

Chapter 2

Key issues – Biosecurity Bill 2014

2.1 Submitters to the inquiry supported, in principal, the repeal of the *Quarantine Act 1908* and the introduction of the Biosecurity Bill 2014 and related draft legislation. However, suggestions for improvement were made. Submitters:

- highlighted issues with aspects of the bill, including offshore quarantine zones, cost recovery requirements, and offences and enforcement powers;
- noted with concern apparent differences between the bill and the 2012 draft legislation; and
- questioned whether the bill would provide sufficient and transparent review processes, particularly regarding the biosecurity import risk analysis process.

2.2 Additionally, submitters commented on issues relevant to the implementation of a new biosecurity system, and questioned the merit of the consultation processes for the bill and the proposed subordinate legislation. This report reflects the main themes and issues brought to the attention of the committee by submitters to this inquiry.

General support for the bill

2.3 Submitters expressed strong general support for the introduction of the bill.¹ It was recognised that the ageing Quarantine Act can no longer support modern demands. Submitters characterised the regulatory framework established by the Quarantine Act as both outdated and out of touch with Australia's current biosecurity needs.² As the Australian Forest Products Association submitted, 'it is high time to revise and consolidate the archaic *Quarantine Act 1908*...with a modern and effective regulatory framework'.³

2.4 Submitters were generally satisfied the bill, if passed, would significantly address deficiencies in the Quarantine Act and lead to a more efficient regulatory system. The Tasmanian Salmonid Growers Association considered that 'many of the proposed changes to the legislation address the weaknesses in the existing legislation'.⁴ Overall, it was evident that industry expects that the bill, if passed, would reduce existing complexities within the biosecurity system. AUSVEG noted 'the bill intends to bring much greater simplification to the existing system', while the Food

1 See, for example, Australian Pork Limited, *Submission 17*, p. 1; Cherry Growers Australia Inc, *Submission 5*, p. 1; National Farmers' Federation, *Submission 19*, cover letter.

2 See, for example, Australian Banana Growers' Council Inc, *Submission 13*, p. 1; Tasmanian Salmonid Growers Association, *Submission 6*, p. 3.

3 Australian Forest Products Association, *Submission 12*, p. 4.

4 Tasmanian Salmonid Growers Association, *Submission 6*, p. 3.

and Beverage Importers Association (FBIA) submitted the bills would provide a 'more systematic and clearer' regulatory system.⁵

2.5 Several submitters highlighted areas of present confusion for which the bill, if passed, would provide much needed clarity. Notably, Ports Australia commented that the new legislation would address uncertainty about the processes for proclaiming first points of entry:

[T]he current Quarantine Act has no provision for establishing a first point of entry. This was a matter of some concern to ports who wanted to become first points of entry and we are accordingly pleased that the new bill will establish a clear process for securing and maintaining this status.⁶

2.6 Similarly, the FBIA submitted that the Approved Arrangements provisions in Chapter 7 of the bill would significantly remedy issues with antecedent provisions in the Quarantine Act that are 'cumbersome' and out of step with industry practice.⁷

2.7 There was general industry consensus that the proposed system would reduce over-regulation, and promote flexibility and consistency between regulatory requirements and businesses' operational arrangements.⁸ The Australian Forest Products Association Ltd (AFPA) approved the introduction of the principle of 'shared responsibility' between government and industry.⁹ The Customs Brokers and Forwarders Council of Australia Inc (CBFCA) submitted:

It is an industry expectation that the bill will cut red tape and reduce the regulatory burden on compliant businesses which interact with Australia's biosecurity system. The bill is seen as providing a strong regulatory framework to enable the management of biosecurity risks in a responsive manner, to enhance Australia's capacity to manage biosecurity risks into the future in partnership with industry and ensures Australia remains competitive in the international trade environment.¹⁰

2.8 Submitters approved the risk-based approach to biosecurity regulation, arguing the policy would strengthen Australia's capacity to respond to biosecurity threats. The AFPA approved of the proposed regulatory approach, stating that it would provide 'more outcomes focus to the legislation'.¹¹ Australian Pork Limited noted it is

5 AUSVEG, *Submission 8*, p. 2; Food and Beverage Importers Association, *Submission 22*, pp 1—2.

6 Ports Australia, *Submission 1*, p. 1.

7 Food and Beverage Importers Association, *Submission 22*, p. 2.

8 See, for example, Australian Forest Products Association, *Submission 12*, p. 2. For an exception, see Australian Petroleum Production and Exploration Association, *Submission 25*.

9 Australian Forest Products Association, *Submission 12*, p. 2.

9 Australian Veterinary Association, *Submission 10*, p. 1.

10 Customs Brokers and Forwarders Council of Australia Inc, *Submission 3*, p. 1.

11 Australian Forest Products Association, *Submission 12*, p. 2.

'supportive of the bill and is confident that it will improve the function of Australia's world-class biosecurity system'.¹² The CBFCA advised the council:

actively supports the proposed new biosecurity legislation which will create a responsive and flexible operating environment...The new legislation will provide a better management of the biosecurity security risks of animal, plants, pests and diseases entering in Australia through the international trade pathway.¹³

2.9 However, many submitters offered recommendations for improvement and identified areas where their concerns had not been satisfactorily addressed. Submitters highlighted issues with both provisions of the bill and concerns with the likely implementation of the proposed new regulatory system.

Committee view

2.10 The committee recognises the need for comprehensive revision of Australia's biosecurity legislation. On the whole, the Quarantine Act has served Australia well. However, the piecemeal approach to amendment and update over the past century has led to legislation that is at best inefficient and, at worst, unworkable. The identified problems with prescribing a port as a 'first point of entry' is a key example of the need for a new legislative approach to biosecurity. The committee commends the introduction of the Biosecurity Bill 2014 and related bills. However, the committee notes submitters' views on, and concerns with, aspects of the draft legislation. To ensure the Quarantine Act is replaced with the most appropriate and effective biosecurity legislative scheme, these views warrant more detailed consideration and are discussed below.

Differences between the 2012 bills and the 2014 legislative package

2.11 The bill before the committee is substantially similar to the 2012 iteration that was considered by the committee in 2013. However, there are differences between the two bills—some welcomed by stakeholders and others less so. The Invasive Species Council identified 19 key differences.¹⁴ These were disputed by the department, which advised that the Council's list 'is not complete nor correct'.¹⁵ Overall, submitters noted with concern two key differences between the bill and the 2012 draft legislation: requirements for the regulation of domestic ballast water and the role of the Inspector-General of Biosecurity.

Proposed regulation of domestic ballast water

2.12 The bill proposes to regulate the use of ballast water and management sediment by Australian and foreign vessels in Australian seas. These changes would implement Australia's obligations under the *International Convention for the Control*

12 Australian Pork Limited, *Submission 17*, p. 1.

13 Customs Brokers and Forwarders Council of Australia Inc, *Submission 3*, p. 3.

14 Invasive Species Council, *Submission 16*, pp 4—5.

15 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

and Management of Ships' Ballast Water and Sediments.¹⁶ The ballast water and sediment held on board domestic and international ships have the potential to damage industries that rely on the maritime environment, such as fisheries and tourism.¹⁷

2.13 The Australian Shipowners Association (ASA) welcomed the management of *international* ballast water, observing that 'the industry has long called for consistent international arrangements and for a single national regime rather than piecemeal State-based arrangements'.¹⁸ However, the ASA was critical of the government's decision to introduce controls over domestic ballast water 'before appropriate treatment systems had been fitted to vessels'. The ASA reported that the economic impact would be 'considerable', cost 'tens of millions of dollars' and result in delays.¹⁹ The ASA called for the implementation of the domestic ballast water provisions to be delayed for a period of six years, to enable all vessels to be fitted with ballast water treatment systems.

2.14 Shipping Australia Ltd (SAL) echoed these concerns, arguing that 'while consistent national standards for domestic ballast water are supported, the timing of their introduction is not.'²⁰ SAL cited practical and logistical problems with the timing of the proposed new requirements, advising that 'it is not certain how the additional ballast water reporting arrangements will be implemented in the Maritime Arrivals Reporting Systems (MARS), which is still to be rolled out.'²¹ SAL further emphasised that the proposed domestic ballast water provisions had not been subject to prior industry consultation.²²

2.15 In stark contrast to the advice provided by industry representatives, the Department of Agriculture advised that the proposed ballast water provisions were the subject of industry consultation in 2012 and October 2014. Further, the department advised '[t]here has been no change to the government's ballast water policy position between the two versions of the bill'.²³ The regulation of domestic ballast water is not unique to the 2014 bill, but was a feature of the Biosecurity Bill 2012:

The Biosecurity Bill 2012 included an Australia-wide ballast water and sediment management regime, which included the management of both international and domestic ballast water.²⁴

16 Department of Agriculture and Department of Health, *Submission 15*, pp 19–20.

17 Department of Agriculture and Department of Health, *Submission 15*, p. 7.

18 Australian Shipowners Association, *Submission 11*, p. 1.

19 Australian Shipowners Association, *Submission 11*, p. 1.

20 Shipping Australia Ltd, *Submission 23*, p. 1.

21 Shipping Australia Ltd, *Submission 23*, p. 1.

22 Shipping Australia Ltd, *Submission 23*, p. 1.

23 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

24 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015); Biosecurity Bill 2012, Part 2, Chapter 5; clause 269.

2.16 This advice was also provided in the department's submission to the committee's inquiry into the Biosecurity Bill 2012.²⁵

2.17 However, the department did advise that requirements for pre-arrival reporting have been extended in the 2014 bill to encompass all vessels intending to discharge ballast water.²⁶

2.18 The Department of Agriculture further advised that a six year delay in implementing the domestic ballast water requirements is unnecessary as the bill would allow several options to manage domestic ballast water. These options would include ballast water exchanges and obtaining exemptions from the Director of Biosecurity, which would 'limit the regulatory impact of the requirements of the bill whilst industry prepares for the changes.'²⁷ Further, department stated its 'intention, where appropriate, to liaise with regulated stakeholders regarding the development of any regulations and administrative policy.'²⁸

Committee view

2.19 The regulation of ballast water would clearly have an impact on the shipping industry. However, the department has provided assurances that it would work with industry to facilitate its transition to the new requirements. The committee considers that this is an appropriate response, especially given Australia's international maritime obligations.

Inspector-General of Biosecurity

2.20 As detailed in chapter 1 of this report, the 2012 draft legislation included the Inspector-General of Biosecurity Bill 2012 that, if passed, would have transformed the Office of the Inspector-General of Biosecurity from an administrative to a statutory position. The bill would have clearly defined the role and responsibilities of the Inspector-General of Biosecurity. Prescribed responsibilities would have included reviewing and publicly reporting on the performance of biosecurity officials and the process for conducting biosecurity import risk analyses (BIRAs).²⁹ As noted in the explanatory memorandum to the 2012 bill, it was intended that this independent oversight would 'provide an assurance framework for stakeholders' and encourage continual improvement.³⁰ Overall, submitters to the 2012 inquiry supported the

25 Department of Agriculture, Fisheries and Forestry, *Submission 26* (inquiry into the Biosecurity Bill 2012), Attachment A.

26 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015); Biosecurity Bill 2012, Part 2, Chapter 5; clause 269.

27 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

28 Department of Agriculture and Department of Health, *Submission 15*, p. 20.

29 Inspector-General of Biosecurity Bill 2012, clause 6.

30 Inspector-General of Biosecurity Bill 2012, explanatory memorandum, p. 1.

objectives of the Inspector-General of Biosecurity Bill 2012. However, submitters sought additional measures to further the Inspector's independence.³¹

2.21 While the review process would differ, the Biosecurity Bill 2014 does include a framework for the review of the exercise of the powers and functions of biosecurity officials. Clause 567 would authorise the Minister to review the administration of the biosecurity regulatory requirements. Clause 643 would allow the review powers to be delegated. The explanatory memorandum clarifies that it is envisaged the review function would be undertaken by the Inspector-General of Biosecurity.³²

2.22 Submitters were highly critical of the proposed review process under clauses 567 and 643. The process was condemned a 'backwards' and 'retrograde' step that would potentially allow conflicts of interest.³³ Submitters highlighted key differences between clauses 567 and 643 and the review process designed under the Inspector-General of Biosecurity Bill 2012. Specifically, submitters noted with concern the proposed discretionary timing, conduct and scope of the reviews and the internal, confidential nature of review findings.³⁴

2.23 Submitters concluded that the bill would not guarantee independent, transparent review. The Law Council of Australia advised that 'the lack of a statutory basis for the Inspector-General of Biosecurity has the potential to reduce the independence of that office.'³⁵ Similar concerns are evident in AUSVEG's comment that clauses 567 and 643 'cannot legitimately be described as an independent review process'.³⁶ One submitter questioned the legitimacy of an internal review framework, characterising the 2014 proposal as 'a major step backwards in the necessary integrity of Australia's biosecurity system'.³⁷

2.24 There was evident concern that the proposed review framework is not aligned with the object of shared responsibility between government and industry. As AUSVEG stated:

[a]s it stands the Department is not subject to any form of mandated review. This is a retrograde step and only serves to reinforce the impression that the

31 See, for example, Australian Veterinary Association, *Submission 14 – 2012 inquiry*, p. 4; AUSVEG, *Submission 2 – 2012 inquiry*, p. 4; Growcom, *Submission 23 – 2012 inquiry*, p. 7; Nursery Garden Institute Australia, *Submission 8 – 2012 inquiry*, p. 8.

32 Biosecurity Bill 2014, explanatory memorandum, p. 368.

33 Tasmanian Salmonid Growers Association, *Submission 6*, p. 6; Invasive Species Council, *Submission 16*, p. 3; AUSVEG, *Submission 8*, p. 9.

34 See, for example, Tasmanian Salmonid Growers Association, *Submission 6*, p. 6; Invasive Species Council, *Submission 16*, p. 3.

35 Law Council of Australia, *Submission 21*, p. 4.

36 AUSVEG, *Submission 8*, p. 9.

37 Richard Stoklosa, *Submission 26*, p. 1.

Department does not want any meaningful dialogue with industry unless it is on their terms.³⁸

2.25 Accordingly, there was strong support for a return to the 2012 approach. It was put to the committee that, contrary to what is proposed in the Biosecurity Bill 2014, the office of the Inspector-General of Biosecurity should be a statutory position.³⁹

2.26 The department took a different view, and informed the committee that the Inspector-General would continue to have broad investigatory powers.⁴⁰ Further, the department advised that, should the Minister's powers be delegated to the Inspector-General, the bill would enhance the Inspector-General's capacity to compel information and would essentially 'enable the existing Inspector-General of Biosecurity to do things that a statutory position would be able to do.'⁴¹

Committee view

2.27 The bill does not seek to diminish the role of the Inspector-General of Biosecurity. Rather, through delegation, the Inspector-General's review powers could increase. The committee notes with interest advice in the explanatory memorandum and evidence before the inquiry that it is envisaged that the Inspector-General would be integral to the maintenance and ongoing improvement of Australia's biosecurity system.

2.28 However, the committee respects submitters' views that there is potential for the independence of internal reviews to be compromised. It is of concern that the bill does not contemplate that review findings will be publicly released. This seems contrary to the shared commitment between government and industry to biosecurity management. It is the committee's view that review findings should be publicly released and reports tabled in Parliament. Additionally, it would benefit Australia's biosecurity management system if reviews were routinely conducted.

Recommendation 1

The committee recommends that the findings of reviews conducted under clause 567 of the Biosecurity Bill 2014 be publicly released and reports tabled in Parliament.

38 AUSVEG, *Submission 8*, p. 9.

39 Law Council of Australia, *Submission 21*, p. 4; NSW Farmers' Association, *Submission 27*, p. 2; Mr Richard Stoklosa, *Submission 26*, pp2—3.

40 Ms Rona Mellor, Deputy Secretary, Department of Agriculture, *Committee Hansard*, 11 February 2015, p. 7.

41 Mr Greg Williamson, First Assistant Secretary, Service Delivery Division, Department of Agriculture, *Committee Hansard*, 11 February 2015, p. 6. See also Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

Concerns with provisions of the bill

2.29 Submitters noted concerns with a number provisions in the bill; of particular note were:

- the Biosecurity Risk Analyses process;
- offshore quarantine zones;
- cost recovery requirements; and
- enforcement provisions, including proposed offences and entry, search and seizure powers.

The Biosecurity Risk Analysis process

2.30 The Biosecurity Import Risk Analysis (BIRA) process proposed by the bill was the source of much concern amongst submitters. The committee heard that particular issues arose from the role of the Eminent Scientists Group (or similar body), regional difference and transparency. Some submitters also expressed dissatisfaction with the consultation process conducted by the department.⁴²

2.31 The current import risk analysis process is not specifically referred to in the Quarantine Act; however it is referred to in the *Quarantine Regulations 2000* and the IRA Handbook 2011.⁴³ Part 2, Division 2, of the bill sets out the proposed scheme for BIRAs. Clause 165 contains a simplified outline of the part, stating that:

This part provides for the Director of Biosecurity to conduct Biosecurity Import Risk Analyses (BIRAs) in relation to particular goods, or a particular class of goods, that may be imported, or are proposed to be imported, into Australian territory.

A BIRA is an evaluation of the level of biosecurity risk associated with the goods or the class of goods.

A BIRA may identify conditions that may be met to manage the level of biosecurity risk associated with the goods, or the class of goods, to a level that achieves the ALOP [Appropriate Level of Protection] for Australia.⁴⁴

2.32 A note has been added, stating:

The level of biosecurity risk associated with the goods may vary according to the place in Australian territory at which the goods are to enter Australian territory or be unloaded, so the conditions may vary accordingly.⁴⁵

42 The government recognises these concerns: Departments of Agriculture and Health, *Submission 15*, p. 14.

43 Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Question 6.

44 Clause 165, Biosecurity Bill 2014. See also Clause 166.

45 Clause 165, Biosecurity Bill 2014. See also Clause 166.

2.33 The ALOP is defined in the bill as 'a high level of sanitary and phytosanitary protection aimed at reducing biosecurity risk to a very low level, but not to zero'.⁴⁶

2.34 The Director of Biosecurity may conduct a BIRA, and decide in which order BIRAs are conducted. The Minister for Agriculture may also direct the Director of Biosecurity to commence a BIRA in relation to particular goods or class of goods. The direction must be in writing, provide reasons and be tabled in both Houses of Parliament.⁴⁷

2.35 The bill does not set out the process the Director of Biosecurity would have to follow when making a BIRA, other than to state that s/he must follow the process set out in the Regulations and any guidelines created by the Director of Biosecurity. The guidelines may provide matters to be taken into account when conducting a BIRA. Any such guidelines would need to be published on the Department of Agriculture's website, and would not be a legislative instrument.⁴⁸

2.36 The bill would require the regulations to require the Director to prepare three reports and as part of the BIRA process: a draft report, a provisional report and a final BIRA report. Each of these reports must include any information prescribed by the regulations and be published in accordance with the regulations.⁴⁹ The explanatory memorandum to clause 170 states that it is intended that stakeholders can comment on the draft reports and that these comments would be taken into account when preparing the provisional and final reports.

2.37 The bill provides neither a right to request review of a BIRA nor a right to request reasons for a BIRA.⁵⁰ The draft regulations and guidelines for making a BIRA are yet to be released by the department. The department has provided a table setting out the differences between the current process and the process proposed by the bill.⁵¹

Criticism of the BIRA process

2.38 Some submitters strongly criticised the BIRA process in the bill, arguing that the bill does not improve transparency, accountability or reduce conflicts of interest.⁵² Curiously, the bill reserves all relevant direction about the process itself to be dealt

46 Clause 5, Biosecurity Bill 2014. Some submitters were critical of the ALOP for Australia as stated in the bill. See, for example: AUSVEG, *Submission 8*, pp 3–4. Others support it, for example Australian Pork, *Submission 17*, p. 2.

47 Clause 168, Biosecurity Bill 2014.

48 Clause 169, Biosecurity Bill 2014.

49 Clause 170, Biosecurity Bill 2014.

50 A large number of decisions made by the Director of Biosecurity, including decisions relating to the importation of goods to Australia that may draw upon the relevant BIRA, would be subject to internal review and would be appealable to the Administrative Appeals Tribunal: Clauses 574—578, Biosecurity Bill 2014.

51 Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Attachment A.

52 See, for example: AUSVEG, *Submission 8*, p. 4; Invasive Species Council, *Submission 16*.

with in the regulations, and the person who conducts the BIRA process is the same person who sets the guidelines to be followed when conducting a BIRA: the Director of Biosecurity.

2.39 For example, AUSVEG observed that Part 2 of the bill 'does not include any requirement for the Director of Biosecurity to provide stakeholders with the reasoning behind decisions for having or not having a BIRA'; nor is there a requirement for BIRAs to be subject to external review.⁵³ More generally, the Australian Honey Bee Industry Council (AHBIC) emphasised that the BIRA process must be timely, and gave the example of the drone semen import analysis that has been ongoing since 2001.⁵⁴ The AHBIC recommended that the bill or regulations be amended to provide that a BIRA is completed within a 'reasonable time frame'. Delays can result in damage or disadvantage to particular industries and 'tempts illegal importation'.⁵⁵

2.40 The following section discusses the key issues.

Criticism of the BIRA process: The role of the Eminent Scientists Group

2.41 A number of submitters criticised the removal of the Eminent Scientists Group (ESG) from the decision making process in the new BIRA.⁵⁶ The AFPA observed that the bill in its current form may be deficient in relation to the BIRA process, submitting that:

[a]ppropriate provisions should be included for expert input with relevance to industry, to ensure scientific rigour and impartiality. Further, an independent appeal process based on facts and science should be included.⁵⁷

2.42 The NSW Natural Resources Commission drew the committee's attention to the difficulty with making an accurate risk assessment when it comes to invasive species, and the need for expert advice:

[T]here is often insufficient information to perform an accurate quantitative risk assessment. Further, risks and impacts to the environment can be difficult, if not impossible, to quantify in economic terms. Given the limitations of quantitative risk assessment, a range of experts should be involved in evaluating outcomes and deliberating responses.

The unique nature of biosecurity risks should be considered in designing any risk assessment process so that long-term impacts are properly evaluated. It may be difficult to assess long-term risks of invasive species relative to emergencies such as disease outbreaks.⁵⁸

53 AUSVEG, *Submission 8*, p. 4.

54 Australian Honey Bee Industry Council, *Submission 14*, p. 4.

55 Australian Honey Bee Industry Council, *Submission 14*, p. 4.

56 See, for example, Mr Richard Stoklosa, *Submission 26*, p. 5.

57 Australian Forest Products Association, *Submission 12*, p. 7.

58 NSW Natural Resources Commission, *Submission 9*, p. 3.

2.43 The Australian Banana Growers Council (ABGC) submitted that the role of the eminent scientists group in the BIRA process must be 'maintained and strengthened'.⁵⁹

2.44 In response to questions asked by the committee, the department emphasised that science is at the centre of its 'evidence based policy development, decision-making and service delivery', and that the department employs a large number of scientists with specialisations in a variety of fields.⁶⁰ Specifically, in relation to the ESG, the department advised that:

[d]uring the examination of the IRA process the department found that the ESG is highly valued in the IRA process but that improvements could be made to increase its value to the department and to stakeholders. Views from stakeholders supported the continuing use of the ESG or similar external expert group in the IRA process. However many stakeholders made comments about its structure, role and timing within the process.⁶¹

2.45 The draft regulations released in 2012 noted that the Director of Biosecurity may commission research or advice when s/he considered that such advice is essential.⁶² The National Farmers' Federation (NFF) observed that the wording in the 2012 draft regulations *may* go some way to addressing its concerns, however 'there remains a lack of independent scientific oversight that, while possibly finding agreement with the Director's final decision, will assist in placing any accusations levelled at the Director for the decision.'⁶³ In response to questioning, the department assured the committee that it would consult further with stakeholders on the use of external scientific advice when the draft regulations and guidelines are released for consultation later this year.⁶⁴

2.46 As the regulations and guidelines have not yet been released by the government the committee is unable to make any further comment on the adequacy or otherwise of these documents as they relate to the BIRA process. Nevertheless, it is clear to the committee that the success of the BIRA process will rest, in part, on the contributions of independent scientists with the appropriate specialist knowledge.

Criticism of the BIRA process: Regional variation

2.47 The committee heard that the bill does not adequately account for regional differences across Australia. This was also a criticism of the 2012 bill.

59 Australian Banana Growers' Council, *Submission 13*, p. 2.

60 Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Question 8.

61 Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Question 8.

62 National Farmers' Federation, *Submission 19*, pp 1–2.

63 National Farmers' Federation, *Submission 19*, p. 2.

64 Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Question 8.

2.48 As outlined earlier, a BIRA may 'identify conditions that must be met to manage the level of biosecurity risk associated with the goods, or class of goods, to a level that achieves the appropriate level of protection for Australia'.⁶⁵ The ABGC expressed concern that the 'generality' of this clause will mean a BIRA could permit certain geographic areas to import particular items because the appropriate level of protection is low in that region. Using the example of fruit importation, the council submitted that once the fruit is in Australia it is very difficult to then prevent the fruit being brought into another area, especially as this responsibility would fall to state governments.⁶⁶ In the case of bananas, the council submitted that:

[i]t is not acceptable to suggest that the protection of a domestic industry from exotic pests and diseases will rely upon the public's goodwill to appropriately dispose of fruit when travelling interstate or between restricted zones. Given that bananas are the single most commonly purchased item in Australian supermarkets, the ABGC considers both the likelihood and consequences of the travelling public transferring disease into commercial growing regions as high.⁶⁷

2.49 The Tasmanian Salmonoid Growers Association were also critical of the bill's failure to formally recognise regional differences when assessing biosecurity risk, submitting that 'the removal of current regional differentiation fails to prevent accidental or mischievous introduction of disease by even a single person'.⁶⁸ Cherry Growers Australia submitted that:

[t]he one size fits all does not suit the continent of Australia and the Federal Government in conjunction with the State and Territory jurisdictions should work together to ensure this occurs and can be flexible to changes over time.

2.50 The department, in its submission, advised that it had addressed these concerns in the 2014 bill:

[T]he provisions in the Biosecurity Bill 2014 have been strengthened to include a note in the provisions for conducting biosecurity import risk analyses which explicitly states that the department can and will consider areas of different pest or disease status when conducting IRAs under the Biosecurity Bill 2014.⁶⁹

2.51 Clause 166 of the bill states that a BIRA will identify the risk posed by a particular good, or class of goods, and detail any necessary biosecurity risk management conditions. The note to the section acknowledges that risk level, and therefore necessary conditions, may vary between geographical areas:

65 Clause 165, Biosecurity Bill 2014.

66 Australian Banana Growers' Council, *Submission 13*, pp 1–2.

67 Australian Banana Growers' Council, *Submission 13*, p. 2.

68 Tasmanian Salmonoid Growers Association, *Submission 6*, p. 4. See also, Richard Stoklosa, *Submission 26*.

69 Departments of Agriculture and Health, *Submission 15*, p. 15.

Clause 166: Note

The level of biosecurity risk associated with the goods may vary according to the place in Australian territory at which the goods are to enter Australian Territory or be unloaded, so the conditions may vary accordingly.

2.52 The department assured the committee that regional difference would be taken into account, and that the differences between regions in Australia are 'valid'.⁷⁰ During the hearing the department advised that it did not consider it appropriate to use the term 'regional difference' in the legislation because 'it is not a term defined in relevant international agreements or standards'.⁷¹ Ms Debbie Langford, Assistant Secretary, Department of Agriculture, explained the measures in the bill that would address the regional differences in Australia:

Firstly, I would point you towards the actual definition of biosecurity risk, and that is in section 9, on page 13 of your copy. In there it says that biosecurity risk is the likelihood of a disease or pest entering, establishing et cetera, and the potential for causing harm. I think the key there is that we will see that it is entering Australian territory or part of Australian territory. And that is so that when we are looking at risk we can say that it is one risk to the country but a different risk to a part of the country. That is something we can do because of that definition.⁷²

Committee view

2.53 The BIRA process is a cornerstone of the bill, and it is important that the framework is fair, accurate and achieves the intended purposes. The committee is concerned that the BIRA process as it is currently articulated may be deficient in these respects. The committee seeks assurances from the department that BIRA reports released by the Director of Biosecurity are subject to review, that reasons for BIRAs will be given, and that there is recourse for stakeholders who disagree with a BIRA made under this Part. The committee also seeks assurances from the department that the regulations will require that reasons for a BIRA be provided to stakeholders, and that, where appropriate, expert scientific assistance will be sought.

2.54 Australia is a large country with diverse regions. Different regions have different risk profiles. The committee recognises the concerns expressed by stakeholders as valid: a one size fits all approach is not appropriate. Pleasingly, this is a view also shared by the department. The committee is satisfied that the department has given weight to the valid concerns expressed. The note to clause 166 would recognise that 'the level of biosecurity risk associated with the goods may vary according to the place in Australia at which the goods are to enter Australia or be

70 Ms Rona Mellor, Deputy Secretary, Department of Agriculture, *Proof Committee Hansard*, 11 February 2015, p. 6.

71 Departments of Agriculture and Health, *Submission 15*, p. 15.

72 Ms Debbie Langford, Assistant Secretary, Department of Agriculture, *Proof Committee Hansard*, 11 February 2015, p. 5.

unloaded'. The committee is satisfied with the department's advice that this will ensure that regional differences can be taken into account when assessing biosecurity risk.

Recommendation 2

2.55 The committee recommends that the government ensure that the Biosecurity Regulations state that the Director of Biosecurity must request expert scientific advice when conducting Biosecurity Import Risk Analyses.

Recommendation 3

2.56 The committee recommends that the government ensure the regulations state that the Director of Biosecurity must provide all stakeholders with a reasonable opportunity to comment on each Biosecurity Import Risk Analysis report.

Recommendation 4

2.57 The committee recommends that the Biosecurity Regulations require that the Director of Biosecurity provide reasons for the conclusions reached in each Biosecurity Import Risk Analysis report.

Recommendation 5

2.58 The committee recommends that the government ensure that the Biosecurity Regulations provide a process for internal review if an interested party disagrees with a final Biosecurity Import Risk Analysis report.

Offshore quarantine zones

2.59 Clause 191 would establish the boundaries of Australia's quarantine zone by making all aircraft and vessels entering 'Australian territory' subject to biosecurity controls. Relevantly, clause 12 would define 'Australian territory' to include the 'coastal sea of Australia'. While not explored in the explanatory memorandum to the bill, Australia's coastal sea, and therefore 'Australian territory', extends to 12 nautical miles off the Australian coast. This figure is the culmination of definitions spread across the bill, the *Acts Interpretation Act 1901*, the *Seas and Submerged Lands Act 1973* and the United Nations Convention on the Law of the Sea.

2.60 At present, Australia's quarantine zone encompasses Australia's 'exclusive economic zone', which is 200 nautical miles from the Australian coast. The bill would have the effect of moving the quarantine boundary from 200 nautical miles to 12 nautical miles.⁷³ As the department acknowledged, this substantial change in the jurisdiction of Australia's quarantine zone would shift the regulatory focus from sea-based installations to vessels travelling from installations to Australia's coastal sea. As the department explained:

regulation under the Quarantine Act largely focuses on interactions between an installation and an international conveyance. However, this is not the primary area of biosecurity risk...It is movements by domestic conveyances

73 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

travelling between the installation and mainland Australia that pose the greatest biosecurity risk.⁷⁴

2.61 The department acknowledged the jurisdictional change would transfer the regulatory burden, with the effect that 'conveyances travelling between Australia and an installation outside 12 nautical miles would be subject to additional requirements'.⁷⁵ However, the committee was informed that this is necessary to appropriately target biosecurity risks:

The bill will achieve better risk management outcomes by shifting legislative focus to conveyances entering Australian territory...Installations are remote and located in deep waters beyond the 12 nautical mile mark. This remoteness means that the installation itself and any interaction with international conveyances that do not travel on to mainland Australia do not pose a significant biosecurity security risk.⁷⁶

2.62 The Australian Shipowners Association was critical of this proposed change, submitting that:

[t]his change will result in an enormous compliance and operational burden for thousands of vessel movements compared to the handful of international facilities that previously required quarantine clearance each year.⁷⁷

2.63 The Australian Petroleum Production and Exploration Association (APPEA) shared these concerns, estimating that compliance costs would exceed \$10 million per year. APPEA also advised that imposing biosecurity regulations on currently unregulated activities would present operational difficulties that could substantially increase business costs.⁷⁸ APPEA also warned that the additional regulation would undermine the industry's global competitiveness.⁷⁹

2.64 The Department of Agriculture advised it intends to deal with this change in policy through Approved Arrangements, exemptions and standing permissions; the particulars of which will be dealt with in the regulations.⁸⁰ However both APPEA and the ASA were sceptical of this approach, questioning the form and content of the proposed regulations.⁸¹ As the ASA stated:

"We'll sort it out in the regulations" is not a satisfactory basis for industry to be assured that the requirements will not pose an excessive burden.⁸²

74 Department of Agriculture and Department of Health, *Submission 15*, p. 19.

75 Department of Agriculture and Department of Health, *Submission 15*, p. 19.

76 Department of Agriculture and Department of Health, *Submission 15*, p. 19.

77 Australian Shipowners Association, *Submission 11*, p. 1.

78 Australian Petroleum Production and Exploration Association, *Submission 25*, p. 1.

79 Australian Petroleum Production and Exploration Association, *Submission 25*, p. 2.

80 Department of Agriculture and Department of Health, *Submission 15*, p. 19.

81 Australian Shipowners Association, *Submission 11*, p. 4; Australian Petroleum Production and Exploration Association, *Submission 25*, p. 2.

82 Australian Shipowners Association, *Submission 11*, p. 4.

2.65 The ASA also questioned the process for obtaining exemptions, advising that such arrangements would be:

an acceptable outcome provided that such exemption is automatic or deemed and the vessel itself...does not have to apply to be granted such exception.⁸³

2.66 The associations also disputed the necessity for the new regulatory approach, arguing that the process would not improve biosecurity management but would increase red tape and be inconsistent with the policy to remove unnecessary regulation.⁸⁴

Committee view

2.67 Retracting Australia's quarantine zone from 200 nautical miles to 12 nautical miles is a significant change. While the committee considers that it is an appropriate and proportionate response to targeting the biosecurity risks presented by vessels entering Australian territory, the effect on Australia's shipping industry should not be underestimated.

2.68 The committee agrees with the intended approach to develop Approved Arrangements, exemptions and standing permissions to ensure that biosecurity requirements are not only robust and effective but are appropriately tailored for industry participants. The committee anticipates that a broad cross-section of affected industries would seek Approved Arrangements and related instruments. This would foster a culture of working partnership between government and industry and, in turn, strengthen Australia's biosecurity response.

2.69 However, the committee has not received assurances that Approved Arrangements, exemptions and standing permissions will be finalised before the new biosecurity requirements would commence. As new regulatory requirements, the affected vessels could not access the three year transition period that would be afforded to vessels currently regulated (as detailed in chapter 1 of this report). Industry's concern is therefore understandable.

2.70 The committee recommends the Department of Agriculture commit all resources necessary to ensure that Approved Arrangements, exemptions and standing permissions arising out of the proposed jurisdictional change would be in force before the bill, if passed, would commence. The committee will be seeking the department's advice on its progress with this matter.

Recommendation 6

2.71 The committee recommends that the Department of Agriculture commit all resources necessary to ensure that Approved Arrangements, exemptions and standing permissions arising out of the proposed change in Australia's

83 Australian Shipowners Association, *Submission 11*, p. 5.

84 Australian Shipowners Association, *Submission 11*, p. 4; Australian Petroleum Production and Exploration Association, *Submission 25*, p. 2.

quarantine zone from 200 nautical miles to 12 nautical miles are in force before the bill, if passed, would commence.

Recommendation 7

2.72 The committee recommends that the Department of Agriculture provide updates to the committee on its progress with developing Approved Arrangements, exemptions and standing permissions arising out of the proposed change in Australia's quarantine zone from 200 nautical miles to 12 nautical miles.

2.73 The committee also notes that neither the explanatory memorandum nor the bill clearly define the territorial limits of Australia's quarantine zone. Legislation, and its requirements, should be clear, easy to interpret and to apply. It is of some concern to the committee that it requires interpretation of multiple pieces of legislation to understand the extent of the proposed biosecurity zone. The committee recommends that a note be added to clause 12 of the bill to clearly advise the reader of the legislative basis for the boundaries of Australia's quarantine zone. At a minimum, the explanatory memorandum should be amended to provide an overview of the relevant sections in the Acts Interpretation Act, the Seas and Submerged Lands Act and the United Nations Convention on the Law of the Sea.

Recommendation 8

2.74 The committee recommends that a note be added to clause 12 of the Biosecurity Bill 2014 to clearly advise the reader of the legislative basis for the boundaries of Australia's biosecurity zone.

Recommendation 9

2.75 The committee recommends that the explanatory memorandum to the Biosecurity Bill 2014 be amended to clearly outline the legislative basis for the 12 nautical mile quarantine boundary proposed under the Biosecurity Bill 2014.

Cost recovery

2.76 Part 3, Chapter 11 of the bill would allow the government to charge fees for activities carried out under the bill, if passed. Part 3 would also authorise the government to take certain actions, including the selling of goods, to recover unpaid cost recovery charges. The department advised that the proposed cost recovery provisions adhere to the Australian Government's *Cost Recovery Guidelines*.⁸⁵ As the committee was informed, cost recovery extends only to the cost of biosecurity services. It does not include general and unrelated government administrative costs:

Consistent with the Australian Government cost recovery policy, the Department recovers the costs of biosecurity activities from recipients of the activity. Those that create the risk or need for regulation are charged the cost of the activity. Other costs that are not related to the provision of cost

85 Biosecurity Bill 2014, explanatory memorandum, p. 345.

recovered activities, and those mandatory functions due to the Department being a government entity, are funded by government.⁸⁶

2.77 The NFF noted its support for the proposed sale of withheld goods to recover unpaid fees.⁸⁷ While not necessarily supporting the policy to transfer cost to industry, both the CBFCA and the Tasmanian Salmonid Growers Association called for cost-effective and cost efficient, equitable and transparent cost recovery arrangements. Industry consultation was seen as key.⁸⁸

2.78 A number of submitters drew the committee's attention to the fact that there is a public benefit arising from appropriate biosecurity risk management, and submitted that costs should not be borne by industry alone. For example, in relation to Australian forests, the committee heard that plant species in native forests managed by AFPA members are 'prevalent across the landscape and across land tenures in natural forests and urban environments'. Consequently, it was argued that industry should not bear sole responsibility for the costs of plant biosecurity management as 'biosecurity risks and responsibilities are not exclusive to our industry rather there is a significant public good aspect'.⁸⁹ Similarly, Tasmanian Salmonid Growers Association submitted:

TSGA recognises that some fee-for-service activities should occur but primary industry should not be responsible for covering the costs due to the demonstrated public good that biosecurity as to the Australian public.⁹⁰

2.79 The AFPA further noted that, in keeping with the policy intentions underlying the bill, the new biosecurity regulatory framework should result in a more cost efficient regulatory system. The AFPA submitted that these savings should, in turn, be passed on to industry.⁹¹

2.80 In response to the committee's questions, the department advised that it would revise its costings following the implementation of the bill, if passed. Revised costings 'would reflect any reduction in the cost base from savings to regulatory and operational reforms'.⁹²

Committee view

2.81 The committee expects that the cost recovery framework would, should the bills pass, reflect the costs of a modern, efficient regulatory system.

86 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

87 National Farmers' Federation, *Submission 19*, p. 3.

88 Customs Brokers and Forwarders Council of Australia Inc., *Submission 3*, p. 6; Tasmanian Salmonid Growers Association, *Submission 6*, p. 6.

89 Australian Forest Products Association, *Submission 12*, p. 7.

90 Tasmanian Salmonid Growers Association, *Submission 6*, p. 6.

91 Australian Forest Products Association, *Submission 12*, p. 7.

92 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

Proposed coercive powers

2.82 The Law Council of Australia questioned the proposed expanded powers of biosecurity officers.⁹³ Of particular note were the proposed powers to enter and search premises and to seize or destroy material without warrant or the owner's consent.⁹⁴ The council argued that powers to act without warrant or consent are 'extraordinary'. The council also noted with concern the apparent lack of safeguards, including training and qualification requirements, to ensure the powers are only used appropriately. It was recommended that, in line with the safeguards applying to the exercise of coercive powers by the Australian Federal Police, the bill be amended to require a report on the exercise of the powers to be presented to the relevant Minister or to an independent statutory body. Alternatively, Council recommended the bill be amended to allow an independent statutory body to determine whether powers, where exercised, were used lawfully and proportionately.⁹⁵

2.83 In response, the Department of Agriculture advised that the proposed warrant powers are necessary and proportionate to manage the unique threats posed by biosecurity emergencies.⁹⁶ The department further advised that training programs and guidelines would be available to biosecurity officers, and that biosecurity enforcement officers would be expected to comply with the Australian Government Investigations Standards.⁹⁷ (General training requirements of biosecurity officers are discussed in more detail below.)

Committee view

2.84 The power to enter and search premises, and to seize goods, without the owner's consent or without a warrant is significant, and has the potential to substantially infringe personal rights and liberties. However, in certain circumstances such powers are necessary. The committee accepts that the ability to quickly enter premises without consent may be an appropriate response to the threats posed by biosecurity emergencies. Yet, the committee does not accept such power should be exercised without scrutiny. Disclosure of any such use of the coercive powers proposed under the bill is necessary to ensure a transparent and proportionate regulatory system. The committee agrees with the Law Council of Australia that it would be appropriate that each instance of the use of powers—to enter and search premises without warrant or consent or to seize material without warrant or consent—be reported to the Minister and to Parliament.

Recommendation 10

93 Law Council of Australia, *Submission 21*, pp 7—9.

94 The Law Council of Australia in particular commented on clauses 470, 515, 545, 546 and 548.

95 Law Council of Australia, *Submission 21*, p. 8.

96 Department of Agriculture and Department of Health, *Submission 15*, pp 16—17.

97 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

2.85 The committee recommends the Biosecurity Bill 2014 be amended to require that the use of powers to enter and search premises without warrant or consent and to seize or destroy goods without warrant or consent to be reported to the Minister and to Parliament.

Proposed offences

2.86 Submitters did not fail to notice what the department characterised as 'improved compliance tools that are fit for purpose, modern and useful'.⁹⁸ In particular, submitters noted the proposed introduction of strict liability offences and increased penalty levels.

2.87 The Law Council of Australia criticised proposed offences with penalty levels that would exceed the penalties for similar offences in existing Commonwealth legislation. In particular, the council noted clause 69, which would create the offence of failing to provide prescribed contact information. The offence would carry a penalty of imprisonment for 12 months, 60 penalty units or both. The council advised that this penalty level exceeds that of similar offences under the *Australian Federal Police Act 1979*.⁹⁹ The explanatory memorandum does not provide information about the proposed penalty.¹⁰⁰

2.88 The bill also contains several strict liability offences; that is, offences for which 'fault' does not apply.¹⁰¹ As the CBFCA noted, these offences signal a 'change in the department's compliance posture'.¹⁰² Broadly, there were three concerns with the proposed use of strict liability offences.

2.89 First, submitters questioned whether strict liability is generally an appropriate deterrence mechanism. The Law Council of Australia argued that strict liability is a significant departure from normal Commonwealth practice, particularly for offences relating to non-compliance or failure to provide documentation.¹⁰³ The Council also advised that, at times, justification provided in the explanatory memorandum misrepresents the views of third parties such as the Commonwealth Ombudsman.¹⁰⁴

2.90 Second, submitters highlighted proposed offences that would apply to persons with communication difficulties. Clause 58 was of particular note. This clause would create the strict liability offence of failing to comply with a direction. The Law

98 Department of Agriculture and Department of Health, *Submission 15*, p. 7.

99 Law Council of Australia, *Submission 21*, p. 12.

100 Biosecurity Bill 2014, explanatory memorandum, p. 110.

101 A person commits a strict liability offence if he or she undertakes the prohibited conduct or action irrespective of whether the person did so knowingly, intentionally, or recklessly (the *Criminal Code*, s. 6.1). The defence of reasonable mistake of fact would apply, providing the opportunity for the person to demonstrate that he or she had considered relevant facts and acted under a mistaken but reasonable belief about those facts (the *Criminal Code*, s. 9.2).

102 Customs Brokers and Forwarders Council of Australia Inc, *Submission 3*, p. 5.

103 Law Council of Australia, *Submission 21*, pp 12—13.

104 Law Council of Australia, *Submission 21*, p. 12.

Council of Australia submitted that in this instance the use of strict liability would be inappropriate as it would unreasonably increase biosecurity officers' powers of control, search, monitoring and questioning.¹⁰⁵

2.91 In respect of clause 58, the explanatory memorandum advises that 'special protections' would be provided to children and 'individuals who may be temporarily incapable of understanding requirements or complying with a measure due to illness'.¹⁰⁶ Specifically, it advises that such 'incapable persons' or children would not be subject to the requirement to provide information 'unless an officer has taken reasonable steps to contact a parent, guardian or next of kin'.¹⁰⁷ The explanatory memorandum does not comment on the potential liability of persons who do not otherwise understand directions, for example due to language barriers. In its consideration of the bill, the Senate Standing Committee for the Scrutiny of Bills observed that strict liability offences are appropriate in some circumstances, but asked the Minister for Agriculture to provide 'a fuller justification of the application of strict liability in this instance', stating that:

[It] is possible that persons subject to requirements to answer questions may have recently arrived in Australia and may also be suffering from an illness, there may be instances where they are not reasonably able to comply with a request to answer questions or provide information as required.¹⁰⁸

2.92 While not noted by submitters to the inquiry, the committee is aware that a similar situation would arise under clause 46. This clause would create a civil penalty for failing to comply with certain entry and exit requirements. An individual may still contravene entry and exit requirements even if the individual is unable to comply. The explanatory memorandum does not provide an explanation, or a justification, for this proposal. At the hearing, the Department of Agriculture provided the following advice:

[S]ubsection (4) of section 46 has the keywords 'may contravene'...We have been interpreting the law and those kinds of phrases for a long time.¹⁰⁹

2.93 At the committee's request, the department outlined a potential scenario:

Say, for example, if you are unable to speak the language in which a form was available. We try to make forms available in a wide range of languages, but for the sake of argument, we did not have one in a language. The obligation still exists on the individual to comply with the law even if,

105 Law Council of Australia, *Submission 21*, p. 12.

106 Biosecurity Bill 2014, explanatory memorandum, p. 106.

107 Biosecurity Bill 2014, explanatory memorandum, p. 98.

108 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 16.

109 Mr Rob Cameron, Assistant Secretary, Health Emergency Management Branch, Department of Health, *Committee Hansard*, 11 February 2015, p. 2.

despite best efforts, the requirement is unable to be met. Again, the key phrase there is 'may', so there is an element of discretion.¹¹⁰

2.94 Third, the CBFCA argued there is a significant need for the Government to widely disseminate information about the proposed offences, as service providers can otherwise rely on information provided by third parties:

It is important to note that service providers (licensed customs brokers in particular) are accredited by the Department under the Non-Commodity for Containerised Cargo Clearance (NCCC) Accreditation Course. Such accredited persons are employed by the business entity that holds a Compliance Arrangement with the Department. These accredited persons are responsible for documentation assessment on behalf of the cargo owner (importer), in facilitating biosecurity border clearance activities.

As to the new strict liability provisions it will be important (as to the responsible person listed under future Approved Arrangement) to ensure such persons are aware of obligations related to documentation assessment, clearance and movement of cargo subject to biosecurity risks, as under an Approved Arrangement it is the business entity which will be the entity which will bear any strict liability offence by the employee under vicarious liability and this issue will impact on business insurance requirements.¹¹¹

2.95 The CBFCA's concern that proposed penalties may not be appropriate for persons relying on third party information was also noted in relation to clauses 532 and 533. These clauses would create civil penalties for knowingly providing false or misleading information or documents. The council particularly noted that third parties, such as customs brokers, act in good faith on information provided.

2.96 In response, the Department of Agriculture advised that the civil penalty is designed to target behaviours undertaken knowingly, and further stated that the defence of reasonable mistake of fact may be available.¹¹²

Committee view

2.97 Deterrence is a necessary component of any effective regulatory system. The committee agrees with the Department's advice that penalties must be proportionate, balanced, consistent and based on the level of presented risk. However, it is unclear whether this balance has been achieved in every case.

2.98 In some cases, such as in relation to clause 140, the proposed departure from the Commonwealth standard has been explained in relation to the likely resulting biosecurity hazard. However, in other cases, such as the proposed offence in clause 69, the decision for penalties to exceed those that currently apply to similar offences in Commonwealth legislation has not been well explained. All departures from Commonwealth norms must be justified. Such justification must be included in

110 Mr Cameron, Department of Health, *Committee Hansard*, 11 February 2015, p. 2.

111 Customs Brokers and Forwarders Council of Australia Inc, *Submission 3*, p. 5.

112 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

the explanatory memorandum. The committee also notes the extensive comments of the Senate Standing Committee for the Scrutiny of Bills following its review of the bills. These comments include concerns with the penalty levels for some of the proposed offences and civil penalties. The committee draws these concerns and the Minister's response when it is provided, to the Senate's attention.¹¹³

2.99 The use of strict liability is a significant departure from Commonwealth standards. While permissible, it should not be undertaken lightly. The strict liability offences would not only apply to industry, but to ordinary Australian citizens and foreign tourists. These are serious offences with serious penalties. Their purpose is to create a safe Australia, not to catch people unawares. Information is key. It is incumbent upon government to disseminate well targeted, clear and thorough information about Australia's biosecurity requirements and the offences that may apply.

2.100 The committee remains concerned that the strict liability offences are inappropriate for persons who are unable to communicate with biosecurity officers or understand instructions. The committee seeks assurances that all necessary steps would be taken to ensure information is appropriate for foreign nationals and persons with disabilities. The department should arrange advice sheets appropriate for persons with disabilities and persons from non-English speaking backgrounds.

2.101 The committee also notes the proposed civil penalty under clause 46, under which a person may still be liable despite being incapable of complying with directions. The integrity of this scheme would rely on the training, patience and common sense of biosecurity officers. It is vital that biosecurity officers routinely undertake cross-cultural and customer service training, and have all necessary support to be equipped to exercise sound judgement in all situations.

2.102 The concerns put forward by the CBFCA highlight the novelty of the proposed enforcement regime. There is evident confusion about how the offences and civil penalties will work in practice. This is all the more reason for government to provide clear guidance to industry. This committee's inquiry has brought to light particular offences, and aspects of offences, that need to be explained. For example, advice could usefully explain the concept of *knowingly*, as opposed to inadvertently, providing false information.

Recommendation 11

2.103 The committee recommends that the Department of Agriculture and the Department of Health ensure that advice sheets about the proposed new biosecurity requirements, and related offences, are available and appropriate for people with disabilities and people from non-English speaking backgrounds.

Recommendation 12

113 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, pp 11–27.

2.104 The committee recommends that the Department of Agriculture and the Department of Health develop guidance material to facilitate industry's transition to the proposed new compliance regime.

Concerns with the implementation of a new regulatory system

2.105 Submitters raised the following issues relevant to the implementation of a new biosecurity regulatory system:

- cross-jurisdictional coordination; and
- the qualifications and training of biosecurity officers.

Co-ordination between Commonwealth agencies and the states and territories

2.106 Four government departments would have responsibilities under the proposed bill: the Departments of Agriculture, Environment, Foreign Affairs and Trade, and Health.¹¹⁴ In addition, the Immigration and Border Protection Portfolio has responsibilities under the proposed package of legislation, and worked with the Department of Agriculture in the development of the bill.¹¹⁵ Relatedly, one submitter in particular was critical of the fact that the Minister for the Department of the Environment was not specifically mentioned in the bill.¹¹⁶

2.107 The proposed bill also touches upon a number of state responsibilities. The committee heard that there may be areas where commonwealth and state responsibilities conflict, or at least overlap, and it is important that appropriate coordination occurs to ensure that biosecurity risks are managed appropriately.

2.108 The NSW Natural Resources Commission noted that an intergovernmental agreement, as permitted by the bill, could be used to ensure adequate surveillance to quickly identify and manage new incursions of invasive species:

[T]he Commonwealth should support devolved, regionalised arrangements that have sufficient funds to tackle the new incursions expeditiously and seriously. These arrangements should be consistent across Australia with strong data sharing arrangements to support rapid response.¹¹⁷

2.109 Australian Pork Limited noted that the proposed expansion of the Commonwealth's ability to declare biosecurity emergencies and zones may result in a shift from state managed responses to national management. This may be a positive development for large multi-state responses, but might create a source of tension for smaller emergencies, especially if a particular state wanted to respond to an emergency differently to the Commonwealth.¹¹⁸ Nevertheless, Australian Pork Limited expressed confidence that the new powers proposed by the bill would

114 Department of Agriculture and Department of Health, *Submission 15*.

115 Immigration and Border Protection Portfolio, *Submission 20*, p. 1.

116 Invasive Species Council, *Submission 16*, p. 3. See also, Dr Sophie Riley, *Submission 4*, p. 4.

117 New South Wales Natural Resources Commission, *Submission 9*, p. 2.

118 Australian Pork Limited, *Submission 17*, p. 2.

'complement' existing cooperative arrangements, such as the Emergency Animal Disease Response Agreement, 'rather than hinder them'.¹¹⁹

2.110 The AFPA approved recent investment in pest trapping programs at ports, but observed that given the large number of organisations at the state and federal level involved in such programs there is a risk that important information might not be shared with all relevant organisations. The AFPA suggested that the bill or regulations be amended to enable important information relating, for example, to research findings or new trapping methodologies to be shared with all stakeholders.¹²⁰

2.111 The committee heard that there are well established coordination processes in place between the Commonwealth and the states and territories. The department advised that the bill would promote further collaboration, and the Commonwealth would 'continue to encourage the States and Territory governments to provide input and feedback in the development of delegated legislation and administrative practices, as appropriate'.¹²¹

2.112 Submitters commented that adequate funding is crucial to managing biosecurity risk, and to ensure that states and territories can take appropriate action. The NFF observed a decrease in government funding to assist industry in the area of disease surveillance and control.¹²² The NFF asked the committee to:

seek clarity on how the Federal Government intends resourcing its responsibilities under the new legislation and under what agreements the Federal and jurisdictional governments will ensure co-operation in pooling their resources to maximum effect.¹²³

2.113 In response, the department advised that '[t]here are no proposals to amend existing funding arrangements with regard to biosecurity emergencies'.¹²⁴

Committee view

2.114 For the bill to operate as intended there must be cooperation between the various relevant Commonwealth departments, and between the Commonwealth, the states and the territories. The committee is satisfied that the bill has been drafted with cross-jurisdictional challenges in mind and that cooperation will occur.

The qualifications and training of biosecurity officers

2.115 This section elaborates on the comments made earlier in this chapter in relation to the qualifications of officers exercising coercive powers earlier. The

119 Australian Pork Limited, *Submission 17*, p. 2.

120 Australian Forest Products Association, *Submission 12*, p. 5.

121 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

122 See also, NSW Farmers' Federation, *Submission 27*, pp 6–7.

123 National Farmers' Federation, *Submission 19*, p. 3.

124 Department of Agriculture, answers to questions on notice, 11 February 2015 (received 27 February 2015).

committee heard that the effectiveness of the new risk security framework is based on the skills of biosecurity officers within the Department of Agriculture. For this reason, a number of submitters called for greater investment in skills and training.

2.116 For example, the Plant Biosecurity Cooperative Research Centre called for a significant increase in government investment in biosecurity science and training, observing that:

Currently, many frontline biosecurity officers have little biological training – their major responsibilities related to checking that importers, passengers and others are following pre-set standard rules and procedures. Under a more flexible arrangement they will face more complex situations, sometimes with different considerations being required for the same commodity. The move to a risk based approach will require a very significant investment in training of officers involved in frontline biosecurity activities to ensure that they can deal with this increased complexity and can recognise when things go wrong.¹²⁵

2.117 The Australian Veterinary Association called for recognition in the bill when a biosecurity officer is required to have the particular skills of a veterinarian.¹²⁶

2.118 The committee asked the departments to comment on the training and qualifications necessary for a person to become a biosecurity officer, human biosecurity officer and biosecurity enforcement officer. In relation to biosecurity officers, the departments advised:

Powers under the legislation will be exercised by appointed biosecurity officers (see clause 545) who have the appropriate training and knowledge to recognise biosecurity risks and manage them appropriately—supported by extensive technical, policy and scientific expertise.¹²⁷

2.119 The department did not mention any particular specialist qualifications, however did note that staff also undertake 'staff training' and 'competency based assessments'.¹²⁸

2.120 The bill provides that Human Biosecurity Officers would need to have appropriate clinical experience and also be an employee of either the Commonwealth Department of Health, a state or territory counterpart or be a member of the Australian

125 Plant Biosecurity Cooperative Research Centre, *Submission 18*, p. 2. *Note*: this organisation supports the move to a risk based approach from a rule based approach, but noted that the success of this transition depends on the skills of officers, and suggested amendment to the bill.

126 Australian Veterinary Association, *Submission 10*, Appendix A, p. 3.

127 Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Question 13.

128 Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Question 13.

Defence Force.¹²⁹ The departments advised that Human Biosecurity Officers would also be required to complete training in human biosecurity.¹³⁰

2.121 Under the bill, Biosecurity Enforcement Officers would be required to meet the requirements of the Australian Government Investigations Standards. The departments advised that:

This includes the requirement that staff involved in investigations meet minimum levels of training or qualifications and that the department meets the minimum standards for effective and efficient management of investigations, including record keeping.¹³¹

Committee view

2.122 The committee agrees that the success of the new scheme proposed by the bill is dependent in large part upon the skill and expertise of biosecurity officers within the Department of Agriculture. The committee notes the department's assurances that adequate support and training will be provided to officers, and will be following this issue closely as part of the committee's general oversight of the department.

Consultation process conducted by the Department of Agriculture

2.123 Submitters drew the committee's attention to two aspects of the consultation process. First, submitters commented on opportunities to contribute to the development of the Biosecurity Bill 2014 and related bills. Second, submitters noted concerns with the anticipated consultation process for the proposed regulations and other subordinate legislation.

Consultation on the Biosecurity Bill 2014 and related bills

2.124 Submitters emphasised that the bill is the culmination of several years' work. The Department of Agriculture and the Department of Health advised that consultation on the development of legislation to replace the Quarantine Act commenced in 2009.¹³² The committee was informed that the consultation processes varied, and included 'workshops, roundtables, industry fora, international meetings, online blogs, submissions and meetings across the country.'¹³³ Additionally, the department established an industry legislation working group, comprising 16 industry representatives,¹³⁴ which 'provided substantial input into the development of the bill

129 Clause 564, Biosecurity Bill 2014.

130 Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Question 13.

131 Clause 546, Biosecurity Bill 2014. See also Department of Agriculture and Department of Health, answer to question on notice, 11 February 2015 (received 27 February 2015), Question 13.

132 Department of Agriculture and Department of Health, *Submission 15*, p. 13.

133 Department of Agriculture and Department of Health, *Submission 15*, p. 13.

134 Department of Agriculture and Department of Health, *Submission 15*, p. 13.

since its inception in 2009.¹³⁵ In all, approximately 440 organisations were consulted throughout the bill's six-year formation.¹³⁶

2.125 Submitters recognised that consultation for the 2014 draft legislation is in addition to consultation on the Biosecurity Bill 2012 (the 2012 Bill).¹³⁷ The majority of submitters expressed satisfaction with the level of consultation undertaken by the department. Industry representatives advised they had been provided extensive opportunities for input.¹³⁸ Ports Australia submitted that the consultation process for the 2012 Bill was 'excellent', while the NFF acknowledged:

[the] extensive process the Department of Agriculture...has undertaken in putting together the Biosecurity Bill 2014. NFF also appreciates being involved through its representation on the Industry Legislation Working Group established by DAFF for use as a sounding board during the early parts of the drafting process.¹³⁹

2.126 Several submitters highlighted legislative changes that had been made in response to stakeholder feedback. It was acknowledged that the consultation processes had helped shape the bill.¹⁴⁰ For example, Ports Australia advised that 'input on relevant parts of the draft legislation received a good hearing and, in many cases, amendments were implemented as a result of reasoned arguments'.¹⁴¹

2.127 However, the committee was informed that industry was not notified of key changes to the draft legislation. There was evident uncertainty about the precise differences between the 2012 Bill and the Biosecurity Bill 2014, with a number of organisations submitting that the publicly available information was insufficient.¹⁴² Significantly, the Australian Industry Working Group on Biosecurity advised that 'members have expressed concern at the apparent lack of consultation with industry relating to the last-minute changes to the bill'.¹⁴³ The committee was also informed the industry was provided limited access to the draft 2014 bill.¹⁴⁴

135 Australian Industry Working Group on Biosecurity, *Submission 24*, p. 1.

136 Department of Agriculture and Department of Health, *Submission 15*, p. 13.

137 See, for example, Australian Chicken Meat Federation, *Submission 7*, p. 2.

138 See, for example, Ports Australia, *Submission 1*, p. 2; Australian Chicken Growers Council Ltd, *Submission 7*, p. 1; Tasmanian Salmonoid Growers Association Ltd, *Submission 6*, p. 3.

139 National Farmers' Federation, *Submission 19*, cover letter.

140 See, for example, Australian Industry Working Group on Biosecurity, *Submission 24*, p. 1.

141 Ports Australia, *Submission 1*, p. 1.

142 AUSVEG, *Submission 8*, p. 2; Invasive Species Council, *Submission 16*, p. 2, Australian Horticultural Exporters Association, *Submission 28*, p. 2.

143 Australian Industry Working Group on Biosecurity, *Submission 24*, p. 1.

144 Mr Richard Stoklosa, *Submission 26*, p. 1; Australian Horticultural Exporters Association, *Submission 28*, p. 2.

2.128 The departments advised the committee that consultation would continue, noting that 'there will be more opportunities to discuss feedback and work with stakeholders in the development of regulations and administrative policies'.¹⁴⁵

Regulations

2.129 There was evident concern with the consultation process for the draft subordinate legislation. Industry's message was uniform and clear: meaningful, thorough and genuine consultation is required. Industry representatives routinely noted that the operational details of the proposed new biosecurity system will be contained in subordinate legislation.¹⁴⁶ As Ports Australia noted, 'the details and the certainty upon which industry will rely will be found in the regulations'.¹⁴⁷ Unfortunately, the proposed regulations were not available to the committee for review or to stakeholders for comment. This was a significant concern for industry.¹⁴⁸

2.130 The Australian Chicken Growers Council advised that the failure of the government to provide the draft regulations made 'it difficult for stakeholders to provide in-depth comments that address how the legislation will operate as a whole'. This concern was shared by other industry representatives, including the Australian Chicken Meat Federation which noted that the 'staggered process of drafting and releasing the new legislative framework does not allow stakeholders to consider the new system as a whole before the bills are considered by Parliament'.¹⁴⁹

2.131 The NFF sought assurances from the government that 'industry will be closely involved in the drafting of the regulations and other supporting documents'.¹⁵⁰ Similar assurances were sought by numerous industry sectors, including the Australian chicken meat industry, the Australian pork industry, the horticultural sector and the shipping industry.¹⁵¹ Industry consultation was considered necessary to ensure regulations are both practical and align with industry expectations. As the Australian Chicken Growers Council argued, robust and meaningful consultation is necessary 'to ensure that they [the regulations] will meet the expectations of industry and prevent the formulation of legislation that is burdensome to industry'.¹⁵²

145 Department of Agriculture and Department of Health, *Submission 15*, p. 14.

146 See, for example, NSW Farmers' Association, *Submission 27*, p. 8; Australian Horticultural Exporters Association, *Submission 28*, p. 4.

147 Ports Australia, *Submission 1*, p. 1.

148 See, for example, AUSVEG, *Submission 8*, p. 2; Tasmanian Salmonid Growers Association, *Submission 6*, p. 3; Australian Banana Growers Council Inc., *Submission 13*, p. 1; Australian Horticultural Exporters Association, *Submission 28*, p. 4.

149 Australian Chicken Meat Federation Inc., *Submission 7*, p. 2.

150 National Farmers' Federation, *Submission 19*, p. 3.

151 See, for example, Australian Chicken Meat Federation, *Submission 7*, p. 2; Australian Pork Limited, *Submission 17*, p. 1; Food and Beverage Importers Association, *Submission 22*, p. 3; Shipping Australia Ltd, *Submission 23*, p. 2; Australian Banana Growers Council Inc., *Submission 13*, p. 1; Australian Horticultural Exporters Association, *Submission 28*, p. 4.

152 Australian Chicken Growers Council, *Submission 7*, p. 2.

2.132 In response to these concerns the department acknowledged the need for consultation, advising that 'when we draft regulations we also consult.'¹⁵³ The department advised that stakeholders would be consulted on the development of the regulations.¹⁵⁴ The committee was further reminded of the parliamentary disallowance process for regulations, and advised that this process provides sufficient opportunity to scrutinise subordinate legislation.¹⁵⁵

Committee view

2.133 Indubitably, the department has conducted extensive consultations with key stakeholders in relation to the current bill and earlier iterations. The department is also preparing to consult with stakeholders as it develops the regulations. However, the committee has received evidence that these consultations do not always correlate to changes to the bill to reflect the issues raised and some consultations appear to be rushed.

Recommendation 13

2.134 The committee recommends that the Department of Agriculture continue to consult closely with all relevant stakeholders and ensure that stakeholders are provided sufficient time to consider and respond to proposed regulations.

Conclusion

2.135 All Australians benefit from a robust, independent and scientifically informed biosecurity system. The Quarantine Act has served Australians well, and has contributed to Australia's strong biosecurity framework. However, the world has changed since the early twentieth century and it is time for an update. The Quarantine Act has been amended more than fifty times and has become outdated, difficult to administer and interpret, and unable to respond to current needs. The bills before the committee seek to bring about the reforms necessary for a first-class biosecurity system to protect Australia's future.

2.136 The package of biosecurity bills reflects the work of many years, originating with the Beale Review. The committee commends the Departments of Agriculture and Health for their careful work developing the bills and consulting with stakeholders. The committee also notes the contributions made by industry, state and territory governments, and other stakeholders during consultations on the bill and submissions to inquiries conducted by parliamentary committees.

2.137 The committee notes that the bills are not perfect, and there are areas that the government can improve, particularly in relation to consultation and timely release of draft regulations. The bills before the committee are draft 'framework' legislation. That is, they would provide the broad principles and the general framework for Australia's

153 Ms Mellor, Department of Agriculture, *Committee Hansard*, 11 February 2015, p. 9.

154 Ms Mellor, Department of Agriculture, *Committee Hansard*, 11 February 2015, p. 9.

155 Ms Mellor, Department of Agriculture, *Committee Hansard*, 11 February 2015, p. 8.

biosecurity scheme but would leave the scope and operational details to delegated legislation. The committee reiterates the view of the Senate Standing Committee for the Scrutiny of Bills that such legislation is 'inherently problematic from the point of view of effective Parliamentary scrutiny, and avoids detailed parliamentary debate of the content of important provisions'.¹⁵⁶ The committee also notes that the bill contains 21 clauses or subclauses that would provide for regulations that would in turn be exempt from disallowance pursuant to section 42 of the *Legislative Instruments Act 2003* (Cth).¹⁵⁷

2.138 Pleasingly, the departments have taken the opportunity to amend the bill to reflect feedback provided through consultations on the 2012 package of bills. On balance, the committee believes that the Biosecurity Bill 2014 and related bills propose a comprehensive modernisation of the Australian biosecurity legislation.

Recommendation 14

2.139 Subject to the foregoing recommendations, the committee recommends that the Senate pass the Biosecurity Bill 2014 and related bills.

**Senator the Hon Bill Heffernan
Chair**

156 Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the future directions and role of the Scrutiny of Bills Committee*, 30 November 2011, p. 33.

157 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 11. The explanatory memorandum states the exemption is necessary to ensure that expert decision-makers can manage biosecurity risks effectively.

