

SUBMISSION TO

**THE SENATE STANDING COMMITTEE ON RURAL AND REGIONAL AFFAIRS
AND TRANSPORT**

on

BIOSECURITY BILL 2012

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Submission by Sophie Riley, to the Senate Standing Committee on Rural and Regional Affairs and Transport on the Biosecurity Bill 2012

INTRODUCTION

Expertise

My name is Sophie Riley and I am a senior lecturer in the Faculty of Law at the University of Technology Sydney. My scholarship, research interests and publications encompass the regulation of invasive alien species.¹ Select Conferences and Publications include:

2012

- ‘Law is Order and Good Law is Good Order: the Role of Governance in the Regulation of Invasive Alien Species’ (2012) *Environmental Planning and Assessment Law Journal* 16.
- Using ‘Threatening Processes’ To Protect Freshwater Biodiversity From Invasive Alien Species’ (2012) 1 *Canberra Law Review* 58.
- Paul Martin, Miriam Verbeek, Sophie Riley, Robyn Bartel and Elodie Le Gal *Innovations in Institutions to Improve Weed Funding, Strategy and Outcomes, Research Agenda*, RIDC (2012).
- Sophie Riley, ‘RIO + 20: What Difference has Two Decades Made to State Practice in the Regulation of Invasive Alien Species?’ Conference paper presented at the IUCN Colloquium, July 2011 in Baltimore.

2011

- ‘Heads I Win, Tails You Lose: Uncertainty and the Protection of Biodiversity from Invasive Alien Species’ (2011) 14 (1&2) *Asia-Pacific Law Journal*, 139
- Robyn Bartel and Sophie Riley, ‘How do We Radically Improve Weeds Laws? Critical Action for Wicked Problems’, 16th NSW Weeds Conference, July 2011 in Coffs Harbour

2010

- Sophie Riley, ‘Plausible Hypothesis or Scientific Certainty: Protecting Biodiversity from Invasive Alien Species in an Era of Climate Change’, IUCN Colloquium September 2010, in Ghent

2009

- ‘Preventing Transboundary Harm from Invasive Alien Species’ (2009) 18 (2) *RECIEL* 198.
- ‘A Weed by any Other Name: Would the Rose Smell as Sweet if it Were a Threat to Biodiversity’, (2009) 22 (1) *Georgetown International Environmental Law Review* 157.

¹ Other research interests include pedagogy for widening participation in higher education, particularly with respect to improving learning outcomes for international students.

Scope of Submission

I have read the Biosecurity Bill 2012 (the Bill) and welcome the opportunity to comment. I have also had the opportunity to read the submission made by the Invasive Species Council for the NGO group, titled 'Exposure draft of the Biosecurity Bill 2012 A submission from Environment NGOs', (NGO submission) and support and agree with their comments and discussion. Accordingly, this document will not re-visit matters such as, the strengths of the Bill or the impact of invasive alien species (IAS) on Australia's economy and environment, which have already been covered by the NGO submission. Rather this document focusses on three matters: protection of the environment; terminology; and the precautionary principle.

1. PROTECTION OF THE ENVIRONMENT

The shift from quarantine to biosecurity has coincided with increasing recognition of the links between biosecurity regulation and protection of the environment, particularly with respect to management of IAS. As a starting point, the term 'biosecurity' itself is generally acknowledged to be wider than 'quarantine'. In the context of plant and animal health and safety the Food and Agriculture Organization describes biosecurity as:

a strategic and integrated approach that encompasses the policy and regulatory frameworks (including instruments and activities) that analyse and manage risks in the sectors of food safety, animal life and health, and plant life and health, including associated environmental risk [including] the introduction and management of invasive alien species and genotypes...²

Thus, preventing the introduction of IAS should be squarely placed on the biosecurity agenda.

Currently, section 4 of the *Quarantine Act 1908* (Cth) describes (but does not define) quarantine in terms of processes and outcomes that include preventing or controlling the introduction, establishment or spread of diseases or pests that will or could cause significant damage to humans, animals, plants and the environment.³ The reference to the environment was added in 1999 following the Nairn review and its recommendations to extend the scope of quarantine to the natural environment.⁴ Although these amendments highlighted the importance of linkages between quarantine and environmental protection, the amendments did not translate into a more effective IAS regime. Indeed, the 2008 review, *One Biosecurity, A Working Partnership: The Independent Review of Australia's Quarantine and Biosecurity Arrangements Report to the Australian Government*, (Beale review) noted that Australia's existing biosecurity framework was not being used effectively to analyse and manage the risks to the Australian environment.⁵ The Beale review further noted that that risks to environmental biosecurity are not as well developed as those for risks to primary production.⁶

² Food and Agriculture Organization, Fact Sheet, *Biosecurity for Agriculture and Food Production*, available from <<http://www.fao.org/biosecurity/>>.

³ *Quarantine Act 1908* (Cth) section 4(1)(b).

⁴ M E Nairn, P G Allen, A R Inglis and C Tanner, *Australian Quarantine: A Shared Responsibility* Department of Primary Industries and Energy, Canberra (1996) at paragraph 2.2.4.

⁵ Roger Beale, Jeff Fairbrother, Andrew Inglis, David Trebeck, *One Biosecurity, A Working Partnership: The Independent Review of Australia's Quarantine and Biosecurity Arrangements Report to the Australian Government*, Commonwealth of Australia (2008), paragraph 5.4.11.

⁶ *Ibid*, paragraph 7.2.3.

Accordingly, the review recommended that biosecurity risk analysis should enjoy the same ‘professional capacity to assess risks to the environment’ as the agricultural product sector.⁷

The Biosecurity Bill 2012, therefore, represents a significant opportunity to entrench environmental protection into biosecurity processes, including import risk analysis, monitoring and other follow-up mechanisms. Yet, it appears to be an opportunity that has not been fully engaged.

To start with, environmental matters are subordinated to those connected with primary production. Clause 165 of the Bill, for example, sets out that the ‘Agriculture Minister may direct the Director of Biosecurity to commence a BIRA’, yet there is no equivalent power for the Environment Minister. A further issue from an environmental perspective is the lack of consultation on and publication of risk assessments other than BIRAs, which contrasts with the approach taken under the Environment Protection and Biodiversity Conservation Act 1999 for decisions about new animal imports. In addition, the Bill also provides that decisions are to be made by the Director of Biosecurity, who is also the Secretary of DAFF. This potentially creates a conflict between the uses of biosecurity to protect the environment and the promotion of international trade.⁸ It is not clear what role the Department of the Environment will play in the decision-making process; however, the Biosecurity Bill does not refer to a specific role for the Department of the Environment, meaning that the department will play a very small role, if any.

The NGO submission emphasized the importance of including those who have expertise in environmental biosecurity. The author strongly endorses recommendations 7 and 8 of the NGO submission:

Rec 7. Implement the Beale review recommendation for biosecurity to be administered by a statutory National Biosecurity Authority, with an independent Director of Biosecurity and an expert Biosecurity Commission.

Rec 8. Specify that at least one-third of Biosecurity Commissioners have primary expertise in disciplines relevant to environmental biosecurity, including ecology and conservation biology, and are appointed by the Environment Minister, as recommended by the Hawke review of the EPBC Act.

2. TERMINOLOGY

Another issue related to protection of the environment stems from particular terms used in the Bill that could create confusion. For example, proposed clause 9 specifies that an invasive pest ‘is an alien species (within the meaning of the Biodiversity Convention)’; and the Biodiversity Convention is defined as ‘the Convention on Biological Diversity, done at Rio de Janeiro on 5 June 1992, as in force for Australia from time to time’. The combined effect of these definitions is to conflate the notions of ‘invasive’ and ‘alien’ in a very unhelpful manner.

It is well known, that not all alien species will become invasive;⁹ and Australia’s obligations in accordance with Article 8(h) of the Biodiversity Convention are to ‘prevent the

⁷ Ibid, recommendation 42.

⁸ Invasive Species Council, ‘Exposure draft of the Biosecurity Bill 2012 A submission from Environment NGOs’, 2, 8, 26 and 40.

⁹ Jeffrey A McNeely ‘The Great Reshuffling: How Alien Species Help Feed the Global Economy’ in O

introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species'. Article 8(h) does not refer to alien species as a whole, but only to those that pose a threat to biodiversity. Accordingly, determining which alien species are likely to pose a threat to biodiversity is crucial for the effective operation of biosecurity systems. It is for this very reason, that BIRAs and associated processes such as monitoring are important and why this submission commenced by highlighting the significance of including environmental indicators into these systems.

It is also worth pointing out that the Biodiversity Convention itself does not define an alien species. Article 8(h) refers to those alien species that threaten biodiversity – thus the emphasis lies on the invasive rather than alien qualities of the species. Definitions however are found in the CBD Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems Habitats or Species (CBD Guiding Principles):¹⁰ an alien species is one that has been introduced outside its natural past or present distribution; while an invasive alien species is an alien species whose introduction and spread threatens biological diversity. Therefore, the reference in the Biosecurity Bill to an alien species as being defined by the Biodiversity Convention should be revised.

A further reason that reinforces the need to be as accurate as possible in the use of definitions stems from a growing body of literature criticising the regulation of IAS and linking them with nativism and xenophobia.¹¹ Typical of this genre is the following comment:

The natural scientists who worry about the penetration of alien species often appear to be unaware of the parallels between their discourse and that of racists and national chauvinists. Few of these scientists would presumably wish to be classified as such. Yet racists and nationalists have been known to legitimate their arguments by drawing parallels between the arguments of scientists concerning ecological imperialism and the supposed threat of foreign species, on the one hand, and, on the other, the perceived threat of foreign races and cultures to the native populations of their countries¹²

However, as Simberloff has rightly pointed out, ¹³far from being grounded in nativism and xenophobia, natural scientists and regulators do not target all alien species, rather they target those species that are invasive and harm or threaten biodiversity and other interests. Consequently, having a definition in an important instrument such as the Biosecurity Bill, that confuses concepts of 'alien' and 'invasive', will further obfuscate the underlying principles that form the basis of efforts to deal with IAS.

Recommendation 1

It is recommended that separate definitions be adopted for the terms 'alien' and 'invasive' in accordance with the definitions set out in the CBD Guiding Principles.

Sandlund, P Schel, A Viken (eds) *Proceedings of the Norway/UN Conference on Alien Species* Trondheim July 1995 Directorate for Nature Management Trondheim (1996) 53.

¹⁰ Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species. Adopted April 2002 as part of Decision VI/23 of the Conference of the Parties. Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/6/20 (23 September 2002), definitions in footnote (57).

¹¹ See for example, Emma Marris, *Rambunctious Garden, Saving Nature in a Post-Wild World*, Bloomsbury, (2011); G Adrian Franklin, *Animal Nation*, UNSW Press (2006); and Gröning and J Wolschke-Bulmahn, 'The Native Plant Enthusiasm: Ecological Panacea or Xenophobia' (2003) 28 (1) *Landscape Research*, 75.

¹² Kenneth R Olwig, 'Natives and Aliens in the National Landscape' (2003), 28 (1), *Landscape Research*, 61, 61.

¹³ D Simberloff, 'Confronting Introduced Species: A Form of Xenophobia?', (2003) 5 (2) *Biological Invasions*, 179-92

3. PRECAUTIONARY PRINCIPLE/APPROACH

The use of the precautionary approach as a guide to decision-making with respect to intentional introduction of alien species is endorsed by Guiding Principle 1 of the CBD Guiding Principles. It should be noted that the term ‘precautionary approach’ is different from ‘precautionary principle’, as used in the preamble to the CBD. Principle 15 of the Rio Declaration sets out the precautionary approach:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

This explanation uses qualifying descriptors such as ‘serious or irreversible’ damage and ‘full scientific certainty’. As such, the precautionary approach is to be applied in cases of significant threat, rather than as an overarching ‘principle’ that guides policy in all circumstances. By way of example, Norway’s Nature Diversity Act 2009 applies the precautionary approach, noting that ‘If there is a risk of serious or irreversible damage to biological, geological or landscape diversity, lack of knowledge shall not be used as a reason for postponing or not introducing management measures’.

Although the approach/principle debate occupies an important place in the literature¹⁴, it is not the objective of this submission to visit this topic. Suffice it to say, that the CBD Guiding Principles refer to the ‘precautionary approach’ and Australia thus faces overriding responsibilities based on notions of prevention and precaution, with respect to IAS. The trigger for implementation of measures is either the point where scientific evidence indicates that a species is a known threat to biodiversity; or where there is some evidence indicating that the species is likely to be invasive, although the evidence is incomplete or inconclusive.

Notwithstanding the provisions of the CBD Guiding Principles, the Biosecurity Bill 2012 does not refer either to the precautionary approach or the precautionary principle. This stance likely accords with the conclusions of the Beale Review that found:

The Panel is of the view that to the extent that adopting in the Biosecurity Act the definition of the precautionary principle in the *Environmental Protection and Biodiversity Conservation Act 1999* led to different outcomes to those that would arise from applying Article 5.7 of the SPS Agreement, there is a risk that Australia would be in breach of its obligations under that Agreement and hence would be open to challenge through the World Trade Organization dispute settlement procedures.¹⁵

¹⁴ Owen McIntyre and Thomas Mosedale, ‘The Precautionary Principle as a Norm of Customary International Law’ (1997) 9 *Journal of Environmental Law* 221; Justice Paul Stein, ‘Are Decision-makers too Cautious with the Precautionary Principle?’ (2000) 17 *Environmental and Planning Law Journal* 3, 4; Cameron Hutchinson ‘International Environmental Law Attempts to be ‘mutually supportive’ with International Trade Law: a compatibility analysis of the Cartagena Protocol to the Convention on Biological Diversity with the World Trade Organisation agreement on the application of sanitary and phytosanitary measures’ (2001) 4 (1) *Journal of International Wildlife Law & Policy* 1, parag 5.3; B Goldstein and R Carruth, ‘The Precautionary Principle and/or Risk Assessment in World Trade Organization Decisions: A Possible Role for Risk Perception’ (2004) 24 *Risk Analysis* 491, 491-492; Jacqueline Peel ‘Precaution – A Matter of Principle, Approach or Process?’ (2004) 5 *Melbourne Journal of International Law* 483.

¹⁵ Roger Beale, Jeff Fairbrother, Andrew Inglis, David Trebeck, *One Biosecurity, A Working Partnership: The Independent Review of Australia’s Quarantine and Biosecurity Arrangements Report to the Australian*

Yet, this is not necessarily the case. The author has written on this point in an article titled, 'Heads I Win, Tails You Lose: Uncertainty and the Protection of Biodiversity from Invasive Alien Species' (2011) 14 (1&2) *Asia-Pacific Law Journal*, 139. The problem stems from how uncertainty is treated. In accordance with Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures,¹⁶ States may implement temporary measures where scientific evidence is 'insufficient'. However, the notion of insufficiency in the context of article 5.7 refers to the volume of scientific material, rather than its conclusiveness. This makes it difficult for regulators to argue for precautionary biosecurity measures on the basis of inconclusive scientific evidence. Yet as the NGO submission points out on page 30, other jurisdictions, such as New Zealand and Norway, are moving towards integrating the precautionary approach into their biosecurity regimes. Indeed, Australia's Weed Risk Assessment was developed in a manner to comply with Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures and stop the entry of potentially damaging plants.

Recommendation 2

That wording similar to that found in Norway's Nature Diversity Act 2009, with respect to the precautionary approach, be included in the Biosecurity Bill.

SUMMARY

The author makes two recommendations designed to enhance the role of biosecurity in protection of the environment:

Recommendation 1: It is recommended that separate definitions be adopted for the terms 'alien' and 'invasive' in accordance with the definitions set out in the CBD Guiding Principles.

Recommendation 2: That wording similar to that found in Norway's Nature Diversity Act 2009, with respect to the precautionary approach, be included in the Biosecurity Bill.

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Government, above n 5, paragraph 5.4.11.

¹⁶ The Agreement on the Application of Sanitary and Phytosanitary Measures (SPSA) [1995] *ATS* no 8.