

## FOOD STANDARDS AGENCY AND FOOD STANDARDS SCOTLAND JOINT SECTION 42 ADVICE – UK-AUSTRALIA FREE TRADE AGREEMENT

### 1.0 Introduction

1.1 As the UK's Food Safety Authorities with a statutory duty to protect food and feed safety<sup>1</sup> and consumers' interests in relation to food, the Food Standards Agency (FSA) and Food Standards Scotland (FSS) were asked by the Department for International Trade (DIT) on the 8<sup>th</sup> March 2022 to provide joint advice on the UK-Australia Free Trade Agreement (FTA), as signed on the 16<sup>th</sup> December 2021. Specifically, FSA and FSS were asked, in accordance with section 42(4) of the Agriculture Act 2020, to provide advice on whether, or to what extent, the measures in the UK-Australia FTA are consistent with the maintenance of UK levels of statutory protection for human health for the areas within FSA/FSS statutory remit. This response represents our advice to DIT's request.

1.2 In summary, the FSA/FSS advice is that:

- The UK-Australia FTA maintains existing food safety statutory protections in accordance with retained law.
- No changes to the UK food safety regulatory system are required to give effect to this FTA at the point of entry into force.
- The FTA text preserves the regulatory autonomy of the UK Government and devolved administrations with respect to matters of food safety, and will not prejudice any future decisions in this regard, which will continue to be taken by health ministers across the UK informed by transparent advice on science and evidence from the FSA and FSS. This is key to upholding statutory protections in the future.

### 2.0 Scope of FSA and FSS advice

2.1 Whilst recognising that human health issues related to food go wider than food safety, on this occasion the FSA and FSS are providing advice on food safety statutory protections only. The advice therefore does not cover broader public health statutory protections, a separate assessment for which will be included in the UK Government's main report. Nor does the advice cover statutory protections for non-safety food standards which are out of scope of this advice. The FSA/FSS will consider our approach on broader human health issues related to food for future requests for advice under section 42(4) of the Agriculture Act 2020.

2.2 UK levels of statutory protection are defined in the Agriculture Act 2020 as being the levels of protection provided for under any legislation which has effect in, or in any part of, the United Kingdom. Food safety is a devolved competence, meaning that any extant food safety legislation that has legal effect in Wales, Scotland, England or Northern Ireland (NI) is relevant to this consideration. This includes national and retained EU law applicable within Great Britain, as well as national and EU law currently applicable within Northern Ireland by virtue of the Northern Ireland Protocol. All references to UK food safety requirements in this advice relate to this food safety legislation, which has been taken into account in the joint FSA/FSS advice below.

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<sup>1</sup> For the purposes of this advice, any reference to food safety includes feed safety where it relates to human health.

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### 3.0 Consumer and stakeholder interest

- 3.1 In writing this advice, it is important to first set out the relevant wider context in relation to consumer views and stakeholder concerns. Further to the request received from DIT, the FSA and FSS therefore invited submissions on food safety statutory protections from interested parties, including those who represent the interests of consumers. With thanks to respondents, relevant views received as part of this consultation process have been cited in our advice.
- 3.2 Data from recent FSA and FSS consumer engagement surveys has consistently shown that consumers have significantly greater levels of concern about food produced outside the UK than within the UK. In the latest wave of the FSA's 'Food and You2'<sup>2</sup> survey, which collected views from consumers in England, Wales and Northern Ireland between April and June 2021, 75% of participants had concerns about food outside the UK being safe and hygienic compared to 54% for food within the UK; 71% were concerned about food produced outside the UK being what it says it is, compared to 51% for food coming from within the UK. The most recent wave of FSS' Food in Scotland survey, from December 2021<sup>3</sup>, found that 70% of respondents indicated they were concerned about food standards and the quality of food we eat, and FSS consumer research conducted in September 2020 ahead of EU Exit<sup>4</sup> found 77% of respondents were either 'quite or very concerned' about a drop in standards post 31<sup>st</sup> December 2021. A nationally representative FSA poll conducted in November 2020<sup>5</sup> found that almost eight in ten people (78%) supported the UK keeping its current food standards, even if food was more expensive and less competitive in the global market.
- 3.3 In June 2021, Which?<sup>6</sup> conducted research with a nationally representative group of 3,263 consumers to understand their views and attitudes towards international trade. Which? also reported high levels of support for maintaining UK food safety standards. Of the respondents surveyed they reported that 91% thought that the UK government should make sure that when agreeing trade deals the same standards relating to safety and health should apply to imports as to food produced in the UK. In their response to our engagement with interested parties, Which? cited that *"it is important that the FTA does not undermine the UK's ability to regulate in the way it needs to in the future – whether for food safety or in order to uphold other consumer interests in relation to food"*.
- 3.4 It is clear from this evidence that maintaining food safety standards in trade deals is important to consumers and stakeholders and existing statutory protections, such as the right to regulate for levels of protection appropriate to UK consumers based on science and evidence, and the right to take proportionate precautionary action on a provisional basis to protect consumers, will play a key role in how those standards are maintained in future. FSA and FSS will continue to provide science and evidence-based advice to ministers that takes into account consumers' wider interests in relation to food so that they can have confidence that food is safe and what it says it is as the UK Government takes forward its independent trade policy. Stakeholders have also been clear on the importance of having robust scrutiny arrangements in place for assessing the impacts on human health.

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<sup>2</sup> [Food and You 2 - Wave 3 | Food Standards Agency](#)

<sup>3</sup> [Food in Scotland Consumer Tracker Survey Wave 13 | Food Standards Scotland](#)

<sup>4</sup> [FSS Brexit survey](#)

<sup>5</sup> [Food in a Pandemic | Food Standards Agency](#)

<sup>6</sup> [Which? consumer priorities and trade deals Dec 21](#)

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### 4.0 Overview

- 4.1 The preamble to the UK-Australia FTA legal text sets the tone for a trading agreement which is underpinned by some important themes in the context of maintaining statutory protections for food safety. Namely, the Parties recognise each other's respective autonomy and sovereign right to regulate within their territories in order to achieve legitimate public policy objectives, including the protection of public health.
- 4.2 The initial provisions in Chapter 1 support this theme by setting out that the Parties affirm existing rights and obligations under the World Trade Organisation (WTO). In a food safety context, these basic international rights allow the UK Government and devolved administrations to continue to take proportionate unilateral measures necessary to protect the health of consumers across the UK.
- 4.3 Given that regulatory autonomy is underlined as important to both Parties in this FTA, it follows that no new permissions or authorisations were agreed 'up-front' for agri-food products that are not already authorised for import to the UK or Australia. In order to access each other's market for any new agri-food exports, each Party must submit an application via each other's respective market access processes. In the UK, for products of animal origin (POAO), such applications are received, coordinated and risk assessed by the Defra-led UK Office for Sanitary and Phytosanitary (SPS) Trade Assurance, with input from FSA/FSS, Defra agencies and other government departments as appropriate. Access for any new agri-food products would only be permitted following a robust assessment to confirm a trading partner is able to meet UK import requirements. Such assessments would also look at food production standards in the exporting country, which could differ without impacting on food safety. The FTA does not include provisions that affect the existing UK ban on certain growth promoters used in meat production such as hormone treated beef, which applies to both domestic and imported foods.
- 4.4 In the same way, should an Australian business wish to market a new product in Great Britain (GB) such as a novel food, food additive or genetically modified food, an application would need to be made through the regulated products application service and undergo risk analysis by FSA/FSS to determine the safety of the product before it could be authorised for use as an ingredient in foods imported into GB.<sup>7</sup>
- 4.5 Negotiation of this FTA will not require any new food safety legislation, nor any changes to domestic regulatory food safety policy to be brought forward by the FSA or FSS in order to meet the obligations at the point of entry into force.
- 4.6 Pesticide Action Network UK has concerns that "*the FTA might facilitate trade in foodstuffs containing pesticide residues that are not currently allowed to appear in UK food because they pose a risk to human health*" and this concern is shared by Sustain. Australia already exports a range of agri-food products to the UK. In 2019, for example, Australia exported 9,112 tonnes of meat and meat offal, 12,808 tonnes of vegetables and certain roots and tubers, 43,577 tonnes of animal / vegetable fats and oils, 7,345 tonnes of cereals and 236,638 tonnes of beverages, spirits and vinegar<sup>8</sup>. Crucially, food and feed imports from

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<sup>7</sup> [GB Regulated Products Application Service](#)

<sup>8</sup> UK Trade Info from HMRC (<https://www.uktradeinfo.com/>), as summarised in the FSA trade tool: <https://foodstandards.shinyapps.io/TradeDataVis/>

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Australia continue to have to meet UK food safety requirements, including, for example, complying with any existing prohibitions and maximum limits for pesticide residues (MRLs) and veterinary medicines, in addition to any other maximum levels for contaminants etc. Both under WTO terms, and under the terms of this FTA, nothing would prevent the UK Government or devolved administrations from maintaining or introducing science and evidence-based measures, or from taking provisional action on the basis of pertinent information, for imported food and feed which would deviate from international standards or guidelines in order to meet the level of food safety protection deemed appropriate for consumers across the UK.

- 4.7 Products of animal origin imported to the UK from Australia only do so on the basis that Australia is listed as an approved country by the UK and listed for that particular commodity. Such commodities must come from establishments that meet UK requirements. The listing process is now managed by the UK Office for SPS Trade Assurance and involves, amongst other things, audit and assessment of a country's system of official controls and the country's residue monitoring plan. Further assurances that consignments are meeting UK import requirements are provided by the official certification accompanying the consignment that attests that the POAO has been produced to UK standards. Consignments are subject to official controls at the UK border and a percentage are subject to physical checks which may include testing for contaminants such as heavy metals or veterinary residues. Nothing in the FTA removes any of these requirements and assurances with regards to ongoing trade.

### 5.0 Relevant chapter analysis

5.1 In assessing the maintenance of existing statutory protections for food safety, the following chapters are particularly relevant:

- Chapter 5 – Customs Procedures and Trade Facilitation
- Chapter 6 – Sanitary and Phytosanitary (SPS) Measures
- Chapter 7 – Technical Barriers to Trade (TBT)
- Chapter 25 – provisions on antimicrobial resistance (AMR)

### 5.2 Chapter 5 – Customs Procedures and Trade Facilitation

There are several articles in this chapter which contain provisions relating to the customs procedures for goods, in particular articles 5.7 on Expedited Shipments, article 5.8 on Release of Goods and article 5.20 on Perishable Goods. In all cases, exemptions have been included in the text which ensures that where SPS checks by Port Health (including food safety import checks) are required, these can still be conducted as they are now without any time constraints. This means that where documentary, identification or physical checks including sampling and testing, is required for the purposes of public health protection, the release times stipulated in these articles would not apply.

Article 5.9 on risk management is also pertinent to official controls carried out at Border Inspection Posts by Port Health Authorities. Nothing in the article prevents Port Health from continuing to conduct risk-based imported food and feed checks and surveillance as is the case now.

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### 5.3 Chapter 6 – Sanitary and Phytosanitary (SPS) Measures

The SPS chapter text agreed with Australia is of fundamental importance when it comes to reserving the UK's right to maintain existing laws and regulations to protect human life and health, including food safety. It is also important that the agreed text has not impinged on the way food law regulation and enforcement is implemented in the UK – the following key articles outline how the text achieves this:

#### 5.3.1 Article 6.4 Affirmation of the SPS Agreement

Affirmation of rights and obligations under the WTO SPS Agreement means that the Parties recognise that WTO terms have primacy when it comes to the application of measures that protect human health and life. Nothing in the SPS Chapter with Australia will affect that and this is significant as the WTO SPS Agreement provides both Parties with important rights that allow us to respectively set our own level of public health protection appropriate to the population in line with the relevant science and evidence, socio-economics and technical feasibility (Art 5, WTO SPS Agreement<sup>9</sup>).

#### 5.3.2 Article 6.5 Science and Risk Assessment

The article on science and risk assessment reaffirms the importance of ensuring that SPS measures are based on scientific principles (in line with Art 2(2) of the WTO SPS Agreement). It also directly references the article 5 WTO provisions on risk assessment which includes the ability to adopt provisional SPS measures on the basis of pertinent information where relevant scientific evidence is insufficient. These international rules underpin the UK's own framework for food safety regulation – for example, UK general food law includes a precautionary principle that can be adopted where the possibility of harmful effects on health is identified but scientific uncertainty persists. Nothing in this article restricts the way in which the FSA and FSS carry out risk analysis for food and feed safety issues.

#### 5.3.3 Article 6.7 Equivalence

Article 4 of the WTO SPS Agreement on Equivalence<sup>10</sup> obliges WTO Members to accept the SPS measures of other Members as equivalent even if these measures differ from their own if the exporting Member objectively demonstrates that its measures achieve the importing Member's appropriate level of protection. The WTO SPS Committee developed specific guidance to help Members implement this article<sup>11</sup>. Such equivalence determinations are trade facilitative and can result in smoother trade in the products affected by the laws and regulations that have been deemed as equivalent.

No new equivalence determinations for agri-food products were agreed as part of this FTA. High level principles re-affirming WTO terms on the approach each Party will have to future equivalence determinations were agreed, along with text which leaves the door open for the Parties to establish a more detailed, mutually agreeable process by which equivalence determinations can be made in the future. How any future equivalence mechanism might work in practice will be key, and FSA and FSS would be involved in any future discussions on such a process. FSA and FSS would also play

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<sup>9</sup> [The WTO Agreement on the Application of Sanitary and Phytosanitary Measures](#)

<sup>10</sup> Equivalence is defined by the WTO as “the state wherein sanitary or phytosanitary measures applied in an exporting country, though different from the measures applied in an importing country, achieve, as demonstrated by the exporting country and recognized by the importing country, the importing country's appropriate level of sanitary or phytosanitary protection”.

<sup>11</sup> [WTO SPS Committee's Decision on Equivalence](#)

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a key role alongside other government departments in risk assessing any future equivalence requests and recommending any special conditions of trade (which could include particular requirements for processing, packaging etc.) that may be required to meet the UK's level of protection with regard to food safety. This is important because, as Which? has highlighted in its response – *“how equivalence is applied will be significant because many of the standards that matter to consumers are about how the level of protection is achieved, i.e. the production process, not merely the end result”*. Such determinations would also not restrict the UK from making changes to our SPS regime in future in the interests of consumers across the UK, in which case any determination would be reviewed. Importantly, the final decision on equivalence always rests with the importing party.

### 5.3.4 Article 6.8 Trade Conditions

Nothing in this article affects the ability of FSA and FSS to carry out its role and develop risk management advice and implement food law as we do now.

### 5.3.5 Article 6.9 Audit and Verification

Whether in the context of UK audit in Australia or hosting an inward mission from Australia here in the UK, this article sets a helpful framework for conducting audits with a view to minimising burdens on the Parties and ensuring that the parameters of an audit are clearly communicated and agreed in advance. Nothing in the article prevents the UK from conducting an audit where justified for the purpose of seeking assurances on Australia's food safety control systems, nor does it prevent the UK from taking emergency food safety measures as appropriate (see para 5.3.8 below).

### 5.3.6 Article 6.10 Certification

This article preserves UK's right to require official certification of imported foods from Australia where deemed necessary in order to receive assurances on a consignment-by-consignment basis that UK import requirements have been met. This is, however, only to the extent necessary to meet the objective of laws and regulations applicable within the UK – this is in keeping with the proportionate and risk-based approach taken to food safety regulation in the UK.

### 5.3.7 Article 6.11 Import checks and fees

This article does not constrain the UK's right to carry out risk-based import checks and to take appropriate enforcement action where non-compliance is identified, in line with existing UK laws and regulations.

### 5.3.8 Article 6.12 Emergency SPS Measures

The emergency measures text respects both Parties' right to take rapid action to protect human life and health and lays down some parameters for how the Parties would engage in such instances and for conducting science-based reviews to justify either continuance or lifting of the measures.

### 5.3.9 Article 6.14 Transparency, Notification and Information Exchange

This article obliges Australia to promptly notify the UK of a significant food safety issue related to a good traded with the UK and to share information in a timely manner which may support our response. This complements the good relationships the FSA and FSS already have with the Emergency Contact Points in the Australian Food Safety Authority and as members of INFOSAN – International Food Safety Authorities Network. Similarly, information relating to any significant food safety issue affecting NI would additionally be communicated via the EU Rapid Alert System for Food and Feed, as NI is within the EU regulatory zone.

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### 5.3.10 Article 6.16 Committee on SPS Measures

This article establishes a forum through which UK and Australia can consider any matter related to the SPS Chapter. This includes, for example, periodically reviewing the implementation of the chapter by the Parties, exchanging relevant information and identifying opportunities to work collaboratively. Notably, the Committee's activities may include discussion of proposed SPS measures being considered by either the UK or Australia, agreement of a procedure for equivalence assessments, as well as resolution of SPS issues that affect trade between the two countries. It is important to highlight that this forum, along with any technical working groups established by the SPS Committee, will be working to resolve trade issues within the confines of the existing regulatory frameworks. These committee structures are not intended to replace or usurp the separate decision making mechanisms and processes through which trading partners, including Australia, can, for example, apply to export a new product to the UK, or be formally consulted on proposed new regulations etc. The forum will help signpost to these dedicated channels and facilitate communications between us. This is crucial to the fundamental commitment made by both sides in this FTA to recognise each other's respective autonomy and sovereign right to regulate within their territories and will be key to upholding statutory protections in the future.

### 5.3.11 Article 6.18 Non-Application of Dispute Settlement

Non-application of dispute settlement to the SPS chapter means that neither the UK nor Australia have recourse to dispute settlement under the FTA for SPS matters. Any dispute would instead need to be raised via WTO mechanisms as is the case now. However, Parties may make use of the FTA provisions on technical consultation to try to resolve issues bilaterally.

## 5.4 Chapter 7 – Technical Barriers to Trade (TBT)

The TBT chapter is relevant to the maintenance of statutory protections in relation to human health, including food safety, insofar as it preserves the UK's right to regulate in line with international WTO rights and obligations and with respect to specific marking and labelling provisions, as detailed below.

### 5.4.1 Article 7.4 Affirmation of the TBT Agreement

Affirmation of rights and obligations under the WTO TBT Agreement means that the Parties recognise the primacy of WTO terms in applying technical regulations, standards and conformity assessment procedures. The agreed text therefore re-affirms the right of the UK to implement technical measures to achieve legitimate policy objectives, including the protection of human health and food safety (Art 2, WTO TBT Agreement).

### 5.4.2 Article 7.5: Technical Regulations

Article 2.7 of the WTO SPS Agreement obliges WTO members to give positive consideration to accepting as equivalent, technical regulations of other members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

This article reaffirms this WTO commitment, and requires UK and Australia, on request, to explain the reason for not accepting a technical regulation of the other Party as equivalent to its own. As such, it does not change existing UK statutory protections insofar as it may relate to technical food and feed safety regulations.

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### 5.4.3 Article 7.6: International Standards

This article reaffirms WTO commitments to base TBT measures on relevant international standards where they exist. This does not affect the UK's right to regulate or require changes to existing statutory food safety protections.

### 5.4.4 Article 7.8 Marking and Labelling

This article builds on the general rights and obligations contained within the WTO TBT Agreement with specific reference to marking and labelling, which includes marking or labelling measures required for food or feed safety purposes. In line with WTO commitments, the text of this article therefore safeguards the UK's right to regulate for the purpose of food and feed safety labelling and does not require changes to existing statutory protections in the UK. Both the UK and Australia must ensure such measures are non-discriminatory and are no more trade-restrictive than necessary to fulfil legitimate policy objectives (Article 2, WTO TBT Agreement). The article also provides some flexibility for both the UK and Australia to accept mandatory marking or labelling information being provided on detachable labels or accompanying documentation, where legitimate policy objectives are not compromised.

## 5.5 Chapter 25 – provisions on antimicrobial resistance (AMR)

### 5.5.1 Article 25.2 Antimicrobial Resistance

AMR is a national strategic priority for the UK Government and devolved administrations which has led to the development of a 20-year Vision for AMR and the current 5-year National Action Plan (NAP), which runs until 2024. Outputs from the FSA's and FSS' AMR research programme and cross-government partnership activity is contributing to the NAP as well as improving our ability to undertake AMR food safety risk assessments to ensure that future work meets important and emerging challenges. The Chapter 25 text on AMR promotes strengthened AMR surveillance and monitoring (25.2(5)) which is supportive of our own AMR research programmes and surveillance agenda. The recognition of the importance of a 'One Health' approach in line with the Global Action Plan (25.2(2)) is in line with the approach FSA and FSS are taking in relation to surveillance activities, acknowledging the critical implications for food safety, human health and food security. The 'Alliance to Save Our Antibiotics', whilst recognising that the FTA itself doesn't apply safeguards, has also welcomed the recognition between UK and Australia of the importance of a transnational, 'One Health' approach to AMR in the FTA.

## 6.0 Conclusions

6.1 We have set out the FSA and FSS's advice on the text of the UK-Australia FTA and its impact on statutory protections for food safety. In summary, our conclusions are:

- The UK-Australia FTA maintains existing food safety statutory protections in accordance with retained law.
- No changes to the UK food safety regulatory system are required to give effect to this FTA at the point of entry into force.
- The FTA text preserves the regulatory autonomy of the UK Government and devolved administrations with respect to matters of food safety and will not prejudice any future decisions in this regard, which will continue to be taken by health ministers across the UK informed by transparent advice on science and evidence from the FSA and FSS. This is key to upholding statutory protections in the future.