



Quarantine Amendment (Commission of Inquiry) Bill 2007

Patrick O'Neill
Law and Bills Digest Section

Contents

Purpose.....	2
Background.....	2
Equine influenza (EI).....	2
Australian outbreak of EI.....	4
Basis of policy commitment	6
ALP policy position.....	7
Financial implications.....	8
Key issue.....	8
Main provisions	9
Concluding comments	10

Quarantine Amendment (Commission of Inquiry) Bill 2007

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Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To enable a Commission of Inquiry into the outbreak of equine influenza in Australia to operate under the aegis of the *Quarantine Act 1908*, but with powers under the *Royal Commissions Act 1902*.

Background

Equine influenza (EI)

The nature, occurrence and effects of equine influenza (EI) are described as follows in the latest version of AUSVETPLAN, which outlines Australia's proposed response to outbreaks of EI:

Equine influenza (EI) is an acute, highly contagious, viral disease, which can cause rapidly spreading outbreaks of respiratory disease in horses. Other equine species are also susceptible. Australia and New Zealand are the only countries with significant equine industries that have remained free from EI.

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EI is endemic in Europe (except Iceland), North America and South America. Sporadic outbreaks of disease occur in these regions, and vaccination is practised. Epidemics occur when a significantly new antigenic virus strain emerges or is introduced. The most recent such occasion was in the United Kingdom in 2003. EI is also endemic in North Africa and Asia.

In the past 20 years, serious epidemics in South Africa (1986, 2003), India (1987), Hong Kong (1992), Dubai (1995) and the Philippines (1997) have been associated

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with importations of subclinically infected horses by air from endemic areas and *inadequate post-arrival quarantine procedures*. [emphasis added]

An outbreak of EI in northeast China in 1989 with high morbidity and mortality revealed a genome dissimilar to known equine viruses, but similar to some of recent avian origin. Transfer of an avian virus directly to horses without reassortment was suspected, implying susceptibility of horses to some avian H3N8 strains (Guo et al 1992).

There has been no occurrence of EI in Australia or New Zealand, and vaccination is not practised. Australia's free status has been confirmed by paired serology as part of a larger case-control study of horses with respiratory disease (Christley et al 2001). New Zealand conducted serological surveys for EI in the 1980s and found EI antibody in only a few horses with a history of vaccination (Horner and Ledgard 1988).

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In fully susceptible horses, clinical signs of EI are easily recognisable. The primary signs are sudden onset of pyrexia (to between 39°C and 41°C); a deep, dry, hacking cough; and a watery nasal discharge, which may later become mucopurulent. Other signs include depression, loss of appetite, laboured breathing, and muscle pain and stiffness. The disease spreads very rapidly to susceptible in-contact horses, with high morbidity (McQueen et al 1966, Gerber 1970).

Vaccination reduces the incidence and severity of clinical signs (Powell et al 1995). Clinical signs in partially immune vaccinated animals, which can still become infected and shed virus, are variable and can be very difficult to discern. There may be little or no coughing or pyrexia. Subclinical infection can occur.

Previously healthy adult horses usually recover from uncomplicated EI within 10 days, although coughing may persist for longer. Relatively high case mortality rates have been recorded in young foals, older horses debilitated by intercurrent disease or malnutrition, and donkeys.¹

AUSVETPLAN also outlines the strategies proposed to contain an outbreak of EI:

Equine influenza (EI) has a short clinical course with minimal mortality, and there is no long-term carrier state (see Section 1.6.2). Therefore, eradication (stamping out)

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1. Animal Health Australia for Primary Industries Ministerial Council, 'Australian Veterinary Emergency Plan, AUSVETPLAN. Disease Strategy Equine influenza. Version 3.0, 2007. Proof for approval', 24 August 2007, http://www.animalhealthaustralia.com.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=955FA5A8-C0D0-9FAC-3E32-33DC206BDC68&siteName=aahc, accessed on 12 September 2007.

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can be achieved by effective isolation of infected animals for the duration of virus excretion, rather than by their compulsory slaughter.

Because of the rapid spread of EI in susceptible equine populations and the high level of horse movements, the most important initial priority is to minimise disease spread (ie containment).

Containment relies on the following principles:

- quarantine of cases and in-contact horses;
- immediate imposition of horse movement controls until the extent of the outbreak is clarified;
- once the extent of the outbreak is clarified, effective movement controls over horses, equipment and fomites in declared areas; and
- effective tracing and surveillance.²

Australian outbreak of EI

The discovery of a horse suffering from equine influenza at the Eastern Creek Quarantine Station in Sydney was announced by the Hon. Peter McGauran, Minister for Agriculture, Fisheries and Forestry, on 23 August 2007.³ Fifty-two horses at Eastern Creek, as well as 27 horses at Spotswood, Victoria, were to remain quarantined until 30 days after they were proven free of EI.

On 25 August, Mr McGauran announced that 11 horses at Centennial Park in Sydney had been found to be infected with EI.⁴ Also on 25 August, all horse movements in NSW were halted, by a control order under the *Exotic Diseases of Animals Act 1991* (NSW). Restricted areas were also established, requiring permits to move horses, horse vehicles and equipment.⁵ A control order was also in effect in Victoria from 25–31 August, under the *Livestock Disease Control Act 1991* (Vic), and was followed by an order prohibiting entry or import of horses into Victoria from New South Wales or Queensland during September.⁶ The movement of horses from Victoria to South Australia currently requires a

2. *ibid.* p. 23.

3. The Hon. Peter McGauran, Minister for Agriculture, Fisheries and Forestry, *Blow for Australia's top horse studs*, media release, Canberra, 23 August 2007 (but dated 22 August).

4. The Hon. Peter McGauran, Minister for Agriculture, Fisheries and Forestry, *Flu outbreak threat to horse racing*, media release, Canberra, 25 August 2007.

5. For more information, including a list of associated orders/legislation, see NSW Department of Primary Industries, 'Equine Influenza', <http://www.dpi.nsw.gov.au/agriculture/livestock/horse/influenza>.

6. See Victorian Department of Primary Industries, 'Equine Influenza', <http://www.dpi.vic.gov.au/dpi/nrenfa.nsf/LinkView/5743686525FBB3BDCA25734E001164EF2FCC42C90CB016EECA25734F000AFF44>.

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permit from the South Australian government. Movement of horses was restricted within the ACT from 1 September 2007.⁷ In South Australia, a movement ban on horses and equine stock has been replaced with a permit system (from 3 September 2007 until further notice).⁸ In Western Australia, a 72-hour standstill was imposed on 25 August, and has since been replaced with a ban on interstate movement of horses, ponies, donkeys, mules and equipment.⁹ A standstill zone was declared in the Northern Territory on 27 August, but has been replaced by restrictions on interstate movements.¹⁰ Finally, there is also a ban on the importing of horses into Tasmania.¹¹

By 11 September, there were 410 infected properties, 359 dangerous contact properties and 274 suspect properties in NSW, with over 4400 infected horses, and a total of 27 Restricted Areas.¹²

As to the possibility of eliminating EI, the head of the CSIRO's Australian Animal Health Laboratory, virologist Martyn Jeggo has been reported as stating:

“I don't know, I'll be quite honest,” he says. “I don't know what the chances are at [this] stage.”¹³

The economic cost of the outbreak in the breeding industry has been estimated at \$1 billion from forgone stud fees and fewer foals being born next year.¹⁴

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7. Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No 2), under the Animal Diseases Act 2005 (ACT). See ACT Department of Territory and Municipal Services, ‘Horse Quarantine Declared in the ACT—Equine Influenza’, http://www.tams.act.gov.au/live/equine_influenza.
 8. Primary Industries and Resources SA, ‘Equine Influenza Response’, <http://www.pir.sa.gov.au/horseflu>, accessed on 12 September 2007.
 9. Western Australian Department of Agriculture and Food, ‘Equine Influenza’, http://www.agric.wa.gov.au/content/pw/ah/equine_influenza.htm, accessed on 12 September 2007.
 10. Northern Territory Department of Primary Industry, Fisheries and Mines, ‘Equine Influenza’, http://www.nt.gov.au/dpifm/Primary_Industry/index.cfm?newscat1=Animal%20Biosecurity&newscat2=&header=Equine%20Influenza, accessed on 12 September 2007.
 11. Tasmanian Department of Primary Industries and Water, ‘Interstate Horse Flu Outbreak’, <http://www.dpiw.tas.gov.au/inter.nsf/WebPages/LBUN-76FVNP?open>, accessed on 13 September 2007.
 12. NSW Department of Primary Industries, ‘Equine Influenza: current situation’, <http://www.dpi.nsw.gov.au/agriculture/livestock/horse/influenza/information/current-situation-in-nsw>, accessed on 12 September 2007.
 13. Leigh Dayton, ‘[Race to corral virus](#)’, *The Australian*, 29 August 2007, p. 13.

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On 9 September Mr McGauran announced a \$110 million funding package for those affected by EI. Employees will receive the equivalent of the Newstart Allowance, businesses will receive \$5000, and primary carers will receive up to \$60 a day for each horse that is unable to undertake normal activities, and could otherwise have generated an income, if not for the quarantine restrictions. Up to 10,000 horses in the ACT, New South Wales and Queensland are estimated to be eligible for this payment, which is expected to cost \$44 million.¹⁵

The main drawback of the compensation scheme appears to be that breeders are unable to claim for lost income caused by the inability to service horses. There has been increasing talk of class actions against the Commonwealth for the damages caused by the presumed breakdown in quarantine. Twenty-five trainers at Randwick are reported to have launched a class action, and thousands of trainers, breeders, jockeys, and riding school employees are said to be joining a class action to be launched by Sydney law firm Clinch Neville Long Letherbarrow.¹⁶

Basis of policy commitment

The reasons for the outbreak of EI are as yet unknown, but a breakdown or deficiency in quarantine procedures is the most likely cause:

Dr James Gilkerson, president of Equine Veterinarians Australia, and University of Melbourne Vet School virologist, said responsibility lay fairly and squarely with quarantine authorities.

“There’s a breakdown in the quarantine system somewhere. But I don’t think there’s any concrete evidence so far to identify what that gap is,” he said.

“Whether it was an animal being released inappropriately in the quarantine procedures ... that’s the most likely.”¹⁷

The Minister himself has agreed with this analysis:

“It is true to assume it is perfectly logical to think there has been a breach of quarantine. What we don’t know is where or how or by whom. It was a breach of

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14. Fiona Carruthers, [‘Billion-dollar crisis as horse flu hits studs’](#), *Australian Financial Review*, 6 September 2007, p. 7.
 15. The Hon. Peter McGauran, Minister for Agriculture, Fisheries and Forestry, [\\$110 million equine influenza assistance](#), media release, Canberra, 9 September 2007.
 16. James Madden and Selina Mitchell, [‘Quarantine centre ‘lax’ before flu’](#), *The Australian*, 13 September 2007, p. 5. Peter Ker and Dan Silkstone, [‘Horse breeders to sue Canberra over huge flu losses’](#), *The Age*, 12 September 2007, p. 3.
 17. Craig Sherborne, [‘Trojan horse’](#), *Herald Sun*, 1 September 2007, pp. 33–4.

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quarantine in all likelihood. It may have been human error or deficiencies in the standards of quarantine. Our inquiry is looking at both. How did the virus escape through the quarantine barriers and were the quarantine barriers adequate in the first place?”¹⁸

Calls for an inquiry into the outbreak of EI were made as early as 27 August, when the Leader of the Opposition called for ‘an urgent and independent inquiry as to whether there has been any breakdown in Australia’s quarantine procedures’.¹⁹ Queensland Premier Peter Beattie also called for an inquiry.²⁰

On 2 September, the Australian Racing Board released letters it had written to then Agriculture Minister Warren Truss in 2004 and 2005, opposing the ‘devolution of quarantine inspection of recently imported horses from AQIS Veterinary Officers to private veterinarians employed by importers’, and warning that ‘a quarantine breakdown is the only way Australia will be exposed to [EI]’.²¹

Also on 2 September, the Prime Minister and the Minister for Agriculture announced that recently-retired High Court judge, the Hon. Ian Callinan QC, would chair an independent inquiry. The inquiry would have ‘full powers to subpoena witnesses and, if thought appropriate, conduct public inquiries and any legislation required to invest the inquiry with that power [would] be introduced into Federal Parliament when it reconvenes the week after next’.²² Mr Callinan was chairman of the Queensland TAB 1985–90.

ALP policy position

The terms of reference of the inquiry have not yet been announced, although it was reported that they were expected to be finalised on 3 September.²³ Labor’s primary industries spokesman, Senator Kerry O’Brien, has raised concerns that the inquiry will

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18. [‘Quarantine lapse the likely cause: McGauran’](#), *Canberra Times*, 2 September 2007, p. 4.
 19. K. Rudd, MP, [Transcript of doorstep interview: Australian Institute of International Affairs NSW Conference, Sydney](#), media release, 27 August 2007, p. 5.
 20. Erik Jensen, [‘Call for public flu inquiry heeded’](#), *Sydney Morning Herald*, 3 September 2007, p. 6.
 21. Letter from Andrew Ramsden, Chairman, Australian Racing Board, to the Hon. W. Truss, 24 September 2004, quoted in Michael McKenna and Cath Hart, [‘Canberra was told of horse flu risk’](#), *The Australian*, 3 September 2007, p. 1.
 22. The Hon. J. Howard and the Hon. P. McGauran, [Transcript of joint press conference: Sydney: 2 September 2007: equine influenza](#), media release, 2 September 2007.
 23. E. Jensen, ‘Call for public flu inquiry heeded’, op. cit.

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mirror the Australian Wheat Board inquiry, in which the responsibility of Government ministers fell outside the terms of reference.²⁴

Reports on 4 September indicated that the inquiry would have a narrow focus on the ‘immediate causes and future safeguards rather than industry warnings in 2004 and 2005 about quarantine procedures.’ The inquiry is also unlikely to consider compensation issues, leaving this issue to the courts.²⁵

The Shadow Minister for Regional Development, Mr Crean, has indicated in Parliament that he will be moving amendments to expand the terms of reference to cover the spread of EI in addition to its outbreak, to compare Australian quarantine practice with international standards, to evaluate whether Australian standards have been adhered to, and to require the minister to table the report in Parliament.²⁶

Financial implications

The Explanatory Memorandum states that the Bill will have no financial impact, but the conduct of the inquiry will of course cost a significant amount. The 2004 Royal Commission into the Centenary House Lease, for example, cost some \$4 million,²⁷ whereas the larger HIH Royal Commission (2001–03) cost some \$39 million.²⁸

Key issue

The traditional means of establishing an inquiry with wide powers is to use the *Royal Commissions Act 1902*. Queensland academic Scott Prasser has described the qualities of royal commissions:

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24. Erik Jensen, ‘[Ministers may front inquiry on equine flu](#)’, *Sydney Morning Herald*, 5 September 2007, p. 5.
 25. Steven Scott and Mark Skulley, ‘[Horse flu inquiry to have narrow focus](#)’, *Australian Financial Review*, 4 September 2007, p. 9.
 26. The Hon. S. Crean MP, ‘[Second reading speech: Quarantine Amendment \(Commission of Inquiry\) Bill 2007](#)’, House of representatives, *Debates*, 13 September 2007, pp. 30–1.
 27. Sen. the Hon. Chris Ellison, Minister for Justice and Customs, ‘Response to Question on Notice: Royal Commission of Inquiry into the Centenary House Lease’, Senate, *Debates*, 16 November 2004, p. 101.
 28. The Hon. P. Ruddock, Attorney-General, ‘Response to Questions on Notice: Building and Construction Industry and HIH Royal Commission’, House of Representatives, *Debates*, 24 May 2004, p. 28913.

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The importance of this statutory foundation is that it confers on royal commissions and similar bodies, special and coercive powers of investigation to collect and procure information, protect witnesses, compel witnesses to attend hearings and give evidence, even if self-incriminating. However, there are prohibitions on the use of evidence gathered by royal commissions in any subsequent legal proceedings. With the exceptions listed below, most other public inquiries are not established under legislation and do not have such powers of investigation as royal commissions. Instead, such inquiries rely on their executive government appointment and prestige to progress their investigations.²⁹

Since royal commissions have such comprehensive powers, the question that arises is: why should the inquiry into the outbreak of EI not simply be set up as a royal commission? The Minister's second reading speech stated that the Bill provides the commissioner 'with all the necessary powers of a royal commission, within the quarantine-specific context of the Quarantine Act.'³⁰ The main difference appears to be that the staff appointed to assist the commissioner will be able to exercise the powers of quarantine officers. In discussing this provision, the Explanatory Memorandum gives the example of search powers, but there is no explanation as to why the normal search powers of royal commissions would be insufficient. The Quarantine Act contains some search powers that go further than those in the Royal Commissions Act, such as the power to search a vessel or vehicle without warrant in emergency situations (s. 66AI). This appears to be the main justification for proposing a separate Act to enable this commission of inquiry, rather than using a royal commission.

Main provisions

Item 5 of Schedule 1 inserts a new Part VIB into the Quarantine Act.

Proposed section 66AY permits the Minister to appoint a commission of inquiry into:

- the outbreak of EI in Australia in 2007
- related quarantine requirements and practices
- and any incidental matters

The focus on related requirements and practices may exclude the commission of inquiry from considering whether recent *changes* to quarantine practice, as highlighted by the Australian Racing Board, were properly considered or good policy. This will depend on

29. Scott Prasser, 'Royal commissions in Australia: when should governments appoint them?', *Australian Journal of Public Administration*, vol. 65, no. 3, 2006, p. 32.

30. The Hon. P. McGauran, '[Second reading speech: Quarantine Amendment \(Commission of Inquiry\) Bill 2007](#)', House of Representatives, *Debates*, 12 September 2007, p. 1.

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how the terms of reference, and the commission of inquiry itself, interpret the word 'related'.

Proposed sections 66AZ and 66AZA replicate functions that apply to royal commissions, namely the ability to hold hearings within or outside Australia, and dispensation from the rules of evidence. **Proposed paragraph 66AZ(3)** allows the commissioner to determine the procedure at the hearings. This is also consistent with royal commissions which may, at their discretion, adopt an inquisitorial approach.

Quarantine officers who are seconded to the commission of inquiry are to be subject exclusively to the directions of the commissioner (**proposed sub-sections 66AZB(2) and 66AZC(3)**).

Some or all of the powers of quarantine officers may be granted to persons assisting the commission of inquiry (**proposed section 66AZC**). This appears to be the key difference from the powers that would be available to a public servant seconded to a royal commission. See the 'Key issue' section above.

Proposed section 66AZE gives the commission of inquiry the powers and status of a royal commission, except powers of search, which are provided under **proposed section 66AZC**. The records of the commission of inquiry are also to be treated in the same manner as those of royal commissions.

Schedule 2 makes consequential amendments to

- the *Archives Act 1983*, equating the records of the commission of inquiry to those of royal commissions
- the *Freedom of Information Act 1982*, excluding the commission of inquiry from the Act in the same way as royal commissions and other bodies, and
- the *Privacy Act 1988*, excluding the commission of inquiry from the Act in the same way as royal commissions and other bodies.

Concluding comments

A public inquiry into the outbreak of EI is obviously called for because of the serious effects of the current outbreak and the need to ensure that quarantine measures are adequate and are being adequately enforced. Parliament may wish to consider whether the definition in **proposed section 66AY** is wide enough to allow inquiry into all the matters that have been the subject of public debate.

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