
6 COMMONWEALTH LEGISLATION

6.1 Introduction

Throughout the Report, the Panel has made recommendations that have legislative implications. Giving effect to these recommendations in the *Quarantine Act 1908* would require significant amendments to that Act. The question is whether the opportunity should be taken to overhaul the legislation to make it modern and simpler to administer.

6.2 Current arrangements

The Commonwealth's primary biosecurity legislation is the *Quarantine Act 1908* with a number of subordinate pieces of legislation including the *Quarantine Regulations 2000*, the *Quarantine Proclamation 1998*, the *Quarantine (Cocos Islands) Proclamation 2004*, the *Quarantine (Christmas Island) Proclamation 2004*, the *Quarantine Service Fees Determination 2005* and the *Quarantine Service Fees (Australia Post) Determination 2005*.

The *Export Control Act 1982*, the *Imported Food Control Act 1992* and the *Australian Meat and Livestock Industry Act 1997* are also relevant to biosecurity. Other related legislation includes the *Environment Protection and Biodiversity Conservation Act 1999* and the *Gene Technology Regulation Act 2000*.

As mentioned in Chapter 2, the states also have biosecurity legislation.

6.3 Current debates and views in submissions

The core of the *Quarantine Act 1908* was drafted over a century ago. Since that time, biosecurity risks have changed significantly with modern trade and movement of goods and people. As a result, in its Issues Paper, the Panel posed questions around whether the Act was still relevant and effective or whether it should be rewritten and modernised (Quarantine and Biosecurity Review Panel 2008).

Many submissions argued for a comprehensive modernisation of the Act. For example, Ms Meryl Stanton, a previous Executive Director of AQIS with experience in administering the Act, argued that:

‘The Quarantine Act is a century old and looks it. How much better it would be to have a coherent law, with easily tracked regulations, that could serve as a tool for policy makers, operational managers and staff in their decision making, as a clear guide to importers and exporters (most of whom are keen to comply) and as a compliance tool for law enforcers.’ (Meryl Stanton submission, p. 2)

Other submissions put a similar view.

‘The Quarantine Act 1908 (as amended) should be re-written and modernised, simply because the dynamic times we live in have outpaced the Act’s scope and reach.’ (Australian Institute of Agricultural Science and Technology submission, p. 1)

‘It [the Act] needs to be rewritten and modernised. A revamp about once a century would be the minimum you can get away with one would think.’ (DigsFish Services Pty Ltd submission, p. 3)

However, the view was not unanimous. The Quarantine and Exports Advisory Council noted the power and flexibility that the current Act offers, and suggested that it should only be comprehensively rewritten if it was preventing AQIS from achieving its functions.

‘The test here would be to ask whether AQIS is prevented in any way from delivering its quarantine functions by gaps, weaknesses or ambiguity in the current legislation. From QEAC’s perspective this appears not to be the case.’ (Quarantine and Exports Advisory Council submission, p. 19)

Others supported this more conservative approach, suggesting more minor amendments to the Act.

‘There does not appear to be a compelling case for a complete restructure and rewrite of the Quarantine Act (1908). Some improvements in searching through the Act for sections related to human health and animal health might be made if those were put into separate sections.’ (Australian Horse Industry Council submission, p. 7)

‘One amendment to the legislation that we believe is essential is the inclusion of a clause setting out the object or purpose of the Quarantine Act. Such a clause might help in ensuring that interpretations of sections of the Act were realistic and cognisant of operational requirements.’ (Food and Beverage Importers Association submission, p. 7)

Some submissions suggested a legislative amendment to separate out human health from animal and plant health.

‘The human health aspects of the Act should be removed and placed into different legislation.’ (Department of Primary Industries and Resources South Australia submission, p. 5)

Others argued that a single piece of legislation was the best approach because it removed duplication and avoided demarcation disputes.

‘... it is an arbitrary distinction to separate out the human health aspects, with potentially significant implications in terms of ensuring efficiency and consistency in implementation of the quarantine and biosecurity system.’ (Western Australian Government submission, p. 5)

The separation of human and animal and plant health has been considered in the past. In 1984, a process was started to separate the *Quarantine Act 1908* into a Human Quarantine Act and an Agricultural Quarantine Act. However, it was deferred in 1993 because of competing pressures and a lack of demand for the change. This experience provides some insight into the costs, risks and distractions that a significant legislative process can involve.

Some state governments have already started the process of modernising their biosecurity legislation. For example, Western Australia has the *Biosecurity and Agriculture Management Act 2007* which brings together regulation that was previously spread across 17 different Acts. The *Biosecurity and Agriculture Management Act 2007* will come into effect once the associated regulations have been drafted. The Queensland Government may also move in this direction, having noted the need to develop more contemporary state legislation in a recent biosecurity discussion paper.

6.4 Panel’s consideration

The *Quarantine Act 1908* is not a modern piece of legislation and it shows. There is no consistent logic in the placement of provisions. The interrelationship between the Act, the Proclamations and the Regulations makes the whole package difficult to understand. The intent of the Act is unclear, in part due to the fact that unlike more recent legislation, there is no statement of objectives which flows through into the individual provisions. There is no description in the legislation of Australia’s Appropriate Level of Protection and no provisions to enable the Minister to determine Guidelines for the conduct of Import Risk Analyses.

The Act was clearly constructed to rely principally on the Commonwealth’s Constitutional quarantine power. It is focused accordingly on pests and diseases that can be vectors of disease transmission, and in particular on control of the border. Biosecurity is a much broader concept than this. In places the drafting of the existing legislation is not sufficiently broad to call up biosecurity relevant

powers enlivened by Australia's treaty obligations, or the Commonwealth's powers in relation to corporations and international and interstate trade and commerce.

The core of the *Quarantine Act 1908* was drafted a century ago. Since that time, biosecurity risks have changed significantly as have Australia's international trade interests and treaty obligations. The Act has been progressively amended to cater for these changes, leading to overlapping provisions and powers. In some cases, activities are now supported by more than one source of authority, while in others, apparently similar provisions require specific steps to be followed if the actions taken are to be lawful. Some specific examples of administrative complexity are shown in Box 15.

BOX 15 *Quarantine Act 1908* – examples of administrative complexity

Example: Section 67 establishes offences for importing goods in contravention of the Act. The illegal items may be seized under section 68 of the Act. However, for a successful prosecution, related goods may also need to be seized, for example suitcases constructed to hide the goods. Section 68 does not permit the seizure of those related goods. The only other relevant provision is section 66AD, but the powers in that provision can only be exercised if the premises have been entered under section 66AB. Section 66AB is linked to the exercise of specific powers set out in section 66AA. It is not clear whether premises that have not been entered with the express purpose of exercising powers set out in section 66AA would be premises entered under section 66AB. The complexity in relation to premises is even greater when the seizure is occurring at an airport.

Example: In managing risks arising from the entry into Australia of an overseas vessel, quarantine officers need to gain ready access to overseas vessels at the port of entry. An example of such a power is section 70 of the Act, which provides that an officer may board and examine things found on the vessel at a port or place in Australia. However, to board a vessel, the officer must first obtain entry to the port. Many first ports are now privately owned. The ability of the officer to enter private premises without consent is limited to places described in section 66AB of the Act, which does not include privately owned ports. Therefore, the officer has to obtain either consent or a warrant to enter these ports.

The complexity and variation in the Act is not just an issue for the lay reader. More importantly, it makes the Act very difficult to administer. The Panel has been advised that AQIS often has to seek legal advice on how to interpret individual provisions and which provisions to use in different circumstances. This complexity not only adds costs in terms of legal advice, but increases the training burden for the regulatory agency, induces unduly cautious reactions by management and reduces the likelihood of successful prosecutions for breaches of the Act.

Many of the Panel’s recommendations have legislative implications (see Box 16). Implementing them within the current Act would be a significant undertaking, particularly given the existing complexity of that Act. Even small changes are likely to involve significant consequential amendments. The Panel’s view is that rather than trying to rework the legislation yet again, the opportunity should be grasped to develop a new Act—the Biosecurity Act.

BOX 16 Recommendations requiring legislation

- Extending the Commonwealth’s legislative reach beyond the border and to implement fully its treaty obligations (Recommendations 1, 2 and 4-8).
- Establishing the National Biosecurity Commission and the National Biosecurity Authority (Recommendations 12, 13, 16-18, 22 and 33).
- Establishing the Inspector General of Biosecurity (Recommendations 20 and 69).
- Establishing the role for the Minister in setting the Appropriate Level of Protection and making Guidelines for decision making on whether the Appropriate Level of Protection can be met (Recommendation 31).
- Process for making import permit decisions (Recommendation 36).
- Process for Biosecurity Import Risk Analyses (Recommendation 37).
- Providing for merits review in specific circumstances (Recommendation 39).
- Creating a targeted offence for interfering with officers in the performance of their duties (Recommendation 15).

As the title suggests, the Biosecurity Act would draw on the broad set of Commonwealth Constitutional powers to move from a narrow ‘quarantine’ focus to the management of biosecurity risks in a modern trading environment. The Act would start with a clear statement of objectives to this effect, which would flow through into broader yet simpler provisions that provide the powers needed to manage risks across the continuum effectively. Ideally, the new Act would be clear and unambiguous for the regulator and for those being regulated.

The Panel’s view is that the Biosecurity Act should incorporate human health elements, providing a comprehensive approach to biosecurity risk management. To give effect to this proposal, the Department of Health and Ageing would need to be closely involved in developing the new legislation.

Links with other Commonwealth legislation would also need to be considered. For example, in the Panel’s view it would be appropriate to draw into the Biosecurity Act the provisions of the *Imported Food Control Act 1992*. In addition, thought would need to be given to the treatment of biosecurity and the

relationship with existing legislation such as the *Environment Protection and Biodiversity Conservation Act 1999*, the *Gene Technology Regulation Act 2000* and relevant export legislation.

As discussed in Chapter 2, if the Panel's recommendations are accepted, the Act should be developed in parallel with the negotiation of the new National Agreement on Biosecurity with the states. The aim should be to complete the legislation and the Agreement within two years from the acceptance of the Panel's recommendations.

Pending the passage of the legislation, administrative steps should be taken to commence implementation of the proposed structures (Chapter 3). Functions could be grouped into a new 'interim' authority within the Department of Agriculture, Fisheries and Forestry and appointments made to an interim, advisory National Biosecurity Commission. The increases in resources to be applied to the pre-border and border functions (Chapter 9) could be progressively applied in advance of the completion of the legislation and intergovernmental agreement.

Recommendation

- 43 A new Biosecurity Act should be drafted to replace the *Quarantine Act 1908* giving effect to the Panel's legislative recommendations, drawing on a much broader set of the Commonwealth's Constitutional powers and providing for modern and effective management of biosecurity risks.