

Review of Key Parts of the Biosecurity Act 1993

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Introduction

Changes in technology, new approaches to managing risk, and a drive for improved efficiencies mean that the Biosecurity Act 1993 has not kept up with the changing face of New Zealand's biosecurity system. The Minister for Biosecurity, Hon David Carter, has asked the Ministry of Agriculture and Forestry (MAF) to review the Biosecurity Act 1993 (the Act) with the aim of introducing amendments into Parliament by mid-late 2010.

The project will focus on the need for change in key areas rather than review all aspects of the Act. This Information Paper has been prepared by MAF to introduce the priority areas of the Act that appear to warrant amendment. For each of the main subject areas, the Paper sets out the drivers for change, what should be different in the future and what might change in the Biosecurity Act. It has been produced to aid discussions on what might form the basis of specific changes to be introduced next year.

Key questions from MAF's perspective include:

- Are the drivers identified appropriate?
- Do the likely areas of change seem reasonable or not?
- Are there any obvious areas of change that are missing?

MAF is holding workshops on November 26 in Wellington and November 27 in Auckland to start working through these issues. You are welcome to attend these workshops and provide your feedback directly. Please advise Elizabeth Stoddart by email at elizabeth.stoddart@maf.govt.nz if you would like to attend. MAF will also be holding further workshops in February and March 2010 to work through the issues in more detail.

If you are unable to attend the November workshops and/or wish to make written comment¹ on the content of this document, we would welcome comments by **23 December 2009** so that they can be considered prior to the workshops in February and March.

Following the workshops, MAF will finalise its analysis considering key issues raised by stakeholders, and prepare advice for Ministers. We expect that the Government will make decisions on the final policy content of the Biosecurity Act Amendment Bill in mid-2010, and the Bill will be introduced into the House later in the year.

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¹ Any feedback given may be subject to requests under the Official Information Act 1982 (OIA). If you consider that any or all of the information you provide should be treated as confidential or commercially sensitive please state this clearly. A decision to withhold information under the OIA may be reviewed by the Ombudsman.

Biosecurity and New Zealand

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. Our native plants and animals are precious to New Zealanders and tourists alike.

The biosecurity system is designed to:

- prevent harmful pests and diseases from coming into New Zealand and establishing themselves, with the assurance that international trade and tourism are maintained; and
- reduce the harm from unwanted pests and diseases already established in New Zealand, thus maintaining New Zealand's economic, social, cultural, health and environmental opportunities.

The biosecurity system covers activities:

- **offshore** – information on intelligence and surveillance is gathered and exchanged, thereby reducing the risks posed by goods and passengers coming from other countries;
- **at our borders** – managing people, goods and craft arriving in New Zealand to reduce the risks of harmful pests and diseases entering New Zealand, and in turn facilitating international trade; and
- **within New Zealand** – eradicating or managing those pests and diseases that are in New Zealand.

The aim is to ensure “New Zealanders, our unique natural resources, our plants and animals are all kept safe and secure from damaging pests and diseases” (Biosecurity Strategy 2003).

THE BIOSECURITY ACT 1993

The Biosecurity Act 1993 (the Act) was a world first – a law specifically designed to support the systematic protection of all New Zealand's valued biological systems from the harmful effects of pests and diseases.

The Act has not been significantly reviewed since its introduction and modern risk-based approaches cannot be fully implemented because of its constraints. There appear to be a number of key areas where amendments are now required in light of:

- technology developments;
- changes in Government policy and/or accountabilities;
- evidence of new biosecurity risks (for example in the marine area).

The Minister for Biosecurity has asked MAF to review the Act to ensure that the current legislation supports the biosecurity system improvements and likely future state of the biosecurity system. The aim is to introduce amendments into Parliament in the latter half of 2010. The intent of the review is to identify and focus on key areas of the Act that most strongly warrant amendment rather than attempting to do a fully comprehensive review of the entire Act.

Areas where legislative change appears to be needed include:

- border management;
- marine biosecurity;
- pest management;
- biosecurity preparedness and response within New Zealand;
- the sanctions regime for non-compliance.

In some cases these changes reflect recent Cabinet decisions (for example, joint agreements with industry on biosecurity preparedness and response), whereas in other areas the ideas are at their early stages (for example, in border management).

1. Border Management

1.1. DRIVERS FOR CHANGE

The Government's focus for the border has been for MAF to maintain or improve the management of biosecurity risks at the border, by making sure that resources are targeted to the highest risks, and using technology more effectively.

Once the current economic downturn is over, trade and passenger volumes are forecast to start increasing again. The Government wants border agencies to work together far better and, wherever possible, use shared systems to provide more seamless management of border risks.

Modern approaches to managing biosecurity risk involve these risks being managed at the country of origin where possible. Yet the Biosecurity Act was written on the basis that all goods would be physically inspected at the border by MAF staff. For example, the Act gives an "inspector" responsibility for clearing goods and does not expressly contemplate using modern assessment methods such as risk profiling and offshore certifications that are now proving very effective. One specific driver for change is the increased use of electronic information to inform and communicate clearances.

1.2. WHAT SHOULD BE DIFFERENT IN THE FUTURE

New Zealand's future border operations should involve:

- greater management of risk offshore where possible;
- clear importer obligations, with more flexibility in terms of how some standards can be met;
- early provision of information by importers, shippers and airlines to streamline the entry of goods by allowing better targeting of MAF resources;
- MAF and Customs processing compliant importers and passengers as seamlessly as possible;
- the use of a much broader range of methods and tools to assess and manage risk at the border to encourage compliance and reduce the reliance on physical inspection at the border; and
- clear consequences for those who breach the requirements.

1.3. WHAT MIGHT CHANGE IN THE BIOSECURITY ACT

To achieve the above, amendments to the Biosecurity Act will be necessary to:

- allow MAF to require information on incoming goods and passengers before they arrive in New Zealand and share this information with other border agencies;
- allow electronic systems to receive passenger and importer declarations, and communicate clearance decisions;
- provide clarity on the legal obligations of those importing risk goods;
- provide for enforcement of import rules after goods have been cleared;
- allow more flexibility in the way that import rules can be set; and
- provide for improved clearance options by providing for a range of risk assessment tools and remove the requirement to always have visual inspection of goods before clearance is given.

Requiring information in advance of import

The need for faster decision-making at the border and the proposed new Joint Border Management System with the New Zealand Customs Service require changes to the Biosecurity Act. Changes are needed to enable MAF to obtain and use information about incoming goods, craft and passengers before they arrive in New Zealand, and to share this information with other border agencies.

Use of electronic systems at the border

The Act needs to explicitly recognise the use of electronic systems to collect information, make assessments, and communicate decisions and directions to passengers or importers. Information submitted electronically must be able to meet the requirements of the Act, including being able to be used as evidence in prosecutions and situations of non-compliance.

The legislation should ideally enable the use of electronic systems to:

- capture electronic passenger declarations rather than using the current paper-based declaration card;
- capture information to support the development of risk profiles, inform risk assessment and decisions on whether to take action, and inform enforcement activities;
- apply risk profiles and alerts, and help verify that risks have been managed; and
- where appropriate, communicate directions and clearances.

Of course, an inspector should still be able to perform the above activities, exercise judgement and discretion, and override the electronic process when needed.

Obligations on importers

The Act effectively makes it MAF's job – as opposed to importers – to ensure that goods entering the country do not present a biosecurity risk. This means that some importers may focus entirely on what they need to do to get a MAF clearance, rather than considering what they should be doing to better manage biosecurity risks. This also leaves the liability of importers unclear, particularly in cases where exotic diseases and pests are found in the goods after an inspector has cleared them. Amendments seem desirable to make importers' obligations clear.

A further change could be to enhance the use of conditions on a clearance to enable the management of risks associated with goods to continue after the goods have been cleared for entry. For example, a condition could be imposed requiring that the goods be used only in a specific way.

Allow more flexibility in the way that import rules are set

The Act is unclear on exactly what needs to go in an “import health standard” and what can sit outside it. In effect, this risks confusing requirements (for example, “goods must be clean”) with actions that can be taken by MAF to ensure compliance with these requirements (for example, inspection or audit). Changes seem desirable so that it is clear what level of detail is required in import health standards. Also, the legislation should allow an import health standard to be written based on achieving desired outcomes, rather than the more usual prescriptive “input” format. This should, over time, encourage the development of alternative ways to achieve compliance.

There is also a question as to whether the Biosecurity Act should be amended to expressly require consideration of the direct costs of a proposed import requirement when recommending the issuing of an import health standard. The aim would be to ensure that the level of biosecurity protection achieved is weighed up against the direct costs of achieving that level of protection.

Provide for a suite of intervention tools to manage risks

Reducing the reliance on physical inspection at the border requires the use of a greater range of risk assessment methods and tools. These tools include:

- risk profiling, potentially using information received before the goods arrive at the border;
- documentation checks where there is confidence in the authorities and systems of the country of origin;
- visual inspection;
- sampling or testing where a selection of the goods is tested;
- treatment of the goods to effectively manage the risks; and
- post-entry quarantine where goods are sent to a quarantine facility.

The review will ensure that the Act is consistent with the use of these and other appropriate risk assessment tools.

2. Marine Biosecurity

2.1. DRIVERS FOR CHANGE

Oil and gas exploration and production activities in New Zealand's Exclusive Economic Zone (EEZ) are creating biosecurity risks for New Zealand's marine environment. Examples of activities that may introduce invasive marine organisms to New Zealand include:

- exploratory drilling rigs and platforms operating at sites in the EEZ may have lots of organisms attached to them; and
- tankers discharging ballast water when berthed alongside structures and vessels in the EEZ.

The biosecurity risks in the EEZ are not exclusively related to oil and gas exploration. Future activity in the EEZ, such as large-scale seabed mining (for example, for gold and iron-sand), energy generation, aquaculture, carbon capture and storage, and bio-prospecting could also be expected to create biosecurity risks to New Zealand's marine environment.

Controls imposed under the Biosecurity Act only apply in New Zealand territorial waters (up to the 12 mile limit), which means that rigs, structures, platforms and craft operating in the EEZ do not receive any form of biosecurity assessment or clearance.

The Act also does not easily allow for the risk management of hitchhiker organisms which may come into the EEZ or territorial waters through ballast water or hull fouling.

2.2. WHAT SHOULD BE DIFFERENT IN THE FUTURE

Rigs, structures, platforms and craft that are anchoring, berthing, or operating in the EEZ will come within the scope of MAF's border management powers. Craft passing through the EEZ to a port in New Zealand will continue to be governed by MAF's border management powers in the same way they are currently.

Other biosecurity activities, such as emergency response or pest management, could be undertaken in the EEZ in response to invasive marine organisms introduced by economic activity in the EEZ.

2.3. WHAT MIGHT CHANGE IN THE BIOSECURITY ACT

The Act provides MAF with powers to regulate the entry of craft and risk goods on board, and the discharge/unloading of risk goods, but the jurisdiction of the Act does not extend beyond the Territorial Sea. While the Continental Shelf Act 1964 extends the jurisdiction of the Biosecurity Act to the EEZ, this only applies in limited circumstances and does not enable the management of all activities or vessels within the EEZ for biosecurity purposes.

The previous Government agreement in principle to amend the Act to extend its jurisdiction to the EEZ so that the appropriate risk management provisions for managing the Territorial Sea will be able to be applied within the EEZ.

Further, MAF considers that amendments to the risk management provisions for managing the Territorial Sea may need to be enhanced to improve their workability, particularly in light of the extended application to the EEZ. Amendment should more clearly provide mechanisms to manage the risks of hitchhiker organisms associated with craft.

3. Pest Management

3.1. DRIVERS FOR CHANGE

There are a large number of players involved in managing pests in New Zealand. Pest management activities range in scale from individuals managing cabbage moths in their gardens through to the co-ordinated management of bovine Tuberculosis by the Animal Health Board.

MAF, regional councils, the Department of Conservation, industry groups, Tangata Whenua and non-Government organisations are all involved in pest management, and need to co-ordinate their activities where appropriate.

The pest management system has evolved over time and is fragmented, with unclear roles and responsibilities for individual agencies which result in gaps and overlaps in the system.

Unlike other land owners, the Crown is not required to meet rules in regional pest management strategies, which undermines the effectiveness of these strategies.

Work is underway to address these issues and improve the frameworks and tools that enable effective pest management in New Zealand. Other central Government agencies, regional councils, industry and Tangata Whenua are involved.

Specific issues with the Act identified from this work include:

- there is limited guidance on how the tools within the Act should be applied and used by the parties concerned;
- national and regional pest management strategies are not flexible enough to provide for quick action on new pest threats, and are onerous and cumbersome to implement;
- the pest management strategies are focused on the pests themselves, and are not well suited for alternative approaches to pest management, such as pathway management or site focused activities;
- its lack of obligation on any particular agency to undertake activities in pest management, thus allowing for the situation where no-one takes the lead and no decision is made; and
- there are insufficient tools for MAF to be effective in its leadership role.

3.2. WHAT SHOULD BE DIFFERENT IN THE FUTURE

The aim of this work is to ensure that in the future:

- New Zealanders will be active, informed and supportive participants in the pest management system;
- pest management participants will have strong relationships and work together effectively to best achieve biosecurity outcomes;
- pest management programmes will be effective, efficient and responsive to changes in the biosecurity environment; and
- the pest management system will produce sound decisions that are supported by those affected.

3.3. WHAT MIGHT CHANGE IN THE BIOSECURITY ACT

Potential changes that are being explored include:

- whether roles and responsibilities in pest management should be included within the Biosecurity Act, or whether there are alternative ways to clarify these;
- providing greater national policy direction and mechanisms for allowing this;
- improving national and regional pest management strategies so that they are more flexible and fair across all landowners; and
- whether the Crown should be bound to rules in regional pest management strategies.

4. Biosecurity Preparedness and Response within New Zealand

4.1. DRIVERS FOR CHANGE

The Government has asked MAF to find ways to improve biosecurity “readiness” and “response”. Readiness and response mean preparing for, and responding to, pests and diseases found in New Zealand. The Biosecurity Funding Review, which was approved by the previous government in 2005, recommended joint decision-making and cost sharing with primary industries.

To this end, the Government has recently announced that MAF will develop a cost-sharing agreement with willing primary industries. Under the agreement, MAF and primary industries will work together to reduce the impact of unwanted pests and diseases.

Currently, the Government both funds and makes all the decisions on biosecurity activities - generally on a case-by-case basis, and often in reaction to the latest crisis or industry pressure. Some industries are proactive and contribute directly to these readiness and response activities as well as their own, while others do not.

The new agreement will encourage primary industries to invest in biosecurity preparedness consistently and fairly across all industries. This will result in faster and less costly responses that are more likely to eradicate or control pests and diseases. Signatories to the agreement will be involved in deciding future biosecurity priorities.

4.2. WHAT SHOULD BE DIFFERENT IN THE FUTURE

The government-industry cost-sharing agreement will enable MAF and each participating industry to jointly:

- decide what pests and diseases (risk organisms) are a priority;
- design and oversee readiness for these priority risk organisms;
- improve our capability and capacity to respond to these risk organisms; and
- agree on cost shares for readiness and response for each risk organism, based on the proportion of public to industry benefits.

The introduction of cost-sharing is to be phased in gradually. For the first three years participating industries will contribute towards readiness measures only. Cost-sharing towards response measures will be phased in later on. MAF will retain responsibility for funding and responding to pests and diseases with major economic impacts.

Industries that join this agreement will have joint decision-making rights and cost sharing responsibilities. If the proposed amendments are made, there will still be a need to ensure equity and fairness amongst industries, and that the initial costs lead to longer-term cost reductions.

4.3. WHAT MIGHT CHANGE IN THE BIOSECURITY ACT

Amendments to the Biosecurity Act seem necessary to clearly enable MAF to enter into agreements that relate to the use of its statutory powers under the Act.

The amendments may also set out criteria to help determine when an industry organisation has sufficient mandate to enter into an agreement.

The amendments are also likely to affect the provisions relating to compensation, and levies.

5. The Sanctions Regime for Non-compliance

5.1. DRIVERS FOR CHANGE

A regulator must ensure that an appropriate overall level of compliance with the law is maintained. The majority of people either comply with legal requirements, or are willing to do so when informed of their obligations.

An effective compliance regime does, however, need appropriate sanctions to respond to non-compliance. This includes having a range of enforcement responses to deal with different levels of non-compliance. Stakeholders have indicated that they want to see those not complying with biosecurity rules targeted more directly and with stronger sanctions.

The Act allows infringement notices to be issued in cases where passengers make erroneous declarations about what is in their accompanying baggage. This enables non-compliance of this kind to be dealt with promptly and efficiently.

There is no similar tool for other kinds of non-compliance, and the only enforcement response is therefore to take a prosecution. Prosecutions are a lengthy and resource-intensive process. Furthermore, many of the offences in the Act are difficult to successfully prosecute, because they involve complex definitions and require proof that the offender intended to behave in a certain way.

One example of where sanctions could be improved is dealing with non-compliant transitional facilities (places that are approved for the holding, inspection, treatment, destruction or disposal of un-cleared risk goods). Currently the only option for responding to this is to completely cancel the facility's approval. This is often unnecessarily harsh and re-instatement is costly to businesses. In cases of minor or temporary non-compliance, improved administrative options, such as an ability to suspend an approval, would improve control and performance.

5.2. WHAT SHOULD BE DIFFERENT IN THE FUTURE

A broader range and application of enforcement tools should be provided to see a more flexible, effective and efficient regime supporting biosecurity compliance. Proposals in this area will, of course, take into account issues relating to human and civil rights.

5.3. WHAT MIGHT CHANGE IN THE BIOSECURITY ACT

Amendments to the Act could add new offences to target more specifically the range of non-compliance that typically comes to MAF's notice.

The Act might also be amended so that a more extensive range of sanctions are available with which to respond to non-compliance, so that a costly prosecution is not the only option. Using the transitional facility example above, an amendment to the Act could enable a facility's approval to be suspended rather than just cancelled.

6. Other Proposed Changes

A few other aspects of the Biosecurity Act also need attention. Two examples of other proposed changes are access to data and the compensation claims area.

6.1. ACCESS TO RURAL PROPERTY DATA

Rural property data is currently held across numerous government and industry databases, and is not readily accessible.

MAF is developing “Farms On Line” as a Crown-owned resource to provide a more complete, robust and accurate rural property register to support MAF to prepare for, and respond to, biosecurity threats. In order for MAF to rapidly respond to any disease incursions that could threaten stock or crops, MAF, through Farms On Line, needs to maintain access to up-to-date rural property contact details. This information is most appropriately sourced from local authorities’ rating information databases.

MAF proposes to amend the Act to enable access to these databases. The amendment would require local authorities to give Farms On Line access to personal contact information from the rating information databases, as a precautionary biosecurity measure, in the absence of any immediate threat of a stock or crop disease outbreak. The general purpose of such access will be to provide for the continuous monitoring of New Zealand's status in regard to pests and unwanted organisms.

Farms On Line will comply with the Privacy Act and will have principles, systems, and protocols governing access to and use of personal information. MAF has consulted with the Office of the Privacy Commissioner in developing the approach to the protection of personal information.

6.2. AMENDMENTS TO COMPENSATION CLAIM PROCESSES

When an action taken under the Act to manage or eradicate a risk organism causes certain types of loss to a person, compensation is payable. However, the Act currently contains no time limit for claimants to lodge claims with MAF. This leads to administrative and budget challenges for MAF, including financial liabilities for claims not lodged.

A statutory time limit for lodging compensation claims would encourage claimants to make timely claims while still allowing plenty of time for compiling information that would be the basis for the claim. Some limited exceptions to the time limit would be allowed for so that certain claims could be accepted later where there are extenuating circumstances.