Sub 09-65

Office of the Minister for Biosecurity

Chair, Cabinet Economic Growth and Infrastructure Committee

BIOSECURITY ACT 1993: APPROVAL FOR AMENDMENTS

Proposal

1. This paper is one of two related papers that seek policy approval for significant amendments to the Biosecurity Act 1993. It contains recommendations for legislative change for all parts of the Act except the pest management provisions, which are considered in the related paper, *Managing Pests in New Zealand: Discussion Paper and Legislative Changes*. The paper also proposes some amendments to the Maritime Transport Act that relate to marine biosecurity.

Executive Summary

2. The Biosecurity Act 1993 (the Act) provides a legal framework for the effective management of risks that harmful organisms can present to a range of values in New Zealand. These include economic, environmental, human health, cultural and social values.

3. The Act has not been substantially amended since 1997. The amendments proposed in this paper are necessary to support a step-change in the way biosecurity is managed. Collectively the changes will promote more effective and efficient biosecurity, encourage partnerships in the management of biosecurity risks, and provide flexibility to enable future improvements. All aspects of the biosecurity system are implicated:

    - Border risk management – preventing the introduction of harmful organisms whilst facilitating safe trade;
    - Readiness – preparing for the possible introduction of harmful organisms;
    - Response – responding to the discovery of a new harmful organism; and
    - Pest Management - managing the impacts of established harmful organisms.

4. Stakeholders were consulted on the proposals in this paper during two rounds of targeted stakeholder workshops in late 2009 and early 2010. In addition, extensive consultation has taken place within some of the key projects that have generated proposals for legislative change.

Background

5. Biosecurity is critical to New Zealand's prosperity and way of life. More than any other developed country, New Zealand depends on the success of its primary industries and the biosecurity system that underpins them. The biosecurity system also protects the native plants and animals, and other resources, that are taonga of significance to Maori, and precious to all New Zealanders.

6. When it was enacted in 1993, the Biosecurity Act largely reflected the biosecurity practices in place at the time. The Act authorised the Ministry of Agriculture and Forestry (MAF) to set the import requirements that goods needed to meet in order to get clearance for entry, and MAF officers at ports and airports inspected goods upon arrival to ensure these requirements were met. The Act also provided a suite of powers for Government departments to manage newly discovered pests, and mechanisms by which regional councils and other groups could manage pests that are widely established.

7. The policy underlying the Act arguably presumes that:
   - it is the Government's role to check that imports are safe at the border and to manage responses to new pest outbreaks; and
   - those affected by established pests should be responsible for managing them.

8. Seventeen years later the world is quite different. With the growth in trade and travel, the development of new technologies, and changes in the way supply chains operate, it is not always efficient or effective for the Government to manage import risks by relying on physically inspecting goods at the border. Many biosecurity risks are better managed off-shore and while goods are in transit, and it will often be the case that importers through their supply chain relationships are better placed than the Government to act.

9. Unfortunately the Act does not envisage a 'system' based approach to the management of import risks. The obligations on importers to manage the risks they create are limited, and the Act does not create positive incentives and promote the best use of resources by enabling MAF to target its interventions on poorly performing importers, while intervening less where importers are meeting their obligations.

10. Similar issues arise in the post-border space. Industry is often better placed than the Government to judge the merits of preparing for or taking action against newly arrived pests, but has limited capacity to influence the Government's priorities. Industry does not participate in readiness and response decisions. Nor does it share the cost of readiness and response activities from which it directly benefits. In the absence of a shared decision-making and funding model, industries will continue to rely on the Government to invest in readiness and lobby for the Government to respond to all new pest incursions. Decisions on priorities, investment in readiness, and the cost efficiency of services will continue to be sub-optimal.

11. Problems also exist in the management of widely established pests. New Zealand's pest management system has evolved over time and is fragmented. Roles and responsibilities amongst the multiple players are unclear, which produces gaps and overlaps in services. The tools for pest management in the Act can be cumbersome and time consuming to use, and there is a particular problem in that the Crown is not bound by regional council pest management strategies, which can undermine the effectiveness of these strategies.

12. Finally, since the Act was created, new threats have emerged or become apparent. This is particularly so in the marine area. The tools in the Act are not well suited to the management of marine biosecurity risks posed by craft visiting New Zealand waters, and the Act generally has no effect beyond the 12 nautical mile limit. New economic activity within the 200 mile exclusive economic zone, such as the use of drilling rigs, presents biosecurity risks that cannot at present be effectively managed.

13. Since MAF Biosecurity New Zealand was established in late 2004, it has been systematically reviewing all aspects of the biosecurity programme, and developing new approaches and systems to meet the challenges of managing biosecurity risks in a changing world. Much of this transformation work is now nearing completion, and implementation of new approaches at the border, in the marine environment, and within New Zealand will require amendments to the Act. The amendments proposed in this paper will collectively contribute to:

More effective and efficient risk management

MAF requires improved regulatory tools for responding to an increasingly complex set of risks and expectations. Biosecurity should not impose unjustifiable compliance costs and time impositions on commerce - interventions should be targeted on areas of greatest risk, and at points where they will have best effect. Greater use should be made of technology and intelligence, and operational systems should be streamlined.

Clearer roles and responsibilities, and improved collaboration and partnerships

Where there is a lack of clarity around roles and responsibilities, productive activity can be frustrated as parties struggle to find their proper role, or actively work to avoid taking action. Achieving role clarity, and sheeting home responsibility to those that are best placed to act in any given circumstance, will be important in ensuring a workable biosecurity system. Biosecurity cannot be the responsibility of central Government alone. Local government, the trade and travel industry, domestic industries with natural resource interests, and other stakeholders all have roles to play. The Biosecurity Act should enable partnerships and cooperation between these players, both at the border and within New Zealand.

Ability to handle future change

Biosecurity risk management has been significantly modernised in recent times. Further significant improvements will be wanted in the future. The amendments need to take a broad rather than narrow focus, and they need to be enabling rather than prescriptive – thus avoiding locking in 2010 practices.

Comment

14. The proposals for legislative change are broken down into the following areas:

    - Border risk management (pages **4** to **14**)
    - Readiness and Response (pages **15** to **18**)
    - Enforcement and Compliance (pages **18 to 20**);
    - System-wide and miscellaneous amendments (pages **20** to **22**).

Border risk management amendments

Overall context

15. The role of biosecurity at the border is to manage the risks posed to New Zealand by harmful organisms that could enter the country, while still facilitating compliant trade and travel.

Overview of current legislative provisions

16. The Act regulates the importation of all goods into New Zealand. Imported goods require "biosecurity clearance" before they can be freely moved throughout the country.

17. "Risk goods" cannot be given clearance unless they comply with the requirements of a MAF-issued import health standard.

18. Uncleared imported goods may be moved to a "transitional facility", for purposes such as inspection, treatment or quarantine.

19. To assist in managing the risks from imported goods, the Act includes powers to deal with both craft and passengers that have entered New Zealand territory.

Summary of changes in approach to border risk management

20. MAF has been extensively reviewing the way that it operates at the border, to ensure that the increasingly complex challenges it faces can be managed within the resources that can realistically be made available. Key themes that will drive new approaches to managing the border are:

    - All players through the import supply chain need to take responsibility for managing the biosecurity risk that their activities create;
    - Resources should be focussed through better use of information and improved risk targeting on the most significant risks;
    - MAF's interventions should be effective and efficient, involve consistent decision-making and provide opportunities for greater industry input;
    - The border should not be seen as a single point of intervention, but rather as a system where risk can be managed at different points, including through managing risk offshore wherever possible;
    - MAF should maximise the benefits for border management that can be gained from collaboration with other border agencies;

- There should be clear incentives for compliance and disincentives for non-compliance.

Requirements for others to manage the biosecurity risks they create

Requirements for importers

21. MAF sets the requirements for the importation of risk goods in import health standards. Currently, if imported risk goods do not comply with the relevant import health standard, the main legal consequence is that the goods can be rejected for biosecurity clearance. In effect, this places obligations on MAF rather than an importer to ensure that goods are safe for import. In practice, some importers routinely import non-compliant risk goods, and then apply an onshore treatment to achieve compliance and receive biosecurity clearance. In addition, some importers focus solely on whether they have met official requirements for biosecurity clearance, rather than taking broader responsibility for doing all they can to manage the biosecurity risks created by their activities.

22. The management of biosecurity risks at the border would be enhanced if importers were encouraged to be more proactive about managing the risks created by the goods that they bring into the country. This view is strongly supported by many domestic stakeholders.

23. It is proposed that the Act be amended by adding a series of new duties for importers. The new duties will signal an expectation that importers should take greater responsibility for managing the biosecurity risks that they create, while ensuring that they do not face unreasonable and absolute obligations.

24. The specific duties that would apply to importers are:

    - To take all reasonable steps to ensure that goods being imported comply with the requirements of any applicable import health standard;
    - To take all reasonable steps to ensure that information that relates to their goods, and that is required by MAF, is accurate and complete;
    - To keep accurate and complete records for the purpose of allowing the location of imported goods to be traced;
    - To not abandon any uncleared goods that the importer has brought into New Zealand.

25. Although not directly enforceable of themselves, insertion of these duties may help to establish the duty of care element needed for a successful common law claim, which is consistent with a longer term move to promoting incentives for importers and others to meet their biosecurity responsibilities. In addition, the duties would be supported by two key changes to the Act.

26. First, the proposed new compliance order mechanism (see paragraphs 118 to 121) would be used to address situations where an importer has not complied with any of the new duties, and this has created an undesirable risk at the border. It will become an offence to fail to comply with a compliance order.

27. Second, it is proposed that import health standards should be able to include requirements for importers to make declarations about the goods that they are importing. These declarations would relate to steps that the importer has taken to manage the risks that are created by the importation of the goods.

28. The requirements for importer declarations would be accompanied by a new strict liability offence for a refusal to make a declaration when required, or for making an erroneous declaration. The strict liability offence could be prescribed in regulations as an infringement offence, so that it could operate in the same way as the existing infringement notice system for passenger declaration offences. Higher-level offences for deliberately providing a false declaration are already included in the Act.

Requirements for persons in charge of craft

29. Although the Act includes provisions to control craft that have arrived in New Zealand, the focus of these provisions is on craft as the carriers of risk goods, rather than recognising that craft themselves may be carrying harmful organisms. Marine craft can, for example, carry harmful organisms on their hulls.

30. The current approach to managing risks from craft involves a mix of mechanisms under the Act, such as an import health standard for ships' ballast water. This results in a patchwork of regulatory intervention that has the potential to lead to confusion and lack of transparency.

31. Amendments are proposed to provide for the issuing of craft risk management standards. These standards would set out the biosecurity requirements that craft arriving in New Zealand must meet. Risks arising from goods on the craft would continue to be managed under relevant import health standards.

32. Craft risk management standards could apply to both sea craft and aircraft, and would be developed in a similar way to an import health standard, including a requirement to consult with people who may be affected by the standard.

33. Giving craft risk management standards legal effect would be achieved in a similar way to the importer responsibilities set out in the previous section:

- the Act would include a duty for persons in charge of craft arriving in New Zealand to take all reasonable steps to ensure that the craft meets the requirements of the applicable craft risk management standard;
- the new compliance order mechanism would be available in cases where a person has not complied with this duty;
- the Act would provide for persons in charge of craft to make a declaration about whether they have taken the steps that are required by the standard. The Act would also include a new strict liability offence for a refusal to make a declaration when required, or for making an erroneous declaration. The strict liability offence could be prescribed in regulations as an infringement offence, so that it could operate in the same way as the existing infringement notice system for passenger declaration offences.

Further amendments relating to craft - International Ballast Water Convention

34. Amendments are proposed to enable New Zealand to ratify the International Convention for the Control and Management of Ships' Ballast Water and Sediments (the Ballast Water Convention). Ballast water discharges from shipping are one of the main pathways by which non-indigenous marine organisms could be introduced to New Zealand waters.

35. The previous Government agreed that New Zealand should become a party to the Ballast Water Convention, and agreed the key legislative changes that are required for New Zealand to implement the Convention. The legislative changes primarily involve the Maritime Transport Act 1994, and include:

    - A new power to take samples of ballast water;
    - A new offence to apply where ballast water has been discharged in breach of the requirements of the Ballast Water Convention, or in breach of conditions imposed by the Director of Maritime New Zealand; and
    - A new levy-making power for an annual levy on ships that discharge ballast water from outside New Zealand waters in New Zealand waters.

36. As these amendments are closely related to other marine biosecurity proposals in this paper, it is proposed to include them in the Biosecurity Amendment Bill. Officials consider it likely that this will comply with the restrictions in Standing Orders on using one Bill to amend more than one Act. Officials will seek confirmation of this from the Office of the Clerk before the Bill is introduced.

<u>Effective and efficient interventions and better risk targeting</u>

Use of electronic systems

37. MAF is moving towards the greater use of electronic systems in the management of biosecurity at the border, which will speed up import processing and allow better targeting of risk. This includes the development, together with the New Zealand Customs Service, of the Joint Border Management System, which is an information system that will replace the separate systems currently used by the two agencies.

38. The Act does not allow for the complete adoption of electronic systems – in many places it requires the use of manual processes.

39. Proposed amendments to the Act include:

    - Requiring that relevant information be provided to MAF in an electronic form;
    - Enabling information to be stored and used for future risk assessments;
    - Ensuring that biosecurity clearance decisions can be made and communicated appropriately in an electronic systems environment;
    - Enabling MAF to issue directions and other statutory communications electronically; and

- Revising offences, to recognise that a person's interaction with the biosecurity agencies may be with an electronic system, rather than with an appointed inspector.

40. One issue that is highlighted by the move to electronic systems is the way that biosecurity clearances are given. For some imported goods, MAF does not expressly communicate to the importer that the goods are cleared for entry to New Zealand. For example, airline passengers arriving in New Zealand are not expressly told that their goods are cleared. Instead, the "biosecurity cleared" status is implied by the fact that MAF has permitted the passenger to move, with their goods, beyond the border agency area and into the airport terminal.

41. It is proposed to amend the Act to specify when imported goods can be taken to have been cleared, in cases where MAF has not expressly communicated clearance. The general principle is that goods can be taken to have been cleared when MAF has permitted them to move beyond the border, provided:

    - there has been no false or misleading information provided to MAF, or other attempt to deceive MAF officers; and
    - there has been no communication to the contrary from MAF.

Improved powers to access information

42. MAF is currently unable to access all the information that is necessary to carry out comprehensive risk assessments of cargo and passengers before a craft's arrival in New Zealand. This results in unnecessary delays in clearing goods and passengers.

43. It is proposed that MAF's powers to require advance information be broadened, and that new provisions be modelled along similar lines to relevant provisions of the Customs and Excise Act 1996. This will enable the two agencies to coordinate their information requirements and minimise the regulatory impact on businesses.

44. A further change relating to information requirements concerns the questions that persons arriving in New Zealand are required to answer (currently in the form of the passenger declaration card). The Act clearly requires that passengers answer questions about the goods in their possession, but is less clear in relation to other questions that passengers are asked, such as whether the person has been on a farm in the last 30 days. It is proposed to amend the Act to clearly authorise the full range of questions that a person arriving in New Zealand is currently asked.

Greater flexibility about when visual inspection is required

45. The current drafting of the Act suggests that visual inspection of imported risk goods (or at least a sample of the goods) is required before the goods can be given biosecurity clearance. In practice, visual inspection is not always the best way to determine whether risk goods are safe to be cleared. Other measures, such as certification issued by a trusted and audited overseas authority, are increasingly being used.

46. It is proposed that the Act be amended to more clearly recognise that a range of measures can be relied upon to form a judgement on whether it is safe to give clearance for imported risk goods.

Changes relating to import health standards

Outcome-based import health standards and Equivalence decisions

47. Import health standards generally set out specific risk management measures that must be applied to ensure that the goods can safely be given clearance.

48. MAF has recognised that in an increasing number of cases, it would be desirable for import health standards to state the outcome that must be achieved before the goods can be cleared, rather than specifying particular measures that must be applied. Outcome statements will allow importers to develop their own options for achieving the outcome, thereby reducing business compliance costs.

49. It is therefore proposed that the Act be amended so that import health standards can set out specific measures that must be applied, an outcome that must be achieved, or a combination of both.

50. A related issue concerns the process for dealing with equivalence requests. Under international trade rules (see para 54 for more detail) New Zealand is obliged to accept proposals for alternative import measures, if the exporting country can demonstrate that the measures achieve the same level or a greater level of biosecurity protection. It is proposed to amend the Act to include a transparent process for considering equivalence requests that are received from either exporting countries or from importers.

Matters to consider when developing an import health standard

51. MAF must consider the following matters when developing an import health standard:

- The organisms that might be brought into New Zealand by the goods;
- The effects that those organisms might have;
- New Zealand's international obligations; and
- Other matters that are considered relevant to effectively managing risk.

52. These requirements are arguably inconsistent with the Government's regulatory guidelines in that they place strong emphasis on identifying and mitigating risks, without requiring analysis on whether the risk mitigation measures are in fact justified.

53. To more accurately reflect good regulatory practice, amendments are proposed to more explicitly recognise some other factors that may need consideration:

- The efficacy of applying the proposed measures for mitigating the biosecurity risk (this refers to the degree to which an option for managing risk reduces the likelihood and magnitude of adverse consequences);
- The feasibility and direct cost of the proposed measures for mitigating the biosecurity risk (this would cover the technical, operational and economic factors affecting the implementation of risk management options).

54. A second amendment is proposed to give explicit effect to the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement). The SPS Agreement is fundamental to ensuring that biosecurity measures at the border are fairly applied, and includes key requirements such as measures needing to be based on science. New Zealand relies heavily on the SPS Agreement in ensuring market access for its primary production exports, and therefore seeks to adopt best practice when applying the Agreement to imports.

55. Although the Act already requires that international obligations be considered when developing an import health standard, this does not clearly reflect how fundamental the SPS Agreement is to setting import requirements. To promote transparency and understanding of the SPS Agreement, it is proposed to include a requirement for an import health standard to be consistent with New Zealand's obligations under the SPS Agreement. Other international treaties will continue to be considered as appropriate to the particular import health standard.

<u>The border as a system, rather than a single point of intervention</u>

Post-clearance requirements for imported goods

56. The scope of the border risk management provisions in the Act is generally limited to managing risks up to the point of biosecurity clearance. This reflects a view of the border as a single point of intervention.

57. The border is just one part of the biosecurity risk-management system. Risks are managed at different points along the import and distribution supply chain, and in some cases post-border measures on imports are an important tool. For example, measures for fresh produce imported for consumption are less stringent than measures for produce imported for planting, and post-border controls are necessary to ensure the produce is used as intended. To allow risks to be managed after goods have been given clearance, it is proposed to add three new tools to the Act. The three new tools would be available as a "menu" that can be chosen from where some kind of post-clearance risk management is desired.

58. First, it is proposed to add a new regulation-making power to the Act, which will enable regulations to set out requirements for managing the risks from imported goods after they have been given biosecurity clearance.

59. Second, it is proposed to expand the scope of import health standards so that they can also set out post-clearance requirements. This amendment would be accompanied by a new duty for people in possession or control of imported

goods to take all reasonable steps to comply with any post-clearance requirements. Although this duty would not be enforceable of itself, it may help to establish the duty of care element needed for a successful common law claim. It is also proposed that the new compliance order mechanism (see paragraphs 118 to 121) would be used to address non-compliance with post-clearance requirements.

60. Third, it is proposed to enable an inspector to impose conditions when giving clearance, and to provide a framework for ensuring that people who come into possession or control of imported goods are aware of any post-clearance conditions.

61. MAF acknowledges that it would only be appropriate to put in place post-clearance requirements for imported goods if there is a credible regime for monitoring compliance with the requirements.

Transitional and containment facilities

62. Transitional facilities are places where uncleared goods can lawfully be taken for purposes such as inspection, treatment or quarantine. The operators of transitional facilities are therefore entrusted with the custody of imported goods that are not, at the time, safe to be cleared for entry into New Zealand.

63. Containment facilities are places such as zoos, where new organisms that are not intended to be released into the New Zealand environment are held.

64. The Act sets up an approval system, under which these facilities and their operators must be approved by MAF. The Act also provides for standards relating to the construction, maintenance and operation of facilities.

Regulation of transitional facility and containment facility operators

65. There is a relatively high level of non-compliance with the requirements for transitional and containment facilities, and a number of legislative amendments are proposed.

66. First, it is proposed to add more clarity to the criteria that are considered before deciding whether to approve an operator of a facility. The Act currently requires MAF to be satisfied that a person applying to operate a facility is a "fit and proper person". In practice, MAF has found it difficult to exclude unsuitable operators. It is proposed that the Act set out a specific list of matters that can be considered when assessing an application. These would include whether the applicant has been convicted of certain specified offences, or has previously failed to comply with relevant standards issued under the Act.

67. Second, it is proposed to add to the Act a set of duties that transitional and containment facility operators would be obliged to comply with, and to add a corresponding offence for a failure to comply. The offence would be a strict liability offence, with an appropriate statutory defence that would exempt an operator from liability if they can demonstrate that they had taken all reasonable steps to ensure compliance. The duties would include:

- A duty to comply with the relevant operating standards for the facility;
- A duty to comply with all directions, requirements and other communications from MAF relating to goods held at the facility; and
- A duty not to give clearance for, or to physically release, any imported goods other than in accordance with the operating standard for the facility and any applicable directions or other communications from MAF.

68. Third, it is proposed to add to the Act a power to suspend the approval of a facility or a facility operator that is not complying with the relevant standard or any of the proposed new duties. The Act currently allows for the complete cancellation of an approval in cases of non-compliance. The option of suspension would allow a more graduated approach to be taken to non-compliance where this is appropriate.

Allowing low-risk clearance decisions to be made at transitional facilities

69. About 590,000 containers were imported into New Zealand during 2008/09. It is not practical for MAF to inspect all containers and their contents. MAF therefore targets containers that either contain risk goods, or that have recently been in locations that give rise to biosecurity concerns; i.e., "high-risk" containers.

70. Low-risk containers may be taken to a transitional facility, where an "accredited person" employed by the facility and trained by MAF carries out a visual inspection to check for risk organisms. If risk organisms are found, then MAF must be contacted, so that a MAF inspector can take over decision-making in relation to the container and its contents.

71. If no risk organisms are detected, the container is free to leave the facility, but a MAF inspector must later "clear" the goods in a manner that adds cost but no benefit.

72. The Act provides only for inspectors to take final decisions on the clearance of all goods. Amendments are therefore proposed to enable operators of transitional facilities to make final clearance decisions in appropriate low-risk circumstances. The new provisions would provide that:

    - the operating standards for transitional facilities can include criteria for when the operator of a facility is lawfully able to give biosecurity clearance;
    - the operator of a transitional facility can give clearance for imported goods when this is done in accordance with the operating standard for the facility;
    - any biosecurity clearance given by an operator of a transitional facility must be notified to MAF in such manner as MAF may specify, along with any related information that MAF may require; and
    - operators of transitional facilities have a duty not to give clearance for, or to release from the facility, any imported goods other than in accordance with the operating standard for the facility and any applicable directions or other communications from MAF. This duty should be read in conjunction with the proposed duties described in paragraph 67.

Clearing risk goods without an import health standard

73. Imported goods that are classified as “risk goods” can not be given clearance for entry into New Zealand unless they comply with the requirements set out in an import health standard.

74. This requirement is appropriate for most types of imported risk goods, such as fresh fruit and produce, which present a complex range of possible risks. In some cases, however, the imported goods are of a type that do not usually present any significant biosecurity risk, such as electronic goods, and only come within the category of “risk goods” because some contamination (such as hitchhiker insects) is present in the particular consignment.

75. In such cases, there is often a straightforward treatment that can be applied to enable safe biosecurity clearance. Following this approach is sensible, in that it avoids interventions that are not justified on risk management grounds, but it does not fit neatly within the requirements of the Act.

76. It is therefore proposed to amend the Act to recognise that in some circumstances a biosecurity clearance can be given for risk goods for which there is no import health standard. The inspector dealing with the goods would be required to have regard to any relevant guidance or advice issued by a chief technical officer, and be satisfied that there are no circumstances that make it unwise to issue a clearance. Except as permitted by a chief technical officer, this option would not be available for goods that are a live organism, or material derived from an organism. For most kinds or organisms and organic material, the complexity of the risks will require that decisions be guided by an import health standard.

Collaboration with other agencies

77. MAF’s frontline biosecurity staff work at the border alongside other agencies, including the New Zealand Customs Service and the Aviation Security Service. Staff regularly come across a person or goods that are of interest to one of the other border agencies, and MAF works closely with other agencies to ensure that risks across boundaries are effectively managed.

78. In addition, incidents arise where MAF may need to share information with other regulators, or with agencies in other countries, to ensure that the appropriate agency is fully aware of an issue that it needs to manage.

79. The actions that MAF needs to take to collaborate in this way do not always require statutory powers. There are, however, some situations where there is uncertainty about whether a statutory power is required. For example, the disclosure of personal information is only permissible under the Privacy Act if certain criteria are met.

80. In contrast to the Biosecurity Act, the Customs and Excise Act 1996 confers powers on officers to facilitate collaboration with other agencies. For example, a Customs officer may direct a person to remain in a designated place until

processing under the Biosecurity Act is completed, and may seize and detain risk goods for which no biosecurity clearance has been given.

81. It is proposed to amend the Biosecurity Act by adding similar provisions to those in the Customs and Excise Act, to clearly authorise collaboration among frontline agencies. It is also proposed to add a power to enable MAF to make disclosures to other agencies, where this is necessary for the other agency to carry out its regulatory compliance or public protection role.

Compliance and Enforcement

New importation offence

82. Attempts to evade detection by MAF when importing risk goods occur regularly, and cover a range of scenarios across different pathways. The offence provision that has to be used in response to these attempts does not directly target the non-compliant behaviour, and involves elements of knowledge that are difficult to prove. As a result, it is difficult for MAF to make an enforcement response in as many cases as would be desirable.

83. To remedy this, it is proposed to add a new strict liability offence to the Act, which would apply to situations where:

- a person causes or permits goods to be imported; and
- the importation of the goods has occurred with either false, misleading or incomplete information being provided to MAF, or with steps having been taken to hinder the detection of the goods by MAF.

New power to give directions relating to uncleared goods

84. An inspector may authorise with conditions the movement of uncleared goods to transitional facilities, for purposes such as treatment. It is difficult at present for MAF to respond where there is non-compliance with conditions set on a movement authorisation.

85. MAF has identified that it would be more legally robust if, as well as being able to impose conditions on an authorisation to move uncleared goods, an inspector could simply issue a range of directions relating to how uncleared goods are moved to and dealt with at a transitional facility. Failure to comply with such a direction would become a strict liability offence.

Express power to require name and other details

86. The Act does not contain an express power to require people arriving in New Zealand to provide their name and other details. This power is a basic component of effective enforcement. It is proposed to amend the Act to require any person who has arrived in New Zealand to state their full name and their residential address or other contact details, and to produce their passport or other evidence of identity. This requirement would be similar to what is in section 147 of the Customs and Excise Act 1996.

Readiness and Response amendments

Overall context

87. The readiness and response parts of the biosecurity system are in place because, despite the actions to manage risk at the border, there will continue to be "incursions", where a harmful new organism is detected within New Zealand.

88. "Readiness" refers to the actions that are taken to prepare for the possible detection within New Zealand of a new harmful organism. These actions include operating a "hotline" for reporting organisms, and specific surveillance programmes to achieve early detection of any incursions.

89. "Response" refers to the actions that are taken following the detection in New Zealand of a new harmful organism. These include initial investigations to identify the organism and determine its distribution, immediate measures to limit its spread, and measures to eradicate it.

Overview of current legislative provisions

90. The Act provides a "toolbox" of powers that can be accessed to carry out readiness and response activities. These actions include powers to enter property, take samples, impose movement controls, give directions, and take direct action to manage or eradicate an organism.

91. The Act also provides a compensation entitlement, to cover losses that occur when powers are exercised to manage or eradicate an organism, and the powers result in damage to or destruction of property, or restrictions on the movement of goods.

Summary of changes in approach to readiness and response

92. The Government agreed last year to a significant new approach to the way that MAF works with industry stakeholders on readiness and response activities. This new approach will see MAF develop an agreement with willing industries that provides for joint decision-making and cost sharing for readiness and response [CAB Min (09) 31/11].

93. Joint decision-making and cost sharing will ensure that industry's true priorities for expenditure are made clearer, and will allow industry expertise to be more readily brought to the decision-making table.

94. As well as the amendments required to enable the implementation of government-industry agreements, amendments are also proposed to enable "Farms On Line" (a rural property register to improve readiness and response activities), and to the Act's compensation provisions.

Amendments to enable the implementation of government-industry agreements

Amendments to allow for joint decision-making

95. It is proposed that the Act expressly authorise the Director-General of MAF to enter into a government-industry agreement on behalf of the government. A clear authority to enter the agreement is desirable, because jointly-made decisions on how to use statutory powers will be made under the agreement.

96. It would be useful for the Act to also include a list of the kinds of matters that may be included in an agreement. If this list is drafted as a non-exhaustive list, it will have the advantage of clearly authorising the key matters that are likely to be covered in an agreement without closing off the possibility of also including other matters.

97. The Act should also include some provisions to guide the Director-General in determining whether an industry organisation has the mandate to develop an agreement. It is proposed that the Act require the Director-General to be satisfied that the industry organisation adequately represents the members of its industry, and include a list of criteria for the Director-General to take into account when considering this.

98. The Act should also recognise that in some situations it may be appropriate for different parts of an industry to be represented separately by different organisations.

Amendments to allow for cost-sharing

99. A key mechanism for funding the industry share of government-industry agreement costs will be a statutory levy. Amendments are required to the Act's existing levy provisions so they can be used for this purpose.

100. It is proposed that two options be available for an industry to fund its share of readiness and response activities. One option would be for a levy to be in place under which members of the industry pay directly to MAF. The other option would be for the members of the industry to pay the levy to their industry organisation, which would then pay the industry share to MAF as required under the agreement.

101. An incursion response is usually an unforeseeable event that is difficult to establish funding for in advance. For this reason, it is envisaged that the Crown would initially meet the entire cost of an incursion response, and that the pre-agreed industry share would then be recovered over a period of up to ten years. The Act should be amended to clearly authorise the use of a levy in this way.

102. There is a need to ensure that an industry share of an incursion response can be collected from industries that are not a party to an agreement. This will address concerns expressed by some industry organisations about the potential for "free-riding" by industries that might choose not to enter into an agreement with government, based on an expectation that the government will

always respond to an incursion of an organism that is of concern to the industry.

103. Cabinet agreed, in response to this concern, that MAF should consider mandatory cost-recovery from non-participating industries for any significant benefits they receive from a response. The Act should be amended to clearly authorise the use of a levy in this way.

Amendments relating to how the compensation provisions apply

104. In working with industry to develop a draft agreement, it has been recognised that there may be cases where the parties wish to develop alternative compensation arrangements to those that generally apply under the Act. For example, some industries may wish to pursue this option to reduce the costs of a response that need to be shared.

105. It is therefore proposed to amend the Act to enable signatories to specify alternative compensation arrangements that would apply to responses that are implemented under the agreement. It would be important to ensure that any alternative arrangements did not undermine the underlying purpose of the compensation provisions. For this reason, it is proposed that the Director-General only be able to agree to vary the compensation arrangements if satisfied that the alternative arrangements are consistent with the purpose of the agreement, and are not likely to:

- discourage the early reporting of harmful new organisms; or
- reduce the level of cooperation with an incursion response.

106. A further amendment is required to ensure that compensation can be paid from a mix of Crown and industry funding. The Act currently provides that compensation must be paid with money appropriated by Parliament.

<u>Amendments relating to “Farms On Line”</u>

107. In October 2009, Cabinet agreed to the Farms On Line project, which will develop a Crown-owned resource that will bring together accurate, complete and up-to-date rural property information to improve biosecurity protection [EGI Min (09) 22/6]. This information will strengthen MAF’s ability to respond quickly to incursions, reduce the costs of incursion responses, and provide trading partners with greater confidence about New Zealand’s pest and disease status.

108. Amendments are necessary to enable MAF to access some of the information held by local authorities for rating purposes. This will ensure that Farms On Line has accurate property information and up-to-date personal contact information. Some of the information that MAF will seek to access is already in the public domain, such as valuation data and land use data. MAF will also seek access to personal contact information for land owners and occupiers. Information will be downloaded from local authorities for all properties in their areas, but urban property information will not be actively managed in the Farms On Line database. All land owners and occupiers will have the ability to opt out of having their details included in Farms On Line.

109. The information that has been obtained from local authorities, and that is not already in the public domain, will be used for the purposes of Part 4 of the Biosecurity Act, and any purposes that have been specifically allowed under individual permissions. The information will not be used for any other purpose unless authorised by a subsequent Act of Parliament.

Amendments relating to compensation claims

110. Some other minor changes are proposed to the Act's compensation provisions. First, it is proposed to add an express requirement for a claimant to take reasonable steps to mitigate losses. This would apply, for example, in cases where movement controls that impact on business operations remain in place for some time. MAF already informs claimants in such situations that it expects businesses to minimise any ongoing losses from the movement controls. There would, however, be benefits from adding to the Act an express requirement to mitigate losses, as this would make the requirement more transparent and reduce the scope for dispute over its application.

111. Second, it is proposed to set a time limit of one year within which compensation claims must be lodged with MAF. While most claims are submitted promptly, there are some cases where claims are not made until some years after the event. This creates difficulties for MAF in managing the funding that is allocated to incursion responses, and makes it more difficult to properly verify the factual basis for the claim.

112. The one-year time limit would apply from the date when the claimant is in a position to verify their loss. This is the preferred starting point for the time limit, because it can take some time after powers are exercised before a claimant is able to verify their losses and submit a claim. The Act would also include a discretion for late claims to be considered, if the failure to meet the time limit was caused by factors beyond the claimant's control.

Other Enforcement and Compliance amendments

Categorisation of offences

113. Under criminal law, offences are classified into different categories. The primary categories are:

- offences where it is necessary to prove that the defendant acted knowingly or intentionally (often still referred to by using the Latin term *mens rea*, which means "guilty mind"); and
- offences of strict liability, where it is only necessary to prove that the defendant did a particular action, and the defendant then has the ability to defend the charge by demonstrating that they had acted without fault.

114. Some of the offences under the Act are clearly mens rea offences, because the wording of the offence includes a word such as "knowingly". Some of the offences are neither clearly mens rea offences, nor clearly strict liability. This can be contrasted with other modern legislation in the environment sector, such

as the Resource Management Act 1991, which designates some offences as strict liability by specifically stating that it is not necessary to prove that the defendant intended to commit the offence.

115. The lack of clarity around the categorisation of offences leads to uncertainty about what the prosecution has to prove to a court, which is undesirable for both the prosecution and the defence. It is proposed to resolve this uncertainty by clearly designating the offences under the Act that are strict liability.

116. These offences will be selected by having regard to the criteria in the Legislation Advisory Committee Guidelines, together with criteria developed by the courts in determining the classification of offences. MAF intends to work closely with the Ministry of Justice in selecting the appropriate offences.

117. It is also proposed to change the status of offences in the Act that are drafted so that the offence is committed if the defendant has acted "without reasonable excuse". The without reasonable excuse element creates some uncertainty about what matters can be relied on to exclude a defendant from liability. It is proposed to remove the without reasonable excuse element and instead designate the offences as strict liability, with the defendant having the ability to defend the charge if they can demonstrate that they had acted without fault.

Compliance orders

118. The Act confers on inspectors and other officers a range of powers to give directions, with the focus of these powers being on the management of biosecurity risk in a particular situation.

119. There is no general power under the Act to give directions for the purpose of remedying non-compliance with legislative requirements. It would be desirable to add to the Act a power to issue a compliance order, along similar lines to provisions in the Hazardous Substances and New Organisms Act 1996.

120. It is proposed that the scope of a compliance order would include:

- The prohibition of activities that do not comply with the Act, or with regulations or other instruments issued under the Act; and
- Requiring activities that are necessary to ensure compliance with the Act, or with regulations or other instruments issued under the Act.

121. The Act would include a right to appeal a compliance order, and a new offence for failing to comply with a compliance order.

Civil Liability

122. The usual enforcement option for responding to a breach of an Act is criminal proceedings. In the criminal process, the prosecution must prove beyond reasonable doubt that an offence was committed, following which a sentence such as imprisonment or a fine is imposed.

123. Some Acts also include an option of civil proceedings for a breach of the legislation. An example is the Hazardous Substances and New Organisms Act 1996. Under this Act, the enforcement agency has the option of applying for a pecuniary penalty order for a breach of the Act, and a person who has suffered loss as a result of a breach can sue to recover their losses.

124. It is proposed to add a civil liability regime to the Biosecurity Act. The intention is that civil proceedings would be available as an option for non-compliance in cases where:

- a significant financial sanction is necessary to counter economic incentives for non-compliance; or
- a person's non-compliance has the potential to result directly in significant losses to others.

125. It may also be appropriate for the civil liability regime to apply to a breach of the proposed new duties on importers and others that are set out in the Border Risk Management section.

126. MAF intends to work closely with the Ministry of Justice to identify the offences in the Act for which it would be appropriate to have civil proceedings as an alternative option.

System-wide and miscellaneous amendments

Extending the application of the Act to the Exclusive Economic Zone

127. The provisions of the Biosecurity Act generally have no effect beyond New Zealand territorial waters, and therefore do not apply beyond the 12 nautical mile limit.

128. New economic activity in New Zealand's exclusive economic zone (EEZ) has the potential to increase the biosecurity risks to our marine environment. For example, in 2008 an oil rig was cleaned of biofouling in Tasman Bay, and it was found that a potentially invasive mussel species had been present on the rig's hull. It is therefore proposed to extend the operation of the Act so that it can provide for the management of biosecurity risks that arise in the EEZ.

129. Applying the provisions of the Act to the EEZ will need to be done in a way that is consistent with the United Nations Convention on the Law of the Sea (UNCLOS). Under UNCLOS, New Zealand has jurisdiction over activities that relate to the exploration and exploitation of resources within the EEZ. It would therefore be possible, for example, to apply the Act to manage biosecurity risks that arise from vessels that operate in association with an oil drilling installation in the EEZ.

130. MAF officials will work closely with the Ministry of Foreign Affairs and Trade, to ensure that the amendments relating to the EEZ are consistent with New Zealand's obligations under UNCLOS.

Reference to the Treaty of Waitangi

131. In developing the proposals for amendments, MAF officials considered the benefits that might be gained from including in the Act an express reference to the Treaty of Waitangi.

132. MAF has taken significant steps to improve its responsiveness to Maori in recent years, in line with the expectations of the Biosecurity Strategy 2003. An example of this can be seen from the recent response to a disease affecting Kauri trees in Northland, during which MAF resourced Maori organisations to participate as partners in the response at the governance and operational level. Consideration is being given to applying this engagement model, appropriately adapted, to other work programmes.

133. On balance, officials do not consider that an express reference to the Treaty is necessary to ensure the proper recognition of the interests of Maori in biosecurity decision-making.

Call-in of powers of inspectors and authorised persons

134. The Act provides for the appointment of different statutory officers, who may access various powers under the Act.

135. At the national level, chief technical officers, who are generally senior managers, are appointed to carry out a number of key roles under the Act. These roles include the appointment of inspectors and authorised persons.

136. Inspectors and authorised persons are in turn able to access a wide range of powers under the Act, which enable the implementation of measures to manage biosecurity risks in particular situations. For example, inspectors and authorised persons have powers to deal with people, craft and goods at the border, and to take direct action to manage or eradicate an organism.

137. Situations occasionally arise where it is more appropriate for an implementation-level power that is conferred on an inspector or authorised person to be exercised by a chief technical officer, because of the complexity or significance of the decision.

138. To provide for these situations, it is proposed to add to the Act a new ability for a chief technical officer to "call in" the exercise of a power or performance of a function by an inspector or authorised person. This call-in option would be available in cases where the chief technical officer considers that it is necessary or desirable to ensure that the purposes of the Act are achieved.

Statutory powers for auditors

139. Audits are an important element in ensuring that the biosecurity system is operating effectively and efficiently. Auditing the system involves checking on the work of MAF's staff and contractors, and other third parties, and requires access to a wide range of land, premises and information.

140. The Act does not provide for the appointment of staff to perform an audit function (other than in relation to an audit of levy monies). As a result, MAF's audit staff are generally accompanied by inspectors appointed under the Act, to ensure that the relevant statutory powers are available. This is not the best use of time for inspectors, and increases the costs of audits.

141. It is therefore proposed to amend the Act to specifically provide for the appointment of auditors. The proposal is that auditors would be appointed by MAF's Director-General, and would have the specific powers necessary to carry out the audit function.

Incorporation of material by reference

142. Some of the legal instruments issued under the Act (such as import health standards) require reference to a large amount of technical detail. In some cases, the authoritative source of the technical detail is in another document, and it is inefficient to replicate the detail, especially when it is regularly updated.

143. It is therefore proposed to add to the Act a general power to incorporate material by reference. This power would be available for both secondary and tertiary instruments, and would include the ability for the latest version of the material to be automatically incorporated.

Other minor changes

144. A number of minor amendments to the Act are proposed to correct errors or omissions in the current wording.

145. Section 28B – the Act generally prohibits biosecurity clearance being given for new organisms under the Hazardous Substances and New Organisms Act 1996 (the HSNO Act). Section 28B sets out exceptions to this prohibition, which apply in cases where a new organism has been given an approval under the HSNO Act, and biosecurity clearance is necessary to enable the HSNO Act approval to be implemented. The list of approvals in section 28B is incomplete, and needs to also include approvals under sections 38BA, 48 and 49F of the HSNO Act.

146. Section 119 – this section contains a reference to "restricted goods", which is not a defined term in the Act. It is proposed to delete the reference to this term.

147. Section 121 – this section provides the power to take samples and carry out other actions, for surveillance purposes. The power to take samples is qualified by the need to have a belief on reasonable grounds that the thing from which the samples are taken may harbour pests or unwanted organisms. This requirement is inconsistent with the effective operation of many surveillance programmes. It is therefore proposed to remove the requirement.

148. Section 144 – it is proposed to amend section 144(6), to include a reference to the Governor-General extending the duration of a biosecurity emergency by Proclamation. This will make section 144(6) consistent with section 147.

Consultation

149. The following departments were consulted on a draft version of this Cabinet paper – The Treasury; the State Services Commission; the New Zealand Customs Service; the Parliamentary Counsel Office; the Departments of Conservation, Internal Affairs, Labour, and Prime Minister and Cabinet; the Ministries of Justice, Economic Development, Tourism, Environment, Health, Defence, Foreign Affairs and Trade, Fisheries, Transport, and Research, Science and Technology; the New Zealand Food Safety Authority; Te Puni Kokiri; the New Zealand Defence Force; Land Information New Zealand; Statistics New Zealand. The content of this paper has been revised to incorporate the departmental comments that were received.

150. The following agencies were also consulted in the preparation of this paper: The Environmental Risk Management Authority; the New Zealand Transport Agency; Maritime New Zealand; the Office of the Privacy Commissioner; and the Office of the Ombudsmen. The Office of the Privacy Commissioner has identified potential privacy issues with some of the proposals for information collection and sharing, and MAF officials will work closely with the Office during the legislative drafting phase.

151. Stakeholder consultation consisted of two rounds of targeted consultation in late 2009 and early 2010. The consultation process comprised interactive workshop sessions, together with an opportunity for written comments, and was based around two Information Papers prepared by MAF. Extensive consultation with stakeholders has also taken place within some of the key projects that have generated the proposals for legislative change.

152. Stakeholders are generally very supportive of imposing clearer obligations on importers and modernising border processes. Some are nervous about any significant move away from physical inspection at the border and want assurances that biosecurity protection will not be reduced. They were strongly supportive of MAF “getting tougher” on non-compliance at the border and with transitional facilities – and contrasted MAF’s lack of offences in this area with Customs’ greater access to and use of offences. Some domestic industries are nervous about the government-industry agreement provisions – but this appears more linked to the negotiations themselves.

Financial Implications

153. There are no direct financial implications arising from this paper.

Human Rights

154. Some of the proposals in this paper raise potential issues of inconsistency with the rights that are affirmed by the New Zealand Bill of Rights Act 1990. MAF considers that any potential inconsistencies are justified in accordance with section 5 of the New Zealand Bill of Rights Act 1990, and will work closely with the Ministry of Justice in the drafting of the amendments to ensure that this is the case.

Legislative Implications

155. The proposals in this paper are intended to be enacted by the Biosecurity Amendment Bill 2010. This Bill is included in the 2010 Legislation Programme, [omitted in accordance with sections 9(2)(f)(iv) and 9(2)(g)(i) of the Official Information Act 1982].

156. The Biosecurity Act is binding on the Crown, with one exception relating to regional pest management strategies. None of the proposals in this paper will have any impact on the extent to which the Crown is bound. The related paper, *Managing Pests in New Zealand: Discussion Paper and Legislative Changes*, seeks a decision on whether to change the Crown's legal position in relation to regional pest management strategies.

Regulatory Impact Analysis

157. The Regulatory Impact Analysis requirements set out in Cabinet Office Circular CO (09) 8 apply. A Regulatory Impact Statement has been prepared and is attached to this paper.

Quality of the Impact Analysis

158. Susan Keenan, Policy Manager MAF Biosecurity New Zealand, has reviewed the Regulatory Impact Statement prepared by MAF Biosecurity New Zealand and associated supporting material, and considers that the information and analysis summarised in the Regulatory Impact Statement meets the quality assurance criteria.

Consistency with the Government Statement on Regulation

159. I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement and I am satisfied that, aside from the risks, uncertainties and caveats noted in this Cabinet paper, the regulatory proposals recommended in this paper are consistent with the commitments in the Government Statement on Regulation.

Publicity

160. I propose to make a specific announcement of the decisions arising from this paper when the Bill is ready for introduction.

Recommendations

I recommend that the Committee:

Background

1. **note** that:

    1.1. the Biosecurity Act 1993 (the Act) has not been substantially amended since 1997; and

    1.2. amendments to the Act are required to ensure that the Act promotes a biosecurity system that is more effective and efficient;

Border risk management amendments

Amendments to require those best placed to manage biosecurity risks to do so

2. **agree** to add the following new provisions to the Act, for the purpose of encouraging importers of risk goods to be more proactive about managing the risks created by the goods that they bring into the country:

    2.1. a new duty for importers to take all reasonable steps to ensure that risk goods being imported into New Zealand comply with the requirements of any applicable import health standard;

    2.2. a new duty for importers to take all reasonable steps to ensure that information that relates to their goods, and that is required by MAF, is accurate and complete;

    2.3. a new duty for importers to keep accurate and complete records for the purpose of allowing the location of imported goods to be traced;

    2.4. a new duty for importers to not abandon any uncleared goods that the importer has brought into New Zealand;

    2.5. new provisions to enable import health standards to include requirements for importers to make declarations about the goods that they are importing;

    2.6. a new strict liability offence for a refusal to make an importers' declaration within the time required, or for making an erroneous declaration;

3. **agree** to make the following amendments to the Act, for the purpose of setting out requirements to be met by persons in charge of craft that arrive in New Zealand:

    3.1. addition of new provisions allowing for craft risk management standards, which will have the purpose of setting out the requirements that craft arriving in New Zealand must meet, to effectively manage the risks from organisms that may be introduced in or on the craft;

3.2. addition of a duty for persons in charge of craft arriving in New Zealand to take all reasonable steps to ensure that the craft meets the requirements of the applicable craft risk management standard;

3.3. new provisions to require persons in charge of craft that arrive in New Zealand to make declarations about whether they have taken the steps that are required by the applicable craft risk management standard;

3.4. a new strict liability offence for a refusal to make a declaration within the time required, or for making an erroneous declaration

4. **note** that in 2008, Cabinet:

4.1. agreed that, subject to the successful completion of the parliamentary treaty examination process and passage of amendments to legislation, New Zealand accede to the International Convention for the Control and Management of Ships' Ballast Water and Sediments (the Convention);

4.2. agreed that the implementation of the obligations imposed by the Convention be given effect through a combination of the Maritime Transport Act 1994 and the Biosecurity Act 1993;

4.3. agreed that legislative amendments to the Maritime Transport Act 1994 (and any consequential amendments to the Biosecurity Act 1993) be enacted through the Maritime Transport Amendment Bill;

[EDC Min (08) 11/14]

4.4. agreed to amend the Maritime Transport Act 1994 to create a power to take samples of ballast water;

4.5. agreed to amend the Maritime Transport Act 1994 to create a new offence to apply where ballast water has been found to have been discharged in breach of the Convention, or in breach of conditions imposed by the Director of Maritime Transport;

4.6. agreed to amend the Maritime Transport Act 1994 to create a new levy-making power for an annual levy on ships that discharge ballast water from outside New Zealand waters inside New Zealand waters;

[EDC Min (08) 18/1]

5. **agree** to rescind the decision referred to in paragraph 4.3, and to instead enact the amendments to the Maritime Transport Act 1994 (and any consequential amendments to the Biosecurity Act 1993) in the Biosecurity Amendment Bill;

Amendments to promote effective and efficient interventions and to improve risk targeting

6. **agree** to make the following amendments to the Act, for the purpose of promoting effective and efficient interventions, and to assist in ensuring that resources are targeted on the most significant risks:

6.1. amendments to allow for the full implementation of electronic systems in managing the biosecurity system, including:

- Requiring that relevant information be provided to the Ministry of Agriculture and Forestry (MAF) in an electronic form;
- Enabling information to be stored and used for future risk assessments;
- Ensuring that biosecurity clearance decisions can be made and communicated appropriately in an electronic systems environment;
- Enabling MAF to issue directions and other statutory communications electronically; and
- Revising the offences under the Act, to recognise that a person's interaction with the biosecurity agencies may be with an electronic system, rather than with an appointed inspector;

6.2. amendments to specify when imported goods can be taken to have been cleared, in cases where MAF has permitted goods to be taken beyond the border but has not expressly communicated whether or not the goods are cleared;

6.3. addition of broader powers, modelled on relevant provisions of the Customs and Excise Act 1996, to require persons in charge of craft and importers to provide information to MAF in advance of the arrival of craft and goods in New Zealand;

6.4. addition of new provisions to clearly authorise the full range of questions that persons arriving in New Zealand are asked (currently in the form of the passenger declaration card);

6.5. amendments to make it clear that it is not always necessary to carry out visual inspection before biosecurity clearance is given for risk goods, and that a range of measures can be relied on to form a judgement that it is safe to give biosecurity clearance;

Amendments to import health standard provisions

7. **agree** to make the following amendments to the provisions of the Act that relate to import health standards:

7.1. amendments to make it clear that an import health standard can be drafted so that it sets out either specific measures to be applied, or an outcome that must be achieved, or a combination of both;

7.2. addition of new provisions to establish a transparent process for dealing with equivalence requests (requests to approve alternative measures to those set out in an import health standard, on the basis that they achieve the same level or a greater level of biosecurity protection);

7.3. amendments so that when developing an import health standard MAF may have regard to the efficacy, feasibility, and direct costs of the risk reduction measures being considered for the standard;

7.4. addition of a new requirement to be satisfied, before recommending the issuing or amendment of an import health standard, that the standard is consistent with New Zealand's obligations under the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures;

Amendments relating to post-clearance requirements for imported goods

8. **agree** to make the following amendments to the Act, for the purpose of enabling post-clearance requirements to be applied to imported goods:

8.1. addition of a new regulation-making power, which will enable regulations to set out requirements for managing the risks from imported goods after they have been given biosecurity clearance;

8.2. amendment to the scope of import health standards, so that they can set out requirements that must be met after imported goods have been given biosecurity clearance;

8.3. a new duty for people in possession or control of imported goods to take all reasonable steps to comply with any post-clearance requirements;

8.4. addition of a new power for an inspector to impose conditions when giving biosecurity clearance, and a framework for notifying any conditions on clearance to people who come into possession or control of imported goods;

Amendments relating to transitional and containment facilities

9. **agree** to make the following amendments to the Act, for the purpose of promoting a higher level of compliance with the requirements relating to transitional and containment facilities:

9.1. amendments to the provisions relating to the approval of operators of transitional and containment facilities, so that there is more clarity about the specific matters that can be relied on to exclude unsuitable people from being approved;

9.2. addition of a new requirement for the operators of transitional and containment facilities to meet the following duties;

- a duty to comply with the relevant operating standards for the facility;
- a duty to comply with all directions, requirements and other communications from MAF relating to goods held at the facility;
- a duty not to give biosecurity clearance for, or to release from the facility, any imported goods other than in accordance with the operating standard for the facility and any applicable directions or other communications from MAF;

9.3. addition of a new strict liability offence for a failure to comply with any of the duties referred to in paragraph 9.2;

9.4. addition of a new power to suspend the approval of a transitional or containment facility, or a facility operator, for non-compliance with the relevant standards or with any of the duties referred to in paragraph 9.2;

9.5. addition of new provisions that will enable the operators of transitional facilities to give biosecurity clearance for low-risk goods, when this is done in accordance with criteria set out in the operating standard for the facility;

Amendments relating to clearance of risk goods for which there is no import health standard

10. **agree** to amend the Act to allow biosecurity clearance to be given for imported risk goods for which there is no import health standard, provided that:

- the inspector has had regard to any relevant guidance or advice from a chief technical officer and is satisfied that it is not unwise to issue a clearance; and
- the goods are not a live organism, or material derived from an organism (except where this has been permitted by a chief technical officer);

Amendments relating to collaboration with other agencies

11. **agree** to make the following amendments to the Act, for the purpose of clearly authorising actions that MAF needs to take to collaborate with other regulatory agencies:

11.1. addition of new powers, to be modelled on provisions in the Customs and Excise Act 1996, that authorise frontline biosecurity staff to seize and detain goods and people where there is non-compliance that should be dealt with by another agency;

11.2. addition of a new power to enable MAF to make disclosures to other agencies, where this is necessary for the other agency to carry out its regulatory compliance or public protection role;

Amendments relating to compliance and enforcement provisions

12. **agree** to make the following amendments to the Act, for the purpose of improving the range of options available for responding to key areas of non-compliance:

12.1. addition of a new strict liability offence that would apply to situations where a person causes or permits goods to be imported, and the importation of the goods has occurred with either:

- false, misleading or incomplete information being provided to MAF; or

- with steps having been taken to hinder the detection of the goods by MAF;

12.2. addition of a new power allowing an inspector to give directions relating to how uncleared goods are moved to a transitional facility, and dealt with at a transitional facility;

12.3. addition of a new requirement for any person arriving in New Zealand to state their full name and residential address or other contact details, and to produce their passport or other evidence of identity;

Readiness and Response amendments

Amendments to enable the implementation of government-industry agreements

13. **note** that in August 2009, Cabinet:

13.1. directed MAF to negotiate with willing industries a final government-industry agreement for joint decision-making and cost sharing for biosecurity readiness and response; and

13.2. noted MAF's intention to provide further advice on the necessary legislative changes as part of the review of the Act;

[CAB Min (09) 31/11];

14. **agree** to make the following amendments to the Act, for the purpose of enabling government-industry agreements to be implemented:

14.1. a new provision to authorise the Director-General of MAF to enter into agreements with one or more industry organisations for joint decision-making and cost sharing for biosecurity readiness and response;

14.2. a new provision that sets out a non-exhaustive list of the matters that may be included in a government-industry agreement;

14.3. a new provision that states the criteria for the Director-General to take into account in determining whether an industry organisation adequately represents the members of its industry;

14.4. amendments to the levy provisions to ensure that:

- the industry share of costs under a government-industry agreement may be either collected directly by MAF, or collected by the industry organisation that is a party to the agreement;

- levies can be used to recover the industry share of the costs of an incursion response over a period of up to 10 years after the response; and

- a levy can be imposed on the members of an industry that is not a party to a government-industry agreement, but that has received a clear and significant benefit from an incursion response funded by the Crown;

14.5. amendments to the compensation provisions so that a government-industry agreement can specify alternative compensation entitlements that will apply to an incursion response under the agreement, provided that the alternative arrangements are consistent with the purpose of the agreement, and would not be likely to discourage the early reporting of harmful new organisms or reduce the level of cooperation with an incursion response;

14.6. amendments to the compensation provisions so that the costs of compensation can be paid from a mix of Crown and industry funding;

Amendments relating to the Farms On Line project

15. **note** that in October 2009, Cabinet agreed to the Farms On Line project, under which MAF will develop a Crown-owned resource bringing together accurate, complete, and up-to-date rural property information to improve biosecurity protection [EGI Min (09) 22/6];

16. **agree** to amend the Act to enable MAF to access the following information that is held by local authorities for rating purposes -

- property descriptions:
- valuation and land use information:
- personal contact information:

- and to allow MAF to use and disclose this information for the purposes of the Farms On Line project;

17. **agree** that the Act should include a provision that enables individuals to opt out of having their personal contact details used or disclosed for the purposes of the Farms On Line project;

Amendments relating to compensation claims

18. **agree** to make the following amendments to the compensation provisions in the Act, which will add clarity to what is expected of claimants for compensation:

18.1. a provision that expressly provides for the existing requirement that claimants take reasonable steps to mitigate their losses, and that limits the payment of compensation in situations where reasonable steps have not been taken;

18.2. a new provision that requires claims to be submitted within a period of one year, with the one-year period starting from when the claimant is in a position to verify their losses;

Amendments to enforcement and compliance provisions

19. **agree** to make the following amendments to the Act, for the purpose of improving the range of options that are available for dealing with non-compliance:

    19.1. designation of certain offences as strict liability offences, with the offences being selected by having regard to the criteria in the Legislation Advisory Committee guidelines and the criteria developed by the courts;

    19.2. removal of the "without reasonable excuse" element from offences under the Act, with those offences instead being designated as strict liability;

    19.3. addition of new provisions, to be modelled on the Hazardous Substances and New Organisms Act 1996, for the issuing of compliance orders as a response to non-compliance with any provision of the Act (including any duty provided for in the Act), or with any regulations or other instruments issued under the Act;

    19.4. addition of a civil liability regime, so that civil proceedings would be available as an option for non-compliance in cases where:

    - a significant financial sanction is necessary to counter economic incentives for non-compliance; or
    - a person's non-compliance has the potential to result directly in significant losses to others.

System-wide and miscellaneous amendments

Amendments to extend the application of the Act to the Exclusive Economic Zone

20. **agree** to amend the Act so that it can provide for the management of biosecurity risks that arise in the Exclusive Economic Zone (EEZ), in a manner that is consistent with New Zealand's obligations under the United Nations Convention on the Law of the Sea;

Reference to Treaty of Waitangi

21. **note** that MAF officials have considered whether the Act should be amended to include an express reference to the Treaty of Waitangi, and have concluded that this is not necessary, given the measures that are in place or that are under development to ensure proper recognition of the interests of Maori in biosecurity decision-making;

Other amendments

22. **agree** to make the following amendments to the Act:

22.1. addition of a new provision to enable a chief technical officer to call in the exercise of a power or performance of a function by an inspector or authorised person;

22.2. addition of a new power for the Director-General of MAF to appoint auditors, who will have access to the specific powers that are necessary to effectively perform the audit function;

22.3. addition of a new power to incorporate material by reference in instruments issued under the Act, including the ability for the latest version of the material to be incorporated automatically;

22.4. amendment to section 28B, so that it allows biosecurity clearance to be given for new organisms that have been approved under sections 38BA, 48 and 49F of the Hazardous Substances and New Organisms Act 1996;

22.5. removal of the undefined term, “restricted goods”, from section 119;

22.6. amendment to section 121 so that the power to take samples and carry out other actions is not qualified by the requirement to hold a belief that the goods being dealt with may harbour pests or unwanted organisms;

22.7. amendment to section 144(6), so that it includes a reference to the Governor-General extending the duration of a biosecurity emergency by Proclamation;

22.8. any necessary consequential amendments and transitional provisions;

Next steps

23. **note** that the 2010 Legislation Programme [omitted in accordance with sections 9(2)(f)(iv) and 9(2)(g)(i) of the Official Information Act 1982];

24. **invite** the Minister for Biosecurity to issue drafting instructions to Parliamentary Counsel Office for a Bill to implement the above decisions;

25. **note** that officials’ preliminary view is that the amendments to the Maritime Transport Act referred to in paragraph 4 may be included in the Biosecurity Amendment Bill without requiring agreement to introduce the Bill as an omnibus Bill, and that confirmation of this will be sought from the Office of the Clerk before the Bill is introduced.

Hon David Carter
Minister for Biosecurity
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