

Senate Rural and Regional Affairs and Transport Legislation Committee Inquiry

Biosecurity Amendment (Advanced Compliance Measures) Bill 2023

Joint Submission of the Department of Agriculture,
Fisheries and Forestry, and the Department of Health
and Aged Care

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Biosecurity Amendment (Advanced Compliance Measures) Bill 2023

Background

Australia's biosecurity system is essential to protecting over \$90 billion worth of agricultural production and more than \$5.7 trillion worth of unique, environmental assets. Australia's strong biosecurity laws and regulatory system continue to be tested by individuals and bodies corporate whose actions jeopardise Australia's biosecurity status.

For example, in early 2023 Operation Avoca resulted in one of Australia's largest single biosecurity detections of different biosecurity risk materials, and ongoing detections of high-risk materials in the luggage of air and sea travellers.

This is being further exacerbated by the continued growth in the volume and complexity of Australia's global trade, and expanding pest and disease spread. To meet these challenges, the biosecurity regulatory framework must be evidence-based, intelligence-led and able to respond to non-compliance with effective and proportionate responses.

The Biosecurity Amendment (Advanced Compliance Measures) Bill 2023 (the Bill) will amend the *Biosecurity Act 2015* (the Biosecurity Act) to enhance the government's regulatory framework and strengthen its ability to assess and manage biosecurity risk and take compliance action against those who jeopardise Australia's biosecurity status by breaking the law. By increasing civil penalties, the Bill aims to deter non-compliance with the Biosecurity Act and ensure that the penalties are proportionate to the potential harm to Australia's biosecurity status, human health, market access and economy.

The amendments are in line with the overarching policy intention and objectives of the Biosecurity Act and are consistent with the government's approach to deliver a strengthened biosecurity system.

A comprehensive Explanatory Memorandum was provided with this Bill to assist members of Parliament, officials and the public to understand the objectives and detailed operation of the measures contained within the Bill. This serves as a companion document to the Bill and plays an important role as an aid to interpreting the Bill. The Explanatory Memorandum also includes a comprehensive Statement of Compatibility with Human Rights which provides a detailed assessment of how each provision in the Bill may engage human rights and, if so, why each such provision is compatible with human rights.

The proposed amendments in the Bill aim to ensure that the biosecurity regulatory regime is well adapted to the evolving biosecurity environment. While some proposed amendments are intended to address practical gaps and minimise administrative burden within the existing legislative framework, others would facilitate necessary regulatory reform to enable a more intelligence and evidence-based approach to biosecurity interventions and enhance the Commonwealth's ability to take compliance action against those who jeopardise Australia's biosecurity status by breaking the law.

For example, whilst the Biosecurity Act already enables biosecurity officers to require the provision of information from persons arriving in Australia for biosecurity risk assessment purposes, the proposed amendments in Schedule 1 are intended to provide the

Commonwealth with an enhanced ability to maintain accurate datasets for incoming travellers to inform future profiling, and future biosecurity assessment and management processes which will allow for targeted interventions, as well as to streamline the assessment and management of biosecurity risk which may be posed by classes of incoming travellers. This will improve the efficiency and effectiveness of biosecurity interventions at the Australian border, particularly where an arriving flight or voyage has originated in a country or region where there is a high biosecurity risk posed by a disease or pest.

The amendments in Schedule 2 are intended to address administrative inefficiencies associated with the existing show cause notice requirements for approved arrangements, which may require more than one notice to be issued to a biosecurity industry participant in relation to the same conduct in certain circumstances. These amendments will introduce more flexibility for the Department of Agriculture, Fisheries and Forestry's (DAFF) decision-making processes in response to non-compliance and provide greater clarity and certainty to biosecurity industry participants covered by an approved arrangement.

The amendments in Schedules 3 and 4 are intended to ensure that the Commonwealth's penalty regime is adequate and that penalties proportionately reflect the seriousness of non-compliant conduct. These amendments are consistent with previous amendments to the Biosecurity Act.

Key amendments by the Bill

What changes does the Bill make to enhance the assessment and management of biosecurity risk at the Australian border?

Subsection 196(2) of the Biosecurity Act currently provides that the Director of Biosecurity (the Director) or their delegate (in practice this will be a biosecurity officer) may require a person to provide information, including by answering questions, for the purpose of assessing the level of biosecurity risk associated with the person and any goods that the person has with them. This enables the Director to require a person arriving in Australian territory on an aircraft or vessel, including a member of the crew or person in charge of the aircraft or vessel, to provide information to a biosecurity officer at an international airport or port, for the abovementioned purpose. In practice, the information to be provided is that set out in an incoming passenger card (IPC) or crew declaration. Under the current legislative framework, a biosecurity officer may only require the provision of such information from an individual, rather than from classes of individuals. As the numbers of incoming travellers often exceeds one million per month, this is inefficient, and the Bill seeks to remedy this as follows.

The proposed amendments will amend the Biosecurity Act to enable a biosecurity officer to require not only an individual person, but also each person within a class of persons who intends to enter, or enters Australian territory on an incoming aircraft or vessel, to provide information for the purpose of assessing the level of biosecurity risk associated with the person and any goods the person has brought with them into Australian territory. The purpose of this amendment is to provide an effective addition to the current biosecurity management options for incoming travellers in order to enable more streamlined assessment and management of biosecurity risk. These amendments do not enable the collection of additional personal information beyond what is already permitted under the Biosecurity Act; rather they simply allow the collection of that information from classes of persons as well as individuals.

As noted above, the Biosecurity Act already allows for the collection of information from incoming travellers. Currently, persons arriving in Australia may be requested to voluntarily provide their passport or travel document for the purpose of the assessment of biosecurity risk. However, in order to better and more securely manage biosecurity risks associated with incoming travellers, it is important for biosecurity officers to have the ability to require the provision of a travel document in order to deploy resources in a more effective, efficient and focussed manner. A strategy of targeted intervention is intended to manage biosecurity risks arising from incoming travellers more effectively and focus resources on those persons who would seek to contravene Australia's critical biosecurity laws.

In order therefore to better protect Australia from existing and emerging biosecurity risks and to focus compliance actions on persons more likely to break biosecurity laws, additional amendments are proposed. These new measures will enable a biosecurity officer to require an individual person or each person within a class of persons who intends to enter, or enters, Australian territory on an incoming aircraft or vessel to provide a passport or travel document for the purpose of assessing the level of biosecurity risk associated with the person and any goods the person has brought with them into Australian territory and/or for the purposes of the future profiling or future assessment of biosecurity risks. Where a person is required to produce a passport or travel document, a biosecurity officer may scan it, collect information from it and retain that information for these purposes.

The proposed amendments also introduce a new civil penalty provision that will apply where a person is required to produce a passport or travel document to a biosecurity officer but fails to do so, with a maximum amount payable of \$37,560.

The proposed amendments will ensure that DAFF can streamline the assessment and management of biosecurity risk and also have access to, and be able to retain, a complete dataset to inform future profiling and future assessment and management of biosecurity risk and targeted interventions for non-compliance. Without these changes, the dataset would only be comprised of information that is provided by consent at a particular point in time, which may limit DAFF's access and ability to use data associated with non-compliance.

In January 2023, the total number of incoming travellers in Australian territory was 1,608,010. In February 2023, the total number was 1,375,520, in March 2023, it was 1,344,580 and in April 2023 it was 1,370,470. As the number of arriving international travellers continues to increase following the COVID-19 pandemic, access to complete and accurate datasets will be critical to improving the efficiency and effectiveness of biosecurity risk management options for incoming travellers, particularly where flights or vessels have originated in a country or region where there is a high biosecurity risk posed by a disease or pest.

In developing these amendments, DAFF had regard to the Centre of Excellence for Biosecurity Risk Analysis (CEBRA)'s *Technical Report for CEBRA project 190810 – Advanced Profiling*, produced in April 2022. The report described limitations in the survey and interception data used to identify risk and construct traveller profiles and noted missing data as a key challenge in profiling arriving international travellers.

How does the Bill address administrative inefficiencies that are associated with processes for approved arrangements?

Chapter 7 of the Biosecurity Act enables the Director of Biosecurity or the Director of Human Biosecurity (the relevant Director) to approve proposed arrangements that provide for the holder of the arrangement, known as the biosecurity industry participant, to carry out certain biosecurity activities to manage biosecurity risks associated with specified goods, premises or other things.

Currently, in certain circumstances, the relevant Director may vary, suspend or revoke an approved arrangement following processes set out in Chapter 7 of the Biosecurity Act. For example, the relevant Director may vary, suspend or revoke an approved arrangement in circumstances where there is a change in the biosecurity risk associated with activities carried out under an approved arrangement.

The primary purpose of the amendments to Chapter 7 of the Biosecurity Act is to provide for a single streamlined notice provision that applies to a proposed variation, suspension or revocation. This would allow flexibility for the relevant Director to issue a single notice in relation to one or more of these proposed outcomes seeking further information in relation to the alleged conduct. This is different to the current structure which provides for separate notices to be issued in relation to each proposed outcome, requiring the relevant Director to select a proposed outcome before seeking information from the biosecurity industry participant in relation to the alleged conduct. This current structure can result in a more prolonged process because if, for example, the relevant Director issues a notice proposing to revoke an approved arrangement, the relevant Director cannot then decide after considering written submissions to instead suspend the approved arrangement without issuing a further notice in relation to the proposed suspension and waiting a further 14 days for written submissions in relation to the same conduct.

The proposed streamlined notice requirements would consolidate the existing notice requirements for a proposed suspension or revocation into a single provision, while adding these requirements for a proposed variation, and are otherwise substantively the same as those that currently exist in the Biosecurity Act for a proposed suspension or revocation of an approved arrangement. Allowing the flexibility for the relevant Director to issue a single notice in relation to one or more proposed outcomes would enable an incident or concern to be dealt with proportionately and in a timely manner, creating administrative efficiencies for both DAFF and the biosecurity industry participant.

In providing for a single notice provision, the proposed amendments would also introduce statutory procedural fairness requirements for a proposed variation in line with the existing procedural fairness requirements for suspensions and revocations. There is currently no requirement in the Biosecurity Act for a notice to be issued in relation to a proposed variation inviting the biosecurity industry participant to show cause why the approved arrangement should not be varied. The proposed amendments would provide that the relevant Director must not vary an approved arrangement or the conditions of the arrangement without first providing a notice inviting a biosecurity industry participant to give a written submission within 14 days in response to the variation proposal. This would benefit biosecurity industry participants by providing certainty as to the procedural fairness requirements that apply to a proposed variation.

Separately, the proposed amendments would introduce the issuing of written reprimands as an alternative option to other sanctions, such as revocation or suspension of an approved arrangement, which may not be considered appropriate in the given circumstances. In practice, a written reprimand could be issued to a biosecurity industry participant who contravenes the requirements of an approved arrangement, but where the conduct does not warrant a decision by the relevant Director to vary, suspend or revoke the approved arrangement. The reprimand would not have any immediate consequences for the biosecurity industry participant but would put the participant on notice in relation to their future conduct. For example, a reprimand could be issued where a sealed sea cargo container arrives in Australian territory subject to the condition that a biosecurity officer inspects before the seals are opened, however one seal is opened in human error prior to the biosecurity officer arriving.

The proposed amendments would provide greater flexibility for the relevant Director to make a decision in relation to an approved arrangement that is proportionate and timely, as well as provide greater clarity and certainty for a biosecurity industry participant.

In developing these amendments, DAFF has actioned recommendations made by the Inspector-General of Biosecurity in their report, '*Effectiveness of approved arrangements in managing biosecurity risks in Australia*', published in 2019. The report recommended that DAFF develop more effective policies, processes, and instructional material to manage critical non-compliance with an approved arrangement, including clarifying processes for suspension or revocation, as well as contingency response plans for such eventualities, and timely sanctions for less serious non-compliance.

What changes does the Bill make to the penalty regime under the Biosecurity Act?

Civil penalties

The Biosecurity Act provides for a number of civil penalty provisions that enable the Commonwealth to take enforcement action against an individual or body corporate who contravenes Australia's biosecurity laws. The civil penalty framework under the Biosecurity Act forms an important part of the Commonwealth's suite of regulatory tools to manage biosecurity and human biosecurity risk.

The proposed amendments will increase a range of existing civil penalties that are available for contraventions of key provisions across the Biosecurity Act which, if not complied with, may significantly damage plant, animal and human health, the environment, market access and the economy. The proposed penalty increases are reasonable, necessary and proportionate to the level of risk posed by non-compliance. These amendments will apply to provisions in the Biosecurity Act that relate to managing biosecurity and human biosecurity risks and knowingly providing false or misleading information.

For example, subsection 46(1) of the Biosecurity Act currently provides for a maximum civil penalty of 30 penalty units (\$9,390), that applies where an individual does not comply with an entry requirement determined under section 44 of the Biosecurity Act. The amendments would increase the maximum civil penalty that can be imposed under subsection 46(1) to 150 penalty units (\$46,950). Entry requirements that are determined under the Biosecurity Act are a key safeguard in preventing a listed human disease from entering, establishing or spreading in Australian territory or a part of Australian territory making these requirements a key part of the human biosecurity management framework. In the context of the COVID-19 pandemic, a person who did not comply with an entry requirement determined under section 44 of the Biosecurity Act may have risked the introduction of a new COVID-19 variant into Australia, which may have had significant impact on Australia's public health system and vulnerable populations. The proposed increase reflects the potentially serious consequences to human health posed through contravening the requirements.

Separately, subsection 438(1) of the Biosecurity Act currently provides for a civil penalty provision, with a maximum civil penalty of 120 penalty units (\$37,560), that applies where a person knowingly gives false or misleading information to a biosecurity industry participant covered by an approved arrangement. The amendments would increase the maximum civil penalty that can be imposed under subsection 438(1) to 600 penalty units (\$187,800). Biosecurity industry participants covered by an approved arrangement are authorised and required to carry out certain biosecurity activities to manage biosecurity risks associated with specific goods, premises, or other things. Accurate and complete information is essential to assessing or managing biosecurity risks, and the provision of false or misleading information to a biosecurity industry participant could jeopardise Australia's agricultural industries by allowing a pest or disease to potentially enter, spread and establish itself within Australia. The proposed increase reflects the potentially significant biosecurity impact that may result from the conduct associated with non-compliance.

The proposed amendments will reinforce the Commonwealth's existing penalty regime to provide a more effective deterrent against conduct that may result in significant and lasting impacts to Australia's biosecurity and human biosecurity status, market access and economy. It is important that civil penalties in the Biosecurity Act are set at a level that means the penalty is not perceived as a cost of doing business or otherwise worth the risk.

The proposed penalty increases are consistent with DAFF's continued commitment to ensuring adequate penalties for non-compliance, as demonstrated by previous amendments to the Biosecurity Act, such as the *Biosecurity Amendment (Strengthening Penalties) Act 2021* and the *Biosecurity Amendment (Strengthening Biosecurity) Act 2022*.

The current civil penalty amounts for contraventions of certain key requirements relating to the assessment and management of human biosecurity risks no longer serve as a proportionate deterrent against non-compliance in the face of growing human biosecurity threats. The increased penalties reflect the seriousness of non-compliance with Australia's human biosecurity laws and the impact that contraventions may have on Australia's human health, and the consequential effects on Australia's economy and public health systems. The ongoing evolution of communicable diseases in the world poses a high risk to Australia's human biosecurity, and the increased penalties seek to address this risk.

The proposed amendments to civil penalty provisions have been consulted on broadly across Commonwealth agencies, including the Department of Home Affairs, the Attorney-General's Department, and the Department of the Prime Minister and Cabinet. DAFF worked with the Department of Health and Aged Care on the amendments relating to civil penalty provisions in Chapter 2 of the Biosecurity Act. In developing the amendments to civil penalty provisions across the Biosecurity Act, DAFF and the Department of Health and Aged Care also had regard to the Attorney-General Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Strict liability offences and infringement notices

The proposed amendments will insert nine new strict liability offences to existing provisions within the Biosecurity Act. These new strict liability offences would also be subject to the infringement notice framework under the Biosecurity Act, as it triggers the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). This will enable the issuing of infringement notices to individuals or bodies corporate who allegedly contravene a relevant strict liability offence provision. The infringement notice framework under the Biosecurity Act forms an important part of the Commonwealth's suite of regulatory tools to manage biosecurity and human biosecurity risk.

Subjecting these new strict liability offences to the infringement notice scheme would enable immediate regulatory responses for high-volume, low-penalty alleged contraventions in a fast-paced operational environment where a high volume of contraventions of biosecurity laws is occurring. The ability to take regulatory action (in the form of issuing an infringement notice) in a timely manner would be critical in ensuring an effective deterrent from alleged non-compliance.

Currently, there are no mechanisms under the Biosecurity Act to deal with low-level alleged non-compliance with certain provisions, other than through prosecution of a criminal offence or seeking a civil penalty order. These are resource intensive options and are inappropriate for alleged non-compliance that are at the lower end of object seriousness, but that nevertheless could pose high levels of biosecurity risk. Such alleged contraventions could still compromise Australia's economy, agricultural sector, animal, plant and human health and the environment, by bringing pests and diseases to Australia, and therefore must be addressed effectively.

For example, the proposed amendments will enable biosecurity officers to issue an infringement notice to the holder of an import permit who allegedly contravenes a condition of that permit (section 187 of the Biosecurity Act), as opposed to other regulatory options that

may not be effective or appropriate in the circumstances. This will also extend to include alleged contraventions of permits that have been suspended or revoked under section 181 of the Biosecurity Act. This may occur where the holder of an import permit for a good that is restricted to personal use instead uses the good for commercial or retail purposes that are specifically prohibited by the permit conditions.

The proposed amendments are consistent with DAFF's continued commitment to ensuring appropriate regulatory action for non-compliance. In developing these amendments, DAFF had regard to the Attorney-General Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.