

## **EXPLANATORY STATEMENT**

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

*Export Control Act 2020*

*Export Control (Organic Goods) Rules 2021*

### **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 for the application of the Act and how the Act interacts with State and Territory laws.

The *Export Control (Organic Goods) Rules 2021* (the Organic Goods Rules) prohibit the export of prescribed organic goods from Australian territory, or from a part of Australian territory, unless prescribed export conditions are adhered to. These conditions ensure the importing country requirements are satisfied, reflect industry standards, and meet Australia's international obligations. Prescribed organic goods are regulated by the Organic Goods Rules.

The Organic Goods Rules are made by the Secretary under section 432 of the Act. Section 432 of the Act relevantly 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.

A number of provisions in the Act set the parameters of the Secretary's rule-making power and either:

- provide examples of the kinds of things for which the Secretary may make provision in the rules; or
- set out the default matters for the provision and allow the Secretary to give further detail in the rules.

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 for the purposes of rules relating to organic goods.

### **Purpose**

The purpose of the Organic Goods Rules is to ensure Australian exported organic goods satisfy requirements to enable and maintain overseas market access. The Organic Goods Rules include measures to ensure exported organic goods reflect relevant standards, are

described accurately and are traceable. The Organic Goods Rules also include measures to ensure the integrity of organic goods exported from Australia.

By setting out key requirements for the export of organic goods in the Organic Goods Rules, and having those Rules made by the Secretary, the regulatory framework can be kept fit for purpose if importing country requirements change. Having the capacity to change the Organic Goods Rules quickly is crucial to ensuring that Australian producers, processors, and exporters do not experience disruption in market access and can continue to export goods that meet requirements. This is particularly important because one non-compliant export of goods can have significant consequences for other exports, including restrictions on, or the closure of, market access.

The Organic Goods Rules, in conjunction with the Act, set out the requirements that are particular to the export of organic goods from Australian territory. Wherever possible, the Organic Goods Rules have been made consistent with other commodity specific export rules that share the same requirements and to ensure consistency in the new framework for stakeholders and regulators that deal in multiple commodities. This will allow for a streamlined approach to regulating the different commodities that will be prescribed and will ensure the framework is more accessible.

## **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 that 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, they 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, 2 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 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 clearer framework that is flexible and responsive to emerging issues.

## **Impact and Effect**

The Organic Goods Rules impose regulatory controls on organic goods that are to be exported from Australia so that these products meet trade requirements. These controls maintain and strengthen the existing regulatory controls and oversight for the export of goods.

Chapter 1 deals with formal and preliminary matters and sets out the special meanings of words and phrases used in the Organics Goods Rules.

Chapter 2 deals with matters relating to exporting goods. These include:

- defining prescribed goods;
- prohibiting the export of certain goods;
- applying for exemptions; and
- providing requirements for the issue of organic goods certificates.

Chapter 5 deals with matters relating to approved arrangements. These include:

- requirements for approval;
- conditions of approval for an approved arrangement;
- obligations of holders of approved arrangements; and
- application for the approval of a proposed arrangement and renewal, variation, suspension and revocation of approval.

Chapter 8 provides for other matters relating to export. These include:

- notices of intention to export; and
- trade descriptions.

Chapter 9 deals with matters relating to powers and officials. These include:

- provisions for the conduct of audits and carrying out of assessments; and
- provides for powers and functions of authorised officers in relation to inspections.

Chapter 10 provides for compliance and enforcement in relation to samples taken:

- in exercising monitoring or investigation powers; and
- dealing with things seized in exercising investigation powers.

Chapter 11 deals with miscellaneous matters such as:

- review of decisions;
- record-keeping;
- storage of samples;
- compensation for the damage or destruction of goods; and
- relevant Commonwealth liabilities.

Chapter 12 provides a scheme of transitional and savings provisions that will preserve certain rights and liabilities under the previous legislative framework. The provisions also allow for eligibility of organic goods that commenced under the previous framework to continue, where applicable, under the Organic Goods Rules.

## **Consultation**

In accordance with the requirement for consultation under section 17 of the *Legislation Act 2003*, the Organic Goods Rules have been informed by consultation with stakeholder groups, including industry representatives and certifying organisations responsible for the certification of organic goods. The level of regulatory oversight will not change under the new legislative framework, however the requirements are easier to understand, administer and use.

A public consultation draft of the Organic Goods Rules was published on the Department's website from 10 July 2020 to 7 August 2020. During this time, the Department consulted with stakeholders through a number of roundtables. Five written submissions were received and considered in further developing these rules.

An exposure draft of the Organic Goods Rules was released on 7 September 2020 as part of a package of revised commodity specific rules for 60 days of public consultation to ensure Australia's compliance with internal obligations under the World Trade Organization's Sanitary and Phytosanitary measures. One submission was received during this time, and feedback obtained from the consultation rounds has been considered in the development of the Organic Goods 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 Organic Goods Rules. The Act established a new regulatory framework which is supported by a number of subordinate legislative instruments, that aim to improve Australia's agriculture export legislation (which is 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 Organic Goods Rules are set out in Attachment A.

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

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

The Organic Goods Rules incorporate the *National Standard for Organic and Bio-Dynamic Produce* as it exists at the commencement of the Organic Goods Rules. In 2021, this standard was available on the Department's website (<http://www.awe.gov.au>).

## **Other**

The Organic Goods 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 (Organic Goods) Rules 2021**

**CHAPTER 1—PRELIMINARY**

***Part 1—Preliminary***

**1-1 Name**

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

**1-2 Commencement**

Section 1-2 provides for the Organic Goods 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 Organic Goods Rules are made under the Act. However, Chapter 12 of the Organic Goods Rules is made under the Act and the *Export Control (Consequential Amendments and Transitional Provisions) Act 2020*.

**1-4 Application of this instrument**

Section 1-4 provides that the Organic Goods Rules do not limit the operation of any other rules made under the Act, and that the Organic Goods Rules apply in addition to any other rules, in relation to prescribed goods. The effect is that prescribed goods exported under the Organic Goods Rules may also be subject to requirements of other rules made under the Act. This is required as some commodities will have to meet other requirements to be exported.

The example following section 1-4 explains that milk products described as organic or biodynamic may be prescribed milk products under the *Export Control (Milk and Milk Products) Rules 2021*.

**1-5 Simplified outline of this instrument**

Section 1-5 provides a simplified outline of the matters covered in the Organic Goods Rules and details the structure. The outline is not intended to be comprehensive and is included to assist readers. It is intended that readers will rely on the substantive provisions of the Organic Goods Rules.

The Organic Goods Rules prescribe matters and make other provisions in relation to certain organic goods (prescribed organic goods) for the purposes of the Act. Chapters in the Organic Goods Rules have the same name and number as corresponding Chapters in the Act. Gaps in the Chapter numbering in the Organic Goods Rules are because some Chapters of the Act are not relevant to the export of organic goods.

## ***Part 2—Interpretation***

### **1-6 Definitions**

Section 1-6 contains definitions of key terms which are used in the Organic Goods Rules. The note at the start of this section lists some of the terms used in the Organic Goods Rules which are defined in section 12 of the Act. Such terms will have the same meaning in the Organic Goods Rules as they have in the Act.

Section 1-6 also includes some ‘signpost’ definitions that refer readers to the sections in which terms are substantively defined.

The definition of ***approved certifying body*** refers to the holder of an approved arrangement for organic goods certification operations.

The purpose of the definition of ***cosmetic product*** is to provide clarity around the types of products that are considered to be for the purpose of cosmetic use. A ***cosmetic product*** is defined as a substance intended to be placed in contact with external parts of the body or with the teeth or mucous membranes of the oral cavity, with the exclusive or principal purpose of cleaning, perfuming, changing the appearance of, protection or keeping in good condition those parts of the body. This definition also includes substances for use on domestic animals. Examples of cosmetic products include soap, shampoos, fragrances, skin moisturisers, colour cosmetics and deodorants.

The definition of ***National Organic Standard*** refers to the *National Standard for Organic and Bio-Dynamic Produce* as it exists at the commencement of the Organic Goods Rules. This standard is owned by the Department and is Australia’s mandatory export standard for market access purposes. In 2021, the National Organic Standard is available on the Department website (<http://www.awe.gov.au>). The Standard provides the organic industry with a nationally agreed standard for Australian export goods labelled as organic or biodynamic and also provides a framework covering production, processing, transporting, labelling and importation. The Standard aims to ensure conditions of fair competition in the market by distinguishing those products produced according to the Standard from those produced by other means.

The purpose of the definition of ***organic goods*** is to provide clarity around the types of goods that can be classified as an organic good. ***Organic goods*** are defined as goods that are described as organic, biodynamic, biological, ecological or any other similar description, or described as including such ingredients. This includes goods that are described as in-conversion to organic or biodynamic. ***Prescribed organic goods*** are regulated by the Organic Goods Rules, and this is defined as organic goods that are prescribed goods under Division 1 of Part 1 of Chapter 2 of the Organic Goods Rules.

The purpose of the definition of ***organic goods certificate*** is to provide clarity around the type of mandatory government certificate that is issued in relation to prescribed organic goods. An ***organic goods certificate*** is a government certificate that states that all relevant importing country requirements relating to the prescribed organic goods and the operations to produce or prepare them for export are met. A note under this definition explains that the issuing body for an organic goods certificate is an approved certifying body or the Secretary.

The purpose of the definition of ***resources industry structure*** and ***installed*** is to provide certainty around the kinds of structures (for example, oil rigs and similar off-shore structures) that are covered by the Organic Goods Rules. Goods consigned to a ***resource industry structure*** that is ***installed*** in an area are not required to comply with prescribed export control conditions (see paragraph 2-2(f) of the Organic Goods Rules). The definition of ***resources industry structure*** means of a ‘resources industry fixed structure’ (as defined in the *Sea Installations Act 1987*) and a resources industry mobile unit that is not a vessel, as defined in the *Sea Installations Act 1987*. This definition of ***resources industry structure*** includes a fixed structure (including a pipeline) or a moveable or floatable structure (that is not a vessel) that is used off-shore wholly or principally for exploring or exploiting natural mineral resources.



## CHAPTER 2—EXPORTING GOODS

### *Part 1—Goods*

#### **Division 1—Prescribed goods**

Division 1 of Part 1 of Chapter 2 of the Organic Goods Rules sets out which kinds of goods will be *prescribed goods* for the purposes of the Act. Prescribed goods are subject to the regulatory controls imposed by the Act, including the requirement to comply with the prescribed export conditions.

#### **2-1 Organic goods that are prescribed goods**

Subsection 28(1) of the Act allows the Secretary to prescribe kinds of goods for the purposes of the Act. A kind of good prescribed by rules made for the purposes of subsection 28(1) is *prescribed goods*. The Act regulates the export of *prescribed goods*.

Subsection 2-1(1) prescribes, for the purposes of subsection 28(1) of the Act and subject to subsections 2-1(2) and (3), organic goods which are intended for export as *prescribed goods*.

This means that goods that meet the definition of *organic goods* in section 1-6 of the Organic Goods Rules will be subject to the regulatory controls in the Act and the Organic Goods Rules, including the requirement to comply with prescribed export conditions. However, this rule is subject to the express exceptions set out in subsections 2-1(2) and 2-1(3) and the circumstances set out in section 2-2.

The note following subsection 2-1(1) explains to the reader that organic goods that meet the circumstances prescribed by section 2-2 are not taken to be prescribed good for the purposes of the Act.

Subsection 2-1(2) provides that organic goods that are cosmetic products are not prescribed goods for the purposes of subsection 28(1) of the Act unless the goods are intended to be exported to a particular country (the *importing country*) and, for the purpose of meeting an importing country requirement of that country, an organic goods certificate is required in relation to the organic goods.

The note following subsection 2-1(2) provides examples of cosmetic products that include soap, shampoos, fragrances (including for pet grooming), skin moisturisers, colour cosmetics and deodorants.

The terms *cosmetic product* and *organic goods certificate* are defined in section 1-6 of the Organic Goods Rules.

Subsection 2-1(3) provides that organic goods for export to New Zealand are not prescribed goods for the purposes of subsection 28(1) of the Act unless an organic goods certificate is required for the purpose of meeting an importing country requirement of New Zealand.

The purpose of subsections 2-1(2) and (3) is to remove barriers to trade where there is minimal risk to food safety and human and animal health, while ensuring importing country requirements are met. This provides flexibility to increase or decrease the level of regulation for the export of organic goods where there are changes in importing country requirements. This also provides for the regulation of organic goods for export where there is a need to focus on exports that attract the most risk.

## **2-2 Organic goods that are taken not to be prescribed goods**

Subsection 28(4) of the Act allows the rules to prescribe that a kind of goods is taken not to be prescribed goods for the purposes of the Act in specified circumstances.

Section 2-2 is made for the purposes of subsection 28(4) of the Act. It sets out the circumstances when organic goods that are prescribed under subsections 2-1(1) of the Organic Goods Rules are not prescribed goods for the purposes of the Act.

It is not necessary for the organic goods to be subject to the regulatory controls in the Act in the circumstances listed in section 2-2, as these goods are:

- intended to be consumed in transit (paragraphs 2-2(a) and (b)) on a flight or voyage; or
- being transited through Australia (paragraphs 2-2(c) and (d)); or
- not imported into another country (paragraphs 2-2(e) and (f)) but to an external Territory or certain *resources industry structures*.

Requiring organic goods in these circumstances to meet the requirements of the Organic Goods Rules would be redundant and excessively burdensome as the goods are intended to be consumed and not enter another country or to be re-exported in the same condition in which they entered Australia.

Paragraph 2-2(d) provides an exception for organic goods that are imported into Australian territory and then exported in the same covering in which, and with the same trade description with which they were imported.

The note following section 2-2 explains that a resource industry structure that is not installed is taken to be a vessel in accordance with the *Sea Installations Act 1987*.

## **Division 2—Prohibited export and prescribed export conditions**

Division 2 of Part 1 of Chapter 2 of the Organics Rules sets out specific requirements that must be complied with when exporting prescribed organic goods (prescribed export conditions). The purpose of the prescribed export conditions is to ensure that prescribed goods are exported in accordance with the requirements in the Act and the Organic Goods Rules.

Division 2 also provides that the Organic Goods Rules may prohibit export of prescribed goods unless the exporter of the organic goods holds a valid organic goods certificate and the prescribed conditions in other relevant rules are complied with. For example, if the goods are prescribed meat products under the *Export Control (Meat and Meat Products) Rules 2021*, the export of the goods would also be subject to export conditions for prescribed meat products under that instrument.

### **2-3 Purpose and application of this Division**

Section 29 of the Act provides that the rules may prohibit the export of prescribed goods from Australian territory or a part of Australian territory (including to a specified place) unless conditions prescribed by the rules are complied with.

Subsections 2-3(1) and (2) provide that Division 2 of Part 1 of Chapter 2 of the Organic Goods Rules is made for the purposes of section 29 of the Act and that it applies to prescribed organic goods (i.e., organic goods prescribed under section 2-1).

The first note following subsection 2-3(2) refers the reader to Division 1 of Part 1 of Chapter 2 of the Organic Goods Rules for what goods are prescribed organic goods.

The second note following subsection 2-3(2) notifies the reader that, under subsection 2-2 of the Organic Goods Rules, organic goods are taken not to be prescribed goods in specified circumstances.

Subsection 2-3(3) provides that a provision (the *relevant provision*) of Division 2 does not apply to prescribed organic goods which are to be exported in a circumstance referred to in subsection 52(1) or (3) of the Act (for example as a commercial sample) and for which an exemption from the relevant provision is in force in relation to the prescribed organic goods.

This acknowledges that Part 2 of Chapter 2 of the Act allows certain persons to apply for and be granted an exemption from one or more provisions of the Act in the circumstances listed in section 52. For instance, a person may be granted an exemption from having to comply with one or more of the prescribed export conditions in relation to the export of prescribed organic goods for experimental purposes.

### **2-4 Export of prescribed organic goods is prohibited unless prescribed conditions are complied with**

Paragraph 29(1)(a) of the Act allows the rules to prohibit the export of prescribed goods from Australian territory or from a part of Australian territory unless the conditions prescribed by the rules are complied with.

Section 2-4 provides the prescribed export conditions that must be complied with for the export of prescribed organic goods from Australian territory. The export of prescribed organic goods is prohibited unless the exporter of the organic goods holds an organic goods certificate that is in force at the time the organic goods are exported. This condition is necessary to enable and maintain market access for goods exported from Australian territory and to ensure compliance with importing country requirements. The prescribed export conditions maintain the integrity of our exports, Australia's positive relationships with trading partners and our reputation as a reliable exporter of safe and high-quality products.

The first note following section 2-4 explains that additional conditions may also apply to the export of particular prescribed organic goods that also fit within other regimes – such as particular organic goods that are also subject to the *Export Control (Meat and Meat Products) Rules 2021*.

The second note following subsection 2-4(1) alerts the reader that a person may commit an offence or be liable to a civil penalty if prescribed goods are exported in contravention of prescribed export conditions (see Division 4 of Part 1 of Chapter 2 of the Act).

## ***Part 2—Exemptions***

Part 2 of Chapter 2 of the Organic Goods Rules sets out the matters relating to exemptions from one or more provisions in the Act in relation to prescribed organic goods.

Under Part 2 of Chapter 2 of the Act, an exemption from one or more requirements of the Act (including prescribed export conditions) may be granted following an individual application in certain circumstances, rather than in relation to all organic goods of a particular kind or exported to a particular country. This is to enable a reduced level of regulatory oversight in circumstances where there is minimal risk posed by exporting the organic goods while ensuring importing country requirements are met.

### **2-5 Application of this Part**

Section 2-5 provides that Part 2 of Chapter 2 of the Organic Goods Rules applies only in relation to prescribed organic goods, which are called *relevant goods* in this Part.

The first note following section 2-5 draws the reader’s attention to Division 1 of Part 1 of Chapter 2 of the Organic Goods Rules, which sets out what are prescribed organic goods.

The second note following section 2-5 notifies the reader that, under section 2-2 of the Organic Goods Rules, organic goods are taken not be prescribed goods (see section 12 of the Act) in the specified circumstances.

### **2-6 Period for making application for exemption**

Subparagraph 53(3)(f)(i) of the Act allows the rules to prescribe the period within which an application for an exemption from one or more provisions of the Act may be made.

Section 2-6 is made for the purposes of subparagraph 53(3)(f)(ii) of the Act, and prescribes the timeframe in which an application for exemption for one or more provisions in the Act must be made in relation to relevant goods. This period is 10 business days before either the proposed date of export of the relevant goods (if operations to prepare the relevant goods for export have started), or the proposed date to start carrying out those operations (in any other case). The timeframe is to ensure the Secretary has a reasonable amount of time to assess applications for exemption prior to the export of the prescribed organic goods.

The first note following section 2-6 refers the reader to subparagraph 53(3)(f)(ii) of the Act, which allows the Secretary to allow a different period in which the application may be made in an individual case.

The second note following section 2-6 explains that an application for exemption must comply with the requirements in subsection 53(3) of the Act.

### **2-7 Conditions of exemption—matters to which Secretary must have regard**

Section 55 of the Act allows the Secretary to impose conditions on an exemption. When deciding whether to impose a condition on an exemption, the Secretary is required to have regard to the matters prescribed by the rules (subsection 55(2)).

Section 2-7 is made for the purposes of subsection 55(2) of the Act and requires the Secretary, in deciding whether it is necessary to impose conditions on an exemption that relates to prescribed organic goods, to consider whether the imposing the condition would ensure that one or more objects of the Act will be met in relation to the goods.

This requirement is intended to ensure that exemptions are only approved in circumstances where the objectives of the Act are met and goods exported from Australia are of the highest standard, strengthening Australia's reputation as a trading partner.

### **2-8 Period of effect of exemption**

Paragraph 57(b) of the Act allows the rules to prescribe the period that an exemption remains in force unless it is revoked earlier.

Section 2-8 is made for the purposes of paragraph 57(b) of the Act and provides the period of effect of an exemption that relates to prescribed organic goods to be indefinite or another period specified in the instrument of exemption (unless it is revoked under section 59 of the Act).

The Secretary will have the discretion to determine the appropriate period in the instrument of exemption. It may be appropriate that some exemptions remain in force for different periods. This will provide the necessary flexibility to deal with changing circumstances for regulating prescribed goods.

The note following section 2-8 explains that, under paragraph 57(a) of the Act, an exemption takes effect on the date specified in the instrument of exemption under paragraph 56(1)(e) of the Act.

### **2-9 Variation of conditions of exemption—matters to which Secretary must have regard**

Subsection 58(2) of the Act allows the Secretary to vary the conditions imposed on an exemption that is in force under Part 2 of Chapter 2 of the Act, if the Secretary considers it necessary to do so. When deciding whether it is necessary to vary a condition on an exemption, the Secretary is required to have regard to the matters prescribed by the rules (subsection 58(3)).

Section 2-9 is made for the purposes of subsection 58(3) of the Act and requires the Secretary, in deciding whether it is necessary to vary conditions on an exemption that relates to prescribed organic goods, to consider whether varying the condition would ensure that one or more objects of the Act will be met in relation to the goods.

This requirement is intended to ensure that exemptions are varied in circumstances where the objectives of the Act are met and goods exported from Australia are of the highest standard, strengthening Australia's reputation as a trading partner.

## **2-10 Revocation of exemption—matters to which Secretary must have regard**

Subsection 59(1) of the Act allows the Secretary to revoke an exemption that is in force under Part 2 of Chapter 2 of the Act. In considering whether to revoke an exemption, the Secretary is required to have regard to the matters prescribed by the rules (subsection 59(2)).

Section 2-10 is made for the purposes of subsection 59(2) of the Act, and prescribes matters to which the Secretary must have regard in considering whether to revoke an exemption. The Secretary must consider whether the conditions of the exemption have been or are being complied with.

### ***Part 3—Organic goods certificates***

Part 3 of Chapter 2 of the Act provides for government certificates to be issued for goods that are to be exported or have been exported from Australian territory. Part 3 of Chapter 2 of the Organic Goods Rules sets out specific requirements relating to the issue of organic goods certificates for organic goods that are to be or have been exported from Australian territory. An organic goods certificate must be in force in relation to the prescribed goods at the time of export.

An organic goods certificate is an official document containing details about the product being exported and is a mandatory requirement for the export of organic and biodynamic goods. The purpose of the organic goods certificate is to confirm to importing country authorities that the organic goods have met specified requirements of that country.

The term *organic goods certificate* is defined in section 1-6 of the Organic Goods Rules.

## **2-11 When organic goods certificate may be issued**

Section 62 of the Act allows the rules to make provision for and in relation to the issue of government certificates in relation to goods that are to be, or that have been, exported.

Section 2-11 is made for the purposes of subsections 62(1) and (2) of the Act, and provides that an organic goods certificate may be issued for prescribed organic goods that are to be, or have been, exported.

The first note following section 2-11 refers the reader to section 2-4 of the Organic Goods Rules, which provides that an organic goods certificate must be in force in relation to prescribed organic goods at the time the goods are exported.

The second note following section 2-11 explains that an organic goods certificate may be issued for prescribed organic goods that have been exported if the organic goods certificate that was in force at the time the goods were exported has been revoked. The note also refers to subsection 75(1) of the Act and section 2-18 of the Organic Goods Rules that, an organic goods certificate may be revoked under certain circumstances.

The third note following section 2-11 draws the reader's attention to section 65 of the Act in relation to applying for an organic goods certificate. The note also refers to section 1-6 of the Organic Goods Rules for the definition of the term *organic goods certificate*.

The fourth note following section 2-11 explains that if the Secretary has approved a form for the application and a manner for making an application, an application for an organic goods certificate must include information required by the form and be made in a manner approved by the Secretary (see paragraphs 65(2)(a) and (b) of the Act).

The fifth note following section 2-11 alerts the reader that, under section 11-3 of the Organic Goods Rules, an organic goods certificate (other than a certificate issued by electronic means) must be retained in a secure place when not in use.

## **2-12 Information to be included in organic goods certificate**

Subsection 62(1) of the Act provides that the rules may make provision for and in relation to the issue of government certificates in relation to goods that are to be, or that have been, exported.

Section 2-12 sets out, for the purposes of subsection 62(1) of the Act, the information to be included in the organic goods certificate in relation to prescribed organic goods as:

- the kind and quantity of the organic goods;
- the name and address of each organic operator in relation to the organic goods;
- the importing country for the organic goods;
- the date the organic goods are proposed to be exported;
- the issuing body of the organic goods certificate; and
- if the issuing body is an approved certifying body, that the approved certifying body reasonably believes that:
  - export operations have been carried out in accordance with the National Organic Standard; and
  - all importing country requirements relating to the export operations and the organic goods have been met.

The *National Organic Standard* is defined in section 1-6 of the Organic Goods Rules as meaning the *National Standard for Organic and Bio-Dynamic Produce* published by the Department, as that document exists at the commencement of the Organic Goods Rules. The Standard could, in 2021 be viewed on the Department website (<http://www.awe.gov.au>).

The note following section 2-12 explains that an organic goods certificate must be in a form approved by the Secretary (see section 5-5 of the Organic Goods Rules).

## **2-13 Requirements before organic goods certificate may be issued**

Section 62 of the Act allows the rules to make provision for and in relation to the issue of government certificates in relation to goods that are to be, or that have been, exported.

Subparagraph 62(2)(b)(iii) of the Act allows the rules to make provision for and in relation to requirements that must be complied with in relation to a kind of goods before a government certificate in relation to goods of that kind may be issued.

Section 2-13 provides, for the purposes of subparagraph 62(2)(b)(iii) of the Act, the requirements that must be complied with before an organic goods certificate in relation to prescribed organic goods may be issued. These requirements are that:

- export operations in relation to the organic goods have been carried in accordance with the National Organic Standard;
- applicable requirements of the Act in relation to the export operations and the organic goods have been complied with; and
- all importing country requirements relating to the export operations and the organic goods have been met.

The note following section 2-13 refers the reader to section 1-6 of the Organic Goods Rules and subsection 432(1) of the Act which provide that a reference to the Act includes a reference to the Organic Goods Rules.

## **2-14 Issuing bodies for organic goods certificates**

Section 63 of the Act relates to issuing bodies for a government certificate in relation to a kind of goods that are to be, or that have been exported. Paragraph 63(1)(a) allows the rules to prescribe a person or body as an issuing body for government certificates in relation to goods of that kind.

Section 2-14 is made for the purposes of section 63 of the Act, and provides that each of the following is an issuing body for an organic goods certificate:

- an approved certifying body;
- the Secretary.

## **2-15 Changes that require applicant to give additional or corrected information to issuing body**

Subsection 66(1) of the Act requires a person who has made an application for a government certificate to provide certain additional or corrected information to the issuing body if the applicant becomes aware that information included in the application (or other document provided to the issuing body) was incorrect or incomplete (paragraph 66(1)(a)), or if a change prescribed by the rules occurs (paragraph 66(1)(b)).



Section 2-15 is made for the purposes of paragraph 66(1)(b) of the Act and has the effect that the applicant for an organic goods certificate must provide the issuing body with relevant additional or corrected information where there are reasonable grounds to suspect that:

- the integrity of the organic goods cannot be ensured; or
- operations to produce or prepare the organic goods for export have not been carried out in accordance with the National Organic Standard; or
- an importing country requirement relating to the export operations or the organic goods has not been met.

The purpose of this provision is to place an obligation on the applicant for the organic goods certificate to monitor the goods (to the extent it is reasonable to do so) to ensure the application for the organic goods certificate continues to accurately reflect the circumstances, and to inform the issuing body when there are reasonable grounds to suspect that the relevant circumstances have changed.

This will allow the issuing body to consider whether one or more of the grounds to refuse the application for the organic goods certificate (under section 67 of the Act) are met in light of the changed circumstances and ensures organic goods certificates are only provided where the goods are supplied in compliance with the Act and the Organic Goods Rules, enhancing Australia's reputation as a reliable trading partner.

The note following section 2-15 notifies the reader that if a change prescribed by section 2-15 occurs, the applicant must, as soon as practicable, provide the issuing body with additional or corrected information under subsection 66(2) of the Act to the extent that it is relevant to the issuing body's consideration of the application.

## **2-16 Circumstances for refusing to issue organic goods certificate**

Section 67 of the Act requires the issuing body, on receiving an application for a government certificate in relation to a kind of goods, to decide to either issue the certificate or refuse to issue the certificate. The issuing body may refuse to issue the certificate if one or more of the grounds in subsection 67(3) are met. Paragraph 67(3)(g) allows the rules to prescribe additional circumstances to refuse to issue a government certificate.

Section 2-16 prescribes, for the purposes of paragraph 67(3)(g) of the Act, additional circumstances for an issuing body to refuse to issue an organic goods certificate in relation to prescribed organic goods. These additional circumstances are necessary to protect Australia's trade reputation and ensure Australia complies with international obligations and sanitary matters relating to food safety, animal health or human health.

The additional circumstances for refusing to issue a certificate are:

- the applicant failed to provide sufficient evidence that export operations to produce or prepare the organic goods for export were carried out in accordance with the National Organic Standard;

- compliance with the National Organic Standard in relation to the organic goods is not sufficient to ensure that all relevant importing country requirements are met; or
- the export of the organic goods could result in trade in the export of goods from Australian territory being adversely affected.

These circumstances ensure that government certificates are not issued for organic goods that could cause harm to Australia's trade reputation. The purpose of this section is to ensure an organic goods certificate may be refused if there has not been compliance with the regulatory controls in the Act for prescribed goods.

The note following section 2-16 explains that paragraphs 67(3)(a) to (f) of the Act set out additional grounds for refusal of an organic goods certificate.

### **2-17 Changes that require holder of certificate to give additional or corrected information to issuing body**

Subsection 74(2) of the Act requires the holder of a government certificate to provide certain additional or corrected information to the issuing body if the holder becomes aware that information included in their application (or other document provided to the issuing body) was incorrect or incomplete (paragraph 74(1)(a)), or if a change prescribed by the rules occurs (paragraph 74(1)(b)).

Section 2-17 is made for the purposes of paragraph 74(1)(b) of the Act and has the effect that the holder of an organic goods certificate must provide the issuing body with relevant additional or corrected information where there are reasonable grounds to suspect that:

- the integrity of the organic goods cannot be ensured;
- an importing country requirement relating to the organic goods has not been met and will not be, or is not likely to be, met before the organic goods are imported into the importing country; or
- operations to produce or prepare the organic goods for export were not carried out in accordance with the National Organic Standard.

The purpose of this provision is to place an obligation on the holder of the organic goods certificate to monitor the goods (to the extent it is reasonable to do so) to ensure the organic goods certificate continues to accurately reflect the circumstances for the issue of the certificate, and to inform the issuing body when there are reasonable grounds to suspect that the relevant circumstances have changed.

This will allow the issuing body to consider whether one or more of the grounds to revoke the organic goods certificate (under section 75 of the Act) are met in light of the changed circumstances, and ensures organic goods certificates are only provided where the goods are supplied in compliance with the Act and the Organic Goods Rules, enhancing Australia's reputation as a reliable trading partner.

The note following section 2-17 notifies the reader that if a change prescribed by section 2-17 occurs, the holder of the organic goods certificate must, as soon as practicable, provide the issuing body with additional or corrected information to the extent that it is relevant to assessing the matters under subsection 74(2) of the Act.

## **2-18 Circumstances for revoking organic goods certificate**

Subsection 75(1) of the Act provides that the issuing body that issued a government certificate in relation to a kind of goods, or the Secretary, may revoke the certificate if the issuing body or the Secretary (as the case may be) reasonably believes certain circumstances exist.

Paragraph 75(1)(h) of the Act allows the rules to prescribe additional circumstances where the issuing body or the Secretary may revoke a government certificate.

Section 2-18 is made for the purposes of paragraph 75(1)(h) of the Act, and prescribes additional circumstances in which an organic goods certificate may be revoked. These are where:

- operations to produce or prepare the organic goods for export have not been carried out in accordance with the National Organic Standard; or
- compliance with the National Organic Standard in relation to the organic goods has not ensured, or is ineffective in ensuring, that all relevant importing country requirements relating to the organic goods and the operations to produce or prepare them for export are met.

The purpose of this section is to ensure that organic goods certificates may be revoked where compliance with the National Organic Standard and importing country requirements have not been met.

## **2-19 Return of organic goods certificate**

Subsection 76(1) of the Act allows the rules to require a person who is in possession of a government certificate that was issued to the person to return the certificate to the issuing body in the circumstances (paragraph 76(1)(a)), and timeframe (paragraph 76(1)(b)), prescribed by the rules.

Subsection 2-19(1) is made for the purposes of paragraph 76(1)(a) of the Act and provides the circumstances in which an organic goods certificate in relation to prescribed organic goods must be returned to an issuing body. These circumstances are if the organic goods are no longer intended for export to the country for which the organic goods certificate was issued, or where the certificate has been revoked under section 75 of the Act. The purpose of this requirement is to ensure that organic goods certificates are not misused by placing an obligation on the holder to return the certificate where the organic goods are no longer intended for export or the certificate has been revoked.

Subsection 2-19(2) is made for the purposes of subsection 76(1)(b) of the Act and provides that an organic goods certificate must be returned within 10 business days starting on the day the circumstance listed in subsection 2-19(1) of the Organic Goods Rules occurs. Ten business days is a reasonable timeframe for the holder to return the certificate to the issuing body but is short enough to mitigate against the risk that the certificate would be misused.

Subsection 2-19(3) provides that the requirement in section 2-19 to return the organic goods certificate does not apply to an organic goods certificate that was issued electronically, as there will not necessarily be a physical certificate to return.

Failure to comply with the requirement to return an organic goods certificate in the circumstances set out in section 2-19 will be a contravention of a civil penalty provision (subsection 76(2) of the Act).

## **CHAPTER 5—APPROVED ARRANGEMENTS**

### ***Part 1—Requirements for approval***

The purpose of the approved arrangement is to clearly describe the processes and practices which, when correctly applied by the holder of an approved arrangement, underpin the certification of organic products for export.

The Secretary may, on application by a person, approve applications for a proposed arrangement for organic goods certification operations. An approved arrangement is subject to certain conditions.

#### **5-1 Proposed arrangement for organic goods certification operations**

Subsection 151(1) of the Act provides that, on receiving an application under section 150 of the Act to approve a proposed arrangement, the Secretary must decide to approve the arrangement or refuse to approve the arrangement. Subsection 151(2) of the Act sets out the requirements that the Secretary must be satisfied with before approving a proposed arrangement. Paragraph 151(2)(d) of the Act allows the rules to prescribe additional requirements that must be satisfied.

Subsection 5-1(1) provides that for the purposes of paragraph 151(2)(d) of the Act, section 5-1 prescribes other requirements of which the Secretary must be satisfied before approving a proposed arrangement for organic goods certification operations. Approved arrangements provide the framework for the Secretary to have regulatory oversight of export operations and activities.

The requirements in section 5-1 are necessary to enable the Secretary to efficiently deal with an application for approval of an arrangement and decide if the proposed arrangement meets the requirements of the Act and importing country requirements.

The note following subsection 5-1(1) refers the reader to paragraph 151(2)(a) of the Act and section 5-16 of the Organic Goods Rules that it is also a requirement for the approval of proposed arrangements for organic goods certification operations that the applicant is a fit and proper person.

Subsection 5-1(2) provides that the proposed arrangement must record that the applicant for approval of the arrangement is committed to meeting the objects referred to in section 3 of the Act that are applicable to the operations and the prescribed organic goods covered by the arrangement and is also committed to complying with the requirements of the Act in relation to those operations.

Subsection 5-1(3) provides that the proposed arrangement must cover all aspects of the organic goods certification operations that are to be carried out.

Subsection 5-1(4) provides that the proposed arrangement must record details of:

- the organisational structure of the applicant;
- the system of controls implemented to ensure that the conditions prescribed by Part 2 of Chapter 5 of the Organic Goods Rules will be complied with in relation to the operations covered by the arrangement;
- any other system of controls to be implemented to ensure that there will be reasonable grounds for issuing an organic goods certificate in relation to the prescribed organic goods covered by the arrangement.

Subsection 5-1(5) provides that organic goods certification operations carried out in accordance with the proposed arrangement must be objective, fair, accurate and complete.

Subsection 5-1(6) provides that the matters required to be recorded in the proposed arrangement by paragraphs 5-1(4)(a) and (b) must be appropriate to ensure compliance with the requirements of the Act in relation to the operations covered by the arrangement.

## ***Part 2—Conditions of approved arrangement***

### **Division 1—Purpose of this Part**

#### **5-2 Purpose of this Part**

Section 152 of the Act deals with conditions imposed on an approved arrangement. Paragraph 152(1)(b) allows the rules to prescribe conditions that will apply to an approved arrangement (unless the Secretary decides the condition is not to be a condition of the approved arrangement).

Section 5-2 provides that Part 2 of Chapter 5 of the Organic Goods Rules (sections 5-2 to 5-11) prescribes, for the purposes of paragraph 152(1)(b) of the Act, the conditions of an approved arrangement for organic goods certification operations.

The first note following section 5-2 refers the reader to paragraph 157(1)(b) of the Act, which provides that the conditions also apply to an approved arrangement that has been renewed.

The second note following section 5-2 alerts the reader that failure to comply with a condition of an approved arrangement is an offence and the contravention of a civil penalty provision under section 184 of the Act.

### **Division 2—General**

Division 2 of Part 2 of Chapter 5 of the Organic Goods Rules (sections 5-3 to 5-5) imposes conditions on an approved arrangement relating to general requirements for organic goods certification operations.

### **5-3 Requirements of National Organic Standard must be met**

Section 5-3 provides that an approved arrangement must ensure that the requirements of the National Organic Standard are met in relation to the export operations carried out in relation to prescribed organic goods, and the prescribed organic goods themselves.

For example, if prescribed organic goods will be prepared in a particular way under the approved arrangement, then the approved arrangement must ensure its processes and procedures meet the requirements, as described by the National Organic Standard. This ensures that the organic goods for export meet Australia's mandatory export standard for organic and bio-dynamic goods.

The *National Organic Standard* stipulates minimum requirements for products placed on the market with labelling which states or implies they have been produced under organic or bio-dynamic systems. The production procedures are an intrinsic part of the identification and labelling of, and claims for, such products. In 2021, the National Organic Standard could be viewed on the Department's website (<http://www.awe.gov.au>).

### **5-4 Importing country requirements must be met**

Section 5-4 provides that an approved arrangement must ensure importing country requirements relating to the export operations carried out in relation to prescribed organic goods, and to the prescribed organic goods themselves, must be met. Ensuring all applicable importing country requirements are covered and met by the approved arrangement enables ongoing market access for prescribed organic goods that are exported from Australia.

### **5-5 Organic goods certificate must be in approved form**

Section 5-5 provides that an approved arrangement must ensure that organic goods certificates issued in accordance with the approved arrangement are in a form approved by the Secretary.

### **Division 3—Management practices**

Division 3 of Part 2 of Chapter 5 of the Organic Goods Rules (sections 5-6 to 5-11) imposes conditions on an approved arrangement relating to management practices for organic goods certification operations.

### **5-6 Operations must be objective, fair, etc.**

Subsection 5-6(1) provides that organic goods certification operations carried out in accordance with an approved arrangement must be objective, fair, accurate and complete.

Subsection 5-6(2) provides that the holder of an approved arrangement must ensure that organic goods certification operations carried out in accordance with the approved arrangement meet importing country requirements relating to organic goods certification.

The purpose of this section is to ensure transparency of Australia's export regulatory and policy framework to trading partners.

## **5-7 Management practices, organisational structure, resources and personnel**

Subsection 5-7(1) sets out the responsibility of the holder of an approved arrangement to ensure that the management practices, organisational structure, resources provided to carry out organic goods certification operations and personnel who carry out those certification operations, and the training those personnel receive, are appropriate to comply with the Act and importing country requirements relating to organic goods certification operations and prescribed organic goods.

Subsection 5-7(2) provides that the holder of the approved arrangement must also make a written record of the management practices, organisational structure, resources and personnel referred to in paragraphs 5-7(1)(a) to (c).

The first note following subsection 5-7(2) refers the reader to section 11-6 of the Organic Goods Rules, which provides that the required records must be kept by the holder for at least 5 years.

The second note following subsection 5-7(2) refers the reader to subsection 12(1) of the *Electronic Transactions Act 1999*, regarding the requirements for making electronic records.

## **5-8 Verification of compliance with the Act and other matters**

Section 5-8 details the matters that must be verified and the requirement for a record of verification to ensure compliance with the Act and the Organic Goods Rules. Verification is the continual review of process control systems to ensure regulatory requirements are met.

Subsection 5-8(1) provides that the holder of an approved arrangement must verify that carrying out organic goods certification operations in accordance with the approved arrangement will comply with the applicable requirements of the Act and conditions of sections 5-4 and 5-7 of the Organic Goods Rules. This verification is necessary to demonstrate compliance with the regulatory controls in the Act and Organic Goods Rules.

Subsection 5-8(2) provides that a written record must be made of the methods, procedures, tests, monitoring and other evaluations used to verify compliance with the matters referred to in subsection 5-8(1), and the results of the verification.

The note following subsection 5-8(2) refers the reader to subsection 11-6 of the Organic Goods Rules, which provides that the holder of the approved arrangement must retain each record made under subsection 5-8(2) for at least 5 years.

## **5-9 Action must be taken to address non-compliance**

Subsection 5-9(1) provides that corrective action must be taken to address any non-compliance or likely non-compliance with the matters referred to in subsection 5-8(1) when carrying out organic goods certification operations in accordance with an approved arrangement. Corrective action must also be taken to ensure that the non-compliance does not occur again, or that the likely non-compliance is avoided. The effectiveness of the corrective action must also be assessed by the holder of the approved arrangement.



Subsection 5-9(2) provides that the holder of the approved arrangement must make a written record of the corrective action taken to address non-compliance and ensure that the non-compliance does not recur or occur, and the assessment of the effectiveness of the corrective action.

The note following subsection 5-9(2) refers the reader to subsection 11-6 of the Organic Goods Rules, which provides that the holder of the approved arrangement must retain the required records for at least 5 years.

### **5-10 Internal audit and management review**

Section 5-10 sets out the requirements for internal audits and management reviews, and the records that must be made.

Subsection 5-10(1) provides that internal audits and management reviews must be conducted of the effectiveness of the management practices of the holder of an approved arrangement in ensuring compliance with the matters referred to in subsection 5-8(1). The purpose of the internal audits and management reviews are to measure the effectiveness of the management practices of the holder of an approved arrangement.

The note following subsection 5-10(1) explains that an internal audit under section 5-10 is not an audit under Part 1 of Chapter 9 of the Act.

Subsection 5-10(2) requires a record to be made of each internal audit and management review undertaken under subsection 5-10(1). The record must contain the results and each decision (if any) to take action, and each action taken, as a result of an internal audit or management review.

The note following subsection 5-10(2) refers the reader to section 11-6 of the Organic Goods Rules, which has the effect that the holder of the approved arrangement is required to retain the record for at least 5 years.

### **5-11 Secretary must be notified of critical non-compliance**

Subsection 5-11(1) provides that the Secretary must be notified immediately if any of the following people become aware of a critical non-compliance in carrying out organic goods certification operations in accordance with the approved arrangement:

- the holder of the approved arrangement;
- a person who manages or controls operations;
- a person who carries out the operations in accordance with the approved arrangement;  
or
- a person who conducts internal audits in relation to the operations as required by section 5-10.

Subsection 5-11(2) provides, for the purpose of subsection 5-11(1), a ***critical non-compliance*** is a failure, or combination of failures:

- to comply with the requirement for prescribed organic goods provided by the approved arrangement or the conditions of the approved arrangement;
- to meet applicable importing country requirements for prescribed organic goods; or
- that prevents an accurate assessment being made as to whether the requirements referred to in paragraphs 5-11(2)(a) and (b) are being complied with or met.

Subsection 5-11(3) provides that, if the holder of an approved arrangement gives a notification under subsection 5-11(1) orally, the holder must, as soon as practicable after giving the notification, also give a notification in writing.

The purpose of this section is to provide clarity around what may constitute a critical non-compliance and the steps a holder of an approved arrangement, or a person who works in operations related to the approved arrangement, must take to address critical non-compliance.

### ***Part 3—Renewal of approved arrangement***

Part 3 of Chapter 5 of the Organic Goods Rules (section 5-12) sets out requirements relating to the renewal of an approved arrangement for organic goods certification operations.

#### **5-12 Period within which application to renew approved arrangement must be made**

Section 155 of the Act deals with an application to renew an approved arrangement. Subsection 155(2) allows the holder of an approved arrangement to apply to the Secretary to renew the approved arrangement. Subsection 155(4) requires an application for renewal to be made within the period prescribed by the rules (paragraph 155(4)(a)) or a longer period if allowed by the Secretary (paragraph 155(4)(b)).

Section 5-12 prescribes the timeframe in which an application to renew an approved arrangement for organic goods certification operations must be made for the purposes of paragraph 155(4)(a) of the Act. The timeframe for such an application is 60 days starting on the day that is 180 days before the approved arrangement is due to expire. In other words, the application must be submitted when the approved arrangement is between 180 days and 120 days from expiring.

The purpose of providing a specific timeframe for allowing applications to be made is to give the Secretary sufficient time to consider an application before a decision is required to be made. Requiring a person to apply for renewal in the above timeframe ensures that the Secretary has sufficient time to decide the application before the approval expires.

The first note following section 5-12 provides an example of how section 5-12 works in practice. If an approved arrangement expires on 8 July in a year (other than a leap year), an application for renewal of an approved arrangement can be made at any time between 9 January and 10 March in that year.

The second note following subsection 5-12 explains to the reader that under subsection 155(1) of the Act, applications to renew approved arrangements will only need to be made for approved arrangements that have an expiry date.

#### ***Part 4—Variation of approved arrangement***

Part 4 of Chapter 5 of the Organic Goods Rules (section 5-13) deals with varying an approved arrangement for organic goods certification operations.

#### **Division 1—Variations by holder**

##### **5-13 Significant variations**

Section 164 of the Act lists the matters the holder of the approved arrangement and the Secretary must have regard to in considering whether a proposed variation, or the combined effect of two or more variations, is significant. Subparagraph 164(2)(c)(ii) allows the rules to prescribe kinds of variations.

Section 5-13 is made for the purposes of subparagraph 164(2)(c)(ii) of the Act and prescribes the following kinds of variations in relation to an approved arrangement for organic goods certification operations:

- a variation of the person who manages or controls the organic goods certification operations (including a person who may sign organic goods certificates in accordance with the approved arrangement);
- a variation that may adversely affect the accuracy or completeness of any organic goods certificates issued in accordance with the approved arrangement; and
- a variation that may adversely affect the Secretary's ability to accurately assess whether organic goods certificate issued in accordance with the approved arrangement are accurate and complete.

This will assist industry to determine which variations are significant and to reassure importing countries of the integrity of approved arrangements for organic goods.

The note following section 5-13 refers the reader to section 21 of the Act, which explains who is taken to be a person who manages or controls export operations.

#### **Division 2—Variations required by Secretary**

##### **5-14 Other reasons for requiring holder to vary approved arrangement**

Subsection 165(1) of the Act allows the Secretary to make certain variations of an approved arrangement on their own initiative (including by requiring the holder of the approved arrangement to vary an aspect of the approved arrangement).

Subsection 165(2) sets out the grounds on which the Secretary must be satisfied before varying an approved arrangement under subsection 165(1). Paragraph 165(2)(h) enables the rules to prescribe additional grounds for the variation of an approved arrangement.

Section 5-14 is made for the purposes of paragraph 165(2)(h) of the Act and provides that the Secretary may require the holder of an approved arrangement for organic goods certification operations to vary an aspect of the approved arrangement if the Secretary is no longer satisfied that compliance with the approved arrangement will ensure there will be reasonable grounds for organic goods certificates to be issued.

***Part 5—Obligations of holders of approved arrangements etc.***

**5-15 Other events of which the Secretary must be notified**

Subsection 186(1) of the Act requires the holder of an approved arrangement to notify the Secretary if certain events occur. Paragraph 186(1)(e) allows the rules to prescribe other kinds of events.

Section 5-15 is made for the purposes of paragraph 186(1)(e) of the Act and prescribes the following events in relation to an approved arrangement for organic goods certification operations:

- a person who was permitted to sign organic goods certificates in accordance with the approved arrangement ceases to do so;
- if the holder of the approved arrangement is a partnership – the partnership has been or is to be dissolved;
- if the holder of the approved arrangement is an unincorporated association – the association has been or is to be dissolved;
- if the holder of the approved arrangement is a trust – the trust has been or is to be terminated; and
- there is any other change in the persons who manage or control the organic goods certification operations.

Prescribing these events ensures that the Secretary is notified of any changes in personnel who carry out operations in relation to an approved arrangement for organic goods certification.

***Part 6—Fit and proper persons***

**5-16 Kinds of persons who are required to be fit and proper persons**

Section 372 of the Act sets out the requirements when determining whether a person is a fit and proper person. Subsection 373(1) of the Act allows the rules to prescribe the kinds of persons who are required, for the purposes of Chapter 5 of the Act, to be a fit and proper person.

Subsection 5-16(1) provides, for the purposes of subsection 373(1) of the Act, that section 5-16 prescribes the kinds of persons who are required, for the purposes of Chapter 5 of the Act (approved arrangements), to be fit and proper persons (having regard to the matters referred to in section 372 of the Act).

Subsection 5-16(2) provides, in relation to a proposed arrangement for organic goods certification operations, the kinds of persons are:

- the applicant for approval of the approved arrangement; and
- a person who would manage or control the organic goods certification operations, including a person who would be signing organic goods certificates in accordance with the approved arrangement.

The note following subsection 5-16(2) refers the reader to section 21 of the Act, for a person who is taken to be a person who would manage or control export operations.

Subsection 5-16(3) provides, in relation to an approved arrangement for organic goods certification operations, the kinds of persons are:

- the holder of the approved arrangement; and
- a person who manages or controls the organic goods certification operations, including a person who signs organic goods certificates in accordance with the approved arrangement.

The note following subsection 5-16(3) refers the reader to section 21 of the Act, for a person who is taken to be a person who manages or controls export operations.

Prescribing the kind of persons required to be a fit and proper person provides clarity for those performing organic goods certification operations as to whether they are required to meet the fit and proper person test.

### ***Part 7—Matters relating to applications***

Part 7 of Chapter 5 of the Organic Goods Rules (sections 5-17 to 5-19) deals with matters relating to applications under the Act concerning approved arrangements for organic goods certification operations.

#### **5-17 Application of this Part**

Section 5-17 sets out the applications under the Act to which the requirements in Part 7 of Chapter 5 of the Organic Goods Rules apply. These are:

- an application under section 150 of the Act to approve a proposed arrangement for organic goods certification operations; or
- an application under section 155 of the Act to renew an approved arrangement for organic goods certification operations; or

- an application under section 161 of the Act to approve a variation of an approved arrangement, or to vary the conditions of an approved arrangement, for organic goods certification operations; and
- an application that is taken to be made under subsection 166(2) of the Act to approve a varied approved arrangement for organic goods certification operations.

The first note following section 5-17 refers the reader to paragraphs 377(1)(a) and (b) of the Act, which requires that if the Secretary has approved a manner for making an application, the application must be in the approved manner, and if the Secretary has approved a form for the application, must include the information required by the form.

The second note following section 5-17 explains to the reader that the Secretary may accept any information previously given to the Secretary in connection with an application made under the Act as satisfying any requirement to give that information under subsection 377(1) of the Act.

### **5-18 Initial consideration period**

Section 379 of the Act details the requirements dealing with applications made under the Act. Subsection 379(3) allows the rules to prescribe the initial consideration period in which an application must be considered by the Secretary. If the Secretary does not make a decision on the application within the prescribed consideration period (and the initial consideration period is not renewed), the application is taken to have been refused.

Section 5-18 prescribes, for the purposes of subsection 379(3) of the Act, the initial consideration period for an application is 120 days. The initial consideration period may be extended in accordance with subsection 379(5) of the Act. The period of 120 days is appropriate, having regard to the matters the Secretary must consider in granting or refusing an application.

The note following section 5-18 explains that, under subsection 379(4) of the Act, the consideration period begins on the day after the day the Secretary receives the application.

### **5-19 Period within which request relating to application must be complied with**

Subsection 379(9) of the Act allows the Secretary to make a number of requests in relation to a relevant application, including requesting additional information or requesting consent to enter premises. Subsection 379(10)(b) allows the rules to prescribe a maximum period within which such a request must be complied with.

Section 5-19 prescribes, for the purposes of paragraph 379(10)(b) of the Act, a period of 6 months within which a request from the Secretary under subsection 379(9) in relation to an application must be complied with. The initial consideration period is indicative and can be extended under section 379 of the Act. The maximum period prescribed by this section is appropriate as it permits sufficient time to comply with matters provided in subsection 379(9) of the Act. The period provides certainty for industry.

## CHAPTER 8—OTHER MATTERS RELATING TO EXPORT

### *Part 1—Trade descriptions*

The aim of trade description compliance management is to ensure that an approved arrangement is effective and operates in accordance with the Act to ensure prescribed goods intended for export:

- meet requirements to have an accurate trade description;
- meet importing country requirements necessary to maintain market eligibility; and
- are traceable, can be recalled if required and their integrity is ensured.

#### **8-1 Purpose of this Part**

Section 248 of the Act allows the rules to make provision for and in relation to trade descriptions for prescribed goods that are intended to be exported.

Section 8-1 provides that Part 1 of Chapter 8 of the Organic Goods Rules (sections 8-1 to 8-4) is made for the purposes of section 248 of the Act, and makes provision for, and in relation to, trade descriptions for prescribed organic goods that are intended to be exported.

This ensures trade descriptions include relevant information and are used in a way that will ensure the identity of prescribed organic goods can be ascertained and not confused with any other goods. The term *trade description* is defined in section 246 of the Act.

The note following section 8-1 alerts the reader that a person who engages in conduct that contravenes a provision in Part 1 of Chapter 8 of the Organic Goods Rules may commit an offence or be liable to a civil penalty under section 249 of the Act.

#### **8-2 Trade description must be applied to prescribed organic goods that are intended to be exported**

Subsection 8-2(1) provides that the exporter of prescribed organic goods must ensure that a trade description, including the information referred to in subsection 8-2(2) is applied to the organic goods before they are exported.

The first note following subsection 8-2(1) refers the reader to section 246 of the Act for the definition of the term *trade description*.

The second note following subsection 8-2(1) refers the reader to section 247 of the Act for the definition of the term *applied* in relation to a trade description.

The third note following subsection 8-2(1) explains that a requirement under another instrument made for the purposes of section 432 of the Act for a trade description to be applied may also apply in relation to prescribed organic goods (see section 1-4 of the Organic Goods Rules).

Subsection 8-2(2) provides, for the purposes of subsection 8-2(1), the information that a trade description in relation to the prescribed organic goods must include is:

- the kind of organic goods and the net weight or number of units of the organic goods;
- if the organic goods did not originate in Australian territory, the country of origin of the organic goods;
- the name and address of the producer, manufacturer or exporter of the organic goods; and
- any information necessary to meet relevant importing country requirements relating to the organic goods.

The inclusion of this information is important to ensure the identity of the prescribed goods can be ascertained and provides assurance of the integrity of the goods to trading partners.

The first note following subsection 8-2(2) explains that the trade description must be accurate, and also refers the reader to Division 3 of Part 2 of Chapter 8 of the Act for offences and civil penalty provisions in relation to false trade descriptions.

The second note following subsection 8-2(2) refers the reader to the Australian Consumer Law (within the meaning of the *Competition and Consumer Act 2010*), which contains prohibitions on engaging in conduct that is misleading or deceptive or is likely to mislead or deceive, and prohibitions on making false or misleading representations about the goods (see sections 18, 29 and 151 of the Australian Consumer Law).

### **8-3 General requirements for trade descriptions**

The purpose of section 8-3 is to set out the general requirements for trade descriptions applied to prescribed organic goods.

Subsection 8-3(1) provides that trade descriptions must be accurate and unambiguous, legible, prominent, conspicuous, not obscured in any way and, to the extent practicable, be securely attached (unless the trade description is stated in any document relating to the organic goods) and tamper evident.

Subsection 8-3(2) requires information or pictures that are applied to prescribed organic goods, in addition to the trade description, to not be inconsistent with the information required under subsection 8-2(2) of the Organic Goods Rules.

This ensures that the prescribed organic goods meet the importing country requirements necessary to maintain market eligibility, are traceable, and can be recalled if required.

### **8-4 Trade descriptions in language other than English**

Subsection 8-4(1) provides that section 8-4 applies in relation to a trade description that is applied to prescribed organic goods if any part of the trade description is in a language (the *foreign language*) other than English.



Subsection 8-4(2) provides that the foreign language part of the trade description must not be inconsistent with the English part of the trade description.

Subsection 8-4(3) requires certain persons, on request by an authorised officer, to make available in writing to an authorised officer an English translation of the foreign language part of the trade description. Those persons are:

- an organic operator in relation to the prescribed organic goods; or
- the exporter of the prescribed organic goods; or
- the holder of an approved arrangement for the organic goods certification operations.

Subsection 8-4(4) requires the translation of the foreign language part of the trade description into English to be done by an appropriately qualified person who is not an employee of, and is independent of, the person who has been asked to make the translation available. This is necessary to independently verify that the foreign language part of the trade description is consistent with the English language part of the trade description.

## **CHAPTER 9—POWERS AND OFFICIALS**

### ***Part 1—Audits***

Part 1 of Chapter 9 of the Organic Goods Rules deals with matters relating to audits of export operations relating to organic goods.

Audits help retain wide access to overseas export markets by ensuring compliance with export requirements and importing country requirements. Under sections 266 and 267 of the Act, the Secretary may require an audit to be conducted of export operations carried out in certain circumstances, or in relation to the performance of functions under the Act. An audit under section 266 may be conducted by an authorised officer or an approved auditor, while an audit under section 267 may be conducted by a Commonwealth authorised officer or a person prescribed by the rules for the purposes of subsection 267(3) of the Act.

### **Division 1—General**

#### **9-1 References to audit in this Part**

Section 9-1 provides that a reference in Part 1 of Chapter 9 of the Organic Goods Rules to an audit is a reference to the following audits under Part 1 of Chapter 9 of the Act:

- an audit of export operations carried out in relation to prescribed organic goods;
- an audit in relation to the performance by certain persons of their functions or the exercise of their powers under the Act in relation to prescribed organic goods (see subparagraph 267(1)(a)(i) or (v) of the Act). These persons are third party authorised officers and any other person (other than a Commonwealth authorised officer or a State or Territory authorised officer) who performs functions or exercises powers under the Act; or
- an audit in relation to compliance by a third party authorised officer with any conditions they are subject to when performing their functions and exercising their powers under the Act in relation to prescribed organic goods. Such conditions could be contained in their instruments of authorisations to be, for example, a third party authorised officer.

### **Division 2—Conduct of audit etc.**

#### **9-2 Purpose of this Division**

Section 270 of the Act sets out matters relating to the conduct of audit under the Act. Subsection 270(4) of the Act allows the rules to make provision for and in relation to other matters relating to the conduct of audits, and the processes to be followed after an audit has been completed. Subsection 270(5) provides a non-exhaustive list of matters for which the rules may make provision under subsection 270(4).

Section 9-2 provides that Division 2 of Part 1 of Chapter 9 of the Organic Goods Rules (sections 9-2 to 9-4) is made for the purposes of subsections 270(4) and (5) of the Act and provides for, and in relation to, matters relating to the conduct of an audit, processes for

dealing with non-compliance failures relating to matters to which an audit relates, and audit reports. Audits ensure requirements are being met and export conditions are being complied with on an ongoing basis. This provides assurance to trading partners that relevant importing country requirements are being met and that organic or bio-dynamic claims are underpinned by an effective and appropriate regulatory system.

### **9-3 Manner in which audit must be conducted**

Section 9-3 requires an audit to be conducted as expeditiously as reasonably practicable and in a way that results in minimal interference to the activities under audit export operations, or performance of functions or the exercise of powers under the Act, to which the audit relates. This minimises the impact on industry, while still ensuring compliance with requirements is being verified.

### **9-4 Audit reports**

Section 9-4 sets out the requirements relating to audit reports, including how audit reports are to be provided. Audits ensure relevant requirements are being met and conditions are being complied with on an ongoing basis. The audit report ensures sufficient information is provided to enable an assessment of compliance with requirements.

Subsection 9-4(1) requires an audit report to be made in writing after the audit is completed or ends.

Subsection 9-4(2) requires the audit report to be given to the Secretary (in the approved manner) and to the relevant person for the audit within 14 business days after the audit is completed or ends.

The first note following subsection 9-4(2) explains that an auditor is an authorised officer for an audit that is covered by section 9-1, and refers the reader to section 12 of the Act for the definition of *auditor*.

The second note following subsection 9-4(2) refers the reader to section 269 of the Act for who is the *relevant person* for an audit.

## ***Part 2—Authorised officers***

### **9-5 Other grounds for giving direction to relevant person**

Subsection 305(1) of the Act specifies the person to whom an authorised officer may give a direction under the Act to deal with non-compliance, and the grounds for which the direction may be given. Item 8 of the table in subsection 305(1) allows the rules to prescribe additional persons and grounds for direction to those prescribed persons.

Section 9-5 is made for the purposes of item 8 of the table in subsection 305(1) of the Act and prescribes, specifically in relation to prescribed organic goods, additional persons who may be given a direction by an authorised officer to deal with non-compliance and the grounds under which a direction may be given. These are in addition to the directions that can be given in the table under subsection 305(1) of the Act. Persons that may be given directions to

deal with non-compliance are listed in column 1 of the table and the grounds for giving the directions are in column 2 of the table.

The additional persons to whom an authorised officer may give a direction are applicants for, and holders of, organic goods certificates for prescribed organic goods.

The relevant grounds for giving a direction to applicants for, and holders of, organic goods certificates generally relate to where:

- some or all of the organic goods do not comply, or are not likely to comply, with a requirement of the Act that applies in relation to the organic goods;
- some or all of the organic goods do not meet, or are not likely to meet, an importing country requirement relating to the organic goods; or
- a matter stated in, or to be stated in, the organic goods certificate for the relevant organic goods is not true and correct.

Issuing directions enables authorised officers to deal with prescribed organic goods that may affect Australia's trading reputation or may not meet importing country requirements.

## **CHAPTER 10—COMPLIANCE AND ENFORCEMENT**

### **10-1 Samples taken in exercising monitoring or investigation powers**

Section 326 of the Act triggers the standard suite of monitoring powers in Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) for the purposes of the Act. Section 327 provides for additional monitoring powers on top of the standard monitoring powers. Those additional monitoring powers are taken to be monitoring powers under Part 2 of the Regulatory Powers Act.

Section 329 of the Act triggers the baseline investigation powers in Part 3 of the Regulatory Powers Act for the purposes of the Act. Section 330 provides for additional investigation powers on top of the standard investigation powers. Those additional investigation powers are taken to be investigation powers under Part 3 of the Regulatory Powers Act.

One of the additional monitoring and investigation powers provided by paragraph 327(2)(a) and subsection 330(2) of the Act is the power to take, test and analyse samples of any thing on premises entered under Parts 2 or 3 of the Regulatory Powers Act.

Section 10-1 provides the requirements for a sample taken under paragraph 327(2)(a) or subsection 330(2) of the Act. The sample must be identified with a mark or tag and kept in the custody or control of an authorised officer until whichever of the following listed events occurs first. The listed events are where the sample is:

- destroyed during testing or analysis in accordance with section 412 of the Act;
- given to an analyst appointed under section 413 of the Act; or
- otherwise disposed of.

### **10-2 Dealing with things seized in exercising investigation powers**

Subsection 10-2(1) provides that section 10-2 applies if a place where operations are carried out to produce, prepare or transport prescribed organic goods for export, or where organic goods certification operations are carried out, has been entered under an investigation warrant and a thing was seized under the warrant.

Subsection 10-2(2) provides that the thing must be identified with a mark or tag and kept in the custody or control of an authorised officer until whichever of the following listed events occurs first. The listed events are that the thing is:

- returned in accordance with subsection 66(4) of the Regulatory Powers Act; or
- disposed of in accordance section 68 of the Regulatory Powers Act.

## CHAPTER 11—MISCELLANEOUS

### *Part 1—Records*

Retention of records is necessary for monitoring compliance with importing country requirements and government and industry standards. Records may also be relevant in relation to the traceability of goods if there is a need to recall those goods. Retaining records is essential for accountability and enables oversight of the export supply chain.

#### **11-1 Purpose of this Part**

Section 408 of the Act deals with requirements to retain records. Subsection 408(1) allows the rules to make provision for and in relation to requiring records to be retained by any of the following (relevantly):

- a person who carries out, or has carried out, export operations in relation to prescribed goods;
- a person who manages or controls, or who has managed or controlled, export operations at a registered establishment;  
  
a person who manages or controls, or has managed or controlled, export operations in accordance with an approved arrangement;
- a person who carries out, or has carried out, export operations in relation to non-prescribed goods in relation to which an application for a government certificate has been made or a government certificate has been issued.

Subsection 408(2) of the Act sets out a non-exhaustive list of matters that may be the subject of rules made under section 408 of the Act.

Section 11-1 provides that Part 1 of Chapter 11 of the Organic Goods Rules (sections 11-1 to 11-7) is made for the purposes of subsections 408(1) and (2) of the Act and makes provision for and in relation to requiring the retention of records in relation to prescribed organic goods.

The note following section 11-1 alerts the reader that a person may commit an offence of strict liability if the person is required to retain a record in accordance with a provision of Part 1 of Chapter 11 of the Organic Goods Rules and does not comply (subsection 408(3) of the Act).

#### **11-2 General requirements for records**

Section 11-2 sets out the general requirements for records required to be retained under Part 1 of Chapter 11 of the Organic Goods Rules in relation to prescribed organic goods.

Subsection 11-2(1) requires records to be in English, be dated, accurate, legible, and able to be audited. In addition, if the record was required to be in another language to meet importing requirements, it must also be kept in that other language (in addition to the English record).

Subsection 11-2(2) specifies that a person is taken to have complied with a requirement to retain a record under Part 1 of Chapter 11 of the Organic Goods Rules if they have retained a copy of a document where the original version was given to another person, as required, under a Commonwealth, State or Territory law or in accordance with ordinary commercial practice.

### **11-3 Organic goods certificates**

Subsection 11-3(1) requires a person to whom an organic goods certificate in relation to organic goods is issued under the Act, to retain the certificate in a secure place when it is not being used.

Subsection 11-3(2) provides that the requirement under subsection 11-3(1) does not apply in relation to an organic goods certificate that was issued by electronic means.

This ensures, for example, that an organic goods certificate is not misused or lost.

### **11-4 Records to be retained by exporter**

Section 11-4 requires an exporter of prescribed organic goods to retain the following records for at least 5 years starting on the day the record is made or when it comes into their possession:

- any document that is relevant to showing whether the exporter has complied, or is complying, with the applicable requirements of the Act; and
- any document that is relevant to showing whether importing country requirements have been, or are being, met in relation to the export of prescribed organic goods.

The note following subsection 11-4(1) notifies the reader that a reference to the Act includes a reference to the Organic Goods Rules (in accordance with section 1-6 of the Organic Goods Rules and subsection 432(1) of the Act).

### **11-5 Records to be retained by organic operator**

Section 11-5 requires an organic operator of prescribed organic goods to retain the following records for at least 5 years starting on the day the record is made or when it comes into their possession:

- any document that is relevant to showing whether the organic operator has complied, or is complying, with the applicable requirements of the Act; and
- any document that is relevant to showing whether importing country requirements have been, or are being, met in relation to the export of prescribed organic goods.

The note following subsection 11-5(1) notifies the reader that a reference to the Act includes a reference to the Organic Goods Rules (in accordance with section 1-6 of the Organic Goods Rules and subsection 432(1) of the Act).

## **11-6 Records to be retained by holder of approved arrangement**

Section 11-6 requires the holder of an approved arrangement for organic goods certification operations to retain each document:

- that is made by the holder or that comes into their possession; and
- that is relevant to showing compliance with the applicable requirements of the Act, the approved arrangement, and the conditions of the approved arrangement.

The note following subsection 11-6(1) provides the reader with an example—an approved certifying body must retain each record made under subsections 5-8(2) (verification of compliance), 5-9(2) (action to address non-compliance), and 5-10(2) (internal audits and management reviews) of the Organic Goods Rules.

Subsection 11-8(2) provides that these records must be retained for at least 5 years, starting from the day the record is made or when it comes into the holder's possession (as the case may be).

## **11-7 Records must not be altered or defaced during retention period**

Subsection 11-7(1) provides that records that are required to be maintained under Part 1 of Chapter 11 of the Organic Goods Rules must not be altered or defaced during the period they are required to be retained (the *retention period*).

Subsection 11-7(2) provides that records can be marked up or have notations added to them in accordance with ordinary practice.

Subsection 11-7(3) provides that where a record (the *original record*) is altered or defaced in accordance with ordinary practice, the person required to keep the record must also retain additional documents. These are additional documents that come into the person's possession or are created by the person, which shows how the original record was altered or defaced.

## ***Part 2—Samples***

### **11-8 Storage of samples**

Section 411 of the Act allows the rules to make provision for and in relation to the storage of samples that may be tested or analysed under the Act.

Subsection 11-8(1) is made for the purposes of section 411 of the Act and requires samples that may be tested or analysed under the Act, to be held under conditions that are unlikely to affect the result of any testing or analysis of the samples. This is necessary to preserve the integrity of samples that may be used for regulatory purposes.

Subsection 11-8(2) provides that the requirement in subsection 11-8(1) does not apply in the context of samples that may be tested under Chapter 10 of the Act (compliance and enforcement) or the Regulatory Powers Act. This exception is necessary to allow for samples to be tested and analysed in a manner that may destroy the sample.



### ***Part 3—Damaged or destroyed prescribed organic goods***

#### **11-9 Division of compensation between owners**

Section 419 of the Act allows the Secretary to approve the payment of a reasonable amount of compensation in respect of goods that are damaged or destroyed in the course of exercising powers or functions under the Act, if the Secretary considers it appropriate. Section 420 provides for matters relating to claims for compensation under section 419.

Subsection 420(2) of the Act sets out who can be paid compensation approved under section 419. Relevantly, paragraph 420(2)(b) provides that if there are 2 or more owners of the compensable goods, the compensation is to be divided among those owners as prescribed by the rules.

Section 11-9 is made for the purposes of paragraph 420(2)(b) of the Act and sets out how compensation is divided among 2 or more owners of damaged or destroyed prescribed organic goods. The total compensation payable must be divided among those owners according to their proportion of interest in the organic goods at the time of destruction or damage.

The Secretary must be satisfied the proportion represents the owner's interest at the time the goods were damaged or destroyed. This ensures each owner is paid an amount of compensation equal to their share of ownership that the Secretary considers is equitable in the circumstances and no owner is disadvantaged because of the destruction of, or damage to, the goods.

#### **11-10 Amount of compensation**

Subsection 420(5) of the Act provides that the amount of compensation payable under subsection 419(1) is a reasonable amount prescribed by, or determined in accordance with, the rules.

Section 11-10 is made for the purposes of subsection 420(5) of the Act and specifies the amount of compensation payable under subsection 419(1) of the Act to the owners of damaged or destroyed prescribed organic goods where the damage or destruction occurred in the course of performing functions or duties, or exercising powers, under the Act.

Subsection 11-10(1) provides that the amount of compensation payable for prescribed organic goods damaged by a person who is performing functions or duties or exercising powers under the Act is the lesser of either the amount the Secretary determines was the market value of the organic goods immediately before they were damaged, or the cost of repairing the damage.

The note following subsection 11-10(1) refers the reader to subsection 419(2) of the Act, which deals with when compensation is not payable in respect of goods that are damaged as a result of samples of the goods being taken during an audit or as permitted by subsection 327(2) or 330(2) of the Act.

Subsection 11-10(2) provides that the amount of compensation payable for destroyed prescribed organic goods is the amount the Secretary determines was the market value of the organic goods immediately before their destruction.

#### ***Part 4—Relevant Commonwealth liabilities***

##### **11-11 Circumstances in which relevant Commonwealth liability of a person is taken to have been paid**

Section 431 of the Act provides that a relevant Commonwealth liability of a person is taken to have been paid for the purposes of a specified provision of the Act in the circumstances prescribed by the rules.

Subsection 11-11(1) provides that section 11-11 is made for the purposes of section 431 of the Act and prescribes circumstances in which a relevant Commonwealth liability of a person is taken to have been paid for the purposes of certain provisions of the Act (a ***relevant provision***). The specified provisions of the Act are:

- paragraph 151(2)(b) (approval of proposed arrangement);
- paragraph 156(2)(b) (renewal of approved arrangement); and
- paragraph 161(3)(a) (variation of approved arrangement).

The note following subsection 11-11(1) refers the reader to the definition of ***relevant Commonwealth liability*** in section 12 of the Act.

Subsection 11-11(2) prescribes the circumstances that a relevant Commonwealth liability is taken to have been paid for the purposes of the provisions specified in subsection 11-11(1). These circumstances are where:

- the person, or another person, has given a written undertaking (a ***payment undertaking***) to the Secretary to pay the amount; and
- the undertaking includes a term that the relevant Commonwealth liability is to be reduced by the amount paid in accordance with the undertaking; and
- the Secretary accepts the undertaking.

When accepting an undertaking, the Secretary must consider the financial position of the person who gave the payment undertaking, the nature and likely cost of the relevant export operations, whether the person will be able to comply with the undertaking and, if applicable, meet the cost of the export operations and any other relevant considerations (paragraph 11-11(2)(c)).

This ensures that the Secretary is able to approve, among other things, a proposed arrangement even where the relevant Commonwealth liability of the applicant has person has not been paid, provided the requirements of this section are met.

Subsection 11-11(3) provides that payment undertaking may be given by a person in relation to their relevant Commonwealth liability or the relevant Commonwealth liability of another person.

Subsections 11-11(4) and (5) allow for a single undertaking to relate to 2 or more Commonwealth liabilities. Should a single undertaking relate to 2 or more Commonwealth liabilities, or a person has provided 2 or more undertakings in relation to different relevant Commonwealth liabilities, then the Secretary may then decide in which order payments are to be applied to reduce the outstanding Commonwealth liabilities.

Subsection 11-11(6) allows for a payment undertaking to be varied at any time by agreement between the Secretary and the person who gave the undertaking.

Subsection 11-11(7) allows the Secretary to agree to a variation to a payment undertaking if having considered the matters at paragraph 11-11(2)(c), the Secretary considers the variation appropriate, and the variation does not reduce the amount of the remaining Commonwealth liability.

The matters at paragraph 11-11(2)(c) are the same matters the Secretary must consider when deciding whether to accept the undertaking in the first place, namely the financial position of the person who gave the undertaking, the nature and likely cost of the relevant export operations, whether the person will be able to comply with the undertaking and, if applicable, meet the cost of the export operations and any other relevant considerations.

## CHAPTER 12—TRANSITIONAL PROVISIONS

The transitional provisions in Chapter 12 will ensure that:

- persons who have submitted applications under the old *Export Control (Organic Produce Certification) Orders* (old Export Control (Organic Produce) Orders) do not have to resubmit those applications for a decision or determination to be made;
- decisions or determinations made under the old Export Control (Organic Produce) Orders remain effective; and
- requests made by an authorised officer in relation to trade descriptions remain effective.

The transitional provisions in Chapter 12 are in addition to transitional provisions provided for in the *Export Control (Consequential Amendments and Transitional Provisions) Act 2020*, which provides transitional arrangements for matters that were under the old Export Control (Organic Produce) Orders and are now dealt with under the Act. This includes, for example, the transition of approved arrangements and organic goods certificates.

### *Part 1—Preliminary*

#### **12-1 Definitions**

Section 12-1 defines terms that are used in Chapter 12 of the Organic Goods Rules (sections 12-1 to 12-7).

The term ***approved certifying organisation*** is specifically defined as an organisation that was the holder of a QM certificate, which was in force under the old Export Control (Organic Produce) Orders immediately before the commencement time.

The term ***commencement time*** is specifically defined as the time when section 3 of the Act commences. This will enable readers to understand when the transitional provisions in Chapter 12 of the Organic Goods Rules apply.

The term ***old Export Control Law*** is specifically defined to refer to any of the following, as in force immediately before the commencement time:

- the *Export Control Act 1982* (the ***old Export Control Act***);
- regulations made under the old Export Control Act; or
- an order made under regulation 3 of the *Export Control (Orders) Regulations 1982*.

The old Export Control Act is repealed by the *Export Control (Consequential Amendments and Transitional Provisions) Act 2020*, which commences at the time when section 3 of the Act commences. The regulations made under the old Export Control Act and the orders made under regulation 3 will cease to have effect when the old Export Control Act is repealed.

The term ***old Export Control (Organic Produce) Orders*** is defined as the *Export Control (Organic Produce Certification) Orders* as in force immediately before the commencement time. The Orders will be repealed at the commencement of the Organic Goods Rules.

The term ***organic produce certification operations*** means operations carried out by an approved certifying organisation in relation to the issue or revocation of an organic produce certificate under the old Export Control (Organic Produce) Orders.

The term ***transition period*** refers to the 3 year period beginning at the commencement time.

## ***Part 2—Approved arrangements***

### **12-2 QM certificate in force immediately before commencement time**

Subsection 12-2(1) provides that section 12-2 applies in relation to a QM certificate (an ***old QM certificate***) that was in force under the old Export Control (Organic Produce) Orders immediately before the commencement time. A QM certificate is a certificate issued by an authorised officer to an organic certifying organisation or to an individual operator.

Subsection 12-2(2) provides that the QM system and the QM manual to which the old QM certificate related, as they existed immediately before the commencement time, continue in force after the commencement time:

- as if, read as one, they were an approved arrangement (a ***continuing approved arrangement***) for organic goods certification operations under Chapter 5 of the Act; and
- subject to the conditions, if any, to which the old QM certificate was subject immediately before the commencement time.

The first note following subsection 12-2(2) explains to the reader that the continuing approved arrangement will also be subject to the conditions provided by the Act and the conditions prescribed by Part 2 of Chapter 5 of the Organic Goods Rules.

The second note following subsection 12-2(2) explains that the continuing approved arrangement may be renewed, varied, suspended, or revoked under Chapter 5 of the Act.

Subsection 12-2(3) has the effect that, for the purposes of the application of the Act in relation to the continuing approved arrangement, the organisation to which the old QM certificate had been issued is the holder of the continuing approved arrangement.

Subsection 12-2(4) provides that, subject to subsection 12-2(6), if there was no expiry date for the old QM certificate, the continuing approved arrangement remains in force unless it is revoked under Part 6 of Chapter 5 of the Act or it is taken to have been revoked under section 188 of the Act.

Subsection 12-2(5) provides that, subject to subsection 12-2(6), if there was an expiry date for the old QM certificate, the continuing approved arrangement continues in force until that expiry date unless it is renewed under Part 3 of Chapter 5 of the Act on or before that date, or it is revoked under Part 6 of Chapter 5 of the Act or it is taken to have been revoked under section 188 of the Act on or before that date.

Subsection 12-2(6) provides that, unless the continuing approved arrangement has been renewed, or has ceased to have effect before the end of the transition period, the continuing approved arrangement ceases to have effect at the end of the transition period.

### **12-3 Secretary may direct holder to vary continuing approved arrangement**

Subsection 12-3(1) provides that section 12-3 applies to a continuing approved arrangement within the meaning of subsection 12-2(2).

Subsection 12-3(2) provides that the Secretary may direct the holder of the continuing approved arrangement, in writing, to vary the text of the continuing approved arrangement by replacing a reference to an old Export Control Law, or a provision of an old Export Control Law, with a reference to the Act or the Organic Goods Rules (as the case requires), or by making any other variation that the Secretary considers necessary to ensure that:

- the approved arrangement complies with subsection 150(2) (application for approval of proposed arrangement) of the Act and the requirements prescribed by Part 1 of Chapter 5 of the Organic Goods Rules; and
- carrying out export operations in relation to prescribed organic goods in accordance with the approved arrangement will ensure compliance with the requirements of the Act in relation to those export operations and that importing country requirements relating to those export operations and goods will be met.

The note following subsection 12-3(2) refers the reader to subsection 12-2(3) which provides that the holder of the continuing approved arrangement is the person to whom the old QM certificate had been issued.

Subsection 12-3(3) provides if the holder of the continuing approved arrangement is given a direction under subsection 12-3(2) to vary the text of the continuing approved arrangement, the holder must comply with the direction within 2 years after receiving it or within any further period (not exceeding one year) granted by the Secretary on application, in writing, by the holder.

Subsection 12-3(4) has the effect that both of the following:

- subparagraph 171(1)(h)(i) of the Act (grounds for suspension – the holder of the approved arrangement failed to comply with a direction given by an authorised officer or the Secretary); and
- subparagraph 179(1)(h)(i) of the Act (grounds for revocation – the holder of the approved arrangement failed to comply with a direction given by an authorised officer or the Secretary);

apply in relation to the approved arrangement as if the reference to a direction in those subparagraphs included a reference to a direction given to the holder of the approved arrangement under subsection 12-3(2).

The note following subsection 12-3(4) refers the reader to subparagraphs 171(1)(h)(i) and 179(1)(h)(i) of the Act which provides that the continuing approved arrangement may be suspended or revoked if the holder of the approved arrangement fails to comply with the direction.

#### **12-4 Application for QM certificate made but not decided before commencement time**

Subsection 12-4(1) provides that section 12-4 applies if an application had been made under the old Export Control (Organic Produce) Orders (suborder 3.02(1)) for the issue of a QM certificate for one or more kinds of organic produce and no decision had been made on the application before commencement time.

Subsection 12-4(2) has the effect that, after the commencement time:

- the application is taken to be an application made under section 150 of the Act to approve a proposed arrangement for organic goods certification operations; and
- the QM manual for the QM system to which the application relates, read as one, are taken to be the proposed arrangement to which the application relates.

The note following subsection 12-4(2) advises the reader that section 378 of the Act (which requires additional or corrected information in relation to an application to be given in certain circumstances) applies in relation to the application.

Subsection 12-4(3) provides that section 377 of the Act (requirements for applications), subparagraph 379(1)(a) and subsection 379(4) of the Act (dealing with applications) do not apply in relation to the application.

Subsection 12-4(4) provides that the consideration period for the application, for the purposes of section 379 of the Act, starts on the day the commencement time occurs.

The note following subsection 12-4(4) refers the reader to section 5-18 of the Organic Goods Rules which provides that the initial consideration period for the application is 120 days.

#### **12-5 Application for approval of modification of QM system made but not decided before commencement time**

Subsection 12-5(1) provides that section 12-5 applies in relation to a QM system that continues in force under subsection 12-2(2) as if it were a continuing approved arrangement if, before the commencement time:

- an application had been made under the old Export Control (Organic Produce) Orders (suborder 3.11) for approval of a modification of the QM system; and
- no decision had been made on the application before the commencement time.

Subsection 12-5(2) has the effect that, after commencement time, the application is taken to be an application made under paragraph 161(1)(b) of the Act to approve a significant variation of the continuing approved arrangement.

The note following subsection 12-5(2) advises the reader that section 378 of the Act (which requires additional or corrected information in relation to an application to be given in certain circumstances) applies in relation to the application.

Subsection 12-5(3) provides that section 377 of the Act (requirements for applications), paragraph 379(1)(a) and subsection 379(4) of the Act (dealing with applications) do not apply in relation to the continuing approved arrangement.

Subsection 12-5(4) provides that the consideration period for the application for the purposes of section 379 of the Act, starts on the day the commencement time occurs.

The note following subsection 12-5(4) refers the reader to section 5-18 of the Organic Goods Rules which provides that the initial consideration period for the application is 120 days.

### **12-6 Corrective action request given before commencement time**

Subsection 12-6(1) provides that section 12-6 applies to an organisation that is the holder of a continuing approved arrangement under subsection 12-2(3).

Subsection 12-6(2) provides if the holder had been given a corrective action request under the old Export Control (Organic Produce) Orders (suborder 3.17(1)) in relation to the QM certificate to which the continuing approved arrangement relates and before the commencement time:

- the request had not been complied with; and
- the QM certificate had not been revoked under the old Export Control (Organic Produce) Orders (suborder 3.17(3));

then the holder must comply with the request on or before the date mentioned in the request.

Subsection 12-6(3) provides that if the holder fails to comply with the request on or before the date mentioned in the request, the Secretary may revoke the continuing approved arrangement under paragraph 179(1)(h) of the Act as if the failure to comply with the request were a failure to comply with a direction given to the holder by an authorised officer or the Secretary.

### **12-7 Modifications of the Act relating to applications**

Subsection 12-7(1) provides that paragraph 150(2)(a) of the Act (applications for approval of proposed arrangement) has effect in relation to an application to which section 12-4 of the Organic Goods Rules applies as if the words “or be a record of information from which a written document or documents can be produced” were inserted after the words “in one or more documents”.



Subsection 12-7(2) provides that paragraph 377(2)(b) of the Act (requirements for applications) has the effect in relation to an application to which section 12-4 or 12-5 of the Organic Goods Rules applies as if the words “(including by access to a computer database or data compiled electronically from a database)” were added after the words “made available to the Secretary for evaluation”.

The note following subsection 12-7(2) explains to the reader that rules may provide that provisions of the Act have effect with any modifications prescribed by the rules (subitem 92(3) of Schedule 3 to the *Export Control (Consequential Amendments and Transitional Provisions) Act 2020*).

**Statement of Compatibility with Human Rights**

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

***Export Control (Organic Goods) 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*.

**Overview of the legislative instrument**

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

- In conjunction with the *Export Control Act 2021* (the Act), it implements an improved regulatory framework for the export of prescribed goods, reducing complexity and strengthening compliance;
- It reduces duplication in the regulatory framework and provides streamlined and consolidated export-related requirements;
- It imposes regulatory controls on organic goods that are to be exported from Australia so that these products meet trade requirements and maintain overseas market access; and
- It provides a scheme of transitional and savings provisions that will preserve accrued rights and liabilities under the *Export Control (Organic Produce Certification) Orders*. The provisions allow for decisions and approvals under the former Orders to continue, where applicable, under the Organic Goods Rules.

**List of human rights engaged**

The Organic Goods Rules engage the following rights:

International Covenant on Civil and Political Rights (ICCPR)

- Article 17 of the ICCPR – Right to protection from arbitrary interference with privacy;
- Article 22 of the ICCPR – Right to freedom of association.

## **Assessment of Compatibility with Human Rights**

### **Right to protection from arbitrary interference with privacy (Article 17 of the ICCPR)**

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. The right to privacy can be limited to achieve a legitimate objective where the limitations are lawful and not arbitrary. For an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' as implying that any interference with privacy must be proportionate to a legitimate end and be necessary in the circumstances. While the United Nations Human Rights Committee has not defined 'privacy', the term is generally understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

Chapters 2, 5, 8, 9 and 11 of the Organic Goods Rules require a person to provide information or documents. Requiring persons to provide information or documents may incidentally require the provision of personal information. The collection, use, storage, and disclosure of personal information may engage the right to freedom from arbitrary or unlawful interference with privacy.

The collection of this information is necessary for the legitimate objective of regulating the export of prescribed organic goods to maintain overseas market access, including assessing the suitability of a person to participate in export operations and to ensure those persons continue to comply with the legislative requirements in the Organic Goods Rules. A person who provides information in an application 'opts in' to the regulatory system. A person who has opted in should expect that a certain amount of personal information about the way their business operates will need to be provided to the Secretary to gain the benefits of that system.

#### ***Fit and proper person test***

Participation in Australia's agricultural export markets is not a right; it is a privilege granted by the Australian Government to suitable persons. A person seeking the benefits of participating in those markets does so in the knowledge that the existence of certain prior conduct or associations may result in the rejection of an application, or suspension, variation or revocation of a registration or other approval.

The Organic Goods Rules requires that an applicant for approval of a proposed arrangement for organic good certification operations, a person who would manage or control the organic goods certification operations, the holder of an approved arrangement for organic goods certification operations, and a person who manages or controls the organic goods certification operations, must be fit and proper persons.

The Secretary can apply the fit and proper person test. Persons are required to notify the Secretary if they have been convicted of certain specific offences or ordered to pay a pecuniary penalty in relation to certain specified contraventions. When determining whether a person is a fit and proper person, the Secretary may consider the nature of the offences, the

interest of the industry or industries relating to the person's export business, and any other relevant matter. While these factors are considered by the Secretary when applying the fit and proper persons test, they may not automatically give rise to a negative finding. Rather, it will be up to the Secretary to consider whether a person is fit and proper after having regard to these matters.

A fit and proper person test can be used to consider a person's history of compliance with legislation and then deny approval to register an establishment, or to suspend, revoke or alter the conditions on an existing approved arrangement. This ensures that persons or companies are suitable entities to be responsible for the appropriate management of relevant risks.

Enabling the Secretary to take into account a broad range of matters is important when considering whether a person is a fit and proper person because such a person might be involved in the export of a wide range of goods, with varying degrees of risk. This ensures that the integrity of the regulatory framework is not compromised by limiting conduct that can be considered in this context. As the agricultural export sector is regularly changing and evolving, this is reasonable and proportionate and ensures that the current level of market access can be maintained and possibly even increased in future.

Australia's access to markets and the ability to export agricultural goods depends on its trading reputation and the confidence of its trading partners. To the extent these requirements engage Article 17 of the ICCPR, any interference with privacy is not arbitrary as the requirement to provide information, including for the fit and proper person test, is necessary, reasonable and proportionate for the legitimate objective of ensuring that persons who are involved in exporting goods from Australian territory are trustworthy and demonstrate the required integrity necessary to uphold Australian law and protect our trading reputation. In addition, any information collected under the Organic Goods Rules and the Act is protected from unauthorised disclosure by confidentiality provisions in sections 388 to 397 of the Act.

### **Right to freedom of association (Article 22 of the ICCPR)**

Article 22(1) of the ICCPR protects the right to freedom of association with others. Article 22(2) permits limitations which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This right may be engaged by the requirement to be a fit and proper person which incorporates an assessment of a person's associates.

### ***Fit and proper person test***

Business associates and others may have influence over the primary person such that they may be able to compel them to undertake illegal activities on their behalf, through inducement or other means. Putting a 'fit and proper person' test in place will notify the Department of any associates of the primary person who may pose a risk and allow them to take action to ensure Australia's agricultural exports are not compromised.

The associates' test is designed to ensure that an applicant for a regulatory control under the Act (e.g. approved arrangements) is a suitable person to be responsible for managing relevant risks, considering potential consequences of non-compliance. It is appropriate for

associates to be included in the consideration to ensure that the conduct of all types of entities may be considered where the Secretary considers it appropriate to do so.

While the fit and proper person test could be seen to restrict the associations a relevant person may have, it does not prevent or prohibit a person from holding any particular associations. Rather, holding certain association may mean that a person's circumstances are not compatible with participation in Australia's agricultural export markets. Australia's agricultural export industries are underpinned by trust. Importing country requirements relating to agricultural goods will often relate to the preservation of public health, with non-compliance representing a risk to Australia's participation in those markets. Consideration of a person's associations is necessary because associates may leverage their personal relationship with the primary person to engage in non-compliant export activities. This may pose a risk to public health and safety. Therefore, to the extent that the fit and proper person test limits the right to freedom of association, it is permissible under Article 22(2) as it is for the purpose of protecting public health.

### **Conclusion**

The Organic Goods Rules is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Andrew Edgar Francis Metcalfe AO**

**Secretary of the Department of Agriculture, Water and the Environment**