
2 ONE BIOSECURITY – THE COMMONWEALTH, STATES AND TERRITORIES WORKING TOGETHER

2.1 Introduction

One of the principal recommendations of the Nairn Report was the concept of a *quarantine continuum*, encompassing activities undertaken pre-border, at the border and post-border. The Nairn Report noted that while activities across the continuum did not have to be undertaken by a single agency, there was a need for national coordination and consistency.

As noted in the previous chapter, the Nairn Report also promoted the concept of *shared responsibility*. This chapter describes how biosecurity responsibilities are currently shared between the Commonwealth and state governments across the continuum and recommends how this partnership can be improved. Since the Nairn Report, the nature and extent of pressures on the continuum have changed, making an effective working relationship on biosecurity between the Commonwealth and the states more important than ever.

2.2 Current arrangements

2.2.1 Legal and program arrangements and the biosecurity continuum

The Commonwealth's powers to legislate arise from the Australian Constitution. The powers that are most relevant to the regulation of biosecurity are the quarantine power, the external affairs power, the international and interstate trade and commerce power and the corporations power, which form part of section 51 of the Constitution. The external affairs power is particularly relevant in the context of the SPS Agreement, International Health Regulations and environmental treaties such as the *Convention on Biological Diversity*.

To date, the Commonwealth has not exercised its full Constitutional power. Rather, the Commonwealth's legislation, the *Quarantine Act 1908*, has

primarily focused on regulating the border and pre-border activities. Examples of Commonwealth activities in these areas include Import Risk Analyses by Biosecurity Australia and quarantine screening and inspection of vessels, goods and passengers arriving at points of entry into Australia.

Post-border activities have generally been understood to be the responsibility of state governments. The Commonwealth legislation does include provisions that potentially apply to goods and persons anywhere in Australia, including beyond the border. However, these provisions by and large focus on emergency situations.

The Victorian Government submission described the relationship as follows:

‘The prevention of the spread of exotic pests and diseases is a shared responsibility of all states and territories, industry and the community. The prevention and mitigation of these pests entering Australia is the responsibility of the Federal Department of Agriculture, Fisheries and Forestry (DAFF) through Biosecurity Australia (BA) and the Australian Quarantine and Inspection Service (AQIS).’ (Victorian Government submission, p. 1)

The Commonwealth does, however, make some significant post-border program investments. These include investments in:

- improved exotic and emergency pest and disease preparedness;
- the health status of animal and plant industries through the Commonwealth’s financial contributions to Animal Health Australia and Plant Health Australia;
- awareness programs aimed at the business sector and the community;
- monitoring and surveillance programs, including the Northern Australia Quarantine Strategy (see Chapter 7);
- eradication of specific emergency pests and diseases such as equine influenza, red imported fire ants and citrus canker; and
- the maintenance of significant biosecurity infrastructure, such as the Australian Animal Health Laboratory (see Chapter 7).

From the viewpoint of human health, imported food arrangements are similar to those described above, in that the Commonwealth’s role under the *Imported Food Control Act 1992* is largely pre-border and border related. The Commonwealth’s role ceases at the time that the food is released by the Commonwealth’s authorised officer. In terms of exports, the Commonwealth employs the services of the states to conduct some inspection functions under the *Export Control Act 1982*. Commonwealth/state relationships in this area are set out in various memoranda of understanding.

2.2.2 Commonwealth/state agreements, decision making and consultative forums

A number of agreements have been developed to help clarify the respective responsibilities of the Commonwealth and state governments. Examples include the *Memorandum of Understanding on Animal and Plant Quarantine Measures* (see Box 1) and the deeds covering the emergency response arrangements (see Chapter 4).

BOX 1 Memorandum of Understanding on Animal and Plant Quarantine Measures

The *Memorandum of Understanding on Animal and Plant Quarantine Measures* was signed by the Commonwealth and the states on 21 December 1995, following Canada's successful World Trade Organization action against Australia in regard to salmon (see Box 4). It recognises that Australian governments need to work cooperatively to ensure that Australia meets its international obligations under the SPS Agreement.

The principal provisions require the states to:

- consult fully with the Commonwealth before implementing any relevant sanitary or phytosanitary measures which could inhibit trade into Australia and which may not conform with the provisions of the SPS Agreement;
- not apply measures which would not conform with the provisions of the SPS Agreement; and
- take appropriate corrective action as a matter of urgency if it is found that a measure does not conform to the SPS Agreement.

On 24 October 2002 the memorandum was extended to include more detail on Commonwealth responsibilities, including that the Commonwealth:

- is committed to addressing regional differences in pest and disease status and risk and consequent SPS measures as part of an Import Risk Analysis;
- will consult fully with the states on the Import Risk Analysis work program and on Import Risk Analyses about to commence;
- will, in conducting each Import Risk Analysis, take into account information on regional pest and disease status and risk profile provided by the states; and
- will consult with the states at every stage in the Import Risk Analysis process to resolve issues arising from regional differences in risk.

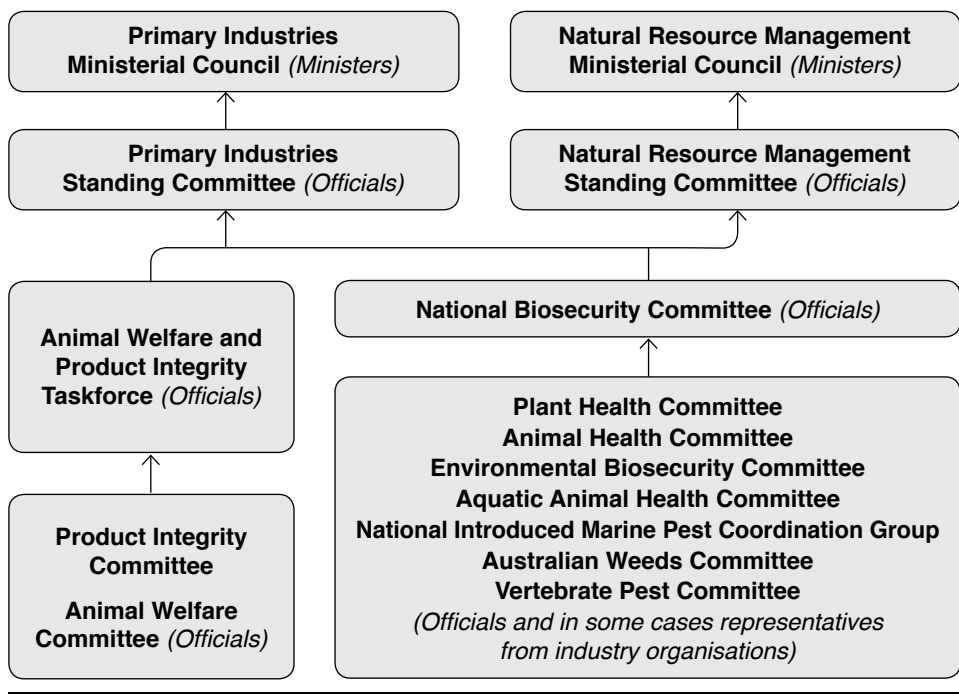
In return, the states agreed they would assist in each stage of the Import Risk Analysis process wherever possible, in particular through early and comprehensive input of regional pest and disease status and risk information and by making specialist staff available. States also agreed to work with the Commonwealth in communicating the results of Import Risk Analyses to regional businesses and communities.

In addition, governments have established institutional arrangements for joint discussion and decision making on biosecurity policy. These include the Natural Resource Management Ministerial Council, the Primary Industries Ministerial Council and subcommittees associated with biosecurity (see Figure 2). There are also other Ministerial Councils that deal with biosecurity-related matters, for example, the Australia and New Zealand Food Regulation Ministerial Council.

The National Biosecurity Committee is one of the sub-committees shown in Figure 2. Part of its responsibility is to coordinate the implementation of AusBIOSEC, a whole-of-government project to enhance the biosecurity system for primary production and the environment (see Box 2).

The Commonwealth and the states have also developed an intergovernmental agreement which establishes a national system for dealing with the risks of marine pest incursions. The national system aims to implement Australia’s obligations under the International Maritime Organization’s *Convention for the Control and Management of Ships’ Ballast Water and Sediments*. Australia signed the Convention in 2005. It is yet to be ratified. International standards for biofouling management have not yet been established. Further detail on the national system is described in Box 3.

Figure 2 Current Ministerial Councils and subcommittees associated with biosecurity



BOX 2 AusBIOSEC

AusBIOSEC is a project being progressed under the auspices of the Natural Resource Management Ministerial Council and the Primary Industries Ministerial Council to improve the Australian biosecurity system for primary production and the environment.

One of the priorities for AusBIOSEC is to address the gaps which exist in the current system in relation to pests and diseases with environmental and social effects. National response and cost sharing arrangements are being developed through an Intergovernmental Agreement. The cost sharing arrangements include: national significance criteria; minimum information requirements; criteria for assessing the technical feasibility of a proposed response plan; and costs that may be eligible for national cost sharing under a national response plan.

In addition, AusBIOSEC encourages collaborative work across jurisdictions in areas such as: response planning; information sharing and management; research and development; communication and awareness; surveillance; reporting; biosecurity diagnostic systems; and intra- and interstate biosecurity arrangements.

The Intergovernmental Agreement is currently being considered by governments and is due to be signed in 2009.

BOX 3 National System for the Prevention and Management of Marine Pest Incursions

The National System for the Prevention and Management of Marine Pest Incursions addresses biosecurity risks by preventing pest incursions, ensuring coordinated emergency response actions, and providing for the management and control of introduced marine pests.

Under the *Intergovernmental Agreement on a National System for the Prevention and Management of Marine Pest Incursions*, which is currently being revised, the Commonwealth is responsible for ensuring international vessels comply with mandatory ballast water management requirements under the *Quarantine Act 1908*, while the states have responsibility for legislating for ballast water sourced within Australia. Victoria is currently the only state that regulates the movement of intra- and interstate ballast water.

AQIS also conducts biofouling inspections for international vessels arriving in Australia on a case-by-case basis, targeting yachts and other high-risk vessels such as slow moving dredges, drilling platforms and illegal fishing boats. Australia has developed voluntary biofouling management guidelines to assist vessel operators manage biofouling. Western Australia is the only state to have legislated to control the biosecurity risks posed by biofouling on vessels moving in domestic waters.

2.3 Current debates and views in submissions

2.3.1 Risk to Australia's treaty obligations arising from state decisions

An area of tension in the Commonwealth/state relationship is the nexus between Commonwealth Import Risk Analysis decisions and their application at a state level.

While the *Memorandum of Understanding on Animal and Plant Quarantine Measures* sets out basic requirements for the Commonwealth and the states, it is not legally binding. The potential for state-level measures to inhibit trade into Australia remains, leaving Australia at risk of breaching its treaty obligations. The end result can be significant, as was demonstrated when Tasmania took unilateral action in relation to salmon imports, leading to an additional finding of World Trade Organization inconsistency in a dispute brought by Canada against Australia. This case was described by the Department of Foreign Affairs and Trade in their submission (see Box 4).

BOX 4 Australia's experience in relation to salmon imports

'Australia – Measures Affecting Importation of Salmon involved a complaint by Canada against Australia's quarantine prohibition on fresh, chilled or frozen Canadian salmon. The World Trade Organization Appellate Body found that Australia's final Import Risk Analysis did not conform with SPS provisions and therefore the import prohibition was not based on a proper risk assessment. The Appellate Body also found that the different measures applied between fresh, chilled or frozen salmon and other fish having diseases in common (for which imports were not prohibited) amounted to discrimination or a disguised restriction on international trade.

Australia was accorded eight months to bring its measures into WTO consistency. During that period, Australia conducted revised risk assessments. As a result, the prohibition on wild, ocean caught Pacific salmon was replaced with a suite of quarantine measures; quarantine measures on certain other fin fish were tightened. Canada formally complained that the measures taken to comply, as well as a new quarantine measure by Tasmania, were still WTO-inconsistent. The compliance panel found that, with the exception of one of the Commonwealth's 11 quarantine measures applied to salmon, Australia's revised measures were consistent with its SPS obligations. However, the panel found that the Tasmanian measure was not based on a risk assessment and therefore was WTO-inconsistent. Australia reached agreement with Canada on an adjusted measure to replace the inconsistent Commonwealth measure and also in relation to steps that Australia would take to achieve Tasmania's observance of Australia's SPS obligations under the existing Memorandum of Understanding between the Commonwealth, States and Territories on quarantine.'

(Department of Foreign Affairs and Trade submission, p. 14)

Despite the clearly expressed views of the World Trade Organization Appellate Body, a number of states questioned the Commonwealth's ability and willingness to recognise individual pest and disease status and continue to apply state specific restrictions on imports. The combined Western Australian Government submission noted:

‘Regional differences in pest/disease status have been inconsistently applied in risk analysis. The risk assessments often overlook or ignore the concerns of States/Territories or regions that have provided evidence of pest free status or official control being in place for a particular species of note.’ (Western Australian Government submission, p. 3)

In Tasmania, this concern led the Tasmanian Government to introduce a state Appropriate Level of Protection and state-level risk analyses.

‘Tasmania’s ALOP statement is entirely consistent with that adopted nationally although it is perhaps rather more informative. Where we sometimes differ from the rest of the country, and what other jurisdictions appear to have difficulty with, is that we carefully consider the consequences of pest introduction specifically for Tasmania and the sort of Tasmania we want to project to the rest of the world.’ (Tasmanian Government submission, p. 4)

2.3.2 Disagreement over responsibilities

While there is widespread support for the concept of a seamless biosecurity continuum, evidence provided to the Panel indicates that disagreement over specific roles and responsibilities is leading to gaps in the continuum, to the detriment of the overall system. Areas of contention include the Commonwealth’s role in post-border investigation of pest and disease detections and monitoring and surveillance and, in particular, the provision of resources to support this activity.

The debate is illustrated in the terminology adopted by different governments. For example, in its submission, the Tasmanian Government characterises post-border detections as ‘quarantine barrier breaches’, proposing that responsibility for managing the breach should rest with the Commonwealth. Conversely, the Commonwealth refers to such incidents as ‘post-quarantine detections’ and has argued that responsibility for action rests with the relevant state biosecurity agency.

The Quarantine and Exports Advisory Council noted that there was not an effective partnership between the Commonwealth and the states in relation to monitoring post-border leakage and collaborative amendment of biosecurity measures. It suggested that:

‘This is hampered by the limited information sharing and an attitude that AQIS systems have failed at the post-border stage rather than recognising this as an important element in the quarantine/biosecurity continuum.’ (Quarantine and Exports Advisory Council submission, p. 6)

The Panel is aware that work is underway to resolve the specific issue of post-border detections, however, the examples above do indicate a lack of clarity around the Commonwealth’s post-border role.

The Queensland Government noted that the relationship between the Commonwealth and the states generally works well, but was critical of the shifting relative balance between Commonwealth and state post-border responsibilities over time. Its view was that the Commonwealth should be investing more post-border to balance sharing of responsibility.

‘Over time, the role of the States has significantly expanded from controlling or eradicating endemic pest and diseases to the prevention, surveillance and response to exotic or emergency pests and diseases that threaten trade, the environment or our way of life ...

The situation is further exacerbated when States have to mount and fund responses due to a breakdown in the quarantine system, as was the case with equine influenza and citrus canker.’ (Queensland Government submission, p. 2)

The Victorian Government also discussed the issue of post-border responsibilities, citing as an example the import conditions set by the Commonwealth to ensure that green prawns imported for human consumption are not used for bait. This example was also raised by other states. The Victorian Government argued that in setting the import conditions, the Commonwealth had in effect shifted its risk management responsibilities to the states by imposing conditions that need post-border enforcement, a role that the Commonwealth would like the states to fill.

A similar concern was raised by Australian Pork Limited in relation to post-border compliance associated with pork imports. It argued that the Commonwealth was failing to meet its responsibilities because of a lack of appropriate mechanisms to enforce post-border requirements.

‘... APL asks how can AQIS be confident that all of the “miscellaneous” boneless frozen swine meat ... being imported into Australia ... is destined for ham and smallgoods production? How is AQIS able to track and verify compliance with this through its currently designed audit system (and within the remit of its responsibilities as defined by the Quarantine Act)?’ (Australian Pork Limited submission, p. 39)

2.3.3 The need for collaboration

Demands on the overall system continue to increase. The volume of trade is growing and risk profiles are changing. Monitoring and surveillance needs are increasing as more trading partners move toward requiring active verification to substantiate pest and disease freedom claims (an approach described as ‘known not to occur’ rather than ‘not known to occur’). In addition, the system faces new priorities in terms of threats to both the terrestrial and aquatic environments.

The capacity of jurisdictions to respond to these increasing demands varies, with the priority given to biosecurity depending on how much stands to be lost as a result of an outbreak and what experience governments have had with outbreaks in the past. Variable levels of commitment have implications for the national integrity of the biosecurity system.

‘The nature of surveillance systems varies across the states and territories. Increased Commonwealth funding may provide an appropriate mechanism to standardise all the states and territories’ approaches. Disparities exist with regard to staffing levels, deployment, surveillance mechanisms and data management, and need to be addressed.’ (Victorian Government submission, p. 4)

Several states indicated that they were spending considerably more time responding to detections and dealing with outbreaks, with fewer resources available for longer-term investments in infrastructure, monitoring and surveillance, and capacity building. The Commonwealth and the states raised similar concerns in relation to a shortage of skilled people, appropriate infrastructure and overall resources. Recognising these demands and constraints, there was general support for enhanced collaboration between the Commonwealth and the states.

‘Post Border quarantine requires strong partnerships between the Commonwealth and the States and Territories ... It is essential that States and Territories are much better engaged with the Commonwealth at this post-border part of the quarantine and biosecurity arrangements.’ (National Farmers’ Federation submission, p. 4)

Many submissions noted the potential for AusBIOSEC to increase the level of collaboration between jurisdictions, with the initiative acknowledged as an important step in the right direction. However, widespread concern was expressed about slow progress in developing AusBIOSEC. Questions were asked about its capacity to develop more than emergency response agreements for environmental pests and diseases not covered by existing emergency response and cost sharing arrangements.

The Queensland Government submission pointed to a broader leadership role for the Commonwealth in identifying and funding national priorities. It proposed a national biosecurity program, linked to performance standards and formal monitoring and auditing.

‘There is a real opportunity for the Commonwealth Government to take a leadership role in this area by ensuring a clear line of sight between national priorities and funding sources. Two suggestions which are offered for consideration to address these issues are:

- Establishment of a national biosecurity program where national activities are funded through a national funding stream linked to performance standards and formal monitoring and auditing. Delivery mechanisms could continue to use a variety of Commonwealth, State and private agencies; and
- A formal agreement between the Commonwealth and State Treasuries for funding of new national programs. This would require establishment of a much more robust approval mechanism than currently exists.’ (Queensland Government submission, p. 4)

2.3.4 Variable state biosecurity requirements

A number of business organisations flagged the difficulties they face as a result of different biosecurity rules imposed by different states. While the importance of differences in pest and disease status was acknowledged, it was suggested that in some cases state biosecurity requirements were not science-based or least trade restrictive.

Nursery and Garden Industry Australia expressed concern about the costs to businesses that arise from different state approaches—including biosecurity restrictions, quarantine zones, pest and disease freedom and biosecurity protocols. A particular issue is the way in which states undertake pest and disease risk assessments, and the flow-on effects in terms of variable risk management protocols. It argued for a national risk assessment methodology to reduce red tape and compliance costs for businesses.

‘... inconsistencies across the country raise major questions surrounding the science that supports such significant differences between departmental experts. A nationally adopted and implemented process that mandates the uniform processes for plant biosecurity across Australia and ensuring the protocols are relative to the risk needs immediate action.’
(Nursery and Garden Industry Australia submission, p. 12)

Nursery and Garden Industry Australia also complained about the lack of coordinated databases that set out the biosecurity requirements in different states

in relation to any given product. It said that this led to considerable overhead costs for commercial nurseries preparing product for shipment around the country.

Management of marine pest and disease risks, in particular those associated with ballast water and biofouling, is another area where business groups expressed concern about different state approaches, as well as Commonwealth/state variation. Under current arrangements for ballast water, vessels entering Australian waters are subject to requirements imposed by the Commonwealth. Subsequent coastal ballast water management is the domain of the various states. Shipping Australia expressed concern about this arrangement in terms of lack of national consistency.

‘Victoria, for example, has introduced its own ballast water management regime for interstate and intrastate vessels and Western Australia is considering introducing its own BWM regime which raises concerns with SAL that individual State/Territory procedures will not be consistent with the national regime.’ (Shipping Australia Limited submission, p. 8)

The Industry Working Group on Quarantine and Ports Australia expressed similar views.

The Panel is aware that considerable effort is being made by governments to clarify responsibilities in this area and to establish harmonised approaches. However, the Industry Working Group on Quarantine suggested that a more consistent and efficient regime would be for the Commonwealth to take responsibility for managing both international and domestic ballast water.

‘... it is the general industry view that, from the perspective of achieving the most consistent and efficient regime one national/federal body should be responsible for the management of both international and domestic ballast water.’ (Industry Working Group on Quarantine supplementary submission, p. 15)

In the meantime, there have been a number of marine pest and disease incursions in Australian waters resulting in significant costs to government, business and the environment. At least ten incursions of high-profile pests and diseases are known to have occurred since 1986, including the introduction of the northern Pacific seastar in Tasmania, black-striped mussel in the Northern Territory and Asian green mussel in a number of locations.

Interstate inconsistency was not only noted by business interests. The Queensland Government proposed that model laws should be developed.

‘A perennial issue is the difficulty in achieving timely and consistent legislation across all jurisdictions, especially when national requirements change. An aspirational objective for consideration would be the

development of model biosecurity laws for achieving this consistency in a timely fashion across all Australian jurisdictions.’ (Queensland Government submission, p. 3)

Domestic food arrangements provide an example where states have agreed to adopt harmonised regulatory approaches. A Food Regulation Agreement was developed in 2002 to enable a national approach. The Agreement obliges the states to pass legislation so as to ensure consistent administration and enforcement of the Food Standards Code, including Food Safety Standards. Arrangements of this nature, sometimes underpinned by broadening the scope of Commonwealth law, exist in other regulatory fields including competition law and energy regulation.

2.4 Panel’s consideration

2.4.1 The Commonwealth’s Constitutional capacity

The Commonwealth unquestionably has Constitutional powers that allow for a much broader legislative base than currently exists for biosecurity matters. The Panel’s assessment is that the Commonwealth could extend its reach well into the post-border elements of the continuum almost to the point of managing the entire biosecurity continuum. This broad reach would be based on a combination of the quarantine power, the external affairs power and the international and interstate trade and commerce power—with support from other powers such as the corporations power.

For example, the quarantine power is likely to support Commonwealth legislation that is designed to prevent the spread of pests and diseases from one part of Australia to another, regardless of whether the pest or disease is exotic or endemic. The quarantine power would also support measures to control and eradicate the pest or disease. Through a combination of powers, the Commonwealth could also enter the field in relation to the spread of pests and diseases, including weeds, across state borders and between regions within states.

On the basis of the external affairs power, the Commonwealth could enact legislation to ensure Australia’s compliance with its international trade obligations. For example, a Commonwealth Act could confer authority for goods to be imported into Australia where the Commonwealth has given import approval from a biosecurity viewpoint and World Trade Organization obligations apply. This could override any state law that attempted to impose further biosecurity requirements on import into that state, including indirect import through another state.

The international and interstate trade and commerce power would support laws providing for biosecurity measures in relation to the movement of trade from overseas or interstate.

2.4.2 Extending the Commonwealth's legislative reach

Given the broad scope of the Commonwealth's Constitutional capacity, there is a range of options that could be considered in relation to how biosecurity responsibilities are shared across the Commonwealth and the states.

At one end of the spectrum is a solely Commonwealth approach to biosecurity, with a single Commonwealth Act and biosecurity agency covering the continuum. While the Commonwealth's powers would provide authority needed for most of a national approach, there could still be a need for some referral of powers by the states.

A Commonwealth approach would provide comprehensive coverage, bringing together pre-border, border and post-border elements under a single regulatory and service delivery agency. It would remove the debates which currently occur around roles and responsibilities. However, these benefits would come at the expense of local connections, including linkages with local business and state agricultural and natural resource management agencies. In addition, establishing these new arrangements would be difficult, distracting attention and resources from the business of biosecurity management for a significant period of time. In the Panel's view, this option is not a practical way forward.

At the other end of the spectrum would be a further withdrawal from the post-border arena by the Commonwealth. The Panel's view is that this option would not be sustainable. It would weaken Australia's monitoring and surveillance and emergency response capability and risk its ability to discharge its international treaty obligations.

The Panel's recommended approach is a **One Biosecurity: a working partnership** model, under which the Commonwealth would broaden its legislation, underpinning a partnership with the states (see below for discussion of a new Commonwealth-state compact), so as to make it quite clear that an authority to import goods into Australia under that legislation also authorises the goods to be imported into a state on the same conditions (if any). This implies that goods landed in one state should be able to be moved to another without additional biosecurity conditions being imposed. Any state law which attempted to apply conditions or restrictions on imports in excess of those applied by the Commonwealth would be invalid.

A consequence of this **One Biosecurity: a working partnership** proposal is that it would be important for differences in regional pest and disease status to be genuinely taken into account as part of the import permit decision. Another consequence is that the Commonwealth should improve its legislative capacity to enhance post-border controls of biosecurity risks as well as its operational and financial support for them.

As a corollary, the Commonwealth would need to have an enhanced capacity to enforce import permit conditions on imported products, including in relation to their movement and use beyond the border. The Commonwealth's authority would need to be expanded with systems such as a national traceability scheme developed to underpin it. The traceability scheme would be introduced progressively on the basis of an assessment of risk of classes of imports and the practicality of maintaining traceability at a reasonable cost.

The Panel observes that this would be consistent with traceability systems in Europe and North America which are progressively developing the ability to track biosecurity risk product across the border as well as within the country. While these systems received impetus from BSE and foot and mouth disease outbreaks, they are now being applied in other product areas. Increasingly, with approaches recognising area freedoms and the accreditation of food production and transport chains, these systems extend pre-border. They are relevant to Australia's exports for many commodities. For Australian beef products, the advantages of traceability for export and domestic control in the event of a disease outbreak have led to the National Livestock Identification System.

Increased power would bring with it an increased obligation on the Commonwealth to support the monitoring, surveillance, investigation and, where appropriate, prosecution of post-border biosecurity detections associated with imports. Increased Commonwealth investment should be subject to appropriate matching commitments from the states.

Recommendations

- 1 The Commonwealth's biosecurity legislation should provide that authority given by the Commonwealth to import goods into Australia also authorises the goods to be imported into a state or territory on the same conditions (if any). It should provide that this authority operates to the exclusion of any state or territory law that imposes biosecurity regulation on the direct, or indirect via another state or territory, import of the goods into the state or territory.
- 2 The biosecurity legislation should provide necessary legislative authority for a comprehensive system of tracing imported goods, including from their production or manufacture, through Australia's biosecurity border and into the community, to ensure that, among other things, the Commonwealth is able to enforce any biosecurity conditions imposed on the goods. The specifics, including priorities for application to products or classes of product, should be developed in consultation with relevant stakeholders. Authorised officers should be provided with comprehensive and consistent investigative, enforcement and prosecutorial powers.
- 3 As part of this extended reach, the Commonwealth should increase its resources to support the monitoring, surveillance, investigation and, where appropriate, prosecutions associated with post-border biosecurity detections (see also Recommendation 74).

2.4.3 Ballast water and biofouling

As a signatory to the International Maritime Organization's *Convention for the Control and Management of Ships' Ballast Water and Sediments*, Australia is required to ensure that nationally consistent measures are applied to vessels carrying domestically sourced ballast water. Any variation in requirements between jurisdictions should be supported by scientific evidence, including data from port surveillance and monitoring which confirms the presence or otherwise of marine pests and diseases.

The proposed national system for managing marine pests has been under development for a considerable period of time. Even with its endorsement by all jurisdictions, there is no assurance that the obligations will actually be given effect. This may result in Australia breaching international obligations, assuming the Convention is ratified, and could leave Australia with a less than comprehensive biosecurity system with respect to marine pests and diseases from ballast water.

As a result, the Panel sees merit in the Commonwealth extending its legislative reach to take responsibility for managing biosecurity risks associated with international and domestic ballast water movements. This approach is consistent with that taken for maritime safety and marine pollution. It would simplify legislative and administrative arrangements and ensure that a comprehensive system for ballast water management is implemented.

Under the scheme described above, the Commonwealth would be making science-based decisions on what is an acceptable level of risk in relation to ballast water. The Commonwealth would need to consult with the states in these decisions to ensure that regional pest and disease differences are accounted for, as per the arrangements for Import Risk Analyses described in Chapter 5.

Applying the same model to risks arising from biofouling is more complex. While the role for the Commonwealth in relation to international biofouling risks is clear, the absence of an international convention or agreed international standards makes the Commonwealth's legislative base for domestic biofouling less clear. The lack of current state regulation for many of the vessels that pose a biofouling risk would also make a national regulatory scheme particularly difficult. The Panel notes that Australia has developed biofouling management guidelines but these are only utilised on a voluntary basis.

As a result, the Panel recommends that the Commonwealth's regulatory responsibilities should be limited to biofouling requirements for the arrival of international vessels. Domestic management arrangements should remain with the states, with jurisdictions to work collaboratively to implement a voluntary national scheme for domestic biofouling in accordance with the

Intergovernmental Agreement on a National System for the Prevention and Management of Marine Pest Incursions. The Commonwealth should also promote the development of an international convention and agreed standards for biofouling management through the International Maritime Organization.

To support the proposed ballast water and biofouling regime, the Panel recommends a greater role for the Commonwealth in monitoring and surveillance for priority exotic marine pests and diseases. This is further discussed in Chapter 7.

Recommendations

- 4 The Commonwealth should extend its legislative reach to cover the field with respect to international and domestic ballast water regulation.
- 5 In relation to biofouling, the Commonwealth's legislative reach should be restricted to international vessels arriving in Australia, with the states and territories retaining responsibility for domestic biofouling requirements. The Commonwealth should promote the development of an international convention covering biofouling through the International Maritime Organization.

2.4.4 Emergency situations

Some state governments suggested to the Panel that to remove any uncertainties in handling emergency situations and to provide a more rapid response, the Commonwealth legislation should also provide for the responsible Minister to manage an emergency response nationally. Doing so would reflect agreement that to rely on clear Commonwealth powers would be preferable to relying on state powers that often have subtly different triggers, varying time-frames, and provide emergency response agencies with differing powers and different limitations on those powers. Appropriate Commonwealth powers could actually encourage a more cooperative approach with the states.

The *Quarantine Act 1908* already provides the Commonwealth with the power to manage some emergency situations. However, this power is exercised through a proclamation by the Governor-General and is restricted to the quarantine Constitutional head of power, potentially leaving certain biosecurity emergencies beyond the scope of the Commonwealth's authority. The quarantine power is restricted to the control of the entry and spread of diseases and carriers of diseases that affect people, animals or plants. It is not likely to cover other pests which are not disease vectors, but which are considerable biosecurity threats in their own right, such as Khapra beetle, which is a serious grain storage pest, and

varroa mite which can damage bee populations and hence pollination on which a number of agricultural sectors rely (see Chapter 7).

The Panel's view is that this power needs to be both broader and simpler to operate. It should continue to provide the capacity to authorise state officers to undertake activities on the Commonwealth's behalf. In most cases, this significant power would be used where agreed by the states, for example on the advice of the National Management Group that exists under emergency response arrangements. However, it should not be limited to that situation.

Recommendation

- 6 The biosecurity legislation should continue to provide for national powers to deal with biosecurity emergencies. However, the powers should not be limited to quarantinable pests and diseases and associated measures and emergencies. They should clearly extend to biosecurity measures generally and biosecurity emergencies supported by the Commonwealth's constitutional reach. The opportunity should be taken to rationalise and simplify the existing powers, including by providing that they may be invoked or exercised by the Minister rather than the Governor-General.

2.4.5 Harmonising state approaches

It has already been proposed that the Commonwealth remove the capacity for states to apply additional biosecurity measures to imported products moving across state borders. However, concerns have also been raised about restrictions on the movement of domestic product. As described in Section 2.3.4, variable state biosecurity requirements impose a significant regulatory burden on businesses. It has also been suggested that in some cases specific measures constitute a disguised restriction on interstate trade.

An example was the restrictions that were maintained by some states on the movement of citrus from Queensland after it had been agreed through national consultative committees that citrus canker had been contained. It was put to the Panel that this unjustifiably restricted the movement of Queensland product as well as hampering Australian arguments internationally that citrus canker had been contained. The counter argument was that the restrictions were reasonably held in place until individual states could be assured that lifting them would not have implications in terms of international market access for those states' products. Either way, a consistent national approach took time to implement.

The Panel sees a significant opportunity for Commonwealth law to facilitate harmonised approaches to state biosecurity requirements for interstate trade in

domestic products, in line with the **One Biosecurity: a working partnership** model. The Panel's view is that biosecurity requirements for interstate trade in domestic products should be science-based and not more trade restrictive than required, analogous to the requirements set for Australia under international treaty obligations and also ensuring compliance with section 92 of the Constitution.

Ideally, agreement on regional differences in pest and disease status, and harmonisation of approaches on particular biosecurity measures should be achieved by discussion between the states and the Commonwealth. However, failing agreement, the Panel recommends that the Commonwealth should be provided with a limited legislated capacity to override a biosecurity restriction on interstate trade. The power should be restricted to situations where the Commonwealth Minister has been advised by the proposed National Biosecurity Commission (see Chapter 3) that the biosecurity restriction is not based on sound science and/or is not the least trade restrictive option available. Only a state or the Commonwealth Minister would have the capacity to lodge an application with the Commission for such an assessment.

These are major changes and as outlined further in the following section, the proposed legislative power, and the circumstances in which it would be used, should be discussed comprehensively with the states as an element of an overall approach to upgrading national biosecurity laws and institutions.

Recommendations

- 7 The biosecurity legislation should provide the Commonwealth with the capacity to override a specified law of a state or territory that imposes biosecurity controls on the use, movement, treatment or disposal of domestic goods imported into the state or territory from another state or territory. This capacity should only be available where the National Biosecurity Commission has determined that the biosecurity controls:
 - a are not justified by an examination and evaluation of available scientific information; or
 - b are more trade restrictive than required and so constitute a disguised restriction on interstate trade and commerce in domestic product(s).
- 8 The National Biosecurity Commission may only assess and make such a determination in relation to a biosecurity control under a state or territory law if an application for such an assessment and determination has been made by the relevant Commonwealth or state or territory Minister.

2.4.6 National Agreement on Biosecurity

The Commonwealth has the Constitutional reach to take up the legislative extensions described above without the support of the states. However, to do so would render the overall system less effective. A better approach would be for the Commonwealth to act in partnership with the states under a **One Biosecurity: a working partnership** model. This would include consulting with them on central policy matters such as the Appropriate Level of Protection and the Biosecurity Import Risk Analysis Guidelines as well as the priority to be given to market access requests (see Chapter 5). Given the important role of the National Biosecurity Commission in decision making, the states should also be given a role in appointing the Commissioners (see Chapter 3).

To give effect to the **One Biosecurity: a working partnership** approach, the Panel considers that a National Agreement on Biosecurity should be developed to replace existing agreements and memoranda of understanding, setting out the roles and responsibilities of the jurisdictions, and binding the Commonwealth to consult with the states on the above matters. In addition, the National Agreement on Biosecurity should provide for:

- emergency response policy and arrangements, including the circumstances in which the Commonwealth would utilise its national emergency management powers;
- the steps preceding the Commonwealth's use of its legislative authority to override inappropriate state restrictions on interstate trade in domestic products;
- joint decisions on national priorities for investment by the Commonwealth and the states, including in monitoring and surveillance, research and development and biosecurity infrastructure;
- full and automatic information sharing between jurisdictions in a manner consistent with the requirements of the *Privacy Act 1988*, including information collected through pre-border intelligence activities, border controls (such as interception data) and monitoring and surveillance programs; and
- consideration to be given to practical and least cost mechanisms for implementing Commonwealth and state responsibilities.

One of the programs for discussion under the National Agreement on Biosecurity would be proposed investment by the Commonwealth in monitoring and surveillance for national priority exotic pests and diseases (discussed further in Chapter 7). The Panel's view is that this program should be developed and administered in consultation with the states and business.

The National Agreement on Biosecurity should be overseen by the Natural Resource Management Ministerial Council with referral of matters to the Primary Industries Ministerial Council as required. Capacity should be provided for Ministers from other portfolios, such as health, to be included in discussions as needed.

Recommendations

- 9 A National Agreement on Biosecurity, to underpin a partnership approach between the Commonwealth and the states and territories on biosecurity, should provide for:
 - a the Commonwealth to consult with the states and territories on the Appropriate Level of Protection and Biosecurity Import Risk Analysis Guidelines and priorities for considering market access requests;
 - b the Commonwealth to consult with the states and territories on the appointment of members of the National Biosecurity Commission (other than the Director of Biosecurity);
 - c emergency response policy and arrangements, including the circumstances in which the Commonwealth would utilise its national emergency management powers;
 - d the steps preceding the Commonwealth's use of its legislative authority to override inappropriate state and territory controls on interstate trade in domestic products;
 - e joint decisions on national priorities for investment by jurisdictions, including in monitoring and surveillance (including identifying national priority exotic pests and diseases for Commonwealth investment), research and development and biosecurity infrastructure; and
 - f full and automatic information sharing between jurisdictions (in a manner consistent with obligations under the *Privacy Act 1988*), including information collected through pre-border intelligence activities, border controls (such as interception data) and information gathered through monitoring and surveillance programs (see Recommendation 54).
- 10 The National Agreement on Biosecurity should replace existing intergovernmental agreements such as the *Memorandum of Understanding on Animal and Plant Quarantine Measures* and the *Intergovernmental Agreement on AusBIOSEC*.

2.4.7 Legislation and implementation

Chapter 6 discusses the difficulties associated with administering the *Quarantine Act 1908*. The Panel has reached the conclusion that, rather than continuing to rework the existing legislation, inevitably making it even more complex and difficult to follow than it is now, the opportunity should be taken to develop a modernised and simplified Act—the Biosecurity Act (see Chapter 6).

If the Panel's recommendation is accepted, the Act should be developed in parallel with the negotiation of the National Agreement on Biosecurity with the states. The aim should be to complete the legislation and the intergovernmental agreement within a reasonable period, say two years, from the acceptance of the Panel's recommendations. While agreement with the states is highly desirable, the Commonwealth should reserve the right to proceed unilaterally, or with a limited number of participating states, if agreement is not forthcoming within that timeframe.

The introduction of enhanced Commonwealth support for monitoring and surveillance of nationally significant pests and diseases (see Chapter 7) should be contingent on agreement with the states on appropriate matching commitments on these functions so that Commonwealth funding is clearly a net addition to the national effort, not an exercise in cost shifting (see Chapter 9).

Recommendation

- 11 The aim should be to develop the Biosecurity Act (see Recommendation 43) and negotiate the National Agreement on Biosecurity within two years. While agreement with the states and territories is highly desirable, the Commonwealth should reserve the right to proceed with the Panel's recommendations unilaterally, or with a limited number of participating states and territories, if agreement is not forthcoming within that timeframe.

