

Summary of proposals to amend the Biosecurity Act 1993

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1. Introduction

In November 2009, MAF held workshops in Wellington and Auckland to discuss at a high level the areas of the Biosecurity Act 1993 that appear to warrant amendment. An information paper provided prior to these workshops set out the drivers for change, what should be different in the future and how the Biosecurity Act might be amended.

Based on feedback received at the workshops, written submissions and further analysis, MAF has now developed more detailed proposals for change, as set out in this document.

MAF will be holding a second round of workshops on 22 February 2010 in Wellington and 26 February in Auckland to hear your feedback on these more detailed proposals. Please advise us by email at Biosecurity.Act@maf.govt.nz if you or your representative would like to attend.

If you are unable to attend the February workshops and/or wish to make written comment¹ on the content of this document, we would welcome comments by Friday 12 March so that they can be considered as MAF finalises advice for Government decisions.

We expect that the Government will make decisions on the final policy content of the Biosecurity Amendment Bill in mid-2010, and that the Bill will be introduced into the House later in the year.

1.1. CONTACT DETAILS

Please address comments to: Biosecurity Act Review
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¹ Any feedback given may be subject to requests under the Official Information Act 1982 (OIA). If you consider that any or all of the information you provide should be treated as confidential or commercially sensitive please state this clearly. A decision to withhold information under the OIA may be reviewed by the Ombudsman.

2. Biosecurity and New Zealand

Biosecurity is critical to New Zealand's prosperity and way of life. More than any other developed country, New Zealand depends on the success of its primary industries, and the biosecurity system that underpins them. The biosecurity system also protects the native plants and animals, and other resources, that are taonga of significance to Maori, and precious to all New Zealanders.

The biosecurity system is designed to:

- prevent harmful pests and diseases from coming into New Zealand and establishing themselves, with the assurance that international trade and tourism are maintained; and
- reduce the harm from unwanted pests and diseases already established in New Zealand, thus maintaining New Zealand's economic, social, cultural, health and environmental opportunities.

The Biosecurity Act was enacted in 1993 and largely reflected the biosecurity practices in place at the time. MAF was able to set out the requirements that goods needed to meet in order to get biosecurity clearance to enter New Zealand, and MAF officers at ports and airports inspected goods upon arrival to ensure they met these requirements and did not carry unwanted pests. The Act also provided a suite of powers for MAF to manage newly discovered pests, and mechanisms by which regional councils and other groups could manage pests that are widely established.

Key underlying philosophies behind the Act were arguably presumptions that:

- (1) it was the Government's role to check that imports were safe at the border and to manage responses to new pest outbreaks, and
- (2) those affected by established pests would be responsible for managing them.

Seventeen years later the world is quite different:

- With the growth in trade and travel and the development of new technologies and processes such as "just in time" delivery, it is no longer efficient or effective to rely so heavily on physical inspection at the border to manage the risks from imported goods.
- Indeed, many biosecurity risks are better managed off shore and while goods are in transit – and by those responsible for bringing goods in. Unfortunately the current system results in those that do meet their biosecurity obligations facing the same level of intervention as those who don't.
- Behind the border, industry is often better placed than the Government to judge the merits of preparing for or taking action against newly arrived pests, but has limited capacity to influence the Government's priorities.
- While a lot of pest management activity takes place, setting priorities and co-ordinating efforts amongst the multiple players has proven to be challenging.
- New threats have emerged or become apparent – e.g. in the marine area – that were not envisaged.

Stakeholder feedback, as recent as late last year, has emphasised these concerns, although opinions understandably vary on what solutions might be appropriate.

In light of this and looking ahead to the future, a more effective biosecurity system seems likely to be one that:

- incentivises those responsible for bringing risk goods or craft into New Zealand to ensure that any biosecurity risks are managed throughout the steps in the supply chain;
- enables MAF to more effectively target *and* penalise those who flout these obligations;
- results in the planning for and management of responses to newly arrived pests being carried out by those best placed to do so; and
- achieves more integrated and effective management of established pests.

To achieve this, biosecurity legislation would need to:

- impose clearer obligations on those importing goods – and set out appropriate consequences/penalties for when these obligations are not met;
- provide better powers to collect and use data for scanning and profiling so that compliant activity can be facilitated and non-compliant activity targeted;
- provide a wider suite of tools for use by MAF and possibly others at various points in the supply chain to encourage voluntary compliance and sanction non-compliance;
- enable government and industry to jointly plan for and manage responses to the discovery of new pests and diseases; and
- provide clearer roles, responsibilities and processes for those who manage established pests.

The changes set out in this document are designed to steer the system in this direction.

3. Border Management

3.1. OBLIGATIONS ON IMPORTERS

Summary of drivers for change

Under the Biosecurity Act 1993 (the Act), the Ministry of Agriculture and Forestry (MAF) sets the requirements for goods to be imported into New Zealand. The Act effectively places the responsibility on MAF to set requirements to ensure that imported goods do not present a biosecurity risk. In the case of “risk goods” as defined in the Act, these requirements are set out in an Import Health Standard.

This approach promotes two behaviours that are not conducive to effective biosecurity management:

1. Some importers routinely present consignments of certain risk goods for clearance that do not comply with the Import Health Standard requirements. They do this knowing that MAF will step in and require the importer to undertake the necessary treatment to ensure biosecurity risks are managed.
2. Some importers focus solely on meeting the MAF published requirements for biosecurity clearance, rather than considering what they could be doing to better manage the risks associated with their import operation. Importers may be able to positively influence biosecurity risks through their commercial import arrangements and post-clearance behaviour, which can add significantly to the overall success of New Zealand’s biosecurity management.

The issue is that the current structure of the legislation places full reliance on the ‘point’ of MAF inspection at the border. A more comprehensive approach is to look at the ‘import system’ and the key parties involved, and how to use these to enhance biosecurity risk management. Amendments to the Act seem desirable to make importers more responsible for the risks that their goods pose and to make their obligations and liabilities clearer.

Options for Legislative Change

MAF has considered who could reasonably be expected to take greater responsibility in relation to the importation of goods which pose biosecurity risks. The various parties in the import supply chain have different roles, incentives and abilities to undertake biosecurity risk management. Three possibilities were identified for who could be required to meet legal duties: overseas exporters, logistics operators and importers.

Although overseas exporters are often well-placed to manage the biosecurity risks associated with imported goods, MAF has very little ability to influence what these parties do. It is not therefore feasible to hold exporters responsible. Logistics operators (such as shippers, stevedores, and land transporters) can also potentially influence the biosecurity risks associated with goods imported to New Zealand. However, these operators are essentially service providers to those with a primary interest in the import transaction, and it would not be reasonable to hold them responsible for managing biosecurity risks.

There are examples where statutory duties are applied to traders (importers or exporters) such as in the Animal Products Act 1999, and this also seems an appropriate way forward in the import risk situation. In practice importers often rely on others to manage their interests in the importing process. That said, the importer may have the ability to influence biosecurity outcomes by, for example, their decisions as to who they deal with and their business contract arrangements. Contractual arrangements could, for example, reflect any biosecurity responsibilities that the importer is required to meet.

Proposed Changes to the Biosecurity Act

The best way of improving clarity around importers' responsibilities in the system seems to be to impose specific duties on people who are responsible for the importation of goods.

A first step in doing this would be to define who is an 'importer'. The proposal at present is that the definition would encompass all importers, including importer agents, and this may not be limited to commercial operators. There could be merit in aligning the Biosecurity Act definition to the Customs and Excise Act 1996 definition, and this will be considered.

In order to make the duties both fair and effective, it is considered that the Act should require importers to 'take all reasonable steps' to ensure that they fulfil their duties. Two levels of duties are proposed:

1. Where "risk goods" are being imported subject to an Import Health Standard, those responsible for the importation of the goods will have duties to ensure that the requirements of the Import Health Standard are met. The provision is likely to comprise a "series" of specific duties. To give an idea of what these may cover here are two examples:
 - a. importers should take all reasonable steps to ensure that their goods meet the requirements of the applicable Import Health Standard; and
 - b. importers should maintain records enabling imported goods to be traced to the point that they leave the importer's control.
2. In the case of all imported goods, importers will have a general responsibility to undertake good biosecurity risk management activities. The exact scope of this duty is still being developed, but it is likely to focus on a requirement for importers (and potentially other persons in the import system) to take all reasonable steps to ensure that imported goods do not bring unwanted pests and diseases to New Zealand. Depending on how this general duty is worded, associated definitions may be required.

In the case of duties where imported goods are subject to an Import Health Standard, MAF is considering an offence that would apply where there is deliberate or repetitive breach of the import health standard. This would mean that there is no criminal liability in situations such as a one-off occurrence that is caused by a genuine misunderstanding.

The new offence could also have an associated list of acceptable defences to provide further clarity around the circumstances in which an importer would be regarded as having taken all reasonable steps to comply with the standard, and therefore not be criminally liable.

Consideration is being given to defences such as the breach being the result of:

- an act or omission of another person, and the importer was powerless to manage the situation;
- an accident;
- a cause outside of the importer's control; and
- the importer has evidence of taking all reasonable steps or precautions to avoid this and future breaches.

The general duty will likely be very broad and high level, and if it is drafted in that manner it would not lend itself to the creation of an offence for directly breaching the duty. The Act could, however, enable an inspector to issue a direction to an importer whose actions are not consistent with the general duty. The direction would set out in specific detail what the importer needs to do to ensure compliance with the general duty. Failure to comply with the direction could then be enforced in accordance with the general provisions in the Act relating to the directions of inspectors. Such a duty may also be influential in promoting increased responsibility for biosecurity among importers.

3.2. THE NEED FOR INFORMATION AND USE OF ELECTRONIC SYSTEMS

Summary of drivers for change

Improve information requirements

In order to effectively use modern risk assessment techniques, MAF needs information about imported goods, craft, and passengers. MAF has long standing relationships with the New Zealand Customs Service, and certain information about incoming cargo supplied by Customs is vital for biosecurity risk management. Co-operation between border-agencies will continue and initiatives such as the Joint Border Management information system will further enhance relationships.

Nevertheless, there are limitations with the information that is currently available, and the Biosecurity Act does not empower MAF to require the range of information necessary for making decisions at the border on its own behalf. For example, the Customs Service does not require importers to provide notification of goods below a certain monetary value. This means that MAF may not be notified of the goods, even though they may pose a biosecurity risk. Also, in some cases there are allowable time delays in the information being provided, whereas biosecurity clearance decisions require the necessary information to be at hand.

Use of electronic devices and systems

The Biosecurity Act does not reflect the significant advances in technology that have occurred over the past decade. The Act requires some functions to be carried out in a manual way, such as passenger declarations and goods inspection. For other functions, there is a measure of uncertainty about whether available (or future) electronic systems can be used to support biosecurity risk management. An ability to use electronic devices and systems with legal certainty is necessary for MAF to improve risk targeting and manage risks in a more efficient way.

For example, the electronic system “SmartGate” was implemented at Auckland airport for Australia and New Zealand passport holders in December 2009. SmartGate provides arriving passengers with the option to self-process through passport control by using ePassports and facial recognition technology to perform the customs and immigration checks that are usually conducted by a Customs officer. It will become the primary processing option for customs and immigration purposes. While the details of this are still being considered, it is clear that the Biosecurity Act needs to be amended to enable SmartGate to support the biosecurity clearance process for passenger baggage in appropriate circumstances.

Specifically, electronic systems could be used to:

- enable passengers to make declarations electronically rather than via the current paper-based declaration card. This could mean passengers are able to make declarations earlier, such as in the departure country or during flight;
- capture and store information to support the development of risk profiles, inform risk assessment and decision-making, and maintain records of non-compliance. This means MAF could better use information to target those not complying and facilitate those who are; and
- issue directions, authorisations and clearance to goods, where appropriate. This means MAF could better target resources to areas of high risk and focus efforts on non-compliance.

Consideration is also being given to improving the management of the passenger pathway by using electronic images of passenger baggage to profile risks “behind the scene” or in advance of the passengers’ arrival. The Act is being reviewed to ensure that it is not constraining the full use of information or electronic systems in carrying out biosecurity risk assessment or management.

Proposed Changes to the Biosecurity Act

It is proposed to insert new provisions into the Act enabling MAF to require information about incoming goods and passengers. Such provisions are likely to model similar provisions in the Customs and Excise Act 1996 (for example, section 21 of that Act). As well as filling a gap in the Biosecurity Act, this approach would enable MAF and Customs to better align their information requirements where appropriate thus enabling more seamless interactions with importers.

An enabling amendment is also proposed to allow MAF to fully use information and electronic systems in the future for passenger and cargo clearance processes. A section by section approach would not be an efficient way of approaching this issue. A generic provision applying across the whole Act is proposed. However, if there are any specific provisions for which electronic information could **not** be accepted, then these exceptions would be specifically identified.

MAF will look to various other statutes, such as the Electronic Transactions Act 2002, to assess what is the best way to achieve this. MAF is also assessing the effect of the Privacy Act 1993 in terms of data storage and sharing.

The changes that may be needed to ensure that baggage inspection may occur in the absence of the passenger will be further considered.

3.3. CLEARING RISK GOODS WITHOUT AN IMPORT HEALTH STANDARD

Summary of drivers for change

The main purpose of Part 3 of the Act is to provide for the effective management of risks associated with importing risk goods.

Sometimes goods that do not inherently or usually pose biosecurity risks arrive at the border with contamination from hitchhiker organisms, such as insects, soil, or weed material. Under the Act, goods with this kind of contamination must be considered as risk goods, and yet will not have an import health standard because they are not inherently risky. This situation occurs regularly and means inspectors are in the position of needing to make a biosecurity clearance decision in the absence of an applicable Import Health Standard.

In taking clearance decisions the inspector is informed by the advice of Chief Technical Officers or other technical experts. This advice is contained in MAF-approved treatment schedules for the commonly occurring hitchhiker organisms. For unusual cases the advice of a Chief Technical Officer may be sought directly. In either case, if there is a suitable treatment, and this has been successfully applied, the inspector is then able to issue clearance.

This process is pragmatic and will continue to be a feature of clearance operations in the foreseeable future. A review of the clearance provisions in the Act suggests that they do not clearly reflect operational practices – the Act contemplates that there will always be an Import Health Standard for a risk good.

In addressing this issue, it is not intended to circumvent the Import Health Standard system: if particular goods are frequently being imported with associated hitchhiker organisms, an Import Health Standard would be required for those goods.

Proposed Changes to the Biosecurity Act

It is proposed that the Act be amended to recognise a process for making clearance decisions on consignments of imported goods where the goods are contaminated with hitchhiker organisms, but there is no Import Health Standard.

This would enable an inspector to take clearance decisions for these types of goods where an approved treatment exists. Treatments would be approved by a Chief Technical Officer, and could be approved as:

- a treatment that can be generally applied to resolve a particular kind of hitchhiker contamination on certain types of goods; or
- a specific treatment for a particular case.

Following application of the approved treatment, the inspector would be able to make a final decision on clearance, with the ability to withhold clearance if it appears that the treatment has not succeeded, or other unforeseen circumstances make it unwise to issue a clearance.

3.4. MAKING A CLEARANCE DECISION

Summary of drivers for change

Within Part 3 of the Act, section 27 sets out the criteria that an inspector uses to decide whether to clear goods for entry to New Zealand. Certain criteria can only practically be met if an inspector physically inspects the risk goods for clearance purposes – often referred to as “visual inspection”. While this can be an important way of assessing risk, it is not always the most effective way to do so.

In some cases, visual inspection will not enable the inspector to be satisfied that there are no risk organisms present (for example viral and bacterial diseases). In others, thorough visual inspection is not practical as it would involve dismantling or damaging the goods concerned. Furthermore, the sheer scale and nature of New Zealand’s import trade means it is not viable, nor efficient, to visually inspect every imported risk good.

Proposed Changes to the Biosecurity Act

The principal objective here is to review section 27 so that it provides greater flexibility around clearance decisions. It is proposed that section 27 be amended to include a menu of the methods and actions that can be used to assess and manage the biosecurity risk and inform biosecurity clearance decisions.

The methods and actions that either an inspector or another party might perform could include the following:

- questioning - asking passengers or importers questions about their goods;
- checking documentation - where documents specifying what the good is and how it has been treated (e.g. whether it has been fumigated offshore) are checked/verified;
- inspecting - where an inspector visually checks the goods and assesses the biosecurity risk;
- identifying organisms – identifying an organism to determine whether it is of concern;
- the taking of and use of electronic images, electronic tagging systems – independent of passengers;
- risk profiling/intelligence – where the risks posed by persons/goods/pathways etc are assessed and intervention methods are tuned to the level of risk presented;
- risk screening – where cargo documentation is assessed against import requirements and risk profiles, to identify risk goods that may need to be checked on arrival or which require sanitary/phytosanitary certification or permits;
- sampling/testing – where an inspector has the goods or a sample of the goods examined and/or tested;
- treating goods – where goods are treated in a way (e.g. fumigated) that effectively manages risks; and
- quarantining goods – where goods are sent to a facility on arrival where any pests and diseases in or on the goods have an opportunity to express themselves. This is most commonly used with plants for propagation and live animals.

Clearances at Transitional Facilities

Work is continuing to ensure that the clearance of goods from transitional facilities can occur quickly and efficiently. This may require authorising parties other than MAF-employed inspectors to provide clearance for certain low risk goods.

3.5. BORDER MANAGEMENT – POST-CLEARANCE MANAGEMENT

Summary of drivers for change

At present, some goods are imported where an important aspect of risk management occurs after clearance has been given. For example, currently garlic imported for consumption does not require pre-clearance treatment because the risk of disease associated with garlic is managed through cooking and/or eating. In contrast, garlic imported for sowing must be treated in a way that manages the risk of diseases before it can be cleared. Ensuring that the biosecurity risk is fully managed relies on the garlic being used for the purpose for which it was imported: garlic imported for eating must not be planted.

Another factor that supports development of post-clearance requirements is that the life cycle for certain pests might necessitate biosecurity risk management extending beyond the port of entry. For example, Asian gypsy moths are a hitchhiker species that present a high risk in connection with sea containers. The eggs for this species are very difficult to detect at the border, but as a caterpillar or moth this species is much more likely to be observed. Consideration is being given to options that would enable managing risks at the most appropriate part of the supply chain.

The problem in the Biosecurity Act is that there is no clear and readily available basis to impose and enforce risk management requirements that apply after imported goods have been cleared.

Proposed Changes to the Biosecurity Act

The November 2009 Information Paper suggested that an option for addressing this problem would be a new provision for conditions to be applied post-clearance. Further analysis has identified practical limitations to this approach.

Another way of addressing this issue, and to strengthen our biosecurity risk management generally, would be to include any post-clearance requirements in the relevant Import Health Standard. This would mean that the scope of an Import Health Standard would be expanded as required for certain goods, to include requirements that might apply after a biosecurity clearance has been given. Post-clearance requirements would be subject to the same development processes, including the criteria and consultation requirements, as for any other requirements in the Import Health Standard.

Where a post-clearance requirement is considered essential for managing risk, it should only be included where there is confidence that compliance with the requirement can be adequately monitored and enforced.

If this option were to be implemented alongside a duty on importers to meet Import Health Standard requirements (refer **section 3.1** above), an importer who failed to meet post-clearance requirements would also potentially be in breach of duty.

Where a post-clearance requirement was required to apply beyond the importer to other persons in the supply chain, this would need to be specifically addressed within the Import Health Standard, and required through another mechanism. A comparable model is in the Hazardous Substances and New Organisms Act 1996 approach to ‘conditional approvals’ for certain new organisms. MAF will review the workability and applicability of this type of approach.

3.6. PROPOSED CHANGES TO IMPORT HEALTH STANDARDS

The section empowering the making of Import Health Standards is section 22.

The recommendation for issuing an Import Health Standard is made by a Chief Technical Officer (CTO). In making the recommendation the CTO must have regard to certain matters set out in subsection 22(5). The section also contains other process requirements such as consultation and notification.

There are several proposed amendments to section 22 that are discussed separately, below.

3.6.1 Outcome Statements in Import Health Standards

Summary of drivers for change

Import Health Standards are currently issued individually for different kinds of ‘risk good’. There are approximately 400 of them, many of which are highly specific, taking the form of detailed requirements for clearances of particular goods or classes of goods from specified countries.

In an increasing number of circumstances, MAF is keen to write Import Health Standards that contain an outcome statement – what is to be achieved to enable biosecurity clearance. For example, an import health standard for an inanimate good could, in principle, contain a statement such as “the goods must be clean” which does not necessarily specify how the goods should be cleaned.

In addition, using an outcome statement in conjunction with process-specific treatment requirements will more clearly signal the outcome MAF is seeking, allowing an importer to more easily work out whether to propose alternative methods for the outcome to be met through an equivalence request.

Whatever the structure or content of an Import Health Standard, the Standard would still need to provide enough detail to ensure that the requirements to be met could be known with certainty by both importers and inspectors, and the process for permitting alternative measures would also need to be clear.

Proposed Changes to the Biosecurity Act

It is proposed that section 22 of the Act be amended to make it clear that an Import Health Standard can include an outcome statement in appropriate circumstances.

3.6.2 Matters to consider relating to the measures in import health standards

Section 22 currently requires consideration to be given to the organisms that might be introduced to New Zealand by risk goods, and the effects that those organisms might have, when developing an import health standard. These two matters provide an assessment of the risk associated with the goods.

In developing an import health standard, the other key matters for consideration relate to the measures that can be imposed to reduce the risk associated with the goods. The Act, however,

is silent on what should be considered in relation to the measures that might be included in a standard.

In practice, MAF may consider a range of matters relating to risk reduction measures when developing an import health standard. These include the feasibility of applying the measures, the reliability of the measures, and the costs of applying the measures.

MAF considers that there would be advantages in specifying the kinds of matters that can be taken into account when developing the measures to be included in an import health standard. Doing this would transparently demonstrate to all interested parties the range of matters that may be taken into account.

Proposed Changes to the Biosecurity Act

It is proposed to specify in section 22 the range of matters that may be taken into account in relation to the risk reduction measures that are considered for inclusion in an import health standard. These matters would include the feasibility of applying the measures, the reliability of the measures, and the costs of applying the measures.

3.6.3 Consideration of the SPS Agreement

Summary of drivers for change

In recommending the making of an Import Health Standard regard has to be given to a number of matters including New Zealand's international obligations (s22(5)(c)). If New Zealand has a binding international obligation then international law (the Vienna Convention on the Law of Treaties) requires New Zealand to honour it. It would be preferable to include New Zealand's international obligations more specifically in legislation where needed.

There are a number of relevant international obligations that may apply to any particular Import Health Standard, depending on the specific subject and nature of the Standard being developed. Of them, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) sets out the fundamental obligations that apply to the development of each and every Import Health Standard.

The SPS Agreement provides the rules that allow World Trade Organisation (WTO) members to manage risks on the import of products to protect human, animal or plant life or health. Breaches of the SPS Agreement can be investigated through the WTO Dispute Settlement Body and continued non-conformance would lead to compensation or retaliation being authorised by the WTO. The reputational implications of any non-compliance on the part of New Zealand would also be very important.

The Act was drafted prior to the SPS Agreement being finalised and therefore does not reference it by name.

Proposed Changes to the Biosecurity Act

It is proposed that section 22 be amended to ensure that, when a Chief Technical Officer is recommending the making of an Import Health Standard, they are acting in accordance with the SPS Agreement. Section 22(5)(c) of the Act would remain, or something very similar to it, to ensure that MAF can continue to consider the relevance of other international obligations as appropriate for any particular Import Health Standard.

3.7. CO-OPERATION WITH OTHER AGENCIES

Summary of drivers for change

Inspectors acting under the Biosecurity Act sometimes encounter goods or gather information that may be of interest to another government department for purposes set out in other legislation. For example, an inspector may find what appear to be illegal drugs hidden within a consignment of goods that they are inspecting for biosecurity purposes. In this situation the inspector notifies Customs of the find, and a Customs Officer takes appropriate action under the Customs and Excise Act 1996.

The Biosecurity Act would benefit from additional clarity confirming a biosecurity inspector's power to take and hold goods which may be of interest to other law enforcement agencies, and to disclose information that may be relevant to the purposes of another department.

Regarding disclosure, Information Privacy Principle 11 in the Privacy Act 1993 allows for the sharing of personal information in specific circumstances. MAF may also wish to share personal information with other agencies to manage compliance, offence and crisis situations that are not covered by the exceptions in Information Privacy Principle 11. In order to remove doubt about what information can be disclosed, it makes sense to insert a disclosure provision in the Biosecurity Act.

Proposed Changes to the Biosecurity Act

The key border partner agencies are the New Zealand Customs Service, the Department of Labour and the New Zealand Food Safety Authority. As a minimum it would seem sensible that any new authorisation in the Biosecurity Act referenced appropriate provisions of the border-related Acts managed by these agencies, that is the Immigration Act 2009, the Customs and Excise Act 1996 and the Food Act 1981 (to be replaced by the Food Bill).

In addition we would consider providing for powers to manage goods that may be evidence of offences related to imports under other pieces of legislation. For example:

- Agricultural Compounds and Veterinary Medicines Act 1997;
- Animal Products Act 1999;
- Crimes Act 1961;
- Fisheries Act 1996;
- Medicines Act 1981; and
- Passports Act 1992.

This provision will be modelled on section 175C of the Customs and Excise Act 1996.

It is proposed to insert a disclosure provision for the sharing of personal information both domestically and internationally. The disclosure provision will limit the purposes for disclosure and prescribe who the information can be disclosed to. Examples of such statutory provisions that exist for border agencies include the Animal Products Act section 161, and the Customs and Excise Act section 282A.

4. Marine Biosecurity and Risks from Craft (including aircraft)

4.1. SUMMARY OF DRIVERS FOR CHANGE

There are two key drivers for change in this area.

First, new economic activity in New Zealand's exclusive economic zone (EEZ) has the potential to increase the biosecurity risks in our marine environment. The EEZ extends to 200 nautical miles from New Zealand's coast. The new economic activity primarily relates to oil and gas exploration and production, which involves the use of drilling rigs, production and storage vessels, tankers and supply ships. In future, other possible activities in the EEZ may also create biosecurity risks, such as seabed mining, energy generation, carbon capture and storage, and bioprospecting.

The provisions of the Biosecurity Act generally have no effect beyond New Zealand territorial waters, and therefore do not apply to any place that is beyond the 12 nautical mile limit. Biosecurity risks that may affect our marine environment, however, can extend beyond the 12 mile limit. The effective management of these risks may be compromised because the activity is occurring beyond the jurisdiction of the Biosecurity Act.

A second key driver for change concerns the management of biosecurity risks that arise directly from craft. Harmful organisms can potentially enter New Zealand both on imported goods, and on the craft that transport those goods.

The risks from imported risk goods are managed by way of import health standards. There is no equivalent option under the Biosecurity Act for managing the risks created by craft. The risks from craft are currently managed by a combination of import health standards for particular risks (such as ballast water) and the use of specific powers in the Act by inspectors. This results in a patchwork of regulatory intervention that has the potential to lead to confusion and lack of transparency.

4.2. PROPOSED CHANGES TO THE BIOSECURITY ACT

Extending the application of the Act to the EEZ

There are a number of changes to the Biosecurity Act that should be considered to extend its application to the EEZ. They fall into the following categories:

- extending the requirements that relate to the arrival of craft, so that they apply within the EEZ;
- extending the application of reporting obligations under the Act;
- extending the application of the Act's restrictions on spreading and multiplying pests and unwanted organisms;
- making powers for biosecurity activities such as surveillance and incursion response available in the EEZ; and
- allowing regulations and national pest management strategies to have effect within the EEZ.

Extending requirements that relate to the arrival of craft, so that they apply within the EEZ

MAF proposes amendments to the Act that would:

- Extend the definition of “arrive in New Zealand”, so that a craft is taken to arrive in New Zealand if it anchors, berths or operates in the EEZ after a voyage originating outside the EEZ. The obligations that apply once a craft has arrived in New Zealand, such as complying with the directions of an inspector and providing information, would then apply. The legislation would need to make it clear that a craft that is simply passing through the EEZ would not be considered to have arrived in New Zealand.
- Extend the notification requirements for craft, so that craft entering the EEZ must advise when and where they will enter the EEZ, and where they intend to anchor, berth or operate. It is also proposed to amend the Act to enable regulations to be made to require the supply of other information relevant to biosecurity risks. Again, craft that are simply passing through the EEZ to another location would not be required to notify MAF.
- Extend the powers to give directions to craft that are carrying unwanted organisms or risk goods, so that those powers can be exercised anywhere within the EEZ.
- Enable MAF to designate a location in the EEZ, or an existing structure in the EEZ, as a place of first arrival, for the purposes of craft that intend to anchor, berth or operate in the EEZ.

Extending the application of reporting obligations under the Act

There would be benefits for marine surveillance if the reporting obligations in the Act were extended, so that they apply within the EEZ. The reporting obligations cover notifiable organisms, and organisms that are not normally seen or detected in New Zealand.

Extending the application of the Act's restrictions on spreading and multiplying pests and unwanted organisms

It may be appropriate to extend to the EEZ the restrictions contained in the Act on knowingly doing things that result in the spread, multiplication, etc, of pests and unwanted organisms.

Making powers for biosecurity activities such as surveillance and incursion response available in the EEZ

It is proposed that the powers available under the Act, including in particular the powers in Part 6, should be able to be exercised within the EEZ. This would mean that powers to do things such as taking samples, setting up movement controls, and treating infected goods, could be exercised within the EEZ, for the purpose of eradicating or controlling harmful organisms.

Allowing regulations and national pest management strategies to have effect within the EEZ

It is proposed that national pest management strategies under Part 5 of the Act, and regulations made under section 165, should be able to apply within the EEZ. This would enable a regulatory regime to be applied within the EEZ, in cases where this is necessary to effectively manage a biosecurity risk.

Changes relating to the management of risks from craft

MAF proposes that the Act be amended to provide for a new instrument, which may be called a Craft Risk Management Standard. The focus of a Craft Risk Management Standard would be on the requirements that persons in charge of craft must meet to effectively manage the risks from organisms that may be introduced in or on the craft. The intention is that the Standard would provide a single source to refer to for all biosecurity requirements relating to the arrival of craft in New Zealand.

In accordance with the definition of “craft” in the Act, the Craft Risk Management Standard would apply to both sea craft and aircraft.

Different standards would need to be developed for different kinds and classes of craft. MAF proposes that a Craft Risk Management Standard would be developed in a similar way to an import health standard, including a requirement to consult with people who may be affected by the standard.

Consideration will need to be given to the enforcement of a Craft Risk Management Standard. The legislation could create a duty to comply with the requirements of the Standard, in a similar way to the proposed duty to comply with the requirements of an import health standard (see **section 3.1** above). Other options are:

- applying some other kind of sanction for non-compliance, such as a requirement for the craft to leave New Zealand territory, or to take actions that are directed by an inspector to remedy the effects of non-compliance; or
- relying on existing powers in the Act that apply to craft that are in New Zealand territory, such as those in sections 19, 31, 32 and 33.

A tool along the lines of a Craft Risk Management Standard could also be developed to apply to the movement of craft around New Zealand, as well as the entry of craft to New Zealand from overseas. This would provide an ability to address the spread by craft of harmful organisms from one area of New Zealand to another.

5. Pest Management

5.1. SUMMARY OF DRIVERS FOR CHANGE

MAF is working with other government agencies, regional councils, industry and Maori to improve the pest management system in New Zealand, through the Future of Pest Management project.

The pest management system, while world leading, has evolved over time and is fragmented, with unclear roles and responsibilities for individual agencies which result in gaps and overlaps in the system. As a result, the most cost effective management approach is not necessarily being adopted.

Relationship with the Future of Pest Management project

The Future of Pest Management project is working to address the issues in the pest management area and improve the frameworks and tools that enable effective pest management in New Zealand. Although the project has not fully developed its proposals for changes to the pest management system, the areas where legislative changes are likely to be needed have been identified, and a range of options are currently being developed and tested. The project has developed a number of background working papers that will be available soon at the following link: <http://www.biosecurity.govt.nz/pests/surv-mgmt/mgmt/future-project>. These papers provide more detail on some of the proposals outlined in this chapter.

It is intended that the proposed legislative changes to be introduced into Parliament will be informed by the work to be completed through the Future of Pest Management project, as well as through this consultation process. MAF will be consulting on the overall Future of Pest Management project (including non-legislative areas) in May and June 2010. If you wish to be involved in that process, please indicate that in your submission.

5.2. PROPOSED CHANGES TO THE BIOSECURITY ACT

The following amendment proposals are general in nature and provide for a broad framework only. More detail around processes, criteria etc, will be included later in regulations. This means that the changes to the Act are likely to be enabling, with development of regulations occurring primarily through the implementation phase of the Future of Pest Management project, from October 2010.

The proposals for amendment fall into the following categories:

- Providing MAF, as leader of the biosecurity system, with a clearer mandate for leading pest management and the necessary tools to do this.
- Specifying functions of regional councils.
- Resolving uncertainty in pest management responsibilities.
- Changes to regional and national pest management strategy development processes to enable more effective pest management.
- Requiring Crown land to be subject to the requirements of regional pest management strategies.

In addition, consideration will be given to amending the purpose statement of Part 5 of the Biosecurity Act, to ensure that it provides sufficient guidance to the improved pest management system.

There may also be other minor amendments to the Biosecurity Act or consequential amendments to other legislation to allow more effective pest management to occur and ensure that pest management decisions are transparent, consistent and achieve the best overall outcomes.

MAF's leadership

Articulating the oversight and leadership role

As leader of the biosecurity system, MAF is responsible for oversight and leadership for pest management. However, because there are a large number of players involved in pest management and the Act allows any party to propose a pest management strategy, it is not clear to all parties specifically what is included within this oversight and leadership role. MAF does not lead all pest management programmes (nor would this be desirable), but there are differing expectations of what activities MAF should be undertaking in its leadership capacity.

One way to address this issue is to clearly articulate the components of MAF's oversight and leadership role in the Act so that all those involved in pest management understand MAF's role, and MAF can be held to account for fulfilling that role.

Possible components of an oversight and leadership role are:

- Developing, monitoring and reviewing an agreed strategic direction for the pest management system.
- Co-ordinating pest management organisations and interests at the national level.
- Supporting decision-making processes to achieve the most cost-effective approach to a pest management issue.
- Promoting collective action at a national level.
- Maintaining an overview of pest management to identify risks and opportunities.

Ensuring consistency in process and approach

Part of MAF's leadership role is ensuring consistency of process and approach to pest management programmes. In the past, guidelines have been developed to facilitate consistency, however they have not been adopted by all participants. The Future of Pest Management project is exploring ways in which the legislation could be amended to enable the Minister to issue requirements for those developing pest management strategies. Any such requirements would be developed collaboratively with other participants.

The types of things that could be covered by these documents include:

- agreed outcomes and principles to guide pest management decisions;
- requirements that support consistent decision-making;
- standard terminology for describing pest management activities in strategies; and
- requirements to apply a common framework for measuring performance and providing performance information.

It is intended that these documents would be given effect to through Regulations, rather than being prescribed in the Act itself or through some other mechanism. This means that the documents would be sufficiently flexible and would have a formal process for development and review, including consultation with affected parties. The Act already enables Regulations to be issued for some of the above purposes.

Specifying functions of regional councils

Regional councils are crucial participants in the pest management system. The overall clarity of roles and responsibilities in pest management could benefit from specifying the functions that regional councils have in relation to pest management. The Act currently provides for powers of regional councils in section 13, but does not specify any particular functions.

The functions of regional councils being considered for inclusion are to:

- lead pest management in the region;
- deliver and support regional public good outcomes required by regional communities;
- facilitate good neighbour outcomes and enforcement; and
- support programmes for national level outcomes.

In considering whether functions of regional councils should be included in the Act, the project will consider whether any additional clarity is gained and whether specifying functions may have unintended consequences.

Resolving uncertainty in pest management responsibilities

Many of the issues with the current system are caused by uncertainty about who is responsible for a particular pest, pathway or site. In addition, pests are sometimes not being managed using the most cost-effective overall approach, and the costs associated with pests and pest management are not always fairly distributed across society.

The Future of Pest Management project is proposing that Government designate a party to resolve uncertainty where responsibilities are not clear, including providing advice on the most cost-effective approach to managing a pest, pathway or site. This is considered more practical than rigidly assigning types of issues to parties in advance, as they may not be best-placed to manage them. Over time, this process will create greater clarity of responsibilities.

Although the process would identify who should be responsible for a pest issue, it would then be for those responsible to decide whether or not to intervene. For such a system to be successful, agreed processes and criteria are required, including input into the decisions from affected parties.

Further work is needed to determine how the system (if agreed) would be reflected in the legislation – in particular what would be set out in the Act, provided for through subsequent regulations, and what would be in non-statutory documents. At this stage it is expected that, at a minimum, the responsibilities would be set out in the Act, with processes and criteria about how the role will be exercised likely to be provided for within regulations. It is intended that the process would not be operational until after the Regulations are made.

Further work is also needed to determine the most suitable party to be responsible for determining who is best placed to decide about a pest, pathway or site. The Future of Pest Management project is considering a number of options, including a statutory committee consisting of nominees from affected parties, or giving responsibility to the Minister for Biosecurity (who could then delegate the function to a person or a committee).

Changes to regional and national pest management strategies

The key existing regulatory tools for pest management in the Biosecurity Act are national and regional pest management strategies. These tools are designed to enable groups to levy and bind people into taking collective action.

A range of problems with these strategies have been identified, including issues related to their creation, the ability to adjust the strategies over time, and the way in which strategies assign responsibilities and costs. A range of possible changes to enable more effective pest management are being considered.

Multiple process routes depending on significance

The process for developing a pest management strategy is inflexible and can be a barrier to their creation. The process to be used and criteria to be satisfied for a pest management strategy to be made are the same regardless of:

- how many people the strategy will affect and the extent they will be affected;
- the powers that the strategy will confer; and
- the length of time the strategy will be in place for.

This means that the process is overly onerous for relatively simple strategies. As a result, very few pest management strategies have been developed by parties other than regional councils. Creating a flexible and scalable process for pest management strategy development will increase the likelihood that strategies will be developed at a national level. It will also make it easier for sector groups to form strategies to help them manage pests or pathways within the sector (e.g. to allow sector levies to pay for research into improved control methods, or to allow sector rules on things like animal hygiene to be imposed to reduce disease spread).

Work is being undertaken within the project to provide a more streamlined process for simple strategies. This would require criteria to establish when that process could be used, and what a streamlined process would look like. There is also work to ensure that all the processes for developing pest management strategies are efficient and effective.

For a national pest management strategy, the Act currently requires the Minister to appoint a board of inquiry unless satisfied that there is no significant body of persons who are affected by the strategy and oppose it. The project is exploring alternative, less costly means to ensure that appropriate decisions are made on national pest management strategies.

Challenges to strategies/ability to amend strategies

The Act currently requires that a pest management strategy must be reviewed after five years. Regional pest management strategies are developed so that there is one strategy (or sometimes two strategies) per region, which contain multiple pests. Although the Act did contemplate that multiple pests could be included within a single strategy, the review and amendment provisions are such that this creates problems.

The first issue is that any appeal to the Environment Court on a particular provision within a strategy means that the entire strategy cannot be implemented until the appeal is complete. One possible way to resolve that problem is to provide that where a provision of a pest management strategy is the subject of an appeal to the Environment Court, unaffected provisions can be approved and implemented.

The second issue is that, if there are changes in the nature or status of pest or pathway risks and new rules are required (or old rules should be removed), a strategy needs to be reviewed in full. This means that all species and rules that the strategy covers are up for review and can be submitted on. Currently only minor amendments, where a change does not create a significant effect on the rights and obligations of any person, may be made without a full review of the strategy. Therefore regional councils are unwilling to make changes to the strategy rules until the review period as specified in the Act, currently five years.

One option being considered is that the Act is amended to provide for amendments to a strategy without requiring a full statutory review of the strategy. Where the rights or obligations of persons are affected, the amendments would need to follow the public process required to develop a pest management strategy. This could follow the streamlined process route (as discussed in the section above), where the proposal meets the criteria for a less significant proposal. This change will allow specific areas or pest species to be addressed, without impacting management of other species within the strategy.

If amendments to strategies could be done without a full review process, the full review could potentially occur less frequently, as the strategy would be less likely to get out of date while it is in force. The project is therefore exploring the possibility of changing the review requirement to ten years.

Enabling pest management strategies for pathway and site management

The Act currently only provides for pest management strategies to address a particular pest. The pest management system is increasingly, however, focusing on pathway and site-based management that address multiple pests (some of which may not be known). For example, the recent decision by Fish and Game councils to ban the use of felt soled waders was a response to didymo, but it was also recognised that these could move a range of other organisms.

The Act does allow pathway management to manage a particular pest. However, we do not always know the specific risk organisms that can be transferred via a particular pathway, especially in the marine environment. Allowing pathway management allows us to take proactive steps to prevent the spread of pests before they become recognised or a problem.

Means to allow pest management strategies that address site-led and pathway management where the particular pests to be managed may not be able to be identified are being developed.

Crown obligations to regional pest management strategies

The Crown is not currently bound by regional pest management strategies. This can undermine the effectiveness of the strategies, as the Crown is a large landowner. Central and regional government agencies have recently agreed that, as a general principle, the Crown should meet good neighbour obligations, determined under regional pest management strategies to reduce the spread of pests.

While simply binding the Crown would improve pest management it also means that Crown land managing agencies face uncertain financial obligations, and there is a risk that this will divert funds from other, nationally important work. Work is underway to ensure that any good neighbour obligations are appropriately set, and that the Crown can manage its fiscal risks. The Crown is also intending to increase its engagement in the development of regional pest management strategies to articulate their views on the implications of the proposals on government outcomes. Not all the options being considered will require changes to the legislation.

Issues being addressed in designing the new approach include:

- ways to make good neighbour obligations fit well with overall system priorities;
- whether there should be a mechanism to allow the Minister for Biosecurity to exempt landowners from particular regional pest management strategy obligations where the obligations do not align with agreed pest management system-wide priorities; and
- the extent to which regional councils could take enforcement actions against the Crown.

6. Biosecurity Preparedness and Response within New Zealand

6.1. SUMMARY OF DRIVERS FOR CHANGE

MAF is looking for ways to improve our preparation for, and response to, unwanted pests and diseases. The Biosecurity Funding Review, which was approved by the previous government in 2005, recommended joint decision-making and cost sharing with primary industries. This approach, in MAF's view, will help to boost biosecurity "readiness" and "response" in New Zealand.

In August 2009, Cabinet directed MAF to develop a joint decision-making and cost sharing agreement with willing primary industries. This agreement will be based on a draft agreement that has been developed over the last four years by a MAF-industry working group. Under the agreement, MAF and primary industries will work together to reduce the impact of unwanted pests and diseases. Participating industries will be able to be involved in decision-making regarding biosecurity readiness and response activities that they are contributing to financially.

The draft agreement presented to Cabinet envisaged that there would be a suite of documents developed by the parties:

- A Master Deed would apply to MAF and all industry signatories. It will set out the general principles of the partnership, such as the rights and obligations of joint decision-making and cost sharing.
- Operational agreements between MAF and industry signatories would record priority risks, cost shares, and alternative compensation arrangements if required.

6.2. PROPOSED CHANGES TO THE BIOSECURITY ACT

Legislative changes must be made to the Biosecurity Act 1993 to clearly authorise joint decision-making and to ensure that appropriate funding mechanisms are available. The proposed amendments fall into three broad categories:

- Provisions authorising government-industry agreements, and clarifying how they relate to the exercise of statutory powers.
- The funding mechanisms to enable cost sharing and cost recovery under an agreement.
- The application of the Act's compensation provisions.

Provisions authorising government-industry agreements, and clarifying how they relate to the exercise of statutory powers

Authorise MAF to enter into an agreement

MAF proposes that the Act should expressly authorise the Director-General to enter a government-industry agreement on behalf of the Government.

MAF considers that it would be useful for the Act to include a list of the kinds of matters that may be included in the agreement. It would be important for this list to be drafted so that it is not exhaustive. In other words, the purpose of the list would be to clearly authorise the key matters that are likely to be covered in an agreement, without closing off the possibility of also including other matters.

Authorise the use of statutory powers to implement joint decisions

The relevant parties to the agreement will make joint decisions on readiness activities, and on the overall strategy and approach for any incursion responses. MAF and its contractors (possibly including industry partners) will then implement those high-level decisions using statutory powers (e.g. powers to enter property, destroy infected property, impose movement controls, etc).

MAF therefore proposes that the Act should clearly authorise the exercise of statutory powers in accordance with a jointly-agreed plan. The relevant statutory powers are likely to be Biosecurity Act powers, but could potentially include powers under other legislation.

Describe how an industry group can demonstrate its mandate to represent its members

In MAF's view, the Act should require the Director-General to be satisfied that the industry signatory entering the agreement adequately represents the members of its industry. MAF envisages that the Act will include a list of criteria for the Director-General to take into account when considering whether an industry group is sufficiently representative.

The Act should also recognise that in some situations it may be appropriate for different parts of an industry to be represented separately by different organisations.

The funding mechanisms to enable cost sharing and cost recovery under an agreement

Readiness activities can be planned and budgeted for in advance. An incursion response, however, is usually an unforeseeable event that is difficult to establish funding for in advance. For these reasons, the draft agreement provided for the Crown to initially meet the entire cost of incursion responses under the agreement. MAF would then recover the pre-agreed shares of these costs from affected industries over a period of up to ten years.

Enable an industry's funding contribution to be collected

MAF proposes that the levy provisions of the Act are amended to enable levy orders that can recover the pre-agreed shares of costs from industry members. This may occur in two ways: either MAF recovers the pre-agreed shares of costs directly from industry members, or the industry body collects the shares of costs from its members and then reimburses MAF after a response has commenced. MAF proposes that the levy provisions in the Act should be amended to give clear authorisation to use levy orders in this manner.

Authorise MAF to recover costs from non-participating industries after a response

In some cases, an industry that has not committed to joint decision-making and cost sharing may receive a clear and significant benefit from a response. A situation like this could lead to concerns about "free-riding" industries that have not signed the agreement.

The Government has agreed that it may be appropriate to use the levy provisions of the Act to collect a fair share from industries in these cases. MAF therefore proposes that the Act should be amended to give clear authorisation to recover incursion response costs from industries after a response, if they are considered a beneficiary but have not signed up to the new arrangements. It is obviously MAF's hope, however, that industries will choose to enter the framework for joint decision-making and cost sharing.

Applying the Act's compensation provisions

Enable signatories to specify their own compensation provisions

The draft agreement recognised that parties to the agreement may set up alternative compensation arrangements to those provided by the Act. Some industries might take this option to keep response costs low. Others might want to provide financial assistance beyond the compensation offered under the Act to help producers to recover from a biosecurity emergency.

MAF therefore proposes that the Act should be amended to enable signatories to specify their own compensation provisions if they agree to opt out of the Act's compensation provisions. It would be important that any alternative compensation provisions should encourage early reporting and avoid perverse incentives to spread unwanted pests or diseases.

Enable signatories to agree to share the costs of compensation

Section 162A (3) provides that MAF pays compensation with money appropriated from Parliament. This section of the Act could be interpreted as a barrier to cost sharing for compensation payments. MAF therefore proposes that section 162A (3) be amended to make it clear that compensation can also be provided from industry funds.

7. Enforcement and Compliance Provisions

7.1. SUMMARY OF DRIVERS FOR CHANGE

Non-compliance with the Biosecurity Act occurs in a number of different areas. Not all non-compliance needs to have an enforcement response – education is often more effective. It is important, however, that effective enforcement options are available to deal with cases of serious or repeated non-compliance. It is also important that a range of enforcement options are available to allow a graduated approach to different levels of non-compliance.

Some of the non-compliance that is encountered is difficult to respond to effectively using the enforcement options that are currently available under the Act. The reasons for this include:

- offence provisions that do not directly target the conduct that is of concern;
- offence provisions that include complex elements that are difficult to prove in practice;
- limited options for dealing with repeated, lower-level non-compliance; and
- penalties that are not commensurate with the seriousness of the non-compliance.

7.2. PROPOSED CHANGES TO THE BIOSECURITY ACT

There are a number of ways in which the compliance and enforcement provisions in the Act could be enhanced. The potential enhancements are discussed in more detail below, in the following categories:

- new offence provisions;
- provisions relating to transitional and containment facilities;
- greater use of infringement offences;
- compliance orders;
- improvements to key enforcement and compliance powers;
- civil liability provisions.

New offence provisions

New importation offence

Attempts to evade detection by MAF when importing risk goods occur regularly. These attempts cover a range of scenarios, including:

- passengers concealing within their personal baggage food products that they wish to import for their own use;
- amateur collectors arranging for goods to be sent to them through the mail with an incorrect description of the goods; and
- smuggling of rare and endangered wildlife by organised crime operations.

The offence provision that is used in these cases is the offence under section 154(f) of the Act, which relates to possession of unauthorised goods, with knowledge that they are unauthorised goods. If the attempted importation is detected and prevented, the applicable offence is an **attempt** to possess unauthorised goods, again with knowledge that they are unauthorised goods.

There are a number of difficulties in successfully prosecuting an offence in these circumstances. The definition of “unauthorised goods” is long and complex, and proving that the importer knew that the goods were unauthorised can be difficult.

It is therefore proposed that a new offence be added to the Act, which more directly addresses situations where a person attempts to evade detection by MAF when importing risk goods. The key elements of the offence would be:

- a person causes or permits goods to be imported; and
- the importation of the goods has occurred with either false, misleading or incomplete information being provided to MAF, or with steps having been taken to hinder the detection of the goods by MAF.

It is proposed that this offence would be designated as a strict liability offence. This would mean that it is not necessary to prove that the importer knew of the false or misleading information, or the steps that were taken to hinder detection. The Act would, however, include a statutory defence that could apply if the defendant can demonstrate that they acted reasonably, and did not know of those matters.

Clarifying the categorisation of certain offences under the Act

Under criminal law, offences are classified into different categories. The primary categories are:

- offences where it is necessary to prove that the defendant acted knowingly or intentionally (often still referred to by using the Latin term *mens rea*, which means “guilty mind”); and
- offences of strict liability, where it is only necessary to prove that the defendant did a particular action, and the defendant then has the ability to defend the charge by demonstrating that they had acted without fault.

The offences under the Biosecurity Act are set out in section 154. It is clear from some of the offences that they are *mens rea* offences, because the wording of the offence includes a word such as “knowingly”.

Some of the offences, however, are neither clearly *mens rea* offences nor clearly strict liability. This creates an undesirable lack of certainty about exactly what the prosecution has to prove to a court, and is in contrast to some other modern legislation, where the offences that are strict liability are specifically identified as such in the Act

It is therefore proposed that certain key offences under the Act where this is a problem be reviewed so that there is greater clarity about their categorisation.

Provisions relating to transitional and containment facilities

Transitional facilities are places where imported goods can be taken for purposes such as inspection, treatment and quarantine, before the goods are cleared for entry into New Zealand. Containment facilities are places that are approved for the purpose of holding organisms that are not intended to be released into the New Zealand environment. MAF approves places as transitional and containment facilities, and their operators, based on whether they meet the relevant standards for construction, maintenance and operation.

The current transitional and containment facility compliance system does not work as well as it could. There are some incentives for good compliance with the standard, such as lower frequency of audits and hence lower cost to the facility (and vice versa), but aside from this the principal sanction that is available is confined to a full cancellation of the approval for the facility, and/or its operator. This means that there is limited ability to take a graduated approach to different levels of non-compliance.

Two changes to the Act are proposed, that will allow for more effective response to non-compliance by facility operators.

Firstly, it is proposed that a power be added to the Act, allowing MAF to **suspend** a facility's approval in cases of non-compliance. Suspension could usefully be applied in the following situations:

- where a facility is left without an operator;
- where a specific action needs to be carried out before the facility is fit to operate; or
- as a “next step” for compliance purposes, prior to complete cancellation of approval.

Once issued with a suspension notice, a facility would temporarily lose the approval to carry out all or some of its biosecurity activities, as specified in the notice. If the facility continued to carry out such activities while issued with a suspension notice, it would be committing an offence and could therefore be charged.

The suspension notice would specify a period of suspension, and, if applicable, specific actions to be carried out and/or conditions to be observed. Once MAF had carried out an audit to satisfy itself that the non-compliance had been addressed and risks were being appropriately managed, it would be able to lift the suspension. MAF would lift the suspension through a written notice, which would allow the facility to resume some or all of its biosecurity activities as specified in the notice.

The second proposed change is to impose an enforceable duty to comply with the operating standard, and with other relevant provisions of the Act, such as the restrictions on allowing uncleared goods to leave a transitional facility. A breach of the duty would be an offence against the Act. An important element of work in relation to duties for transitional facility operators will be to review the biosecurity clearance processes that are applied within transitional facilities, to ensure that these are robust, and in alignment with the Act.

Greater use of infringement offences

Infringement offences provide a practical way of dealing with offences that are committed in large numbers, and that involve straightforward factual situations. An infringement offence can be prosecuted in the ordinary way, or can be dealt with by issuing an infringement notice that specifies an infringement fee that must be paid. If a notice is issued, then no court hearing is held unless the defendant requests one, and the infringement fee can be collected as an unpaid fine if the defendant takes no action.

The offence of making an erroneous declaration about goods when entering New Zealand is currently an infringement offence. MAF has identified a further area of non-compliance that would be suitable to deal with by way of an infringement offence.

Causing or permitting uncleared goods to leave a transitional facility without proper authority

The Biosecurity Act strictly controls the way in which uncleared imported goods can be dealt with. The general effect of section 25 is to prohibit uncleared goods from being moved from one location to another without the authority of an inspector. The authority to move uncleared goods can be given subject to conditions.

The importation of risk goods often involves the goods being moved from one place to another, for purposes such as inspection, treatment, or quarantine. MAF is aware of a relatively high level of non-compliance with the requirement to move goods in accordance with the authority of an inspector. MAF proposes that the offence relating to moving uncleared goods other than in accordance with the authority of an inspector should be an infringement offence, with a fee of \$750.

Following amendments to the Act that were passed in 2009, it is now possible to specify that an offence is an infringement offence by way of regulations made under the Act, rather than by having to amend the Act. In the case of a failure to comply with section 25, however, it seems likely that amendment to the Act will also be required. The reason for this is that the current penalty for a failure to comply with section 25 includes the possibility of imprisonment. Legislation guidelines are clear that it is not appropriate for an infringement offence to be punishable by imprisonment.

Compliance orders

The Biosecurity Act has a range of powers, including powers to give directions. The direction-giving powers are generally focussed on ensuring that a biosecurity risk arising in a particular situation is managed.

The Act does not include a general power to give directions for the purpose of remedying non-compliance. This is in contrast to other modern legislation, such as the Hazardous Substances and New Organisms Act 1996.

MAF proposes that the Biosecurity Act be amended to enable compliance orders to be issued, along similar lines to the Hazardous Substances and New Organisms Act. The scope of a compliance order would include:

- the prohibition of activities that do not comply with the Act; and
- requiring activities that are necessary to ensure compliance with the Act.

In accordance with the Hazardous Substances and New Organisms Act model, the legislation would include a right to appeal a compliance order, and would create a new offence for failing to comply with a compliance order.

Improvements to key enforcement and compliance powers

Express power to require name and address, and for person to produce passport

The Act does not include any express power to require a person to provide their name and address. The power to require this information is a basic element of effective law enforcement, and can be seen in other legislation such as the Animal Welfare Act 1999.

There is also no specific power to require a person arriving in New Zealand to produce their passport, although the ability to make this requirement does fall within the scope of more generic powers to make goods available for inspection.

It is proposed to amend the Act by adding a power to require suspected offenders to provide their name, address, and date of birth, and by adding a specific power to require the production of a passport at the border.

Power to question persons and require production of documents

The Act includes duties for people to provide information in specific situations, generally relating to the assessment of risk as people and craft enter New Zealand. Search warrants can also be obtained to authorise the seizure of evidence of offending.

The Act does not, however, include general powers to require information in the context of investigating potential offending against the Act. Some of the investigations that MAF needs to carry out in a “post-border” situation, where goods may have been unlawfully imported, present complex factual situations that are difficult to unravel. To enhance the ability to effectively carry out these investigations, consideration is being given to adopting, for enforcement purposes, similar powers to those available under the Fisheries Act, to require persons to answer questions, and produce documents.

Authority for questions on passenger declaration card

Passengers arriving in New Zealand are required to complete a declaration card. The main focus of the card is on the goods that a passenger has in their possession. The ability to require a declaration in respect of goods is clearly authorised by section 30 of the Act.

The declaration card also includes questions about other matters that are relevant to risk assessment, such as the person’s occupation, the places they have recently visited, and whether they have been involved in certain activities such as hiking. The authority to require a declaration in relation to some of these matters is not clearly provided for in the Act. It is proposed to amend the Act to include a clear authority to require a declaration in relation to all of the matters that are included in the passenger declaration card.

Civil Liability provisions

Consideration is being given to adding civil liability provisions into the Biosecurity Act. Civil liability provisions have been used in other legislation, such as the Commerce Act, where substantial economic benefits can be gained from offending. Similar provisions have also been included in other legislation, such as the Hazardous Substances and New Organisms Act (the HSNO Act). Under the HSNO Act model, there are two kinds of civil liability orders that can be sought from the courts.

One kind is what is called a pecuniary penalty order. MAF, as the enforcement agency for new organisms under the HSNO Act, can apply to the High Court for an order if certain provisions of the Act have been breached. It is only necessary to prove the breach to the civil standard of proof, and the legislation directs the Court to consider various factors in determining the size of the penalty, such as the extent of loss or damage to any person or to the environment.

The other kind of order can be applied for by a person who has suffered loss as a result of another person breaching certain provisions in the legislation.

Examples of the situations where civil liability orders may be appropriate in responding to non-compliance under the Biosecurity Act include the following:

- a deliberate breach of border controls that causes loss to domestic producers; and
- cases where border controls are repeatedly breached because there are economic incentives to do so.

8. Other Proposed Changes

Other aspects of the Biosecurity Act also need attention. Other proposed changes are as follows:

8.1. ACCESS TO RURAL PROPERTY DATA

As referred to in our November 2009 information paper, MAF is developing “Farms On Line” as a Crown-owned resource to provide a more complete, robust and accurate rural property register to support MAF to prepare for, and respond to, biosecurity threats.

MAF confirms its proposal to amend the Act to enable access to local authorities’ rating information databases for up-to-date personal contact information about rural property. The amendment would require local authorities to give MAF’s Director-General access to this information, to be held in the Farms On Line database. The general purpose of such access will be to provide for the continuous monitoring of New Zealand’s status in regard to pests and unwanted organisms. Participation in Farms On Line by property owners and occupiers will not be compulsory.

8.2. AMENDMENTS TO COMPENSATION CLAIM PROCESSES

Section 162A of the Act provides an entitlement to compensation, in cases where powers under the Act are used to manage or eradicate an organism, and the exercise of those powers causes loss as a result of:

- damage to or destruction of property; or
- restrictions on the movement or disposal of goods.

No compensation is paid if the loss relates to unauthorised goods or uncleared goods.

No changes to the basic entitlement to compensation are proposed. The two changes that are proposed in relation to compensation are:

- inserting an express legislative requirement for claimants to mitigate their losses; and
- imposing a time limit for the lodging of compensation claims

Mitigation of losses

The proposal is to include an express requirement in the Act for claimants to mitigate their losses.

The requirement for a claimant to mitigate their losses is one that the courts have developed in relation to common law claims, such as claims for losses caused by negligence. The idea behind the requirement is that a claimant should not be able to claim all the losses caused by another person’s wrongdoing, if the claimant has not taken reasonable steps to limit their losses.

The issue of mitigation of loss can arise in relation to Biosecurity Act compensation claims. For example, if movement controls limit the use of business assets, and are in place for a lengthy period, it may be possible for the claimant to use their assets in an alternative way to generate some income until the movement controls are lifted.

In implementing the compensation provisions, MAF currently applies a requirement for claimants to take reasonable steps to mitigate their losses. MAF is satisfied that this is based on a sound interpretation of the losses that can legally be claimed under section 162A. There would be advantages, however, in expressly including a requirement for claimants to take reasonable steps to mitigate their losses. The advantages would be in making the requirement more transparent to claimants, and reducing the scope for dispute over its application.

Time limit for claims

The proposal is to set a time limit of one year, within which compensation claims must be lodged with MAF.

The Act does not impose any time limit for lodging claims with MAF. While most claimants submit their claims promptly, there are some cases where claims are not made until some years after the event. This creates difficulties for MAF in managing the funding that is allocated to incursion responses. The verification of claims also becomes more difficult when the events that they relate to occurred some time in the past.

MAF proposes that the one-year time limit would apply from the date when the loss suffered by the claimant is verifiable. There are various options for determining the point from which a time limit is measured. The proposed option has been chosen because it can take some time after powers are exercised before a claimant is able to verify their losses and complete their claim.

The legislation would still enable MAF to consider late claims, in cases where it would be unjust to disallow the claim. This would allow the time limit to be waived if an event beyond the control of the claimant, such as illness or accident, prevented compliance with the time limit.

8.3. APPROVAL OF TRANSITIONAL FACILITY OPERATORS

The system for approving facility operators is strongly biased towards approval of operators. This makes it difficult for MAF to prevent poor operators from entering the system, or stop known poor performers from becoming operators of other facilities.

The current approval criteria for operators in section 40 of the Act includes that the person is a “fit and proper person”. There is no guidance in the legislation as to what criteria would satisfy this requirement, and in practice, MAF has found the lack of criteria has meant the burden of proof is on MAF to demonstrate why an applicant should not be approved.

In response to these concerns, MAF proposes that criteria be added to the Act to inform when a person should be considered a “fit and proper person” to be a facility operator. Current proposals for relevant criteria are:

- any specified conviction entered against the applicant;
- whether there has in the past been a serious or repeated failure by the applicant to comply with the standards for transitional or containment facilities;
- whether there are other grounds for considering that the applicant is likely in the future to fail to comply with the standards for transitional or containment facilities; and
- any other matters that the Director-General considers relevant.

8.4. CHANGES TO CRITERIA FOR POWER TO EXAMINE ORGANISMS (SECTION 121)

Section 121 of the Biosecurity Act 1993 allows inspectors and authorised persons to examine or test any goods or material for purposes set out in that section, either at the border or post-border. However, the inspector or authorised person can only use the power if he or she believes on reasonable grounds that the goods (etc) harbour pests or unwanted organisms. Sometimes, information from a test may be needed to confirm a belief that the goods or material do **not** harbour pests or unwanted organisms. In addition, not all pests or unwanted organisms display signs that would lead to the “reasonable belief” required under the section.

We propose to remove the ‘reasonable belief’ requirement from the section. This change will mean that the section has the necessary degree of flexibility to enable information to be collected in the full range of situations that it may be required for appropriate biosecurity management, for example to underpin biosecurity decisions and report on New Zealand’s pest or disease status.

8.5. OTHER TECHNICAL AMENDMENTS PROPOSED

Issue	Proposal
1. The section of the Act relating to the power to seize abandoned goods (s119) is ambiguous, and includes the term “restricted goods”, which is an undefined term.	Clarify section to remove ambiguity. Remove reference to “restricted goods” from section 119.
2. The section of the Act relating to clearance of certain new organisms and qualifying organisms (s28B) does not refer to all the cases where it might be necessary to give clearance for a “new organism” under the HSNO Act	Amend section 28B so that it also refers to cases where ERMA has approved the use of organisms in an emergency.
3. Delegation of powers and functions that are set out in a Gazette notice	Amend the Act to clarify that the Director-General’s power to delegate includes the delegation of powers and functions that are conferred by a Gazette notice issued under the Act.
4. Use of powers for audit purposes	Specify that persons may be appointed for the purpose of auditing, and limit the powers available to these appointees.
5. Validity of reference to lists	Clarify that it is valid for instruments issued under the Act to refer to lists where needed, and that references to lists are taken to be a reference to the most recent version of the list.
6. Power to direct inspectors and authorised persons in the exercise of their powers	Review the scope of the power to direct inspectors and authorised persons so that it allows the appropriate decision maker to exercise judgement,

7. Minor wording issue relating to definition of "organism", to remove any suggestion that human beings and any genetic structure derived from human beings are considered organisms under the Act.

8. Scope of transitional facility directions under section 125 is confined to specifying how long goods must remain in the facility for.

and the right balance to be struck.

Proposal is to insert the words "subject to paragraph (a)" at the beginning of paragraph (e) of the definition of "organism" to remove ambiguity.

Amend section 125, so that directions can also relate to how the goods are to be dealt with in the transitional facility.
