

Community and Public Sector Union

Rebecca Fawcett – A/g Deputy Secretary

Biosecurity Legislation Reform Section
Department of Agriculture, Fisheries and Forestry
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Email:

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Dear Sir/Madam

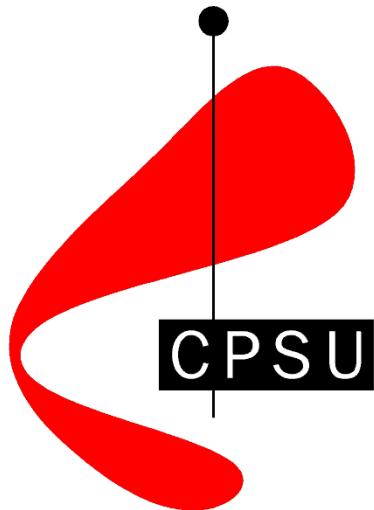
Re: CPSU Submission to the Inquiry into proposed Biosecurity Legislation Reform

The Community and Public Sector Union (CPSU) welcomes the opportunity to make a submission to the Inquiry into Biosecurity Legislation as it gives those who are directly affected by the proposed changes the chance to express their views.

The CPSU thanks the Department for the opportunity to comment on these issues. Should you wish to discuss this submission any further the contact person is Osmond

Yours sincerely

Rebecca Fawcett
CPSU A/g Deputy Secretary



CPSU (PSU Group) Submission:

Inquiry into proposed new Biosecurity Legislation

October 2012

Background

The PSU Group of the CPSU represents workers in the Australian Public Service, the ACT and Northern Territory Public Service, the telecommunications sector, call centres, employment services and broadcasting. We are a national union with members in every state and territory. The CPSU is the principal union representing employees in the Agriculture, Fisheries and Forestry portfolio, including the Department and Biosecurity Australia.

The CPSU has prepared this submission after consultation with CPSU Section Council, delegates and members in the Agriculture, Fisheries and Forestry portfolio.

The purpose of the Bill is to replace the *Quarantine Act 1908*, implement a risk based approach to biosecurity management and an integrated approach across the biosecurity continuum; involving offshore, border and onshore activities.

The feedback provided by members relates to a range of concerns around industry self-regulation and the need for greater clarification about powers and responsibilities. CPSU members also highlighted the need for additional resourcing to manage the expected increased workload from proposed reforms.

In response to the proposed changes, CPSU members identified issues regarding:

- 1) Consultation on the Regulations;
- 2) Job security of DAFF employees;
- 3) Auditing processes;
- 4) Reclassification of staff;
- 5) Adverse impact of industry self-regulation;
- 6) Need for additional funding to effectively implement these reforms; and
- 7) Reporting signs and symptoms listed human diseases on incoming vessels.

CPSU members also identified a number of positives elements that they were supportive of in the proposed Bill.

Summary of Recommendations

1. Passage of the proposed Bill is delayed until Departmental staff are consulted on the Regulations and are able to provide feedback
2. The Department clarifies the likely impact of new biosecurity provisions for industry participants on Departmental staffing arrangements.
3. The Department clarifies what “limited functions” industry participants will be allowed to do and what legislative mechanisms will be enacted to guarantee this
4. The proposed legislation is amended to include mechanisms to prevent the outsourcing of jobs including adding a legislated criterion for the appointment of “other persons” considered necessary as biosecurity officers.
5. Auditing is maintained in-house and third party auditors are only employed to provide specialist technical assistance under Departmental employed staff.
6. An independent assessment process of third party auditors occurs before they are approved by the Directors of Biosecurity and Human Biosecurity as appropriately qualified and experienced
7. A set auditing rate is established by the Department and additional funding for increased auditing rates is guaranteed over the forward estimates.
8. Consultation on transitional provisions in subordinate legislation to ensure Compliance Officers will be automatically deemed Biosecurity Enforcement Officers under the new Act prior to adoption
9. The APS Code of Conduct applies to all Authorised Officers regardless of whether they are APS employees.
10. Sanctions are automatically enacted after a time limited period for those industry participants who are found to be non-compliant
11. Amend the proposed legislation to include a precautionary principle modelled on the Queensland Biosecurity Act 2011.
12. The Department obtain additional resourcing to implement the new Biosecurity Legislation in line with the Beale Review Recommendations 73, 74, 76, 77, 78, 79 and 80.
13. The proposed legislation includes a requirement that operators of incoming vessels to report individuals with any signs of symptoms of listed human diseases
14. Genuine consultation about how verbal directions are to be used by staff prior to adoption of subordinate legislation.
15. Maintain these aspects of the proposed legislation that CPSU members support in the final Biosecurity Bill

Issues

1. Consultation on the Regulations

CPSU members welcomed the extended period of consultation about the proposed biosecurity legislation. Many previously expressed concern that the consultation would conclude before the three unreleased chapters were circulated for comment.

There is, however, concern that there will not be an opportunity to comment on the Regulations before passage of the Bill. Much of detail referred to in the legislation is likely to be in the Regulations and will affect staff.

Members have indicated they wanted to examine the Regulations to provide feedback. Passage of the legislation should be delayed until after there is a period of consultation with Departmental staff on the proposed Regulations.

The CPSU recommends a period of genuine consultation on the proposed Regulations prior to the passage of the bill.

Recommendation: Passage of the proposed Bill is delayed until Departmental staff are consulted on the Regulations and are able to provide feedback.

2. Impact of changing powers and responsibilities on Departmental employees

CPSU members raised a number of questions about the impact of the proposed changes on the role of Departmental employees, what powers authorised officers and industry participants will have and the implications for Departmental staffing levels.

Division of responsibilities between industry participants and the Department

Most members' concerns related to new biosecurity provisions for industry participants. Greater clarification is needed about what powers industry participants will have and whether Departmental employees will lose responsibilities. For example, under the legislation, industry participants will be able to release their own goods which may affect the responsibilities Departmental staff have:

Goods that are subject to biosecurity control are released from biosecurity control if a written notice releasing the goods from biosecurity control is given to a person in charge of the goods by a biosecurity industry participant who is authorised to release the goods in accordance with an approved arrangement covering the biosecurity industry participant.¹

It is currently unclear what responsibilities will be left to the Department if industry participants can release goods from biosecurity control and what will be the impact on current staffing arrangements.

Outsourcing of jobs

A major concern is the lack of difference between Biosecurity Officers and authorised officers. The legislation outlines provisions for authorising "other persons" to be biosecurity officers, stating that:

The Director of Biosecurity is responsible for authorising persons to be biosecurity officers and biosecurity enforcement officers. This can include Commonwealth employees, state or territory government employees, or other persons the Director of Biosecurity considers necessary²

Staff are concerned that private sector employees may be authorised as Departmental biosecurity officers, leading to the outsourcing of jobs. The Department has indicated that the intent of the new legislation is to "*provide scope, where it is appropriate to do so, to allow limited functions performed by biosecurity officers*" to be done by industry participants. The new clause, however, seems to be quite broad, leaving the potential for industry employed staff to undertake the core duties of officers. In contrast, the current *Quarantine Act* is quite specific about what external arrangements can be approved.

Further clarification is also needed to outline the criteria used to determine whether "other persons" are necessary. The relevant clause only states that "other persons" may be appointed if:

...the person satisfies the training and qualification requirements for biosecurity officers determined under subsection (5).³

The Director of Biosecurity appears to have discretion to "*determine, in writing, training and qualification requirements for biosecurity officers*".⁴ It is unclear if requirements will be in Regulations or if it will be a determination made by the Director of Biosecurity as "*a determination made under subsection (5) is not a legislative instrument*".⁵"

¹ Biosecurity Bill 2012, Chapter 3, Part 1, Division 9, MG160, 1b

² Biosecurity Bill 2012, Chapter 11, Part 4, Division 1, GA210, 1a

³ Biosecurity Bill 2012, Chapter 11, Part 4, Division 1, GA210, 1b

⁴ Biosecurity Bill 2012, Chapter 11, Part 4, Division 1, GA210, 5

⁵ Biosecurity Bill 2012, Chapter 11, Part 4, Division 1, GA210, 6

Members want certainty that “other persons” will only be appointed as necessary and not be used as a means to replace ongoing Departmental staff. The CPSU recommends that the legislation is amended so the Director of Biosecurity may only be able to appoint “other persons” for a temporary period. There should also be included legislative criteria to determine whether the appointment of other persons as biosecurity officers is necessary.

Recommendation: The Department clarifies the likely impact of new biosecurity provisions for industry participants on Departmental staffing arrangements

Recommendation: The Department clarifies what “limited functions” industry participants will be allowed to do and what legislative mechanisms will be enacted to guarantee this.

Recommendation: The proposed legislation is amended to include mechanisms to only allow the temporary appointment of “other persons” and add a legislated criterion for the appointment of other persons considered necessary as biosecurity officers.

3. Auditing processes

The proposed legislation indicates that the Department will place a greater emphasis on auditing as a result of self-regulation. CPSU members have expressed concerns about the potential for the outsourcing of auditing and compliance and whether auditing rates will make up for the reduction in inspections.

Third party auditors

Members were concerned that the proposed legislation allows third party auditors to be approved to conduct audits, in addition to Biosecurity Officers:

An auditor approved in writing by the Director of Biosecurity or the Director of Human Biosecurity (as the case requires).⁶

Members are concerned that the reference to third party auditors is an indication that the regular outsourcing of auditing by the Department is an option for the future. The Departmental response that it “does not intend to routinely make use of third party auditors in the near future, but the legislation aims to ensure there is sufficient flexibility to do so in the future, if needed” has not alleviated but added to this concern.

One member indicated that management informed them that third party auditors were required as the Department does not have staff that are currently qualified to audit some scientific labs. There may be some justification for involving third party auditors for highly complex systems, however, this is not specified in the proposed legislation. Clarification is needed to ensure that third party auditors work under direction of the Department and are only there to provide technical expertise.

The Department must also clarify how it will determine third party auditors are necessary and what process will be undertaken to assess their expertise. The exposure draft states that:

The Director of Biosecurity or the Director of Human Biosecurity must not approve a person for the purposes of paragraph (2)(b) unless the person is appropriately qualified and experienced.⁷

This statement does not clarify how a third party auditor will be determined to be qualified and experienced other than an assessment by the Directors of Biosecurity and Human Biosecurity. There must be an independent process overseen and managed by the Department to ensure third party auditors have the specialist expertise required, which Biosecurity Officers do not have, to conduct an audit.

⁶ Biosecurity Bill 2012, Chapter 9, Part 5, ENF205, 2b

⁷ Biosecurity Bill 2012, Chapter 9, Part 5, ENF205, 3

Rates of auditing

CPSU members also wanted a guarantee of increased rates of auditing and more surveillance to make up for a likely decrease in inspections. The experience of meat inspectors is that auditing rates are being wound back. There are fewer inspections and the rate of auditing has not made up for this decrease. Members indicated support for increased checks and balances through a set auditing rate that will not drop off after a few years due to budgetary pressures.

Recommendation: Auditing is maintained in-house and third party auditors are only employed to provide specialist technical assistance under Departmental employed staff.

Recommendation: An independent assessment process of third party auditors occurs before they are approved by the Directors of Biosecurity and Human Biosecurity as appropriately qualified and experienced.

Recommendation: A set auditing rate is established by the Department and additional funding for increased auditing rates is guaranteed over the forward estimates.

4. Reclassification of staff

CPSU members want further clarification as to whether biosecurity officers will need additional training to continue in their roles and if so, what kind. There has been an indication that there will be a changeover but that the detail will be in the Regulations.

There was particular concern that many compliance officers who will reclassified as biosecurity officers only have prior work experience in investigation roles. The new category of biosecurity enforcement officer requires experience as a biosecurity officer first. The Department has indicated that the arrangements for compliance officers will be the same as for quarantine officers and there will be an automatic transition, however, this is in transitional provisions which are currently being drafted. It is unclear if there will be adequate consultation on subordinate legislation before it is adopted.

CPSU members should be consulted about these transitional provisions and be able to view the details about training requirements and administrative guidance prior to the adoption of any subordinate legislation.

Recommendation: Consultation on transitional provisions in subordinate legislation to ensure Compliance Officers will be automatically deemed Biosecurity Enforcement Officers under the new Act prior to adoption.

5. Potential adverse impacts of self-regulation

Many CPSU members expressed concerns that the move away from Department-run inspections towards self-regulation by industry participants may have adverse impacts on quarantine outcomes.

Under the proposed legislation, industry participants will be responsible for managing their own biosecurity risks:

A person may apply to the relevant Director for approval of an arrangement (an industry arrangement) that provides for the person to carry out specified activities (biosecurity activities) to manage biosecurity risks associated with specified goods, premises or other things.⁸

While the Department has indicated that it will allow limited functions to be carried out by industry participants under an approved arrangement, there is concern that the clause is very broad and that multiple locations with different conditions will be covered by a single agreement. CPSU members

⁸ Biosecurity Bill 2012, Chapter 7 Part 2, AA30

wanted to know what those limited functions are and what are approved arrangements including whether it included self-assessment. The current *Quarantine Act* is quite specific about what arrangements can be approved.

Members also indicated that the proposed self-regulation of import inspections by industry participants is similar to the current regime for exports and for meat inspectors. There are a number of issues with industry self-regulation for exports which will need to be addressed.

Managing conflict of interests

There was concern about the potential for conflict of interest with self-regulation, particularly if there are company-based inspectors. It is unclear, if the staff of industry participants are authorised to take on biosecurity roles and how accountability and independence in the national interest will be guaranteed. Any assessment of risk by an industry participant is likely to be influenced by the monetary impact of a decision.

The CPSU previously raised these concerns about the conflict of interest of authorised officers, employed by industry rather than the government, and the difficulty to be independent of their employer in a submission to the *Inquiry into biosecurity and quarantine arrangements* about changes to the Australian Meat Export Inspection System in November 2010.⁹

While self-regulation may be an improvement for the businesses that do the right thing and reduce their costs, there is a greatly increased risk from those who are not doing the right thing want to avoid additional costs.

An example provided by a member was the importation of heavy machinery. Imported heavy machinery needs to be “as clean as new” and are assessed at Quarantine Approved Premises. The member indicated that often these imports are failed by the Department multiple times as they are not “as clean as new”. It is unclear how there will be a guarantee that this will occur with self-regulation unless caught out by an audit.

While a fit and proper person test may profile importers, this will not be enough. Greater investigation of the potential biosecurity risks of industry participants and surveillance will be required to offset these increased risks. More information is needed about how the monitoring of approved arrangements will take place to ensure compliance.

The CPSU recommends that the APS Code of Conduct should apply to those “other persons” who will be authorised under the new legislation. While the Department has indicated that as “other persons” would not be APS employees and thus would not be subject to the Code of Conduct, these provisions already exist for non-APS staff working in the meat inspection export system. Though not perfect, it may help address some concerns about independence and conflict of interest.

Increased risk of biosecurity incidents.

CPSU members are very concerned that biosecurity incidents will increase and pre-damage control will be far more difficult due to industry self-regulation. It is likely to shift the focus to damage control where the Department will be dealing with a biosecurity risk once it is in, rather than stopping those risks at the border.

For exports, the risk is only to overseas markets. With imports, there are biosecurity risks to animal health, human health, the environment as well as our export markets. Once a biosecurity risk is in, there is limited power to stop it. New Zealand has experienced damaging incursions such as Varroa mite and has only been kept out of Australia due to our strict quarantine laws.

This is a legitimate concern as industry self-regulation may mean that many non-commercial imports will undergo the same level of inspection as it is not a huge proportion of imports (low approach rate). This is inadequate as this is often the source of quarantine breaches.

⁹ Community and Public Sector Union, “Submission to Inquiry into biosecurity and quarantine arrangements”, 18 November 2010, p.3

Furthermore, members working as government meat inspectors indicated their experience of self-regulation have been reduced inspection rates and that industry assessments have not been as effective as Departmental inspections. A recent report that over the past year, 13 shipments of Australian meat have been rejected by the United States because they contained faeces or other matter and E.coli was detected in three shipments confirms that self-regulation has not been as effective.¹⁰

One option to address this increased risk may be to adopt a precautionary principle, similar to the QLD new biosecurity legislation. The Queensland Biosecurity Act 2011 included in its Purpose that:

...the principle that lack of full scientific certainty should not be used as a reason to postpone taking action to prevent a biosecurity event or to postpone a response to a biosecurity risk¹¹

The inclusion of a precautionary principle would help maintain a level of protection which would prevent a lack of scientific certainty from being the reason to prevent a biosecurity event or postpone a response to a biosecurity.

Sanctions for non-compliance

Members in export areas indicated that their experience is that auditing regimes may find critical non-compliance but nothing will happen for a significant period of time. Their past experience has been that industry participants can continue to operate for another six months before being suspended.

As imports have a greater risk than exports, it is essential that sanctions do not take a long to come into effect. Without an effective deterrent for non-compliance, it is possible that more industry participants could continue to fail to comply, creating further biosecurity risks. The automatic enactment of sanctions after a limited time period must occur for non-compliant industry participants.

Recommendation: The APS Code of Conduct applies to all authorised officers regardless of whether they are APS employees.

Recommendation: Amend the proposed legislation to include a precautionary principle modeled on the Queensland Biosecurity Act 2011.

Recommendation: Sanctions are enacted automatically after a time limited period for those industry participants who are found to be non-compliant.

6. The need for funding to implement these reforms properly

The Department has indicated that the Biosecurity Legislation reform is consistent with the themes and issues raised in the Beale Review, however, it is unclear that the additional funding necessary to support these reforms will be provided.¹²

CPSU members noted while the Government accepted all the Beale Review recommendations in principle¹³, it is unclear if Department will implement all its recommendations. Members noted the importance of implementing recommendations 73, 74, 76, 77, 78, 79 and 80, which primarily cover cost-recovery or additional funding. Members have raised a particular concern that Beale Review recommendation 74, which called for increased resources with post-border biosecurity and prosecution, may not be adopted¹⁴

The CPSU notes that the Commonwealth Government has committed to \$364.7 million over four

¹⁰ Brewster, Kerry, "Aussie meat exports found with E.coli, faeces", *ABC News*, 25 May 2012, <http://www.abc.net.au/news/2012-05-25/aussie-meat-exports-found-with-e-coli/4032216>.

¹¹ Queensland Legislative Assembly, Biosecurity Act 2011, Chapter 1 Part 2, Section 4, C

¹² Department of Agriculture, Fisheries and Forestry (DAFF), *Reform of Australia's Biosecurity System – new biosecurity legislation*, July 2012, p.7

¹³ DAFF, *Review of Australia's Quarantine and Biosecurity Arrangements - Australian Government preliminary response*, http://www.daff.gov.au/about/publications/quarantine-biosecurity-report-and-preliminary-response/beale_response

¹⁴ DAFF, *Reform of Australia's Biosecurity System – new biosecurity legislation*, July 2012, p.23

years as part of *Reforming Australia's Biosecurity System* in the 2012-13 Budget. It includes \$124.5 million for "core frontline biosecurity operations and external review and verification processes" and \$19.8 million for biosecurity information technology.¹⁵

While this commitment is welcome, this is far less than the \$260 million per annum increase of Beale Review recommendation 73 and the amount committed for biosecurity information is far less than Beale Review recommendation 75 for \$225 million over a number of years for investment in information technology and business systems for biosecurity.¹⁶

The Beale Review recommendations are a package of recommendations to maintain the integrity of the biosecurity system. Sustainable funding of the biosecurity system is needed to ensure funding is available to address emerging risks and priorities.

If these reforms are implemented without the additional resourcing that is recommended, the changes will not work effectively. It will only lead to more staff losses, outsourcings and a less effective quarantine system. The Department must provide more resources, particularly if there is a shift towards greater compliance and auditing functions to ensure it is as effective as quarantine inspections in ensuring our biosecurity.

Recommendation: The Department obtain additional resourcing to implement the new Biosecurity Legislation in line with the Beale Review recommendations 73, 74, 76, 77, 78, 79 and 80.

7. Reporting signs and symptoms listed human diseases on incoming vessels

CPSU members are concerned that there appears to be no requirement for the operators of incoming vessels to report people with signs or symptoms of listed human diseases in the proposed legislation. It is unclear whether the requirement is in another section of the legislation or the intent behind such a change.

Currently, *Quarantine Act 1908* clearly places the responsibility with the master of the vessel to report any individuals with signs or symptoms.¹⁷ The proposed legislation is clear in the exit requirements that the operators have responsibility to report, however, it appears that the responsibility lies with the individual on incoming vessels.

The proposed legislation must include an obligation on the operators of incoming vessels to report any signs and symptoms of listed diseases as a safeguard to prevent any possible outbreak.

Recommendation: The proposed legislation include a requirement that operators of incoming vessels to report individuals with any signs of symptoms of listed human diseases

8. Positive benefits of the proposed Biosecurity Legislation reform

CPSU members also identified a number of positives in the proposed new legislation which they support. They advised that the Bill is easier to read and interpret compared with the existing legislation, were supportive of changes that would allow them to refer matters to internal legal rather than referring to Commonwealth Department of Public Prosecutions and allow human remains to be brought back to Australia without an import permit.

CPSU members were also supportive in principle of bringing the gap between State and Federal Government legislation. However, members indicated they would like further information about how it will actually work.

¹⁵ Leo Terpstra and Roger Beckmann, "Ensuring Australia's Biosecurity" in Parliamentary Library, *Budget Review 2012-13 Index*, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201213/Biosecurity

¹⁶ DAFF, *Review of Australia's Quarantine and Biosecurity Arrangements - Australian Government preliminary response*, http://www.daff.gov.au/about/publications/quarantine-biosecurity-report-and-preliminary-response/beale_response

¹⁷ Quarantine Act 1908, Part IV, Division 1, Section 22

Other aspects of Biosecurity Legislation reform that CPSU members indicated they supported included:

- Increased compliance powers, in particular introducing civil penalties, the graduated penalty system and sanctions against industry arrangements;
- A fit and proper person test for people holding approved arrangements;
- Inclusion of verbal direction in legislation;¹⁸
- Improvements in dealing with abandoned goods;¹⁹
- Maintaining that it is an offence to not comply with a biosecurity officer's directions;
- Ensuring notice is not required for treatment that may damage the good if there is reasonable suspicion there is a high level of risk and it requires immediate treatment;²⁰
- Making it an offence to bring in goods requiring a permit without a permit;
- Shifting the liability for biosecurity measures from the Commonwealth to importer; and
- Enabling court injunctions against individuals that are planning to do something that will go against the act.

CPSU members did however express some concern that details about how verbal directions are to be used by staff will be in subordinate legislation such as Regulations. This subordinate legislation has not been released yet. Members have indicated they would like genuine consultation on these details prior to subordinate legislation being adopted.

Recommendation: Genuine consultation about how verbal directions are to be used by staff prior to adoption of subordinate legislation.

Recommendation: Maintain these aspects of the proposed legislation that CPSU members support in the final Biosecurity Bill.

¹⁸ Biosecurity Bill 2012, Chapter 11, Part 6, Miscellaneous, GA295.

¹⁹ Biosecurity Bill 2012, Chapter 3, Part 1, Division 4, MG97

²⁰ Biosecurity Bill 2012, Chapter 3, Part 1, Division 4, MG90