

EXPLANATORY STATEMENT

Issued by Authority of the Director of Biosecurity

Biosecurity Act 2015

Biosecurity (2022 Infringement Notices) Determination 2021

Legislative Authority

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

Subsection 524A(1) of the Act provides that the Director of Biosecurity may make a determination listing goods, or classes of goods, for the purposes of section 524. Section 524 of the Act makes provision for the issuing of infringement notices under the Act and subsection 523(1) lists provisions of the Act that are subject to an infringement notice.

Under subsection 524A(2) of the Act, the Director of Biosecurity may only make the determination if the Director is reasonably satisfied that there is a high level of biosecurity risk associated with the goods or the class of goods.

Subsection 524A(3) of the Act provides that a determination made under subsection 524A(1) must specify the period during which the determination is to be in force, but the period must not be longer than 12 months.

Subsection 524A(4) of the Act provides that a determination made under subsection 524A(1) is a legislative instrument but is not subject to disallowance.

Purpose

The *Biosecurity (2022 Infringement Notices) Determination 2021* (the Determination) lists goods, and classes of goods, that the Director of Biosecurity is satisfied have a high level of biosecurity risk associated with them. The Determination lists goods and classes of goods which are ‘category 1 goods’ or ‘category 2 goods.’

Subsection 88(2) of the *Biosecurity Regulation 2016* (the Regulation) sets out the amounts prescribed for an infringement notice for an alleged contravention of subsection 532(1) or 533(1) of the Act by an individual who is at a ***first point of entry*** (as defined in section 18 of the Act), when the individual gives information or produces a document in compliance, or purported compliance, with a requirement under subsection 126(1) or 196(2) of the Act.

The penalty unit amounts set out in subsection 88(2) of the Regulation for infringement notices are prescribed by reference to the goods and classes of goods listed in the Determination, and so allows for infringement notice amounts to reflect the relative biosecurity risk of the goods to which the alleged contravention relates.

Background

Section 196 of the Act (read together with regulation 53 of the Regulation) provides that the Director of Biosecurity (in practice, acting through a biosecurity officer as the Director's authorised subdelegate) may require all passengers, crew and persons in charge of an aircraft or vessel who enter or intend to enter Australian territory on an aircraft or vessel to 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, in practice at a first point of entry. Subsection 126 of the Act provides that a biosecurity officer may require a person whom that officer suspects, on reasonable grounds, has information in relation to goods that are subject to biosecurity control to answer questions or provide information in relation to those goods.

There are exotic pests and pathogens commonly associated with certain goods that have a high likelihood of surviving travel into Australia, establishing and spreading in Australia. Where travellers knowingly fail to declare goods of a sort known to pose biosecurity risks (particularly conditionally non-prohibited goods) on arrival at a first point of entry or knowingly provide false or misleading information or documents in relation to such goods, they deny biosecurity officers the opportunity to identify, assess and manage biosecurity risks. They also deny biosecurity officers the opportunity to determine if specified import conditions have been met and/or direct the goods to undergo regulatory requirements that must be undertaken upon the goods arriving into Australia, such as post-entry quarantine disease screening and/or testing. In these circumstances, it is only when goods of a sort known to pose biosecurity risks are detected and intercepted through other means (such as automated profiling of travellers, detector dogs or x-rays) that biosecurity risks can be identified, assessed and managed in accordance with Australian biosecurity law.

Under subsections 532(1) and 533(1) of the Act, where the person knowingly gives false or misleading information (or knowingly produces a false or misleading document) in compliance or purported compliance with a requirement under the Act, the person is likely to contravene the Act. Similarly, if the person fails to comply with a requirement to answer questions or provide information in writing about goods under subsection 126(1) or 196(2) of the Act, the person is also likely to contravene the Biosecurity Act.

If a biosecurity officer believes on reasonable grounds that the person has contravened a provision of the Act subject to an infringement notice, the officer may give the person an infringement notice for the alleged contravention. Under subsection 523(1) of the Act, subsections 532(1) and 533(1) are provisions of the Act that are subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act).

Subsection 524(6) of the Act permits regulations to be made to prescribe different numbers of penalty units for an infringement notice for different kinds of alleged contraventions of the Act. Subsection 524(6) also allows amounts to be prescribed by reference to the kinds of goods or class of goods to which an alleged contravention relates. Subsection 524(7) of the Act permits such regulations to apply, adopt or incorporate matters referred to in a determination made by the Director of Biosecurity under subsection 524A(1).

Subsection 88(2) of the Regulation prescribes different infringement notice amounts where an individual who is at a first point of entry allegedly contravenes subsection 532(1) or

533(1) of the Act when giving information or producing a document in compliance or purported compliance with a requirement under subsection 126(1) or 196(2) of the Act.

Subsection 88(2) of the Regulation prescribes these amounts by reference to category 1 goods, category 2 goods and goods which are neither category 1 nor category 2. Category 1 goods and category 2 goods are defined in section 5 of the Regulation as those goods or classes of goods listed as such in a determination made under subsection 524A(1) of the Act.

Subsection 524(4) of the Act provides that the amount to be stated in an infringement notice for the purposes of paragraph 104(1)(f) of the Regulatory Powers Act is the least of:

- one fifth of the maximum penalty that a court could impose for that contravention; and
- 12 penalty units where the person is an individual or 60 where the person is a body corporate; and
- if the regulations prescribe a different number of penalty units for the alleged contravention, that number of penalty units.

Consultation

The Office of Best Practice Regulation (OBPR) was consulted regarding the *Biosecurity Amendment (Infringement Notices) Regulations 2020* (Reference OBPR21-01134). The OBPR advised that based on the information provided, the OBPR considers the proposal is unlikely to have a more than minor regulatory impact, and therefore the preparation of a Regulation Impact Statement is not required for the proposal.

Impact and Effect

As noted below in more detail, infringement notices may be issued for certain alleged contraventions of the Act with different penalty unit amounts depending on the type of goods and their associated level of biosecurity risk. The Determination supports this framework by listing goods, and classes of goods, which the Director of Biosecurity is satisfied have a high level of biosecurity risk associated with them, as being either ‘category 1 goods’ or ‘category 2 goods.’ This assists in the protection of Australia’s biosecurity status by deterring individuals from failing to provide the required information relating to goods or classes of goods that have a high level of biosecurity risk associated with them, when arriving in Australian territory at a first point of entry. The different categories of goods provide a proportionate level of deterrence commensurate with the biosecurity risks known to be associated with the goods listed in each relevant category. This ensures that biosecurity risk can be adequately identified, assessed and managed.

Paragraph 88(2)(b) of the Regulation provides that the infringement notice amount is 6 penalty units where the alleged contravention relates to category 2 goods. The note to subsection 88(2) confirms that where an alleged contravention relates to category 1 goods, the amount is 12 penalty units, in accordance with subsection 524(4) of the Act. This is one fifth of the maximum penalty that a court could impose for a contravention of subsection 532(1) or 533(1) of the Act. Alleged contraventions relating to all other goods attract an infringement notice amount of 2 penalty units, in accordance with paragraph 88(2)(a) of the Regulation.

The differentiation between infringement notice amounts for category 1 and category 2 goods is based on an assessment of the relative biosecurity risks posed by a failure to declare goods of the relevant category on arrival at first points of entry in circumstances where a person is usually required to hold an import permit for the goods or meet certain alternative conditions.

Failing to declare category 1 goods (for example, live plants) may attract a 12 penalty unit infringement notice as goods in this category pose a more serious biosecurity threat than category 2 goods (for example, fresh fruit) which may attract an infringement notice of 6 penalty units.

The Determination will remain in force for 12 months, beginning on 1 January 2022. This is the maximum period permitted under subsection 524A(3) of the Act.

Details/ Operation

Details of the instrument are set out at [Attachment A](#).

Other

The Determination is a legislative instrument but, under subsection 524A(4) of the Act, section 42 (disallowance) of the *Legislation Act 2003* does not apply to the Determination.

Decisions made by the Director of Biosecurity in relation to the Determination are informed and underpinned by subject matter and technical expertise in order to maintain the integrity of the risk management process and the broader management of biosecurity risks, as well as uphold the objectives of the biosecurity framework.

The Determination reflects 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 has determined, based on relevant risk assessments, pose the highest level of biosecurity risk in this context, while category 2 classes of goods pose a high level of biosecurity risk but not as high a biosecurity risk as category 1 goods.

As such, it is appropriate that this Determination is exempt from disallowance due to the nature of the instrument and the risk assessments used to determine the high level of biosecurity risk associated with the goods and classes of goods listed in the Determination. The identification of goods or classes of goods posing a high level of biosecurity risk is a technical and scientific decision based on whether the biosecurity risk is satisfactorily managed within the objective standards established by the Act.

To maintain a high level of accountability, the power to make the instrument is non-delegable below the level of an SES officer and may only be made for a maximum of 12 months.

As the Determination is exempt from disallowance, this also means that a Statement of Compatibility with Human Rights is not required in accordance with paragraph 15J(2)(f) of the Legislation Act and subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Determination commences on 1 January 2022.

Details of the *Biosecurity (2022 Infringement Notices) Determination 2021*

Section 1 – Name

Section 1 provides that the name of this instrument is the *Biosecurity (2022 Infringement Notices) Determination 2021* (the Determination).

Section 2 – Commencement

Section 2 provides that the whole of the Determination commences on 1 January 2022.

Section 3 – Authority

Section 3 provides that this instrument is made under subsection 524A(1) of the *Biosecurity Act 2015* (the Act).

The note to this section explains that the Determination lists classes of goods for the purposes of infringement notices for alleged contraventions of certain provisions of the Act. An infringement notice may state 12 penalty units if the contravention relates to category 1 goods and 6 penalty units for category 2 goods in accordance with subsection 524(4) of the Act and the regulations made for the purpose of that subsection. Subsection 524(4) of the Act prescribes the amount to be stated in an infringement notice for the purposes of paragraph 104(1)(f) of the Regulatory Powers Act.

Section 4 – Period in force

Section 4 provides that the Determination is in force for 12 months beginning on 1 January 2022.

Section 5 – Definitions

Section 5 provides for definitions of meat, meat product and retorted.

This section defines **meat** as a part of an animal (other than a fish, cetacean, mollusc, crustacean, cnidarian, echinoderm or a tunicate) that is intended or able to be used as food by a human being or an animal (whether or not it is cooked, dried or otherwise processed). This definition includes blood, bone-meal, meat meal, tallow and fat.

A **meat product** is defined in section 5 as a product that contains meat or of which meat is an ingredient.

The term **retorted** is also defined in section 5 as heated in a hermetically-sealed contained to a minimum core temperature of 100°C, obtaining an F₀ value of at least 2.8.

These definitions are required because meat or meat products that have been retorted are excluded from the class of goods known as “meat” and “meat products” that is listed as a class of category 1 goods in section 6.

Section 6 – Category 1 goods

Section 6 provides a list of classes of goods and goods that have been assessed to be category 1 goods for the purposes of the Determination. This section allows infringement notice amounts prescribed by subsection 524(4) of the Act (read together with regulation 88(2) of the Regulation) to reflect the goods and classes of goods that have been listed as category 1 goods in the Determination. Category 1 goods pose a high biosecurity risk when travellers fail to declare them upon arrival in Australia.

Section 6 provides that the following classes of goods are category 1 goods:

- (a) live plants;
- (b) whole unprocessed seeds;
- (c) meat and meat products, except meat or meat products that have been retorted;
- (d) prawns that are raw or partially raw (that is, not sufficiently cooked to coagulate all of the protein in the prawn meat);
- (e) live animals, and the remains of animals that have died in transit before arriving in Australian territory or on arrival in Australian territory;
- (f) eggs of a bird or reptile that are intended for hatching;
- (g) veterinary vaccines.

It is appropriate to issue an infringement notice for failing to declare these classes of goods as the failure to declare has the effect of preventing a biosecurity officer from considering the high biosecurity risks posed by the goods. For example, a person declaring live plants allows biosecurity officers to determine if the species of live plant is permitted entry into Australia and if any treatment requirements apply. In relation to unprocessed seeds when these goods are declared by a person, a biosecurity officer can determine if the seed species is permitted entry into Australia and if any other regulatory requirements, such as purity testing, apply. Declaring meat and meat products allows biosecurity officers to determine if the goods meet Australia's requirements under biosecurity legislation which often include documentation such as a veterinary certificate from the country of export providing evidence of the sourcing and disease status of the exporting country.

Classes of Category 1 goods

Paragraph 6(a) in section 6 provides that live plants are a class of category 1 goods. The term "live plants" includes all live plants (other than seeds) that are imported for the purposes of growth and/or propagation. They often carry exotic pests and diseases such as arthropods, bacteria, fungi and viruses, such as *Xylella* which is Australia's number one national priority plant pest. As such, it is appropriate that this class of goods is listed as category 1 goods. This class of goods is also sometimes referred to as "nursery stock" and includes, but is not limited to: budwood, bulbils, bulbs, corms, cuttings, grafting wood, plants, rhizomes, roots, seedlings, slips, stems, tissue cultures, tubers.

Paragraph (b) in section 6 provides that whole unprocessed seeds are a class of category 1 goods. The class covers all whole seeds of plants that have not been processed (for example, roasted, ground into a powder etc). Whole unprocessed seeds often carry exotic diseases and pests such as khapra beetle. As such, it is appropriate that this class of goods is listed as category 1 goods.

Paragraph (c) in section 6 provides that meat and meat products, except meat or meat products that have been retorted, are a class of category 1 goods. The terms “meat”, “meat products” and “retorted” are defined in section 5. There are several significant biosecurity risks associated with uncontrolled entry of meat and meat products into Australia including, but not limited to, foot-and-mouth disease, African swine fever, bovine spongiform encephalopathy, and infectious bursal disease. As such, it is appropriate that this class of goods is listed as category 1 goods.

Meat and meat products include blood, bone meal, meat meal, tallow, fat, jerky and biltong from any species of animal, unless that animal has been excluded by this Determination.

The listed class in paragraph (c) expressly excludes retorted meat and meat products as the biosecurity risk is significantly reduced if the meat or meat products have been retorted. Retorted meat and meat products must be heated in an unopened, hermetically sealed container for a time, and to a temperature beyond 100 °C, obtaining an F₀ value of at least 2.8, sufficient to render the contents commercially sterile. To meet Australia’s import requirements, retorted products must not require freezing or refrigeration to maintain quality. For example, salami, while preserved, is not retorted and is a category 1 good.

Fish, cetaceans, molluscs, crustaceans, cnidarians, echinoderms or tunicates are excluded from the class of goods in paragraph (c) of section 6. This means meat or meat products from aquatic animals such as sharks, dolphins, whales, lobsters and jellyfish are not classified as category 1 goods. Smoked salmon is an example of a meat product that is not a category 1 good.

Paragraph (d) in section 6 provides that prawns that are raw or partially raw are a class of category 1 goods. Raw prawns or partially raw prawns can be infected with exotic pathogenic agents including bacteria, parasites, fungi and viruses such as white spot syndrome virus and yellowhead virus genotype 1. As such, it is appropriate that this class of goods is listed as category 1 goods.

The class of goods in paragraph (d) includes prawns that are uncooked (that is, prawns that have not been cooked until all the protein in the prawn meat has coagulated and no raw prawn meat remains). Breaded, battered and crumbed prawns, and uncooked highly processed prawns such as dumpling, dim sum or spring roll type products, are not included in this class of goods.

Paragraph (e) in section 6 lists live animals, and the remains of animals that have died in transit before arriving in Australian territory or on arrival in Australian territory as a class of category 1 goods. Live animals and the remains of animals that have died in transit before arriving in Australian territory or on arrival in Australian territory can carry exotic pests and diseases, including arthropods, nematodes, bacteria, fungi, viruses and viroids, as well as pose a risk of becoming an invasive species themselves while alive. As such, it is appropriate that this class of goods is listed as category 1 goods.

The class of goods covered by paragraph (e) does not include humans, dead or alive. Humans are expressly excluded from the definition of ‘animal’, as defined in section 9 of the Act, as they do not pose the same biosecurity risk. Animals that were dead before the journey to Australia commenced are also excluded from paragraph (e) and are not considered category 1 goods. This includes animals that have undergone a taxidermy process to be prepared,

preserved, stuffed or mounted. Animal parts, animal reproductive material and animal products are also not covered by the class of goods provided for by paragraph (e).

Paragraph (f) in section 6 provides that eggs of a bird or reptile that are intended for hatching are a class of category 1 goods. Eggs of a bird or reptile that are intended for hatching can carry many diseases of biosecurity concern to Australia. Reptile eggs could harbour togaviruses and herpesviruses while avian eggs can harbour Newcastle disease virus, avian influenza and many other potential pathogens, all of which if introduced could have serious negative consequences for Australia's unique fauna and the environment. As such, it is appropriate that this class of goods is listed as category 1 goods. Eggs of a bird or reptile for hatching include whole eggs for breeding purposes through a commercial industry and hobby breeders. The legal import of these goods requires mandatory pre-export certification, inspection and testing, and post-arrival quarantine, inspection and testing.

Eggs intended for human consumption are not considered to be category 1 goods for the purposes of this determination. This is because eggs of a bird or reptile for hatching are more likely to come into contact with animals and the environment within Australia and risk spreading pests and disease of biosecurity concern, and therefore pose a higher biosecurity risk.

Paragraph (g) in section 6 provides that veterinary vaccines are a class of category 1 goods. Veterinary vaccines are products that when administered to the animal, provide, induce, or change an immune response to a target chemical or biological entity. Veterinary vaccines are prepared in a manner designed to maintain the immunobiological characteristics of the infectious agent used to generate the vaccine. This preserves the infectious agent used in the preparation of the vaccine, as well as any contaminating or extraneous agents which present additional biosecurity risks. As a fundamental component of their use, veterinary vaccines are delivered directly to susceptible animal species in the manner most likely to introduce efficient infection. This means there is a significantly high biosecurity risk associated with veterinary vaccines. As such, it is appropriate that this class of goods is listed as category 1 goods.

Section 7 – Category 2 goods

Section 7 provides for classes of goods that have been assessed to be category 2 goods for the purposes of determining infringement notice amounts under subsection 524(4) of the Act and regulations made for the purposes of that subsection (being regulation 88(2) of the Regulation). Category 2 goods pose a high biosecurity risk when travellers fail to declare them upon arrival in Australia.

It is appropriate to issue an infringement notice for failing to declare these classes of goods as the failure to declare the goods has the effect of preventing a biosecurity officer from considering the high biosecurity risks posed by the goods. Declaring these goods would allow biosecurity officers to determine if the goods meet Australia's requirements under biosecurity legislation, which often include a phytosanitary certificate along with sampling and inspection. As such, it is appropriate that this class of goods is listed as category 2 goods

Section 7 provides that the following classes of goods are category 2 goods:

- a) fresh fruit;
- b) fresh vegetables;

- c) fresh fungi;
- d) fresh leaves;
- e) fresh herbs.

Fresh fruit, fresh vegetables, fresh fungi, fresh leaves and fresh herbs can harbour a range of pests and diseases, including but not limited to exotic fruit flies, citrus canker, Plum pox virus, Panama disease, citrus greening, zebra chip and fire blight. Pests such as brown marmorated stink bug may also be present on these horticultural produce goods.

These classes of goods cover whole, intact and unprocessed horticultural produce. Horticultural produce that has been partially processed, such as having been sliced or the peel removed, is not covered by these classes of goods for the purpose of this Determination.

Section 8 – Repeal

Section 8 provides that the Determination is repealed at the start of 1 January 2023. Subsection 524A(3) provides that the duration of the Determination must be no longer than 12 months. The *Biosecurity (2021 Infringement Notices) Determination 2020*, which the Determination replaces, is repealed on 1 January 2022.