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No. 114 2001–02

## Quarantine Amendment Bill 2002

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No. 114 2001-02

Quarantine Amendment Bill 2002

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# Quarantine Amendment Bill 2002

**Date Introduced:** 14 March 2002

**House:** House of Representatives

**Portfolio:** Agriculture, Fisheries and Forestry

**Commencement:** The emergency coordinated response powers provisions commence on proclamation or, in any event, 6 months after the date of Royal Assent. Commercial smuggling and associated offence provisions commence 28 days after the legislation receives Royal Assent.

## Purpose

To amend the *Quarantine Act 1908* to:

- establish a framework for the activation and use of emergency ‘coordinated response powers’ when an epidemic caused by a quarantinable disease or pest exists which has the potential to affect a primary industry of ‘national significance’. These powers will be exercisable if the Governor-General, acting on the advice of the Executive Council, has made a proclamation and the Minister has authorised agency heads to take action to control the epidemic or remove the danger by using ‘quarantine measures’.
- explicitly provide that ‘quarantine’ includes destroying untreatable premises.
- amend some offence provisions and create a new offence of aggravated illegal importation (commercial smuggling).

## Background

### Constitutional power over quarantine

Section 51(ix) of the Commonwealth Constitution gives the Commonwealth Parliament power to make laws about ‘quarantine’. This power is exercised concurrently with the States. The principal Commonwealth statute is the Quarantine Act which covers human, animal and plant quarantine. The two main Commonwealth agencies dealing with quarantine are the Department of Health and Ageing (DHA) and the Australian Quarantine Inspection Service (AQIS). DHA has primary responsibility for human quarantine and

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AQIS for animal and plant quarantine. Legislation dealing with human disease outbreaks, animal and plant quarantine is also in place at State and Territory level.<sup>1</sup>

## Emergency powers in the Quarantine Act

There are two existing emergency power provisions in the Quarantine Act. In the early part of the 20<sup>th</sup> century, ‘uncertainty and disagreement over the appropriate role of Commonwealth and State governments resulted in problematic responses to outbreaks of communicable disease. An example of this was the influenza pandemic of 1918-1919, in response to which both the Commonwealth and the States implemented quarantine measures that were partly overlapping and inconsistent.’<sup>2</sup> Section 2A<sup>3</sup> was inserted into the Quarantine Act in response to this situation and gives the Commonwealth power to override State legislation by proclamation in an emergency.

Section 2B enables the Governor-General, on the advice of the Executive Council, to declare that an epidemic caused by a quarantinable disease or pest exists or that there is a danger of such an epidemic. Once such a declaration is made, the Minister is empowered to take whatever action is necessary to control and eradicate the epidemic by the use of quarantine measures. Section 2B was inserted into the Quarantine Act in 1947 because of concerns that outbreaks of communicable diseases in Europe, Africa and Asia in the unsettled conditions following World War II combined with increases in the volume and speed of air travel to Australia necessitated giving the Minister ‘power to meet an emergency arising through an outbreak of disease in a remote part of Australia’.<sup>4</sup>

The amendments in the current Bill create a new emergency power in the Quarantine Act.

## Commercial smuggling offence

Prior to the 2001 General Election, the Coalition parties announced that if re-elected they would introduce legislation to create an offence of commercial smuggling under the Quarantine Act with penalties of up to \$1 million.<sup>5</sup> The amendments introduce such an offence.

## Main Provisions

### Emergency coordinated response powers

Existing subsection 2B(1) of the *Quarantine Act 1908* empowers the Governor-General to proclaim that an epidemic caused by a quarantinable disease or pest exists. For convenience, such a proclamation is referred to in this Digest as a ‘subsection 2B(1) proclamation’. While such a proclamation is in force, the Minister may ‘give such direction and take such action as he or she thinks necessary to control and eradicate the

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epidemic, or to remove the danger of the epidemic, by quarantine measures or measures incidental to quarantine’.

**Item 1** amends existing section 2B so that, in certain circumstances, the Governor-General’s proclamation can authorise the use of what are called ‘coordinated response powers’. For convenience, such a proclamation is referred to in the Digest as a ‘coordinated response powers proclamation’. Before issuing such a proclamation, the Governor-General must be satisfied that an epidemic exists that potentially so affects ‘an industry of national significance that it calls for the exercise of coordinated response powers’. The Minister may then authorise the heads of ‘national response agencies’ to take whatever action they think necessary to control or eradicate the epidemic or remove the danger of the epidemic by the use of ‘quarantine measures’. These powers may, in turn, be conferred by agency heads on their officers, contractors and volunteers<sup>6</sup>, and exercised by anyone performing the duties of the agency head<sup>7</sup> or by successors to those agency heads.<sup>8</sup>

The Minister may make the authorisation subject to conditions or limitations [**new paragraph 3(2)(a) and subsection 3(4)**]. Further, any action taken by a person authorised by the Minister or a national response agency head must be no more than is ‘reasonably appropriate and adapted’ to controlling and eradicating the epidemic or removing the danger of the epidemic (**item 5**).

An authorisation given by the Minister or a national response agency head is revoked when the relevant coordinated response powers proclamation is revoked [**new subsection 3(7)**].

The expression ‘industry of national significance’ is defined as any primary industry whose disruption would be a matter of national significance, irrespective of whether it is an export industry (**item 6**).

A ‘national response agency’ is defined to mean the Commonwealth, State and Territory police forces, or, where a Ministerial declaration is in force and gazetted, the defence forces, Commonwealth, State or Territory departments or other public agencies (**item 7**). The Minister must consult with the Defence Minister before declaring the defence forces to be a ‘national response agency’ [**new subsection 5(1AA)** inserted by **item 8**]. Similarly, before declaring any department or agency to be a ‘national response agency’, the Minister must consult with the portfolio Minister [**new subsection 5(1AB)** inserted by **item 8**].

### The definition of ‘quarantine’

The definition of ‘quarantine’ is important because emergency proclamations made by the Governor-General authorise action to be taken to control epidemics by the use of ‘quarantine’ measures.

There are two limbs to the existing definition of ‘quarantine’ in the Quarantine Act. Quarantine is defined to include:

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- examining, detaining, isolating, and treating vessels, people, plants and other things
- in order to prevent or control the introduction or spread of diseases or pests that could cause significant damage to people, animals, plants, the environment or economic activities.

The first limb of this definition is repealed and replaced by **item 4**. The existing words are reinserted and new words added so that the definition explicitly refers to seizing and destroying animals, plants or other goods or things, and destroying untreatable premises.

### Arrangements with the States and Territories for the certification of export products

**Items 9 and 10** enable the Commonwealth to make arrangements with the States and Territories to assist them to certify export products in accordance with international agreements.<sup>9</sup>

### Compensation for the destruction of goods and premises

Existing section 69A of the Quarantine Act provides for compensation to be paid if goods are destroyed under the Act and the Minister ‘considers it appropriate’. ‘Goods’ include animals and plants. The circumstances in which compensation is not payable and how compensation is to be determined are also set out in section 69A. **Item 11** repeals existing subsection 69A(1) and substitutes a new subsection which enables compensation to be paid not only when goods are destroyed under the Act but when premises are destroyed. This amendment is consequential on the new definition of ‘quarantine’ inserted by **item 4**.

**Items 12-16** make other amendments which flow from the fact that the Quarantine Act will be amended to allow for the destruction of premises as well as goods.

### Immunity from civil proceedings

Existing section 82 of the Quarantine Act makes the Minister and quarantine officers immune from civil liability in relation to anything they do in good faith in the performance of their statutory duties, functions or powers.

**Item 17** inserts **new subsection 82(1A)** into the Quarantine Act. **New subsection 82(1A)** provides that a person acting under a coordinated response powers authorisation is immune from civil proceedings for anything they do in good faith in the performance of functions, duties or powers under the authorisation.

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## Offences

### General

From 15 December 2001, the principles of criminal responsibility found in the *Criminal Code Act 1995* applied to all existing Commonwealth offences. Following the passage of the Criminal Code Act, the Commonwealth embarked on a program to review and revise all Commonwealth offences so that they harmonised with the Code's principles of criminal responsibility. However, this program was not completed before 15 December 2001. Apart from creating some new offences, the Quarantine Amendment Bill 2002 amends some existing offences in the Quarantine Act in the light of principles of criminal responsibility found in the Criminal Code.

The Criminal Code provides that an offence consists of physical elements and fault elements.<sup>10</sup> Physical elements relate to external events such as conduct, its circumstances and its results. Fault elements relate to a person's state of mind. The fault elements set out in the Criminal Code, in descending order of culpability, are intention, knowledge, recklessness and negligence.<sup>11</sup>

In general, in order to establish guilt, the prosecution must prove the existence of both the physical elements of the offence and their corresponding fault elements.<sup>12</sup> However, the Criminal Code provides for strict and absolute liability offences and for offences where particular physical elements attract strict or absolute liability.<sup>13</sup> Where strict or absolute liability applies, the prosecution does not have to prove fault. It is most often used in minor or regulatory offences or where requiring the prosecution to prove fault elements would render the legislation unenforceable. The difference between strict and absolute liability is that the Criminal Code supplies a mistake of fact defence in relation to strict liability but not in relation to absolute liability.<sup>14</sup>

The amendments do not create any strict liability offences. However, they do apply strict liability to some physical elements in a number of offences.

### Offences relating to emergency proclamations

Existing subsection 2B(3) of the Quarantine Act creates an offence of failing to comply with a direction given by the Minister<sup>15</sup> when a subsection 2B(1) proclamation is in force. The penalty is a maximum of 10 years imprisonment. The physical elements of this offence are conduct<sup>16</sup> and circumstance. The operation of Chapter 2 of the Criminal Code means that the fault element of intention applies to the physical element of conduct in the offence (failing to comply with a direction). At present, as a result of the application of the Criminal Code, the prosecution would also have to prove fault in relation to the physical element of circumstance in the offence—that the direction was given under subsection 2B(2). However, **item 2** inserts **new subsection 2B(4)** which provides that strict liability applies to the physical element of circumstance in the offence. In other words, the prosecution will not have to prove that a defendant put his or her mind to the particular

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provision in the Quarantine Act. As stated earlier, the Criminal Code provides a mistake of fact defence in relation to strict liability elements in offences.<sup>17</sup>

**New subsection 3(9)** creates a new offence of failure to comply with Ministerial directions issued when a coordinated response powers proclamation is in force. The effect of **new subsection 3(9)** is that strict liability will apply to the physical element of circumstance—that the direction was given under **new section 3**. The maximum penalty for this offence is 10 years imprisonment.

**Items 1 and 3** also insert notes after existing subsection 2B(2) and **new section 3**. These notes draw the attention of the reader to the fact that, as a result of section 149.1<sup>18</sup> of the Criminal Code, it is an offence to obstruct a person who is authorised to take action under a Ministerial directive given when a subsection 2B(1) proclamation or a coordinated response powers proclamation is in force.

### Commercial smuggling and associated offences

Existing subsections 67(1)-(4) of the Quarantine Act contain offences of illegally importing and removing animals, plants or other goods in contravention of the Quarantine Act. These provisions are repealed and new offences are created by **item 18**.

**New subsection 67(1)** replaces the existing offence of importing a disease, pest or thing in breach of the Quarantine Act. Changes are made to some of the physical elements of the offence and also to the fault elements. For instance, the amendments provide that strict liability will apply to the physical element of circumstance in the offence—that the importation contravenes the Quarantine Act.<sup>19</sup> The maximum penalty remains 10 years imprisonment.<sup>20</sup>

**New subsection 67(3)** creates a new offence of ‘aggravated illegal importation’ (commercial smuggling) where a person obtains a ‘commercial advantage’ by importing a disease, pest, animal, plant or goods and the importation contravenes the Quarantine Act. The maximum penalty for an individual who is convicted of this offence will be 10 years imprisonment or a fine of 2,000 penalty units<sup>21</sup>, or both. In the case of a corporation, the maximum fine is 10,000 penalty units.<sup>22</sup> Examples of ‘commercial advantage’ are provided by **new subsection 67(4)** and are avoiding business costs involved in obtaining an import permit or meeting quarantine requirements or avoiding delays associated with complying with quarantine measures. Once again, strict liability applies to the physical element of circumstance—that the importation contravened the Quarantine Act.

**New subsection 67(4B)** replaces an existing offence of illegally removing animals, plants or things in contravention of the Quarantine Act. Changes are made to some of the physical elements of the offence and also to the fault elements. For instance, strict liability will apply to the physical element of circumstance—that the removal contravenes the Quarantine Act [**new subsection 67(4C)**].<sup>23</sup> The existing maximum penalty of 10 years imprisonment is retained.

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## Endnotes

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- 1 See H Kelsall, P Robinson & G Howse, 'Public health law and quarantine in a federal system', *Journal of Law and Medicine*, 7(1), August 1999, pp. 87–95.
- 2 Department of Health and Aged Care, *Human Quarantine Legislation Review. Public Consultation Discussion Paper*, April 2000, p. 51.
- 3 *Quarantine Act 1920*.
- 4 Senator McKenna, Second Reading Speech, Quarantine Bill (No.2) 1947, *Parliamentary Debates (Hansard)*, 3 December 1947, p. 3017.
- 5 John Anderson, Deputy Prime Minister, 'Coalition toughens quarantine penalties', *Media Release*, 7 November 2001; Warren Truss, Minister for Agriculture, Fisheries and Forestry, 'Quarantine strengthened under Coalition', *News Release*, 7 November 2001.
- 6 **New subsections 3(2) and 3(12).**
- 7 **New subsection 3(3).**
- 8 **New subsection 3(5).**
- 9 **Item 9** enables the Governor-General to make arrangements with State Governors and the Northern Territory Administrator. **Item 10** enables the Prime Minister to make arrangements with the Chief Minister of the Australian Capital Territory. Under the *Australian Capital Territory (Self-Government) Act 1988*, the ACT has no Administrator. The Chief Minister carries out functions that would ordinarily be carried out by a Governor or Administrator. For example, in other jurisdictions the Governor or the Administrator assents to law whereas in the ACT the Chief Minister gazettes proposed laws.
- 10 Section 3.1.
- 11 Sections 5.1-5.6.
- 12 Section 3.2.
- 13 Sections 6.1 and 6.2.
- 14 Sections 6.1 and 6.2.
- 15 Under subsection 2B(2).
- 16 'Conduct' as defined in the Criminal Code can include 'an omission to perform an act'. See sections 4.1 and 4.3.
- 17 See paragraph 6.1(2)(b), Criminal Code.
- 18 Section 149.1 of the Criminal Code creates an offence of obstructing a Commonwealth public official. The maximum penalty is imprisonment for 2 years.
- 19 A present, a person must 'know' that the importation breaches the Quarantine Act but in the absence of contrary evidence, this knowledge is presumed if, for example, the person hides the thing. See existing subsection 67(2).

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- 20 Where a Commonwealth offence is stated to be punishable by a term of imprisonment only, the *Crimes Act 1914* contains a formula which enables a court to convert this penalty to a pecuniary penalty and/or a term of imprisonment (section 4B).
- 21 2,000 penalty units equals \$220,000—section 4AA, Crimes Act.
- 22 10,000 penalty units equals \$1,100,000—section 4AA, Crimes Act.
- 23 At present, a person must ‘know’ that the removal contravenes the Quarantine Act but knowledge is presumed to exist, in the absence of contrary evidence if, for example, the person conceals the animal, plant or goods. See subsection 67(4).

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