arils and seeds, based on these characteristics, to allow different risk management tools to be implemented proportionate to the level of risk to public health identified by FSANZ.

The Amending Order will have the effect that only fresh or frozen ready-to-eat berries and pomegranate arils and seeds must be covered by a recognised food safety management certificate, consistent with the level of risk identified by FSANZ. A food safety management certificate demonstrates that a food producer operates a food safety management system consistent with internationally agreed food safety principles.

### **Impact and Effect**

The Principal Order identifies and classifies certain kinds of food to which the Act applies as ‘risk food’, so that those foods can be inspected under the Scheme for the purposes of managing risks to public health. The effect of the Amending Order is to amend the Principal Order to allow for the foods described above to be regulated under the Scheme in a manner that is consistent with the risk to public health and safety.

### **Consultation**

On 16 November 2021, the Minister consulted with FSANZ as required by section 17 of the Act. FSANZ responded on 18 November 2021 that it has no objection to the Amending Order.

The Office of Best Practice Regulation (OBPR) has assessed the preliminary assessment on the regulatory impact of the proposed legislative changes. OBPR has determined that a Regulatory Impact Statement is not required. (OBPR ID 44674 refers).

### **Details/ Operation**

Details of the Amending Order are set out in [Attachment A](#).

### **Other**

The Amending Order references the Australia New Zealand Food Standards Code, its standards and schedules, and FSANZ risk advice on imported food. These can be accessed without charge at [www.foodstandards.gov.au](http://www.foodstandards.gov.au).

The Amending Order 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](#).

The Amending Order is a legislative instrument for the purposes of the *Legislation Act 2003*.

**Details of the Imported Food Control Legislation Amendment (Risk Foods) Order 2021**

**Clause 1 – Name**

This item provides that the name of the instrument is the *Imported Food Control Legislation Amendment (Risk Foods) Order 2021* (the Amending Order).

**Clause 2 – Commencement**

This item provides that the whole of the Amending Order will commence on 1 December 2021 or the day after this instrument is registered.

**Clause 3 – Authority**

This item provides that the Amending Order is made under section 10 of the *Imported Food Control Regulations 2019*.

**Clause 4 – Schedules**

This item provides that the *Imported Food Control Order 2019* (the Principal Order) and the *Imported Food Control Amendment (Risk Foods) Order 2020* (the 2020 Order) are amended as set out in the Schedule.

**Schedule 1 – Amendments**

***Imported Food Control Amendment (Risk Foods) Order 2020***

**Item 1 Section 2 (table item 3)**

This item repeals table item 3 of Section 2 of the *Imported Food Control Amendment (Risk Foods) Order 2020* (the 2020 Order), and substitutes new table items 3 and 4.

New table item 3 will provide that items 1 to 3 of Schedule 2 of the 2020 Order will commence on 9 November 2023, rather than 9 November 2022 as currently provided for by the 2020 Order.

Items 1 to 3 of Schedule 2 to the 2020 Order cover bivalve molluscs and bivalve mollusc products, excluding those that are dried or both retorted and shelf stable, particularly the requirement, under section 6(1) of the Principal Order, that these imported products are covered by a recognised foreign government certificate.

This item delays the commencement of the requirement for bivalve molluscs and mollusc products to be covered by a recognised foreign government certificate by a further 12 months to 9 November 2023, to allow exporting countries further time to comply with the requirement following delays as a result of the COVID-19 pandemic.

New table item 4 retains the commencement of items 4 and 5 of Schedule 2 of the 2020 Order as 9 November 2022. These items relate to berries and pomegranate arils and seeds being covered by a recognised food management safety certificate.

## **Item 2 Schedule 2 (heading)**

This item is a consequential amendment to the 2020 Order. By omitting ‘24 months after registration’ and substituting ‘later’ in the heading of Schedule 2 of the 2020 Order, this item reflects that items 1 to 3 of Schedule 2 to the 2020 Order will not commence until 36 months after registration of the 2020 Order (that is, on 9 November 2023).

## ***Imported Food Control Order 2019***

### **Item 3 Section 4**

This item inserts a new definition of ‘kava products’ into the Principal Order, being the definition contained in *Australia New Zealand Food Standards Code – Standard 2.6.3 – Kava* (the Code) as in force at the commencement of the Amending Order.

This item has the effect of providing that kava products are defined as:

- a beverage obtained by the aqueous suspension of kava root using cold water only, and not using any organic solvent; or
- dried or raw kava root.

### **Item 4 Clause 1 of Schedule 1 (table items 17 and 18)**

This item repeals table items 17 and 18 of clause 1 of Schedule 1, that refer to ‘Berries that are ready-to-eat’ and ‘Pomegranate arils, and pomegranate seeds, that are ready-to-eat’, respectively. This item substitutes new table items 17, 17A, 18, and 18A, as follows:

<b>Item</b>	<b>Kinds of food</b>
17	Berries that are: (a) fresh or frozen; and (b) ready-to-eat; and (c) not retorted
17A	Berries that are dried and ready-to-eat, but are not retorted
18	Pomegranate arils, and pomegranate seeds, that are: (a) fresh or frozen; and (b) ready-to-eat; and (c) not retorted
18A	Pomegranate arils, and pomegranate seeds, that are dried and ready-to-eat, but not retorted

A definition of ‘ready-to-eat’ is contained in section 4A of the Principal Order, and a definition of ‘retorted’ with respect to goods other than animal products is contained in section 4B(2).

This item also amends the 2020 Order so that only berries and pomegranate arils and seeds that are fresh or frozen, ready-to-eat, and not retorted, need to be covered by a recognised food safety management certificate from 9 November 2022. A recognised food safety

management certificate is not required for berries and pomegranate arils and seeds that are dried are not covered by this requirement, due to the lower risk that these products pose to public health.

**Item 5 Clause 1 of Schedule 1 (at the end of the table)**

This item amends the table found at clause 1 of Schedule 1 to the Principal Order to provide that kava products, as defined by the Code, are a risk food for the purposes of the Principal Order, and the Scheme established by the Act and the Regulations.

## Statement of Compatibility with Human Rights

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

### Imported Food Control Legislation Amendment (Risk Foods) Order 2021

This 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 *Imported Food Control Legislation Amendment (Risk Foods) Order 2021* (the Amending Order) updates the *Imported Food Control Order 2019* (the Principal Order) consistent with advice published by FSANZ, to:

- classify certain forms kava as risk food;
- update the description of ready-to-eat berries and pomegranate arils and seeds, and
- extend the commencement of the requirement for certain bivalve molluscs and bivalve mollusc products to be covered by a recognised foreign government certificate.

#### Human rights implications

The Amending Order engages the right to health (Article 12) in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 12 of the ICESCR promotes the right of all individuals to enjoy the highest attainable standards of physical and mental health.

In its *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) stated that health is a ‘fundamental human right indispensable for the exercise of other human rights’, and that the right to health is not the right to be healthy, but rather a right to a system of health protection that provides equal opportunity for people to enjoy the highest attainable level of health. The General Comment further states at paragraph 11 that health is defined as an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, which includes access to an adequate supply of safe food and nutrition. Paragraph 36 further states that it is the obligation of states to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, including in ensuring equal access for all to the underlying determinants of health, such as nutritiously safe food.

Article 4 of the ICESCR further provides that countries may subject economic, social and cultural rights — such as the right to health — only to such limitations ‘as are determined by law in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting general welfare in a democratic society’.

Following revised advice by Food Standards Australia New Zealand (FSANZ), the Amending Order classifies kava products as a risk food and revises the categories of berries and pomegranate arils and seeds as risk foods, so that these foods can be inspected and analysed

for relevant hazards at a rate that is consistent with the risk to public health. The Amending Order also extends the commencement date requiring bivalve molluscs and bivalve mollusc products to be covered by a recognised foreign government certificate.

The Amending Order therefore engages and promotes the right to health in Article 12 of the ICESCR by providing for:

- the inspection and analysis of kava products to ensure compliance of kava products imported into Australia with Australian food standards and the requirements of public health and safety, based on advice from FSANZ about the potential to pose a medium or high risk to public health;
- requiring a recognised foreign government certificate for bivalve molluscs and bivalve mollusc products, excluding those that are dried or both retorted and shelf-stable, to provide additional assurance on the safety of these foods, from 9 November 2023; and
- requiring a recognised food safety management certificate for fresh and frozen berries that are ready-to-eat and pomegranate arils, and pomegranate seeds, that are ready-to-eat to provide additional assurance on the safety of these foods, from 9 November 2022.

## **Conclusion**

The Amending Order is compatible with human rights because it is promoting the right to health through controlling imported food so that food is safe for human consumption.

**The Hon. David Littleproud MP**  
**Minister for Agriculture and Northern Australia**