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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**BIOSECURITY BILL 2014**

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**EXPLANATORY MEMORANDUM**

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(Circulated by authority of the Minister for Agriculture,  
the Hon. Barnaby Joyce MP)



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## BIOSECURITY BILL 2014

### ***Purpose of the Bill***

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The Biosecurity Bill 2014 (the Bill) will provide the primary legislative means and a modern regulatory framework for the Australian Government to manage the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health, the environment and the economy.

The Bill is designed to manage biosecurity risks—including the risk of listed human diseases—entering Australian territory, or emerging, establishing themselves or spreading in Australian territory or a part of Australian territory. The Bill will also enable the management of risks relating to ballast water and sediment and biosecurity emergencies. The Bill will give effect to Australia's international rights and obligations, including under the World Health Organization *International Health Regulations 2005* (International Health Regulations), the World Trade Organization *Agreement on the Application of Sanitary and Phytosanitary Measures 1994* (SPS Agreement) and the *Convention on Biological Diversity 1992* (Biodiversity Convention).

### ***Why is the Bill necessary?***

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Australia's people, economy and environment benefit significantly from a strong biosecurity system. Australia's unique pest and disease status helps to protect our way of life, including our environment, human health, and the wellbeing of our domestic animals and plants. This unique status means that our agricultural industries, environment and communities have remained free of many pests and diseases common elsewhere, giving Australia a comparative advantage in export markets around the world.

Australia's biosecurity system must be underpinned by a modern and effective regulatory framework. Currently, biosecurity is managed under the *Quarantine Act 1908* (Quarantine Act) and related regulations. Australia's biosecurity risks have changed significantly since the Quarantine Act was first drafted over a century ago. Shifting global demands, growing passenger and trade volumes, increasing imports from a growing number of countries and new air and sea craft technology have all contributed to a new and challenging biosecurity environment.

Whilst the Quarantine Act has enabled the effective management of biosecurity risks to date, it has been progressively amended no less than fifty times, mostly to cater for the changing demands placed on the biosecurity system. These amendments have contributed to creating complex legislation that is difficult to interpret and contains overlapping provisions and powers. Australia's biosecurity system has been subject to review several times, and proposed reforms to strengthen the system have included the development of new biosecurity legislation.

The Bill provides a strong regulatory framework that enables the management of biosecurity risks in a modern and responsive manner and enhances Australia's capacity to manage biosecurity risks into the future.

## **Key principles**

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### **Legislation for a strong agricultural industry**

Australia is free of many pests and diseases that are common around the world. This favourable status increases the demand for Australian agricultural products domestically and internationally. If harmful pests or diseases enter or spread in Australian territory, the agricultural sector, including farmers and exporters, will feel an enormous impact.

The Bill helps protect Australia's favourable pest and disease status through a strong, clear and flexible legislative framework. As a result, Australia will be able to maximise its agricultural productivity and continue to pursue new agricultural export opportunities. The Australian Bureau of Statistics showed farm exports rose almost 5 per cent to \$3.8 billion between December 2013 and January 2014<sup>1</sup> and agricultural exports were worth \$39.4 billion to the Australian economy in the 2013-14 financial year.<sup>2</sup>

The Bill contains new powers that allow for the management of a wider range of pests and diseases already present in Australian territory, such as fruit fly, which can adversely affect a wide range of fruit crops grown in Australia, and noxious weeds which might pose a threat to agricultural industries or the environment. The Bill also extends the coverage of existing powers so that some of the biosecurity risks posed by invasive pests can be more effectively managed. This is significant, as some invasive pests have the potential to cause significant damage to Australia's agriculture sector and the environment. For instance, an incursion of red imported fire ants could have an estimated impact of \$8.9 billion over 30 years.<sup>3</sup> These additional powers will complement current arrangements<sup>4</sup> with states, territories and industry to support the management of pest and disease incursions.

The Bill also helps to protect Australia's marine industries from invasive marine pests found in ballast water and sediment. Ballast water is used by ships to maintain their safety and stability at sea, but its uptake and discharge can also spread invasive pests to new marine environments and cause significant harm to the industries that rely upon them. Australia's key fishery industries are susceptible to a range of marine biosecurity threats that may be present in ballast water. In 2011-12 the gross value of Australian commercial fisheries production was \$2.3 billion, with \$1.3 billion coming from the wild-catch sector.<sup>5</sup> The Bill contains powers to manage the biosecurity risk posed by the ballast water held on board domestic and international ships.

### **Clear legislation to manage biosecurity risks**

The Bill provides a strong legislative framework that clearly sets out the powers that can be exercised by officials as well as the requirements of those being regulated.

The Bill has been divided into chapters by subject matter and then structured in a way that makes it easier to find relevant powers. For example, there are three operational chapters that regulate goods, conveyances and onshore biosecurity risks. These chapters have been structured similarly so that the relevant powers and obligations for each topic can be more easily located.

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<sup>1</sup> Australian Bureau of Statistics 2014, *International Trade in Goods and Services Australia*, cat. no. 5368.0 Canberra.

<sup>2</sup> Department of Agriculture 2014, *Agricultural Commodities: March Quarter 2014*, Australian Bureau of Agricultural and Resource Economics and Sciences, Canberra.

<sup>3</sup> Department of Agriculture 2014, *Cost-effectiveness of Biosecurity Response Options to Red Imported Fire Ants in South East Queensland*, Australian Bureau of Agricultural and Resource Economics and Sciences, June 2014.

<sup>4</sup> Emergency Animal Disease Response Agreement, the Emergency Plant Pest Response Deed and the National Environmental Biosecurity Response Agreement.

<sup>5</sup> Department of Agriculture 2013, *Australian Fisheries Statistics 2012*, Australian Bureau of Agricultural and Resource Economics and Sciences, Canberra.



Many powers in the Bill are similar to existing powers under the Quarantine Act, but are clearly stated and easier to use. Duplicate powers have been removed to reduce administrative complexity. This will lead to more effective biosecurity risk management and compliance and enforcement actions, improving the overall operation of Australia's biosecurity system.

The definition of 'biosecurity risk' includes a reference to the likelihood of a pest or disease entering Australian territory 'or a part of Australian territory.' The reference to a part of Australian territory allows for a biosecurity risk to be assessed for a specific area or region, as well as for Australia as a whole. This means that BIRAs can consider and recommend biosecurity measures based on the level of biosecurity risk in a part of Australian territory. A note has been included in the Bill to clarify this.

The Bill will also help to protect Australia's natural environments. The definition of 'biosecurity risk' considers the risk posed to the environment, as well as human, animal and plant health and the economy. Biosecurity risk is a core concept in the biosecurity legislation. Biosecurity officers have a range of powers to assess biosecurity risks, and if they suspect one is present, to impose measures and manage that risk.

### **Increasing efficiency and decreasing regulation**

The Bill is outcomes focused and based on a key principle of minimising regulatory impact while still achieving the best biosecurity outcome. This results in a Bill that cuts red tape and reduces the regulatory burden experienced by compliant businesses that regularly interact with Australia's biosecurity system.

The Department of Agriculture currently uses a risk-based approach to biosecurity intervention, where resources are focused on the risks of greatest biosecurity concern. The Bill will support this policy approach by providing flexible and responsive powers that allow biosecurity officials to best target risk based on the circumstances of each case.

Risk-based intervention reduces the administrative burden on compliant clients, enabling faster clearance at the border through better targeting and a focus on higher risk commodities and stakeholder behaviours. It also reduces delays for industry and cuts the costs for clients who actively and conscientiously take action to manage their biosecurity risks.

The Bill reduces regulation for many businesses by removing duplication and recognising modern business practices and systems that are already in place to manage biosecurity risk. A good example is industry partnerships, where an individual or business enters an arrangement with the Department of Agriculture to manage their biosecurity risks in an approved way (known as approved arrangements). This scheme will replace the duplicative quarantine approved premise and compliance agreement provisions in the Quarantine Act. These provisions overlap and can cause unnecessary administrative costs for businesses that are required to apply for and maintain multiple approvals and agreements with the Department of Agriculture.

The Bill allows businesses to enter into a single arrangement with the Department of Agriculture to manage their biosecurity risks in an approved way. The Bill will also allow a broader range of activities to be conducted under an arrangement. By allowing biosecurity risks to be managed more flexibly, the Bill encourages more businesses to approach the department and propose methods of managing biosecurity risk that can be incorporated into their existing business practices. This can be used to save time and money for both that business and the Commonwealth.

The Bill also modifies key operational provisions from the Quarantine Act that impose an unnecessary regulatory burden and are not required to manage biosecurity risks effectively. For

example, the Quarantine Act does not allow goods to be unloaded from a conveyance automatically when it arrives in Australia. The Bill allows the goods to be unloaded, unless an officer instructs otherwise. This means that the conveyance is not unnecessarily delayed by a requirement to seek permission to unload goods that do not pose a biosecurity risk.

Vessels and aircraft that arrive in Australia are required to arrive at a port or landing place that is declared to be a first point of entry. The Quarantine Act allows an aircraft or vessel to apply for permission to enter a port or landing place that is not a first point of entry. The Bill takes this one step further by allowing a business to apply for a standing permission to arrive in Australia multiple times over an identified period of time. This will reduce the administrative burden faced by the aircraft or vessel, as it may otherwise be required to apply for permission for every arrival.

### **Improving compliance**

The Bill contains a modern compliance framework with new and improved tools to enable more effective and efficient targeting of non-compliant behaviour or activities, while reducing the burden on those that are compliant. The Bill contains a range of enforcement options including: infringement notices, civil penalties, enforceable undertakings and criminal sanctions. This means the Commonwealth can choose between different penalty options and ensure that penalties are imposed in proportion to the offence committed, and are balanced, consistent and based on the level of risk posed.

The Bill also contains options to address the risk posed by people or companies that repeatedly breach biosecurity laws. A fit and proper person test can be used to consider a person or company's history of compliance with Commonwealth legislation and then deny them approval for an import permit on that basis. It can also be used to deny a person approval for an approved arrangement or to suspend, revoke or alter the conditions upon an existing approved arrangement. This ensures that people or companies seeking these approvals, which give them a privileged position, are suitable entities to be responsible for the management of biosecurity risks.

The Bill introduces an associate test that can be used to consider whether a person applying for an import permit or an approved arrangement is an associate of another person that the Department of Agriculture does not consider to be a fit and proper person. This test will be used to prevent a person who has previously been denied an import permit or an industry arrangement with the Commonwealth from applying again under the name of an associate, such as a family member or former business partner.

The Bill contains a range of new warrant powers that allow biosecurity officers to enter premises and then use their powers to manage biosecurity risks. This means that the Commonwealth can more effectively manage biosecurity risks before they are realised, rather than penalising a person or company after they contravene the Act and have caused damage that cannot be undone.

### **Providing protection from public health risks**

The Bill contains a range of biosecurity measures to manage the public health risk posed by serious communicable diseases. To reflect the new way in which human health risks are managed, it includes a range of measures that can be tailored to accommodate an individual's circumstances and aims to ensure individual liberties and freedoms are considered, as well as the risk posed by the disease. The Bill will allow for measures such as passenger entry and exit screening, the management of exotic diseases onshore and provide for the review of human biosecurity decisions, to ensure that the use of powers and exercise of functions under the Bill are balanced against an individual's rights.

The human health provisions of the Quarantine Act, particularly those relating to isolation and treatment, have rarely been used in the last 20 years. It is expected that the human health provisions contained in the Bill will also be seldom used. However it is important that legislative powers are available to manage serious communicable diseases should they occur. This has been particularly highlighted by the recent announcements by the World Health Organization that diseases such as polio and Ebola virus disease have met the conditions for Public Health Emergencies of International Concern.

### **Meeting Australia's international obligations**

The Bill allows for the management of biosecurity risks in a manner that is consistent with Australia's international obligations.

This includes obligations under the World Trade Organization *Agreement on the Application of Sanitary and Phytosanitary Measures 1994* (SPS Agreement), the World Health Organization *International Health Regulations 2005* (International Health Regulations), and the *Convention on Biological Diversity 1992* (Biodiversity Convention).

### **Overview of the Bill**

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The Bill can be broadly divided into three areas; operational chapters that support day to day biosecurity business, stand-alone chapters that support specialised biosecurity situations and general administrative chapters that support the other necessary functions and powers.

#### **Operational chapters**

The primary objective of the Bill is to manage biosecurity risk. This requires powers to identify, assess and manage biosecurity risks in relation to goods, conveyances and onshore pest or disease incursions.

These powers will be exercised by appointed biosecurity officials who have the appropriate training and knowledge to recognise biosecurity risks and manage them appropriately—supported by extensive technical, policy and scientific expertise.

#### *Chapter 3—Managing biosecurity risks: goods*

This Chapter specifically deals with the management of goods which may create a biosecurity risk when they come to Australia. This includes powers to assess and manage biosecurity risks. Some goods will be prohibited from being brought in or imported into Australia. Others can only be brought in or imported if certain conditions are met (conditionally non-prohibited).

In order to evaluate the level of biosecurity risk associated with goods that are proposed for importation into Australia, the Bill will allow the Director of Biosecurity to conduct a Biosecurity Import Risk Analysis (similar to the current Import Risk Analysis process).

#### *Chapter 4—Managing biosecurity risks: conveyances*

This Chapter deals with the movement of conveyances into Australian territory (conveyances include vessels and aircraft). This includes powers to assess and manage biosecurity risks.

International vessels and aircraft arriving in Australia from overseas and the goods on board must arrive at a declared first point of entry that is approved to accept them (unless given permission to do otherwise). This ensures that biosecurity risks enter Australia at a location where there are the appropriate facilities and personnel to manage them to an acceptable level.

### *Chapter 6—Managing biosecurity risks: monitoring, control and response*

This Chapter provides powers to manage biosecurity risks within Australia, including its territorial waters. This chapter will complement existing agreements<sup>6</sup> and state controls, allowing for efficient and effective incursion responses in state, territory and Commonwealth jurisdictions.

This includes powers to assess and manage biosecurity risks. In line with the Biodiversity Convention, the powers will allow for the management of invasive pests.

A biosecurity control order can be issued, requiring that biosecurity measures are carried out in relation to a specific good, conveyance or premise. Over a larger area, monitoring zones can be declared that allow biosecurity officers to undertake monitoring and surveillance activities to check for potential biosecurity risks. If a pest or disease incursion is identified, a biosecurity response zone can be declared allowing biosecurity officers to carry out biosecurity measures and manage the biosecurity risk.

Biosecurity activity zones can also be declared over areas where biosecurity functions or duties are performed on behalf of the Commonwealth. This may include activities at a quarantine station or activities under an approved arrangement. Activity zones allow biosecurity officers to exercise assessment and management powers in the zone and control where and how people, goods or conveyances enter or exit the zone, in order to manage the biosecurity risk.

### **Specialised biosecurity management chapters**

These chapters outline and support specialised biosecurity management.

#### *Chapter 2—Managing biosecurity risks: human health*

This Chapter contains a range of powers to control the spread of communicable diseases that may cause serious harm to human health. The powers only apply in relation to listed human diseases, determined by the Director of Human Biosecurity. The principles of general protection ensure that a power is exercised, or a biosecurity measure is imposed, only when the circumstances are sufficiently serious to justify it, and only if it would be effective, is proportionate, and is no more restrictive or intrusive than is required to manage the risk.

The Chapter also seeks to further implement Australia's obligations as a signatory to the International Health Regulations.

#### *Chapter 5—Ballast water and sediment*

This Chapter creates a single, Australia-wide ballast water and sediment management regime, providing a comprehensive system for ballast water management that covers international and domestic vessels. This will allow Australia to manage risks associated with ballast water and work towards ratification of the Ballast Water Convention. The Convention has not yet come into force but this legislation will help ensure that Australia is ready when it does.

#### *Chapter 7—Approved arrangements*

This Chapter allows the Commonwealth to partner with industry through an approved arrangement scheme. Industry participants may enter into a voluntary arrangement with the Commonwealth to manage the biosecurity risks associated with their own operations in the most efficient and effective way. The industry participant must demonstrate its ability to meet strict standards to maintain the integrity of Australia's biosecurity system.

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<sup>6</sup> Emergency Animal Disease Response Agreement, the Emergency Plant Pest Response Deed and the National Environmental Biosecurity Response Agreement.

### *Chapter 8—Biosecurity emergencies and human biosecurity emergencies*

This Chapter contains provisions to manage a pest or disease that poses a nationally significant threat to human, plant and animal health, the environment or the economy. The focus of these powers is to enable a fast and effective response that helps manage the amount of damage to Australia's communities, local industries and economy.

The emergency chapter will complement existing agreements and state and territory controls, allowing for efficient and effective emergency responses in state, territory and Commonwealth jurisdictions.

### **General administration chapters**

The final group of chapters deal with the general administration of the Bill and apply across the legislation as a whole. They provide a framework for the smooth administration of Australia's biosecurity system.

### *Chapter 1—Preliminary*

This Chapter of the legislation deals with administrative matters such as jurisdiction, definitions of key terms and the objects of the Bill.

### *Chapter 9—Compliance and enforcement*

This Chapter introduces a number of new tools to manage compliance and enforcement, designed to encourage clients to voluntarily comply with biosecurity requirements.

The Bill will contain infringement notices, civil penalties, enforceable undertakings and criminal sanctions. It will also have additional warrants powers that allow officers to enter premises in order to manage biosecurity risk.

### *Chapter 10—Governance and officials*

This Chapter creates the positions of Director of Biosecurity (the Secretary of the Agriculture Department), the Director of Human Biosecurity (the Commonwealth Chief Medical Officer), biosecurity officers, biosecurity enforcement officers and human biosecurity officers. It also assigns some generic powers and functions for each position.

This Chapter also contains powers to gather information for the purposes of undertaking a review of the biosecurity system. It is intended that these powers be delegated to the Inspector-General of Biosecurity. This will help ensure that the biosecurity system is robust and that the assessment and management of biosecurity risk is subject to regular review and continual improvement.

### *Chapter 11—Miscellaneous*

This Chapter includes the remaining provisions for topics that do not belong in other Chapters, but are important for the overall administration of the Bill. This includes cost recovery, exemptions and modifications, immunity, information sharing and reviewable decisions. This Chapter also contains provisions relating to the application of the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters* and the management of biosecurity risks in the external territories.

## ***Rationale for Bill provisions***

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### **Offences and penalties**

#### *Strict liability offences*

When strict liability applies to an offence, the prosecution is only required to prove the physical elements of an offence, they are not required to prove fault elements, in order for the defendant to be found guilty. Strict liability is used in circumstances where there is public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that the person was aware of their duties and obligations.

The Bill contains some strict liability offences. These offences have been used when there is a strong public interest in managing biosecurity risks appropriately and preventing serious damage to plant and animal health, human health, local industries, the economy and the environment.

For example, in Chapter 5 there are a number of strict liability offences that apply to the management of ballast water. There is a strong public interest in preventing invasive marine species from spreading to Australia's marine environments and causing damage to the local industries that rely upon them or the environment. Ballast water is regulated on an international level through the International Maritime Organization and is the subject of an international convention. It can reasonably be expected that a person responsible for the operation of a ballast carrying vessel is aware of their duties and obligations to manage ballast water correctly and meet environmental standards designed to protect the marine environment.

To ensure that the strict liability offences in the Bill only target appropriate conduct, the defence of honest and reasonable mistake of fact is available to the defendant (see section 9.2 of the *Criminal Code*). This means that if a person has considered the relevant facts and is under a mistaken, but reasonable, belief about those facts, he or she is not liable for an offence.

All departures from the *Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) have been approved by the Attorney-General.

#### *Reversing the evidential burden*

Reversing the evidential burden means that a defendant, rather than the prosecution, is responsible for presenting evidence to a court about a particular fact. It is then up to the prosecution to establish that this evidence is incorrect or does not apply. This can be justified in circumstances where the facts in question are peculiarly within the knowledge of the defendant and it would be difficult or expensive for the prosecution to provide evidence, but the evidence is readily and cheaply available for the defendant.

Some offences in the Bill reverse the evidential burden, by making the defendant responsible for providing evidence that proves there is a reasonable excuse why they have failed to meet a duty or obligation under the Act. This has been done because the relevant information is known peculiarly by the defendant and it would be significantly more difficult for the prosecution to prove. For example, a person might have removed a biosecurity control notice affixed to a vessel and seek to rely on the exception that they are a Commonwealth official and approved to do so under another Australian law. This person should easily be able to provide relevant identification and further information about the circumstances and the law that authorised them to remove the notice. It would be more difficult and time-consuming for the prosecution to provide evidence of this.

The Bill also reverses the evidential burden for a defendant to prove that an exception applies if they are suspected of receiving or possessing prohibited goods or conditionally non-prohibited

goods. This is justified because the defendant will have peculiar knowledge about how the goods in their possession were obtained and should be able to produce evidence of how they obtained them, such as a receipt or evidence of an EFTPOS transfer. It would be much more difficult and time-consuming for the prosecution to provide evidence of this.

Shifting the evidential burden for these offences implements the recommendations of the Commonwealth Ombudsman's 2009 Report: *Compliance and Investigation Activities of the Australian Quarantine and Inspection Service (AQIS)*. The reversal of the onus of evidential burden in these circumstances is also consistent with the Guide.

### **Abrogation of the privilege against self-incrimination**

The privilege against self-incrimination is an important common law and international law principle that provides an individual with the right not to answer questions or produce materials which may incriminate them of a criminal offence or expose them to a civil penalty. However, this privilege may be overridden in circumstances where its use can seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence.

Chapters 3, 4 and 6 of the Bill contain powers that allow biosecurity officers to ask questions and require documents that abrogate the privilege against self-incrimination. Removing the privilege in these circumstances is justified, because this information is required to accurately assess biosecurity risks and ensure that they are managed to an acceptable level. For example, the information might inform officers that a shipment of meat products is from a country with a recent foot-and-mouth disease outbreak and strict biosecurity measures are required to prevent the risk of the outbreak spreading to Australia. Foot-and-mouth disease poses a risk of serious damage to Australia's local industries, economy and the reputation of Australian products overseas. Gathering accurate information about a potential foot-and-mouth disease exposure is crucial to a fast and effective response by the Commonwealth. Allowing a person to use the privilege against self-incrimination and refuse to provide important information could result in a significant biosecurity risk remaining unmanaged. Therefore the public benefit of its removal outweighs the loss of personal liberty.

While in some cases it may be feasible to obtain information by other means (for example, through a warrant), the additional time taken to obtain such information may significantly increase the risk of a disease or pest entering, establishing or spreading to Australia. If the privilege is not abrogated, the Commonwealth's ability to manage biosecurity risks through a responsive, evidence-led approach would be significantly reduced.

The abrogation of the privilege has been limited so that self-incriminatory disclosures cannot be used against the person making the disclosure in any proceedings (use and derivative use immunity). The only exceptions to this are in relation to proceedings arising out of sections 137.1 and 137.2 of the *Criminal Code* (in relation to false and misleading information and documents), and proceedings for the contravention of clause 532 or 533 (civil penalties for false or misleading information or documents). This approach is consistent with the Guide.

### **Limitations**

The Bill contains some powers that have the potential to be exercised in a manner that impact upon the rights of a particular person. For example, the Director of Biosecurity can issue a direction requiring an aircraft or vessel to move outside of Australian territory, which might impact upon a person's right to freedom of movement.

To ensure that these decisions only impact upon a person's rights in circumstances where it is justified, Chapter 1 contains general protections that require the relevant decision maker to be

satisfied of a number of principles when making the decision (in addition to other protections already contained in the Bill). These limitations have been included to ensure that any direction given, or action undertaken, is appropriate and adapted and does not impact on a person or his or her rights any more than is necessary to manage the level of biosecurity risk posed.

This is consistent with international treaties such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

### **Entry without warrant or consent**

The Bill contains powers that allow a biosecurity officer and biosecurity enforcement officer to enter premises without a warrant or consent. These powers also have the potential to impact upon a person's rights and therefore can only be exercised in very limited circumstances, as described below.

#### *Biosecurity emergency*

If a biosecurity emergency is declared, biosecurity officers and biosecurity enforcement officers will be able to enter premises without consent or a warrant for the purpose of assessing and managing biosecurity risks associated with the declaration pest or disease. Officers will also be able to access adjacent premises if it is necessary to access the premises where they need to exercise their assessment and management powers.

These powers are justified during an emergency period because of exceptional circumstances that led to the emergency being declared. A biosecurity emergency will only be declared by the Governor-General if the Agriculture Minister is satisfied that a pest or disease poses a nationally significant threat to plant or animal health, human health, the environment or the economy.

Access to premises is required so that officers can assess whether the declaration pest or disease is present and then, if required, undertake urgent measures to manage them. It would significantly impede the Commonwealth's ability to work together with state and territory governments and implement a fast and effective response if biosecurity officers are required to seek warrants or consent for the premises that are likely to be affected.

The power to enter premises is limited to circumstances where the biosecurity officer suspects on reasonable grounds that the declaration pest or disease is present and is accompanied by a biosecurity enforcement officer (who is responsible for establishing entry to the premises and using force against things, such as opening doors or moving objects).

#### *Approved arrangements*

The Bill also allows a biosecurity enforcement officer to enter relevant premises during business hours to determine whether the Act has or is being complied with. This power can be used to access premises where biosecurity activities are being conducted under an approved arrangement.

Entry without a warrant is justified because the premises are the subject of a voluntary agreement between the Agriculture Department and an industry participant, who is approved to manage biosecurity risks on the premises in a particular way.

Biosecurity enforcement officers will be able to enter the premises and exercise their investigation and monitoring powers to determine whether the Act is being or has been complied with or that correct information has been supplied for the purposes of the Act. This will allow non-compliance to be more easily detected and ultimately reduced, leading to greater compliance with the Act and the better management of biosecurity risks overall. A biosecurity enforcement officer may also enter the premise if there are reasonable grounds to suspect there may be particular evidential material on the premises.



### *First points of entry*

The power to enter relevant premises also allows biosecurity officers to enter premises at a first point of entry without a warrant or consent during business hours to determine whether the Act has or is being complied with.

Entry without a warrant is justified because these premises are the subject of a regulatory arrangement with the Commonwealth, where the first point is approved to be a place where goods, people and conveyances can arrive in Australian territory from overseas. As a result, premises at a first point of entry are an area of high risk for biosecurity risks entering, establishing and spreading in Australian territory and causing damage to animal and plant health, human health, the environment, local industries and the economy. It is important that these risks are managed as quickly and efficiently as possible.

Biosecurity officers may enter any premises at a first point of entry for the purpose of performing functions or exercising powers as a biosecurity officer. This will allow the officer to establish whether a biosecurity risk exists and, if required, undertake biosecurity measures to manage that risk.

The Bill also allows a biosecurity enforcement officer to enter the premises at a first point of entry to assess non-compliance with the Act. This will allow non-compliance to be more easily detected and ultimately reduced, leading to greater compliance with the Act and the better management of biosecurity risks overall. A biosecurity enforcement officer may also enter the premise at any time if there are reasonable grounds to suspect there may be particular evidential material on the premises.

### **Exemption from disallowance**

Section 42 of the *Legislative Instruments Act 2003* (LIA) allows some legislative instruments to be exempt from disallowance. These legislative instruments will still have to be tabled in the Parliament.

The Bill allows for some legislative instruments to be exempt from disallowance, for example, determinations of prohibited goods and conditionally non-prohibited goods. This is justified because it is more appropriate for Parliament to delegate the power to make determinations that involve technical and scientific decisions about the management of biosecurity risk to the Director of Biosecurity. An implication of these decisions being disallowed is that political considerations will play a role in what should be a technical and scientific decision making process. This has the potential to frustrate the risk management processes and lead to the inadequate management of biosecurity risks. This approach is consistent with the current arrangements in the *Quarantine Proclamation 1998*.

### **Consultation about provisions of the Bill**

The Attorney-General and the Attorney-General's Department have been consulted on all relevant provisions of the Bill. In particular, approval has been provided by the Attorney-General for the approach taken in relation to higher penalty offences, exemptions from the LIA and the power for biosecurity officers and biosecurity enforcement officers to enter premises and adjacent premises without consent or a warrant.

## ***The Bill's operation***

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### **Date of effect and application**

The Bill provides for staggered commencement of the Bill. Clauses 1 and 2 of the Bill will commence on the day the Bill receives Royal Assent. The remaining clauses of the Bill will commence on a day fixed by proclamation, or if no day is fixed for commencement within 12 months of Royal Assent, they will commence on the day after the end of the 12 months.

Once the Bill receives Royal Assent, the Director of Biosecurity and the Director of Human Biosecurity will be able to make legislative instruments, and authorise various officers as outlined under Chapter 10 (through the operation of the *Acts Interpretation Act 1901*). These instruments and authorisations will come into effect when the operational provisions of the Bill commence.

It is intended that the majority of the clauses of the Bill will commence 12 months after Royal Assent. The period between commencement of clauses 1 and 2 and the remaining clauses of the Bill will allow time for the new requirements in the legislation to be communicated to stakeholders, industry participants and the general public and allow biosecurity officials to undergo appropriate training. It will also provide additional time for consultation with state and territory governments regarding shared responsibilities and obligations under the Bill.

Allowing time for communication and education is important, as a number of policies included in the Bill do not exist under the Quarantine Act. This includes the new powers in Chapter 6 and the enforcement provisions in Chapter 9. It is important that stakeholders are aware of the new requirements—including the introduction of civil penalty provisions and an expanded infringement notice scheme—in the Bill so that they are not inadvertently non-compliant with these requirements.

Proposed transitional arrangements in the Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014 will also allow time for stakeholders to adjust to the new legislative requirements, particularly where these requirements lead to changes in business processes. For example, for first points of entry it is proposed that most ports and landing places declared as a first port under the Quarantine Act will transition over a period of time to become a first point of entry under the Act. These ports and landing places will have three years to ensure they comply with the requirements for first points of entry in the Act. This will provide port and landing place operators an appropriate amount of time to upgrade—if necessary—their facilities, systems or processes.

### ***Financial impact statement***

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No significant direct or indirect financial impact on the Commonwealth will arise from the introduction of this Bill.

## ***Human Rights Compatibility Statement***

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Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Biosecurity Bill 2014**

The Biosecurity Bill 2014 (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Bill**

The purpose of the Bill is to provide the primary legislative means for the Australian Government to manage the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health, the environment and the economy. In achieving this purpose, the Bill aims to promote the right to health, the right to life and also the right to an adequate standard of living, including food, water and housing as provided under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).

The Bill is intended to replace the century-old *Quarantine Act 1908* (the Quarantine Act) to provide a modern regulatory tool aimed at better managing biosecurity risks in current and future trading environments. The Bill allows for the management of a broader range of biosecurity risks at the border and provides for additional powers to monitor and manage biosecurity risks when they are detected in Australian territory to help prevent pests and diseases from impacting upon human, animal or plant health, the environment and the economy.

The Bill provides an effective and adaptive range of biosecurity measures to manage the public health risk posed by serious communicable diseases. It will provide a range of measures which can be tailored to accommodate an individual's circumstances and aims to ensure individual liberties and freedoms are considered in conjunction with the disease risk. It will provide for consideration of personal freedoms and rights to review in decision-making. The Bill is consistent with Australia's international obligations under the World Health Organization's *International Health Regulations 2005*.

The legislation enables a risk based approach to compliance, ensuring that enforcement measures are appropriate to achieve the regulatory outcome sought. The Bill aims to reflect the shared responsibility for biosecurity between governments at all levels, business, industries, trading partners and the community. It is designed to promote good governance, shared responsibility, efficient processes and procedural fairness.

The Bill is also designed to draw upon, support and give effect to various international and domestic agreements and obligations. Internationally, these include:

- the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement)
- the *International Convention for the Control and Management of Ships' Ballast Water and Sediments* (the Ballast Water Convention)
- the *International Health Regulations 2005* (International Health Regulations)
- the *Convention on Biological Diversity* (the Biodiversity Convention)
- the *United Nations Convention on the Law of the Sea*, and
- the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries* (the Torres Strait Treaty).

Domestically, these include the Intergovernmental Agreement on Biosecurity and various emergency response deeds, including the Emergency Animal Disease Response Agreement, Emergency Plant Pest Response Deed and the National Environmental Biosecurity Response Agreement. The Commonwealth intends to work collaboratively with state and territory governments to complement existing powers and agreements in the management of biosecurity risks (however, the Commonwealth will cover the field in some circumstances, as expressly stated in the Bill).

### **List of human rights**

The Bill will engage, or has potential to engage, the following rights:

- Article 6(1) of the ICCPR – Right to life
- Articles 7 and 10 of the ICCPR – Right to freedom from torture and cruel, inhuman or degrading treatment
- Article 9 of the ICCPR – Right to liberty and freedom from arbitrary detention
- Articles 9(4) and 14(5) of the ICCPR – Right to seek review
- Article 12 of the ICCPR – Right to freedom of movement
- Article 14(2) of the ICCPR – Right to the presumption of innocence (reverse burden provisions)
- Article 14(3) of the ICCPR – Right to be free from self-incrimination
- Article 14 (7) of the ICCPR – Right not to be tried or punished again for an offence for which a person has already been finally convicted or acquitted
- Article 17 of the ICCPR – Right to protection from arbitrary interference with privacy
- Article 22 of the ICCPR – Right to freedom of association
- Article 24(1) of the ICCPR and Article 3 of the *Convention on the Rights of the Child* – Rights of the child
- Article 6 of the ICESCR – Right to work
- Article 11(1) of the ICESCR – Right to an adequate standard of living, including food, water and housing
- Article 12 of the ICESCR – Right to health
- Article 15 of the ICESCR – Right to enjoy and benefit from culture, and
- Articles 3 and 5 of the *Convention on the Rights of Persons with Disabilities* – Rights of persons with disabilities.

### **Discussion: general protection clauses and civil penalties**

#### General protections and principles affecting decisions

To ensure that the decision to exercise certain powers under the Bill is reasonable and proportionate to achieve a legitimate objective, clause 32 provides a range of principles that a biosecurity official must be satisfied of when making certain decisions, including:

- that exercising the power is likely to be effective in, or to contribute to, achieving the purpose for which the power is to be exercised
- that exercising the power is appropriate and adapted to achieve that purpose
- that the manner in which the power is to be exercised is no more restrictive or intrusive than is required in the circumstances
- if the power is to be exercised in relation to an individual—that the power is no more restrictive or intrusive than is required in the circumstances, and
- if the power is to be exercised during a period—that the period is only as long as is necessary.

Where powers are to be exercised in relation to a conveyance, the biosecurity official must also consider the impact of the exercise of the power on the health and safety of any persons on board

the conveyance. Decisions to which these principles apply are specified in this statement under each human right that may be engaged by the Bill.

To ensure the exercise of certain powers in Chapter 2 is reasonable and proportionate to achieve a legitimate objective, clause 34 provides a range of principles that a person making a decision must be satisfied of, including:

- that exercising the power, or imposing the biosecurity measure, is likely to be effective in, or to contribute to, managing the risk
- that exercising the power, or imposing the biosecurity measure, is appropriate and adapted to manage the risk
- that the circumstances are sufficiently serious to justify exercising the power, or imposing the biosecurity measure
- that the power, or the biosecurity measure, is no more restrictive or intrusive than is required in the circumstances
- that the manner in which the power is to be exercised, or the biosecurity measure is to be imposed, is no more restrictive or intrusive than is required in the circumstances, and
- if the power is to be exercised or the biosecurity measure imposed during a period—that the period is only as long as is necessary.

The normal principles of administrative law also apply to the exercise of powers in clauses to which the principles under clauses 32 and 34 apply, such as reasonableness, proportionality and natural justice—as they do to the Bill as a whole (except where express limitations apply, such as in Chapter 8 which deals with emergencies). Additionally, a number of the decisions in the Bill to which these clauses apply have tests of reasonableness built into them.

#### Assessment of civil penalties

The Parliamentary Joint Committee on Human Rights Practice Note 2 notes that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a ‘criminal’ penalty for the purposes of ICCPR.

The civil penalty provisions in the Bill should not be considered ‘criminal’ for the purposes of human rights law. While a criminal penalty is deterrent or punitive, the majority of provisions are aimed at objectives that are regulatory or disciplinary in nature. For instance, most provisions do not apply to the general public, but to a sector or class of people who should reasonably be aware of their obligations under the Bill (e.g. operators of incoming vessels), and should be considered ‘disciplinary’ rather than ‘criminal’. In many cases, the civil penalty provisions in the Bill are provided as disciplinary alternatives to the punitive or deterrent criminal offences. Civil penalties will also enable an effective disciplinary approach to dealing with non-compliance by corporations.

The severity of the civil penalties should be considered low; they are all pecuniary penalties (rather than a more severe punishment like imprisonment), there is no sanction of imprisonment for non-payment of penalties and the maximum amount of each civil penalty is the same or lower than the corresponding criminal offence (except where applied to corporations).

Based on the above factors, the cumulative effect of the nature and severity of the civil penalties in the Bill is unlikely to be considered ‘criminal’ for the purposes of human rights law. However, where certain civil penalty provisions could limit human rights—such as by reversing the onus or proof, or abrogating the privilege against self-incrimination—justification has been included. This is to make clear that the provisions are reasonable, proportionate and adapted to achieve a

legitimate objective in the event that they are considered criminal in the context of international human rights law.

## **Assessment of compatibility with human rights**

### **Right to life**

Article 6(1) of the ICCPR includes a duty on governments to take appropriate steps to protect the right to life of those within its jurisdiction, and an obligation to investigate arbitrary or unlawful killings or punish offenders. The United Nations Committee General Comment 6 (1982) states:

‘...the Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for State parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.’

A key objective of the Bill is to promote the right to life by preventing harm to human, animal and plant health through managing the risk of pests and diseases entering, establishing or spreading in Australian territory.

Chapters 2, 5 and 8 of the Bill promote the right to life by providing powers to control the spread of communicable diseases that may cause serious harm to human health.

For example, Chapter 2 promotes the right to life by enabling the Health Minister to prescribe requirements in relation to individuals and operators of certain aircraft or vessels that are entering or leaving Australian territory. These requirements may be imposed for the purpose of preventing the entry, establishment or spread of listed human diseases (clause 44 and 45).

Chapter 5 promotes the right to life by regulating the use of ballast water and management of sediment by Australian and foreign vessels in Australian seas to create an Australian-wide ballast water and sediment management regime. The creation of offences for releasing unmanaged ballast water and sediment under this regime may prevent ballast water that contains human diseases, such as cholera, from being released in Australian seas (see clause 270).

Chapter 8 of the Bill provides for the Governor-General to declare that a human biosecurity emergency exists if the Health Minister is satisfied that a listed human disease is posing a severe and immediate threat, or that is of a nationally significant scale (clause 475).

**Summary:** The Bill promotes the right to life under Article 6(1) of the ICCPR.

### **Right to freedom from torture and cruel, inhuman or degrading treatment**

The right of individuals not to be subjected to cruel, inhumane or degrading treatment is guaranteed by Article 7 of the ICCPR. This right is an absolute right, and is not subject to permissible limitations. Article 10 of the ICCPR further protects the right of an individual to be treated with humanity and dignity if detained.

Chapters 2 and 10 of the Bill include provisions that may engage these rights.

#### Chapter 2

Part 3 of this chapter provides a number of biosecurity measures that can be included under a human biosecurity control order. These include decontamination (clause 89) and traveller movement measures (clause 96). These biosecurity measures are necessary for the legitimate

objective of managing the risk of listed human diseases emerging, establishing or spreading in Australian territory. However, these clauses may operate to engage the right to freedom from degrading treatment, as outlined below. A range of tests and protections are included in the Bill to ensure this right is not limited.

Clause 60 provides that a human biosecurity control order may only be imposed on an individual if the officer is satisfied of the principles set out in clause 34. The officer must also be satisfied that the individual has one or more signs of a listed human disease, or has been exposed to a listed disease (or another individual who has signs or symptoms of a listed human disease), or has failed to comply with an entry requirement under clause 44 and therefore poses a risk to the broader community.

Clause 89 provides that an individual and their clothing and personal effects may be required to be decontaminated under a human biosecurity control order. In some cases, decontamination may require a person to remove their clothing, which could be degrading or humiliating if appropriate protections were not in place. Decontamination may only be included in a human biosecurity control order if the officer is satisfied that it would contribute to the managing of the risk of contagion of a listed disease, or a listed human disease entering, or emerging, establishing itself or spreading in Australian territory (clause 84). The control order must state why the measure is required, how it is to be undertaken, the rights to review in relation to the order, and the details of a chief human biosecurity officer that can be contacted for information and support (clause 61). The contents of the order must also be read out to the individual (clause 63).

If the individual refuses to consent to the decontamination, an officer may request the Director of Human Biosecurity to give a direction for the individual to comply (clause 72). However, in order to give a direction for an individual to comply, the Director must review the decision, including the diagnosis of any listed human diseases specified in the order and the inclusion of the measure to decontaminate the individual, and take into account any reason the individual gives for refusing to consent to the measure. The Director must also be satisfied on reasonable grounds that decontamination would contribute to reducing the risk of contagion of the listed disease, or the listed disease spreading in Australian territory. If the Director gives a direction for the individual to comply, the individual may be able to apply for merits or judicial review of the decision in accordance with clause 76 of the Bill and the *Administrative Decisions (Judicial Review) Act 1977*. If the individual is required to comply with the measure, force must not be used to require them to do so (clause 95).

Clause 101 provides that officers of Customs may prevent individuals from boarding an outgoing passenger aircraft or vessel if doing so would contravene a traveller movement measure in place under a human biosecurity control order. This clause is necessary for the legitimate objective of preventing listed human diseases from spreading to other countries and meeting Australia's obligations under the International Health Regulations. The clause does not limit officers from using force to prevent the person from boarding the aircraft or vessel, which could potentially result in degrading treatment. Although the clause does not prevent officers from using force to prevent the person from boarding the aircraft or vessel, they must not use more force or subject the person to greater indignity than is necessary to prevent them from boarding the aircraft or vessel.

Clause 103 provides that an individual may be detained if they fail to comply with a requirement to remain at a place under clause 68, or with an isolation measure under clause 97. A number of protections are included in the Bill to ensure that the power to detain individuals is only used when necessary and proportionate to a legitimate objective and that individual's right to be free from degrading treatment are protected during detention.

An individual who is detained for failing to comply with an isolation measure may only be detained for the purposes of taking the individual to a medical facility (clause 103). If an individual is required to remain at a place or placed under an isolation order, and they are not an Australian citizen, then they must be informed of their right to seek consular assistance (clause 102). In addition, officers must provide a reasonable time to allow the individual to seek consular assistance and facilitate communication with a consular office if requested. This aims to ensure that all individuals are able to understand why they are being asked to remain at a place or be isolated regardless of language or nationality.

If an individual is detained, clause 104 specifies that officers must not use more force or subject the individual to greater indignity than is necessary and reasonable to detain the person or prevent them from escaping. Further to this, detention must be in a place that, in the officer's opinion, affords adequate personal privacy. Clause 104 also requires the Commonwealth to advise the individual of their right to contact anyone, including a legal representative and to provide facilities for the ill individual to contact that person. A person who has been detained for failing to comply with a requirement to remain at a place must be released after six hours (clause 105). A person detained for failing to comply with an isolation measure must be released when they have been taken to the medical facility specified in the control order, or within 72 hours, whichever is earlier. Additionally, the officer that detains the person must also inform the person that they may communicate, or attempt to communicate, with any person and the officer must give the person the facilities to enable them to do so.

#### Chapter 10

Clauses 558 to 561 provide for decontamination of an individual and their clothing and personal effects. These provisions relate to the management of the risk of a pest or disease, rather than the risk of contagion of a listed human disease as provided for in Chapter 2. These clauses are necessary for the legitimate objective of managing the biosecurity risk associated with the person or their clothing. However they may require a person to remove their clothing which could be degrading or humiliating. A range of protections are included in the Bill to ensure that this right is not limited.

An officer may only request decontamination of the person, or require decontamination of the person's clothing or personal effects, if they suspect on reasonable grounds that the person may have been exposed to a pest or disease and the officer is satisfied that decontaminating the person, clothing or personal effects is likely to be effective in or contribute to managing the biosecurity risk (clause 558). Force must not be used against an individual to require them to comply with a direction to undergo decontamination given under clause 559, or require an individual's clothing or personal effects to be decontaminated under clause 560. Additionally, clause 551(3) provides that a biosecurity officer who requires an individual to allow his or her clothing to be decontaminated must take the individual to a place that affords adequate personal privacy to the individual and provide the individual with suitable alternative clothing if the individual does not have any.

The principles affecting decisions to exercise certain powers (clause 32) also apply to a decision to decontaminate an individual or their clothing or personal effects. In particular, the biosecurity official must be satisfied that, if the power is to be exercised in relation to an individual, the power is no more restrictive or intrusive than is required in the circumstances. Clauses 36 to 40 of Chapter 2 also apply to this clause, which provide a range of protections for children and incapable persons.



**Summary:** The Bill does not limit the right to freedom from torture and cruel, inhuman or degrading treatment under Article 7 of the ICCPR, or the right of an individual to be treated with humanity and dignity if detained under Article 10 of the ICCPR.

### **Right to liberty and freedom from arbitrary detention**

Article 9 of the ICCPR protects the right of all individuals to liberty and freedom from arbitrary detention. The right to personal liberty requires that persons not be subject to arrest and detention except as provided for by law and provided that neither the arrest nor the detention is arbitrary. The right applies to all forms of detention where people are deprived of their liberty.

Provisions in Chapter 2 may operate to limit this right.

### Chapter 2

This Chapter provides powers for individuals to be required to remain at a place (clause 68), remain isolated at a medical facility (clause 97) or detained (clause 103). These clauses are necessary for the legitimate objective of assessing and managing the risk of contagion of a listed human disease. However, these clauses may operate to limit the right to liberty and freedom from arbitrary detention. To ensure these clauses are reasonable and proportionate to the legitimate objective, a range of tests and protections apply.

An individual may only be required to remain at a place under clause 68 if an officer intends to impose a human biosecurity control order under clause 60 and an individual may only be required to remain isolated at a medical facility under clause 97 under a human biosecurity control order. Human biosecurity control orders may only be imposed if an officer believes that an individual has signs or symptoms of a listed human disease, has been exposed to a listed human disease or has failed to comply with an entry requirement under clause 44 and therefore poses a risk to the broader community. An individual may only be required to remain at a place for up to six hours and this period may not be extended (clause 68). After that time the officer must apply measures in a human biosecurity control order or release the individual.

If the individual required to remain at a place or be isolated is not an Australian citizen, then they must be informed of their right to seek consular assistance (clause 102). In addition, officers must provide a reasonable time to allow the individual to seek consular assistance and facilitate communication with a consular office if requested (clause 102).

If an individual does not consent to an isolation measure (clause 97), they may seek internal review by the Director of Human Biosecurity of the direction for the individual to comply (clause 7). In conducting a review, the Director of Human Biosecurity must give consideration to factors affecting the health of the individual and the reasons why they do not consent to the measure. The Director must also be satisfied that the biosecurity measure contributes to reducing the risk of a listed human disease entering, emerging, establishing itself or spreading in Australian territory. The Bill prescribes timeframes for the Director to complete the review to limit the time that an individual's liberty may be restricted.

An individual may be detained if they fail to comply with a requirement to remain at a place under clause 68, or if they fail to comply with an isolation measure that they have been required to comply with under clause 76 (clause 103). Before an individual is detained, a human biosecurity officer must be satisfied of the principles of general protection (clause 34). In addition, an individual may only be detained if the officer is satisfied the individual may pose a significant risk of contagion without detention. The power to detain individuals has been vested only in law enforcement officers under subclause 103(3) as they have sufficient training and skills to ensure the power is exercised in line with Commonwealth guidelines.

Additional protections apply to detention, including that the individual must be advised of their right to contact anyone, including a legal representative (clause 104). Clause 104 also provides that the individual must be taken, as soon as possible, to a place that provides adequate personal privacy to the individual, either at the specified medical facility (for failing to comply with an isolation measure), or at the place where the detainee was when the officer was satisfied that the control order should be imposed (for failing to remain at a place). An individual who has been detained for failing to comply with an isolation measure under clause 97 must be released when they have been taken to the medical facility or when they are no longer required to comply with the isolation measure (clause 105).

Individuals may also seek external merits review of the direction to comply with the isolation measure under *Administrative Appeals Tribunal Act 1975* (clause 76) or *the Administrative Decisions (Judicial Review) Act 1977* (clause 80).

**Summary:** The right to liberty and freedom from arbitrary detention under Article 9 of the ICCPR may be permissibly limited in these instances because a range of tests and protections apply to these clauses to ensure the exercise of the power is reasonable and proportionate to achieving the legitimate objective, and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

### **Right to seek review**

Article 9(4) of the ICCPR protects the right of an individual who is deprived of his liberty by arrest or detention to ‘be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention’. Article 14(5) also provides that ‘everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law’.

The Bill engages this right as a person can be imprisoned as a result of being convicted of an offence under this Act. Additionally, Chapter 2 contains provisions that may result in an individual being required to remain at a place for up to six hours (clause 68), be isolated at a medical facility (clause 97), or detained (clause 103) in certain circumstances. The *Criminal Code* and the Australian criminal justice system more broadly, provide review rights that are available in these circumstances. These review rights ensure consistency with Australia’s international obligations.

**Summary:** The Bill does not limit the right to seek review under Article 9(4) of the ICCPR. Where the Bill does engage this right, it does so in accordance with the *Criminal Code* and as a part of Australia’s broader criminal justice system to ensure consistency with Australia’s international obligations.

### **Right to freedom of movement**

The right to freedom of movement under Article 12 of the ICCPR includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. The right may be limited in certain circumstances, including where the limitation is justified on any of the following grounds: to protect national security, public order, public health or morals or the rights and freedoms of others. The limitation must be necessary and proportionate to protect the purpose for which it is imposed and should be as least intrusive as possible to achieve the desired result.

Chapters 2, 4, 5, 6, 8 and 11 contain clauses which may operate to limit this right.

## Chapter 2

Clauses 44 and 45 enable the Health Minister to determine requirements for individuals who are entering or leaving Australian territory. Entry requirements allow the Commonwealth to prevent the risk of the entry, emergence, establishment and spread of a listed human disease at Australia's borders. Exit requirements seek to prevent the spread of listed human diseases to passengers on aircraft or vessels, or to other countries, in line with Australia's obligations as a signatory to the International Health Regulations. Entry requirements may include the requirement for individuals to provide evidence of specified vaccination or treatment, or provide a declaration on their health status if they have travelled from a country where there is a disease outbreak. Exit requirements may include individuals undergoing screening, such as completing a health declaration prior to leaving Australia. These clauses are necessary for the legitimate objective of assessing and managing the risk of contagion of a listed human disease in relation to people entering and leaving Australia and ensuring Australia's international obligations under Annex 1B of the International Health Regulations are met.

These requirements are consistent with recommendations of the World Health Organization under Part III of the International Health Regulations, to prevent the global spread of communicable disease. Part III of the International Health Regulations allows the WHO to make temporary recommendations in response to Public Health Events of International Concern. These recommendations may include health measures to prevent or reduce the international spread of disease. Health measures are defined in the International Health Regulations to be measures to prevent the spread of disease or contamination, but do not include security or law enforcement measures. Individuals that have not complied with an entry requirement may present a risk of contagion and therefore measures may be required to manage potential risk to human health.

If an individual fails to meet entry or exit requirements under clause 44 or 45 they may be required to remain at a place (clause 68), practice restricted behaviour (clause 87), be restricted from travelling to certain places (clause 96), be isolated (clause 97), prevented from boarding an outgoing aircraft (clause 101) or detained (clause 103). These measures are only available under a human biosecurity control order, or if measures imposed under a control order have not been complied with (except for the requirement to remain at a place under clause 68, which may be applied if an officer intends to impose a control order).

A human biosecurity control order may only be applied if an individual has signs or symptoms of (or has been exposed to) a listed human disease, or if the individual has not complied with an entry requirement under clause 44, and therefore poses a risk to the broader community. Before imposing a control order, an officer must be satisfied of the principles of general protection in relation to human health (clause 34). These strict limitations in the application of a human biosecurity control order ensure that measures applied relate only to the management of a listed human disease or entry requirements and are a proportionate and legitimate limitation to an individual's freedom of movement.

An individual may only be required to remain at a place for up to six hours and this period may not be extended (clause 68). After that time the officer must apply a human biosecurity control order or release the individual.

Restricting behaviour measures (clause 87) are only available under a human biosecurity control order. These measures may require a person to remain in their homes, or not visit specific places for a specified period of time. This may consequentially prevent individuals from attending work or education for the specified time. Certain members of the community are particularly vulnerable to some communicable diseases, such as children and the elderly. These measures are necessary to meet the legitimate objective of reducing the risk of spread to these members of the community.

An ill individual may be required by a human biosecurity control order to attend a specified medical facility to facilitate assessment and treatment of ill individuals, including undergoing an examination, providing body samples for diagnosis, treatment or undergoing a vaccination (clauses 90, 91 and 92). It is essential, where an individual is suspected of suffering from a listed human disease, that the individual be moved to an appropriate place where medical treatment and privacy can be assured.

Traveller movement measures (clause 96) may be included under a human biosecurity control order. These measures may be used to temporarily restrict individuals from travelling on international passenger aircraft and vessels for up to 28 days. Passenger aircraft and vessels often carry large numbers of passengers in close proximity for long periods of time and temporary restrictions may be necessary to meet the legitimate objective of preventing ill individuals from travelling, while they present a risk of contagion to other passengers. These restrictions also prevent the spread of listed human diseases to other countries, in line with Australia's obligations as a signatory to the International Health Regulations.

As a measure of last resort, a human biosecurity control order may specify that an ill individual is required to be isolated at a specified medical facility (clause 97). Isolation would be applied in situations where an individual presents a significant risk of contagion and does not consent to a less restrictive measure, or isolation is the most or only effective measure in managing the listed human disease. If the individual being isolated is not an Australian citizen, they must be informed of their right to seek consular assistance. In addition, officers must provide a reasonable time to allow the individual to seek consular assistance and facilitate communication with a consular office if requested (clause 102). Clause 93 enables management of communicable diseases that may require long term medication but not hospitalisation or isolation. This clause will enable individuals who do not, or no longer, pose a serious risk of contagion to continue their medication and complete their treatment outside of a medical facility.

Clauses 75 to 79 provide mechanisms for review of the direction for an individual to comply with isolation and traveller movement measures, including review under the *Administrative Appeals Tribunal Act 1975* (clause 76) and the *Administrative Decisions (Judicial Review) Act 1977* (clause 80).

Clause 101 enables an officer of Customs to prevent an individual from boarding an outgoing passenger aircraft or vessel. This clause is necessary for the legitimate objective of managing the risk of contagion of listed human diseases, and in doing so, meeting Australia's obligations under the International Health Regulations. An officer may only prevent an individual from boarding an aircraft or vessel if a traveller movement measure is in force under a human biosecurity control order and the individual would contravene the measure if they boarded the aircraft or vessel.

If an individual who is not an Australian citizen is required to remain at a place or placed under an isolation order, they must be informed of their right to seek consular assistance (clause 102). In addition, officers must provide a reasonable time to allow the individual to seek consular assistance and facilitate communication with a consular office if requested.

Clause 103 provides that an individual may be detained if they fail to comply with a requirement to remain at a place under clause 68, or with an isolation measure under clause 74. An individual who is detained for failing to comply with an isolation measure may only be detained for the purposes of taking the individual to a medical facility (clause 103). This is necessary for the legitimate objective of ensuring that individuals that may have a listed human disease are treated and the risk of contagion is managed. Clause 104 requires the Commonwealth to advise the individual of their right to contact anyone, including a legal representative or a consulate, and to provide facilities for the ill individual to contact that person.

Clause 113 enables the Director of Human Biosecurity to establish a human health response zone for the legitimate objective of preventing, or reducing the risk of, a listed human disease emerging, establishing or spreading in Australian territory or a part of Australian territory. These zones may be used, for example, to manage small incidents such as a localised disease outbreak or a laboratory hazard. In declaring the response zone, the Director of Human Biosecurity may determine requirements for people entering or leaving the zone, or require individuals to evacuate the zone or not enter the zone.

To ensure that response zones are a proportionate and legitimate restriction of an individual's freedom of movement, the Director must be satisfied that the requirements are appropriate and adapted to prevent, or reduce the possibility of, the emergence, establishment or spread of the specified listed human disease (subclause 113(4)). The Director must also consult with the Chief Health Officer in the relevant state or territory prior to declaring the zone. The determination must be made public and may only be in place for three months. The Director of Human Biosecurity must not set requirements in a zone that subject individuals to biosecurity measures imposed under a human biosecurity control order (subclause 113(5)). These measures must still be imposed using a control order and the associated protections of human rights and rights to review would apply.

#### Chapter 4

Clause 217 enables a biosecurity officer to direct the person in charge of a conveyance not to leave the conveyance for a specified period. This clause is necessary for the legitimate objective of managing the biosecurity risks associated with conveyances as the person in charge of a conveyance may be required to move the conveyance or to assist a biosecurity officer exercising powers in relation to the conveyance. This clause may operate to limit the right to freedom of movement as the person would not be able to leave the conveyance while subject to the direction. To ensure this clause is reasonable and proportionate to the legitimate objective, the period which the direction can be given for must be no longer than 24 hours.

A number of other clauses in Chapter 4 provide for directions to be given relating to the movement of conveyances, or require vessels and aircraft to land or moor at specific places, including:

- directing the person in charge or operator of a conveyance to secure the conveyance (clause 198)
- directions relating to the movement of a conveyance (clause 202)
- directions relating to the movement of certain aircraft or vessels, including to a place outside of Australian territory (clause 206)
- directions relating to the movement of exposed conveyances (clause 207)
- requiring aircraft to land a first point of entry (clause 237)
- requiring aircraft to be brought to relevant biosecurity entry point at a first point of entry (clause 238)
- requiring aircraft to land, or not to land, at a specified landing place or places (clause 240)
- requiring aircraft not to land at any landing place in Australia territory (clause 241)
- requiring aircraft to land or not to land at specified landing place in order to manage human health risks (clause 242) (protections apply within)
- requiring vessels to be brought to relevant biosecurity entry point (clause 246)
- requiring vessels to be moored or not to be moored at a specified port (clause 248)
- requiring vessels not to be moored at any port in Australian territory (clause 249), and
- requiring vessel to be moored, or not to be moored at a specified port due to human health risks (clause 250)

These clauses are necessary for the legitimate objective of managing biosecurity risks associated with conveyances (and goods and people on board) by ensuring they arrive at appropriate places. If necessary to manage unacceptable risks, powers can also be used to prevent vessels from

arriving at places. These clauses may operate to limit the right to free movement of passengers on board the conveyance to which the direction or requirement relates, as although they are not required to remain on board the conveyance, they may not be able to disembark from it (for example if the aircraft is in flight when a direction is given).

These clauses only apply to conveyances that are subject to biosecurity control. Directions requiring an aircraft to land or not to land at a specified landing place can only be given if a biosecurity officer is satisfied that the direction is necessary to manage biosecurity risk associated with the aircraft or any person or thing on board the aircraft (clause 240(2)). For a direction not to land in Australian territory, the Director of Biosecurity must be satisfied that the level of biosecurity risk associated with the aircraft or any person or thing on board the aircraft is unacceptable and that biosecurity measures cannot be taken to reduce the risk to an acceptable level (clause 241(3)). If the direction relates to a human health risk, it may only be given if the chief biosecurity officer or a human biosecurity officer is satisfied that the direction is necessary to manage human health risks associated with the aircraft or any person or thing on board the aircraft (clause 242(2)).

Prior to issuing a direction under clause 206, 241 or 249 the Director of Biosecurity must also take into account the principles affecting decisions to exercise certain powers (clause 32), including considering the impact of issuing the direction on any persons on board the conveyance. Directions given under clauses 241 and 249 must be revoked if the level of biosecurity risk is no longer unacceptable. Operators could also reasonably be expected to be aware of the first point of entry and biosecurity entry point requirements set out in clauses 237, 238, 246 and 248 as they are common requirements relating to international travel.

## Chapter 5

Clause 303 enables the Director of Biosecurity to exercise a range of powers with respect to the movement of a vessel for the management of ballast water, including keeping a vessel out of a port or requiring the vessel to remain at a specified place. This clause is necessary for the legitimate objective of preventing significant damage to Australia's marine environment and adverse affects to related industries. For example, a vessel may be ordered to remain at a specified place to investigate whether an offence has been committed, or, if an offence has been committed, to prevent any further risk of the spread of exotic pests or diseases from the release of ballast water held on the vessel. This will help to ensure that the objects of the Bill in relation to ballast water—to provide for managing the biosecurity risks related to ballast water and to give effect to Australia's international rights and obligations—are met and maintained.

Clause 303 is necessary to achieve this objective because the ability to regulate the movement of vessels is required to prevent potential threats to the marine environment and to ensure the overall effectiveness of the ballast water management regime. However, this clause may operate to limit the right to free movement, for example where a direction requiring a vessel to stay out of a port results in individuals being hindered from immediately disembarking the vessel at port.

The Director of Biosecurity may only issue a direction under clause 303 if they have clear grounds for believing that an offence against Chapter 5 has been committed. Additionally, they must take into account the principles affecting decisions to exercise certain powers (clause 32). There is no requirement that individuals must remain on board a vessel subject to a direction.

A decision under this clause is a reviewable decision under clause 574. Further, if a vessel is unduly detained or delayed, the Commonwealth is required to pay reasonable compensation for any losses or damage incurred by the owner of the vessel as a result of the detention or delay (clause 307).

## Chapter 6

Clauses 365, 366, 367 and 370 enable the Director of Biosecurity to declare a biosecurity response zone, determine powers that may be exercised in the zone and enable biosecurity officers to exercise those powers. These powers include setting entry and exit requirements, including directing persons to leave the zone (clause 367(c)). These clauses are necessary for the legitimate objective of managing biosecurity risk posed by diseases and pests in a biosecurity response zone. However, these clauses may operate to limit the right to freedom of movement as they may prevent individuals from entering or exiting a biosecurity response zone.

The Director of Biosecurity may only declare a biosecurity response zone under clause 365 if a biosecurity officer suspects, on reasonable grounds, that a disease or pest that poses an unacceptable biosecurity risk may be present in or on goods or premises in the area and the Director is satisfied that it is necessary to declare a zone for the purpose of managing the biosecurity risk posed by the pest or disease. Directions to leave a biosecurity response zone under clause 367 may only be for a maximum of 24 hours. Additionally, the Director must take into account the principles affecting decisions to exercise certain powers (clause 32) when making a decision under Chapter 6.

## Chapter 8

Clauses 445 and 446 enable the Agriculture Minister to determine emergency requirements, give directions and take actions during a biosecurity emergency period, including restricting or preventing the movement of persons, goods or conveyances or causing goods or conveyances to be removed from specified places. These clauses are necessary to achieve the legitimate objective of dealing with biosecurity emergencies of national significance; however, they may operate to limit the right to free movement.

The Agriculture Minister may only determine a requirement under clause 445 if he or she is satisfied that it is appropriate and adapted to prevent or control the establishment or spread of the declaration disease or pest in Australian territory or part of Australian territory. In giving a direction requiring a person not to enter premises under clause 446, the Minister (including delegated officers such as the Director of Biosecurity, biosecurity officers, biosecurity enforcement officers, or a national response agency executive) must be satisfied that the direction is appropriate and adapted to preventing or controlling the establishment or spread of the declaration disease or pest in Australian territory.

Before the Agriculture Minister makes a decision to exercise a power under clause 446, the Minister must also be satisfied of a range of protections (listed in clause 447), including:

- that exercising the power is likely to be effective, or contribute to, achieving the purpose for which the power is to be exercised
- the manner in which the requirement is applied is no more restrictive or intrusive than is required in the circumstances
- if the power is to be exercised in relation to an individual, that the power is no more restrictive or intrusive than required in the circumstances, and
- if the power is exercised during a period, that the period during which the power is to be exercised is only for as long as necessary.

Similarly, clauses 477 and 478 enable the Health Minister to determine requirements, give directions, or take actions during a human biosecurity emergency period including restricting or preventing the movement of persons, goods or conveyances. These clauses are necessary to achieve the legitimate objective of dealing with biosecurity emergencies of national significance. However, they may operate to limit the right to free movement.

The Minister must be satisfied that a requirement or direction is necessary to: prevent or control the entry of the listed human disease into Australian territory, or the emergence, establishment or spread of the listed human disease in Australian territory; prevent or control the spread of the listed human disease to another country; or give effect to a recommendation made by the World Health Organization under the International Health Regulations (clauses 477 and 478).

Before determining a requirement, the Health Minister must also be satisfied that of a range of protections, including:

- that the requirement or direction is likely to be effective, or contribute to, achieving the purpose for which it is to be determined
- the requirement or direction is appropriate and adapted to achieve the purpose for which it is to be determined
- the requirement or direction, or the manner in which the requirement is to be applied, is no more restrictive or intrusive than is required in the circumstances, and
- that the period during which the requirement or direction is to be exercised is only as long as necessary.

A direction under 478 must not require an individual to be subject to biosecurity measures that may be set out in a human biosecurity control order, such as isolation, treatment or movement measures. This means that these more invasive or restrictive measures can only be required if the criteria relating to biosecurity control orders are met.

### Chapter 11

Clauses 618 to 624 of Chapter 11 set out a scheme by which the Director of Biosecurity and the Director of Human Biosecurity may jointly declare parts of Australian territory to which a modified version of certain parts of Chapters 2, 3 and 4 apply. The scheme will be used to manage biosecurity risks associated with parts of Australian territory that have a different risks status to the rest of Australian territory, such as Christmas Island and the Cocos (Keeling) Islands. It will enable regulation of the movement of people, goods and conveyances between such parts and the rest of Australian territory.

These clauses are necessary to achieve the legitimate objective of managing biosecurity risk between parts of Australian territory, however they may operate to limit freedom of movement by, for example, requiring vessels moving between parts of Australian territory to arrive at a first point of entry as if they were arriving from outside Australian territory.

Before making a declaration under clause 619 in order to regulate movements between parts of Australian territory, the Director of Biosecurity and the Director of Human Biosecurity must be satisfied that there is an unacceptable level of biosecurity risk associated with the movements if they are not regulated, and the application of the affected provisions because of the proposed declaration is appropriate and adapted to managing biosecurity risks associated with the movements.

**Summary:** The right to freedom of movement under Article 12 of the ICCPR may be permissibly limited in these instances because these clauses are necessary for the protection of public health, and the protection of the rights and freedoms of others (for example, the right to an adequate standard of living, including food, water and housing under Article 11(1) of the ICESCR). A range of tests and protections also apply to ensure the exercise of these powers is reasonable and proportionate to the legitimate objective and that adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.



### **Right to the presumption of innocence (reverse burden provisions)**

Article 14(2) of the ICCPR states that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to presumption of innocence is also a fundamental common law principle.

Laws which shift the burden of proof to a defendant, commonly known as ‘reverse burden provisions’, can be considered a limitation of the presumption of innocence. This is because a defendant’s failure to discharge a burden of proof or prove an absence of fault may permit their conviction despite reasonable doubt as to their guilt. This includes where an evidential or legal burden of proof is placed on a defendant.

When a defendant bears an evidential burden in relation to an exception it means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply. This can be justified in circumstances where the facts in question are peculiarly within the knowledge of the defendant.

Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that the reverse burden pursues a legitimate objective and is reasonable, necessary and proportionate to achieving that objective. Whether a reverse burden provision impermissibly limits the right to the presumption of innocence will depend on the circumstances of the case and the particular justification for the reverse burden.

The Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) notes that placing the burden of proof on the defendant should be limited to where the matter is peculiarly within the knowledge of the defendant and where it is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The Guide also notes that a reverse burden provision is more readily justified if:

- the matter in question is not central to the question of culpability for the offence
- the penalties are at the lower end of the scale, and
- the conduct proscribed by the offence poses a grave danger to public health or safety.

An additional factor to consider is whether the offences only impose an evidential burden (as the prosecution must still disprove the matters beyond reasonable doubt if the defendant discharges the evidential burden).

The Bill may operate to limit the right to be presumed innocent through imposing an evidential burden on the defendant in relation to a range of matters. Clauses in which an evidential burden is imposed on the defendant, and where strict liability applies, are outlined below. Chapter 4 of the Guide was considered in the development of these clauses and is considered consistent with the proposed reverse burden of proof. Agreement of the Attorney-General was also received in relation to these clauses.

The following clauses include offences for which an exception applies if a person is authorised to engage in the conduct under the Act or another Australian law:

- clause 48 (allowing goods to be unloaded or loaded, or people to embark or disembark, before pratique has been granted)
- clause 151 and paragraph 152(2)(a) (unloading, receiving or possessing goods from a vessel displaying the prescribed quarantine signal)
- clauses 216, 330, 351 and 457 (dealing with goods or conveyances to which a notice is affixed)
- clause 376 (interfering with equipment set up in biosecurity response zone).

It is necessary that the defendant bears the evidential burden in these clauses in order to achieve the legitimate objective of ensuring the objects of the Act are met. These clauses are reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of the exception (that they were authorised by law to undertake the conduct).

A number of civil penalty provisions in the Bill place an evidential burden on the defendant, including:

- clauses 129, 139, 203, 214, 322, 363, 373, 374, 381, 382, 391, 392, 401 and 456 (interfering, removing or defacing notices or biosecurity control orders)
- clauses 130, 204 and 323 (moving goods or conveyances to which a direction has been given or notice affixed)
- clause 393 (interfering with equipment set up in biosecurity monitoring zone), and
- clauses 601 and 607 (moving or interfering with withheld goods or detained conveyances).

These provisions are unlikely to be classified as criminal for the purposes of human rights law, given they operate in a regulatory context and, while they impose not insubstantial pecuniary penalties, they are not of a level of severity that would justify classification as 'criminal' (see assessment of civil penalties at page 21). However, if they were considered criminal, their inclusion would still be justified based on the reasoning set out above in relation to authorised persons.

Clause 438, 439 and 532 create civil penalties for giving false or misleading information or documents. These also place an evidential burden on the defendant in relation to proving that the information or documents were not false or misleading in a material particular (that is, they must provide evidence that the misleading information is trivial or inconsequential). These clauses are necessary to achieve the legitimate objective of ensuring information provided to a biosecurity industry participant is correct. These clauses are reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of the exception (that the information or documents were not relevant).

These clauses also provide an exception where a biosecurity industry participant (or official in clause 532) has failed to take reasonable steps to inform the person that they may be liable to a civil penalty for contravening the provision. The defendant bears the evidential burden with respect to these exceptions, as whether or not a person has been informed that they may be liable to a civil penalty provision for contravening this clause is something peculiarly within the knowledge of that person. It would be difficult for the prosecution to provide evidence that the person has been informed when this evidence can only be known by that person and the biosecurity industry participant. It would also be significantly more difficult and costly for the prosecution to provide evidence that a document is false or misleading than for a defendant to provide evidence of the matter themselves.

A number of other clauses in Chapters 3, 5 and 10 also place the evidential burden of proving exceptions to an offence on the defendant.

### Chapter 3

Clause 120 creates an offence for not giving notice of goods that are, or are intended to be, unloaded in Australian territory. The defendant bears the evidential burden of proving any exceptions, which will be prescribed in the regulations. This clause is necessary in order to achieve the legitimate objective of assessing the biosecurity risk of goods that are, or are intended to be brought into Australian territory. This clause is reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of the exception (for example, that their goods were brought in as accompanied baggage, if such

an exception were prescribed). Any exceptions prescribed under this clause will be consistent with the principles set out in the Guide.

Clauses 143 and 188 create offences relating to bringing or importing goods into Australian territory. These offences contain exceptions where the defendant bears the evidential burden of proving the exception (for instance under subclause 143(7) a defendant may rely upon the exception that they contravened the direction because they issued the same direction to another person who failed to comply with it). It is necessary that the defendant bears the evidential burden in these clauses in order to achieve the legitimate objective of ensuring goods that potentially pose a biosecurity risk may be located by biosecurity officials. These clauses are reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of the exception. For example, under clause 188 (receiving or possessing prohibited goods etc brought or imported into Australian territory) if the defendant did not bring or import the goods into Australian territory, the information or facts about how they obtained the goods, such as information about where they purchased them, will be uniquely in their knowledge.

A number of clauses in Chapter 3 create offences relating to moving, possessing or receiving certain goods, including; receiving or possessing goods unloaded from an aircraft or vessel in contravention of Division 6 of the Chapter (clause 149), receiving or possessing goods unloaded from an aircraft or vessel displaying the prescribed quarantine signal (clause 153) and receiving or possessing prohibited goods (clause 188). These offences contain exceptions where the defendant bears the evidential burden of proving the exception (for example, proving that they did not know that the goods they received were in contravention of Division 6). It is necessary that the defendant bears the evidential burden in these clauses in order to achieve the legitimate objective of ensuring the biosecurity risk associated with the goods is managed. These clauses are reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of the exception.

Clause 186 creates a basic offence for contravening conditions applying to conditionally non-prohibited goods, and additional offences for doing so and obtaining commercial advantage, causing harm to the environment or causing economic consequences. This clause contains an exception to these offences where the person did not do (or omit to do) the act that constituted the failure to comply with the condition, did not aid, abet, counsel or procure the act or omission and was not in any way knowingly concerned in or party to the act or omission. The defendant bears the evidential burden of proving the exception. This is necessary in order to achieve the legitimate objective of ensuring that conditions relating to preventing biosecurity risk material being brought into Australian territory are not contravened. This clause is reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of the exception (for example, if a condition is that a permit must be obtained to being in the goods they will be able to produce the permit).

#### Chapter 4

Clause 193 creates an offence for failing to give a pre-arrival report. Exceptions to this requirement may be prescribed in the regulations; the defendant will bear the evidential burden of proving any exception. This is necessary in order to achieve the legitimate objective of ensuring pre-arrival reports are provided and risks associated with incoming goods, conveyances and people can be assessed and managed. This clause is reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of the exception.

## Chapter 5

Clauses 271, 276, 277, 279, 282, and 283 provide exceptions to the offence of discharging ballast water in Australian seas provided for in clause 270. For example, it is an exception that ballast water has been managed for discharge, that discharge is part of an acceptable ballast water exchange, or that ballast water was taken up and discharged at the same place. The defendant bears the evidential burden with respect to these exceptions.

In addition, the defendant bears the evidential burden of proving an exception for the following clauses:

- clause 284, which creates an offence for failing to report a discharge of ballast water relating to an emergency, an accident or to minimise pollution
- clause 294, which creates an offence in relation to failing to keep requisite records in relation to an Australian vessel's ballast water management system
- clause 299, which provides a exception to the offence of disposing sediment in Australian seas (under clause 298), and
- clause 305, which provides an offence for contravening a direction under Division 3 of Part 6 of Chapter 5.

A similar justification applies to these clauses in that the defendant will have the information or knowledge that is evidence of the exception (that is, they will have the appropriate records, such as the ship's log, to show they did not commit the offence).

It is necessary that the defendant bears the evidential burden in these Chapter 5 clauses in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. These clauses are reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of the exception.

## Chapter 10

Clause 571 creates an offence where a person fails to return an identity card in the prescribed circumstances. The defendant bears the evidential burden of proving the exception that the identity card was lost or stolen. It is necessary that the defendant bears the evidential burden in this clause in order to achieve the legitimate purpose of preventing identity cards from being obtained and used by unauthorised persons. This clause is reasonable and proportionate to the legitimate objective because the defendant will have the information or knowledge that is evidence of this exception, and also because the penalty for this offence is low (one penalty unit).

**Summary:** The offence-specific exceptions included in the Bill are compatible with Article 14(2) of the ICCPR. In consideration that the offences specified above:

- impose an evidential, rather than legal, burden on the defendant, and
- the burden relates to facts which are readily within the person's knowledge

the offences are necessary, reasonable and proportionate to the legitimate objective of protecting Australia's human, plant and animal health, and the environment and economy.

### **Right to the presumption of innocence (strict liability offences)**

Article 14(2) of the ICCPR states that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to presumption of innocence is also a fundamental common law principle.

When 'strict liability' applies to an offence, the prosecution is only required to prove the physical elements of an offence, they are not required to prove fault elements, in order for the defendant to be found guilty. The defence of honest and reasonable mistake of fact is available to the defendant

(see section 9.2 of the *Criminal Code*). Strict liability is used in circumstances where there is public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that the person was aware of their duties and obligations. Strict liability offences can be considered a limitation of the presumption of innocence because the defendant can be found guilty without the prosecution being required to prove fault.

Strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that removal of the presumption of innocence pursues a legitimate objective and is reasonable, necessary and proportionate to achieving that objective. Whether a strict liability provision impermissibly limits the right to the presumption of innocence will depend on the circumstances of the case and the particular justification for an offence being a strict liability offence.

The Bill contains some strict liability offences. These offences have been used when there is a strong public interest in managing biosecurity risks appropriately and preventing serious damage to human, plant and animal health, local industries, the economy and the environment. The application of strict liability in the Bill and the offences to which it relates have been developed in line with the Senate Standing Committee for the Scrutiny of Bills *Sixth Report of 2002 on Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and the Guide, except for the Chapter 5 offences which impose higher maximum penalties than those recommended in the Guide. Agreement of the Attorney-General was received in relation to these clauses.

The offences in the Bill to which strict liability applies are outlined below.

## Chapter 2

Clause 58 provides a strict liability offence where a person fails to comply with a requirement to either answer a question or provide written information under the information gathering powers of Chapter 2 (clause 58). This strict liability offence for failure to provide required information is necessary to address public health risk. The offence is reasonable and proportionate to the legitimate objective as the offence is not punishable by imprisonment and imposes a maximum penalty of 60 penalty units, which is at the lower end of the scale.

Information sought relating to listed human diseases is vital to address public health risk and it is essential that as much information is collected as quickly as possible. This information will be uniquely known to the individual and individuals may be able to provide important details about the epidemiology of a disease, the source of a disease and the potential exposure of themselves and other individuals to the disease. Ideally this would occur before exposed individuals have the opportunity to depart the airport and enter the community and potentially spread the disease to family and friends.

Wherever possible, the Commonwealth will rely on voluntary disclosure. However, in some circumstances, an individual may be unwilling to disclose information about their health status, potential exposure or travel history. In such cases, the need to address public risk justifies the application of the strict liability offence for failure to provide required information.

The monitoring and investigation powers available in Chapter 9 are not appropriate for this purpose as the information being sought must be collected as soon as possible to allow effective management. This is because the Chapter 9 powers have a number of restrictions around them (such as judicial approval of warrants) that reduce their responsiveness in these circumstances.

Clause 37 provides special protections for individuals who may be temporarily incapable of understanding requirements or complying with a measure due to illness. An incapable person who

is not accompanied by a parent, guardian or other authorised person must not be subject to a requirement under Chapter 2.

### Chapter 3

Chapter 3 provides a strict liability offence where a person receives or has in their possession prohibited or suspended goods brought or imported into Australian territory (clause 188). The clause provides exceptions that are additional to the defence of honest and reasonable mistake of fact that is available under section 9.2 of the *Criminal Code*. These include where the goods were not brought or imported into Australian territory, the goods were not prohibited or suspended at the time they were brought in, or the goods are the progeny (offspring) of other goods that were legally brought or imported into Australian territory. This offence is necessary to achieve the legitimate objective of deterring conduct which involves receiving or possessing goods which pose an unacceptable biosecurity risk. It is reasonable and proportionate to the legitimate objective as the offence is not punishable by imprisonment, the penalty is low (maximum 60 penalty units) and additional exceptions are available.

### Chapter 4

Chapter 4 provides a strict liability offence where a person in charge of a conveyance fails to display the prescribed quarantine signal in the circumstances and manner prescribed by the regulations (clause 221). The defence of honest and reasonable mistake of fact under section 9.2 of the *Criminal Code* applies to the clause. This offence is necessary to achieve the legitimate objective of ensuring the requirement to display the prescribed quarantine signal is met. The offence is reasonable and proportionate to the legitimate objective as it is not punishable by imprisonment and imposes a maximum penalty of 50 penalty units, which is at the lower end of the scale.

### Chapter 5

Chapter 5 contains strict liability offences where:

- a person in charge or operator of a vessel in Australian seas discharges ballast water (subclause 270(3)) – 500 penalty units
- a person in charge or operator of a vessel in Australian seas discharges ballast water for the purpose of safety, accident or pollution minimisation and fails to comply with reporting requirements under subclause 284(4) – 500 penalty units
- a person in charge of a vessel does not have a ballast water management system as required by subclause 292(2) – 200 penalty units
- a person in charge of a vessel fails to make a record of ballast water operations and the disposal of sediment in accordance with subclause 293(3) – 200 penalty units
- a person in charge of a vessel fails to retain records in accordance with subclause 294(4) – 200 penalty units
- a person in charge or operator of a vessel in Australian seas disposes sediment, other than to a sediment reception facility (subclause 298(3)) – 500 penalty units
- the owner of an Australian vessel fails to produce a ballast water record, or a copy of the record, in accordance with subclause 301(4) – 80 penalty units, or
- a person in charge of a vessel fails to comply with a direction under Division 3, Part 6 (subclause 305(1)) – 2000 penalty units.

The defence of honest and reasonable mistake of fact under section 9.2 of the *Criminal Code* is available for the above ballast water offences. Some of these offences contain additional exceptions: exceptions to the offence under subclause 270(3) are contained in Divisions 3 to 8 of Part 2 of Chapter 5; exceptions to the offence under subclause 284(4) are contained in clauses 271, 276, 277, 279 and 282; clause 299 sets out specific exceptions in relation to the offence under subclause 298(3); and subclauses 305(2), 305(3) and 305(4) set out exceptions available to the offence under clause 305.

The application of strict liability in these clauses is necessary for the legitimate objective of preventing potentially significant damage to Australia's marine environment and adverse affects to related industries. They will help ensure that the objects of the Bill in relation to ballast water are met and maintained and give effect to Australia's international rights and obligations. These strict liability offences are necessary to achieve this legitimate objective because they are imposed in order to effectively deter contravention of ballast water obligations under the Act.

The application of strict liability in the above clauses is consistent with the Ballast Water Convention. Where relevant, the penalties for these clauses are consistent with equivalent offences and penalties in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (see in particular sections 21, 22(1B)(1), 22(1B)(3), 23(5), 25(3), 27(1)(m), 27(2) and 27A(5)). These higher maximum penalties are proportionate given the potentially significant harm to the marine environment that could be cause by the commission of the offences. Additionally, the clauses are only directed at persons in charge, operators or owners of vessels, who can be expected to be responsible and aware of the requirements of the legislation.

Therefore due to the regulatory nature of the scheme and the availability of exceptions for these clauses, the high penalties are reasonable, proportionate and necessary to achieve the legitimate objective of effective management of ballast water in Australian seas.

#### Chapter 10

Clause 556 contains a strict liability offence where a person does not comply with a direction given by a biosecurity officer to provide suitable and sufficient food and sleeping accommodation for the officer. This offence is necessary to achieve the legitimate objective of enabling an officer to perform functions or duties, or exercise powers under the Biosecurity Act. This strict liability offence is reasonable and proportionate to the legitimate objective as it is not punishable by imprisonment and imposes a maximum penalty of 10 penalty units, which is at the lower end of the scale.

Clause 571 contains a strict liability offence where a person has been issued with an identity card and does not return it within 14 days of ceasing to be an officer. This offence is necessary to achieve the legitimate objective of ensuring that identity cards cannot be obtained and misused by persons that are not authorised under the legislation. The offence is reasonable and proportionate to the legitimate objective as it is not punishable by imprisonment and imposes a maximum penalty of one penalty unit, which is at the lower end of the scale.

**Summary:** The strict liability offences included in the Bill are compatible with Article 14(2) of the ICCPR. In consideration that the offences specified above:

- are not punishable by imprisonment
- have comparatively low penalties (or where higher penalties apply, they are justified)
- make available a range of exceptions, and
- the offences are necessary, reasonable and proportionate to the legitimate objective of protecting Australia's human, plant and animal health, and the environment and economy.

#### **Right to be free from self-incrimination**

Article 14(3)(g) of the ICCPR protects the right of an individual to be free from self-incrimination in the determination of a criminal charge by providing that a person may not be compelled to testify against him or herself or confess guilt. The common law also recognises the privilege against self-incrimination which applies unless expressly or impliedly overridden by statute. The privilege against self-incrimination may be subject to permissible limits. Any limitations must be for a legitimate objective and be reasonable, necessary and proportionate to that objective.

Chapters 2 through 9 contain clauses which may operate to limit this right.

The Bill operates to limit the right to be free from self-incrimination in certain circumstances by expressly removing the privilege against self-incrimination in the following information-gathering clauses of the Bill (as listed in clause 635):

- clauses 44, 45, 69, 70, 85 and Division 6 of Part 2 of Chapter 2 (information gathering powers for human biosecurity)
- clauses 120, 121, 122, 126 and 127 (requiring a person to answer questions or produce documents to assess the level of biosecurity risk of goods brought into Australian territory)
- clauses 193, 194, 195, 196, 200 and 201 (requiring a person to answer questions or produce documents to assess level of biosecurity risk of conveyances entering Australian territory)
- clauses 267 and 268 (reporting ballast water discharges in Australian seas)
- clauses 319 and 320 (requiring a person to answer questions or produce documents relating to goods or premises for the purpose of assessing biosecurity risk)
- subclause 437(1) (audit powers in relation to approved arrangements)
- clauses 450 and 451 (requiring a person to answer questions or produce documents relating to biosecurity emergencies)
- clauses 481 and 484 (requiring information for monitoring and investigation purposes)

Removing the privilege in these circumstances is necessary to achieve the legitimate objective of effective assessment and management of biosecurity risks to human, plant and animal health, the environment and the economy.

Upholding the privilege in relation to individuals who have information regarding a potential biosecurity or human biosecurity risk could have significant consequences such as contagion of a listed human disease, reduced agriculture, fisheries or forestry productivity, serious environmental damage or increased costs associated with controlling pests and diseases. An animal disease outbreak (such as foot-and-mouth disease) has the potential to cause significant and long term damage to Australian industries and the reputation of Australia as a reliable producer of quality food and fibre.

Whilst in some cases it may be feasible to obtain information by other means (for example, warrants), the additional time taken to obtain such information may significantly increase the risk of a disease or pest entering, establishing or spreading to Australia, or within Australian territory. Without these limitations, the Commonwealth's ability to manage biosecurity risks through a responsive, evidence-led approach will be significantly reduced. Removal of the privilege ensures that the assessment of biosecurity risk and application of response measures can occur as urgently as necessary and reflects the magnitude of the potential impacts biosecurity risks pose to Australia.

These limitations are reasonable and proportionate to achieving the objective, as clause 635 provides that self-incriminatory disclosures cannot be used against the person who made the disclosure either directly in court (use immunity) or indirectly to gather other evidence against the person (derivative use immunity). The only exception to the use and derivative use immunity are in relation to proceedings arising out of sections 137.1 and 137.2 of the *Criminal Code* (in relation to false and misleading information and documents) and proceedings for the contravention of clause 532 and 533 of the Bill (in relation to false and misleading information and documents).

**Summary:** These limitations of the right to be free from self-incrimination under Article 14(3)(g) of the ICCPR are permissible as protections apply to ensure the exercise of these powers is reasonable and proportionate to achieving the legitimate objective and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.



### **Right not to be tried or punished again for an offence for which a person has already been finally convicted or acquitted**

Article 14(7) of the ICCPR prohibits an individual from being tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country—commonly known as the prohibition on double jeopardy. This prohibition is limited to proceedings relating to a criminal charge. Despite this limitation however, the approach under international and comparative human rights law has been to look at the substance and the effect of the proceedings themselves, rather than their label under domestic law, when determining whether a proceeding relates to a civil or criminal charge. From an international perspective therefore, it is possible for a civil penalty provision which subjects a person to a significantly high penalty that is intended to be punitive or deterrent in nature to constitute a ‘criminal charge’ for the purposes of the prohibition on double jeopardy.

The civil penalty provisions contained in the Bill are a distinct penalty regime from criminal sanctions and provide a proportionate and effective mechanism to punish actions that may contravene Australia’s biosecurity laws. The civil penalty provisions under the Bill cannot be used to subject a person to imprisonment. Subclause 520(1) of the Bill provides that a court may not make a civil penalty order under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) against a person for a contravention of a civil penalty provisions of the Bill where the person has been convicted of an offence under an Australian law or been found by a court to have contravened a civil penalty provision under an Australian law that is the same, or substantially the same as conduct constituting a contravention under the Biosecurity Act. This protects a person from being penalised twice for the same conduct under Australian law. Similarly, subclause 520(2) provides for a stay of proceedings for a civil penalty order under the Biosecurity Act during corresponding criminal or civil proceedings.

Clause 520 modifies the application of Part 4 of the Regulatory Powers Act, which provides for the circumstances where a court may not make a civil penalty order, may stay proceedings and may commence proceedings to take into account interactions between Commonwealth and state or territory legislation. This has been done to address the potential for an individual to contravene a civil penalty or criminal provision under both a Commonwealth and state or territory law due to the same activity. This departure has been agreed to by the Attorney-General’s Department.

**Summary:** Given the operation of these clauses it is unlikely that a person convicted of a civil offence under the Bill will become subject to an additional proceeding for conduct that is the same or substantially the same as the conduct constituting the first offence unless new evidence relating to the conduct comes to light. The practical operation of these provisions, as well as the usual operation of the rules of evidence, makes it highly unlikely that Article 14(7) would be engaged by the operation of the civil penalty provisions of the Bill.

### **Right to protection from arbitrary interference with privacy**

Article 17 of the ICCPR protects the right to be free from arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence. This right may be subject to permissible limitations where those limitations are provided by law and are non-arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to this purpose.

Chapters 2, 3, 4, 6, 7, 8, 9, and 10 contain clauses which may operate to limit this right.

#### Chapter 2

Entry and exit requirements under clauses 44 and 45 may include requirements to provide declarations or evidence relating to an individual’s health status or medical treatments, or

information on where they have travelled prior to entering Australia. For example, individuals may be required to produce evidence that they have received a vaccination for yellow fever if they have travelled through an area where there is a risk of yellow fever transmission. To ensure that these requirements are a proportionate and legitimate restriction of an individual's privacy, these requirements apply only for the purposes of preventing the entry, establishment and spread of listed human diseases in Australian territory, preventing listed human diseases from spreading to another country, or on recommendation by the World Health Organization under the International Health Regulations.

Clause 51 provides that the Health Minister may determine preventative biosecurity measures to be taken by classes of persons. This may include, for example, requiring blood samples from individuals for testing. These requirements may only apply for the purpose of preventing behaviour or practice that may cause, or contribute to, a listed human disease entering, emerging, establishing itself or spreading in Australian territory. The Health Minister must also be satisfied that the measure is appropriate and adapted to prevent, or reduce, the risk of the disease entering, emerging, establishing itself or spreading in Australian territory. The determination may only be in force for a period of up to one year.

Clauses 55 and 56 enable officers to ask questions and require answers from individuals. In certain situations, it may be vital that officers can quickly obtain information from individuals in order to prevent the entry, emergence, establishment or spread of listed human diseases. Wherever possible, the Commonwealth will rely on voluntary disclosure of this information, however in some circumstances an individual may be unwilling to disclose information about their health status, potential exposure and travel history. In such cases, the need to address public risk will justify the requirement for individuals to answer questions or provide documents under these clauses.

To ensure that there is no arbitrary interference with an individual's privacy, the requirement to provide information under clauses 55 and 56 must be for the purposes of preventing a listed human disease from entering, emerging, establishing or spreading in Australian territory, or preventing a listed human disease from spreading to another country. Biosecurity officials may only ask questions and require documents if they are satisfied that an individual has been exposed to a listed human disease; exposed to another individual who has signs or symptoms of a listed human disease; the questions relate to human remains or an individual who has died in transit or on arrival in Australia, or; the person is subject to a human biosecurity control order or in a human health response zone.

Clause 69 enables an officer who intends to impose a human biosecurity control order to require an individual to provide prescribed contact information for the individual. This clause is necessary for the legitimate objective of ensuring an individual who may have a listed human disease can be contacted. The protections in Chapter 11 described at the end of this section would apply to the collection and storage of this information.

Clause 85 provides that a human biosecurity control order may require an individual to provide an officer with prescribed contact information for any individual with whom the person has been, or will be, in close proximity to. A range of criteria must be met in order for a human biosecurity control order to be imposed, including that the officer imposing the order must be satisfied that the individual has one or more signs or symptoms of a listed human disease, or has been exposed to a listed human disease (or another individual who has signs or symptoms of a listed human disease), or has failed to comply with an entry requirement under clause 44. The principles of general protection (clause 34) must also be met before the order is imposed. This clause is necessary for the legitimate objective of ensuring that individuals who may have been exposed to a listed human

disease can be contacted, and if necessary, assessed and treated. This clause constitutes an authorisation for the purposes of the *Privacy Act 1998*.

Clause 91 provides that an individual may be required by a human biosecurity control order to provide body samples for diagnosis. This clause only applies for the purpose of determining the presence in the individual of listed human diseases and if the individual has undergone examination under clause 90. A range of criteria must be met in order for a human biosecurity control order to be imposed, as outlined above in relation to clause 85. If a person does not consent to providing body samples for diagnosis, they may make an application under the *Administrative Decisions (Judicial Review) Act 1977* for review of the direction to comply (clause 80).

Chapter 2 also provides for sharing of personal information between agencies in specific circumstances. If an individual is subject to a traveller movement measure in a human biosecurity control order, clause 98 includes a requirement that the following Commonwealth bodies are notified using a travel movement measure alert:

- the Agriculture Department
- the Immigration Department
- the Foreign Affairs Department
- the Australian Customs and Border Protection Service, and
- the National Focal point.

To protect an individual's privacy, the alert is restricted to the specified Commonwealth bodies, all of whom have responsibility relating to the movement of conveyances, goods and passengers into and from Australia. In addition, clause 98 restricts the information which can be shared to ensure that only the information necessary to clearly identify the individual subject to the measure and any known travel details of that individual.

A traveller movement measure alert informs the responsible Commonwealth bodies to ensure ill passengers are prevented from boarding a passenger airline or vessel. This manages the risk of contagion to other passengers in the confines of a passenger aircraft or vessel and the risk of spread of a listed human disease to another country. To protect an individual's privacy and reputation, clause 98 specifies that traveller movement alerts must be destroyed within six months of no longer being in force.

Part 2 of Chapter 11 also includes a range of protections relating to the collection, storage and disclosure of protected information. Clause 580 provides that only certain persons may collect, disclose, or use information, and that they may only do so for a permissible purpose (a purpose which promotes the objects of the Act). Clause 585 provides an offence for improper collection or use of protected information.

### Chapters 3, 4 and 5

These chapters contain clauses allowing a biosecurity officer to ask questions or to require persons to provide documents (clauses 126, 127, 200 and 201) and provide reports or notices to enable assessment of the risk associated with goods or conveyances in Australian territory, or intending to enter Australian territory (clauses 120, 121, 122, 194, 195, 196, 267 and 268). By exercising powers to ask questions or require persons to provide documents, notices or reports, a biosecurity officer may incidentally require the provision of personal information. These clauses are necessary for the legitimate objective of assessing the level of biosecurity risk associated with goods or conveyances in, or intending to enter, Australian territory. Biosecurity officers need access to this information in order to properly assess the level of biosecurity risk associated with the goods or conveyances and then to be able to manage any biosecurity risks appropriately. However, the

collection, use, storage and sharing of personal information may operate to limit the right to privacy.

The application of clauses 124, 125, 200 and 201 is restricted to circumstances where a biosecurity officer suspects on reasonable grounds that a person or persons has relevant information or documents required to achieve the legitimate objective of assessing the level of biosecurity risk. Reporting and notification obligations under clauses 120, 121, 122, 194, 195, 196, 267 and 268 apply only in particular circumstances and the persons required to provide the information (such as the owner or operator of the aircraft or vessel) can be reasonably expected to be aware of these obligations.

Additionally, Part 2 of Chapter 11 includes a range of protections relating to the collection, storage and disclosure of protected information. Clause 580 provides that only certain persons may collect, disclose, or use information and that they may only do so for a permissible purpose (a purpose which promotes the objects of the Act). Clause 585 also provides an offence for improper collection or use of protected information.

### Chapter 6

This chapter provides for powers to enter premises (clause 315) and for powers to be exercised on those premises, including the ability to ask questions about goods or premises (clause 319), require documents to be produced and take extracts or copies of documents (clause 320) and inspect and sample anything on the premises (clause 318). These powers are necessary for the legitimate objective of assessing the level of biosecurity risk associated with the premises. Without these powers biosecurity officers would not have sufficient information to effectively assess or manage onshore biosecurity risks. However, these clauses may operate to limit the right to protection from arbitrary interference with privacy by enabling the entry of premises, including residential premises, the searching of premises and the taking of documents which may include personal information.

These powers can only be exercised in particular circumstances and reflect the serious harm that may be caused by biosecurity risks arising onshore. The principles affecting decisions to exercise certain powers (clause 32) apply to all decisions made under Chapter 6.

Additionally, entry to premises under Chapter 6 is only allowed with consent or a warrant. A warrant to enter premises may only be granted if there are reasonable grounds for suspecting that a pest or disease that poses an unacceptable level of biosecurity risk may be present on the premises, or it is reasonably necessary to monitor whether such a pest or disease has entered, established itself or spread in the premises. Officers entering premises under a warrant must also provide identification to the appropriate person for the premises (clause 502).

### Chapter 8

This chapter provides for powers to control the establishment or spread of a declared disease or pest in Australian territory during a biosecurity emergency period (such as a severe and widespread outbreak of foot-and-mouth disease that affects multiple Australian states). Such powers include the power to ask questions or require documents to be produced (clauses 450 and 451) and enter premises without a warrant or consent (clause 470). These powers are necessary for the legitimate objective of managing biosecurity risks during a biosecurity emergency period. If these powers were not provided for, biosecurity officers would be unable to gather sufficient information to effectively assess and manage biosecurity risks during an emergency period. However, these clauses may also operate to limit the right to privacy for the same reasons set out above in relation to Chapters 3, 4 and 6.

These powers may only be exercised during a biosecurity emergency period, which can only be declared by the Governor-General if the Agriculture Minister is satisfied that a disease or pest poses a severe and immediate threat, or is causing harm, on a nationally significant scale to animal or plant health, the environment or economic activities relating to animals, plants or the environment; and the declaration is necessary to prevent or control the establishment or spread of the disease or pest (clause 443).

Additionally, the application of clauses 450 and 451 is restricted to circumstances where a biosecurity officer suspects on reasonable grounds that a person or persons has relevant information or documents required to achieve the legitimate objective. Entry to premises under clause 470 is only allowed during a biosecurity emergency period for the purpose of controlling the establishment or spread of a declared disease or pest in Australian territory. When making a decision to enter premises under clause 470, a biosecurity official must also be satisfied of the principles affecting decisions to exercise certain powers (clause 32). Additional protections include that an enforcement officer entering premises without a warrant under Chapter 8 must announce that he or she is authorised and provide identification (clause 514). The protections in Part 2 of Chapter 11 relating to the collection, storage and disclosure of protected information also apply to these clauses.

Further to this, officers would also be required to meet the requirements of the Australian Government Investigations Standards (AGIS), consistent with the Commonwealth Fraud Control Guidelines. This includes the requirement that staff involved in investigations meet minimum levels of training or qualifications and that the department meets the minimum standards for effective and efficient management of investigations, including record keeping. Quality assurance reviews (QAR) of investigations can also be undertaken to establish whether an investigation was conducted in a way that complied with the AGIS. QARs may be conducted by the Australian Federal Police in relation to criminal investigations and, in relation to non-criminal investigations, can be conducted by another agency with the necessary skills and capacity.

## Chapter 9

This chapter provides for compliance and enforcement powers, including for powers to be drawn from the Regulatory Powers Act. Clause 498 of this chapter and sections 18 and 48 of the Regulatory Powers Act, provide for powers to enter premises, which enables a number of monitoring and investigation powers to be exercised on those premises. These powers include the ability to search the premises, inspect documents or things on the premises, take extracts or copies of documents and sample anything on the premises (sections 19 and 49 of the Regulatory Powers Act and subclauses 482(1), 482(2), 485(1) and 485(2) of the Bill). Additional powers available include the powers to seize evidence (sections 49 and 52 of the Regulatory Powers Act) and ask questions and seek production of documents (sections 24 and 54 of the Regulatory Powers Act).

These powers are necessary for the legitimate objective of ensuring that relevant information required under the Act and information required to assess compliance with the Act, is accessible and available to biosecurity officials when required. However, these clauses may operate to limit the right to privacy as they enable entry to premises that may be a person's residence and inspection, copying and sampling of potentially personal information.

Entry to premises is only allowed with consent or a warrant and a warrant to enter premises may only be granted for the purposes of:

- determining whether the Act has been, or is being, complied with
- determining whether information supplied for the purposes of the Act is correct, or
- there are reasonable grounds for suspecting that there may be evidential material on the premises.

The threshold tests that are laid out above are designed to ensure that any interference with the right to privacy is lawful and is only to ensure compliance with the Act and manage biosecurity risks.

A number of protections are in place to ensure that any interference with the right to privacy is lawful and protect individuals' rights including:

- obligations on biosecurity enforcement officers when entering with consent or under warrant, which include the requirement that consent of the occupier is only to be given voluntarily; and where entry is with a warrant, the requirement that an announcement must be made before entry and details of the warrant given to the occupier (section 25 to 28, 55 to 58 of the Regulatory Powers Act and clauses 500 to 504 of the Bill), and
- the limitations on use of force against things (subclauses 482(8) and 485(8) and clause 505 of the Bill).

Entry to premises without a warrant is only provided for in specific circumstances listed in clause 513, which include:

- entering landing places or ports for the purposes of performing function or exercising powers under the Biosecurity Act (clause 252(2))
- during biosecurity emergencies (clause 470(1))
- entering adjacent premises during a biosecurity emergency for the purpose of gaining access to other premises to exercise powers (clause 472(1)), and
- monitoring or searching premises at which biosecurity activities are carried out by a biosecurity industry participant that is covered by an approved arrangement, or at a first point of entry (clauses 511 and 512).

Protections apply in these circumstances including the requirement for announcement before entry (clause 514) and rights of the appropriate person for the premises (as defined under clause 9) to observe the exercise of powers while on the premises (clause 516). Stakeholders affected by clause 252(2) will be informed of this power through the public release of a determination by the Director of Biosecurity or the Director of Human Biosecurity establishing a place to be a first point of entry. Additionally, entry to premises under this clause is only allowed if the biosecurity official is satisfied of the principles affecting the decision to exercise certain powers (clause 32).

Entry to premises without a warrant or consent is provided for in clauses 511 and 512, as the relevant premises relate to an approved arrangement, where consent to entry is implied by the voluntary nature of the arrangement (and will be a condition of the approved arrangement). Additionally, the premises may only be entered during business hours. Entry under clause 512 is limited to situations where a biosecurity officer has reasonable grounds for suspecting that there may be evidential material on the premises.

Chapter 9 also provides the Director of Biosecurity and the Director of Human Biosecurity with the ability to apply a fit and proper person test and gather personal information from applicants (clauses 530 and 531). The fit and proper person test is necessary for the legitimate objective of ensuring that persons covered by approved arrangements or who have been granted import permits (including for high risk goods) are persons that are able to appropriately and responsibly manage biosecurity risks. The personal information that is to be supplied under clause 531 is designed to work in conjunction with the fit and proper persons test and will allow confirmation of a person's identity. These clauses may operate to limit the right to privacy as they expressly require the release of personal information.

Clauses 530 and 531 specify that the fit and proper person test and collection of personal information for applications powers can be applied to approved arrangements and import permits. They are not requirements placed on the general public—that is, they only extend to circumstances

where the legislation provides a permission based on voluntary application by a person. Additional provisions linking to either the fit and proper persons test or collection of personal information are required to be specified in the regulations.

Clause 530 further provides an exhaustive list of the matters that the Director of Biosecurity and Director of Human Biosecurity must have regard to in determining whether a person is fit and proper, for example, whether a person has been convicted of an offence against the Quarantine Act. Additionally, Part VIIC of the *Crimes Act 1914* applies to the fit and proper person test. This allows, in certain circumstances, that the person does not need to disclose spent convictions and requires persons who are aware of the spent convictions to disregard the convictions.

The above clauses involving the collection, use and storage of personal information are also subject to the confidentiality information clauses (Part 2 of Chapter 11). These limit the circumstances and purposes for which personal information obtained in accordance with the Act can be recorded, disclosed or used (for example, contacting the applicant regarding the application). Additionally, the powers contained in these clauses are required to be exercised in compliance with the *Privacy Act 1988*, which means that there are additional protections on the use and storage of personal information collected under these clauses.

**Summary:** These limitations of the right to protection from arbitrary interference with privacy under Article 17 of the ICCPR are permissible as tests and protections apply to ensure the exercise of these powers is reasonable and proportionate to achieving the legitimate objective and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

### **Right to freedom of association**

Article 22 of the ICCPR protects the right of individuals to free association with others. It also states that the only permissible limitations to this right are those ‘which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others’. In all cases, restrictions must be provided for by legislation (or imposed in conformity with legislation), must be necessary to achieve the desired purpose and must be proportionate to the need on which the limitation is based.

Chapters 2, 6 and 8 contain clauses which may operate to limit this right.

#### Chapter 2

Clause 97 provides that an individual may be required by a human biosecurity control order to remain isolated at a specified medical facility. This clause is necessary for the legitimate objective of preventing the contagion of listed human diseases; however it may limit the right to freedom of association. This measure can only be applied under a human biosecurity control order, which may only be imposed if an officer believes that an individual has signs or symptoms of a listed human disease, has been exposed to a listed human disease or has failed to comply with an entry requirement under clause 44 in relation to a listed human disease and therefore poses a risk to the broader community. The general protections (clause 34) must also be taken into account in imposing the control order. If the individual required to be isolated is not an Australian citizen, then they must be informed of their right to seek consular assistance. In addition, officers must provide a reasonable time to allow the individual to seek consular assistance and facilitate communication with a consular office if requested (clause 102).

Clause 103 provides that an individual may be detained if they fail to comply with a requirement to remain at a place under clause 68, or if they fail to comply with an isolation measure under clause 76. This clause is necessary for the legitimate objective of preventing contagion of listed human diseases. Before an individual is detained, a human biosecurity officer must be satisfied of

the principles of general protection (clause 34). In addition, an individual may only be detained if the officer is satisfied that detention is necessary because, without it, the individual may pose a significant risk of contagion. Additional protections apply to detention, including that the individual must be advised of their right to contact anyone, including a legal representative (clause 104).

Clause 113 enables the Director of Human Biosecurity to determine a human health response zone for the legitimate objective of preventing, or reducing the risk of, a listed human disease emerging, establishing or spreading in Australian territory. These zones may be used, for example, to manage small incidents such as a localised disease outbreak or a laboratory hazard. In declaring the response zone, the Director of Human Biosecurity may determine requirements for not entering or leaving the zone. This may consequentially restrict individuals from attending places where a large number of people may gather, such as a shopping centre, school, work or sporting event. Restricting the movement of ill individuals from such venues protects the right of other individuals within of the community to freedom of association while reducing risk of being exposed to a listed human disease.

To ensure that response zones are a proportionate and legitimate restriction of an individual's right to free association, under subclause 113(4), the zone must only be for preventing or controlling the spread of a listed human disease and the Director must be satisfied that the requirements are appropriate and adapted to prevent, or reduce the possibility of, the emergence, establishment or spread of the specified listed human disease.

The Director must also consult with the Chief Health Officer in the relevant state or territory prior to declaring the zone. The determination must be made public and may only be in place for three months.

#### Chapter 6

Clauses 365, 366, 367 and 370 enable the Director of Biosecurity to declare a biosecurity response zone, determine powers that may be exercised in the zone and enable biosecurity enforcement officers to exercise those powers, as outlined above in relation to the right to freedom of movement. These clauses may also operate to limit the right to freedom of association as they may prevent individuals from entering or exiting a biosecurity response zone and interacting with people within the zone. To ensure these clauses are reasonable and proportionate to the legitimate objective, a range of tests and protections apply which are outlined in relation to the right to freedom of movement above.

#### Chapter 8

Clauses 445 and 446 enable the Agriculture Minister to determine emergency requirements, give directions and take actions during a biosecurity emergency period, including restricting or preventing the movement of persons, goods or conveyances or causing goods or conveyances to be removed from specified places, as outlined above in relation to the right to freedom of movement. They may also operate to limit the right to free association. To ensure these clauses are reasonable and proportionate to the legitimate objective, a range of tests and protections apply, which are outlined in relation to the right to freedom of movement above.

**Summary:** These limitations to the right to freedom of association under Article 22 of the ICCPR are permissible because these clauses are necessary for the protection of public health. A range of tests and protections also apply to ensure the exercise of these powers is reasonable and proportionate to the legitimate objective and that adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.



## **Rights of the child**

Article 24 of the ICCPR provides for the right to such measures of protection as are required by a child's status as a minor, on the part of their family, society and the State. In addition, Australia's human rights framework also considers the Convention on the Rights of the Child (Article 3).

Chapter 2 contains a number of provisions that protect the rights of the child. Clause 36 provides that a child who is subject to a requirement under the chapter may be accompanied by a parent, guardian, next of kin or other authorised person. Clause 37 provides that children must not be subject to biosecurity measures under Chapter 2 unless reasonable steps have been taken to contact a parent, guardian or next of kin of the child. In cases of urgent or life threatening medical needs, an officer must meet those needs first, and then the officer must take reasonable steps to contact a parent or guardian. On contacting a parent, guardian or next of kin, these protections must be explained to them and to allow an accompanying person to accompany the child. Clause 38 provides that officers may give directions to accompanying persons for a child for the purpose of ensuring the child complies with the direction. An accompanying person for a child may also give consent on behalf of the child for the purposes of managing risks to human health. Clause 39 provides that a parent, guardian or next of kin may authorise another person to be an accompanying person for the child. These protections ensure that a responsible person for the child can give informed consent in relation to the child.

These protections also apply to clause 558 of Chapter 11 (decontaminating an individual) as if the section were in Chapter 2 (clause 558(6)).

**Summary:** The Bill protects the rights of the child under Article 24 of the ICCPR as a range of tests and protections apply to ensure that where powers are exercised in relation to children, the exercise of powers is reasonable and proportionate to achieving a legitimate objective and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

## **Right to work**

Articles 6(1), 8 and 8(1)(a) of the ICESCR protect the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts and rights in work, including the enjoyment of just and favourable conditions of work. This right may be subject only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

Chapters 7 and 11 of the Bill contain provisions which may limit this right.

Clauses 423 and 597 provide for the suspension or revocation of permits or approved arrangements to recover unpaid cost recovery charges. The powers under this clause are necessary to achieve the legitimate objective of ensuring the Commonwealth is able to cease providing services to clients when the costs associated with the provision of those services have not been paid. However, they may limit the right to work by preventing a person from working under an approved arrangement or importing goods under an import permit.

Potential engagement with the right to work under this clause is reflective of the business-like arrangement between persons wishing to import goods and the Commonwealth and allows the Commonwealth to cease providing services and activities when the user of those services or activities does not pay for them.

These penalties can only be imposed when a person is liable to pay a cost recovery charge that is due and payable and cannot be imposed arbitrarily. To ensure clients of the system are given sufficient warning about a potential suspension or revocation of a permit or approval, the Director

of Biosecurity is required to provide written notice that a charge is outstanding before invoking these powers. The decisions to revoke or suspend a permit or approved arrangement are reviewable decisions (see Part 1 of Chapter 11). The recovery of costs that are due and payable in relation to goods and vessels is a reasonable and proportionate response to non-payment, even in circumstances where the right to work is engaged.

**Summary:** The right to work Articles 6(1), 8 and 8(1)(a) of the ICESCR may be permissibly limited in these circumstances as tests and protections apply to these clauses to ensure the exercise of the power is reasonable and proportionate to achieving the legitimate objective and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

### **Right to an adequate standard of living, including food, water and housing**

Article 11(1) of the ICESCR protects the right to an adequate standard of living, including food, water and housing. To protect this right, governments have an obligation to ensure the availability and accessibility of the resources necessary for the realisation of the right. Article 4 of ICESCR provides that rights such as this may be subject to permissible limitations only where those limitations are provided by law and are for the purpose of promoting the general welfare in a democratic society.

The United Nations Committee on Economic, Social and Cultural Rights General Comment 12 (1999) notes that, in the context of food, the concept of adequacy is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions. Within this context, adequacy is also linked to the notion of sustainability, which implies food security and that food should be accessible for both present and future generations.

The right to water has been recognised by the United Nations Committee as a subset of the rights contained in the International Convention on Economic, Social and Cultural Rights. In particular, the right to water is recognised under Article 11(1) (right to an adequate standard of living) and Article 12 (right to highest attainable standard of health) in General Comment 15 (2003). The General Comment provides:

‘Water is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.’

By minimising or preventing harm caused to plants and animals that could severely impact upon Australia’s food production systems and food security the Bill represents a positive measure to protect the right to food. In managing the risk of pests and diseases entering, establishing or spreading in Australian territory, the Bill also represents a positive measure to protect the right to water. For instance, Chapter 5 of the Bill provides for the management of the risk of water borne pests and diseases in ballast water.

In addition to promoting these rights, some provisions in Chapter 6 of the Bill may also operate to limit the right to an adequate standard of living, including food, water and housing.

Clauses 365 and 367 enable the Director of Biosecurity to declare a biosecurity response zone in relation to premises, such as a residence and enable biosecurity enforcement officers to exercise a range of powers in that zone. The powers provided for under these clauses are necessary for the

legitimate objective of assessing and managing biosecurity risk posed by diseases and pests in the biosecurity response zone. For example, clause 367 enables a biosecurity enforcement officer to direct a person to leave the zone for a specified period. This power assists with the management of biosecurity risk by facilitating the treatment or destruction of goods and premises within the zone in a safe manner. However, these clauses may potentially operate to limit the right to housing as they may prevent individuals accessing their residence.

Under clause 365 the Director of Biosecurity may only declare a biosecurity response zone if a biosecurity officer suspects, on reasonable grounds, that a disease or pest that poses an unacceptable biosecurity risk is on the premises and the Director is satisfied that it is necessary to declare a zone for the purpose of managing the biosecurity risk posed by the pest or disease. An additional safeguard also applies to clause 367 that a direction to leave a biosecurity response zone may only be for a maximum of 24 hours.

Clause 344 enables the Director of Biosecurity to approve a biosecurity officer to require premises be destroyed, which could include a person's residence. This clause is necessary for the legitimate objective of managing the biosecurity risk associated with premises. However, it may operate to limit the right to housing as it may result in a person's residence being destroyed.

The power is only available in relation to premises that cannot be treated and are specified in a biosecurity control order or a biosecurity response zone determination, which requires the Director of Biosecurity to be satisfied that the zone or control order is necessary for the purposes of managing biosecurity risk. Additionally, the power will only be available to officers if it is specified by the Director in the zone determination or biosecurity control order. Before exercising power under Chapter 6, a biosecurity official must also be satisfied of the principles affecting decisions to exercise certain powers (clause 32). The decision to destroy premises under clause 344 is also a reviewable decision under Part 1 of Chapter 11 and premises must not be destroyed during the review period unless the officer is satisfied disease or pest poses a high level of biosecurity risk that cannot be managed for long enough to allow for review of the decision. Compensation to the owner of the premises may also be available under clauses 633 and 634.

**Summary:** The Bill represents a positive measure to protect the right to an adequate standard of living, including food, water and housing under Article 11(1) of the ICESCR. Where it limits this right, the limitations are permissible as tests and protections apply to ensure the exercise of these powers is reasonable and proportionate to achieving a legitimate objective and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

### **Right to health**

Article 12 of the ICESCR promotes the right of all individuals to enjoy the highest attainable standards of physical and mental health. This includes the application of measures for the prevention, treatment and control of epidemic, endemic, occupational and other diseases (Article 12(2)).

The United Nations Committee on Economic, Social and Cultural Rights has stated in General Comment 14 (2000) that health is a 'fundamental human right indispensable for the exercise of other human rights' and that the right to health is not to be understood as the right to be healthy, but rather entails a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

Article 4 of the ICESCR provides that countries may subject economic, social and cultural rights (such as the right to health) only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the

general welfare in a democratic society.’ The United Nations Committee has stated that such limitations must be proportionate and must be the least restrictive alternative where several types of limitations are available and that even where such limitations are permitted, they should be of limited duration and be subject to review.

The Bill takes positive steps to promote this right with the objects of the Bill including:

- managing the risk of contagion of a listed human disease (as defined by clause 9)
- managing the entry, emergence, establishment or spread of a listed human disease, and
- giving effect to Australia’s international obligations as a signatory to the International Health Regulations.

Chapter 2 promotes the protection of public health by ensuring the Commonwealth has the power to control the spread of serious communicable diseases and also ensures any person developing signs or symptoms of these diseases is provided with prompt medical assessment and treatment. The broad range of measures available in the Bill allows officers to consider the disease risk together with individuals’ circumstances, including medical history and apply the most appropriate and least restrictive measure in the circumstances. The Bill will also ensure Australia’s obligations as a signatory to the International Health Regulations are met. The purpose of the International Health Regulations is to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to, public health.

Clause 42 enables the Director of Human Biosecurity to determine that a disease is a ‘listed human disease’ if the Director is satisfied that the disease is communicable and may cause significant harm to human health. This triggers a range of powers to be available to manage the disease, including the following clauses which promote the right to health:

- Clauses 44 and 45 - entry and exit requirements can be put in place for the purposes of preventing a listed human disease from entering, or establishing itself or spreading in Australian territory or a part of Australian territory.
- Clauses 48 and 49 - vessels and aircraft can be prevented from unloading or loading goods, or allowing people to embark or disembark until pratique is granted
- Clauses 55 and 56 - officers will have the power to ask questions about an individual’s health and exposure to listed human diseases for the purpose of determining the nature of, and to manage, human biosecurity risks, and
- Clause 60 - human biosecurity control orders may be imposed which can include measures to manage human health risks.

A number of measures that may be included in a human biosecurity control order under clause 60 also promote the right to health. These include requiring an individual to provide contact details (clause 85), regularly update an officer of their health status (clause 86), restrict certain behaviour to reduce the spread of disease to others (clause 87), undergo decontamination (clause 89), provide body samples for diagnosis (clause 91), undertake treatment, or receive a vaccination (clause 92), restrict travel movement (clause 96), or be isolated at a medical facility (clause 97).

A range of clauses are also included in the chapter to protect the right to health. Clause 35 specifies that there should be no interference with life threatening medical needs when exercising any power or imposing any measure in relation to an individual under Chapter 2. Clause 94 specifies that biosecurity measures (such as medication, treatment, or medical examination), may only be applied by officers who have appropriate medical training or clinical expertise. In addition, clause 94 requires that these measures must be conducted using appropriate medical and professional standards. Any person who exercises a power or imposes a biosecurity measure under Chapter 2 must first consider the principles of general protection under clause 34. To ensure that officials consider the principles of general protection when exercising powers under the Bill,

biosecurity measures may only be applied to individuals by issuing a human biosecurity control order (clause 60). This requires that officials specify details of the listed human disease(s) that is (are) suspected and the biosecurity measure required to manage that disease.

A control order must only be applied for as long as is necessary, to a maximum of 28 days with no provision for extension. If the officer believes a control order is still necessary to prevent the entry, emergence, establishment or spread of a listed human disease, the officer must reapply the control order and consider the principles of general protection.

In applying a control order, the officer must explain to the individual their rights and obligations, including their rights to review. The officer must also explain why the order is being applied and the risks to the individual of the listed human disease and the contagion risk the individual may pose to the community.

Clause 72 allows the Director of Human Biosecurity to give a direction requiring compliance with a biosecurity measure. A direction to comply with a biosecurity measure is only given if the Director is satisfied the measure contributes to reducing the risk of contagion and listed human diseases entering, emerging or establishing in Australian territory. It further allows the Director to review a biosecurity measure including the diagnosis of the listed human disease in the human biosecurity control order, including an individual's refusal to consent to the measure. The Director of Human Biosecurity must give notice of the outcome of the review within 72 hours from when a request is made or consent is refused.

Consistent with the requirements of the International Health Regulations, clause 108 requires that all reasonable expenses associated with an individual complying with biosecurity measures applied in a human biosecurity control order must be met by Commonwealth. This ensures that all ill individuals who are subject to public health measures do not incur undue personal cost.

In addition to protecting an individual's right to health, Chapters 4 and 5 of the Bill may also operate to limit the right to health.

#### Chapter 4

Clauses 202, 206, 207, 209, 241 and 249 of Chapter 4 enable the Director of Biosecurity to exercise a range of powers with respect to the movement of conveyances, including directing them to remain in a specified place or move to a specified place, or not to land or moor in Australian territory. These clauses are necessary to achieve the legitimate objective of preventing harm to human, animal or plant health as they enable the assessment and management of biosecurity risks related to conveyances. However, they may also operate to limit the right to health as they may affect passengers' access to health facilities and goods, including essential medications and services, by preventing them from disembarking from a conveyance that is subject to a direction (for example, to stay out of a port).

When making a decision to exercise powers under clauses 206, 209, 241 and 249, a biosecurity officer must satisfy the principles affecting decisions to exercise certain powers (clause 32) including the protection that a biosecurity official must consider the impact of the exercise of the power on the health and safety of any persons on board the conveyance. Clause 207 only applies to conveyances that meet the exposed conveyance criteria under clause 192 (conveyances that have been exposed to an aircraft or vessel, another conveyance or goods that are subject to biosecurity control).

Clauses 241 and 249 give biosecurity officers powers to direct an aircraft not to land, or a vessel not to moor, at a landing place in Australian territory. Before giving a direction under this clause, a biosecurity officer must seek written approval of the Director of Biosecurity and the Director

must be satisfied that the level of biosecurity risk associated with the aircraft or vessel, or any person or thing on board, is unacceptable and that biosecurity measures cannot be taken to reduce that level of biosecurity risk to an acceptable level. Additionally, such a direction must not be given for the purposes of managing human health risks associated with the aircraft or person or thing on the aircraft.

#### Chapter 5

Clause 303 enables the Director of Biosecurity to exercise a range of powers with respect to the movement of a vessel where the Director has grounds for believing an offence contained in the chapter has been committed. These include keeping a vessel out of a port or requiring the vessel to remain at a specified place. This clause is necessary for the legitimate objective of preventing potentially significant harm to human health, the marine environment and related industries and giving effect to Australia's international rights and obligations relating to ballast water management. However these movement directions may limit the right to health as they may affect passengers' access to health facilities and goods, including essential medications and services.

Before exercising this power, the principles affecting decisions to exercise certain powers (clause 32) must be satisfied, including the protection that a biosecurity official must consider the impact of the exercise of the power on the health and safety of any persons on board the conveyance. Additionally, the decision to exercise powers under this clause is a reviewable decision (see Part 1 of Chapter 11).

#### Chapter 8

Clause 446 enables the Agriculture Minister to give directions in relation to conveyances, which could include directing a vessel not to land at a port, or requiring it to remain at a specified place. This clause is necessary to achieve the legitimate objective of dealing with biosecurity emergencies of national significance. However, as above, these movement directions may limit the right to health as they may affect passengers' access to health facilities and goods, including essential medications and services.

There are limits on the power to give directions and take actions listed in clause 447, which include that the Agriculture Minister must be satisfied of all of the following before making the decision to exercise the power:

- that exercising the power is likely to be effective, or contribute to, achieving the purpose for which the power is to be exercised
- the manner in which the requirement is applied is no more restrictive or intrusive than is required in the circumstances
- if the power is to be exercised in relation to an individual, that the power is no more restrictive or intrusive than required in the circumstances, and
- if the power is exercised during a period, that the period during which the power is to be exercised is only for as long as necessary.

Additionally, directions under clause 446 may only be issued if a biosecurity emergency is declared under clause 443. This requires the Agriculture Minister to be satisfied that a disease or pest is posing a severe and immediate threat, or causing harm on a nationally significant scale to animal or plant health, the environment, or economic activities and that the declaration is necessary to prevent or control the establishment or spread of the disease or pest in Australian territory or a part of Australian territory. Before a biosecurity emergency is declared, the Agriculture Minister must also be satisfied that the declaration is necessary to prevent the establishment or spread of the disease or pest in Australian territory or part of Australian territory. The normal principles of administrative law also apply to the exercise of powers under this clause, such as reasonableness, proportionality and natural justice.

**Summary:** The Bill represents a positive measure to protect the right to health under Article 12 of the ICESCR. Where it limits this right, the limitations are permissible as tests and protections apply to ensure the exercise of these powers is reasonable and proportionate to achieving the legitimate objective and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

### **Right to enjoy and benefit from culture**

Article 15 of ICESCR protects the right of all persons to take part in cultural life. The United Nations Committee on Economic, Social and Cultural Rights (General Comment 21, 2009) has stated that culture encompasses:

‘ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions.’

The Committee has stated that cultural rights may be exercised by a person as an individual, in association with others, or within a community or group. The Committee has also stated that countries should guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by Indigenous peoples. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected. Countries must take measures to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources. Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

Clause 617 promotes the right to take part in cultural life by allowing for exemptions to be made to enable free movement of traditional inhabitants and the performance of lawful traditional activities within the Torres Strait protected zone (in line with Articles 10 and 11 of the Torres Strait Treaty). The protected zone is a geographical zone in the Torres Strait region which was established under Article 10 of the Torres Strait Treaty in order to acknowledge and protect the traditional way of life and livelihood of traditional inhabitants, including their free movement. See clause 617 for the definition of ‘traditional inhabitant’.

**Summary:** The Bill promotes the right of all persons to take part in cultural life under Article 15 of the ICESCR.

### **Rights of persons with disabilities**

Article 3 of the Convention on the Rights of Persons with Disabilities protects the rights of persons with disabilities. Individuals may be incapable due to disability or temporarily incapable as a result of illness (see clause 9 for the full definition of incapable person). The Bill protects this right by providing for special protections for the rights of individuals who may be incapable of understanding the nature and effect of requirements under the Bill, or may be incapable of consenting to biosecurity measures.

Such individuals may not be subject to biosecurity measures under Chapter 2 of the Bill unless the Commonwealth has taken reasonable steps to contact a parent or guardian. Any urgent or life threatening medical needs of the individual must first be met and a parent or guardian must then be contacted as soon as possible. However, the individual may still be required to remain at a place for up to six hours (clause 68). This allows the Commonwealth to manage any potential risk

of contagion, while contacting a parent or guardian prior to the application of measures in a human biosecurity control order.

The protections in Chapter 2 also apply to subclause 558(6) (decontaminating an individual) as if the section were in Chapter 2.

**Summary:** The Bill does not limit the rights of persons with disabilities under Article 3 of the Convention on the Rights of Persons with Disabilities.

**Conclusion**

The Bill is compatible with the human rights outlined above because it advances the protection of human rights and to the extent that it may operate to limit these rights, the limitations are reasonable, necessary and proportionate to achieve legitimate objectives.

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**Minister for Agriculture,  
the Hon. Barnaby Joyce MP**



## **Chapter 1—Preliminary**

### **Part 1—Preliminary**

#### **Clause 1                      Short title**

This clause provides that the Bill, when enacted, may be cited as the *Biosecurity Act 2014* (the Act).

#### **Clause 2                      Commencement**

This clause provides for the commencement of the Bill. The effect of items within the table in subclause (1) is to enable different parts of the Bill to commence at different times. Each provision of the Bill specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 in the table.

**Item 1** of the table provides that clauses 1 and 2 of the Bill (and anything in the Bill not elsewhere covered by the table) will commence on the day the Bill receives Royal Assent.

**Item 2** of the table provides that the remainder of the clauses (the substantive clauses of the Bill) will commence on a date to be fixed by proclamation. In the absence of proclamation within 12 months of Royal Assent, the substantive clauses will commence on the date of the day after the end of precisely 12 months.

Once the Bill receives Royal Assent, the *Director of Biosecurity* and the *Director of Human Biosecurity* will be able to make legislative instruments, and authorise various officers as outlined under Chapter 10 (through the operation of the *Acts Interpretation Act 1901*). These instruments and authorisations will come into effect when the substantive clauses of the Bill commence.

It is intended that the majority of the clauses of the Bill will commence 12 months plus one day after Royal Assent. The period between commencement of clauses 1 and 2 and the substantive clauses is to allow time for the new requirements in the Act to be communicated to stakeholders, industry participants and the general public, and allow *biosecurity officials* to undergo appropriate training. The delay will also provide additional time for consultation with state and territory governments regarding shared responsibilities and obligations under the Act.

Allowing time for communication and education is important as a number of policies included in the Bill do not exist under the *Quarantine Act 1908*, such as the new powers in Chapter 6 and enforcement regime in Chapter 9. It is important that stakeholders are aware of the new requirements—including the introduction of civil penalty provisions and an expanded infringement notice scheme—in the Bill so that they are not inadvertently non-compliant with these requirements.

#### **Clause 3                      Simplified outline of this Act**

This clause provides an overview of each Chapter of the Bill. It provides that the Bill is about managing diseases and pests that may cause harm to human, animal or plant health, the economy or the environment, and sets out the general purposes of each of the Chapters of the Bill, including the powers that may be exercised and the functions that may be performed under the clauses of that Chapter.

#### **Clause 4                      Objects of this Act**

This clause provides that the objects of the Act are to manage:

- *biosecurity risks*
- the risk of contagion of a *listed human disease*
- the risk of *listed human diseases* entering *Australian territory* or a part of *Australian territory*, or emerging, establishing themselves or spreading in *Australian territory* or a part of *Australian territory*
- risks related to *ballast water*, and
- *biosecurity emergencies* and *human biosecurity emergencies*.

Additionally, the Bill will give effect to Australia's international rights and obligations, including under the *International Health Regulations 2005*, the World Trade Organization *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) and the *Convention on Biological Diversity 1992* (Biodiversity Convention) (see clause 9 for further details of these international agreements).

The objects ensure that the Bill will provide a strong regulatory framework that enables the management of biosecurity risks in a modern and responsive manner and enhances Australia's capacity to manage *biosecurity risks* into the future.

Any exercise of power or performance of a function or duty under the Bill by a *biosecurity official*, including by the *Director of Biosecurity* or *Director of Human Biosecurity*, must be consistent with these objects.

#### **Clause 5                      Appropriate Level of Protection (ALOP) for Australia against biosecurity risks**

This clause defines the Appropriate Level of Protection (ALOP) for Australia. The SPS Agreement contains the basic rules on animal and plant health and food safety standards for trade between World Trade Organization member countries. It requires that sanitary (relating to human and animal) and phytosanitary (relating to plant) measures are based on science and applied only to the extent necessary to protect human, animal or plant life or health. The SPS Agreement allows World Trade Organization members to determine their own appropriate level of sanitary and phytosanitary protection; however it must be applied in a consistent manner—this is known internationally as the ALOP.

Consistent with the SPS Agreement, Australia bases its sanitary and phytosanitary measures on international standards developed by the World Organisation for Animal Health, the International Plant Protection Convention and the Codex Alimentarius where such measures exist and where the measures meet Australia's ALOP. This Bill will manage *biosecurity risks*, while food safety risks in imported food are managed under the *Imported Food Control Act 1992* in accordance with the Australia New Zealand Food Standards Code.

The Australian Government, with the agreement of the state and territory governments, has expressed Australia's ALOP as:

‘providing a high level of sanitary and phytosanitary protection, aimed at reducing biosecurity risks to a very low level, but not to zero.’

Australia's ALOP is included in the Bill to provide additional certainty for importers and trading partners of the formulation of the ALOP that is applied when undertaking risk assessments to determine if, and under what conditions, *goods* may be brought into *Australian territory*.

When performing a function or exercising a power under the Biosecurity Import Risk Analysis (BIRA) process (outlined in Chapter 3) and risk assessments conducted for the bringing in, or

importation of particular *goods* into *Australian territory*, the *Director of Biosecurity* must apply Australia's ALOP. Where risks do not meet Australia's ALOP, *biosecurity measures* may be identified to reduce the risk to a level that meets Australia's ALOP. If no *biosecurity measures* are available to do this, the import will not be allowed. This policy recognises that Australia has the right to protect its unique biosecurity status and that a zero risk stance is impractical as it would mean that people, *conveyances* or *goods* would not be able to enter *Australian territory*.

#### **Clause 6 Act binds the Crown**

This clause provides that the Act will bind the Crown in each of its capacities. This means that the Commonwealth and state and territory governments will be bound to comply with the provisions of the Act. This clause also provides that the Crown will not be liable to be prosecuted for an offence, subject to civil proceedings for a civil penalty order, or given an infringement notice. This means that the Act will apply to the Commonwealth and state and territory governments, but in a modified way so as to avoid a situation occurring where, for example, a government is liable to pay an infringement notice to itself.

#### **Clause 7 Extension of Act to Christmas Island, Cocos (Keeling) Islands and other prescribed external Territories**

This clause provides that the Act will extend to *Christmas Island* and the *Cocos (Keeling) Islands*. It also provides that the Act or any provision of the Act may be extended to other external territories as prescribed in the regulations. However, provisions relating to the management of *ballast water*, as outlined in Chapter 5, will apply to all external territories of Australia.

This clause supports the policy approach not to extend the Act to other external territories unless a formal, scientifically based, risk assessment such as a pest and disease survey has been undertaken (for example, as has been done in the case of *Christmas Island* and *Cocos (Keeling) Islands*). This approach has been taken because the *biosecurity risks* associated with external territories where a risk assessment has not been undertaken are unknown, and free movement of people, *conveyances* and *goods* between such territories and mainland Australia could pose a significant *biosecurity risk*.

When a pest and disease survey has been completed with respect to a specific external territory it is appropriate that the Act apply to that territory to ensure that any identified *biosecurity risks* are able to be managed. This is consistent with the objects of the Act (see clause 4) and the extension of the Act to *Christmas Island* and *Cocos (Keeling) Islands*. Parliament will have the opportunity to scrutinise the extension of the Act to an external territory when the enabling regulations are tabled in each House of the Parliament.

#### **Clause 8 Concurrent operation of State and Territory laws**

Subclause 8(1) provides that the Act does not exclude or limit the operation of a state or territory law that is capable of operating concurrently with this Act. This is subject to two exceptions which are discussed below.

Section 109 of the Constitution invalidates a state law to the extent that it is inconsistent with a Commonwealth law. Determining whether a state law is inconsistent with a Commonwealth law involves interpreting both laws. If the Commonwealth law is interpreted as operating to the exclusion of state law, the state law will be inconsistent with the Commonwealth law and invalid.

This clause applies to territory laws in the same way as it applied to state laws. While section 109 of the Constitution does not apply to territory laws, similar principles apply in relation to the inconsistency or repugnancy of territory laws with Commonwealth laws.

A concurrent operation provision, such as clause 8, is used in interpreting the Commonwealth law to determine whether it operates to the exclusion of state or territory law. It indicates the Parliament’s intention that the Commonwealth law should not operate to the exclusion of state or territory law to the extent that the laws are capable of operating concurrently that as it is not intended to cover the subject matter exclusively or exhaustively. In some cases, the laws may not be able to operate concurrently in specific instances despite the general intention that the laws should.

Without limiting the effect of subclause 8(1), subclause 8(3) clarifies that the Act is not intended to exclude the concurrent operation of state laws imposing offences or civil penalties, where the same or similar conduct is also an offence or subject to a civil penalty under the Act. Under subclause 8(4), subclause 8(3) applies even if the penalty, fault elements, defences or exceptions that apply to the offence or *civil penalty provisions* under the state law differ to those set out in the Act.

There are exceptions to the application of this clause in provisions relating to the prohibition or restriction of bringing in or importing goods into Australian territory (Part 3 of Chapter 3), ballast water (Chapter 5) and biosecurity emergencies or human biosecurity emergencies (Chapter 8). Clauses 172 and 265 and subclauses 445(4), 446(4), 477(5) and 478(4) respectively, set out the intended effect of those parts of the Bill on state and territory laws.

## **Part 2—Definitions**

### **Clause 9 Definitions**

This clause provides definitions for the Bill. Notes are provided below on each definition.

#### ***acceptable ballast water exchange***

This definition provides that ‘acceptable ballast water exchange’ has the meaning given by clause 275. An acceptable ballast water exchange refers to a prescribed proportion (by volume) of *ballast water* in the *tank* of a *vessel* being discharged at an acceptable location and replaced by refilling the ballast water tank. See clause 275 and *ballast water exchange* for further details. This term is used in Chapter 5 in relation to *ballast water management*.

#### ***accompanying person***, for a child or incapable person

This definition provides that the term ‘accompanying person’ for a *child* or *incapable person* refers to a parent, guardian or next of kin of the *child* or *incapable person*, or a person authorised by a parent, guardian or next of kin of a *child* or *incapable person* under clause 39 to accompany the *child* or *incapable person*.

#### ***acquisition of property***

This definition provides that ‘acquisition of property’ has the same meaning as in section 51(xxxi) of the Constitution which currently provides:

‘The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.’

#### ***adjacent premises warrant***

This definition provides that an ‘adjacent premises warrant’ means a *warrant* issued as a result of the test in item 5 of the table in clause 489 being met. That is, an adjacent premises warrant can be issued where it is reasonably necessary that one or more *biosecurity enforcement officers* should have access to the *premises* for the purpose of:

- gaining access to adjacent premises to perform functions, or exercise powers, as a *biosecurity enforcement officer*, or

- accompanying a *biosecurity officer* who needs to gain access to adjacent premises to perform functions, or exercise powers, under or for the purposes of the Bill.

***Administration of a vessel***

This definition provides that administration of a *vessel* has the same meaning as in the *Ballast Water Convention* which currently provides:

“Administration” means the Government of the State under whose authority the ship is operating. With respect to a ship entitled to fly a flag of any State, the Administration is the Government of that State. With respect to floating platforms engaged in exploration and exploitation of the sea-bed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration and exploitation of its natural resources, including Floating Storage Units (FSUs) and Floating Production Storage and Offloading Units (FPSOs), the Administration is the Government of the coastal State concerned.’

***affected provisions***

This definition has the meaning provided by subclause 618(1) and refers to provisions which have been modified for declared movements between parts of *Australian territory*.

***Agriculture Department***

This definition provides that ‘Agriculture Department’ refers to the department administered by the *Agriculture Minister*.

***Agriculture Minister***

This definition provides that ‘Agriculture Minister’ refers to the Minister that administers the *Primary Industries Levies and Charges Collection Act 1991*.

***Agriculture Secretary***

This definition provides that ‘Agriculture Secretary’ refers to the Secretary of the *Agriculture Department*. This term is used in the definition of *Director of Biosecurity*.

***aircraft***

This definition provides that ‘aircraft’ refers to any machine or craft that can derive support in the atmosphere from the reactions of the air, other than the reactions of the air against the earth’s surface. This term is used in the definition of *conveyances*. Chapter 4 includes specific provisions in relation to *aircraft*, *vessels* and other *conveyances*.

Under this Bill, an aircraft that is, or is to be, brought or *imported* into *Australian territory* from outside *Australian territory* on board another *conveyance* is considered to be *goods* from the time the aircraft is first intended to be so brought or *imported* until immediately after the aircraft is *released from biosecurity control*. This is intended to exclude such aircraft from provisions of the Bill that deal with *biosecurity risks* associated with aircraft that convey people or *goods* into *Australian territory* (for example, clause 193—pre-arrival reporting). *Biosecurity risks* associated with such aircraft will be managed under Chapter 3.

However, in relation Parts 1 and 3 of Chapter 11 (and any provision of the Bill that relates to Parts 1 and 3 of Chapter 11) an aircraft which is transported on another *conveyance* will not be considered *goods* so that the cost recovery provisions in Chapter 11 apply as if the aircraft is a *conveyance* (see definition of *conveyance* and *goods* in clauses 16 and 19 for further information).

***ALOP*** (short for Appropriate Level of Protection)

See clause 5 for the meaning of *ALOP*.

***animal***

This definition provides that a reference to an animal in this Bill includes a dead animal and any part of an animal. Chapter 3 provides that the *Director of Biosecurity* and the *Director of Human Biosecurity* may jointly prohibit (absolutely or subject to conditions) *goods* from being brought or *imported* into *Australian territory*. This may include prohibiting (absolutely or subject to conditions) or requiring a permit for the bringing in or importation of live or dead animals, parts of animals or animal products as they are considered *goods* under this Bill.

#### ***appropriate ballast water records***

This definition provides that a *vessel* is considered to have ‘appropriate ballast water records’ if it has on board records made in accordance with clause 295 for an *Australian vessel* and clause 296 for a *foreign vessel*, where the records are sufficient to allow any *biosecurity risk* associated with the vessel’s *ballast water* or *sediment* to be identified and assessed.

These records include a *ballast water record system* to record the details of a vessel’s ballast water uptake and discharge (for all vessels which carry ballast water in *Australian seas*). See clauses 295 and 296 for further information.

#### ***appropriate person***

This definition outlines who an ‘appropriate person’ is in relation to *premises* or *conveyances* which are the subject of certain *warrants*. Specifically:

- for *premises* to which an *entry warrant* or a *premises possession warrant* relates, or *premises* entered under a provision referred to in clause 513, the appropriate person is the occupier of the premises, or another person who apparently represents the occupier, or
- for a *conveyance* to which a *conveyance possession warrant* relates, the appropriate person is the person responsible for the *conveyance*, or another person who apparently represents a person responsible for the *conveyance*.

If an entry warrant relates to a *conveyance*, the appropriate person is the person occupying the *conveyance*, or another person who apparently represents that person (see paragraph (a) of the definition of *premises* in clause 9).

#### ***approved arrangement***

See clause 10 for the meaning of ‘approved arrangement’.

#### ***associate***

See clause 11 for the meaning of ‘associate’.

#### ***Australian law***

This definition provides that ‘Australian law’ refers to a law of the Commonwealth or a law of a state or territory. This term is also intended to include any subordinate legislation made under such a law.

#### ***Australian seas***

This definition provides that ‘Australian seas’ means the waters of Australia (including the internal waters of Australia) within the outer limits of the territorial sea of Australia, including every external territory to which the Act extends (see clause 7 for the extension of the Act to external territories). This term is used in Chapter 5 in relation to *ballast water management* and is affected by the operation of clause 260 (*vessels* in dry dock) and clause 261 (*foreign vessels* near the Australian Antarctic Territory).

#### ***Australian territory***

See clause 12 for the meaning of ‘Australian territory’.

### ***Australian vessel***

This definition provides that ‘Australian vessel’ refers to *vessels* that have Australian nationality under section 29 of the *Shipping Registration Act 1981*. The Shipping Registration Act currently provides that the following ships are taken to be Australian ships and to have Australian nationality:

- registered ships, or
- unregistered ships (other than ships required to be registered), being:
  - Australian-owned ships referred to in section 13 of the Shipping Registration Act ships wholly owned by residents of Australia or by residents of Australia and Australian nationals, or
  - ships operated solely by residents of Australia or Australian nationals or both.

The term also refers to a *vessel* whose administration is the Commonwealth (see *Administration of a vessel*). This term is used in Chapter 5 in relation to *ballast water management*.

### ***baggage***

This definition provides that ‘baggage’ refers to *goods* that are carried on a *conveyance* by or for a person who is on board the *conveyance* (including the *person in charge* and members of the crew of the *conveyance*). This term is used in the decontamination provisions of the Bill (clauses 89 and 560) to specify what things may be decontaminated in addition to a person and his or her immediate personal effects.

*Goods* are only considered baggage if a person intended them to be carried in such a way. For example, if a person is travelling on a *conveyance* and an article which they had sent by post was consigned on the same *conveyance*, the article would not be considered his or her baggage and could not be decontaminated under clause 89 or 560. Powers in Chapter 3 relating to assessment and management of *biosecurity risks* associated with *goods* would apply in relation to the article.

### ***ballast water***

This definition provides that ‘ballast water’ has the same meaning as in the *Ballast Water Convention* which currently provides:

‘Water with its suspended matter taken on board a ship to control trim, list, draught, stability or stresses of the ship.’

Ballast water is an essential part of maintaining a *vessel*’s safe operation and is vital to most cargo loading and unloading activities. Ballast water contains live marine organisms that, if untreated, may create a risk of exotic colonies becoming established when released into *Australian seas*. This has the potential to damage Australia’s marine environment and adversely affect related industries. This term is used in Chapter 5 which specifies *ballast water management* requirements in order to implement the majority of the Ballast Water Convention and manage *biosecurity risks* associated with ballast water. Chapter 5, however, does not generally apply to permanent ballast water in sealed *tanks* (see clause 263).

### ***Ballast Water Convention***

This definition provides that ‘Ballast Water Convention’ refers to the *International Convention for the Control and Management of Ships’ Ballast Water and Sediments 2004*. The Convention is not yet in force, however Chapter 5 is intended to ensure that Australia has a regulatory framework for *ballast water management* in place once the Convention comes into effect.

### ***ballast water exchange***

‘Ballast water exchange’ refers to when *ballast water* in the *tank* of a *vessel* is discharged and replaced simultaneously by refilling the ballast water *tank*. See also *acceptable ballast water exchange*.

### ***ballast water management***

This definition provides that ‘ballast water management’ has the same meaning as in the *Ballast Water Convention* which currently provides:

‘Mechanical, physical, chemical, and biological processes, either singularly or in combination, to remove, render harmless, or avoid the uptake or discharge of Harmful Aquatic Organisms and Pathogens within Ballast Water and Sediments.’

Chapter 5 is intended to ensure that Australia has a regulatory framework for *ballast water management* in place once the *Ballast Water Convention* comes into effect, including the requirement for *vessels* to keep *appropriate ballast water records*. It will be an offence to discharge *ballast water* that has not been managed in accordance with the requirements set out in Chapter 5.

### ***ballast water management certificate***

This definition provides that a ‘ballast water management certificate’ has the meaning given by clause 288 and is a document which certifies that a *vessel*, and any equipment on the *vessel*, can manage the vessel’s *ballast water* in accordance with its *ballast water management plan*.

Chapter 5 provides that *Australian vessels* need to be surveyed when requested by the *Director of Biosecurity* or at a time specified in the regulations in order to keep a valid certificate. Clause 288 outlines items that the certificate certifies in relation to both *Australian vessels* and *foreign vessels*, and who the certificate must be issued or endorsed by.

### ***ballast water management plan***

This definition provides that a ‘ballast water management plan’ is a document that outlines the *ballast water management* methods used by a *vessel* as well as the disposal of *sediments*. See clause 286 for further information.

### ***ballast water operation***

This definition provides that ‘ballast water operation’ refers to when *ballast water* is taken up into a *vessel* or discharged from a *vessel* (whether deliberately, accidentally or part of a *ballast water exchange*), or treated or circulated on a *vessel* for the purposes of *ballast water management*. This term is used in Chapter 5 in relation to *ballast water management*.

### ***ballast water reception facility***

This definition provides that ‘ballast water reception facility’ refers to a facility (which may include a *vessel*) for receiving *ballast water* from *vessels* for treatment or disposal. Clause 278 provides the *Director of Biosecurity* with the ability to approve a ballast water reception facility to receive *ballast water* for treatment or disposal. This term is used in Chapter 5 in relation to *ballast water management*.

### ***ballast water record system***

This definition provides that ‘ballast water record system’ refers to a system for making and keeping records of a *vessel*’s *ballast water* and *ballast water operations* in order to manage *biosecurity risks* associated with *ballast water*. This term is used in Chapter 5 in relation to *ballast water management*. See also *appropriate ballast water records*.

### ***Biodiversity Convention***

This definition provides that ‘Biodiversity Convention’ refers to the *Convention on Biological Diversity 1992*, done at Rio de Janeiro on 5 June 1992, as in force for Australia from time to time. This term is used in relation to the application of this Bill in relation to *invasive pests* (see clause 26 for further information).



### ***biosecurity activities***

This definition provides that ‘biosecurity activities’ has the meaning given by clause 405 which refers to activities carried out under an *approved arrangement* to manage *biosecurity risks* associated with *goods*, *premises* or other things. For example, the treatment of *goods* under an *approved arrangement* to manage *biosecurity risk* associated with those *goods* would be considered a *biosecurity activity*. See Chapter 7 for further information.

### ***biosecurity activity zone***

This definition provides that a ‘biosecurity activity zone’ has the meaning given by subclause 395(1) and is a zone that may be determined by the *Director of Biosecurity* to manage *biosecurity risks* in relation to an area in *Australian territory* where powers are exercised or functions or duties are performed by, or on behalf of, the Commonwealth under this Act. It is intended that this zone will be used in relation to *premises* where an *approved arrangement* is in place or where a Commonwealth facility manages *biosecurity risks*. The Director may only make a *biosecurity activity zone determination* if satisfied it is necessary to manage *biosecurity risks* posed by the exercise of powers or performance of functions under the Bill in the area. A biosecurity activity zone is ongoing and will remain in force until the determination is revoked. See Part 7 of Chapter 6 for further information.

### ***biosecurity activity zone determination***

This definition provides that a ‘biosecurity activity zone determination’ means a determination made under subclause 395(1) by the *Director of Biosecurity*. A biosecurity activity zone determination will set out the powers available in a *biosecurity activity zone*.

As this type of zone is determined in relation to *premises* where powers or functions are performed under the Act (by, or on behalf of, the Commonwealth), consent or a *warrant* will not be required to enter *premises* in the area specified in the determination. See Part 7 of Chapter 6 for further information.

### ***biosecurity control notice***

This definition provides that a ‘biosecurity control notice’ is a notice (in the form approved by the *Director of Biosecurity*) which may be affixed to *goods* or *conveyances* that are *subject to biosecurity control* and states that *goods* or *conveyances* are *subject to biosecurity control*. See clauses 129 and 203 for further information.

### ***biosecurity control order***

This definition provides that a ‘biosecurity control order’ is an order that may be made by the *Director of Biosecurity* under clause 353 to manage an unacceptable level of *biosecurity risk* in relation to *goods* or *premises*. A biosecurity order cannot be used on *goods* or *conveyances* that are *subject to biosecurity control*. The *biosecurity risks* associated with these *goods* or *conveyances* can be managed using the powers in Chapters 3 and 4.

For a biosecurity control order to be made by the *Director of Biosecurity* under clause 353, a *biosecurity officer* must suspect on reasonable grounds that a *disease* or *pest* may be present in or on *goods* or *premises*, that the *disease* or *pest* poses an unacceptable level of *biosecurity risk*, and that *biosecurity measures* are needed to reduce the *biosecurity risk* posed by the *disease* or *pest* to an acceptable level. The biosecurity control order will specify the *biosecurity measures* that a *biosecurity officer* may take to manage the identified *biosecurity risk*, such as treatment of *goods* or *premises*, or specifying entry and exit requirements in relation to *premises*.

If a *biosecurity risk* is present over an area rather than in relation to particular *goods* or *premises*, it is intended that the *biosecurity risk* would instead be managed by determining a *biosecurity response zone* in relation to the area.

**biosecurity control order warrant**

This definition provides that a ‘biosecurity control order warrant’ refers to a *warrant* issued as a result of the test in item 2 of the table in clause 489 being met. Biosecurity control order warrants may be issued by an *issuing officer* if the officer is reasonably satisfied that the test in clause 489 is met. It is reasonably necessary for one or more *biosecurity officers* or a *biosecurity enforcement officers* to enter the *premises* (without consent of the owner or occupier) in relation to which a *biosecurity control order* made under clause 353 which is in force to exercise powers for the purpose of managing the *biosecurity risk* posed by the *pest* or *disease*.

A *biosecurity officer* must have reasonable grounds to suspect a *disease* or *pest* is present on or in the *premises* that poses an unacceptable level of *biosecurity risk* for a *warrant* to be issued. A biosecurity control order warrant may only be applied for by a *biosecurity enforcement officer*, however the warrant may authorise one or more *biosecurity officers* along with one or more *biosecurity enforcement officers* to access the *premises*.

**biosecurity emergency**

This definition provides that a ‘biosecurity emergency’ refers to an emergency that is declared to exist under clause 443(1). The biosecurity emergency provisions in Chapter 8 outline the powers and provisions relating to *biosecurity emergency declarations* and the management of associated *biosecurity risks*. The emergency powers in the Bill are intended to be used in circumstances where the scale and significance of an emergency requires management at a national level. See Chapter 8 for further information.

**biosecurity emergency declaration**

This definition provides that ‘biosecurity emergency declaration’ refers to a declaration of a *biosecurity emergency* made by the Governor-General under subclause 443(1). A biosecurity emergency declaration will specify the *disease* or *pest* that the declaration relates to, the nature of the *biosecurity emergency* and the conditions that gave rise to it and the period during which the declaration is in force (see subclause 443(3)).

**biosecurity emergency period**

This definition provides that a ‘biosecurity emergency period’ refers to the period of time during which a *biosecurity emergency declaration* is in force under paragraph 443(3)(c).

**biosecurity enforcement officer**

This definition provides that ‘biosecurity enforcement officer’ refers to an officer authorised by the *Director of Biosecurity* under clauses 546 and 548. A biosecurity enforcement officer will have specific powers additional to those of a *biosecurity officer*. For example, a biosecurity enforcement officer may apply to an *issuing officer* for a *warrant* to enter *premises* under the Bill under Chapter 9. Biosecurity enforcement officers will have appropriate training and/or qualifications to exercise coercive powers under the Bill.

**biosecurity entry point**

See clause 13 for the meaning of ‘biosecurity entry point’.

**biosecurity industry participant**

See clause 14 for the meaning of ‘biosecurity industry participant’.

**biosecurity measures**

This definition provides that ‘biosecurity measures’ refers to measures to manage any of the following:

- biosecurity risks
- biosecurity emergencies and human biosecurity emergencies

- the risk of contagion of a listed human disease, or
- the risk of listed human diseases:
  - entering *Australian territory* or a part of Australian territory, or
  - emerging, establishing or spreading in *Australian territory* or a part of *Australian territory*.

*Biosecurity measures* may be required under a number of provisions of the Bill (for example clauses 60, 131, 205, and 335), in order to manage *biosecurity risks* associated with people, *goods*, *conveyances* or *premises*. *Biosecurity measures* available in relation to people include, but are not limited to, decontamination, examination, vaccination, treatment, medication or isolation. *Biosecurity measures* available under the Bill in relation to *goods*, *conveyances* and *premises* include, but are not limited to, movement, requiring samples, treatment, exportation or destruction. Applying *biosecurity measures* is a key concept in relation to managing *biosecurity risks* (to meet the objects of the Act) and in relation to reducing *biosecurity risk* to an acceptable level in order to meet Australia's *ALOP*.

### ***biosecurity monitoring zone***

This definition provides that 'biosecurity monitoring zone' means either a *permanent* or a *temporary biosecurity monitoring zone*. Biosecurity monitoring zones are in place to monitor whether a *pest* or *disease* that may pose an unacceptable level of *biosecurity risk* has or is likely to enter, emerge, establish or spread in an area within *Australian territory*. This may be done, for example by setting up insect traps or other equipment. See Part 6 of Chapter 6 for more details.

### ***biosecurity monitoring zone warrant***

This definition provides that 'biosecurity monitoring zone warrant' refers to a *warrant* issued as a result of the test in item 4 of the table in clause 489 being met. A biosecurity monitoring zone warrant may be issued if entry to *premises* (without consent of the owner or occupier), is necessary in a *biosecurity monitoring zone* (see clause 489 for further information). A biosecurity monitoring zone warrant may only be exercised by a *biosecurity enforcement officer*.

### ***biosecurity officer***

This definition provides that 'biosecurity officer' means a person authorised under clause 545 of this Bill. Biosecurity officers will be the main personnel performing functions and exercising powers under this Bill. Biosecurity officers will have appropriate training and/or qualifications to exercise powers under the Bill.

### ***biosecurity official***

This definition provides that 'biosecurity official' is a term used to mean any of the following officers—*biosecurity officer*, *biosecurity enforcement officer* or the *Director of Biosecurity*.

### ***biosecurity response zone***

This definition provides that a 'biosecurity response zone' has the meaning given by subclause 365(1) and is a zone that may be determined by the *Director of Biosecurity* in order to manage *biosecurity risks* where risks have been identified over a specified area. The Director may make a *biosecurity response zone determination* if the Director is satisfied that a *disease* or *pest* is present and it is necessary for the purpose of managing the *biosecurity risk* posed by a *disease* or *pest*. A biosecurity response zone may be declared, for example, where a *biosecurity risk* may have a major impact on an industry or community or has a high potential of spreading to other areas. If the *biosecurity risk* is not present over a large area, the risk may instead be dealt with by making a *biosecurity control order* in relation to *goods* or *premises*. See Part 5 of Chapter 6 for further information.

An area may also be determined to be a biosecurity response zone under Part 5 of Chapter 6 during a *biosecurity emergency period* (see clause 465).

#### ***biosecurity response zone determination***

This definition provides that a ‘biosecurity response zone determination’ is a determination made by the *Director of Biosecurity* under clause 365(1) that a specified area is a biosecurity response zone. Clause 366 specifies the content of a biosecurity response zone determination, including the powers that may be exercised in a response zone. These powers may include treatment or destruction of *goods* or *premises* which pose a *biosecurity risk*, and setting entry or exit requirements to the affected properties (for example, requiring people to undertake decontamination before exiting the zone).

#### ***biosecurity response zone warrant***

This definition provides that ‘biosecurity response zone warrant’ refers to a warrant issued as a result of the test in item 3 of the table in clause 489 being met. Biosecurity response zone warrants may be issued if entry to *premises* (without consent of the owner or occupier) is necessary in a *biosecurity response zone* (see clause 489 for further information). A biosecurity response zone warrant may only be exercised by a *biosecurity enforcement officer*.

#### ***biosecurity risk***

This definition provides that ‘biosecurity risk’ (except as provided by clause 310) means:

- the likelihood of a *disease* or *pest*:
  - entering *Australian territory* or a part of *Australian territory*, or
  - establishing itself or spreading in *Australian territory* or a part of *Australian territory*, and
- the potential for any of the following:
  - the *disease* or *pest* to cause harm to human, *animal* or *plant* health
  - the *disease* or *pest* to cause harm to the *environment*, and
  - economic consequences associated with the entry, establishment or spread of the *disease* or *pest*.

Biosecurity risk is a core concept in the Bill and draws on and is consistent with Australia’s obligations under the *SPS Agreement*. See also clause 310 for the modified definition of biosecurity risk in relation to the Chapter 6.

#### ***biosecurity risk assessment warrant***

This definition provides that ‘biosecurity risk assessment warrant’ refers to a *warrant* issued as a result of the test in item 1 of the table in clause 489 being met. Biosecurity risk assessment warrants may be issued if entry to *premises* (without consent of the owner or occupier) is necessary in order to assess *biosecurity risks* associated with *goods* or *premises*. Biosecurity risk assessment warrants may not be issued in relation to *goods* or *conveyances* which are *subject to biosecurity control* or *goods* in relation to which an *exposed goods order* is in force (see clause 312 for the application of Chapter 6). A biosecurity risk assessment warrant may only be exercised by a *biosecurity enforcement officer*.

#### ***BIRA*** (short for Biosecurity Import Risk Analysis)

This definition provides that ‘Biosecurity Import Risk Analysis’ (BIRA) has the meaning given by clause 166, which outlines that a BIRA is a risk analysis that may be conducted in order to evaluate the level of *biosecurity risk* associated with the *import* or proposed *import* of *goods* into *Australian territory*. BIRAs may identify conditions that must be met to manage the level of *biosecurity risk* associated with the *goods* to a level that achieves *ALOP*. Clause 167 provides that a BIRA is conducted by the *Director of Biosecurity*. See Part 2 of Chapter 3 for further information.

### ***chief human biosecurity officer***

This definition provides that a ‘chief human biosecurity officer’ is a medical practitioner employed by a state or territory body that has been authorised under clause 562 by the *Director of Human Biosecurity*.

### ***child or incapable person***

This definition provides that a ‘child or incapable person’ is:

- a person less than 18 years old, or
- a person who is at least 18 years old and either:
  - incapable (whether permanently or temporarily) of understanding the general nature and effect of, and purposes of carrying out a *biosecurity measure*, or
  - incapable (whether permanently or temporarily) of indicating whether he or she consents or does not consent to a *biosecurity measure*.

### ***Christmas Island***

This definition provides that ‘Christmas Island’ means the Territory of Christmas Island which is an external territory to which the Act applies (see clause 7 for the application of the Act in relation to external territories).

### ***civil penalty provision***

This definition provides that a ‘civil penalty provision’ has the same meaning as in the *Regulatory Powers Act* which currently provides that it is a provision that either:

- sets out at its foot a pecuniary penalty, or penalties, indicated by the words ‘civil penalty’, or
- another provision of an Act or a legislative instrument provides that the provision is a civil penalty provision, or that a person is liable to a civil penalty if the person contravenes the provision, and
- the provision is:
  - a subsection, or a section that is not divided into subsections
  - a subregulation, or a regulation that is not divided into subregulations
  - a subclause (however described) of a Schedule to an Act, or of a legislative instrument, or
  - a clause (however described) of a Schedule to an Act, or of a legislative instrument, that is not divided into subclauses.

Civil penalties can be applied to a variety of contraventions of the Act, and have been included in addition to criminal offences with the intention of providing flexibility to take action where non-compliance has been identified. The *Director of Biosecurity* or the *Director of Human Biosecurity* may apply to a *relevant court* for a civil penalty order where a person contravenes a civil penalty provision.

### ***coastal sea*** of Australia or an external Territory

This definition provides that ‘coastal sea’ of Australia or an external territory has the same meaning as in subsection 15B(4) of the *Acts Interpretation Act 1901*, which currently provides:

‘the territorial sea of Australia, and the sea on the landward side of the territorial sea of Australia and not within the limits of a State or internal Territory, and includes the airspace over, and the sea-bed and subsoil beneath, any such sea.’

This term is used in the definition of *Australian territory* (clause 12).

### ***Cocos (Keeling) Islands***

This definition provides that Cocos (Keeling) Islands means the Territory of Cocos (Keeling) Islands. The Cocos (Keeling) Islands are an external territory to which the Act applies (see clause 7 for the application of the Act in relation to external territories).

### ***commercial-in-confidence***

See clause 15 for the meaning of ‘commercial-in-confidence’.

### ***Commonwealth body***

This definition provides that the term ‘Commonwealth body’ includes a Department of State, or an authority, of the Commonwealth. A Commonwealth body may be declared as a *national response agency* and its officers or employees may be authorised as *biosecurity officers* or *biosecurity enforcement officers*.

### ***competent authority***

This definition provides that a ‘competent authority’ is the authorised body of a member state that is responsible for implementing the *International Health Regulations*.

### ***conditionally non-prohibited goods***

This definition provides that ‘conditionally non-prohibited goods’ has the meaning given by subclause 174(2), which provides that conditionally non-prohibited goods are *goods*, or classes of *goods*, specified in a determination in force under subclause 174(1). The *Director of Biosecurity* and the *Director of Human Biosecurity* may jointly determine that that specified *goods*, or a specified class of *goods*, must not be brought or *imported* into *Australian territory* unless specified conditions (including conditions for administrative purposes) are complied with. See clause 174 for further information.

### ***constitutional trade and commerce***

This definition provides that ‘constitutional trade and commerce’ means trade or commerce between Australia and places outside Australia, trade or commerce among states, or trade or commerce within a territory, between a state and territory or between two territories. The definition reflects the extent of the Commonwealth’s legislative power to regulate trade and commerce in reliance on section 51(i) and section 122 of the Constitution. The term is used in Division 2 of this Chapter in relation to clause 24 (severability).

### ***conveyance***

See clause 16 for the meaning of ‘conveyance’ which include any *vessel*, *aircraft*, vehicle, or train (including railway rolling stock). The regulations may prescribe additional means of transport for the purpose of this definition, which is intended to allow for new developments in transport methods into the future. In limited circumstances a conveyance may be considered to be *goods* (see clause 16 for further information).

### ***conveyance possession warrant***

This definition provides that a ‘conveyance possession warrant’ means a *warrant* issued as a result of the test in item 6 of the table in clause 489 being met. That is, a conveyance possession warrant can only be issued where:

- a person has not complied with a request of a *biosecurity officer* under subclause 209(4) within a specified time period
- a person has not complied with a request of a *biosecurity officer* under subclause 338(4) within a specified time period
- a notice has been provided to the owner or the operator of the *conveyance* under subclauses 210(3) or 343(3), or

- a certificate in relation to the *conveyance* has been issued under subclauses 210(4) or 343(4).

***cost-recovery charge***

This definition provides that a ‘cost-recovery charge’ means:

- a fee imposed prescribed by regulations made for the purposes of subclause 592(1) for a *fee-bearing activity*, or
- a charge imposed by:
  - the *Biosecurity Charges Imposition (Customs) Act 2014*
  - the *Biosecurity Charges Imposition (Excise) Act 2014*
  - the *Biosecurity Charges Imposition (General) Act 2014*
- includes any late payment fee.

A cost-recovery charge sets out all the *fee-bearing activities* and charges that can be collected under the Act.

***covered by***, in relation to an approved arrangement

See clause 14 for the meaning of ‘covered by’, in relation to an *approved arrangement*.

***damage***, in relation to data

This definition provides that ‘damage’ in relation to data includes damage by erasure of data or addition of other data. Clause 326 provides that the Commonwealth is liable to pay compensation for damage to electronic equipment, including damage to data recorded on the equipment, where the damage occurred because insufficient care was exercised in selecting the person who was to operate the equipment or insufficient care was exercised by the person operating the equipment (see clause 326 for further information).

***declaration disease or pest***, in relation to a biosecurity emergency declaration and a biosecurity emergency period

This definition provides that ‘declaration disease or pest’ means the *disease or pest* specified under paragraph 475(3)(a) (the disease or pest to which the declaration relates) in the *biosecurity emergency declaration* that specifies the *biosecurity emergency period*. See Chapter 8 for further information.

***declaration listed human disease***, in relation to a human biosecurity emergency declaration and a human biosecurity emergency period

This definition provides that ‘declaration listed human disease’ means the *listed human disease* specified under paragraph 475(3)(a) (the *listed human disease* to which the declaration relates) in the *human biosecurity emergency declaration* that specifies the *human biosecurity emergency period*. See Chapter 8 for further information.

***de facto partner***

This definition provides that ‘de facto partner’ has the meaning given by the *Acts Interpretation Act 1901*. This term is used in clause 11 dealing with the meaning of *associate*.

***destination part***

This definition provides that ‘destination part’ has the meaning given by subclause 618(2) which relates to the declared movements between parts of *Australian territory*.

***Director of Biosecurity***

This definition provides that ‘Director of Biosecurity’ refers to the person who is, or is acting as, the *Agriculture Secretary*, as specified in clause 540. The Director of Biosecurity has specified

powers and functions under the Bill, including a power of general administration. Chapter 10 outlines who the Director of Biosecurity may delegate his or her powers to.

***Director of Human Biosecurity***

This definition provides that the ‘Director of Human Biosecurity’ refers to the person who occupies, or is acting in the position of the Commonwealth Chief Medical Officer, as specified in subclause 544(1).

***disease***

This definition provides that ‘disease’ refers to the signs or symptoms of an illness or infection caused by a *disease agent*, a collection of signs or symptoms that is clinically defined (for which the causal agent is unknown), or a *disease agent* that has the potential to cause an illness or infection (either directly or indirectly). This broad definition is intended to ensure the widest range of *biosecurity risks* and *human health risks* may be assessed and managed under this Bill.

***disease agent***

This definition provides that ‘disease agent’ includes, but is not limited to, a microorganism, an infectious agent and a parasite. This definition is intended to clarify what is meant by *disease agent* in the definition of *disease*.

***enactment***

This definition provides that ‘enactment’ means an Act of the Commonwealth, a state or a territory, as well as an instrument (including rules, regulations and by-laws) made under an Act of the Commonwealth, a state or a territory.

***engage in conduct***

This definition provides that ‘engage in conduct’ means to do an act, or omit to perform an act.

***entry warrant***

This definition provides that ‘entry warrant’ refers to any of the following *warrants* authorising entry to *premises*:

- a *biosecurity risk assessment warrant*
- a *biosecurity control order warrant*
- a *biosecurity response zone warrant*
- a *biosecurity monitoring warrant*, and
- an *adjacent premises warrant*.

***environment***

This definition provides that ‘environment’ includes ecosystems and their constituent parts, and natural and physical resources. ‘Environment’ is a term used in the definitions of *biosecurity risk* and *pest*. This broad definition is intended to ensure that *biosecurity risks* and *pests* may be assessed and managed in the widest possible range of circumstances.

***evidential burden***

This definition provides that ‘evidential burden’ in relation to a matter means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. For example, a person who bears the evidential burden in relation to adducing evidence that he or she received *prohibited goods* through legal means under clause 188, it means that he or she must adduce evidence that suggests the reasonable possibility that the *goods* were received through legal means.



### ***exit provisions***

This definition provides that ‘exit provisions’ has the meaning given by subclause 619(2) which relates to leaving *Australian territory*.

### ***exposed conveyance***

This definition provides that ‘exposed conveyance’ means an exposed conveyance within the meaning of subclauses 192(2) or (3). That is, an exposed conveyance is a *conveyance* that becomes *subject to biosecurity control* when it is *exposed to* an *aircraft* or *vessel* that is *subject to biosecurity control* (other than those referred to in paragraph 192(1)(a)), or a *conveyance* that becomes *subject to biosecurity control* when it re-enters *Australian territory* (after being *exposed to* another *conveyance* outside of *Australian territory*) and is subject to paragraph 192(1)(b).

### ***exposed goods***

This definition provides that ‘exposed goods’ has the meaning given by subclause 158(3), which refers to *goods* (other than goods that are *subject to biosecurity control*) that are suspected by a *biosecurity officer*, on reasonable grounds, to have been *exposed to goods* or a *conveyance* that is or are *subject to biosecurity control*.

### ***exposed goods order***

This definition provides that an ‘exposed goods order’ means an order made under subclause 159(3). For an exposed goods order to be made under subclause 159(3), a *biosecurity officer* must suspect, on reasonable grounds, that there is an unacceptable level of *biosecurity risk* associated with *goods* that have been *exposed to goods* or a conveyance that is *subject to biosecurity control*. An exposed goods order allows a *biosecurity officer* to exercise the powers in Divisions 4, 5, 6, 7, 8 and 10 of Chapter 3 in relation to the *exposed goods* in the same way the officer would exercise those powers in relation to goods that are *subject to biosecurity control*. Clause 159 sets out where *goods* must be to enable a *biosecurity officer* to make an exposed goods order in relation to them.

An exposed goods order ceases to be in force if when the order expires or is revoked, or if the *goods* are *released from biosecurity control* under Division 10 of Chapter 3.

### ***exposed to***

See clause 17 for the meaning of ‘exposed to’.

### ***Federal Circuit Court***

This definition provides that ‘Federal Circuit Court’ means the Federal Circuit Court of Australia. This term is used in the definition of *relevant court*.

### ***Federal Court***

This definition provides that a reference to the ‘Federal Court’ is a reference to the Federal Court of Australia. This term is used in the definition of *relevant court*.

### ***fee-bearing activities***

See subclause 592(1) for the definition of ‘fee-bearing activities’ which refers to activities carried out by, or on behalf, of the Commonwealth in performing functions or exercising powers under the Bill.

### ***first point of entry***

See clause 18 for the meaning of ‘first point of entry’. This term is primarily used in Parts 3 and 4 of Chapter 4.

### ***Foreign Affairs Department***

This definition provides that ‘Foreign Affairs Department’ refers to the Department administered by the Minister administering the *Diplomatic Privileges and Immunities Act 1967*. The Foreign Affairs Department is specified in clause 98 as one of the bodies and agencies that the *Director of Human Biosecurity* must notify if a *traveller movement measure* is included in a *human biosecurity control order*.

### ***foreign vessel***

This definition provides that ‘foreign vessel’ refers to a *vessel* that is not an *Australian vessel*. The term is used in Chapter 5 in relation to *ballast water management*.

### ***goods***

See clause 19 for the meaning of ‘goods’.

### ***harbour***

This definition outlines that ‘harbour’, for the purposes of the definition of *port*, includes:

- a navigable estuary, river, creek or channel
- a haven, roadstead, dock pier or jetty, or
- any other place in or at which *vessels* can obtain shelter or load and unload *goods* or embark and disembark passengers.

This definition is based upon the definition of ‘harbour’ in the *Navigation Act 2012*. This is to ensure consistency with other Commonwealth legislation to the extent possible while meeting the needs of the Bill. The definition of harbour is used in Chapter 4 in relation to a *first point of entry*.

### ***Health Department***

This definition provides that ‘Health Department’ refers to the department administered by the *Health Minister*.

### ***Health Minister***

This definition provides that ‘Health Minister’ refers to the Minister that administers the *National Health Act 1953*.

### ***Health Secretary***

This definition provides that ‘Health Secretary’ refers to the Secretary of the *Health Department*.

### ***high-value conveyance***

This definition provides that a *conveyance* is considered to be a ‘high-value conveyance’ if it is of a value greater than the amount prescribed by the regulations for the purpose of this definition.

Certain powers in Chapter 4 and Chapter 6 that relate to high-value conveyances are only available to *biosecurity officers* with the written approval of the *Director of Biosecurity*. For example, clause 208 provides that a *biosecurity officer* may require a *conveyance* which poses an unacceptable *biosecurity risk* to be treated, however an officer must receive written approval from the *Director of Biosecurity* in order to require treatment that may damage a high-value conveyance. This differentiation is intended to ensure that the *Director of Biosecurity* (or a delegate) makes decisions that relate to high-value conveyances while still providing operational practicality for *biosecurity officers* to require the treatment of a *conveyance* (other than high-value conveyances) where necessary.

### ***high-value goods***

This definition provides that *goods* are considered ‘high-value goods’ if the *goods* are of a value greater than the amount prescribed by the regulations for the purpose of this definition.

Certain powers in Chapter 3 and Chapter 6 that relate to high-value goods are only available to *biosecurity officers* with the written approval of the *Director of Biosecurity*. For example, clause 136 provides that a *biosecurity officer* may require *goods* (other than high-value goods) which pose a *biosecurity risk* to be destroyed, however an officer must receive written approval from the *Director of Biosecurity* in order to destroy high-value goods. This differentiation is intended to ensure that the *Director of Biosecurity* (or his or her delegate) makes decisions that relate to high-value goods while still providing operational practicality for *biosecurity officers* to require treatment or destruction of *goods* (other than high-value goods) where necessary.

#### ***human biosecurity control order***

This definition provides that a ‘human biosecurity control order’ is an order that is imposed under clause 60 on an individual that may have a *listed human disease*. This order enables biosecurity measures to be specified to control the risks posed by serious communicable diseases.

#### ***human biosecurity emergency***

This definition provides that a ‘human biosecurity emergency’ refers to an emergency that is declared under subclause 475(1). The human biosecurity emergency provisions in Chapter 8 outline the powers and provisions relating to *human biosecurity emergency declarations* and the management of associated *human health risks*. The emergency powers in the Bill are intended to be used in circumstances where the scale and significance of an emergency requires management at a national level. See Chapter 8 for further details.

#### ***human biosecurity emergency declaration***

This definition provides that a ‘human biosecurity emergency declaration’ refers to a declaration of a *human biosecurity emergency* made by the Governor-General under subclause 475(1). A human biosecurity emergency declaration will specify the *listed human disease* the declaration relates to, the nature of the human biosecurity emergency and the conditions that gave rise to it and the period during which the declaration is in force.

#### ***human biosecurity emergency period***

This definition provides that a ‘human biosecurity emergency period’ refers to the period of time specified under paragraph 475(3)(c) during which a *human biosecurity emergency declaration* is in force.

#### ***human biosecurity officer***

This definition provides that a ‘human biosecurity officer’ is a person authorised under clause 563 of this Bill.

#### ***human disease***

This definition provides that a ‘human disease’ is a *pest* or *disease* that has the potential to enter, emerge, establish itself or spread in *Australian territory* or a part of *Australian territory* and cause harm to human health.

#### ***human health response zone***

See clause 113 for the meaning of ‘human health response zone’. A ‘human health response zone’ is a specified area that has been determined to prevent or reduce the risk of a *disease* from entering, emerging, establishing itself or spreading in *Australian territory* or part of *Australian territory* and causing harm to human health. The *Director of Human Biosecurity* is responsible for determining a *human health response zone* under clause 113 of the Bill.

#### ***human health risk***

This definition provides that a ‘human health risk’ is:

- the likelihood of a *disease* or *pest*:

- entering *Australian territory* or a part of *Australian territory*, or
- emerging, establishing itself or spreading in *Australian territory* or a part of *Australian territory*, and
- the potential for either of the following:
  - the *disease* or *pest* to cause harm to human health, or
  - economic consequences associated with the entry, emergence, establishment or spread of the *disease* or *pest*, to the extent that the *disease* or *pest* has the potential to cause harm to human health.

### ***human remains***

This definition provides that ‘human remains’ are the remains of all or any part of the body of a deceased human, but does not include cremated remains.

### ***Immigration Department***

This definition provides that ‘Immigration Department’ refers to the department administered by the Minister administering the *Migration Act 1958*. The Immigration Department is specified in clause 98 as one of the bodies and agencies that the *Director of Human Biosecurity* must notify if a *traveller movement measure* is included in a *human biosecurity control order*.

### ***import***, in relation to goods

This definition provides that ‘import’ in relation to goods, does not include unloading the *goods* for temporary purposes only (for example, to unload other *goods*).

This term is used in Chapter 3 in a number of contexts, including provisions that outline the requirement to obtain a permit to bring or import certain *goods* into *Australian territory* (see Division 3 of Part 3, Chapter 3). The Bill also refers to goods being ‘brought in’ to Australian territory—this term is similar to ‘import’ however it also captures *goods* which are brought in for temporary purposes, such as *goods* that are on board a *conveyance* but are not unloaded in *Australian territory* (for example, ship stores), or *goods* that are transported by land from the *port* or *landing place* of arrival in *Australian territory* to another *port* or *landing place* in *Australian territory* on the way to a final destination outside of *Australian territory*.

### ***incoming aircraft or vessel***

This definition provides that ‘incoming aircraft or vessel’ means an *aircraft* or *vessel* that has entered *Australian territory* during a flight or voyage that commenced outside *Australian territory*, and intends to arrive (or has arrived) at a *landing place* or *port* in *Australian territory*. This term is used in Chapter 4.

### ***incoming passenger aircraft or vessel***

This definition provides that an ‘incoming passenger aircraft or vessel’ is an *incoming aircraft* or *vessel* that is a *passenger aircraft* or *passenger vessel*.

### ***installation***

See clause 20 for the meaning of ‘installation’. The definition of a *vessel* includes an installation for the purposes of the Bill.

### ***internal waters of Australia***

This definition provides that ‘internal waters of Australia’ has the same meaning as in section 10 of the *Seas and Submerged Lands Act 1973*, where it is defined as:

‘any waters of the sea on the landward side of the baseline of the territorial sea’.

To avoid doubt, the definition clarifies that the internal waters of Australia includes waters within the limits of a state. This term is used in the definition of Australian seas.

### ***International Health Regulations***

This definition provides that ‘International Health Regulations’ are the regulations prepared by the World Health Organization to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with, and restricted to, public health risks. Australia is a signatory to the International Health Regulations and a World Health Organization Member State, and is therefore obliged to enforce the International Health Regulations in Australia.

### ***international mail centre***

This definition provides that ‘international mail centre’ refers to a place approved by the Chief Executive Officer of Customs under paragraph (f) of the definition of ‘Customs place’ in subsection 183UA(1) of the *Customs Act 1901*. Chapter 6 provides that a permanent *biosecurity monitoring zone* will be in place around all international mail centres. See clause 376 for further information.

### ***invasive pest***

This definition provides that ‘invasive pest’ refers to a *pest* that is an alien species within the meaning of the *Biodiversity Convention* that is not capable of infesting humans, *animals* or *plants*; acting as a vector for a *disease*; or causing *disease* in any other way.

This definition is intended to capture invasive *pests* such as lantana or bitou bush that may cause harm to human, animal or plant health or the *environment* (by, for example, affecting plant communities or water catchments) although they do not cause harm through infesting humans, animals or plants, or acting as a vector for or cause of *disease*. See clauses 25 and 26 for the application of this Bill in relation to invasive pests.

Article 8(h) of the *Biodiversity Convention* imposes an obligation to ‘prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species’. The Guiding Principles in relation to Article 8(h), adopted by the *Conference of the Parties to the Biodiversity Convention* (COP 6 Decision VI/23), define ‘alien species’ as referring to a species, subspecies or lower taxon, introduced outside its natural past or present distribution. Therefore, an ‘alien species’, for the purposes of the Convention and also this definition, can include species that are not native to a particular part of *Australian territory*, as well as species that are not native to *Australian territory* as a whole.

### ***investigation warrant***

This definition provides that ‘investigation warrant’ means;

- a *warrant* issued under section 70 of the *Regulatory Powers Act* as it applies in relation to evidential material that relates to a provision mentioned in subclause 484(1), or
- a *warrant* signed by an *issuing officer* under section 71 of the *Regulatory Powers Act* as it applies in relation to evidential material that relates to a provision mentioned in subclause 484(1).

### ***isolation measure***

This definition provides that ‘isolation measure’ refers to a *biosecurity measure* provided for under clause 97, which may be imposed under a *human biosecurity control order*. This measure requires an individual to remain isolated at a specified *medical facility*. This measure aims to prevent other members of the community from being exposed to a *listed human disease*.

### ***issuing officer***

This definition provides that ‘issuing officer’ refers to a magistrate, or Judge of the Federal Court or the Federal Circuit Court or a Judge of a state or territory court who has the power to issue a *warrant* under this Bill. It is intended that *warrants* provided for in Chapter 9 will be issued to

allow entry to *premises* (including *conveyances*) under this Bill for the purposes of assessing or managing *biosecurity risks*, or monitoring or investigating compliance with the Act. See clause 537 for conferral of powers on an issuing officer.

### ***just terms***

This definition provides that ‘just terms’ has the same meaning as in section 51(xxxi) of the Constitution, which currently provides:

‘the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.’

The term is used in this Bill in relation to *acquisition of property*.

### ***landing place***, in relation to aircraft

This definition provides that ‘landing place’ means any place where an *aircraft* can land, including an area of land or water, or an area on a building or a *vessel*. The term is used in Chapter 4 to outline where aircraft that are *subject to biosecurity control* can and cannot land. See also *first point of entry*.

### ***late payment fee***

See clause 595 for meaning of ‘late payment fee’, which is an additional fee that is payable if a basic charge that is due and payable under the regulations is not paid at or before the time specified in the regulations.

### ***listed human disease***

See clause 42 for meaning of ‘listed human disease’, which is a *human disease* that the *Director of Human Biosecurity* may consider to be a communicable disease that may cause significant harm to human health, and is determined in accordance with that clause.

### ***managed for discharge***

This definition provides that ‘managed for discharge’ refers to *ballast water* that has met the *ballast water management* requirements set out in Chapter 5. See clauses 272 and 275 for further information.

### ***medical facility***

This definition provides that ‘medical facility’ refers to a facility where medical assessments of individuals are conducted. This includes permanent facilities such as hospitals and clinics, and may also include facilities that are temporarily designated for this purpose.

### ***monitoring warrant***

This definition provides that ‘monitoring warrant’ means a *warrant* issued under section 32 of the *Regulatory Powers Act* as it applies in relation to this Act. A monitoring warrant may be issued if entry to *premises* (without consent of the owner or occupier of the *premises*) is necessary in order to monitor whether the Act is, or has been, complied with or whether information provided for the purposes of the Act is correct. A monitoring warrant may only be exercised by a *biosecurity enforcement officer*.

### ***National Focal Point***

This definition provides that ‘National Focal Point’ refers to the designated point of contact for the sharing of information with other States party to the *International Health Regulations*, as specified in section 9 of the *National Health Security Act 2007*. The National Focal Point is specified in clause 98 as one of the bodies and agencies that the *Director of Human Biosecurity* must notify if a *traveller movement measure* is included in a *human biosecurity control order*.

***national response agency***

This definition provides that ‘national response agency’ refers to the *Agriculture Department* and all *biosecurity officers* and *biosecurity enforcement officers*, or a body that is declared to be a national response agency by the *Agriculture Minister* under clause 452. A national response agency may be declared to assist with the Commonwealth’s response to a *biosecurity emergency*. It is intended that national response agencies will be used to direct people, staff biosecurity zones, close roads and assist with the application of *biosecurity measures* during a *biosecurity emergency*.

***officer of Customs***

This definition provides that ‘officer of Customs’ has the same meaning as in the *Customs Act 1901*. This term is used in Chapter 2.

***operator*** of a conveyance

See clause 21 for the meaning of ‘operator’ of a *conveyance*.

***origin part***

This definition provides that ‘origin part’ has the meaning given by subclause 618(2) which relates to the declared movements between parts of *Australian territory*.

***outgoing aircraft or vessel***

This definition provides that ‘outgoing aircraft or vessel’ refers to an *aircraft* or *vessel* that is departing from *Australian territory*.

***outgoing passenger aircraft or vessel***

This definition provides that ‘outgoing passenger aircraft or vessel’ is an *outgoing aircraft or vessel* that is a *passenger aircraft* or *passenger vessel*.

***passenger***

This definition provides that ‘passenger’ refers to an individual travelling on an *aircraft* or *vessel*, but does not include the crew of that *aircraft* or *vessel*.

***passenger aircraft***

This definition provides that ‘passenger aircraft’ refers to an *aircraft* that can carry six or more *passengers*.

***passenger vessel***

This definition provides that ‘passenger vessel’ refers to a *vessel* that can carry 12 or more *passengers*.

***permanent biosecurity monitoring zone***

This definition provides that ‘permanent biosecurity monitoring zone’ has the meaning given by clause 378 and refers to a *biosecurity monitoring zone* that is permanently in place within the *permissible distance* of the outer boundary of a *first point of entry*, an *international mail centre*, a *biosecurity activity zone* or any other place in *Australian territory* prescribed by the regulations.

It is intended that permanent biosecurity monitoring zones will be used to monitor whether *pests* or *diseases* that may pose an unacceptable level of *biosecurity risk* have entered, or are likely to enter, emerge, establish or spread from places that are known to be subject to high traffic of *goods* or *conveyances* that are *subject to biosecurity control*.

***permissible distance***

This definition provides that ‘permissible distance’ in relation to a *permanent biosecurity monitoring zone* is 400 metres, or greater if prescribed in the regulations for the purposes of this definition.

### ***permissible purpose***

This definition provides that ‘permissible purpose’ means a purpose that promotes the objects of the Act (see clause 4). This term is used in provisions relating to confidentiality of information in Chapter 11. *Personal information* and *commercial-in-confidence* information may be collected for a permissible purpose (e.g. through processing a permit application). Records may be made of that information and it may be disclosed or used for a permissible purpose in the exercise of powers or performance of functions under the Bill (for example, to contacting the person who made the application about the application).

### ***personal information***

This definition provides that ‘personal information’ has the same meaning as in section 6 of the *Privacy Act 1988* which currently provides the meaning as:

‘Information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.’

This term is used in provisions relating to confidentiality of information in Chapter 11.

### ***person assisting***

This definition provides that ‘person assisting’ has the meaning given by clause 536. A *biosecurity officer* may be assisted by other persons in exercising powers and performing functions referred to in subclause 536(1) if that assistance is necessary and reasonable. Similarly, a *biosecurity enforcement officer* may be assisted by other persons in entering *premises*, and exercising powers and performing functions referred to in subclause 536(1), if that assistance is necessary and reasonable. A person giving such assistance to a *biosecurity officer* or a *biosecurity enforcement officer* is a person assisting the officer. See clause 536 for further information.

### ***person in charge***

See clause 22 for the meaning of ‘person in charge’.

### ***person responsible for a conveyance***

This definition provides that a ‘person responsible for a conveyance’ means the owner of the *conveyance*, the *person in charge* of the *conveyance* or the *operator* of the *conveyance*. See clauses 21 and 22 for further information in relation to the meaning of the terms *operator of a conveyance* and *person in charge of a conveyance*.

### ***pest***

This definition provides that ‘pest’ refers to a species, strain or biotype of a plant or animal, or a *disease agent*, that has the potential to cause, either directly or indirectly, harm to human, *animal* or *plant* health, the economy or the *environment*.

This broad definition is intended to ensure that the widest range of *biosecurity risks* and *human health risks* may be assessed and managed under this Bill. See clauses 25 and 26 for the application of this Act in relation to pests, and also the definition of *invasive pests*.



***plant***

This definition provides that a reference to ‘plant’ in this Bill includes a dead plant and any part of a plant. Chapter 3 provides that the *Director of Biosecurity* and the *Director of Human Biosecurity* may jointly prohibit (absolutely or subject to conditions) *goods* from being brought or *imported* into *Australian territory*. This may include prohibiting (absolutely or subject to conditions) or requiring a permit for the bringing in or importation of plants, parts of plants or plant products as they are included in the definition of *goods* under this Bill.

***port***

This definition provides that ‘port’ includes a *harbour*. See the definition of *harbour* for further information.

***possession warrant***

This definition provides that ‘possession warrant’ refers to a *premises possession warrant* or a *conveyance possession warrant* that authorises the taking of possession of *premises* or *conveyances*.

***PPSA security interest***

This definition provides that a ‘PPSA security interest’ means a security interest within the meaning of the *Personal Property Securities Act 2009* and to which that Act applies (other than a transitional security interest within the meaning of that Act). This term is used in Chapter 11 in relation to the cost recovery provisions.

The *Personal Property Securities Act 2009* applies to certain security interests in person property. See section 8 (interests to which the Act does not apply), section 12 (meaning of *security interest*) and Chapter 9 (transitional provisions) of that Act. Further, see section 308 of the *Personal Property Securities Act 2009* for the meaning of transitional security interest.

***premises***

This definition provides that ‘premises’ includes a structure, building or *conveyance*; a place (whether or not enclosed or built on), including a place situated underground or under water; or a part of either of the previous. This broad definition is intended to ensure that powers provided in the Bill are able to be exercised in the widest range of locations in order to manage *biosecurity risk*.

*Conveyances* are included in the definition of premises in most of the Bill as the same policy that applies to premises generally applies to *conveyances* (see clauses 252, 472 and 497 for examples of clauses where premises does not include a *conveyance*).

***premises possession warrant***

This definition provides that ‘premises possession warrant’ refers to a *warrant* issued as a result of the test in item 7 of the table in clause 489 being met. A *biosecurity enforcement officer* may apply for a premises possession warrant where a *biosecurity officer* has requested under subclause 341(1) for the owner of *premises* to arrange for the *premises* to be dealt with or destroyed, and the request has not been complied with. Premises possession warrants will allow *biosecurity officers* to access to *premises* in order to manage *biosecurity risks* associated with the *premises*.

***prescribed contact information***

This definition provides that ‘prescribed contact information’ refers to the contact information that is required to be provided by the *operators* of *passenger aircraft* and *passenger vessels*, individuals that may be suffering from a *listed human disease*, or close personal contacts of individuals that may be suffering from a *listed human disease* (see clause 47, 69 and 85 respectively).

### ***prescribed quarantine signal***

This definition provides that ‘prescribed quarantine signal’ means the signal prescribed under subclause 221(2).

Quarantine signals are internationally-recognised signals (e.g. flags or lights) on *vessels* that indicate the state of health of the people on board. Quarantine signals are prescribed in this Bill in accordance with the *International Code of Signals*. The requirements for how the quarantine signal is to be displayed will be covered in the regulations.

### ***prohibited goods***

See subclause 173(2) for the meaning of ‘prohibited goods’, which refers to *goods* (or classes of *goods*) that the *Director of Biosecurity* and *Director of Human Biosecurity* have jointly determined are prohibited from being *imported* or brought into *Australian territory*. The Directors may only determine that *goods* are prohibited goods if satisfied that the level of *biosecurity risk* associated with the *goods* (or class of *goods*) is unacceptable and that *biosecurity measures* would not be able to be taken to reduce that level of *biosecurity risk* to an acceptable level. The Directors must apply the *ALOP* for Australia in conducting a risk assessment for the purpose of determining whether particular *goods* (or classes of *goods*) should be prohibited goods (see subclause 173(4)).

### ***protected information***

This definition provides that ‘protected information’ refers to *personal information*, or information that is *commercial-in-confidence* that:

- is obtained under, or in accordance with, this Act
- is derived from a record of *personal information*, or information that is *commercial-in-confidence*, that was made under, or in accordance with, this Act, or
- is derived from a disclosure or use of *personal information*, or information that is *commercial-in-confidence*, which was made under, or in accordance with, this Act.

This term is used in provisions relating to confidentiality of information in Chapter 11 which outlines the circumstances that a person can record, disclose or otherwise use protected information for the purposes of the Act (i.e. a *permissible purpose*) (see Part 2 of Chapter 11). Also, see clause 15 for the meaning of *commercial-in-confidence*.

### ***protected person***

This definition provides that ‘protected person’ has the meaning given by subclause 644(6) and refers to a person protected from civil proceedings under clause 644. Civil proceedings involve legal disputes between individuals based on one person claiming that the other has failed in his or her legal duty.

Protection from civil proceedings is intended to allow those required under the Bill to make decisions and take action to manage *biosecurity risk* appropriately without the fear of being sued. This protection does not however extend to protection from criminal prosecution where a protected person is alleged to have committed an offence.

### ***protected zone***

This definition provides that ‘protected zone’ has the meaning given by clause 617 which is the zone established under Article 10 of the *Torres Strait Treaty*, being the area bounded by the line described in Annex 9 to the Treaty.

### ***protected zone area***

This definition provides that ‘protected zone area’ has the meaning given by clause 617 which is the *protected zone* established under the *Torres Strait Treaty*, or an area in the vicinity of the protected zone prescribed in regulations made under clause 617. The area in the vicinity of the

protected zone is included in the definition of this term to ensure that *traditional inhabitants* navigating *protected zone vessels* (which may not have access to accurate navigation equipment) are provided with a buffer zone in which they may travel while still being considered *protected zone vessels*.

***protected zone vessel***

This definition provides that ‘protected zone vessel’ has the meaning given by clause 617, which refers to a *vessel* that meets the conditions set out in that clause. Protected zone vessels are *vessels* that are used to transport *traditional inhabitants* in the *protected zone*. See clause 617 for further details of how Australia will meet its obligations under the *Torres Strait Treaty* in this Bill.

***Regulatory Powers Act***

This definition provides that ‘Regulatory Powers Act’ means the *Regulatory Powers (Standard Provisions) Act 2014*.

***related provision***

This definition provides that ‘related provision’ refers to an offence against this Act or the *Quarantine Act 1908* (as it applied of its own force or to the extent that it continues to apply because of the *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2014*, a *civil penalty provision* under the Biosecurity Act, or an offence against the *Crimes Act 1914* or the *Criminal Code* that relates to the Biosecurity Act or the *Quarantine Act 1908* (as it is applied of its own force or to the extent that it continues to apply because of the *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2014* .

***release from biosecurity control***

This definition provides that ‘release from biosecurity control’ refers to when *goods* and conveyances are no longer *subject to biosecurity control*. See clauses 162 and 218 for further information.

***relevant court***

This definition provides that ‘relevant court’ refers to the Federal Court, the Federal Circuit Court or a court of a state or territory that has jurisdiction in relation to matters arising under the Bill.

***relevant Director***, in relation to a proposed arrangement or an *approved arrangement*

This definition provides that ‘relevant Director’, when used in relation to a proposed arrangement or *approved arrangement*, refers to the *Director of Biosecurity* unless the arrangement provides for *biosecurity activities* to be carried out in relation to *human health risks* only. If the arrangement relates only to *human health risks*, the *Director of Human Biosecurity* is the relevant Director.

***relevant person***

This definition provides that ‘relevant person’ for a *reviewable decision* refers to a person listed in column 1 of the table in subclause 574(1), or for a *reviewable decision* prescribed in the regulations made for the purposes of subclause 574(2), the person prescribed in the regulations to clause 574. A relevant person, in relation to a *reviewable decision*, is the person that may apply for the decision to be reviewed. See clause 574 for further information.

***relevant premises***

See clause 510 for the meaning of ‘relevant premises’, which refers to any *premises* at which *biosecurity activities* are carried out by a *biosecurity industry participant* that is covered by an *approved arrangement* and any *landing place* or *port* that is determined to be a *first point of entry*.

### ***reportable biosecurity incident***

This definition provides that ‘reportable biosecurity incident’ refers to an incident relating to a *biosecurity risk* that must be reported to a *biosecurity officer* or the *Director of Biosecurity* (for incidents reportable in Chapter 3) or the *relevant Director* (for incidents reportable in Chapter 7).

Division 8 of Part 1 of Chapter 3 provides that in relation to *goods* that are *subject to biosecurity control*, the *Director of Biosecurity* may determine that an act, or omission or event is a reportable biosecurity incident. Reportable biosecurity incidents will be listed in a legislative instrument made by the *Director of Biosecurity*. See clauses 155 and 156 for further information.

In Chapter 7, clause 431 provides that a report must be made to the *relevant Director* if an act, omission or event specified in an *approved arrangement* occurs, or if a condition of the *approved arrangement* requires a report to be made to the *relevant Director* if an act, omission or event specified in the condition occurs. See clauses 431 and 432 for further information.

*Reportable biosecurity incidents* are intended to ensure *persons in charge of goods*, *persons in charge of vessels or aircraft* that bring goods into *Australian territory*, and *biosecurity industry participants* report any biosecurity incidents to a *biosecurity officer* or the *Director of Biosecurity* in order to ensure *the biosecurity risk* is assessed and managed.

### ***reviewable decision***

This definition provides that a ‘reviewable decision’ has the meaning given by subclauses 574(1) and (2). Subclause 574(1) lists decisions that are reviewable and subclause 574(2) provides that regulations may prescribe further decisions that are reviewable decisions.

Applications can be made to the Administrative Appeals Tribunal for a decision made personally by the *Director of Biosecurity*, or for a decision that has been reviewed by the *Director of Biosecurity* or other internal reviewer. It is intended that reviewable decisions will allow people in relation to whom a decision has been made under this Act to have the decision reviewed if the person is not satisfied that the decision was made correctly, and potentially re-made if the original decision was found to be incorrect.

### ***sanitation health risk***

The definition provides that ‘sanitation health risk’ has the meaning prescribed under clause 255(1)(a). Clause 255 provides for the regulations to establish a scheme for ship sanitation, which must give effect to the *International Health Regulations*.

### ***sediment***

This definition provides that ‘sediment’ has the same meaning as Sediments in the *Ballast Water Convention*, which refers to ‘matter settled out of ballast water within a ship’. This term is used in Chapter 5 in relation to *ballast water management*.

### ***sediment reception facility***

This definition provides that ‘sediment reception facility’ refers to a facility in *Australian territory* for receiving *sediment* from *vessels* for treatment or disposal in a way authorised under a Commonwealth law or a state or territory law (if the facility is in a state or territory). This term is used in Chapter 5 in relation to *ballast water management*.

### ***ship’s pilot***

This definition provides that ‘ship’s pilot’ refers to a person who does not belong to, but has the conduct of, a *vessel*. The term is commonly used to refer to a person with extensive knowledge of conditions applicable to the *port* that a *vessel* wishes to enter. The ship’s pilot boards the *vessel* to

pilot it into the *port* and ensure it docks safely. This term is used in the definition of *person in charge of a conveyance*.

### ***SPS Agreement***

This definition provides that ‘SPS Agreement’ refers to the *Agreement on the Application of Sanitary and Phytosanitary Measures 1994* set out in Annex 1A to the *World Trade Organization (WTO) Agreement* as in force for Australia from time to time. The *SPS Agreement* contains the basic rules on *animal* and *plant* health and food safety standards for trade between World Trade Organization member countries. It requires that sanitary (relating to human and animal) and phytosanitary (relating to plant) measures are based on science and applied only to the extent necessary to protect human, animal or plant life or health. The *SPS Agreement* allows World Trade Organization members to determine their own appropriate level of sanitary and phytosanitary protection (*ALOP*), which must be applied in a consistent manner.

### ***State or Territory body***

This definition provides that a reference to a ‘state or territory body’ includes a Department of State, or an authority of a state or territory.

### ***subject to biosecurity control***

This definition provides that ‘subject to biosecurity control’ has the meaning given by clause 119 in relation to *goods*, and clause 191 or clause 192 in relation to *conveyances*. *Goods* and *conveyances* that arrive from outside *Australian territory*—or in some circumstances, interact with *goods* or *conveyances* that have arrived from outside *Australian territory*—provide a direct pathway for *biosecurity risks* to enter into *Australian territory*. This Bill makes those *goods* and *conveyances* subject to biosecurity control. When *goods* or *conveyances* are subject to biosecurity control, *biosecurity officers* can exercise powers in relation to them to manage any associated *biosecurity risks*.

### ***survey authority***

This definition provides that ‘survey authority’ refers to a person authorised by the *Director of Biosecurity* under clause 289 to be a survey authority. Regulations can prescribe a scheme for survey authorities to perform a number of functions in relation to *ballast water management certificates* of *Australian vessels* on behalf of the Commonwealth (see clause 290). The *Director of Biosecurity* may only authorise a survey authority under this clause if the Director is satisfied the person has suitable qualifications to perform these functions.

### ***suspended goods***

See subclause 182(2) for meaning of ‘suspended goods’, which provides that suspended goods are *goods* that the *Director of Biosecurity* has determined must not be brought, or *imported*, into *Australian territory* for a specified period.

### ***tank***

This definition provides that ‘tank’ includes a space or compartment. The term is used in the definition of *ballast water exchange*. This definition is intended to ensure that any space or compartment that can contain *ballast water* is captured by the term *ballast water exchange*.

**temporary biosecurity monitoring zone**

This definition provides that ‘temporary biosecurity monitoring zone’ has the meaning given by subclause 384(1) and refers to a *biosecurity monitoring zone* in relation to which the *Director of Biosecurity* has made a *temporary biosecurity monitoring zone declaration*. It is intended that temporary biosecurity monitoring zones will be used to monitor whether *pests* or *diseases* that may pose an unacceptable level of *biosecurity risk* have, or are likely to, enter, emerge, establish or spread from a specified area within *Australian territory*.

**temporary biosecurity monitoring zone determination**

This definition provides that a ‘temporary biosecurity monitoring zone determination’ is a determination made under clause 384(1) that specifies the particular *biosecurity measures* or powers that a *biosecurity officer* may use to manage an identified *biosecurity risk* in a *temporary biosecurity monitoring zone*. Clause 385 specifies the required contents of a temporary biosecurity monitoring zone determination.

**this Act**

This definition provides that any reference to ‘this Act’ includes instruments made under the Biosecurity Act and the *Regulatory Powers Act* applying in relation to this Act.

**Torres Strait Treaty**

See clause 617 for the meaning of ‘Torres Strait Treaty’, which refers to the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters 1978*.

Articles of the *Torres Strait Treaty* that are relevant to this Bill include:

- Article 10.3 which states that ‘the principle purpose of the Parties in establishing the *protected zone* is to ‘acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement’
- Article 11.3 which states that, ‘subject to the other provisions of the *Torres Strait Treaty*, each Party shall continue to permit free movement and the performance of lawful *traditional activities* in and in the vicinity of the *protected zone* by the *traditional inhabitants* of the other Party’, and
- Article 16 which states that ‘each Party shall apply immigration, customs, quarantine and health procedures in such a way as not to prevent or hinder free movement or the performance of *traditional activities* in and in the vicinity of the protected zone by the traditional inhabitants of the other Party’.

See clause 617 for further details.

**traditional activities**

See clause 617 for the meaning of ‘traditional activities’, which refers to the meaning given in the *Torres Strait Treaty*.

**traditional inhabitant**

See clause 617 for the meaning of ‘traditional inhabitant’, which refers to the meaning given in the *Torres Strait Treaty*.

**traveller movement measure**

This definition provides that ‘traveller movement measure’ refers to a *biosecurity measure* provided for under clause 96 that may be imposed under a *human biosecurity control order*. This measure requires that an individual does not leave *Australian territory* on an *outgoing passenger*

*aircraft* or *passenger vessel* for up to 28 days. This measure seeks to prevent the spread of *listed human diseases* to other *passengers*, and to prevent the international spread of the disease.

#### ***unduly detained or delayed***

This definition provides that ‘unduly detained or delayed’ in relation to *ballast water management* refers a *vessel* being unduly detained or delayed under articles 7.2, 8, 9, or 10 of the *Ballast Water Convention*. These articles relate to undue detainment or delay in the course of:

- requiring additional surveys or certifications that are not required under the Convention
- investigating a suspected violation of the Convention and subsequent sanctions against a *vessel*
- inspection and sampling to determine whether a *vessel* is in compliance with the Convention, and
- detaining a *vessel* that has violated the Convention.

Chapter 5 provides that if a *vessel* is unduly detained or delayed as a result of an action undertaken by a *biosecurity officer*, the owner may claim reasonable compensation from the Commonwealth (see clause 307). This is intended to safeguard owners against financial loss if a vessel is detained longer than was required to ensure compliance with the *ballast water management* provisions of the Bill, or if there was no basis for the detention.

#### ***United Nations Convention on the Law of the Sea***

This definition provides that ‘United Nations Convention on the Law of the Sea’ refers to the *United Nations Convention on the Law of the Sea* done at Montego Bay on 10 December 1982 in force for Australia from time to time. This term is used in clause 30 in relation to foreign vessels.

#### ***vessel***

This definition outlines which types of *conveyances* are considered to be a ‘vessel’ under this Bill. The term refers to any kind of vessel used in navigation by water, however propelled or moved, including a barge, lighter or other floating craft, and an air-cushion vehicle (or other similar craft, used wholly or primarily in navigation by water). This definition provides that vessel also includes an *installation*, and any floating structure.

Under this Bill, a vessel (except in relation to Chapter 5) that is, or is to be, brought or *imported* into *Australian territory* from outside *Australian territory* on board another *conveyance* is considered to be *goods* from the time the *vessel* is first intended to be so brought or *imported* until immediately after the vessel is *released from biosecurity control*. This is intended to exclude such vessels from provisions of the Bill that deal with *biosecurity risks* associated with aircraft that convey people or *goods* into *Australian territory* (for example, clause 193—pre-arrival reporting). Biosecurity risks associated with such vessels will be managed under Chapter 3.

However, in relation Parts 1 and 3 of Chapter 11 (and any provision of the Bill that relates to Parts 1 and 3 of Chapter 11) a vessel which is transported on another conveyance will not be considered *goods* so that the cost recovery provisions in Chapter 11 apply as if the vessel were a *conveyance* (see definition of *conveyance* and *goods* in clauses 16 and 19 for further information).

#### ***warrant***

This definition provides that ‘warrant’ refers to any warrant issued under clause 488 or clause 492 or an *investigation warrant* or a *monitoring warrant*.

#### ***World Trade Organization Agreement***

This definition provides that ‘World Trade Organization Agreement’ refers to the *Marrakesh Agreement 1994* that established the World Trade Organization. See *SPS Agreement* for how this Agreement relates to this Bill.

### **Clause 10**                    **Meaning of *approved arrangement***

This clause provides that an approved arrangement is an arrangement for which an approval is in force under paragraph 406(1)(a), including a varied arrangement for which an approval is in force under paragraph 406(1)(a) as it applies because of subclause 412(3).

In order to be approved, an arrangement must meet the requirements set out in the regulations, the applicant must meet a fit and proper person test (see clause 530), and the *relevant Director* must consider that the level of *biosecurity risk* associated with the operation of the arrangement is acceptable. Once an application has been approved by the *relevant Director*, the applicant will become a *biosecurity industry participant*. All arrangements will be supported by an audit model that ensures the *biosecurity risks* are being adequately managed.

Chapter 7 outlines the scope and principles of approved arrangements, the processes for application, approval and any subsequent changes to an arrangement with a *biosecurity industry participant*.

### **Clause 11**                    **Meaning of *associate***

This clause defines the term ‘associate’ which is used in clauses 179, 410 and 530.

Subclause 11(1) provides that the word ‘associate’ covers a person who is or was a consultant, adviser, partner, representative on retainer, employer or employee of the first person or a corporation the first person is employed by or has shares in; a spouse, *de facto partner*, or family member of the first person; a family member of a spouse or *de facto partner* of the first person or any other person who was directly or indirectly concerned with or in a position to control the business or an undertaking of the first person or a corporation he or she is employed by or has shares in. (See section 2D of the *Acts Interpretation Act 1901* for the meaning of *de facto partner*). Guidance is provided on who may be a ‘child’ or a ‘parent’ of a person.

The intent of the associates’ test is to ensure that an applicant for a permit to bring or *import goods* into *Australian territory*, an arrangement or a person who holds an *approved arrangement* is a suitable person to be responsible for managing *biosecurity risks*, in light of the potential consequences of non-compliance. It aims to do this by preventing a person the *relevant Director* has determined should not hold a permit or an *approved arrangement* from obtaining another arrangement via an associate, such as a family member or business partner, on his or her behalf; or by ensuring a person involved in the behaviour that resulted in non-compliance of the first person can be refused a permit or an arrangement or have his or her *approved arrangement* suspended or revoked if the *relevant Director* deems it appropriate. The term ‘associate’ is also used in clause 530 to provide guidance as to who is a fit and proper person.

### **Clause 12**                    **Meaning of *Australian territory***

This definition outlines the application of provisions referring to ‘Australian territory’. A reference in a provision of this Bill to Australian territory is defined to mean a reference to Australia, *Christmas Island*, the *Cocos (Keeling) Islands* (and any external Territory to which that provision extends), and the airspace over these areas. It also refers to the *coastal sea* of Australia, of *Christmas Island*, of the *Cocos (Keeling) Islands* (and of any other external Territory to which that provision extends).

### **Clause 13**                    **Meaning of *biosecurity entry point***

This clause defines the term ‘biosecurity entry point’ for *aircraft*, *vessels* and *goods* in relation to *first points of entry*. Clauses 224 and 230 allow the *Director of Biosecurity* to designate a specified area of a *port* or *landing place* as a ‘biosecurity entry point’ in a *first point of entry* determination. These designated entry points are flexible non-mandatory enforcement tools intended to ensure that *aircraft*, *vessels* and *goods* with a specific type of *biosecurity risk* (i.e. timber) are being taken



to the appropriate place within a *first point of entry* where *biosecurity risks* can be managed effectively.

**Clause 14**                    **Meaning of *biosecurity industry participant* and *covered by***

This clause clarifies terms used in Chapter 7. It defines the term ‘biosecurity industry participant’ to mean a person who is the holder of an *approved arrangement* (until the agreement is approved, the person is referred to as an ‘applicant’). It also explains that the biosecurity industry participant is considered to be ‘covered by’ the *approved arrangement*. Provisions in the Bill that refer to a biosecurity industry participant covered by an arrangement refer to a biosecurity industry participant who is operating in accordance with his or her *approved arrangement*. See Chapter 7 for further information.

**Clause 15**                    **Meaning of *commercial-in-confidence***

This clause defines the meaning of the term ‘commercial-in-confidence’ in relation to information. Under this Bill, information is considered commercial-in-confidence if a person can demonstrate to the *Director of Biosecurity* that all of the following apply in relation to the information:

- release of the information would cause competitive detriment to the person
- the information is not in the public domain
- the information is not required to be disclosed under another *Australian law*, and
- the information is not readily discoverable.

This term is used in the definition of *protected information*.

**Clause 16**                    **Meaning of *conveyance***

This clause provides that the term ‘conveyance’ refers to any *vessel, aircraft, vehicle, or train* (including railway rolling stock). The regulations may prescribe additional means of transport for the purpose of this definition, which is intended to allow for new developments in transport methods into the future. Chapter 4 provides for the management of *biosecurity risks* associated with conveyances in *Australian territory*.

This clause also provides that a reference to a conveyance does not include a reference to a conveyance while it is *goods* because of subclause 19(2) (except in relation to Part 3 of Chapter 11 and any clause of this Bill to the extent that it relates to that Part)

A reference to an *aircraft* does not include a reference to an *aircraft* while it is considered *goods* because of subclause 19(2).

A reference to a *vessel* does not include a reference to a *vessel* while it is considered goods because of subclause 19(2) (except in Chapter 5 and any clause of this Bill to the extent that it relates to that Chapter). These exceptions are provided so that *ballast water* can be managed under Chapter 5 in relation to a vessel carried on board another conveyance, and the cost recovery provisions in Chapter 11 will continue to apply to a conveyance carried on board another conveyance.

Under subclause 19(2), a conveyance (carried conveyance) that is, or is to be, brought or *imported* into *Australian territory* from outside *Australian territory* on board another conveyance is considered to be *goods* from the time the carried conveyance is first intended to be so brought or *imported* until immediately after the carried conveyance is *released from biosecurity control*. This is intended to exclude such carried conveyance from provisions of the Bill that deal with *biosecurity risks* associated with conveyances that convey people or *goods* into *Australian territory* (for example, clause 193—pre-arrival reporting). *Biosecurity risks* associated with such aircraft will be managed under Chapter 3.

However, in relation Parts 1 and 3 of Chapter 11 (and any provision of the Bill that relates to Parts 1 and 3 of Chapter 11) a carried conveyance which is transported on another conveyance will not be considered *goods* so that the cost recovery provisions in Chapter 11 apply as if the carried conveyance is a conveyance (see definition of *goods* in clause 19 for further information).

**Clause 17                    Meaning of *exposed to***

This clause provides the meaning of the term ‘exposed to’. This term is used in Chapters 2, 3 and 4 to describe persons and things that have been in physical contact with, in close proximity to, or exposed to, contamination, infestation or infection from other people or things. In this clause, ‘thing’ includes *goods*, *conveyances* and *premises*. Powers are available in Chapters 2, 3 and 4 in relation to *goods*, *conveyances* or *premises* and people that are exposed to other people or things in order to manage *biosecurity risks* associated with exposure.

**Clause 18                    Meaning of *first point of entry***

This clause defines the term ‘first point of entry’ in relation to *aircraft*, *vessels* and *goods* that are *subject to biosecurity control*. In relation to *aircraft* and *vessels* that are *subject to biosecurity control*, a first point of entry describes the *landing place* or *port* where *aircraft* and *vessels* must arrive after entering *Australian territory*, as determined under paragraph 223(1)(a) or paragraph 229(1)(a).

In relation to *goods* that are *subject to biosecurity control*, or *exposed goods* in relation to which a *exposed goods order* is in force, a first point of entry describes a *landing place* or *port* determined under clause 223(1)(b) or clause 229(1)(b) to be a first point of entry for those *goods* (or a class of *goods* that includes those *goods*).

See Part 3 of Chapter 4 for further details.

**Clause 19                    Meaning of *goods***

This clause provides that the term ‘goods’ includes the following:

- an *animal*
- a *plant* (whether moveable or not)
- a sample or specimen of a *disease agent*
- a *pest*
- mail, and
- any other article, substance or thing (including, but not limited to, any kind of moveable property).

Under subclause 19(2), a *conveyance* (carried conveyance) that is, or is to be, brought or *imported* into *Australian territory* from outside *Australian territory* on board another *conveyance* is considered to be goods from the time the carried *conveyance* is first intended to be so brought or imported until immediately after the carried *conveyance* is *released from biosecurity control*. Once the carried *conveyance* has been *released from biosecurity control* it will be treated as a *conveyance*. For example, a car that is being imported into Australia will be treated as a good until it is released from biosecurity control when it will be treated as a conveyance.

This is intended to exclude such carried *conveyance* from provisions of the Bill that deal with *biosecurity risks* associated with *conveyances* that convey people or goods into *Australian territory* (for example, clause 193—pre-arrival reporting). *Biosecurity risks* associated with such *conveyances* will be managed under Chapter 3.

It will also allow the *Director of Biosecurity* to grant import permits in relation to carried *conveyances* such as farming or mining machinery under clause 179 and place conditions on the

importation or bringing in of the *conveyance*. These *conveyances* will be managed as *goods* at the border, consistent with other types of cargo and consignments.

However, in relation Parts 1 and 3 of Chapter 11 (and any provision of the Bill that relates to Parts 1 and 3 of Chapter 11) a carried *conveyance* which is transported on another *conveyance* will not be considered *goods* so that the cost recovery provisions in Chapter 11 apply as if the carried *conveyance* is a *conveyance*.

For the purposes of Parts 1 and 3 of Chapter 3, and any other provision of this Act to the extent that it relates to either of those Parts, the carried *conveyance* continues to be *goods* after it is *released from biosecurity control*. This ensures that a notice revoking the *release from biosecurity control* under clause 164 can be issued making the carried *conveyance subject to biosecurity control* again where the goods have been released by mistake or based on incorrect information provided to a *biosecurity officer* or *biosecurity industry participant*.

The clause clarifies that the definition of goods does not include *ballast water*, *human remains* or except as provided by subsections 19(2) and (3) a *conveyance*. The *biosecurity risks* associated with *ballast water*, *human remains* and *conveyances* will be managed under the powers available in Chapters 5, 2 and 4 respectively.

#### **Clause 20**                      **Meaning of *installation***

This clause provides that the term ‘installation’ refers to a structure that is either attached to or resting on—or attached semi-permanently or permanently—to a structure that is:

- attached to or resting on—the seabed
- able to float or be floated
- able to move or be moved, as an entity from one place to another, and
- is, or is to be, wholly or principally used in:
  - exploring or exploiting natural resources (such as fish or minerals) with equipment that is on or forms part of the structure, or
  - operations or activities associated with, or incidental to, activities in relation to exploring or exploiting natural resources.

This term is used in the definition of *vessel*.

#### **Clause 21**                      **Meaning of *operator of a conveyance***

This clause provides that ‘operator’ in relation to a *conveyance*, means:

- if there is a body corporate or an unincorporated body responsible for the operation of the *conveyance*—that body, and
- in any other case—the *person in charge* of the *conveyance*.

This term has an alternative meaning when it is used in Chapter 5. In Chapter 5, operator of a *conveyance* has the same meaning as ‘company’ in the Annex to the *Ballast Water Convention* which currently provides that company means:

‘the owner of the ship or any other organisation or person such as the manager, or bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who on assuming such responsibility has agreed to take over all the duties and responsibilities imposed by the *International Safety Management Code*.’

#### **Clause 22**                      **Meaning of *person in charge***

This clause defines the term ‘person in charge’. The term may refer to the owner of a thing or a person in possession or control of a thing.

In relation to *goods*, person in charge refers to the owner of the *goods* or a person (other than a *biosecurity officer* or *biosecurity enforcement officer*) who is in possession or control of the goods. Person in charge of *goods* also includes a *biosecurity industry participant* who is in possession or control of the *goods* as authorised by an *approved arrangement covering the biosecurity industry participant*. A *biosecurity industry participant* is not a person in charge for the purposes of subclauses 134(7), 336(6), 626(5) and 628(7).

In relation to *conveyances*, person in charge refers to the person in charge or command of the *conveyance*, but does not include a *ship's pilot*. *Ship's pilots* are excluded from this definition as although they may be in charge of a *conveyance*, they are not legally responsible for the *conveyance* in the same way as an owner, *operator* or captain of the *conveyance* would be.

The concept of person in charge is used in the Bill instead of owner (the term generally used in the *Quarantine Act 1908*), as it reflects the broad range of people who are responsible for *goods* and *conveyances*. The inclusion of a broad range of people in the definition is intended to increase the operational practicality of the Bill, for example where the owner of a *conveyance* is not in *Australian territory* and a *biosecurity officer* needs to give a direction in relation to the *conveyance* in order to assess or manage *biosecurity risk*.

### **Part 3—Constitutional and international law provisions**

#### **Division 1—Introduction**

##### **Clause 23 Simplified outline of this Part**

This outline sets out the Part's objectives. This Part contains provisions relating to the Constitution (such as the constitutional powers relied on for this Act), the application of the Act in relation to pests, protections in the Constitution, as well as provisions that ensure that the Act is consistent with the rights that foreign aircraft and vessels have under the *United Nations Convention on the Law of the Sea*.

#### **Division 2—Constitutional and international law provisions**

##### **Clause 24 Severability**

This clause provides for continued operation of the Bill (or provisions of the Bill) in the event of a successful constitutional challenge. It sets out the various constitutional heads of power upon which the Bill can draw if its operation is expressly confined to acts or omissions under those constitutional powers. This clause is intended to ensure that the Bill is given the widest possible operation consistent with Commonwealth constitutional legislative power.

This clause provides that the Bill draws on the following constitutional powers:

- Quarantine power section 51(ix) of the Constitution
- External affairs power section 51(xxix) of the Constitution
- Trade and commerce power section 51(i) of the Constitution
- Fisheries power section 51(x) of the Constitution
- Aliens power section 51(xix) of the Constitution
- Corporations power section 51(xx) of the Constitution
- Territories and Commonwealth places power section 122 of the Constitution and the *Commonwealth Places (Application of Laws) Act 1970*
- Postal power section 51(v) of the Constitution

- Sickness benefits power section 51(xxiiiA) of the Constitution
- Census and statistics power section 51(xi) of the Constitution

**Clause 25 Application of this Act in relation to pests that are quarantine risks or invasive pests**

The definition of 'pest' in clause 9 of the Bill is broadly expressed to capture a wide range of pests. Subclause 25(1) limits the application of the Act (other than Part 1 of Chapter 8) to those pests which may pose biosecurity risks (paragraph (a)) or are invasive pests (paragraph (b)). See clause 9 for the definition of 'invasive pest' and clause 26 for the application of the Act in relation to invasive pests.

Part 1 of Chapter 8, which deals with biosecurity emergencies, applies only to pests which may pose biosecurity risks (subclause 25(2)).

Together with the definition of 'pest', clause 25 is intended to ensure that the widest range of pests that may pose a biosecurity risk can be dealt with under the Act, consistent with Commonwealth legislative power.

**Clause 26 Application of this Act in relation to invasive pests**

This clause provides for the application of the Act in relation to invasive pests where this relies only on the external affairs power as engaged by the Biodiversity Convention (see clause 9 for the definition of invasive pest).

The external affairs power (section 51(xxix) of the Constitution), in its treaty implementation aspect, supports legislation that is capable of being reasonably considered appropriate and adapted to fulfilling the obligations and benefits of a treaty (*Victoria v Commonwealth* (1996) 187 CLR 419 at 487-488). Clause 26 is intended to limit the effect of the Act to ensure that, in its application to invasive pests, it is appropriately supported by the external affairs power.

The clause does this by limiting the extent to which a provision of the Act confers a power, function or right, or imposes an obligation, in relation to an invasive pest to the circumstances set out in subclause 26(2). First, it is limited to the purpose of preventing the introduction of, or controlling or eradicating, invasive pests which threaten ecosystems, habitats or species. The second limitation is that the conferral of the power, function or right, or imposition of the obligation, must be reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under Articles 7 and 8 of the Biodiversity Convention. For example, Article 8(h) of the Convention imposes obligations on Australia to prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.

The effect of paragraph 26(1)(b) is that the limitations in subclause 26(2) do not apply where the application of provisions of the Act to invasive pests would be supported by *other* sources of legislative power, that is, other than the external affairs power as engaged by the Biodiversity Convention.

**Clause 27 Compensation for acquisition of property**

This clause is intended to ensure, for the purposes of section 51(xxxi) of the Constitution, that if the operation of the Act results in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay reasonable compensation to the person. This clause also provides for the person to institute court proceedings if the Commonwealth and the person do not agree on the amount of compensation. See also clause 9 for definitions of acquisition of property and just terms.

**Clause 28 Freedom of interstate trade, commerce and intercourse**

This clause provides that a power or function conferred by this Act is not to be exercised in a way that prevents free trade and commerce among the states and territories of Australia.

**Clause 29 Commonwealth not to give preference**

This clause is intended to ensure that a power of function conferred by this Act is not exercised or performed in a way that gives preference to one state or part of one state. This clause is not intended to limit the Commonwealth's ability to consider differences in biosecurity risk between the states and territories that are based on valid scientific evidence.

**Clause 30 Application of the Act to foreign aircraft and vessels**

This clause provides that the Act only applies to foreign aircraft or vessels to the extent that the application is consistent with the exercise of rights of foreign aircraft or vessels in accordance with the United Nations Convention on the Law of the Sea, above or in any of the following:

- the territorial sea of Australia
- the exclusive economic zone, or
- waters of the continental shelf.

**Part 4—Principles affecting decisions to exercise certain powers**

**Clause 31 Simplified outline of this Part**

This outline sets out the Part's objectives. This Part provides that a biosecurity official who is making a decision to exercise a power under certain provisions of this Act must first consider the principles set out in this Part. The principles aim to ensure that the power is exercised only if exercising the power is likely to be effective in, or to contribute to, achieving the purpose for which the power is to be exercised, is appropriate and adapted for its purpose, and is no more restrictive or intrusive than is required. It also provides that where a power is to be exercised in relation to a conveyance, the biosecurity official must consider the impact of the exercise of the power on the health and safety of any persons on board the conveyance.

**Clause 32 The principles**

This clause outlines a list of factors, known as 'the principles', which a biosecurity official must be satisfied of before exercising a number of specified powers in the Bill. The principles must be applied to the following decisions made under the specified clauses of the Bill (or instruments in force under these specified clauses).

If the power is to be exercised in relation to a conveyance, subclause (3) provides the biosecurity official must also consider the impact of the exercise of the power on the health and safety of any persons on board the conveyance. This is consistent with Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR) which provides for the right to life. For example, when making the decision to issue a direction for an aircraft or vessel not to go to a specific location, or be secured, a biosecurity official should consider whether the conveyance has adequate fuel and supplies to comply with this direction and whether any persons on board require life saving medical treatment.

These principles have been included in the Bill to ensure that any direction given or action undertaken is necessary, appropriate, and adapted and does not impact on a person or their rights any more than is necessary to manage the level of biosecurity risk posed. This is consistent with international treaties such as the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*. These principles provide an appropriate balance between individual rights and the management of biosecurity risks, allowing a biosecurity officer to exercise the necessary powers to manage biosecurity risks.

Subclause (4) provides that the principles are not required to be applied in relation to the making of a biosecurity control order or the making of a legislative instrument under Chapter 6 (including a biosecurity control order or a legislative instrument made under Chapter 6 in accordance with Division 5 or 6 of Part 1 of Chapter 8). This is because the decision to make a biosecurity control order or a legislative instrument does not directly impact upon an individual or his or her rights. The impact will occur when a biosecurity official exercises the powers listed in the order, therefore the principles will apply to the decisions that may be included in the order.

See also clause 34, which provides for principles affecting the exercise of power under Chapter 2.

## **Chapter 2—Managing biosecurity risks: human health**

### **Part 1—General protections and listing human diseases**

#### **Division 1—Introduction**

##### **Clause 33                    Simplified outline of this Part**

This clause sets out the Part’s objectives. The Part provides that a biosecurity official must consider general protection principles when exercising a power or imposing a biosecurity measure under Chapter 2 of this Act to ensure that the powers are used only when the circumstances are sufficiently serious to justify them, and only if the biosecurity measure is likely to be effective, is proportionate to the risk, is the least restrictive or intrusive and only for as long as necessary to manage the disease risk.

This Part also ensures that the exercise of powers does not conflict with an individual’s urgent or life threatening medical needs and sets out additional steps that must be carried out before subjecting a child or incapable person to a requirement under Chapter 2.

#### **Division 2—Protections**

##### **Subdivision A—General protections**

##### **Clause 34                    The principles**

All decisions made under Chapter 2 are bound by principles of general protection.

The person making the decision must be satisfied of all the following matters:

- that exercising the power, or imposing the biosecurity measure, is likely to be effective in preventing, reducing or controlling the risk
- that exercising the power or imposing the biosecurity measure is proportionate to the risk
- that the circumstances are sufficiently serious to justify exercising the power, or imposing the biosecurity measure
- that the power, or the biosecurity measure, is the least restrictive or intrusive power that could be exercised in relation to, or measure that could be imposed on, the individual
- that the manner in which the power is to be exercised, or the biosecurity measure is to be imposed, is the least restrictive or intrusive manner, and
- that the period during which the power is to be exercised, or the biosecurity measure is to be imposed, is only for as long as necessary.

The principles are intended to inform all decisions made under this Chapter. An officer, in making a decision, must take into account each of these principles. The principles provide for consideration of the rights enshrined in the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, the personal protections enshrined in the *International Health Regulations 2005* (International Health Regulations), the seriousness of the circumstances and the balance between the public interest in giving an order or including a measure against the public interest in upholding the individual's liberty.

These decisions are made by the officer, using their personal knowledge of infectious disease control in a public health capacity. The principles can inform internal review, merits review and judicial review, thus adding an additional layer of protection for an individual affected by a decision.

Administrative guidelines issued by the Director of Human Biosecurity will provide officials with guidance in relation to the exercise of their powers.

**Clause 35                      No interference with urgent or life-threatening medical needs**

This clause expressly provides that the urgent or life-threatening medical needs of an individual will prevail over the provision of any measures under this Chapter to address human biosecurity risk.

Officers must ensure that, when making a decision with respect to human biosecurity risk, that they first consider the urgent or life-threatening medical needs of the individual. This is in addition to considerations of the principles set out in clause 34.

**Subdivision B—Protections for children or incapable persons**

**Clause 36                      Child or incapable person may be accompanied**

To ensure compliance with Commonwealth guidelines and international obligations, this clause requires that a child or incapable person may be accompanied while subject to the clauses of this Chapter (see clause 9 for definitions of 'child' and 'incapable person').

The only exception to this requirement is set out in clause 41 where an officer who intends to impose a human biosecurity control order (see Part 3, Division 2) on a child or incapable person, may require that person to remain at the place where the officer became satisfied that a human biosecurity control order should be imposed on that person (see clause 68).

**Clause 37                      Officer to contact parent, guardian or next of kin of unaccompanied child or incapable person**

A child or incapable person must not be subject to a requirement under this Chapter unless an officer has taken reasonable steps to contact a parent, guardian or next of kin. To avoid doubt, an officer must address the urgent or life-threatening needs of the child or incapable person in the first instance.

This clause creates an obligation on an officer to contact the parent, guardian or next of kin of a child or incapable person to ensure they are accompanied or provided with the option of being accompanied while under a human biosecurity control order. An officer bears an obligation to explain the rights of a parent, guardian or next of kin under clauses 36 and 39 and allow them to accompany the child or incapable person.



The requirements under this Chapter may not be carried out on the child or incapable person if a parent, guardian or next of kin has indicated they wish the child or incapable person to be accompanied, until the accompanying person is physically accompanying the child or incapable person.

**Clause 38 Requirement to comply with direction**

An accompanying person must comply with any direction given to them by an officer. This clause explicitly provides that an accompanying person is obligated to comply with directions of an officer, despite not being subject to a human biosecurity control order themselves.

This clause creates an offence for contravening a direction given to an accompanying person by a biosecurity officer, human biosecurity officer or chief human biosecurity officer, for the purpose of ensuring the compliance of the child or incapable person with a requirement under this Chapter. A contravention of this clause will give rise to a maximum penalty of five years imprisonment, or a fine of 300 penalty units, or both.

Clause 572 provides that these directions may be given orally or in writing (including by electronic means) and that later directions supersede earlier directions. This ensures that officers can provide direct and timely directions to the accompanying person of a child or incapable person in managing their associated human biosecurity risks.

**Clause 39 Parent, guardian or next of kin may authorise person to accompany child or incapable person**

A parent, guardian or next of kin may nominate another person to accompany a child or incapable person for the purposes of this Chapter. This clause addresses circumstances where a parent, guardian or next of kin are unable to be with the child or incapable person themselves. This ensures that children and incapable persons always have access to a person who can make decisions on their behalf.

**Clause 40 Giving consent**

An accompanying person may give consent on behalf of a child or incapable person. To avoid doubt, this clause makes it explicit that the consent of an accompanying person under Part 3 is taken to be consent of the child or incapable person. Conversely, if an accompanying person does not consent, it is taken that the child or incapable person does not consent.

**Clause 41 Exception for requiring an individual to remain at a place**

A child or incapable person can be subject to the requirement to remain at a place (clause 68) without being accompanied or the officer taking reasonable steps to contact a parent, guardian or next of kin.

This clause is provided where there is an urgent need to address a potential risk of contagion. This may result in a child or incapable person being moved to a medical facility as a priority and there may not be sufficient time to contact a parent, guardian or next of kin. However, no further measures can be applied to, or actions taken in regard to, the child or incapable person until a parent, guardian or next of kin is contacted.

## **Division 3—Listing human diseases**

### **Clause 42 Listing human diseases**

In addition to the principles at clause 34 above, powers and functions under the human biosecurity chapter are restricted to managing a listed human disease. This clause vests the Director of Human Biosecurity with the power to declare a disease to be a listed human disease, if they consider that the disease may be communicable and cause significant harm to human health.

Many of the powers and functions within this Chapter are personally invasive. To ensure there are appropriate safeguards for individuals, the powers and functions in this Chapter flow only in response to preventing or managing the entry, establishment, emergence or spread of a listed human disease in Australia or to another country.

The instrument declaring listed human diseases is exempted from the disallowance section 42 of the *Legislative Instruments Act 2003*. This ensures the Commonwealth will have the continual use of powers and functions in this Chapter to control serious communicable diseases.

The decision to determine, vary or revoke a listed human disease determination is a technical and scientific decision that is made based on whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of biosecurity risks posed by listed human diseases.

## **Part 2—Preventing risks to human health**

### **Division 1—Introduction**

#### **Clause 43 Simplified outline of this Part**

This clause sets out the Part's objectives. This Part allows the Health Minister to prescribe requirements in relation to individuals, and operators of certain aircraft or vessels, that are entering or leaving Australian territory. The Part also sets out powers to require operators of an overseas aircraft or vessel to provide 24 hour contact information to the Director of Human Biosecurity. This allows for the Commonwealth to share information and plan for management of human biosecurity risks.

The powers in this Part also allow pratique to be granted for incoming aircraft and vessels, and for things to be unloaded from, and persons to disembark from, aircraft or vessels. This Part further allows the Minister to apply preventative measures to prohibit or restrict a practice or process which would contribute to the establishment or spread in Australian territory of a listed human disease. The Act provides officers the power to ask questions about an individual's health and exposure to listed human diseases for the purpose of determining the nature of, and management of risks.

## **Division 2—Entry and exit requirements**

### **Clause 44                   Entry requirements**

This clause vests the Health Minister with powers to determine one or more requirements for all individuals or classes of individuals entering Australia. These requirements may only be for the purpose of preventing the entry, establishment, or spread of a listed human disease.

This clause allows the Commonwealth to identify risks to human health posed by individuals intending to enter Australia, and establish mitigating measures to be performed prior to arrival to address any potential risks.

The requirements primarily relate to the provision of information to inform officers of the individual's risk status; however some requirements may require the individual to undertake a vaccination or course of treatment prior to arrival in Australia. Requirements under this clause may include requiring Yellow Fever certification (a recommendation under Article 36 and Annexes 6 and 7 of the International Health Regulations) and identifying when individuals have travelled to high risk areas.

If an individual fails to comply with an entry requirement as determined by the Health Minister, an officer may impose a human biosecurity control order on that individual (see clause 60).

This clause states that a determination made under subclause 44(2) (determination of entry requirements) or an instrument that varies or revokes a determination made under subclause 44(2) is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

The decision to determine, vary or revoke a listed human disease determination is a technical and scientific decision that is made based on whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of human biosecurity risks.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as it is critical for the management of human biosecurity risks that information required to be shared under this clause can be sought in a timely fashion.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

### **Clause 45                   Exit requirements**

This clause provides that the Health Minister may activate exit requirements for individuals or operators of overseas passenger vessels or aircraft leaving Australia, for the purpose of preventing the spread of a listed human disease to another country. Exit requirements may also be activated if a recommendation has been made to the Minister by the World Health Organization under Part III of the International Health Regulations.

Similar to the requirements for entry above, exit requirements allow the Commonwealth to identify human biosecurity risks posed by individuals intending to leave Australia. The requirements provide a spectrum of options to respond to the range and scale of human biosecurity

risks. These include providing public information in airports and seaports to advise of human biosecurity risks; and provision for the Commonwealth to conduct screening of passengers as they exit Australia.

These requirements have been drafted to be consistent with recommendations under the International Health Regulations (e.g. Article 43) relating to the taking of additional health measures to help prevent the international spread of disease.

This clause states that a determination made under subclause 45(2) (determination of an exit requirement) or an instrument that varies or revokes a determination made under subclause 45(2) is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

The decision to determine, vary or revoke an exit requirement determination is a technically and scientifically based decision making process incorporating whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of risks to human health.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as it will allow biosecurity officers to determine whether an unacceptable.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person (see clause 635).

#### **Clause 46                      Civil penalties for failing to comply with certain entry and exit requirements**

This clause sets the penalty for individuals failing to comply with entry requirements under clause 44, for operators failing to comply with a requirement to perform a specified treatment, or for individuals who fail to comply with exit requirements specified under paragraphs 45(6)(d), (e), (f), (g), or (h). The maximum civil penalty for contravention of entry or exit requirements is 30 penalty units.

The penalty levels in this clause reflect the severity of the potential consequences if requirements for entry or exit are not complied with. For example, an entry requirement may be determined for individuals landing in Australian territory from overseas to provide information about their exposure to a listed human disease. If an individual does not share that information, the biosecurity risk associated with that person may not be adequately managed, which may result in the spread of the specified listed human disease within Australian territory.

### **Division 3—Contact information for operators**

#### **Clause 47                      Requirements for operators to provide 24/7 contact information**

An operator of an incoming or outgoing passenger aircraft or vessel must provide the Director of Human Biosecurity with the prescribed contact information for an individual nominated by the operator. The prescribed information will include phone, fax and email contact details.

The contact information is intended to be used to allow the Director to contact operators about a listed human disease outbreak or an individual or class of individuals. The ability to contact

operators quickly allows the Commonwealth to share information and plan and prepare for any risks to human health that is present on the operator's aircraft or vessel.

This clause, together with the amendments to the *National Health Security Act 2007* sharing of information clauses, allows the operator to provide information to the Commonwealth about human biosecurity risk on their vessel or aircraft without contravening the *Privacy Act 1988*.

An operator is liable to a civil penalty if the operator contravenes the requirement to provide 24/7 contact information for a nominated individual, or the information provided is not kept up-to-date, or the information is provided in contravention of the manner prescribed by the regulations. The maximum civil penalty for each contravention is 120 penalty units. This will encourage operators to provide and maintain up to date contact information so that they can be reached in the event of human biosecurity risk associated with their operations.

#### **Division 4—Pratique**

##### **Clause 48                    Positive pratique**

Pratique is a permission to enter an Australian port, disembark and embark persons, and unload and load goods. An operator of an incoming vessel or aircraft cannot perform these activities unless pratique has been granted in some form.

The operator is liable for a civil penalty if he or she contravenes the requirement not to unload or disembark persons before pratique has been granted. The maximum civil penalty for contravention is 120 penalty units. This is to ensure risks to human health can be identified and managed before the vessel or aircraft is unloaded or disembarked. It will be an exception to the civil penalty if the operator is authorised under this Act or under another Australian law to unload or load a thing or to disembark or embark persons.

The positive pratique clause is automatically granted to all incoming vessels and aircraft arriving in Australian territory at an authorised landing place or port, unless the aircraft or vessel is a class specified by the Director of Human Biosecurity as being subject to negative pratique (see clause 49). This clause allows for permission to disembark and unload to be given automatically, on entry into Australian territory and where no risks to human health have been reported.

##### **Clause 49                    Negative Pratique**

This clause allows the Director of Human Biosecurity to specify the circumstances in which positive pratique is not granted and when negative pratique must be given. These circumstances may relate to reporting of signs and symptoms of, or exposure to a listed human disease (as part of pre-arrival reporting – see clause 193); or issues relating to ship sanitation (contained in Part 5 of Chapter 4).

The Director may specify in a legislative instrument the classes of incoming vessels and aircraft that are to be subject to requirements for complying with negative pratique and those requirements. These requirements must be consistent with Articles 28.2 and 43 of the International Health Regulations.

This clause states that requirements specified under this clause is a legislative instrument, but is not subject to disallowance under the *Legislative Instruments Act 2003*. The decision to determine, vary or revoke the requirements should be a technical and scientific decision based on whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of human biosecurity risks.

In the absence of positive pratique, a biosecurity officer must grant an aircraft or vessel negative pratique. The requirements of being granted negative pratique may relate to additional pre-arrival reporting obligations, treatment measures or inspection on arrival, or the requirement for a biosecurity officer to be present for unloading or disembarking. To ensure granting of pratique is as efficient and will have the least impact on industry as possible, negative pratique can be granted orally or in writing.

If an officer grants pratique orally that officer must create a written record as soon as possible after the aircraft or vessel arrives. Under subclause 49(4) this notification is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This reflects that the record is administrative in nature.

#### **Clause 50                    Pre-departure reporting**

This clause allows the Director of Human Biosecurity to specify, in a legislative instrument, information that is required to be provided by operators of specified outgoing international aircraft or vessels (pre-departure reporting). The instrument will also prescribe the manner in which, and the period during which, the information is required to be provided.

An operator or the person in charge of an incoming passenger vessel or aircraft may be required to make a pre-departure report, containing information as specified by the Director. If an operator or person in charge finds that information provided was incomplete or incorrect, he or she must provide that information as soon as reasonably practicable. The information contained in a pre-departure report is intended to provide the Commonwealth with information about the individuals, cargo and aircraft/vessel, in order to manage any potential risks to human health.

The Commonwealth may use pre-departure information to notify the next international destination port's National Focal Point of an impending biosecurity risk, which is consistent with the Commonwealth's obligations under the International Health Regulations to prevent the international spread of disease.

An operator is liable to a civil penalty if the operator contravenes the requirement to provide information in accordance with this clause. The maximum civil penalty for a contravention is 120 penalty units.

This clause states that a legislative instrument made under clause 50 is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*. The decision to create, vary or revoke an instrument made under this clause should be a technically and scientifically based decision making process on whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technical and scientific based decision making and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of human biosecurity risks.

### **Division 5—Preventative biosecurity measures**

#### **Clause 51                    Determining preventative biosecurity measures**

This clause provides that where there is a biosecurity risk posed by a listed human disease, and an identified behaviour, practice or process would contribute to the entry, establishment or spread of the disease, the Health Minister has the power to determine human biosecurity measures to prohibit, require or restrict the behaviour, practice or process.

The biosecurity measures that may be determined in relation to a class of persons include:

- banning or restricting a behaviour or practice
- requiring a behaviour or practice

- requiring a specified person to provide a specified report or keep specified records and/or
- conducting specified tests on specified goods.

The Minister must be satisfied that the biosecurity measure is appropriate and adapted to prevent, or reduce the risk of, the entry, emergence, establishment or spread in Australian territory, of the disease and that the measure is appropriate in the circumstances. The determination must specify the period in which it is in force and has a maximum duration of 12 months.

Before making the determination, the Minister must consult with each state and territory Minister responsible for Health and the Director of Biosecurity.

This clause allows the Commonwealth, in a domestic context, to prescribe biosecurity measures to respond to an outbreak of a disease or the reasonable belief that there is likely to be an outbreak of a disease as a result of a specified behaviour, practice or process. The measures that may be imposed under this clause provide for temporary management of a human biosecurity risk within a state or territory, until the state or territory is able to create clauses within their own legislation to manage the risk in the long term.

The determination will specify the Commonwealth powers and functions available to the state or territory to manage the risk; and the state or territory officers who are to be vested with those powers/functions, in consultation with the state or territory.

In practice, only one determination will be made in relation to a particular behaviour or practice. Agreement of a state or territory would be sought before the determination would apply in that state or territory.

This clause states that a determination under this clause is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*. The decision to determine, vary or revoke the requirements should be a technically and scientifically based decision making process on whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technical and scientific based decision making and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of risks to human health.

The civil penalty for contravention of this clause is contained in clause 52.

#### **Clause 52                      Civil penalty for failing to comply with preventative measures**

This clause sets the penalty for failing to comply with a preventative biosecurity measure in a determination by the Health Minister under subclause 51(2). The maximum civil penalty for a contravention is 120 penalty units.

The penalty levels in this clause reflect the severity of the potential consequences if preventative biosecurity measures are not complied with. For instance a failure to comply could lead to an outbreak of a listed human disease in Australian territory.

**Clause 53 Requirements to destroy disease agents on incoming or outgoing aircraft or vessels**

This clause provides for the development of regulations that require operators of incoming aircraft or vessels to undertake measure to destroy disease agents which have the potential to cause a listed human disease and may exist on the aircraft or vessel. This ensures that the disease agents can be destroyed and the potential risk to human health by the agents can be appropriately managed.

**Division 6—Information gathering powers**

**Clause 54 Who may ask questions and require written information**

This clause provides that certain officers may require answers to questions, or written information. These officers are:

- the Director of Human Biosecurity
- a chief human biosecurity officer
- human biosecurity officer
- biosecurity officer
- a member or special member of the Australian Federal Police
- a member of the police force of a state or territory, or
- a protective services officer within the meaning of the *Australian Federal Police Act 1979*.

Throughout this Division, an officer is taken to be any of those listed above. These officers must be able to ask questions and request written information of individuals in order to determine the nature of, and manage, risk to human health. Under this clause all officers have powers to ask individuals questions relating to their health and exposure to listed human diseases. The application of clause 34 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

This Division is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high as collecting accurate and timely information in relation to an individual to determine the level of risk to human health associated with the individual will allow that risk to be assessed and then appropriately managed.

The offence for contravention of this clause is contained in clause 58. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 contain offences for providing false or misleading information or documents.

**Clause 55 Asking questions and requiring answers from particular individuals**

This clause provides that an officer may ask questions and require answers where:

- a human biosecurity control order is in force (see clause 60 to clause 67), or
- an individual is in a human health response zone (see clauses 113 to 115).

This power allows an officer to ask questions of an individual who is in a biosecurity response zone, or if a human biosecurity control order is in force. Questions may only be asked in relation to the level of risk to human health.

While this clause allows officers to ask questions of a broader scope than in clause 54 above, the questions must still be related to assessing biosecurity risks. The Act also contains separate powers to allow officers to ask questions in relation to biosecurity risks posed by goods (Chapter 3) and conveyances (Chapter 4).



The offence for contravention of this clause is contained in clause 58. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 contain offences for providing false or misleading information or documents.

**Clause 56                    Asking questions and requiring answers from any individual**

This clause differs from clause 55 above, in that an officer may ask any person questions or to provide written information if:

- the officer is satisfied that an individual has one or more signs or symptoms of a listed human disease
- the officer is satisfied the person has been exposed to another individual who has signs or symptoms of a listed human disease, or
- the question relates to human remains, a death in transit or an individual who has died on arrival.

The power allows an officer to ask questions of fellow passengers, crew or family and friends that were travelling with the ill individual. The presence of a sign or symptom of a listed human disease provides a sufficient causal link to justify asking questions of those who have travelled near the ill individual or an individual who has died in transit.

The purpose of asking questions has been cast broadly to include the purpose of preventing the entry, establishment, emergence, or spread of a disease and preventing the spread of a listed human disease in Australian territory, or part of Australian territory or to another country.

The offence for contravention of this clause is contained in clause 58. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 contain offences for providing false or misleading information or documents.

**Clause 57                    Requiring an individual to provide written information**

This clause allows an officer to require an individual to provide written information if:

- the officer is satisfied that an individual has one or more signs or symptoms of a listed human disease
- the officer is satisfied the person has been exposed to another individual who has signs or symptoms of a listed human disease, or
- the question relates to human remains, a death in transit or someone who has died on arrival.

This clause allows an officer to ask questions of fellow passengers, crew or family and friends that were travelling with the ill individual. The presence of a sign or symptom of a listed human disease provides a sufficient causal link to justify asking questions of those who have travelled near the ill individual or an individual who has died in transit.

The purpose of asking questions has been cast broadly to include the purpose of preventing the entry, establishment, emergence, or spread of a disease and preventing the spread of a listed human disease to another country and determining the level of risk to human health associated with the relevant individual.

The offence for contravention of this clause is contained in clause 58. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 contain offences for providing false or misleading information or documents.

**Clause 58                    Offence for failing to comply with a requirement**

A person commits a strict liability offence if a person fails to answer a question or provide written information when required under this Division. The maximum penalty for a contravention is 60

penalty units. This is appropriate as the information gathered from the individual may be vital to address a serious public health risk and it is essential that as much information as possible is collected quickly.

This means that the prosecution will have to prove that the person contravened the provision, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (section 9.2) of honest and reasonable mistake of fact.

In all cases, this information may be uniquely known to the individual, and each individual may be able to provide important details about the epidemiology of the disease, the source of the disease, and the potential exposure of themselves and other individuals to the disease. This information is vital to address public health risk, and it is essential that as much information is collected as quickly as possible. Ideally this would occur before exposed individuals have the opportunity to depart the airport and enter the community, and potentially spread the disease to family and friends.

Alternative powers, such as monitoring and investigation powers, or enforcement, are not appropriate as the information being sought must be collected as soon as possible, to allow the Commonwealth to develop a picture of the disease needing to be managed, and the number of individuals potentially infected and in need of intervention.

Wherever possible, the Commonwealth will rely on voluntary disclosure; however, in some circumstances, an individual may be unwilling to disclose information about their health status, potential exposure or travel history. In such cases, the need to address public risk justifies the application of the strict liability offence for failure to provide required information.

Clause 37 also provides special protections for individuals who may be temporarily incapable of understanding requirements or complying with a measure due to illness. An incapable person must not be subject to a requirement of Chapter 2 of the Bill unless an officer has taken reasonable steps to contact a parent, guardian or next of kin, and any urgent or life threatening medical needs must be met in the first instance.

### **Part 3—Managing risks to human health: human biosecurity control orders**

#### **Division 1—Introduction**

##### **Clause 59                      Simplified outline of this Part**

This clause sets out the Part's objectives. The Part determines the range of measures that can be implemented under a human biosecurity control order to manage the risk posed by listed human diseases. The powers of human biosecurity control order measures include vaccination, restricting the individual's behaviour and ordering the individual to remain isolated. The Part sets out that an individual may consent to a measure included in a human biosecurity control order.

An individual who refuses to consent to a measure (other than an isolation measure or traveller movement measure) is not required to comply unless a direction has been given by the Director of Human Biosecurity. An individual who is given a direction from the Director to comply must do so immediately or in some circumstances, may apply for judicial review within the specified period before being required to comply with the measure.

The application of clause 34 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

## **Division 2—Imposing human biosecurity control orders on individuals**

### **Subdivision A—Imposing, varying and revoking human biosecurity control orders**

#### **Clause 60 Imposing a human biosecurity control order on an individual**

This clause provides that a human biosecurity control order can be imposed to manage risks to human health posed by an individual. This clause outlines the officers who can impose a human biosecurity control order, noting that some measures imposed under a human biosecurity control order are personally invasive and therefore restricted in their application to those officers with clinical expertise or who are medical practitioners. This clause also provides the threshold test for applying a human biosecurity control order.

A human biosecurity control order may only be applied where there are signs and symptoms of or exposure to a listed human disease; or an entry requirement relating to a listed human disease under subclause 44(6) has not been complied with. This restricts intervention to only those diseases identified by the Director of Human Biosecurity as warranting Commonwealth intervention.

A human biosecurity control order may be imposed on an individual on arrival in Australian territory. To facilitate this, the ability to apply the human biosecurity control order in the first instance is vested with a biosecurity officer. A biosecurity officer is restricted from applying any measures that require clinical expertise or qualifications to make informed decisions about management of an individual with a listed human disease.

The application of clause 34 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

#### **Clause 61 Contents of a human biosecurity control order**

This clause provides that a human biosecurity control order must include the following information:

- the grounds under which the human biosecurity control order was imposed, that is, which limb of the threshold test at subclause 60(2) has been satisfied
- the listed human disease in relation to which the order is imposed (this can include more than one listed human disease where the signs or symptoms are not sufficiently clear to point to only a single disease; noting that some listed human diseases will initially exhibit the same signs and symptoms)
- any signs or symptoms of the listed human disease
- the prescribed contact information required under clauses 69 and 70
- each biosecurity measure imposed or to be imposed and an explanation as to why the measure is required (this forms a record of events under the human biosecurity control order; and information about how the biosecurity measure is to be undertaken)
- the period in which the order is in force – up to a maximum of 3 months
- the human biosecurity control order must also explain the responsibilities and liabilities of the individual and the Commonwealth. Paragraphs 61(1)(h) and (i) outlines this, including requirements to notify of contact details, review and offences for non-compliance
- contact details of a chief human biosecurity officer that an individual may contact for information and support
- information about review rights and offences for failure to comply
- other information considered appropriate by the officer imposing order and any other information required by the regulations.

The content outlined in this clause provides information for the individual and other officers to facilitate the management of a listed human disease.

The requirement to provide an explanation why a particular measure is being imposed helps the individual to understand why they are subject to a human biosecurity control order. It also imposes an obligation on the officer to turn their mind to the reasons for imposing a measure, and that they have considered the principles in making the decision.

A maximum duration of an order of 3 months has been specified in part to address the difficulties with diagnosing and treating the disease. The principles in clause 34 apply to ensure an officer does not apply a measure or enforce the human biosecurity control order for longer than is reasonably necessary to address the risk.

The order cannot be extended. If the time expires and the individual still requires management, a new human biosecurity control order must be created. This ensures all the tests are revisited and also provides that a human biosecurity control order cannot be kept in place indefinitely.

The provision of contact details for a chief human biosecurity officer is to ensure an individual has an avenue to contact a medical practitioner who can provide expert advice during the period that the order is in force.

Consent is not required by an individual before a human biosecurity control order is imposed, however there are requirements for notifying a person they are subject to an order (see clause 63) and consent is required for all biosecurity measures. There are also a range of review mechanisms in relation to a human biosecurity control order (see Subdivisions D and E of this Part).

#### **Clause 62                      Form of a human biosecurity control order**

This clause provides that a human biosecurity control order must be in the form approved by the Director of Human Biosecurity. This allows for consistent application of the requirements of the Act. A human biosecurity control order is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This reflects that the human biosecurity control order is administrative in nature.

#### **Clause 63                      Giving a human biosecurity control order to an individual**

This clause requires officers to give a copy of the human biosecurity control order to the individual. The officer must also read the human biosecurity control order to the individual. If the contents of the order are not read out or the written human biosecurity control order is not provided within 24 hours the human biosecurity control order is invalid.

As a human biosecurity control order does not require consent to be applied, it is essential that a person is given a copy of the human biosecurity control order. It is also good regulatory practice that a person is made aware that they are subject to obligations under the Act.

The requirement to read out the human biosecurity control order and follow up with a written copy was developed to address issues that arise in remote locations where the officer may be making verbal orders over the phone. They must follow up with the written copy, which may be sent electronically.

**Clause 64                    Varying a human biosecurity control order**

This clause provides that a variation to a human biosecurity control order must be related to the risk posed by the person or be of a minor technical nature. There are limitations on the power to vary, as not all officers may apply all measures. A chief human biosecurity officer, a human biosecurity officer or a biosecurity officer may only vary measures that he or she may validly impose. This prohibits biosecurity officers from varying a measure that is restricted in its application to a human biosecurity officer or a chief human biosecurity officer.

Any additional powers listed in the varied biosecurity control order must be deemed appropriate for managing the risk posed by the listed human disease to which the order relates by the officer. A variation to a human biosecurity control order must be in writing and will take effect immediately after it is made. Consistent with clause 62, a human biosecurity control order which has been varied is not a legislative instrument.

**Clause 65                    Giving notice of a variation to a human biosecurity control order**

Consistent with giving a human biosecurity control order to an individual at clause 63, This clause requires the officer to give a copy of the varied human biosecurity control order to the individual as soon as practicable. The officer must also cause the variations to the human biosecurity control order to be read to the individual. If the contents of the varied order are not read out or the written human biosecurity control order is not provided within 24 hours the human biosecurity control order is invalid.

**Clause 66                    Revoking a human biosecurity control order**

This clause provides for a chief human biosecurity officer or a human biosecurity officer may revoke a human biosecurity control order in two circumstances:

- if the officer is satisfied that the individual does not pose a risk of contagion; or
- the order no longer contributes to reducing the risk of a listed human disease entering, emerging, establishing or spreading in Australia.

This clause allows for an officer to revoke a human biosecurity control order where there is no longer a contagion risk or where the risk is widespread in the community and a human biosecurity control order no longer contributes to reducing or controlling the risk. This ensures that Commonwealth intervention is only sustained for as long as is necessary or appropriate to manage the risk.

A human biosecurity control order may also expire. An officer may specify when all measures applied expire and thus the human biosecurity control order also expires. Alternatively the human biosecurity control order expires after 3 months if not revoked earlier (see also clause 61).

If a chief human biosecurity officer or a human biosecurity officer determines that there is no longer an unacceptable level of risk posed by the listed human disease to which the order relates, for instance after successful treatment, the order may be revoked rather than allowing the order to lapse. This reflects the potentially invasive nature of powers that can be exercised under a human biosecurity control order.

A revocation must be in writing, is not a legislative instrument and will take effect immediately after it is made.

This clause also outlines the notice requirements for the revocation of the human biosecurity control order. The notification requirements for a revocation of a human biosecurity control order are the same as those set out in clause 63— an officer must give the individual a written notice revoking the order.

**Clause 67                      Notifying Director of Human Biosecurity of imposition, variation or revocation of human biosecurity control order**

This clause requires all officers imposing, varying or revoking human biosecurity control orders to inform the Director of Human Biosecurity that this has occurred.

**Subdivision B—Powers if officer intends to impose human biosecurity control order**

**Clause 68                      Requiring an individual to remain at a place**

This clause allows an officer to require an individual to remain at specified place for up to six hours. This allows the officer time to seek information and impose a human biosecurity control order if it is required. It also allows for contacting a parent or guardian if clause 37 applies. The individual may be detained (see clause 103) for up to six hours to enforce this requirement.

**Clause 69                      Providing contact information**

This clause provides that, if an officer intends to impose a human biosecurity control order on an individual, the officer may require an individual to provide prescribed contact information. The contact information required will be prescribed in the Regulations, and will include the individual's name, address, contact phone number and passport number.

An individual is required to immediately comply with this request; if the he or she does not immediately comply, he or she is liable for a civil penalty. The maximum penalty for contravention is 12 months imprisonment, or a fine of 60 penalty units, or both. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 contain offences for providing false or misleading information or documents.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as it is critical for the management of human biosecurity risks that personal information required to be shared under this clause can be sought in a timely fashion and that person can be contacted as required.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Clause 70                      Requirement for an individual to notify changes to contact information**

This clause sets out that an individual subject to a human biosecurity control order must notify a chief human biosecurity officer as soon as practicable if their prescribed contact information which has been provided in the order, changes. It is essential that the Commonwealth has valid contact information for any individual subject to a human biosecurity control order.

A person is liable to a civil penalty if the person contravenes the requirement to notify a chief human biosecurity officer of a change in the individual's contact information. The maximum penalty for contravention of this clause is 12 months imprisonment, or a fine of 60 penalty units, or both. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 contain offences for providing false or misleading information or documents.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as it is critical for the management of human biosecurity risks that personal information required to be shared under this clause is on hand so that person can be contacted as required.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

### **Subdivision C—When an individual is required to comply with a biosecurity measure**

#### **Clause 71                      Consenting to a biosecurity measure**

This clause sets out that a person may consent to a biosecurity measure included in a human biosecurity control order. If it is practicable to do so, the consent must be recorded in writing on the order.

If an individual does not consent to or withdraws their consent to a measure, then an officer may apply to the Director of Human Biosecurity for a direction to comply under paragraph 72(5)(a). Clause 74 sets out when the individual is required to comply with a measure.

#### **Clause 72                      Director of Human Biosecurity may give direction requiring compliance**

This clause allows for the Director of Human Biosecurity to make an administrative decision as to the validity of a measure under a human biosecurity control order and to issue a direction to comply. A failure to comply with this direction permits the Director to seek enforcement of the decision by a court. The Director will only make such a direction after an officer makes a request for such a direction under subclause 71(3) or a previous direction that is still in force has not been complied with at the end of 25 days.

In circumstances where an individual has refused to comply with a biosecurity measure, an officer may request the Director to issue a direction to an individual to comply with the biosecurity measure. In deciding whether to issue a direction, the Director must conduct a review of the diagnosis and the biosecurity measure proposed to be included in the human biosecurity control order. The Director must take into account the reasons why the individual has refused to consent, and factors which may affect that individual's health. The Director may also take into account any other matter they consider relevant.

If requested, the Director must perform a review and advise the individual of the outcome of that review within 72 hours. The clause also specifies the different calculations for the 72 hour period based on the type of measure imposed.

The Director may give a direction requiring an individual to comply with the measure only if the Director is satisfied that the measure contributes to reducing the risk of contagion of the listed human disease or the disease entering, emerging, establishing or spreading in Australian territory.

An individual may be able to apply for merits of judicial review of a decision to give a direction in accordance with this clause (see clause 74 and the *Administrative Decisions (Judicial Review) Act 1977* (Administrative Decisions (Judicial Review) Act). If an individual refuses to comply with a direction, the Director may be able to apply for an injunction requiring compliance under Part 7 of the Regulatory Powers Act.

#### **Clause 73                      When a direction to comply with biosecurity measures ceases to be in force**

This clause specifies when a direction given in accordance with clause 72 to comply with a biosecurity measure ceases to be in force. A biosecurity measure ceases to be in force if:

- a period of 28 days passes
- a new notice is provided to the individual

- the measure is removed from the human biosecurity control order
- the individual is not required to comply with the direction based on a first determination under the Administrative Decisions (Judicial Review) Act or the decision is set aside by the Administrative Appeals Tribunal, or
- the traveller movement measure or human biosecurity order ceases to be in force.

**Clause 74                      When an individual is required to comply with a biosecurity measure**

This clause sets out that if the Director of Human Biosecurity issues a direction to comply with measures under clause 85 (managing contacts), clause 89 (decontamination), clause 90 (examination), clause 91 (body samples), or clause 92 (vaccination or treatment), the individual is required to comply with the direction when:

- the 7 day period to seek external merits review under the Administrative Decisions (Judicial Review) Act has expired and an application has not been made or
- an application for review has been made under the Administrative Decisions (Judicial Review) Act, the application has been finally determined, and the resulting order is that the individual is required to comply with the measure.

An individual must comply with measures under clause 86 (contacting officer with health status), clause 87 (restricting behaviour), clause 88 (risk minimisation), clause 93 (medication), clause 96 (traveller movement measure) or 97 (isolation measure), the individual is required to comply with the direction when:

- the individual has consented to the measure
- the Director has given a direction to comply under clause 72 and that direction is still in force, or
- in the case of traveller movement and isolation measures, if the individual has refused consent and 72 hours has not passed since he or she refused to consent to the measure.

Although the Bill does not include any specific clauses, this does not negate the general right of all individuals to seek a second medical opinion in relation to their medical diagnosis and treatment. If an individual seeks a second medical opinion, the Director of Human Biosecurity may take this into account when making a decision to issue a direction requiring an individual to comply with a biosecurity measure.

The offence for contravention of this clause is contained in clause 107.

**Subdivision D—AAT review of isolation and traveller movement measures**

**Clause 75                      Obligations on Director of Human Biosecurity relating to Administrative Appeals Tribunal application**

This clause obliges the Director of Human Biosecurity to inform individuals of their right to apply for review of isolation and traveller movement measures by the Administrative Appeals Tribunal and provided with reasonable facilities to enable the individual to do so.

**Clause 76                      Applications**

This clause sets out that where the Director of Human Biosecurity has issued a direction to an individual to comply with an isolation or traveller movement measure, this power provides an individual with an automatic, independent avenue for merits review of that decision through the Administrative Appeals Tribunal. The Commonwealth bears the obligation of informing individuals of their right to seek review.

In the situation where an individual is subject to more than one decision, this clause specifies that an application made with respect to a decision (the first decision) is also taken to be an application relating to a further decision (the second decision), unless the Administrative Appeals Tribunal



gives the individual notice to make a separate application. This allows the Administrative Appeals Tribunal to review similar decisions together, or direct the individual to make a second application if the second decision is of a different nature.

To ensure the appropriate management of the biosecurity risk, the Administrative Appeals Tribunal must make a decision within 7 days of receiving an application under clause 74(1).

**Clause 77                      Reasons and documents**

This clause specifies that section 28 (obtaining reasons for decision) of the *Administrative Appeals Tribunal Act 1975* will not apply in respect to a direction by the Director of Human Biosecurity to comply with an isolation or traveller movement measure. Clause 72 requires the Director of Human Biosecurity to provide reasons for requiring an individual to comply with a biosecurity measure. In addition, this clause instead places an obligation for the Director of Human Biosecurity to provide to both the Administrative Appeals Tribunal and the individual, reasons for the decision and every other document that is in the Director's possession or under his/her control, and is relevant to the review of the decision by the Administrative Appeals Tribunal. The operation of section 28 of the *Administrative Appeals Tribunal Act 1975* requiring that an individual required to comply with a decision be provided with reasons for the decision, and section 37 requiring the lodgement of documentation with the Administrative Appeals Tribunal, are superseded by requirements within clause 77 of this legislation.

The Director must be notified as soon as possible under subsection 29(11) of the Administrative Appeals Tribunal Act that an application for review has been made, and must lodge all relevant documents within 2 days. In the instance where a second decision is made with respect to an individual, the Director must inform the Administrative Appeals Tribunal as soon as possible that a second decision has been made, and relevant documents must be lodged within 2 days.

The Administrative Appeals Tribunal may extend the timeframe for any documents to be lodged, and this will ordinarily be in writing. However this may not occur during times where the Administrative Appeals Tribunal is required to manage the review of a large number of decisions in a short period of time.

**Clause 78                      Time period for making a decision**

This clause requires the Administrative Appeals Tribunal to make a decision with respect to directions which are in force within 7 days of receiving the application, to ensure the continued ability of the Commonwealth to protect public health and manage the risk of contagion posed by an individual. The Administrative Appeals Tribunal may extend the time to make a decision if they are satisfied it is reasonable to do so, but may only extend the time period once.

If the Administrative Appeals Tribunal does not make a decision within 7 days, or within the specified extended time period, then the decision by the Director of Human Biosecurity is taken to be affirmed. If the direction has ceased to be in force then the Administrative Appeals Tribunal is not taken to have made a decision.

**Clause 79                      Limitation on Administrative Appeals Tribunal power to stay etc. decisions**

This clause prevents the Administrative Appeals Tribunal from making an order to stay a decision despite subsections 41(2) to (6) of the Administrative Appeals Tribunal Act. Individuals that are subject to an isolation or traveller movement measure have demonstrated signs or symptoms of, or exposure to, a listed human disease. The individual has been isolated or restricted from travelling because they pose a serious communicable disease risk to the community. This prevents an individual from being released from isolation or travelling on an international passenger airline or vessel, while they pose a risk of contagion to the community.

## **Subdivision E—Other provisions relating to external review of isolation and traveller movement measures**

### **Clause 80**                    **Time period for making applications under the *Administrative Decisions (Judicial Review) Act 1977***

This clause sets out that under the *Administrative Decisions (Judicial Review) Act 1977*, an individual has 28 days to seek review of an administrative decision. The Commonwealth has a reduced capacity for managing the risk of contagion during the period that an individual has available to submit an application for review. This clause requires individuals to submit the application for review within 7 days, to allow for the continued management of disease risk. The Commonwealth bears the obligation of informing individuals of their right to seek review.

### **Clause 81**                    **Judicial review of isolation and traveller movement measures**

This would allow an individual to seek review of a traveller movement measure or isolation measure under the *Judiciary Act 1903*, the *Administrative Decision (Judicial Review) Act*, or under section 75 of the Constitution. This clause is necessary to ensure no breach of human rights, and to prevent the spread of disease during a review period

Under this clause, a requirement for an individual to be subject to a traveller movement measure, or remain isolated under a human biosecurity control order, remains in force unless a court finally determines the validity of the decision to impose the requirement.

Whilst an individual may seek review of the decision to impose a traveller movement measure or isolation order in a court; this clause ensures that they must remain in isolation, or the traveller movement measure remains in place, until the court has comprehensively reviewed the case and made a final determination.

The intention of this clause is to ensure that where an individual is subject to a traveller movement measure, or has been placed in isolation to manage their disease risk, a temporary injunction cannot be sought to release the individual, pending a court determination as to the validity of the decision to impose the measure in question. This manages the potential risk of contagion in Australian territory posed by an individual.

This clause does not extend the ordinary operation of an isolation or traveller movement measure. Isolation and traveller movement measures will cease to be in force if they would have ordinarily expired while the individual seeks review.

## **Division 3—Biosecurity measures that may be included in a human biosecurity control order**

### **Subdivision A—General provisions relating to including biosecurity measures in a human biosecurity control order**

#### **Clause 82**                    **Who can include a biosecurity measure in a human biosecurity control order**

This clause sets out the type of biosecurity measures that can be by different classes of officers established in Chapter 10.

A chief human biosecurity officer or a human biosecurity officer may include any biosecurity measure set out in Subdivision B of this Division. For example, restricting behaviours, decontamination or examination requirements for individuals. This is appropriate as people appointed as chief human biosecurity officers and human biosecurity officers have medical or clinical expertise to allow them to make appropriate decisions to manage risks relating to human health.

Biosecurity officers may only include a restricted range of biosecurity measures in a human biosecurity control order. Biosecurity officers do not have medical expertise and are therefore restricted to applying biosecurity measures that are not personally invasive and do not require medical expertise to apply. As such a biosecurity officer can only require an individual to provide contact information or take risk minimisation measures such as wearing protective clothing (see clauses 85 and 88).

**Clause 83                    Informing individuals of the risk**

This clause requires all officers to take reasonable steps to explain the risk of a listed human disease to the individual's health and the health of the public.

It is intended that this step will assist in obtaining consent to the taking of biosecurity measures. It also imposes an obligation on the Commonwealth to explain the risks and ensure the individual can make an informed decision about the management of their health.

**Clause 84                    Test for including a biosecurity measure in a human biosecurity control order**

This clause sets out that there is a single threshold test for the application of any and all biosecurity measures, that the application of a measure contributes to reducing or controlling the risk of contagion of a listed human disease; or a listed human disease entering, emerging, establishing itself or spreading in Australian territory.

The use of a single threshold test for the application of all biosecurity measures allows for consistent decision making and reduces the administrative burden of satisfying multiple tests for the management of a single listed human disease.

**Subdivision B—Biosecurity measures that may be included in a human biosecurity control order**

**Clause 85                    Managing contacts**

In many cases, an individual will have exposed others to a listed human disease before they are identified by an officer. In these circumstances, the Commonwealth will seek to identify and contact any individuals who have travelled with, or been in close contact with, the ill individual. The Commonwealth may then follow up with the individual and their contacts to inquire after their health and to ascertain if they have any signs or symptoms of a listed human disease.

This is essentially a contact tracing power, and also acts as an authorisation for sharing protected information that would otherwise be in contravention of the *Privacy Act 1988*.

This power may be imposed by a chief human biosecurity officer or human biosecurity officer.

**Clause 86                    Contacting officer with health status**

This clause requires a person to contact an officer with information regarding the presence or absence of signs or symptoms of a listed human disease for a specified period of time. The order may also require the individual to report if specified signs or symptoms disappear.

In many cases an individual will not have sufficient signs or symptoms of a listed human disease to warrant intensive intervention; however they may pose a risk, and may be asked to provide updates to a specified officer on the presence or absence of signs or symptoms of a listed human disease. This allows the Commonwealth to monitor an individual while allowing them to continue their journey or return home. If an individual develops further signs or symptoms, an officer may vary a human biosecurity control order and apply additional biosecurity measures to better manage the risk.

This power may be imposed by a chief human biosecurity officer or human biosecurity officer.

If an individual refuses to comply with such a requirement, the Director of Human Biosecurity may issue the individual with a direction to comply under subclause 72(5).

#### **Clause 87                    Restricting behaviour**

This clause sets out that an individual may be required to do, or not to do, any of the following activities:

- go to and remain at the individual's intended place of residence for a specified period
- not to visit a specified place or class of place where there is an increased risk of contagion  
or
- not to have contact with a class of individuals where the class is of increased risk of exposure.

In some circumstances, an individual who has, or is suspected of having, a listed human disease does not have to be managed in a medical facility. The most effective and least restrictive and invasive decision may be to allow the individual to go home, subject to restrictions in their behaviour. This restriction may include advising them to not go to work or to places where there is a high risk of contagion. It may also include restricting their exposure to particular classes of people, such as children, pregnant women or the elderly.

The terminology with respect to 'specified place or class of place' has been described in terms of the risk of contagion rather than in terms of the type of place, so as not to restrict its application to places of a certain size or character. It may include a workplace, school or hospital facility.

This power may be imposed by a chief human biosecurity officer or human biosecurity officer.

If an individual refuses to comply with such a requirement, the Director of Human Biosecurity may issue the individual with a direction to comply under subclause 72(5).

#### **Clause 88                    Risk minimisation interventions**

This clause allows an officer to require an individual to wear specified clothing or equipment. The officer must specify the circumstance where they must be worn; the period in which it is to be worn and instructions for correct wear. For listed human diseases that are respiratory in nature, effective mitigation measures may include wearing facemasks and gloves to prevent the spread of airborne disease particles.

This power may be imposed by a chief human biosecurity officer, human biosecurity officer, or biosecurity officer.

If an individual refuses to comply with such a requirement, the Director of Human Biosecurity may issue the individual with a direction to comply under subclause 72(5).

#### **Clause 89                    Decontamination**

This clause allows for decontamination of an individual and their personal effects. An officer must specify in the human biosecurity control order that decontamination is required, when and where the decontamination is to take place and who is to conduct the decontamination.

This power, if applied, is intended to be undertaken immediately to contain the contagion risk or to prevent establishment, emergence or spread of a listed human disease.

Decontamination of an individual may be exercised by chief human biosecurity officers or human biosecurity officers as they will have appropriate training to deliver the treatment effectively.

Who will undertake the decontamination of personal effects including any baggage must be specified in the human biosecurity control order.

This decontamination power is separate from decontamination powers provided for in Chapter 10 relating to the management of biosecurity risks (see clauses 588-561).

#### **Clause 90                      Undergoing an examination**

This clause allows for a chief human biosecurity officer or a human biosecurity officer to require an individual to undertake a specified examination relating to the diagnosis of a listed human disease.

Safeguards have been provided by restricting the undertaking of an examination to a medical facility and providing that an individual may seek a review of the decision.

This power may be imposed by chief human biosecurity officers or human biosecurity officers.

The application of clause 94 to this clause means that the vaccination or treatment required by this clause must be carried out in a manner consistent with either appropriate medical standards, or other appropriate or relevant professional standards.

#### **Clause 91                      Requiring body samples for diagnosis**

This clause provides that an individual may be required to provide body samples for determining the presence of a listed human disease. Regulations must specify requirements for taking, storage, transport and labelling of samples, and uses for which body samples may be collected.

Samples may also be provided to the World Health Organization, on request, for use in detecting, assessing or responding to a listed human disease. This is consistent with Australia's obligations under the International Health Regulations to assist the World Health Organization and State Parties in addressing international disease threats.

Safeguards have been provided with respect to this power by restricting the collection of body samples subsequent to examination at a medical facility.

Body samples may only be required by a chief human biosecurity officer or a human biosecurity officer.

The application of clause 94 to this clause means that the taking body samples required by this clause must be carried out in a manner consistent with either appropriate medical standards, or other appropriate other relevant professional standards.

#### **Clause 92                      Receiving a vaccination or treatment**

This clause provides that an individual subject to a human biosecurity control order may be required to receive a specified vaccination or undergo a specified form of treatment in order to manage a listed human disease. This requirement may only be imposed after an examination at a medical facility has been undertaken.

This power may be imposed by a chief human biosecurity officer or a human biosecurity officer.

The application of clause 94 to this clause means that the vaccination or treatment required by this clause must be carried out in a manner consistent with either appropriate medical standards, or other appropriate other relevant professional standards.

### **Clause 93                    Receiving medication**

This clause provides that an individual subject to a human biosecurity control order may be directed to take medication to manage a listed human disease outside of a specified medical facility. The human biosecurity control order must specify how much medication is to be taken and for how long the medication is to be taken for.

Management of some communicable diseases may require long term medication but not hospitalisation, and this allows for individuals who no longer present a risk of contagion to continue medication and complete their treatment outside of a medical facility.

This power may be imposed by a chief human biosecurity officer or a human biosecurity officer.

The application of clause 94 to this clause means that the treatment required by this clause must be carried out in a manner consistent with either appropriate medical standards, or other appropriate other relevant professional standards.

If an individual refuses to comply with such a requirement, the Director of Human Biosecurity may issue the individual with a direction to comply under subclause 72(5).

### **Clause 94                    Appropriate medical or other standards to be applied**

This clause provides that a biosecurity measure conducted under clause 90 (examination), clause 91 (body samples), or clause 92 (vaccination or treatment) and clause 93 (medication) must be carried out in a manner consistent with appropriate medical standards and/or other relevant professional standards.

The clause is intended to ensure that appropriate medical and/or professional standards are complied with by chief human biosecurity officers and human biosecurity officers in undertaking personally invasive measures.

### **Clause 95                    No use of force to require compliance with certain biosecurity measures**

This clause prevents the use of force against an individual to require them to comply with any biosecurity measures imposed in this Subdivision (see clauses 85-93), that are included in a human biosecurity control order. However, reasonable force may be used to prevent an individual from boarding an overseas vessel or aircraft in contravention of a traveller movement measure (clause 96); or to detain a person who fails to comply with an isolation order (clause 97).

The use of force is restricted to law enforcement for the purposes of clause 103 and requiring a person to remain at a place in clause 68; and to an officer of customs for the purpose of clause 101.

### **Clause 96                    Traveller movement measure**

This clause provides that an individual subject to a human biosecurity control order may be placed under a traveller movement measure, which has the effect of restricting the individual's departure from Australia territory on an overseas passenger aircraft or vessel for up to 28 days.

Travel restrictions apply only to overseas passenger aircraft and vessels. An individual may leave Australian territory on any other aircraft or vessel. Overseas passenger aircraft and vessels pose a high risk of contagion because they carry many passengers that will be in close proximity to the ill individual for many hours.

A traveller movement measure may only be applied where an individual poses a significantly high risk of contagion risk and has either indicated an intention to leave Australia territory or is suspected of intending to do so.

This power does not require consent however the individual must be notified that they are subject to the restriction. If a restriction is applied, a traveller movement alert must be issued; notifying border agencies and state and territory health departments of the details of the restriction (see clause 98).

This power may be imposed by a chief human biosecurity officer or human biosecurity officer.

**Clause 97                      Isolation measure**

This clause sets out that an individual subject to a human biosecurity control order may be required to remain isolated at a specified medical facility until the individual is authorised, in writing, to leave. Isolation in many cases is considered the measure of last resort, and is applied where consent is not given by the individual for less invasive or less restrictive measures or alternative measures have not been effective.

This power may be imposed by a chief human biosecurity officer or human biosecurity officer.

If an individual refuses to comply with such a requirement, the Director of Human Biosecurity may issue the individual with a direction to comply under subclause 72(5). In addition the person may be detained under Subdivision B of Division 4 of this Part.

**Subdivision C—Provisions relating to traveller movement measures**

**Clause 98                      Traveller movement measure alert**

This clause provides that the Director of Human Biosecurity must alert the agencies and departments in subclause 98(1) and may alert the additional operators, agencies and departments in subclause 98(3) that a traveller movement measure has been applied to an individual in a human biosecurity control order.

Failure to notify a required person, body or agency does not affect the traveller movement measure that has been applied by the Director.

Notifications provided by the Director must be in writing and be made within 24 hours of the decision to impose a traveller movement measure to an individual.

The Director of Human Biosecurity must further notify anyone who they notified under this clause, if a traveller movement measure ceases to be in force. The clause clarifies that the notification is not a legislative instrument originally for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This reflects that the notice is administrative in nature.

**Clause 99                      Contents of traveller movement measure alert**

This clause provides that an alert made under clause 98 must include the name of the individual, his or her passport number, and a statement that a restriction is in force in relation to the individual and they must not board an outgoing passenger aircraft or vessel for the duration of the restriction.

The alert must also specify the duration of the measure, any known travel details of the individual and the contact details for a chief human biosecurity officer that may be contacted for information in relation to the measure. This information must also include information prescribed by the regulations (if any).

The alert must contain essential information to allow Commonwealth agencies and operators to correctly identify and enforce a traveller movement measure.

As the information contained in the alert is sensitive and personal in nature, it must be dealt with in accordance with the *Privacy Act 1988*.

**Clause 100                    Destruction of a traveller movement measure alert**

This clause requires that all Commonwealth agencies and operators that are provided with a traveller movement measure alert must destroy the alert within 6 months of being advised that the alert is no longer in force. A person who fails to destroy a movement measure alert within the 6 month period is liable to a civil penalty. The maximum penalty for contravention is 120 penalty units.

**Clause 101                    Prevention from leaving Australian territory**

This clause sets out that a Customs officer may prevent an individual who is subject to a traveller movement measure from boarding an overseas passenger aircraft or vessel. The officer must not use more force than is necessary and reasonable to prevent the individual from boarding the aircraft or vessel.

An individual cannot be detained or arrested under this clause. While they are prevented from boarding the aircraft or vessel, they are free to leave the passenger terminal. The intent of this clause is to comply with Australia's obligations under the International Health Regulations to prevent the international spread of communicable diseases.

**Division 4—Other provisions relating to human biosecurity control orders**

**Subdivision A—Consular assistance**

**Clause 102                    Consular assistance**

This clause sets out that where a biosecurity officer or human biosecurity officer has applied a measure in a human biosecurity control order that requires an individual to remain at a place (clause 68) or isolated (clause 97); or an individual is detained (clause 103), and the individual is a non-citizen; the officer must as soon as practicable inform the individual that they may request consular assistance.

An officer must provide an individual with the opportunity to contact their consular for assistance when any measure that results in restricting the individual's liberty is included in a human biosecurity control order.

**Subdivision B—Detention**

**Clause 103                    Detention**

This clause allows a law enforcement officer to detain an individual if they fail to comply with an isolation measure (clause 97) or fail to remain at a specified place required (clause 68). Detention can only be required if a chief human biosecurity officer or a human biosecurity officer is satisfied of the principles in subclause 32(2) and that the detention is necessary because the individual may pose a significant risk of contagion. These tests ensure that detention is only required in circumstances where the community could be at significant risk.

Detention may only be performed by an officer of the Australian Federal Police, a state or territory police officer or a protected services officer.

When enforcing an isolation order in a human biosecurity control order, the detention is for the purpose of moving the individual to the medical facility specified in that order. If the individual refuses to comply with an isolation order, the Commonwealth may seek an injunction from the court requiring the individual to stay isolated.



In all decisions relating to the management of human biosecurity risk, the conflicting interests of the individual versus the community must be considered. In some circumstances, the community risk is such that the individual must be detained to ensure they do not endanger the health of others. This may require an individual to be isolated.

The power to detain an individual has been vested only in law enforcement officers as they have sufficient training and skills to ensure the power is exercised in line with Commonwealth guidelines. A state or territory police officer can only detain an individual under this section consistently with any agreement between that state or territory and the Commonwealth.

**Clause 104                      Rules relating to detention**

This clause sets out that an officer must not use more force, or subject any individual to greater indignity, than is necessary and reasonable to detain the individual and prevent them from escaping detention. An officer must detain the individual in a place that affords the individual personal privacy.

As soon as practicable after detaining the person, the officer must inform the detainee that they may communicate with any person, including a legal representative, and this must be facilitated.

**Clause 105                      Release from detention**

This clause provides that detention must not be used as de-facto arrest power and is only applicable to ensure to ensure an individual remains at a specified place, or complies with an isolation measure.

Where detention is used to require an individual to remain at a place under clause 68, detention must end after 6 hours. It cannot be re-applied. An officer must make a decision whether to take further action within the 6 hours or the individual must be released.

When the detention under subclause 104(2) is for the purposes of enforcing an isolation order, an individual is released from detention once they have been taken to the medical facility specified in the isolation order. However, the individual is still required to remain isolated at the medical facility as specified in the human biosecurity control order.

**Clause 106                      Offence for escaping from detention**

This clause sets out that an individual commits an offence if the individual escapes from a detention under clause 103.

The maximum penalty for the contravention is 5 years imprisonment, or a fine of 300 penalty units, or both.

The criminal penalties available are higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the environment and the economy.

## **Subdivision C—Miscellaneous**

### **Clause 107 Offence for failing to comply with a human biosecurity control order**

This clause imposes a penalty on individuals if they fail to comply with a biosecurity measure included in a human biosecurity control order, after the Director of Human Biosecurity has given a direction for that individual to comply with the requirement under clause 74.

The maximum penalty for a contravention is 5 years imprisonment, or a fine of 300 penalty units, or both.

The criminal penalties available are higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the environment and the economy.

### **Clause 108 Expenses incurred complying with human biosecurity control orders**

This clause sets out that the Commonwealth is liable to pay for reasonable expenses incurred in complying with a biosecurity measure as part of a human biosecurity control order. This clause is consistent with the recommendations of the International Health Regulations.

## **Part 4—Managing risks to human health: other biosecurity measures**

### **Division 1—Introduction**

#### **Clause 109 Simplified outline of this Part**

This clause sets out the Part's objectives. The Part permits human remains to enter Australia without restriction. This Part sets out powers for the Director of Human Biosecurity to specify requirements to specific classes of remains. The Director of Human Biosecurity will also have the power to determine which entry and exit requirements apply.

### **Division 2—Managing deceased individuals**

#### **Clause 110 Human remains brought into Australia territory**

This clause sets out that human remains are permitted into Australia without restriction unless they are a class of remains specified under subclause 110(2). The Director of Human Biosecurity may specify in an instrument the classes that are subject to particular requirements, and what those requirements are. Any requirements specified in the instrument must relate to the prevention or reduction of the risk of a listed human disease entering, emerging, establishing or spreading in Australian territory.

This clause states that a determination made under this clause is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

The decision to determine requirements relating to the entry or management of a class of human remains into Australian territory or part of Australian territory is a technical and scientific decision based on whether the risk of a listed human disease is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technical and scientific based decision making and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of risk to human health.

A person who contravenes a requirement for bringing in human remains or managing human remains after bringing them into Australia territory is liable to a civil penalty. The maximum civil penalty for a contravention is 30 penalty units.

**Clause 111                    Officer may specify requirements for managing human remains**

This clause gives a biosecurity officer, human biosecurity officer, or chief human biosecurity officer the power to give a direction and manage any human remains if an officer is satisfied the remains are likely to be infected with a listed human disease or if a person has not complied with a requirement specified under subclause 110(2) in relation to the remains, in either case, the officer must give a written notice to the person responsible for the remains.

A person who contravenes a direction is liable to a civil penalty. The maximum civil penalty for a contravention is 30 penalty units.

**Clause 112                    Individuals who have died in transit or on arrival**

This clause provides for the Director of Human Biosecurity to specify requirements in an instrument for the management of individuals that die in transit or on arrival into Australian territory. Any requirements specified in the instrument must relate to the prevention or reduction of the risk of a listed human disease entering, emerging, establishing or spreading in Australian territory.

Consistent with the management of human remains at clause 110, individuals who have died in transit are to be managed as individuals under the Act. Unlike the importation of human remains, there is no person who is clearly responsible for an individual who has died in transit. On arrival, the individual will be referred to the state or territory for management. This clause allows the Director of Human Biosecurity to manage any imminent risk of a listed human disease posed by the human remains at the point of arrival in Australia and before they become the responsibility of the state or territory.

This clause states that a determination made under this clause is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

The decision to determine requirements relating to management of individuals who have died in transit or on arrival in Australian territory is a technical and scientific decision based level of risk posed by a listed human disease. Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of contagion risks.

A person who contravenes a requirement is liable to a civil penalty. The maximum civil penalty for a contravention is 30 penalty units.

**Division 3—Human Health Response Zones**

**Clause 113                    Determining human health response zones**

This clause sets out that the Director of Human Biosecurity may determine that a specified area of a state or territory is a biosecurity response zone if the Director is satisfied that it is necessary for the purposes of preventing the emergence, establishment or spread in Australia of a listed human disease. The determination must specify the listed human disease to which the determination relates and any entry or exit requirements for individuals entering or leaving the zone.

The Director must be satisfied that the requirements are appropriate and adapted to prevent, or reduce the possibility of, the emergence, establishment or spread in Australia, of the specified listed human disease. The determination can only be in place for up to 3 months.

This clause has been drafted to address isolated, short term incidents or outbreaks of a listed human disease. It allows the Commonwealth to activate clauses to manage the risk of contagion, and is designed to complement existing state and territory legislation. If the incident or outbreak spreads beyond a single state or territory, an emergency would be declared and the zone will cease to be in force.

This clause states that a determination made under this clause is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of human biosecurity (see Part 2, Chapter 8).

#### **Clause 114                      Consultation requirements**

This clause sets out that before making a determination under clause 113, the Director of Human Biosecurity must consult with the chief health officer for each state or territory in which the zone will lie; and the Director of Biosecurity.

This clause ensures that the state or territory in which the zone is created is fully aware of the intervention of the Commonwealth to address the biosecurity risk. The Director of Biosecurity is also notified in the event the risk has implications for animal or plant health or where biosecurity officers are requested to assist in managing the risk within the zone.

#### **Clause 115                      Notification requirements**

This clause places an obligation on the Commonwealth to make public the declaration of a response zone. It is essential that individuals directly affected by the declaration of the zone are notified that clauses of the Bill may be applicable to them.

This requirement is in addition to the requirement under the *Legislative Instruments Act 2003* that requires the determination to be published on the Federal Register of Legislative Instruments.

#### **Clause 116                      Civil penalty for failing to comply with a requirement of a human health response zone determination**

This clause imposes a civil penalty on individuals who fail to comply with a requirement that is specified in a human health response zone determination under clause 113.

A person who contravenes a requirement is liable to a civil penalty. The maximum civil penalty for a contravention is 30 penalty units.

This is important to encourage individuals to comply with requirements to prevent or reduce the risks of contagion to the community.

## **Chapter 3—Managing biosecurity risks: goods**

### **Part 1—Goods brought into Australia territory**

#### **Division 1—Introduction**

##### **Clause 117                    Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part provides powers to manage biosecurity risks associated with goods brought or imported into Australian territory from outside Australian territory. When goods enter Australian territory, they become subject to biosecurity control, which means that a range of powers become available to assess and manage biosecurity risks associated with the goods.

This Part provides for the management of goods that are or will be subject to biosecurity control, including:

- requiring a notice to be given for goods that are, or are intended to become, subject to biosecurity control
- requirements relating to unloading goods at landing places or ports in Australian territory (including from vessels displaying a quarantine signal)
- powers to assess and manage biosecurity risks associated with goods )and to assess and manage goods which are exposed to these goods)
- powers for biosecurity officers to give directions concerning the unloading of goods from a conveyance, and
- reporting requirements in the event of a biosecurity incident relating to goods.

This Part also sets out the ways that goods are released from biosecurity control.

##### **Clause 118                    Objects of this Part**

This clause outlines the objects of this Part, which are to provide for the assessment of the level of biosecurity risk associated with goods being brought or imported into Australian territory; and to provide for biosecurity measures to be taken in relation to those goods if the level of biosecurity risk associated with them is considered to be unacceptable.

In this Chapter, ‘goods’ may include a conveyance that is being carried on board another conveyance, for the purposes of Parts 1 and 3 of this Chapter (see clauses 16 and 19 for information). These conveyances will be managed as goods at the border, consistent with other types of cargo and consignments.

This will allow conveyances—such as agricultural or mining machinery—to be subject to import permits requirements and conditions.

Treating these conveyances like goods means that biosecurity risks can be appropriately managed through permit conditions and a single notice of intention to unload goods can be used to deal with conveyances—such as cars—as a consignment and gather more accurate information about them for assessing the level of biosecurity risk prior to arrival.

The biosecurity risks with these conveyances will be assessed and managed using the powers available in Chapter 4.

## **Division 2—Goods are subject to biosecurity control**

### **Clause 119 Goods brought into Australian territory are subject to biosecurity control**

This clause applies in relation to goods that are brought into Australia territory on an aircraft or vessel that has entered Australian territory during a flight or voyage that commenced outside Australian territory. Any goods that arrive from outside Australian territory provide a direct pathway for biosecurity risks to enter into Australian territory.

These goods become subject to biosecurity control when the aircraft or vessel carrying the goods enters Australian territory. When goods become subject to biosecurity control, a range of powers in the Bill become available to assess or manage the biosecurity risks associated with the goods. This trigger point for goods becoming subject to biosecurity control reflects the need to assess biosecurity risks associated with goods brought into Australia from overseas, and enable management of those risks.

Goods which are subject to biosecurity control will remain subject to biosecurity control until they have been released from biosecurity control in accordance with Division 10 of this Part.

Goods will be released when they no longer pose a biosecurity risk or once they leave Australian territory (see clause 162).

However, goods on board a conveyance which leaves Australian territory on a journey between places in Australian territory will become subject to biosecurity control again when the conveyance re-enters Australian territory. This ensures that the powers required to assess and manage any biosecurity risks associated with the goods are available if they are required and reflects that the goods still pose a biosecurity risk.

For example, a vessel arriving from overseas may arrive at an Australian port and after unloading some goods may move to another Australian port to unload other goods. This clause ensures that if the vessel happens to leave Australian territory on its voyage to the other Australian port, the goods on board the vessel become subject to biosecurity control again when the vessel re-enters Australian territory and any risks associated with the goods can be assessed and managed at the second port.

## **Division 3—Notice of goods to be unloaded in Australian territory**

### **Clause 120 Notice must be given of goods to be unloaded in Australian territory**

Clause 120 sets out the requirements for a notice to be provided that goods are intended to be brought or imported into Australian territory and unloaded at a port or landing place.

This notice requirement will apply to goods originating outside Australian territory including transhipped goods and goods brought in for temporary purposes. An example of transhipped goods is where a container is unloaded at a port, travels to another port by road, and is loaded onto another vessel.

The notice will allow the Commonwealth to gather important information about goods that assists with the accurate and timely assessment and management of biosecurity risks. This may include information about the country of origin and a description of the goods such as the main material from which the goods are made. Biosecurity officers can use this information to determine what risk management activities are necessary to deal with goods subject to biosecurity control when a conveyance arrives in Australian territory.

This clause also sets out the requirements of the notice. Specifically, the notice must

- include the information in relation to the goods that is prescribed by the regulations
- be given in the manner, and to the person prescribed by the regulations
- be given at a time or during the period prescribed by the regulations (which may be at any time before or after the goods are unloaded at a landing place or port in Australian territory), and
- be in a form or forms approved by the Director of Biosecurity.

The requirements for a notice are prescribed in the regulations. This gives the Commonwealth more flexibility to amend the information required, or the requirements for how and when and in what form the information should be given. The information required may change over time, as the nature and levels of biosecurity risk changes.

The notice must be given by a person prescribed by the regulations in relation to the goods. The prescribed person will be the person who has access to the information set out in the notice.

A person prescribed by the regulations in relation to the goods who contravenes the requirement to provide a notice will commit an offence and is liable to a civil penalty. The maximum penalty for contravention of this provision is two years imprisonment, or 120 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Act create offences and civil penalties for providing false or misleading information or documents.

The regulations may also prescribe exceptions to the requirement to give a notice under this clause. This will provide flexibility and reduce red tape on individuals where there other screening and reporting requirements in place. For example, it is envisaged that personal baggage will be exempted from these requirements as any relevant information in relation to goods will be provided in the incoming passenger card.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

The clause provides that the obligation to provide a notice applies and is required to be complied with, regardless of whether the person is in Australian territory or overseas. This ensures that biosecurity officers will have access to the notice when required to make an assessment of the level of biosecurity risk associated with the goods.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as collecting accurate and timely information through a notice will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address any risk.

Allowing a person to use the privilege and refuse to provide important information, could result in a significant biosecurity risk remaining unmanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain routine information required in a notice. This is impractical and time consuming, particularly given the significant number of goods that are brought in or imported into Australian territory.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Clause 121**                    **Notice of goods to be unloaded in Australian territory—requirement to give additional or corrected information**

This clause creates an obligation on the person who provided notice under clause 120 to provide additional or corrected information where the information provided in the original notice is incomplete or incorrect. This means that a person must provide updated information once they realise the information provided in the notice is incomplete or where circumstances have changed resulting in the information previously provided no longer being correct. This ensures that biosecurity officers are provided with the most accurate information possible to assess and manage biosecurity risks.

This obligation only applies to information that is relevant to assessing the level of biosecurity risk associated with the good. For example, a person will not need to provide corrected information once the goods are released from biosecurity control.

A person who contravenes the requirement to provide additional or corrected information will commit an offence and is liable to a civil penalty. The maximum penalty for a contravention is two years imprisonment, or 120 penalty units, or both if the elements of a fault-based offence are established. The maximum civil penalty for a contravention is 120 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Act create offences and civil penalties for providing false or misleading information or documents.

Similarly to clause 120, a person will be required to give the additional or corrected information regardless of whether they are in Australian territory or overseas.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as ensuring the information contained in a notice is correct and complete will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address any risk.

Allowing a person to use the privilege and withhold correct or further information, could result in a significant biosecurity risk being mismanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain routine information required in a notice. This is impractical and time consuming, particularly given the significant number of goods that are brought in or imported into Australian territory.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Clause 122**                    **Power to obtain extra information relating to goods covered by a notice under section 120**

This clause provides a biosecurity officer with the power to require additional information in relation to goods that are subject to a notice under clause 120, prior to the goods becoming subject to biosecurity control.



This will allow biosecurity officers to make a preliminary assessment of the level of biosecurity risks associated with the goods, ensuring that appropriate resources can be allocated to assess the risks once the goods are unloaded in Australia.

This clause provides biosecurity officers with the power to:

- require a person to answer questions in relation to the goods, where a biosecurity officer suspects on reasonable grounds that the person has information in relation to the goods, or
- require a person to produce documents in relation to the goods, where a biosecurity officer suspects on reasonable grounds that the person has custody or control of specific documents in relation to goods.

A biosecurity officer may make copies of, or take extracts from any document that has been produced, and may remove the document from the place where it was produced in order to make copies or take extracts.

A person who contravenes the requirement to answer questions, provide information or produce documents commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is two years imprisonment, or 120 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Act create offences and civil penalties for providing false or misleading information or documents.

The clause provides that the obligation to provide a notice applies and is required to be complied with, regardless of whether the person is in Australian territory or overseas. This ensures that biosecurity officers will have access to the notice when required to make an assessment of the level of biosecurity risk associated with the goods.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as ensuring the information contained in a notice is correct and complete will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address any risk.

Allowing a person to use the privilege and refuse to answer questions, give information or produce documents relating to goods that are the subject of a report in clause 120, could result in a significant biosecurity risk remaining unmanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain further information to assess the level of biosecurity risk associated with the goods. This is impractical and time consuming, particularly given the significant number of goods that are brought in or imported into Australian territory.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

## **Division 4—Assessment of level of biosecurity risk**

### **Clause 123 Biosecurity risk assessment powers**

This clause provides that the assessment powers in this Division apply and can be exercised in relation to goods that are subject to biosecurity control or exposed goods which have an exposed goods order in force (see Division 9) for the purposes of assessing the level of biosecurity risk.

### **Clause 124 Direction to secure goods**

This clause provides a biosecurity officer with the power to secure goods in a specified manner—for example, by giving a direction to ensure that the goods not be moved. A biosecurity officer may direct the person in charge of goods to secure the goods.

This will allow a biosecurity officer to exercise the other assessment powers in this Division to assess the level of biosecurity risk associated with the goods, and will limit the possibility that any biosecurity risks associated with the goods will spread.

A person who contravenes a direction to secure the good is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, a person may be liable to a civil penalty for moving, dealing with or interfering with goods that has been secured in accordance with a direction given under this clause (see clause 130).

If judicial review is sought in relation to a direction under this clause, the direction will remain in force until a court determines the validity of the direction (clause 538). This ensures that any biosecurity risk remains secure while a final decision is made.

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

### **Clause 125 Inspecting goods and taking samples**

This clause provides a biosecurity officer with the power to inspect and take samples of goods to identify whether a disease or pest is present and assess the level of biosecurity risk associated with the goods. A biosecurity officer may inspect, search and physically examine the goods.

A biosecurity officer may take and test samples of the goods themselves or he or she may direct a person in charge of the goods to deliver samples of the goods, or arrange for a person with appropriate qualifications or expertise to take samples and test the goods. For example, where the goods are in a remote location, the biosecurity officer may arrange for a suitably qualified local person to take samples and send them to be assessed.

A person who contravenes this clause is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

### **Clause 126 Asking questions about goods**

This clause provides biosecurity officers with the power to require a person to answer questions in relation to the goods if the biosecurity officer suspects on reasonable grounds that a person has information in relation to the goods.

This will ensure that biosecurity officers have access to all the necessary information to make an accurate and timely assessment of the level of biosecurity risk associated with the goods. For example, a biosecurity officer may ask questions or seek information about the previous movements of the goods in order to determine whether the goods have been in a location known to have a specific biosecurity risk.

A person who contravenes this clause is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, section 137.1 of the *Criminal Code* and clause 532 of this Act create an offence and civil penalty for providing false or misleading information.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as it will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address that risk.

Allowing a person to use the privilege and refuse to answer questions or provide important information could result in a significant biosecurity risk remaining unmanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain routine information required in a notice. This is impractical and time consuming, particularly given the significant number of goods that are brought in or imported into Australian territory.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

#### **Clause 127                    Requiring documents in relation to goods to be produced**

This clause provides biosecurity officers with the power to require a person to produce documents in relation to goods. Where a biosecurity officer suspects on reasonable grounds that a person has custody or control of specific documents in relation to goods, the biosecurity officer may require the person to produce those documents. A biosecurity officer may make copies of, or take extracts from any document that has been produced, and may remove the document from the place where it was produced in order to make copies or take extracts.

Similar to clause 126, this power assists biosecurity officers to assess the level of biosecurity risk associated with the goods by ensuring that the biosecurity officer has access to all the necessary information to determine the level of biosecurity risk. A person who contravenes the requirement to produce documents is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, section 137.2 of the *Criminal Code* and clause 533 of this Act create an offence and civil penalty for providing false or misleading documents.

This clause is not subject to the privilege against self-incrimination (see clause 635). Similarly to the justification provided in clause 126, the privilege against self-incrimination is abrogated to give biosecurity officers timely access to documents to effectively assess risks and ensure that appropriate biosecurity measures are in place to manage identified biosecurity risks.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

#### **Clause 128                    Movement of goods**

This clause provides biosecurity officers with the power to give directions to a person in charge of goods to:

- not move, deal with or interfere with the goods
- move the goods as soon as practicable to a specified place, or
- any other direction relating to the movement of the goods.

This will allow a biosecurity officer to issue movement directions in relation to the goods to ensure that appropriate biosecurity risk assessment and management activities can be carried out. For example, a biosecurity officer may give a direction for timber products to be moved away from forested areas to ensure that any biosecurity risks associated with the timber do not spread.

The biosecurity officer will also have an ability to cause goods to be moved. This power can be used, for example where a person in charge contravenes a direction to move the good.

A person who contravenes a direction relating to the goods is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, a person may be liable to a civil penalty for moving, dealing with or interfering with goods that has been secured in accordance with a direction given under this clause (see clause 130).

**Clause 129                      Biosecurity control notice may be affixed to goods or given to person in charge of goods**

This clause provides a biosecurity officer with the power to affix a biosecurity control notice to, or near to, the goods or to provide a notice to the person in charge of the goods. This notice is used to inform the person that the movement of the goods is restricted, so that a biosecurity officer can carry out an assessment of the biosecurity risk associated with the goods.

This clause provides that a person must not interfere with, remove or deface the notice affixed to the goods unless the person is authorised to do so under an approved arrangement (see clause 10 for the meaning of approved arrangement), or he or she has been given a direction by a biosecurity official or otherwise has permission under the Act.

A person who interferes with, removes or defaces the notice in contravention of this clause is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. It will be an exception to be authorised under an Australian law to interfere, remove or deface the notice.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 130                      Unauthorised persons must not move etc. goods in relation to which direction has been given or notice has been affixed**

This clause applies to:

- goods that are secured in accordance clause 124
- goods that are subject to movement direction or have been moved under clause 128, or
- goods to which a biosecurity control notice is affixed under clause 129.

A person must not move, deal or interfere with these goods unless the person:

- is authorised to do so under an approved arrangement,
- has been given a direction under the Act by a biosecurity official, or
- has permission under clause 557.

A person who moves, interferes or deals with the goods in contravention of this clause is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

It will be an exception to be authorised under this Act or another Australian law to move, interfere or deal with the goods.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

## **Division 5—Biosecurity measures to manage unacceptable level of biosecurity risk**

### **Clause 131 Biosecurity measures may be required in relation to goods**

This clause provides that where a biosecurity officer suspects, on reasonable grounds, that the level of biosecurity risk associated with the goods that are subject to biosecurity control is of an unacceptable level, the officer may require biosecurity measures to be taken in relation to the goods as set out in this Division.

These biosecurity measures allow a biosecurity officer to manage biosecurity risks to an acceptable level. This power also extends to exposed goods (see clause 161).

### **Clause 132 Movement of goods**

This clause provides that biosecurity officers can require:

- goods to be moved to a particular place
- goods to be left at a specified place for a specified period of time, or
- any other action relating to the movement of the goods.

This allows biosecurity officers to goods to be moved to a location where risk management activities can be undertaken or to prevent the pest or disease from spreading and establishing in Australian territory. For example, a biosecurity officer may give a direction to move a shipping container to a wash bay.

Clause 138 allows a biosecurity officer to direct the person in charge of the goods to carry out this biosecurity measure.

### **Clause 133 Treatment of goods**

This clause provides biosecurity officers with the power to require that goods be treated in a specific manner.

If the goods are high-value goods—that is the value of the goods is greater than the amount prescribed in the regulations—the goods must not be treated in a way that the biosecurity officer suspects may damage the goods without the written approval of the Director of Biosecurity. This extra step reflects the impact ordering such a treatment might have on the owner of the goods and the potential loss of value caused by the treatment.

Regardless of the value of the goods, if the treatment might damage the goods, a person in charge must be asked to agree to the treatment (see clause 134).

This power ensures that biosecurity officers can order necessary treatments for goods to manage biosecurity risks and reduce those risks to an acceptable level. For example, a biosecurity officer may require goods with an ant infestation to be fumigated.

Clause 138 allows a biosecurity officer to direct the person in charge of the goods to carry out this biosecurity measure.

**Clause 134 Treatment that may damage goods**

This clause outlines the requirements for notifying the person in charge of goods where a biosecurity officer suspects on reasonable grounds that the treatment required under clause 133 is likely to damage the goods.

Before any treatment is carried out on the goods, a biosecurity officer must, by notice in writing or orally, inform a person in charge of the goods that the goods are required to be treated in a specified manner which is likely to result in damage to the goods and request the person to agree to the treatment of the goods. If the biosecurity officer suspects on reasonable grounds that the goods pose a high level of biosecurity risk and need to be treated as soon as practicable, the officer will be able to carry out the specified treatment without having to notify the person in charge.

If a notice is given to the person in charge of the goods requesting their agreement to treatment, and the person does not respond or does not agree to the treatment within 30 days, a biosecurity officer may in writing request that the person arrange for the goods to be dealt with or destroyed within a specified period. If the person in charge of the goods does not comply with this request the biosecurity officer may take possession of the goods and cause them to be exported out of Australian territory, destroyed or otherwise disposed of.

This clause allows a biosecurity officer to seek agreement and give a notice orally as well as or instead of in writing. This is appropriate for situations where the biosecurity officer is in direct contact with the person in charge of the goods, for example, at an airport where the officer is inspecting a person's baggage.

The notification requirement gives a person in charge of goods a reasonable opportunity to address the biosecurity risks associated with the goods—with appropriate consequences—if the biosecurity risks have not been managed.

The clause excludes a biosecurity industry participant from the definition of 'person in charge' of goods if the biosecurity industry participant is in possession or control of goods only because of a direction given to the participant by a biosecurity officer. This reflects that it would not be appropriate for the biosecurity industry participant to agree to treatment that may damage goods, where they do not have a relationship to the owner of the goods and the goods are only in their possession because of the actions of the biosecurity officer.

**Clause 135 Export of goods**

This clause allows a biosecurity officer to require goods to be exported from Australian territory. The biosecurity officer may arrange for the goods to be exported or direct a person in charge of the goods to arrange for the goods to be exported. Exporting offers an alternative way to deal with the biosecurity risks (in addition to treatment or destruction of the goods).

As these provisions apply to goods that have been brought or imported into Australian territory, it is appropriate that the goods can be exported, to ensure that the biosecurity risks can be managed. For example, it is envisaged that these goods would be returned to their country of origin.

A person who contravenes a direction to export the goods may commit an offence or be liable to a civil penalty (see clause 140).

### **Clause 136                      Destruction of goods**

This clause provides biosecurity officers with the power to require that goods be destroyed. If the biosecurity officer suspects on reasonable grounds that the goods cannot be effectively treated to reduce the biosecurity risk to an acceptable level, the biosecurity officer may, subject to the notification and approval requirements, require the goods to be destroyed.

If the goods are high-value goods—that is the value of the goods is greater than the amount prescribed in the regulation—the goods must not be destroyed without written approval of the Director of Biosecurity. The decision to require high-value goods be destroyed is a reviewable decision under clause 574. If a review is being undertaken, the good can only be destroyed if the biosecurity officer is satisfied that the goods pose a high level of biosecurity risk and the risks cannot be managed for long enough to allow a review to be finally determined.

The requirement that the Director approve the destruction of high-value goods along with the review function reflect the monetary outlay that an owner may have invested in the good and ensures that an owner or person in charge is able to access review mechanisms to protect his or her goods.

A biosecurity officer must not cause high-value goods to be destroyed until the end of the review period, for any review of the decision to destroy the good to be completed or until an application for review (including an appeal) has been determined. If the goods have been destroyed, because the biosecurity risks cannot be managed for the duration of any review or appeal, no application for review can be made and any review or related proceedings are taken to be discontinued.

Clause 138 allows a biosecurity officer to direct the person in charge of the goods to carry out this biosecurity measure.

### **Clause 137                      Regulations may provide for other biosecurity measures**

The clause allows for regulations to prescribe additional biosecurity measures that a biosecurity officer may use in relation to goods under this Division.

The clause limits the biosecurity measures that can be prescribed by the regulations. The biosecurity measures in the regulations must not be:

- measures that are of a kind set out in Division 4 of this Part (biosecurity risk assessment powers)
- a measure of another kind set out in this Division, or
- a biosecurity measure relating to decontamination (see Division 2 of Part 4 of Chapter 10).

This ensures that the regulations do not contain biosecurity measures already available in the Act. It also ensures that any notification or processes in place in the legislation are not circumvented. For example, an additional prescribed biosecurity measure may include a requirement that certain animals are to be isolated (quarantined).

This clause also allows for other matters relating to a prescribed biosecurity measure to be set out in the regulations. This can include matters such as notification requirements and limitations on carrying out prescribed biosecurity measures during review periods (if the exercise of the prescribed biosecurity measure is a reviewable decision).

Clause 138 allows a biosecurity officer to direct the person in charge of the goods to carry out a biosecurity measure under clauses 132, 133, 136 or 137.

**Clause 138 Powers of biosecurity officer if biosecurity measures are required**

The clause provides that where a biosecurity officer requires biosecurity measures to be taken in relation to goods under clauses 132 (movement), 133 (treatment), 136 (destruction) or a regulation made under clause 137 (prescribed biosecurity measure), the biosecurity officer can direct a person, or arrange for a person to carry out the biosecurity measures. The biosecurity officer can also carry out the biosecurity measure personally.

Where the biosecurity officer gives a direction to a person to carry out a biosecurity measure, or arranges for someone to carry out the biosecurity measure, the biosecurity officer may supervise the person carrying out the biosecurity measures. This ensures that the biosecurity measures are carried out properly, and where they have not been carried out in accordance with the directions, the biosecurity officer can take action to manage the biosecurity risks.

A person who is given a direction to carry out a biosecurity measure under this clause may commit an offence or contravene a civil penalty provision (see clause 140 for further information)

**Clause 139 Biosecurity officer may affix notice to goods**

Clause 139 allows a biosecurity officer, to affix a notice to goods in relation to which biosecurity measures have been required under this Division or a regulation made under clause 137.

This notice must state that the level of biosecurity risks associated with the goods is unacceptable, that biosecurity measures have been required in relation to those goods and that a person may be liable to a civil penalty or offence if they move or interfere with the goods to which the notice relates (see clause 141). The notice is designed to inform a person not to move or interfere with the goods. If it is not possible to affix the notice to the goods, the person exercising the power may affix the notice as near to the goods as reasonably practicable.

A person must not interfere with, remove or deface the notice unless the person is authorised to do so under an approved arrangement (see clause 10) or they been given a direction or permission by a biosecurity official or otherwise has permission under the Act. An unauthorised person who interferes with, removes or defaces the notice may be liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. It will be an exception to be authorised under an Australian law to interfere, remove or deface the notice.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 140 Person must comply with direction to take biosecurity measures**

This clause provides that a person must comply with a direction to take biosecurity measures. A person will commit an offence and be liable to a civil penalty if they contravene a direction under clause 135 to export the goods or under clause 138 to take measures given by a biosecurity officer under this Division (see clauses 132, 133, 136 and 137). The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not



complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 141                      Unauthorised persons must not move etc. goods to which notice has been affixed**

This clause provides that a person must not move, deal or interfere with the goods where a notice has been affixed under subclause 139(1) unless the person is authorised to do so under an approved arrangement (see clause 10 for the meaning of approved arrangement), or he or she has been given a direction by a biosecurity official or otherwise has permission under the Act.

An unauthorised person who moves, deals or interferes with these goods commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If the goods are moved or interfered with biosecurity risk associated with the goods may spread which has the potential to cause serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

It will be an exception to be authorised under an Australian law to move, interfere or deal with the goods.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

These powers are required to ensure biosecurity officers can carry out functions under this Part by affixing notices to goods restricting their movement so that biosecurity measures can be conducted to manage any identified biosecurity risks.

## **Division 6—Unloading goods at landing places or ports**

### **Clause 142                    Application of this Division**

This Division applies in relation to goods that are or will be subject to biosecurity control and are intended to be unloaded from an aircraft or vessel carrying the goods at a landing place or port in Australian territory. The powers in this Division also apply in relation to exposed goods (see clause 161).

### **Clause 143                    Person in charge may allow goods to be unloaded from aircraft or vessel subject to direction etc.**

### **Clause 144                    Person may unload goods from aircraft or vessel subject to direction etc.**

These clauses outline the circumstances in which:

- a person in charge of an aircraft or vessel can allow the unloading of goods at a landing place or port, and
- a person, such as a stevedore, can unload goods from a vessel or aircraft.

These clauses provide that goods can be unloaded:

- subject to any directions given by a biosecurity officer, or
- in accordance with the requirements in clauses 145, 146, 147, 148 and 151.

Subject to meeting the requirements in clauses 145, 146, 147, 148 and 151, goods will be able to be unloaded from a vessel or aircraft without any intervention from biosecurity officers. This will allow goods which do not pose a biosecurity risk to move smoothly through the border, reducing delays on individuals and businesses.

A biosecurity officer may give the person in charge of aircraft or vessels, or another person, a direction relating to the unloading of the goods from the aircraft or vessel. This direction may relate to not allowing some or all of the goods to be unloaded from the aircraft or vessel. For example, where a particular shipping container is suspected of posing a high level of biosecurity risk, a biosecurity officer may direct the person in charge not to unload that shipping container.

A person who contravenes a direction given by a biosecurity officer under these clauses commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalties available are higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of the commission of the offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

It will be an exception to both the offence and civil penalty in clause 143, if the person in charge of the aircraft or vessel gave a direction to a person under clause 144, and the direction was in the same terms as that given by a biosecurity officer, and the other person contravened the person in charge's direction. For example, if a biosecurity officer directs the person in charge of a vessel not to unload a container, and the person in charge has passed that direction on to the stevedore, if the stevedore unloads the container, the person in charge will not be liable.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

Notwithstanding these clauses, nothing may be unloaded from the aircraft or vessel unless pratique has been granted in relation to the aircraft or vessel (see clauses 48 and 49).

**Clause 145**                    **Goods must not be unloaded except at first point of entry for those goods or with permission**

**Clause 146**                    **Permission to unload goods at landing place or port other than first point of entry for those goods**

Clause 145 provides that a person in charge of a vessel or aircraft that brought goods into Australian territory must not allow the goods that are subject to biosecurity control to be unloaded unless:

- the landing place or port is a first point of entry for those goods, or
- permission has been given by the Director of Biosecurity for the goods to be unloaded at that port or landing place.

First points of entry may be determined to receive specific goods, depending on the biosecurity risks associated with the goods and the facilities at the first point to manage the biosecurity risks (see clauses 223 and 229 for further information). This clause ensures that in the event a first point of entry is determined to receive specific goods, the biosecurity risk assessment process for determining a first point of entry is not circumvented and that biosecurity risks associated with unloading goods at places that are not first points of entry are appropriately managed.

A person who unloads goods at a landing place or port that is not a first point of entry for those goods, without permission from the Director, commits an offence and is liable to a civil penalty. The maximum penalty for contravening clause 145 is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

Clause 146 provides that a person in charge or the operator of an aircraft or vessel that is intending to bring goods into Australian territory may request the Director of Biosecurity to give permission to unload the goods at a first point of entry not determined to receive those goods. On receiving a request, the Director may—by notice in writing—give permission. This permission may be subject to conditions. This allows the Director to place any conditions that are appropriate for the management of biosecurity risks associated with the goods. For example, permission to unload timber at a place that is not a first point of entry may be given on the condition that there are fumigation facilities available to manage any biosecurity risks associated with the timber.

This clause provides flexibility for industry by ensuring that alternative arrangements can be made to unload goods at a landing place or port not determined to receive those goods.

A person who has been given permission to unload the goods subject to conditions and contravenes the conditions commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The person in charge of the aircraft or vessel commits an offence if the operator has been given permission subject to conditions and the conditions have been contravened. The operator of the

aircraft or vessel commits an offence if the person in charge has been given permission subject to conditions and the conditions have been contravened. The maximum penalty for contravention of both these offences is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalties available are higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If the goods were unloaded without permission or a condition was contravened biosecurity risk associated with the goods may spread which has the potential to cause serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

Notwithstanding these clauses, nothing may be unloaded from the aircraft or vessel unless pratique has been granted in relation to the aircraft or vessel (see clauses 48 and 49).

**Clause 147**                    **Goods must be brought to biosecurity entry point for those goods at first point of entry**

**Clause 148**                    **Permission to bring goods to alternative biosecurity entry point**

These clauses apply if:

- the aircraft or vessel that brought goods into Australian territory has arrived at a first point of entry for that aircraft or vessel, and
- there is a biosecurity entry point at the first point of entry for goods that are to be unloaded from the aircraft or vessel.

Biosecurity entry points are designated areas within a landing place or port that an aircraft, vessel or goods must enter as soon as practicable upon arriving at a first point of entry—allowing biosecurity risks associated with the aircraft, vessel or goods to be managed at a specific location within the landing place or port (see clauses 224 and 230 for further explanation).

A person in charge of the aircraft or vessel must ensure goods that are unloaded are brought to a biosecurity entry point as soon as practicable, unless the person in charge has been given:

- a direction by a biosecurity officer, or
- permission in accordance with clause 148 for the goods to be brought to an alternative biosecurity entry point.

A person who unloads goods in contravention of this requirement commits an offence and is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

Clause 147 provides biosecurity officers with the power to give directions to the person in charge or the operator of a vessel or aircraft. The direction may require that the goods be brought to an alternative biosecurity entry point at the first point of entry. A biosecurity officer will be able to use the direction power to manage biosecurity risks associated with the goods.

A person who has been given a direction and contravenes the direction commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both if the elements of a fault-based offence are established. The maximum civil penalty for a contravention is 120 penalty units.

A person in charge of the aircraft or vessel who has been given a direction and the direction has been contravened commits an offence and is liable to a civil penalty. The maximum penalty for a

contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The operator of the aircraft or vessel who has been given a direction and the direction has been contravened commits an offence and is liable to a civil penalty. The maximum penalty for contravention of both these offences is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

Clause 148 outlines the process for the Director of Biosecurity to give permission to unload goods at an alternative biosecurity entry point. A person in charge, or an operator, of an aircraft or vessel that brought goods into Australian territory may request the Director of Biosecurity to give permission to unload the goods at a biosecurity entry point that is not a biosecurity entry point for those goods. On receiving a request, the Director may—by notice in writing—give permission.

This permission may be subject to conditions. This allows the Director to place any conditions that are appropriate for the management of biosecurity risks associated with the goods. For example, a condition on unloading timber products at a biosecurity entry point that is not a biosecurity entry point for timber, may include storing the timber products at a premise under an approved arrangement or away from plants or trees.

This clause provides flexibility to industry by ensuring that alternative arrangements can be made to unload goods at biosecurity entry points not determined to receive those goods.

A person who has been given permission subject to conditions and contravenes the conditions commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The person in charge of the aircraft or vessel who contravenes conditions of a permission to unload goods at an alternative biosecurity entry point commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The operator of the aircraft or vessel who contravenes conditions of a permission to unload goods at an alternative biosecurity entry point commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

These clauses ensure that biosecurity risk assessment processes for determining biosecurity entry points at first points of entry are not circumvented and that biosecurity risks associated with unloading goods at places that are not a biosecurity entry point are appropriately managed.

It is appropriate that both the operator of the aircraft or vessel and the person in charge of the goods are liable to these offences, as they will either be giving permission for the goods to be unloaded from the vessel or aircraft, or be the person unloading the goods.

The criminal penalties available are higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with or the goods were unloaded without permission or a condition was contravened biosecurity risk associated with the goods may spread which has the potential to cause serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

Notwithstanding these clauses, nothing may be unloaded from the aircraft or vessel unless pratique has been granted in relation to the aircraft or vessel (see clauses 48 and 49).

**Clause 149                    Receiving or possessing goods unloaded from aircraft or vessel in contravention of this Division**

This clause provides that a person who receives or has in his or her possession goods that were unloaded from an aircraft or vessel in contravention of this Division is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

It will be an exception if the person did not know, or could not reasonably be expected to know that the goods were unloaded in contravention of this Division.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Division 7—Unloading goods from vessel displaying prescribed quarantine signal**

**Clause 150                    Application of this Division**

This Division applies in relation to goods that are subject to biosecurity control including exposed goods (see clause 161) and are unloaded from a vessel that is displaying the prescribed quarantine signal.

**Clause 151                    Unloading goods from vessel displaying prescribed quarantine signal**

This clause provides that a person must not unload goods from a vessel in Australian territory if the goods are subject to biosecurity control or are exposed goods (see clause 161) and the vessel is displaying the prescribed quarantine signal (see clause 221 for further information).

A vessel displaying a quarantine signal has been deemed to pose an unacceptable level of biosecurity risk. This clause ensures that the biosecurity risks are not spread by unloading the goods from the vessel.

A person who unloads goods in contravention of this clause commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units. The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If goods are unloaded from a vessel displaying the prescribed quarantine signal biosecurity risk associated with the goods may spread which has the potential to cause serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

It will be an exception to be authorised under this Act or under another Australian law to unload goods from a vessel displaying the prescribed quarantine signal.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 152                      Receiving or possessing goods unloaded from vessel displaying prescribed quarantine signal**

This clause provides that a person must not receive or have in his or her possession goods unloaded from a vessel that is displaying the prescribed quarantine signal and the goods are subject to biosecurity control or are exposed goods. This clause does not apply if the person is authorised to do so under an approved arrangement, or he or she has been given a direction by a biosecurity official or otherwise has permission under the Act.

This clause appropriately places responsibility on people receiving or possessing goods to ensure that they are aware of the circumstances of the goods arrival and biosecurity status.

A person who receives goods unloaded in contravention of this clause commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. Goods that are unloaded from a vessel displaying the prescribed quarantine signal potentially pose a high level of biosecurity risk. Biosecurity risk associated with the goods may spread which has the potential to cause serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

It will be an exception if the person did not know, or could not reasonably be expected to know that the goods were unloaded in contravention of this Division or if the person is authorised under an Australian law.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

## **Division 8—Reporting biosecurity incidents**

### **Clause 153                    Application of this division**

This Division applies obligations to report biosecurity incidents to goods that are subject to biosecurity control. The Division also applies in relation to exposed goods (see clause 161).

### **Clause 154                    Director of Biosecurity may determine acts, omissions or events to be reportable biosecurity incidents**

This clause provides the Director of Biosecurity with the ability to determine via legislative instrument, what constitutes a biosecurity incident in relation to goods that are subject to biosecurity control or exposed goods (see clause 161). A biosecurity incident can be an act, omission or event. The reporting of biosecurity incidents will allow for biosecurity officers to efficiently manage biosecurity risks associated with an incident.

It is important that biosecurity incidents are reported as soon as practicable, to ensure that any biosecurity risks associated with the incident can be managed to an acceptable level and to limit the risk associated with any pest or disease entering, establishing or spreading into Australian territory.

For example, a person in charge of timber products may be required to report any insect activity. This will allow biosecurity officers to assess if the insect activity is a biosecurity risk and if necessary, carry out biosecurity measures to manage the biosecurity risks associated with those insects.

### **Clause 155                    Reporting by person in charge of aircraft or vessel carrying goods**

### **Clause 156                    Reporting by person in charge of goods**

These clauses provide that a person in charge of an aircraft or vessel that brought goods into Australia and the person in charge of goods once they are unloaded must report any biosecurity incident that he or she is aware of to the Director of Biosecurity or a biosecurity officer as soon as practicable after becoming aware of the incident. It is important that biosecurity incidents are reported as soon as practicable, to ensure that any biosecurity risks associated with the incident can be managed to an acceptable level and to limit the risk associated with any pest or disease entering, establishing or spreading into Australian territory.

It is appropriate that the requirement to report these incidents sits with the person in charge of the aircraft, vessel or goods as he or she is most likely to become aware that a biosecurity incident has occurred as he or she is in possession of the goods.

A person who fails to report a biosecurity incident commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is two years imprisonment, or 120 penalty units, or both if the elements of a fault-based offence are established. The maximum civil penalty for a contravention is 120 penalty units.

The obligation to report a biosecurity incident applies whether or not the person was in Australian territory when they became aware of the biosecurity incident. This reflects that an incident can occur outside Australian territory, and that having an incident reported as soon as practicable allows for the efficient management of biosecurity risks.

### **Clause 157                    How reports must be made**

Clause 157 outlines the process for how reports of biosecurity incidents are to be made. This clause provides the Director of Biosecurity the ability to determine—by legislative instrument—the information that must be included in the report (required by clauses 155 and 156) and the way in which the report must be made.



If a report is not made in accordance with these requirements, the report is not taken to have been made the person who made or was required to make the report may have committed an offence or be liable to a civil penalty. This ensures that all reports are made in the appropriate manner, allowing for biosecurity measures (if required) to be carried out in a timely manner.

### **Division 9—Goods exposed to goods that are subject to biosecurity control**

#### **Clause 158                    Application of this Division**

This Division applies to goods if a biosecurity officer suspects, on reasonable grounds, that the goods have been exposed to goods or conveyances that are subject to biosecurity control and goods in relation to which a biosecurity control order under clause 159 has been made. These goods are defined as exposed goods.

This Division extends some of the powers available in this Part to exposed goods, allowing for biosecurity risks associated with exposed goods to be efficiently assessed and managed.

#### **Clause 159                    Assessment and management of biosecurity risk associated with exposed goods**

A biosecurity officer may exercise the powers in Division 4 of this Part for the purpose of identifying and assessing the level of biosecurity risk associated with exposed goods. If the biosecurity officer suspects on reasonable grounds that the biosecurity risks associated with exposed goods is unacceptable, the biosecurity officer may issue an exposed goods order in accordance with clause 160—extending some of the powers in this Part to manage the biosecurity risks with the exposed goods.

The assessment powers in Division 4 of this Part can only be exercised in relation to exposed goods if the goods:

- are within the precincts of a landing place or port
- are onboard a conveyance which is subject to biosecurity control (see Division 2 of Part 2 of Chapter 4)
- are on premises owned or controlled by the Commonwealth where biosecurity measures can be taken for the purpose of managing biosecurity risk, or
- are on premises where biosecurity activities are carried out in accordance with an approved arrangement.

Limiting the exercise of these powers to these areas reflects that these are areas with a high level of biosecurity risk, which have a direct connection to the goods being brought or imported into Australian territory. It is appropriate that these powers extend to these goods, as exposed goods potentially have an unacceptable level of biosecurity risk by virtue of coming into contact with goods or conveyances that are subject to biosecurity control.

In situations where this Part does not apply and the goods are suspected of having an unacceptable level of biosecurity risk, the biosecurity risks can be assessed and managed by the provisions in Chapter 6.

#### **Clause 160                    Exposed goods orders**

This clause outlines the requirements for an exposed goods order. An exposed goods order must be in writing, specify the goods to which it relates, and the period in which it is in force.

The clause clarifies that an exposed goods order is not a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act 2003*. This is to recognise the fact that the notice is administrative in nature. The exposed goods order is intended to notify the person in charge of exposed goods that the provisions in this Part apply in relation to the goods.

A biosecurity officer must give a copy of an exposed goods order to a person in charge of the exposed goods to which the order relates, if it is practicable to do so.

**Clause 161                    Effect of exposed goods order**

This clause outlines the effect of an exposed goods order. If an exposed goods order is in force in relation to exposed goods, the powers in Divisions 4, 5, 6, 7, 8 and 10 of this Part will apply to the exposed goods as if they were goods subject to biosecurity control. This ensures that biosecurity officers can use the powers to manage and assess the biosecurity risks which may be associated with the goods as a result of the exposure.

An exposed goods order made in relation to exposed goods ceases to be in effect when the order expires, is revoked or the goods are released from biosecurity control in accordance with Division 10.

In the same way as clause 162 applies to goods that are subject to biosecurity control, subclause 161(3) provides that the goods are released from biosecurity control by virtue of leaving Australian territory on a conveyance on a journey between places in Australian territory and the exposed goods order has not expired or been revoked, the exposed goods order takes effect again when the conveyance re-enters Australian territory. This is appropriate as the biosecurity risks associated with the exposed goods, have not been managed to an acceptable level simply by leaving the Australian territory.

**Division 10—Release of goods from biosecurity control**

**Clause 162                    When goods brought into Australian territory are released from biosecurity control**

This clause outlines the circumstances in which goods are released from biosecurity control. Goods will be released from biosecurity control if:

- a notice is given to a person in charge of the goods under clause 163 by a biosecurity officer
- a written notice is given to the person in charge of the goods by a biosecurity industry participant who is authorised to release the goods in accordance with an approved arrangement
- the goods are prescribed goods and the goods leave a designated biosecurity control release area at a first point of entry or an international mail centre
- the goods are destroyed, or
- the goods leave Australian territory.

Goods are released through these mechanisms in recognition that the goods no longer pose an unacceptable level of biosecurity risk. If goods are released from biosecurity control by leaving Australian territory on a conveyance that is on a journey between places in Australian territory, the goods become subject to biosecurity control again when the conveyance returns to Australian territory during that journey (see clause 119). This is appropriate as the biosecurity risks associated with the goods, has not been assessed or managed to an acceptable level.

Goods may be released prior to becoming subject to biosecurity control based on an assessment of the information provided via notice under clause 120. The clause clarifies that if a notice has been issued releasing the goods from biosecurity control, prior the goods became subject to biosecurity control, the goods are taken to be released immediately after they became subject to biosecurity control. This will allow these goods to move smoothly through the border ensuring that individuals and businesses are not subject to delays or additional costs.

The clause clarifies that a release notice is not a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act 2003*. This is to recognise the fact that the notice is administrative in nature. The notice is intended to notify the person in charge of the goods that the goods are released from biosecurity control.

The regulations may provide that a specified area at a first point of entry or an international mail centre is a designated biosecurity control release area. These designated areas reflect that it will not be possible for a biosecurity officer to personally release all goods—either orally or in writing. For example, international mail will be released from biosecurity control when it leaves an international mail centre.

The regulations will also prescribe goods that are released by this mechanism, it is envisaged that these will include personal baggage and international mail. This limits the goods released by the mechanism, and allows biosecurity officers to focus on goods which pose a higher level of risk. Biosecurity officers will still be able to use the assessment and management powers in this Chapter to manage any unacceptable level of biosecurity risk associated with these goods.

A biosecurity officer may refuse to release goods from biosecurity control if the goods are withheld under clause 600 because a cost-recovery charge has not been paid (see subclause 600(4)).

#### **Clause 163 Notice releasing goods from biosecurity control**

This clause provides that a notice issued under clause 162 may be issued in writing or orally. This clause also allows for notices that are issued by an automated electronic system to release goods from biosecurity control. The automated system must comply with the requirements in the regulations. An automated notice is taken to be issued by a biosecurity officer so that the practical effect of this notice is to release the goods under clause 162.

This provision also makes it clear that an automated release notice in relation to goods has no effect to the extent that it is inconsistent with an earlier direction given in relation to the goods by a biosecurity officer under this Act.

#### **Clause 164 Revoking notice releasing goods from biosecurity control**

This clause outlines the process for revoking a notice issued under clause 162 releasing goods from biosecurity control.

If a biosecurity officer or biosecurity industry participant suspects on reasonable grounds that the goods pose an unacceptable level of biosecurity risk the biosecurity officer may revoke the notice issued under clause 162—ensuring that the goods are still subject to biosecurity control. This will allow biosecurity officers to use the powers in Divisions 4 and 5 of this Chapter to assess, and if necessary, manage biosecurity risks associated with the goods.

This ability to revoke a notice given under clause 162 is necessary to manage biosecurity in circumstances where the goods have been released by mistake or based on incorrect information provided to a biosecurity officer or biosecurity industry participant.

A biosecurity officer may revoke a notice releasing goods from biosecurity control that was given to a person by a biosecurity officer or automated electronic system, by informing the person in writing or orally of the revocation.

If a biosecurity industry participant gave a person in charge of goods a written notice releasing goods from biosecurity control, the biosecurity industry participant or a biosecurity officer may revoke the notice by informing the person in writing of the revocation. Biosecurity industry

participant are also afforded this power as they are likely to be in a position to identify any biosecurity risks associated with released goods that are being managed under their approved arrangement.

It is appropriate that these goods are managed under the powers available in this Chapter as it provides a direct link with the goods being brought into Australia and ensures that the biosecurity risk management powers that are available at the border—such as exporting the goods—can be used.

Chapter 6 powers are available for goods that are not subject to biosecurity control. However this provision is intended to be used in cases where goods have been mistakenly released or incorrect information has been provided. For example, a good has been released from biosecurity control based on documentation and when it arrives a biosecurity officer notices that it is infested with insects. Chapter 6 powers in this instance would be administratively burdensome on the department and may result in delayed responses to biosecurity risks.

The clause clarifies that a written revocation notice is not a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act 2003*. This is to recognise the fact that revocation is administrative in nature. The revocation notice is intended to notify the person in that the goods are subject to biosecurity control.

## **Part 2—Biosecurity Import Risk Analyses**

### **Division—Introduction**

#### **Clause 165                      Simplified outline of this Part**

This outline sets out the Part's objectives. This Part confers on the Director of Biosecurity the power to conduct Biosecurity Import Risk Analyses (BIRA). A BIRA can be conducted for goods or a particular class of goods that may be imported or are proposed to be imported. A BIRA is an evaluation of the level of biosecurity risk associated with the goods. It also identifies conditions that must be met to manage the level of biosecurity risk associated with the goods to a level that achieves Australia's Appropriate Level of Protection (ALOP).

### **Division 2—Biosecurity Import Risk Analyses**

#### **Clause 166                      What is a Biosecurity Import Risk Analyses (BIRA)**

This clause defines a BIRA as a scientific evaluation of the level of biosecurity risk associated with goods that may be imported, or are proposed to be imported, into Australian territory. The BIRA can identify conditions that must be satisfied to manage the level of biosecurity risk to achieve Australia's appropriate level of protection (ALOP) (see clause 5 for further information on ALOP).

This clause clarifies that a BIRA can consider and recommend biosecurity measures that are varied based on the level of biosecurity risk in a part of Australian territory. For example, in a recent Import Risk Analysis two quarantine pests associated with stone fruit production in the United States of America were of regional concern to Western Australia (in addition to other quarantine pests of concern to the whole of Australia). As a result, specific import conditions were identified and placed on stone fruit being imported to Western Australia, in addition to the import conditions applied for the whole of Australia.

A BIRA provides information and advice to the Director of Biosecurity to take into account when assessing an import permit application.

**Clause 167                    Director of Biosecurity may conduct a BIRA**

This clause confers the power for the Director of Biosecurity to undertake a BIRA in relation to particular goods or particular classes of goods and provides that the Director must apply Australia's ALOP in conducting the BIRA. The application of Australia's ALOP ensures that any biosecurity measures identified to manage the risks to meet Australia's ALOP will be science-based sanitary and phytosanitary measures consistent with Australia's rights and obligations under the SPS Agreement.

The Director of Biosecurity can determine the order in which BIRAs are conducted subject to any direction from the Agriculture Minister under clause 168.

**Clause 168                    Agriculture Minister may direct Director of Biosecurity to commence a BIRA**

This clause provides that the Agriculture Minister may issue a written direction to the Director of Biosecurity to commence a BIRA in relation to a particular good or a particular class of good. Aside from this direction, the clause provides that the Director of Biosecurity is not subject to any directions from the Agriculture Minister or the Commonwealth Government about the conduct, findings or outcomes relating to the BIRA. This means that although the Agriculture Minister can ensure that BIRAs are being conducted in accordance with Australia's international trade priorities, the BIRA process and scientific decision-making are independent from any direction or influence.

The clause clarifies that a direction from the Agriculture Minister is not a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act 2003*. This is to recognise the fact that written direction to commence a BIRA is an administrative direction by the Minister.

Written directions of this nature will be based on the international trade policies and priorities of the government of the day. This is further reinforced by the requirement that written direction must be tabled in both Houses of Parliament with 15 sittings days of the written notice being issued. This allows for Parliamentary oversight over the directions being given.

**Clause 169                    Process for conducting a BIRA**

This clause provides that the BIRA process must be conducted in accordance with the process prescribed by the regulations and take into account the matters set out in the guidelines made by the Director of Biosecurity. Because the BIRA process is largely administrative in nature the details of the process are to be included in the regulations and administrative guidelines that support this Part rather than in the Bill.

The Director of Biosecurity can in writing make guidelines setting out matters to be taken into account when conducting a BIRA. It is intended that the guidelines will include a range of guidance material and may include, for example, factors to be considered when deciding whether to commence a BIRA process or how the biosecurity risk identified should be assessed against Australia's ALOP. The guidelines must be made publicly available on the Agriculture Department's website to ensure that the BIRA process is transparent for industry and other persons who have a legitimate interest in the outcome of the BIRA process. For the purposes of section 5(1) of the *Legislative Instruments Act 2003*, the guidelines are not a legislative instrument. This is to recognise the fact that guidelines issued for BIRAs are administrative in their nature.

The Director of Biosecurity may also request that the Director of Human Biosecurity prepare a statement of the human health risk associated with the proposed importation of the goods. This ensures that human health impacts are properly considered in the BIRA process.

## **Clause 170**                    **Reports**

This clause provides that the regulations must require the Director of Biosecurity to prepare draft, provisional and final BIRA reports.

Each of the reports must be published and contain the information prescribed by the regulations. It is intended that stakeholders will be able to comment on the draft BIRA report. The provisional BIRA report will build on the draft BIRA report, taking into account stakeholder comments.

Once completed, the BIRA report provides information and advice to the Director to take into account when assessing the prohibition or conditions required for goods, the import of goods and assessing any import permit application. The decision to grant the import permit is made using a variety of information, including, but not limited to, information contained in the BIRA report.

## **Part 3—Prohibited Goods etc.**

### **Division 1—Introduction**

#### **Clause 171**                    **Simplified outline of this Part**

This Part provides the Director of Biosecurity and the Director of Human Biosecurity with the power to jointly determine goods that must not be brought or imported into Australian territory (prohibited goods) and goods that may be brought or imported into Australian territory subject to conditions (conditionally non-prohibited goods). This Part also allows permits to be issued to bring or import certain conditionally non-prohibited goods into Australian territory.

In addition, the Director of Biosecurity will have the power to determine that the bringing or importation of certain goods into Australian territory is suspended for up to six months. The Part also outlines offences and civil penalty provisions.

#### **Clause 172**                    **Exclusion of State and Territory laws**

This clause indicates Parliament's intention that Part 3 of Chapter 3 covers the field in relation to prohibiting or restricting the bringing in or importing of goods into Australian territory for the purposes of managing biosecurity risks associated with the goods. Accordingly, the Act should operate to exclude any state or territory law that purports to prohibit or restrict the bringing in or importing of goods on biosecurity grounds.

Section 109 of the Constitution invalidates a state law to the extent that it is inconsistent with a Commonwealth law. Determining whether a state law is inconsistent with a Commonwealth law involves interpreting both laws. If the Commonwealth law is interpreted as operating to the exclusion of state law, the state law will be inconsistent with the Commonwealth law and invalid. A provision such as clause 172, which sets out Parliament's intention to exclude the operation of state laws will be used in interpreting the Commonwealth law to determine whether it does exclude a particular state law.

An example of where the Act may operate to the exclusion of a state law would be if a state law purports to prohibit the importation of a good on biosecurity grounds and the Act permits the importation. The state law may be inconsistent with the Commonwealth law under section 109 of the Constitution; if so the Act would prevail and the goods would be able to be imported.

It is intended that conditions on the importation of goods into Australian territory will be based on the outcomes of a national risk assessment process, which takes account of variances in biosecurity risk which may occur in parts of Australia.

This clause applies to territory laws in the same way as it applied to state laws. While section 109 of the Constitution does not apply to territory laws, similar principles apply in relation to the inconsistency or repugnancy of territory laws with Commonwealth laws.

This provision is intended to increase certainty about roles and responsibilities with respect to bringing or importing goods into Australian territory. Consistent with the World Trade Organization's SPS Agreement, authority to import goods into Australian territory will also authorise the goods to be imported into a state or territory on the same conditions (if any). The risk assessment process will consider regional differences between states and territories and will allow for different import conditions where differences are based on scientific grounds.

## **Division 2—Prohibited goods and conditionally non-prohibited goods**

### **Clause 173 Prohibited goods**

### **Clause 174 Conditionally non-prohibited goods**

These clauses provide that the Director of Biosecurity and the Director of Human Biosecurity may jointly determine that certain goods or classes of goods that are brought into Australian territory or imported, are prohibited absolutely (prohibited goods) or are prohibited unless certain conditions are satisfied (conditionally non-prohibited goods). The conditions can be in relation to the way the goods are used and may include that the goods not be brought or imported into Australian territory unless a permit, authorising the goods to be bought or imported into Australian territory, has been issued under Division 3 of this Chapter.

The Director of Biosecurity and the Director of Human Biosecurity can only prohibit the bringing in or importation of a good (or class of goods) if they are satisfied that the level of biosecurity risk associated with the goods or the class of goods, is unacceptable and biosecurity measures would not be able to be taken to reduce that level of biosecurity risk to an acceptable level. The power to prohibit the bringing in or importation of goods into Australian territory provides protection from serious diseases and pests posing unacceptably high biosecurity risk coming into Australian territory.

Consistent with the SPS Agreement the Director of Biosecurity and the Director of Human Biosecurity must apply the Australia's ALOP in conducting a risk assessment for the purpose of determining whether particular goods, or a particular class of goods, should be either prohibited goods or conditionally non-prohibited goods.

This clause states that the determinations for prohibited goods and conditionally non-prohibited goods are legislative instruments, but are not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

The decision to determine prohibited or conditionally non-prohibited goods is a technical and scientific decision based on whether the biosecurity risk is able to be satisfactorily managed. Therefore it is appropriate for the Parliament to delegate to the Director of Biosecurity and the Director of Human Biosecurity (whichever relevant) the power to make these determinations. Subjecting these determinations to disallowance could undermine the technical and scientific based decision making and frustrate risk management processes.

These determinations are critical to the management of biosecurity risks posed by the importation of certain types of goods. If these determinations were to be disallowed, all goods would be allowed in regardless of their pest and disease status. This could have a significant impact on the economy and may lead to restrictions being put on Australia's exports by trading partners. In addition, disallowance of a determination made under this clause could lead to inadequate

management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy.

The relevant Director will be able to vary or revoke a determination in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

**Clause 175                    Security may be required in relation to conditionally non-prohibited goods**

This clause provides the Director of Biosecurity with the discretion to require security to be given to conditionally non-prohibited goods that are intended to be, or are brought or imported into Australian territory. The Director of Biosecurity must have regard to criteria prescribed by the regulations when considering whether a security will be required. The regulations may prescribe the range of matters set out in this clause, including the form, amount, timing of the security and circumstances when the security may be kept and used by the Commonwealth.

Securities can be used to ensure that the Commonwealth is not left to meet the costs of applying biosecurity measures to non-compliant goods. This is particularly relevant where the importer of the goods is not an Australian resident as it is difficult to take enforcement action to recover costs for biosecurity measures undertaken with respect to the goods such as treatment, destruction or export of the goods.

If a permit to import conditionally non-prohibited goods is required under this Act, the Director of Biosecurity may refuse to consider the application for the permit until the security is given.

**Division 3—Permits to bring or import goods into Australian territory**

**Clause 176                    Application of this Division**

This Division applies in relation to conditionally non-prohibited goods that must not be brought or imported into Australian territory unless the Director of Biosecurity has granted a permit.

A permit allows the Commonwealth to manage biosecurity risks associated with bringing in conditionally non-prohibited goods into Australian territory. In issuing a permit, the Director of Biosecurity may place conditions on the permit which may for example, relate to managing biosecurity risks for importation and the use or disposal of the goods.

**Clause 177                    Person may apply for permit**

This clause provides that a person may make an application to the Director of Biosecurity for a permit to bring in or import conditionally non-prohibited goods. The permit will authorise the applicant or a person acting on behalf of the applicant to bring or import goods into Australian territory. The permit application must be in a form approved by the Director of Biosecurity and the application must include the information prescribed by the regulations.

Under clause 592, the regulations may prescribe that an application must be accompanied by a specified fee.

Clause 531 provides that the Director of Biosecurity may, by legislative instrument, specify kinds of personal information that are required to be provided with an application for a permit. If personal information is required to be provided with the application and the information is not provided, the application is taken not to have been made.

Permits are used administratively to place conditions on goods, as well as to collect data and track the location of certain classes of goods that may pose a biosecurity risk.



### **Clause 178                    Dealing with application**

This clause provides that the Director of Biosecurity must make a decision in relation to an import permit application within a decision-making period prescribed by the regulations for an application of that kind.

This allows the Director to identify a specific period of time in which a category of applications must be considered. This is required because of the broad range of biosecurity risks posed by imported goods and the various conditions required to manage the risks to an acceptable level. Some applications will be straight forward and require a shorter consideration period. Others will cover goods which pose different levels of biosecurity risk and require a longer decision-making period for the Director to consider whether the biosecurity risks can be managed appropriately.

The decision-making period begins on the day the application was received by the Director. If the Director does not make a decision within the decision-making period, the Director is taken to have refused the application. This is to ensure there is a definite end point where a decision is taken to have been made and the applicant can apply for a review of the decision if they choose.

For the purpose of making a decision regarding an application, the Director can issue a written notice requesting that the applicant, or any other person the Director considers may have information relevant to the application, provide specified information or documents relevant to the application within a specified period.

The initial decision-making period identified in the regulations is extended every time the Director makes a request for information. The period of time for the extension commences when the additional request is made and ends the day the additional information or documents are received by the Director, or the last day of the period identified by the Director in his or her request if the information or documents are not received.

The initial decision making period can also be extended for the purposes of conducting activities prescribed in the regulations. These prescribed activities will assist the Director in assessing an application and considering any conditions required to manage biosecurity risks associated with the import to an acceptable level. For example, it is envisaged that the decision making-period may be extended in circumstances where the biosecurity risks associated with the goods need to be reassessed. The period of time for the extension commences when the activity is started and ends on the day when the activity ends.

This ensures that if the Director requires additional information in order to properly assess an application (particularly more complex applications) and make a decision regarding whether the biosecurity risks can be managed to a satisfactory level, the Director has time to request and receive this information before the decision-making period runs out and a decision to refuse the application is considered to have been made (which attracts review rights under clause 574).

### **Clause 179                    Director of Biosecurity may grant permit**

This clause allows the Director of Biosecurity to grant a permit authorising particular goods or a particular class of goods to be brought or imported into Australian territory when an application is received under clause 177. In making this decision the Director is under an obligation to apply Australia's ALOP to any risk assessment undertaken.

This clause outlines the matters that the Director must take into account in making a decision. The Director must consider:

- if the permit were to be granted, the level of biosecurity risk associated with the goods
- whether it is necessary to impose conditions to reduce the biosecurity risk to an acceptable level, and

- any personal information that is required to be provided with the application for the permit (see clause 531).

In deciding whether to grant a permit, the Director may also consider whether the applicant is a fit and proper person who is likely to adhere to any import conditions (see clause 530) or is an associate of a person whose application for a permit under clause 177 has been refused, as well as any other matters relating to the goods or applicant the Director considers relevant.

The Director may refuse to grant a permit if the applicant is an associate to a person who has been refused a permit under clause 177 or who has had a permit revoked under clause 181. This aims to do prevent a person that the Director has determined should not hold a permit from obtaining another permit via an associate, such as a family member or business partner, on his or her behalf.

The ability to consider other relevant matters provides the Director with flexibility to consider a variety of factors relating to the goods or the applicant, such as the applicants history of complying with permit conditions.

In addition the Director is permitted to refuse to consider an application where the requirement for a security to be paid under clause 175 has not been met.

The Director must issue a permit in writing. In deciding whether to grant a permit, the Director is not subject to directions from the Agriculture Minister in relation to the application (see clause 543). A decision to refuse to grant a permit is reviewable under clause 574.

#### **Clause 180                      Conditions of permit**

This clause provides that a permit issued under clause 179 may be subject to conditions as specified in the permit. This provides the mechanism for ensuring the conditions on conditionally non-prohibited goods are complied with. For example, wood products being imported from overseas may be required as a condition of the permit to undergo fumigation or heat treatment prior to leaving their place of export.

This clause also provides the Director of Biosecurity with the power to, in accordance with the regulations, vary or revoke a condition on a permit, or impose further conditions on the permit. These powers are intended to ensure that the biosecurity risks associated with the bringing in, or importation, of goods continue to be managed to an acceptable level. If the Director is not satisfied this is the case, he or she can require that conditions attached to a permit be varied or revoked; or that further conditions are imposed. For example, where a new biosecurity risk has been identified in relation to goods under a permit, the Director may vary a permit, to impose a condition that manages the newly identified biosecurity risk.

Conditions on a permit may:

- require the holder of the permit to do specified things in relation to the goods to which the permit relates, and
- be required to be met either before or after the goods are brought or imported into Australian territory.

The conditions provide flexibility to manage biosecurity risks associated with goods being brought or imported into Australian territory. Conditions may include a requirement that a good not be used for certain purposes—for example that goods imported as animal feed not be used for human consumption.

A decision to impose, vary or revoke a condition on a permit is reviewable under clause 574.

A person who holds a permit issued under clause 179 may commit an offence or be liable to a civil penalty if the person contravenes a condition of the permit (see clause 187).

**Clause 181                      Variation, suspension or revocation of permit**

This clause provides that the Director may in accordance with the regulations, vary, suspend or revoke a permit issued under clause 179. In deciding whether to vary, suspend or revoke a permit, the Director of Biosecurity is not subject to directions from the Agriculture Minister in relation to the application (see clause 543).

These powers are intended to ensure that the biosecurity risks associated with the bringing in, or importation, of goods continue to be managed to an acceptable level and that conditions on the permit are complied with. If the Director is not satisfied this is the case, the Director can require that a permit be varied, suspended or revoked.

For example, a permit may be varied where additional conditions are required to identify biosecurity risks or revoked where the holder is no longer deemed to be a fit and proper person, or is an associate of a person who has had a permit revoked.

A decision to impose, vary or revoke a condition on a permit is reviewable under clause 574.

Where a permit is revoked, any permit conditions will continue to apply to the goods that have previously been brought in or imported. This ensures the ongoing management of biosecurity risks.

**Division 4—Suspended goods**

**Clause 182                      Director of Biosecurity may suspend bringing or importation of goods into Australian territory for a period**

This clause outlines when the Director of Biosecurity may make a determination to suspend the bringing or importation of specified goods or a class of goods for a period of up to six months. This suspension extends to goods for which a permit has been issued (see clause 184). The Director may only suspend the bringing in or importation of specified goods or class of goods if he or she is satisfied that the level of biosecurity risk associated with the goods, or class of goods, is unacceptable. These goods are called ‘suspended goods.’ For example, if there was a foot-and-mouth disease outbreak in another country, the Director may make a determination suspending the bringing in or importation of all animals or specified animal product into Australian territory from that country.

In making this decision the Director is under an obligation to apply Australia’s ALOP to any risk assessment undertaken. The determination made under this clause must set out the reasons for the suspension.

This clause states that a suspended good determination is a legislative instrument, but is not subject to disallowance under section 41 of the *Legislative Instruments Act 2003*.

The decision to suspend the importation or bringing in of specified goods or a specified class of goods is a technical and scientific decision based on whether the biosecurity risk is able to be satisfactorily managed. Therefore it is appropriate for the Parliament to delegate to the Director the power to make this determination. Subjecting these determinations to disallowance could undermine the technical and scientific based decision making and frustrate risk management processes.

A determination made under this clause is critical to the management of biosecurity risks posed by the importation of goods. If these determinations were to be disallowed, all goods would be allowed in, regardless of their pest and disease status. This could have a significant impact on the economy and may lead to restrictions being put on Australia's exports by trading partners. In addition, disallowance of a determination made under this clause could lead to inadequate management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy.

A determination made under this clause will prevail over any determination made under clause 174 to the extent of the inconsistency. This ensures that the suspension will take precedence. This is appropriate given the potential seriousness of biosecurity risks associated with a suspension.

**Clause 183                      Variation of determination suspending bringing or importation of goods into Australian territory**

The Director of Biosecurity can vary a determination made under clause 182 to extend the period of suspension specified in the determination for a further period of up to six months. If after this time the level of biosecurity risk is still unacceptable, the determination of prohibited goods will be amended. The period of suspension can be extended more than once.

This clause does not limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to a determination under clause 182.

**Clause 184                      Effect on permit of suspended goods determination**

Where a determination is made under clause 182 suspending the bringing in or importation of prescribed goods, it is deemed that any current permits in respect of those suspended goods are also suspended for the time specified.

The intention is to ensure that any permits issued prior to the suspension of the good in the determination are automatically suspended at the time the determination comes into effect to ensure that these goods do not enter Australian territory. The suspension will only take effect from the date of the determination, and will not retrospectively affect the validity of the permit that was issued prior to the determination being made. Permit holders will be directly notified in writing that permits have been suspended. In addition to directly notifying affected import permit holders, a public notification will usually be published on the import condition database (currently ICON) and through an industry notice both published on the Agriculture Department website and distributed to major stakeholders.

A person who was the holder of a permit that is taken to have been suspended may commit an offence and be liable to a civil penalty provision if the person contravenes a condition of the permit that continues to apply because of subclause 181(3) (see clause 187).

**Division 5—Offences and civil penalty provisions**

**Clause 185                      Bringing or importing prohibited goods or suspended goods into Australian territory**

This clause creates offences for bringing or importing prohibited goods or suspended goods into Australian territory. The clause includes aggravated offences where commercial advantage is obtained, where harm is caused to the environment, or where there are economic consequences.

A person who brings or imports into Australian territory prohibited goods or suspended goods commits an offence and is liable to a civil penalty. The maximum penalty for a basic fault based

contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

A person who brings or imports into Australian territory prohibited goods or suspended goods and obtains or may obtain a commercial advantage over the person's competitors or potential competitors commits an offence. The maximum penalty for a contravention of this kind is ten years imprisonment, or 2000 penalty units, or both. An example would be the importation of prohibited plant bulbs or seeds for a nursery business and thereby creating a commercial advantage over other nurseries.

A person who brings or imports into Australian territory prohibited goods or suspended goods and the importation has caused or has potential to cause harm to the environment or has had or has the potential to have economic consequences commits an offence. The maximum penalty for a contravention of this kind is ten years imprisonment, or 600 penalty units, or both. For example a person intentionally brings in a biological agent with an animal disease with the intention to cause damage to Australia's livestock industries. This offence is intended to protect the integrity of Australia's borders.

The clause clarifies that if a person is found not guilty of the offences relating to obtaining commercial advantage, causing harm to the environment or causing economic consequences, the person may be found guilty of the basic fault based offence.

The penalties in this clause are higher than those outlined in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. Obtaining a commercial advantage from bringing in or importing prohibited goods are aggravated circumstances that warrant the additional penalty because of the added monetary benefit that can be gained by an individual involved in this behaviour.

Additionally, these types of goods pose significant biosecurity risks, which may result in serious damage to plant and animal health, Australia's local industries, the economy and the environment. Depending upon the nature and scale of the biosecurity risk, the social and economic costs of controlling and cleaning up the damage may be far greater than even the maximum penalties imposed by the Bill. Therefore, the overall objective is to increase compliance with the Act and decrease the need to resort to prosecution to achieve this aim.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied. The penalties for this offence are intended to reinforce the deterrent effect of the Bill and allow the court a greater capacity to respond meaningfully and proportionally to the worst breaches.

**Clause 186                      Contravening conditions applying to conditionally non-prohibited goods brought or imported into Australian territory**

This clause creates offences for bringing or importing conditionally non-prohibited goods into Australian territory and contravening a condition specified in the determination made under clause 174. The clause includes aggravated offences where commercial advantage is obtained or where harm is caused to the environment or there are economic consequences.

A person who brings or imports into Australian territory conditionally non-prohibited goods and contravenes a condition specified in the determination commits an offence and is liable to a civil penalty. The maximum penalty for a basic fault based contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

A person who brings or imports into Australian territory conditionally non-prohibited goods and contravenes a condition specified in the determination made under subclause 174(1) and obtains a commercial advantage over the person's competitors or potential competitors by this contravention commits an offence. The maximum penalty for contravention of this kind is ten years imprisonment, or 2000 penalty units, or both. For example, an importer may be granted a permit which imposes the condition that a good is only permitted for animal use but instead uses the good for human consumption in order to avoid the cost of the requisite permit.

A person who brings or imports into Australian territory conditionally non-prohibited goods and contravenes a condition specified in the determination made under subclause 174(1) and the contravention has caused or has potential to cause harm to the environment or has had or has the potential to have economic consequences commits an offence. The maximum penalty for contravention is ten years imprisonment, or 600 penalty units, or both.

The penalties in this clause are higher than those outlined in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. Obtaining a commercial advantage from contravening a condition specified in a determination made under subclause 174(1) are aggravated circumstances that warrant the additional penalty because of the added monetary benefit that can be gained by an individual involved in this behaviour.

Additionally, these types of goods pose significant biosecurity risks, which may result in serious damage to plant and animal health, Australia's local industries, the economy and the environment. Depending upon the nature and scale of the biosecurity risk, the social and economic costs of controlling and cleaning up the damage may be far greater than even the maximum penalties imposed by the Bill. Therefore, the overall objective is to increase compliance with the Act and decrease the need to resort to prosecution to achieve this aim.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied. The penalties for this offence are intended to reinforce the deterrent effect of the Bill and allow the court a greater capacity to respond meaningfully and proportionally to the worst breaches. The clause clarifies that if a person is found not guilty of the offences relating to obtaining commercial advantage, causing harm to the environment or causing economic consequences, the person may still be found guilty of the basic fault based offence.

It will be an exception to the offence, if the person who brought or imported the goods into Australian territory:

- did not do the act, or omit to do the act, that constituted the failure to comply with the condition
- did not aid, abet, counsel or procure that act or omissions, and
- was not in any way, knowingly concerned in, or party to, that act or omission (whether directly or indirectly and whether by an act or omission of the person).

This provides an exception to a person who brought or imported the goods and who did not contravene or was not involved in the contravention of a condition.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 187                    Contravening conditions of a permit**

This clause creates offences for contravening a condition of a permit issued under clause 179. The clause also creates an offence for contravening a condition of a permit where a permit has been suspended or revoked under clause 181 and the condition on the permit continues to apply due to subclause 181(3).

A person who contravenes a condition on a permit which is in force commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

A person who contravenes a condition on a permit which has been suspended or revoked and the conditions on the permit continue to apply due to subclause 181(3) commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The penalties in this clause are higher than those outlined in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. Given the potential seriousness of the biosecurity risks posed by conditionally non-prohibited goods it is appropriate that the court be able to impose a high penalty. For example, conditions placed on a permit are intended to reduce the level of biosecurity risk to an acceptable level. If the conditions are not complied with, the goods will pose an unacceptable biosecurity risk which has the potential to cause serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 188                    Receiving or possessing prohibited or suspended goods brought or imported into Australian territory**

This clause sets out a strict liability offence for a person who receives, or has in their possession prohibited or suspended goods that have been imported into Australian territory whilst those goods were determined to be prohibited or suspended goods.

A person who contravenes this clause commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is 60 penalty units.

This is appropriate as there are strong public safety concerns in ensuring that prohibited goods and suspended goods are not to be managed outside of the specified and managed pathway to which they have been restricted. By creating a strict liability offence when a person receives or possesses prohibited or suspended goods, each person with any potential involvement in the movement of these goods is able to be prosecuted.

This means that the prosecution will have to prove that the person contravened the provision, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (section 9.2) of honest and reasonable mistake of fact.

See the Human Rights Compatibility Statement for further information on this strict liability offence.

It will be an exception to this offence if:

- the goods were not brought or imported into Australian territory
- the defendant did not bring or import the goods into Australian territory
- the defendant brought or imported the goods into Australian territory, but at the time they were brought in they were not prohibited goods or suspended goods, and
- the goods are the progeny of other goods that were legally brought or imported into Australian territory.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

The findings of the Commonwealth Ombudsman support the approach towards strict liability offences in suspected importation offences.<sup>7</sup> As highlighted in paragraph 4.5 of the report, it is not presently an offence to own illegally imported goods, whilst it is an offence to import those same goods. Clause 188 gives effect to the recommendations of the Commonwealth Ombudsman by requiring the defendant to adduce evidence that either they did not import or bring in the prohibited or suspended goods, or that the goods are the progeny of other legally imported goods.

## **Chapter 4—Managing biosecurity risks: conveyances**

### **Part 1—Introduction**

#### **Clause 189                      Objects of this Chapter**

This clause provides that the main objects of Chapter 4 are:

- to provide for the assessment of the level of biosecurity risk associated with conveyances entering Australian territory (see clause 12 for the meaning of Australian territory) from outside Australian territory, including by:
  - controlling the places where those conveyances can land or be moored,
  - controlling the movement of conveyances that are subject to biosecurity control while they are in Australian territory
- to provide for biosecurity measures to be taken in relation to conveyances where the level of biosecurity risk is considered unacceptable, and
- to give effect to Australia’s rights and obligations in relation to ship sanitation for the purposes of the International Health Regulations.

In this Chapter, a conveyance does not include a conveyance being carried on board another conveyance (see clause 16 for the meaning of conveyance).

### **Part 2—Conveyances entering Australian territory etc.**

#### **Division 1—Introduction**

#### **Clause 190                      Simplified outline of this Part**

This outline sets out the Part’s objectives. Key provisions include when conveyances become subject to biosecurity control, pre-arrival reporting, powers to assess the level of biosecurity risk,

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<sup>7</sup> Commonwealth Ombudsman 2009, *Compliance and investigations activities of the Australian Quarantine and Inspection Service (AQIS) Report One: audit of policies, procedures, systems and processes* no. 13, August 2009, p 18, accessed at: [http://www.ombudsman.gov.au/files/investigation\\_2009\\_13.pdf](http://www.ombudsman.gov.au/files/investigation_2009_13.pdf)



powers to undertake biosecurity measures, persons leaving conveyances that are subject to biosecurity control, releasing conveyances from biosecurity control and when quarantine signals must be displayed.

## **Division 2—Conveyances that are subject to biosecurity control**

### **Clause 191 Aircraft and vessels entering Australian territory**

This clause applies to an aircraft or vessel (see clause 9 for the definitions of aircraft and vessel) that has entered Australian territory during a flight or voyage that commenced outside of Australian territory. An aircraft or vessel that arrives from outside Australian territory provides a direct pathway for biosecurity risks to enter into Australian territory.

The aircraft or vessel becomes subject to biosecurity control when the aircraft or vessel enters Australian territory. When an aircraft or vessel becomes subject to biosecurity control, a range of powers in this Part become available to assess and manage any biosecurity risks associated with the aircraft or vessel. This trigger point for an aircraft or vessel becoming subject to biosecurity control reflects the need to assess biosecurity risks associated with aircraft or vessel entering Australian territory from overseas, and enable management of those risks.

An aircraft or vessel which is subject to biosecurity control will remain subject to biosecurity control until it has been released from biosecurity control in accordance with Division 7 of this Part. A conveyance will be released when it no longer poses a biosecurity risk or once it leaves Australian territory (see clause 218).

However, an aircraft or vessel which leaves Australian territory on a journey between places in Australia territory will become subject to biosecurity control again when it re-enters Australian territory. This ensures that the powers required to assess and manage any biosecurity risks associated with the aircraft or vessel are available if they are required and reflects that the aircraft or vessel still poses a biosecurity risk.

For example, a vessel from overseas may arrive at a port in Melbourne, unload goods, and then travel on to a port in Tasmania. This provision ensures that if the vessel happens to leave Australian territory (i.e. outside of 12 nautical miles) on its voyage to the Tasmanian port, and is released from biosecurity control under clause 218, the vessel will become subject to biosecurity control again when it re-enters Australian territory and any risks associated with the vessel can be assessed and managed when it arrives in Tasmania.

### **Clause 192 Conveyances exposed to other conveyances that are subject to biosecurity control**

This clause provides that a conveyance that is not already subject to biosecurity control will become subject to biosecurity control if it is exposed to (see clause 17 for the definition of 'exposed to'):

- an aircraft or vessel that is subject to biosecurity control because it enters Australian territory on a journey that commenced outside of Australian territory (see clause 191)
- a conveyance that is subject to biosecurity control under this clause (i.e. an exposed conveyance), or
- goods that are subject to biosecurity control and of a kind prescribed in the regulations.

This ensures that a conveyance can become subject to biosecurity control if it interacts with another conveyance or goods that poses a biosecurity risk, allowing biosecurity officers to assess and manage any biosecurity risks that may have transferred from the second conveyance to the first.

For example, a vessel is moored next to a second vessel that is infested with Asian Gypsy Moths. These moths can fly or be blown between the two vessels, which means there is now a risk that the first vessel has become infested. This clause allows the first vessel to be considered an exposed conveyance and become subject to biosecurity control, giving biosecurity officers access to powers to assess and manage any risks associated with the first vessel.

A conveyance will also become subject to biosecurity control if, in the course of a journey, it leaves Australian territory and is exposed to another conveyance while it is outside Australian territory, then re-enters Australian territory. An exposed conveyance will remain subject to biosecurity control, until it is released (see clause 218).

Similar to clause 191, this ensures that conveyances that travel between places in Australian territory, and in doing so leave Australian territory, become subject to biosecurity control again if they re-enter Australian territory. This gives biosecurity officers the powers required to assess and manage any biosecurity risks associated with that conveyance.

The Director of Biosecurity can determine by legislative instrument that this clause does not apply in relation to specified conveyances or specified conveyances in specified circumstances. This means that an exemption can be given by the Director for different types of interactions between different types of conveyances that pose a minimal biosecurity risk and those conveyances will not become subject to biosecurity control. For example, an exemption may be given to a Royal Australian Navy vessel that interacts with another vessel to refuel.

The Director may vary or revoke a legislative instrument giving an exemption under subsections 33(3) and (3AA) of the *Acts Interpretations Act 1901*.

### **Division 3—Pre-arrival reporting etc.**

#### **Clause 193                    Pre-arrival reporting**

This clause provides that the operator of an aircraft or vessel must give a pre-arrival report if:

- the aircraft or vessel intends to enter, or enters, Australian territory on a flight or voyage that commenced outside Australian territory
- the aircraft or vessel intends to enter, or enters, Australian territory after being exposed to another conveyance while outside Australian territory
- the aircraft or vessel intends to be exposed to a conveyance that is subject to biosecurity control, or
- the aircraft or vessel intends to be exposed to prescribed goods referred to in clause 192 that are subject to biosecurity control.

Pre-arrival reporting allows the Commonwealth to gather important information about a conveyance to assist with the accurate and timely assessment and management of biosecurity risk. This may include information about where a conveyance has travelled, information about the people and goods on board, or information about the conveyance itself. Biosecurity officers can use this information to determine what risk management activities might be necessary when the conveyance arrives in Australian territory.

The obligation to provide a pre-arrival report rests with the operator of the aircraft or vessel, as he or she is the person who is in charge of the conveyance and has access to the required information (see clause 21 for the definition of operator).

A pre-arrival report must:

- include the information in relation to the aircraft or vessel that is prescribed by the regulations
- be given in the manner, and to the person prescribed by the regulations
- be given during the period prescribed by the regulations (which may be at any time before or after the aircraft or vessel enters Australian territory, or is exposed to another conveyance in Australian territory), and
- be in a form or forms approved by the Director of Biosecurity.

The information required may change over time, as the nature and levels of biosecurity risks change. Prescribing the more detailed requirements for a pre-arrival report in the regulations allows the Commonwealth to respond more quickly and flexibly to any change in risk.

The regulations may also prescribe different reporting requirements for different classes of aircraft or vessels. This recognises that different classes of aircraft or vessels do not always pose the same level of biosecurity risk and it is not always appropriate for them to be subject to the same requirements.

A person who contravenes the requirement to give a pre-arrival report commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is two years imprisonment, or 120 penalty units, or both. The maximum civil penalty for contravention is 120 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Bill create offences and civil penalties for providing false or misleading information or documents.

The regulations may also prescribe exceptions to the requirement to provide a pre-arrival report. This is intended to allow reporting by exception for particular aircraft and vessels, where a report is only required if certain criteria is met. For example, an aircraft operator whose aircraft poses a low risk may be granted an exception where he or she is only required to provide a pre-arrival report if a specific thing happens (like a death on board).

It is also intended that exemptions will apply in relation to operators of aircraft or vessels which do not pose an unacceptable level of biosecurity risk. For example, exceptions to pre-arrival reporting requirements may apply to vessels that only travel between ports in Australian territory and installations outside Australian territory in circumstances where the installation only interacts with vessels departing from Australian territory. In these circumstances there is a low level of biosecurity risks associated with the interaction between the vessel and the installation and the pre-arrival report is not required to assess biosecurity risks.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

This clause applies whether or not the person is in Australian territory when he or she is required to give a pre-arrival report. This is to ensure that the pre-arrival report can be required before the aircraft or vessel enters Australian territory and received with enough time for a biosecurity officer to assess potential risks and determine what measures might be required to manage them before the aircraft or vessel arrives at a port or landing place.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as collecting accurate and timely information through a pre-arrival report will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and whether biosecurity measures are required.

Allowing a person to use the privilege and refuse to provide important information could result in a significant biosecurity risk remaining unmanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain the routine information required in a pre-arrival report. This is impractical and time consuming.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Clause 194                    Pre-arrival reporting – requirement to give additional or corrected information**

This clause requires an operator of an aircraft or vessel that has provided a pre-arrival report under clause 193 to provide additional or corrected information as soon as practicable if he or she becomes aware the original information is incomplete or incorrect. This obligation applies whether or not the person is in Australian territory when he or she becomes aware that the original information is incomplete or incorrect. This means that a person must provide updated information once he or she realises the information provided in the pre-arrival report is incomplete or where circumstances have changed resulting in the information previously provided no longer being correct. This ensures that biosecurity officers are provided with the most accurate information possible to assess (or re-assess) and manage biosecurity risks.

A person who contravenes the requirement to provide additional or corrected information commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is two years imprisonment, or 120 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Bill create offences and civil penalties for providing false or misleading information or documents.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as ensuring the information contained in a pre-arrival report is correct and complete will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address any risk.

Allowing a person to use the privilege and withhold correct or further information, could result in a significant biosecurity risk being mismanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain correct or further information relating to the pre-arrival report. This is impractical and time consuming.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Clause 195**                    **Power to obtain extra information relating to an aircraft or vessel covered by a pre-arrival report**

This clause provides a biosecurity officer with the power to require additional information in relation to a pre-arrival report under clause 193, prior to the aircraft or vessel becoming subject to biosecurity control. This will allow biosecurity officers to make a preliminary assessment of the level of biosecurity risks associated with the aircraft or vessel, ensuring that appropriate resources can be allocated to assess the risks once the aircraft or vessel arrives in Australian territory.

This clause provides biosecurity officers with the power to require a person to:

- answer questions or provide information in writing in relation to the aircraft or vessel, where a biosecurity officer suspects on reasonable grounds that the person has information in relation to the aircraft or vessel, or
- produce documents in relation to the aircraft or vessel, where a biosecurity officer suspects on reasonable grounds that the person has custody or control of specific documents in relation to the aircraft or vessel.

A biosecurity officer may make copies of, or take extracts from any document that has been produced, and may remove the document from the place at where it was produced in order to make copies or take extracts.

These powers are required to ensure that if a person has provided a pre-arrival report under clause 193 and there is insufficient information to allow a biosecurity officer to accurately assess the biosecurity risk posed, that officer can request that additional information be provided.

This clause provides that the obligation to provide additional information applies and is required to be complied with, regardless of whether the person is in Australian territory or overseas. This ensures that biosecurity officers will have access to the information when required to make an assessment of the level of biosecurity risk associated with the aircraft or vessel.

A person who contravenes the requirement to answer questions, provide information or produce documents commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is two years imprisonment, or 120 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Bill create offences and civil penalties for providing false or misleading information or documents.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as ensuring the information contained in a pre-arrival report is correct and complete will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address any risk.

Allowing a person to use the privilege and refuse to answer questions, give information or produce documents relating to the aircraft or vessel that are the subject of a report in clause 193, could result in a significant biosecurity risk remaining unmanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain further information to assess the level of biosecurity risk associated with the goods. This is impractical and time consuming.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Clause 196**                    **Persons on incoming aircraft or vessel may be required to provide information to assess biosecurity risk**

This clause provides that a person who enters, or intends to enter, Australian territory on an incoming aircraft or vessel and is included in a prescribed class of persons, must provide information required by, and in a manner approved by the Director of Biosecurity.

This allows the Director of Biosecurity to determine specific categories of persons entering Australian territory that will be required to provide specific information about themselves or their goods for the purpose of assessing biosecurity risk. For example, a person arriving from a country where there has been a biosecurity risk outbreak might be required to provide additional information about where he or she has travelled and the goods being brought back into Australia to enable a more detailed assessment of the potential biosecurity risk.

A person who contravenes the requirement to provide information is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, section 137.1 of the *Criminal Code* and clause 532 of this Bill create an offence and civil penalty for providing false or misleading information.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as collecting accurate and timely information from individuals who may be exposed to, or carrying goods from specific area known to pose a biosecurity risk, will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and whether biosecurity measures are required.

Allowing a person to use the privilege and refuse to provide important information, could result in a significant biosecurity risk remaining unmanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain the routine information required from incoming passengers. This is impractical and time consuming.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Division 4—Assessment of level of biosecurity risk**

**Clause 197**                    **Biosecurity risk assessment powers**

This clause provides that the assessment powers in this Division apply and can be exercised in relation to a conveyance that is subject to biosecurity control for the purposes of assessing the level of biosecurity risk.

**Clause 198**                    **Securing conveyance**

This clause provides a biosecurity officer with the power to secure the conveyance in a specified manner – for example, by giving a direction to ensure that the conveyance not be moved. A biosecurity officer may direct the person in charge or the operator of the conveyance to secure the conveyance. This period must not exceed 48 hours, but another direction can be given once this period expires under subsection 33(1) of the *Acts Interpretation Act 1901*. Placing a time period over how long a conveyance can be secured ensures that the conveyance is only secured for as long as is necessary to assess the level of biosecurity risk and inconveniences the person in charge or the operator as little as possible.

This will allow a biosecurity officer to exercise the other assessment powers in this Division to assess the level of biosecurity risk in relation to the conveyance, and will limit the possibility that any biosecurity risk associated with the conveyance will spread.

A direction to secure a conveyance may include a direction that restricts the movement of the conveyance, restricts access to the conveyance or restricts access to a specified part of the conveyance (such as an area where food is stored). A direction to secure a conveyance does not prevent a person on board from leaving the conveyance.

A person who contravenes a direction to secure a conveyance is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, a person may be liable for a civil penalty for moving, dealing with or interfering with a conveyance that has been secured in accordance with a direction given under this clause (see clause 204).

If judicial review is sought in relation to a direction under this clause, the direction will remain in force until a court determines the validity of the direction (clause 538). This ensures that any biosecurity risk remains secure while a final decision is made.

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

#### **Clause 199                    Inspecting conveyance**

This clause provides a biosecurity officer with the power to conduct a physical inspection of a conveyance. This ensures that an officer can gather information and assess the level of biosecurity risk associated with the conveyance. For example, inspecting the hull of a vessel to assess whether there is any biofouling present.

#### **Clause 200                    Asking questions about conveyance**

This clause provides a biosecurity officer with the power to require a person to answer questions or provide information in writing in relation to a conveyance, if the biosecurity officer suspects on reasonable grounds that the person has that information.

This will ensure that the biosecurity officer has access to all the necessary information to make an accurate and timely assessment of biosecurity risk associated with the conveyance. For example, a biosecurity officer may ask questions or seek information about the previous movements of the conveyance to determine whether the conveyance has been in a location known to have specific biosecurity risk, such as a location known to be infested with Giant African snails.

A person who contravenes the requirement to answer questions or provide information is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, section 137.1 of the *Criminal Code* and clause 532 of this Bill create an offence and a civil penalty for providing false or misleading information.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as it will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address that risk.

Allowing a person to use the privilege and refuse to answer questions or provide important information, could result in a significant biosecurity risk remaining unmanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain the routine information about the conveyance. This is impractical and time consuming.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Clause 201                    Requiring documents relating to conveyance to be produced**

This clause provides a biosecurity officer with the power to require a person to produce specified documents in relation to a conveyance. Where the biosecurity officer suspects on reasonable grounds that a person has custody or control of specific documents in relation to a conveyance, the biosecurity officer may require the person to produce those documents. A biosecurity officer may make copies of, or take extracts from a document that has been produced and may remove the document from the place where it was produced in order to make copies or take extracts.

Similar to clause 200, this power assists a biosecurity officer to assess the level of biosecurity risk associated with a conveyance, by ensuring that the biosecurity officer has access to all the necessary information to determine the level of biosecurity risk.

A person who contravenes the requirement to produce documents is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, section 137.2 of the *Criminal Code* and clause 533 of this Bill create an offence and civil penalty for providing false or misleading documents.

This clause is not subject to the privilege against self-incrimination (see clause 635). Similarly to the justification provided in clause 200, the privilege against self-incrimination is abrogated to give biosecurity officers timely access to documents to effectively assess risks and ensure that appropriate biosecurity measures are in place to manage identified biosecurity risks (see clause 635 for further discussion of the privilege against self-incrimination).

**Clause 202                    Movement of conveyance**

This clause provides a biosecurity officer with the power to give directions to the person in charge or the operator of the conveyance to:

- not move, deal with or interfere with the conveyance
- move the conveyance as soon as practicable to a specified place (except outside of Australian territory), or
- comply with any other direction relating to the movement of the conveyance.

Biosecurity officers can also cause the conveyance to be moved to another place (except outside of Australian territory).

This will allow a biosecurity officer to issue movement directions in relation to a conveyance to ensure that appropriate biosecurity risk assessment and management activities can be carried out. For example, a vessel that has travelled from a location that is known to have Asian gypsy moth may be directed to move to an area away from other vessels. The vessel can then be assessed at a place where there is no risk of any infestation spreading and where management activities can quickly be conducted if they are required.

The power to issue a direction under this clause has been restricted to ensure that an aircraft or vessel cannot be directed outside of Australian territory for the purpose of assessing biosecurity risk. This is because such a direction is more invasive in nature and is not appropriate, as it has not been established whether there is an unacceptable level of biosecurity risk associated with the aircraft or vessel. A direction to move a conveyance does not prevent a person on board the conveyance from leaving that conveyance.



A person who contravenes a direction in relation to the movement of a conveyance is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, a person may be liable to a civil penalty for moving, dealing with or interfering with a conveyance that has been secured in accordance with a direction given under this clause (see clause 204).

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

**Clause 203                      Biosecurity control notice may be affixed to conveyance or given to person in charge of conveyance**

This clause provides a biosecurity officer with the power to affix a biosecurity control notice to, or near to a conveyance, or to give a biosecurity control notice to the person in charge of the conveyance. This notice is used to inform the person that the movement of the conveyance is restricted, so that a biosecurity officer can carry out an assessment of the biosecurity risk associated with the conveyance.

A person must not interfere with, remove or deface the notice affixed to a conveyance, unless the person:

- is authorised to do so under an approved arrangement (see clause 10)
- has been given a direction under this Act by a biosecurity official, or
- has permission under clause 557.

An unauthorised person who interferes with, removes or defaces the notice is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, a person may be liable to a civil penalty for moving, dealing with or interfering with a conveyance that has been secured in accordance with a direction given under clause 204.

It is an exception if the person is authorised to engage in the conduct under this Act or under another Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 204                      Unauthorised persons must not move etc. conveyance in relation to which direction has been given**

This clause applies to a conveyance:

- that has been secured in accordance with a direction given under clause 198
- in relation to which a direction relating to movement has been given
- that has been moved under clause 202, or
- that a biosecurity control notice has been affixed to under clause 203.

A person must not move, deal or interfere with these conveyances unless the person:

- is authorised to do so under an approved arrangement
- has been given a direction under this Act by a biosecurity official, or
- has permission under clause 557.

An unauthorised person who moves, deals or interferes with the conveyance is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

It is an exception if the person is authorised to engage in the conduct under this Act or under another Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

## **Division 5—Biosecurity measures to manage unacceptable level of biosecurity risk**

### **Clause 205 Biosecurity measures may be required in relation to conveyance**

This clause provides that where a biosecurity officer suspects, on reasonable grounds, that the level of biosecurity risk associated with a conveyance that is subject to biosecurity control is of an unacceptable level, the officer may require biosecurity measures to be taken in relation to the conveyance as set out in this Division.

### **Clause 206 Movement of certain aircraft and vessels**

This clause applies in relation to aircraft and vessels that are subject to biosecurity control because they have entered or re-entered Australian territory (see clause 191). A biosecurity officer may direct the person in charge or the operator of the aircraft or vessel:

- not to move, deal with or interfere with the aircraft or vessel
- to move the aircraft or vessel, as soon as practicable, to a specified place (which may be outside of Australian territory), or
- comply with any other direction relating to the movement of the aircraft or vessel.

A biosecurity officer can also cause an aircraft or vessel to be moved to another place, which may be outside of Australian territory.

This allows biosecurity officers to direct or move a conveyance to a location where risk management activities can be undertaken and help prevent the pest or disease from spreading and establishing in Australian territory. For example, an officer may give a direction to a vessel with a Burnt Pine Longicorn beetle infestation to move to another location where the infestation can be managed with a reduced risk of infesting other vessels.

A direction to move an aircraft or vessel, or causing an aircraft or vessel to move outside of Australian territory, can be justified in these circumstances as the level of biosecurity risk has been assessed as unacceptable and removal can be the most effective way to mitigate the risk posed. Before a direction can be given or the conveyance caused to be moved to a place outside of Australian territory, the biosecurity officer must have written approval from the Director of Biosecurity. In making the decision to direct or cause a conveyance to be removed from Australian territory, the Director must consider the principles in clause 32. The application of clause 32 means that the powers in this clause must be exercised in accordance with the principles set out in that clause. This is to ensure that an official with the appropriate level of responsibility is making a decision that is potentially invasive and may impact upon his or her rights (see clause 32 for further information).

The person in charge or the operator of the aircraft or vessel who has been given a direction and does not comply with the direction commits an offence and is liable to a civil penalty (see clause 215). In addition, the person in charge of the aircraft or vessel commits an offence and is liable to a civil penalty if the operator of the aircraft or vessel contravenes this clause, and the operator of the aircraft or vessel commits an offence and is liable to a civil penalty if the person in charge of the aircraft or vessel contravenes this clause. The maximum penalty for a contravention

is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

Making the person in charge and the operator jointly liable ensures that both persons who are responsible for the conduct of the aircraft or vessel can be given a direction in relation to the aircraft or vessel and be held responsible if that direction is not complied with. For example, the person in charge might be an airline carrier staff member who is responsible for scheduling flights and determining where an aircraft lands, while the operator might be a pilot who lands the aircraft. Both are responsible for the movement of the aircraft and for ensuring that any directions are complied with.

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

### **Clause 207                    Movement of exposed conveyances**

This clause applies in relation to an exposed conveyance that is subject to biosecurity control because it has been exposed to another conveyance that is subject to biosecurity control (clause 192). A biosecurity officer has the power to give to the person in charge or operator of the conveyance:

- a direction not to move, deal with or interfere with the conveyance
- a direction to move the conveyance, as soon as practicable, to a specified place (except outside of Australian territory), or
- any other direction relating to the movement of the conveyance.

A biosecurity officer can also cause the conveyance to be moved to another place, except outside of Australian territory.

Similar to clause 206, this power is required to ensure that biosecurity officers can move a conveyance to a place where biosecurity measures can be carried out. A direction must not be given to move the vessel outside Australian territory. The power to issue a direction under this clause has been restricted to ensure that an aircraft or vessel cannot be directed outside of Australian territory for the purpose of assessing biosecurity risk. This is because such a direction is more invasive in nature and this is not appropriate, as it has not been established whether there is an unacceptable level of biosecurity risk associated with the aircraft or vessel. A direction to move a conveyance does not prevent a person on board the conveyance from leaving that conveyance.

The person in charge or the operator of the conveyance who has been given a direction and does not comply with the direction commits an offence and is liable to a civil penalty (clause 215). In addition, the person in charge of the conveyance commits an offence and is liable to a civil penalty if the operator of the conveyance contravenes this clause, and the operator of the conveyance commits an offence and is liable to a civil penalty if the person in charge of the conveyance contravenes this clause (the policy reasoning for joint liability is the same as for clause 206). The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

### **Clause 208 Treatment of conveyance**

This clause provides a biosecurity officer may require a conveyance to be treated in a specified manner.

If the conveyance is a high-value conveyance – that is the value of the conveyance is greater than the amount prescribed in the regulations – the conveyance must not be treated in a way that the biosecurity officer suspects may damage the conveyance without the written approval of the Director of Biosecurity. This extra step reflects the impact ordering such a treatment might have on the owner of the conveyance and the potential loss of value caused by the treatment.

Regardless of the value of the conveyance, if the treatment might damage the conveyance, the person in charge or the operator of the conveyance must be asked to agree to the treatment (see clause 209).

This power ensures that a biosecurity officer can order necessary treatments to manage biosecurity risks and reduce those risks to an acceptable level. For example, a biosecurity officer may require a conveyance with infestation to be fumigated or disinfected.

### **Clause 209 Treatment that may damage conveyance**

This clause outlines the requirements for notifying the person in charge or the operator of a conveyance where a biosecurity officer suspects on reasonable grounds that the treatment required under clause 208 is likely to damage the conveyance.

Before any treatment is carried out on the conveyance, a biosecurity officer must, by notice in writing, inform the person in charge or operator of the conveyance that the conveyance is required to be treated in a specified manner, which is likely to result in damage to the conveyance and request the person in charge or operator to agree to the treatment of the conveyance.

However, if a biosecurity officer suspects on reasonable grounds that there is a high level of biosecurity risk associated with the conveyance that must be treated as soon as practicable, the officer can carry out the specified treatment without having to provide the notification.

If a notice is given to the person in charge or operator of the conveyance requesting their agreement to the treatment, and the person does not respond or does not agree to the treatment within 30 days, a biosecurity officer may in writing request that the person arrange for the conveyance to be dealt with or destroyed in a specified manner, or removed from Australian territory, within the period in the request.

Notice requirements ensure that a biosecurity officer can take steps to address biosecurity risks, while still giving the person in charge or the operator of a conveyance the choice of any available options for how those risks can be managed and a reasonable opportunity to carry it out.

However, if the person in charge or the operator of the conveyance does not comply with the notice by dealing with a conveyance as specified in the notice and within the required timeframe, the biosecurity officer can take further action to ensure that the risk is managed. A biosecurity enforcement officer may, with the written approval of the Director of Biosecurity, take possession of the conveyance and then a biosecurity officer can cause the conveyance to be removed from Australian territory, destroyed or otherwise disposed of.

Before providing written approval, the Director must consider the principles in clause 32. The application of clause 32 means that the powers in this clause must be exercised in accordance with the principles set out in that clause. This ensures that a more invasive decision to require treatment that might damage a conveyance, remove a conveyance from Australian territory or destroy a

conveyance (which is likely to be high value), more appropriately sits at a higher level of responsibility and must be made in light of protections designed to ensure a person's rights are adequately considered (see clause 32).

A biosecurity enforcement officer must not take possession of the conveyance unless the owner has consented in writing or the taking of possession is authorised by a conveyance possession warrant. This ensures that the officer has an appropriate level of authority before he or she can take possession of a conveyance and exercise powers. (See Parts 3 and 4 of Chapter 9 for the obligations and powers of biosecurity enforcement officers in taking possession of a conveyance under warrant).

If a conveyance is to be destroyed, a biosecurity officer can cause any goods on board the conveyance to be removed before it is destroyed. This ensures that the officer can make sure goods on board are not unnecessarily damaged or destroyed while treating the biosecurity risk associated with the conveyance.

Clause 213 provides the power for a biosecurity officer to direct the person in charge or the operator of the conveyance to carry out this biosecurity measure.

#### **Clause 210                      Destruction of conveyance**

This clause provides a biosecurity officer may require that a conveyance be destroyed. If the biosecurity officer considers on reasonable grounds that the conveyance cannot be effectively treated to reduce the biosecurity risk to an acceptable level, the biosecurity officer may, subject to notification and approval requirements, require the conveyance to be destroyed.

A biosecurity officer must have written approval from the Director of Biosecurity before requiring a conveyance to be destroyed. Before providing written approval the Director must consider the principles in clause 32. The application of clause 32 means that the powers in this clause must be exercised in accordance with the principles set out in that clause. The same policy reasoning in clause 209 applies.

The decision to require conveyance to be destroyed is a reviewable decision under clause 574. The conveyance must not be destroyed until after any review of related proceeding (including appeal) has been finalised (see clause 211), unless the owner or operator of the conveyance chooses to destroy the conveyance, or the owner or operator cannot be located.

Before a biosecurity officer can require or cause a conveyance to be destroyed under clause 213, the officer must give written notice to the owner or operator of the conveyance stating that the conveyance is required to be destroyed, the reasons why and requesting that the owner or operator arrange for the conveyance to be removed from Australian territory or destroyed in the manner specified in the notice, within the period specified in the notice.

However, a biosecurity officer is not required to provide this written notice, if, despite making reasonable efforts, the officer has been unable to locate the person in charge or operator of the conveyance and certifies in writing to this effect. This ensures that biosecurity officers are not prevented from exercising powers to adequately manage unacceptable biosecurity risk if the person in charge or operator of the conveyance cannot be found.

Similar to clause 209, if a biosecurity officer suspects on reasonable grounds that there is a high level of biosecurity risk associated with the conveyance that must be treated as soon as practicable, the officer can cause the conveyance to be destroyed without having to notify the owner or the operator of the conveyance. This is to ensure that biosecurity officers can quickly and effectively manage biosecurity risks if they cannot be contained. The biosecurity officer will still

be required to seek the written approval of the Director, who will be required to apply the principles in clause 32.

If the owner or the operator of the conveyance is given written notice, and the conveyance is not destroyed or removed from Australian territory within the period specified in the notice, a biosecurity enforcement officer may take possession of the conveyance and a biosecurity officer can cause the conveyance to be destroyed (this can also take place if a biosecurity officer has issued a certificate certifying that the owner or operator of the conveyance cannot be found or if there is a high level of biosecurity risk that cannot be contained).

The biosecurity officer cannot cause the conveyance to be destroyed without the written permission of the Director, who must consider the principles in clause 32. This is a second level of approval (in addition to the approval for requiring a conveyance to be destroyed), that ensures the decision whether an officer will cause the destruction of a conveyance more appropriately sits at a higher level of responsibility and must be made in light of protections designed to ensure a person's rights are adequately considered (see clause 32).

The decision by the Director to allow a biosecurity officer to cause the destruction of a conveyance is not subject to review, as the decision has already been made that destruction is required and this decision is subject to review. The second decision concerns who carries out the destruction, not whether destruction is warranted.

A biosecurity enforcement officer must not take possession of the conveyance unless the owner has consented in writing or the officer is authorised under a conveyance possession warrant. This ensures that the officer has appropriate level of authority before he or she can take possession of a conveyance and powers are exercised. (See Parts 3 and 4 of Chapter 9 for the obligations and powers of biosecurity enforcement officers in taking possession of a conveyance under warrant).

If a conveyance is to be destroyed, a biosecurity officer can cause any goods on board the conveyance to be removed before it is destroyed. This ensures that an officer can make sure that goods on board are not unnecessarily destroyed with the conveyance.

Clause 213 allows a biosecurity officer to direct the operator or owner to carry out this biosecurity measure.

### **Clause 211                    Conveyance must not be destroyed during review period**

This clause provides that if a biosecurity officer has given a notice in relation to a conveyance under subclause 210(3) (destruction of conveyance), the officer must not require or cause the conveyance to be destroyed under clause 213, until after the period in which an application can be made for review of the decision to require the conveyance to be destroyed. If an application for review has already been made, the officer must not require or cause the conveyance to be destroyed until after the review or related proceedings have been finally determined.

However, a biosecurity officer does not need to wait for the application period to finish or review to be completed, if the biosecurity risk associated with the conveyance is high and cannot be managed for long enough to allow applications to be made or reviews to be finally determined. This ensures that uncontrollable and high levels of biosecurity risk can be managed immediately, without destruction being delayed by review proceedings. If such a delay were to take place, this would increase the chances of a significant biosecurity risk spreading and causing damage.

If a biosecurity officer causes a conveyance to be destroyed before the end of the period in which an application can be made, and no application for review was made before the conveyance was destroyed, an application for a review of the decision cannot be made. This is because once a

conveyance has been destroyed, the decision cannot be remade and there are no longer grounds for a review.

If an application for the review of a decision to destroy a conveyance has been made and a biosecurity officer causes the conveyance to be destroyed before the proceeding has been finally determined, the review or related proceeding is taken to be discontinued. Again, this is because once a conveyance has been destroyed, the decision cannot be remade and there are no longer grounds for a review.

#### **Clause 212 Regulations may provide for other biosecurity measures**

This clause provides for the regulations to prescribe additional biosecurity measures that a biosecurity officer may use in relation to a conveyance.

The clause limits the biosecurity measures that can be prescribed by the regulations. The biosecurity measures in the regulations must not be:

- a biosecurity measure of a kind set out in Division 4 of this Part (biosecurity risk assessment powers)
- a biosecurity measure of a kind set out in this Division (managing an unacceptable biosecurity risk), and
- a biosecurity measure of a kind set out in Subdivision B of Division 2 of Part 4 of Chapter 10 (decontamination of persons and personal effects).

This ensures that the regulations do not contain biosecurity measure already available in the Act. It also ensures that any notification or processes in place in the legislation are not circumvented.

This clause also allows for other matters relating to a prescribed biosecurity measure to be set out in the regulations. This can include matters such as notification requirements that a prescribed biosecurity measure is required to be taken and limitations on carrying out prescribed biosecurity measures during review periods, if the exercise of the prescribed biosecurity measure is a reviewable decision.

Clause 213 allows a biosecurity officer to direct the person in charge, the operator or owner of the conveyance to carry out the biosecurity measures.

#### **Clause 213 Powers of biosecurity officer if biosecurity measures are required**

This clause provides that where a biosecurity officer requires biosecurity measures to be taken in relation to a conveyance under clauses 208 (treatment), 209 (treatment that might damage), 210 (destruction) or a regulation made under clause 212 (prescribed biosecurity measure), the biosecurity officer may:

- direct the person in charge of the conveyance to carry out the biosecurity measure, except for destruction of the conveyance
- direct the operator of the conveyance to arrange the biosecurity measure to be carried out
- direct the owner of the conveyance to arrange for the biosecurity measure to be carried out, if the measure is destruction of the conveyance
- carry out the biosecurity measure, or
- arrange for a person with appropriate qualifications or expertise to carry out the biosecurity measure.

This means that if a biosecurity officer can require a measure to be taken, the officer can direct the person in charge or the operator of the conveyance to carry it out, carry it out himself or herself, or arrange for a person with appropriate qualification and expertise to carry it out. This ensures that biosecurity risk can be carried out in the most efficient way possible, by the most appropriate person in the circumstances. For example, if a conveyance is in a remote location that would

require extensive travel for a biosecurity officer, the officer may arrange for a more conveniently located, qualified person to carry out the biosecurity measure.

Where the biosecurity officer gives a direction to a person to carry out a biosecurity measure or arranges for someone to carry the biosecurity measure, the officer may supervise the person carrying out the biosecurity measure. This ensures that the biosecurity measures are carried out properly, and where they have not been carried out in accordance with the directions, the biosecurity officer can take action to manage the biosecurity risks.

A person who is given a direction and does not comply with the direction commits an offence and is liable to a civil penalty (see also clause 215).

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

#### **Clause 214                      Biosecurity officer may affix notice to conveyance**

This clause provides that a biosecurity officer may affix a notice to a conveyance in relation to which biosecurity measures have been required under Division 5 of this Chapter (biosecurity management powers), or a regulation made under clause 212.

The notice must state that the level of biosecurity risk associated with the conveyance is unacceptable, that biosecurity measures have been required in relation to that conveyance and that a person may be liable to an offence or civil penalty, if the person removes, defaces or interferes with the conveyance to which the notice relates (see also clause 216). This notice is designed to inform a person not to remove, deface or interfere with the conveyance. If it is not possible to affix the notice to the conveyance, the person exercising the power may fix the notice as near to the conveyance as reasonable practicable.

A person must not move, deal or interfere with these conveyances unless the person:

- is authorised to do so under an approved arrangement
- has been given a direction under this Act by a biosecurity official, or
- has permission under clause 557.

An unauthorised person who interferes with, removes or defaces the notice is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

It is an exception if the person is authorised to engage in the conduct under this Act or under another Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

#### **Clause 215                      Person must comply with direction to take biosecurity measures**

This clause provides that a person must comply with a direction to take biosecurity measures in relation to an aircraft, vessel or an exposed conveyance under this Division (clauses 206, 207 or 213).

The person in charge or the operator or the owner of an aircraft or vessel who is given a direction and does not comply with the direction commits an offence and is liable to a civil penalty. In



addition, the person in charge commits an offence and is liable to a civil penalty if the operator is given a direction (other than to arrange for destruction of a conveyance) that is not complied with, and the operator commits an offence or is liable to a civil penalty if the person in charge is given a direction that is not complied with.

The operator also commits an offence and is liable to a civil penalty if the owner of the conveyance is given a direction for destruction of the aircraft or vessel that is not complied with, and the owner commits an offence and is liable to a civil penalty if the operator of the aircraft or vessel is given a direction to arrange for destruction of the conveyance that is not complied with. The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

Making the person in charge and the operator jointly liable ensures that both persons who are responsible for the conduct of the aircraft or vessel can be given a direction in relation to the aircraft or vessel and be held responsible if that direction is not complied with. For example the person in charge might be an airline carrier staff member who is responsible for scheduling flights and determining where an aircraft lands, while the operator might be a pilot who lands the aircraft. Both are responsible for the movement of the aircraft and for ensuring that any directions are complied with. Similarly, making the owner and operator jointly liable ensures that both persons who are responsible for the conduct of the aircraft or vessel can be given a direction in relation to the destruction of the aircraft or vessel and be held responsible if that direction is not complied with.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If a direction is not complied with, significant biosecurity risk may be realised and result in serious damage to human, plant and animal health, Australia's local industries, the economy and the environment.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 216                      Unauthorised persons must not move etc. conveyance in relation to which biosecurity measures have been required**

This clause provides that a person must not move, deal or interfere with a conveyance where a notice has been affixed under subclause 214(1), unless the person is authorised to do so under an approved arrangement (see clause 10), or he or she has been given a direction by a biosecurity official or otherwise has permission under clause 557.

An unauthorised person who moves, deals or interferes with a conveyance commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If a direction is not complied with, significant biosecurity risk may be realised and result in serious damage to human, plant and animal health, Australia's local industries, the economy and the environment.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

It is an exception if the person is authorised to engage in the conduct under this Act or under another Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

These powers are required to ensure biosecurity officers can carry out functions under this Part by affixing notices to conveyances restricting their movement so that biosecurity measures can be conducted to manage any identified biosecurity risks.

## **Division 6—Leaving conveyances**

### **Clause 217                    Person in charge of conveyance may leave conveyance unless directed not to do so**

This clause provides that the person in charge of the conveyance that is subject to biosecurity control may leave the conveyance, unless a biosecurity officer directs the person not to do so. If the person is in charge of an incoming aircraft or vessel arriving in Australian territory, he or she may not leave the aircraft or vessel unless pratique has been granted or authorised to do so under this Act or another Australian law (see also clauses 48 and 49). A biosecurity officer may direct the person in charge of the conveyance not to leave the conveyance for a specified period, which can be no longer than 24 hours.

This ensures that the person in charge of a conveyance can be required to stay on the conveyance if he or she is required to assist with the management of biosecurity risks. This may include moving the conveyance, or assisting a biosecurity officer when exercising powers in relation to the conveyance. A maximum timeframe has been imposed to ensure that the person in charge is only inconvenienced for as long as is required to assist the officer.

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

A person who contravenes a direction not to leave a conveyance commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If a direction is not complied with, significant biosecurity risk may be realised and result in serious damage to human, plant and animal health, the environment and the economy.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

## **Division 7—Release of conveyances from biosecurity control**

### **Clause 218 When conveyance is released from biosecurity control**

This clause provides that a conveyance subject to biosecurity control is released from biosecurity control if:

- a biosecurity officer notifies the person in charge of the conveyance, the owner of the conveyance or the operator of the conveyance that the conveyance is released from biosecurity control
- a written notice releasing the conveyance from biosecurity control is given to the person in charge of the conveyance by a biosecurity industry participant who is authorised to release the conveyance in accordance with an approved arrangement
- the conveyance is destroyed, or
- the conveyance leaves Australian territory.

This ensures that a conveyance can be released from biosecurity control if it has been assessed by a biosecurity officer (or a biosecurity industry participant), and it is determined that the conveyance does not pose a biosecurity risk. It also ensures that if a conveyance is destroyed or leaves Australian territory, effectively removing any biosecurity risks associated with it, the conveyance is considered to be released from biosecurity control. When a conveyance has been released from biosecurity control, biosecurity officers can no longer exercise the assessment and management powers under this Chapter.

If the conveyance is released from biosecurity control by leaving Australian territory and that conveyance is on a journey between places in Australian territory, the conveyance becomes subject to biosecurity control again when the conveyance returns to Australian territory during that journey (clause 191). This is required, as the biosecurity risk associated with the conveyance has not been assessed or managed to an acceptable level, simply by leaving Australian territory.

A notice releasing a conveyance from biosecurity control from a biosecurity officer or a biosecurity industry participant is not a legislative instrument because it is for an administrative purpose.

### **Clause 219 Notice releasing conveyance from biosecurity control**

This clause provides that a notice issued under clause 218 for the release of a conveyance from biosecurity control may be issued in writing or orally. This clause also allows for notices that are issued by an automated electronic system to release conveyances from biosecurity control. The automated system must comply with the requirements in the regulations. An automated notice is taken to be issued by a biosecurity officer so that the practical effect of this notice is to release the conveyances under clause 218.

This provision also makes it clear that an automated release notice in relation to conveyances has no effect to the extent that it is inconsistent with an earlier direction given in relation to the conveyances by a biosecurity officer under this Act.

## **Division 8—Miscellaneous**

### **Clause 220 Information about biosecurity requirements must be given to persons on board incoming aircraft or vessels**

This clause provides that the person in charge or the operator of a conveyance that is subject to biosecurity control because of clause 191, must ensure that every person on board is given information about biosecurity requirements under the laws of the Commonwealth. This information is required to ensure that every person on board is aware of Australia's biosecurity requirements and can comply with them when they enter Australian territory.

A person who contravenes the requirement to provide information on biosecurity requirements is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

The content and form of the information must have been approved by the Director of Biosecurity or the Director of Human Biosecurity. The information may be given in writing or orally, including by means of audio or audio visual recording.

### **Clause 221 Quarantine signal**

This clause provides that the person in charge of a vessel within Australian territory must ensure that the prescribed quarantine signal is displayed on the vessel in the circumstances and in the manner prescribed by the regulations.

Quarantine signals are used on vessels to provide a warning that there may be a high level of biosecurity risk associated with the vessel, the people, or things on board. It is important that these signals are correctly displayed so that biosecurity officers are aware of the risk and can undertake measures to manage it to an acceptable level and other relevant persons can avoid unnecessarily interacting with that vessel. This requirement only applies to vessels, because it is operationally impractical to require an aircraft to display a quarantine signal while in flight.

A person commits a strict liability offence if the person contravenes this clause. The maximum penalty for a contravention is 50 penalty units. This means that the prosecution will have to prove that the person contravened the provision, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (section 9.2) of honest and reasonable mistake of fact.

See the Human Rights Compatibility Statement for further information on this strict liability offence.

Quarantine signals are used worldwide to communicate the presence of human and animal disease; therefore the person in charge of a vessel can reasonably be expected to know they are required to warn other parties of potential biosecurity risks on board.

## **Part 3—First points of entry and biosecurity entry points**

### **Division 1—Introduction**

#### **Clause 222 Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part provides the Director of Biosecurity and the Director of Human Biosecurity with the powers to determine whether a landing place or port is a first point of entry for aircraft, vessels and goods that are subject to biosecurity control. It also provides for an area of a landing place or port that is a first point of entry to be designated as a biosecurity entry point for certain aircraft, vessels and goods that are subject to biosecurity control.

### **Division 2—First points of entry and biosecurity entry points for incoming aircraft and goods**

#### **Clause 223 Determination of landing places that are first points of entry for aircraft or goods that are subject to biosecurity control**

This clause provides the Director of Biosecurity or Director of Human Biosecurity with the power to determine that a specified landing place in Australian territory is a first point of entry for:

- aircraft generally or a specified class of aircraft that are subject to biosecurity control, and
- specified goods or a specified class of goods that are subject to biosecurity control or are subject to an exposed goods order (see clause 160).

First points of entry are required to ensure that overseas aircraft and any goods on board enter Australia at a designated place that has the appropriate facilities to effectively manage any biosecurity risk. Overseas aircraft and goods have the potential to bring with them a range of different biosecurity risks that, if not managed appropriately, may result in foreign pests and diseases establishing or spreading and negatively impacting upon Australia’s human, plant and animal health, the environment and the economy.

A Director may only make a determination in relation to a landing place if he or she is satisfied that the requirements (if any) prescribed in the regulations are met and the level of biosecurity risk associated with the operations at the landing place is acceptable. For the purpose of being satisfied, a Director may have regard to any matter he or she considers relevant.

A Director can consider a range of factors when determining whether he or she is satisfied that the level of biosecurity risk associated with the operations at the landing place is acceptable. This may include:

- the location of the landing place (a landing place in Queensland might experience higher temperatures than one in Victoria, which would allow particular types of pests or disease to flourish that would otherwise be destroyed by the cold)
- the surrounding environment (a landing place close to trees or an area of high wind increases the risk of wood-based pests or plant spores establishing and spreading), o
- the facilities available to manage biosecurity risk (some landing places might have treatment options on site, while others require specific goods to travel inland, increasing the level of biosecurity risk).

Other matters the Director might think are relevant in determining whether he or she is satisfied may include matters of national interest, economic or defence considerations.

**Clause 224**                    **Biosecurity entry points for aircraft and goods that are subject to biosecurity control**

This clause allows a determination of a landing place as a first point of entry under clause 223 to also designate a biosecurity entry point for:

- aircraft generally or a specified class of aircraft referred to in clause 223, and
- specified goods or a specified class of goods that are referred to in clause 223.

Where a biosecurity entry point has been designated, it is a specified area within a landing place that is a first point of entry, where an aircraft or goods to which the biosecurity entry point relates must enter as soon as practicable upon arrival. This is an optional tool that can be used to assist with the management of biosecurity risk by ensuring aircraft and goods are brought to a specified place with the facilities to assess and if necessary, treat a biosecurity risk. They may be used for a range of reasons, such as the size and location of the landing place or the types of biosecurity risk associated with its operations.

For example, a Director may determine under clause 223 that a landing place to be a first point of entry that can accept live animals, but may also determine that the biosecurity risk associated with live animals needs to be managed at a specific location within the landing place (such as a location with the appropriate facilities to assess and treat biosecurity risk, as well as house the animals). Under clause 224, the Director can designate that location to be a biosecurity entry point for live animals and all aircraft that import live animals must take them there as soon as practicable after they arrive. This might involve the aircraft landing, unloading the live animals and then transporting them to the biosecurity entry point.

**Clause 225**                    **Determination may be subject to conditions**

This clause provides that a determination making a landing place a first point of entry may also specify conditions that must be met. A Director can impose any condition he or she considers necessary. These conditions can relate to (but are not limited to), an owner or lessee of the landing place, a person or body that is responsible for carrying out operations at the landing place or the operations carried out at the landing place.

Conditions allow a Director to permit a landing place to accept overseas aircraft, while maintaining control over how specific risks are dealt with and ensure they are managed to an acceptable level. This provides a higher level of flexibility in the management of biosecurity risks at the first point of entry.

For example, a first point of entry may be determined, with a condition that it can only receive timber products during winter, when timber-based pests find it more difficult to establish and spread. This is on the basis that the landing place has some facilities to manage the biosecurity risk associated with timber, but not extensive ones.

**Clause 226**                    **Determination may have effect for specified period**

This clause provides that the determination of a first point of entry may be expressed to have effect for a specified period. If there is a specified period, the Director who determined the first point of entry may vary the determination to extend or shorten the period.

Not all first points of entry are required to be in place indefinitely. For example, the owner or lessee of a landing place may wish to have that landing place determined as a first point of entry to allow goods and equipment required for a nearby mining operation to be more easily imported. In these situations, a Director may determine the landing place to be a first point of entry only for the length of time the mine is expected to be constructed or operational.

This provides a higher level of flexibility in the management of biosecurity risks. It also prevents first points of entry from being determined and then retaining their status when it is no longer required and the biosecurity risks are no longer been managed appropriately. For example, if a landing place is determined to be a first point of entry but is no longer in use, it is likely that it will not have the infrastructure or personnel available to adequately assess and manage risk. If the determination were to last indefinitely, aircraft could legally enter Australia through this landing place and significant biosecurity risks could go unassessed and unmanaged.

**Clause 227                      Variation and revocation of determination etc.**

This clause provides that a Director who determined a landing place to be a first point of entry may vary or revoke the determination, or a condition specified in the determination, if he or she is satisfied that:

- one or more of the requirements prescribed by the regulations in relation to the landing place are no longer being met
- the level of biosecurity risk associated with the operations at the landing place has become unacceptable
- a condition specified in the determination has not been or is not being met
- the landing place is no longer required to be a first point of entry for aircraft or goods to which the determination relates, or
- a circumstance prescribed by the regulations has occurred.

This ensures that if a Director assesses the biosecurity risk associated with the operations at a landing place that is a first point of entry and determines that the operations cannot or are not being appropriately managed (for any of the reasons above), there are options available to reduce those operations or revoke the determination and cease all operations.

**Clause 228                      Determination is a legislative instrument**

This clause states that a determination made under clause 223 or an instrument that varies or revokes a determination made under clause 223 is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

The decision to determine, vary or revoke a first point of entry determination is a technical and scientific decision based on whether the biosecurity risk is able to be satisfactorily managed. Therefore it is appropriate for the Parliament to delegate to the Director of Biosecurity or Director of Human Biosecurity the power to make this determination. Subjecting these determinations to disallowance could undermine the technical and scientific based decision making and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy. Disallowance could be of inconvenience to the industry relying on the availability of the first point of entry and could potentially increase the cost to industry for having to change aircraft landing destination.

**Division 3—First points of entry and biosecurity entry points for incoming vessels and goods**

**Clause 229                      Determination of ports that are first points of entry for vessels or goods that are subject to biosecurity control**

This clause provides that the Director of Biosecurity or Director of Human Biosecurity may determine that a specified port in Australian territory is a first point of entry for:

- vessels generally or a specified class of vessels that are subject to biosecurity control,
- specified goods or a specified class of goods that are subject to biosecurity control or are subject to an exposed goods order (clause 160).

A Director may only make a determination in relation to a port if he or she is satisfied that the requirements (if any) prescribed in the regulations are met and the level of biosecurity risk associated with the operations at the port is acceptable. For the purpose of being satisfied, a Director may have regard to any matter he or she may consider relevant.

The same policy reasoning and examples in clause 223 apply to determining first points of entry for vessels.

**Clause 230                    Biosecurity entry points for vessels and goods that are subject to biosecurity control**

This clause provides that the determination of a specified port as a first point of entry under clause 229 may also designate a biosecurity entry point for:

- vessels generally or a specified class of vessels referred to in clause 229, and
- specified goods or a specified class of goods that are referred to in clause 229.

The same policy reasoning and examples in clause 224 apply to determining biosecurity entry points for vessels.

**Clause 231                    Determination may be subject to conditions**

This clause provides that a determination making a port a first point of entry may also specify conditions that must be met. A Director can impose any condition he or she considers necessary. These conditions can relate to (but are not limited to) an owner or lessee of the port, a person or body that is responsible for carrying out operations at the port or the operations carried out at the port.

The same policy reasoning and examples in clause 225 apply to the conditions contained in a determination of a first point of entry for a vessel.

**Clause 232                    Determination may have effect for specified period**

This clause provides that the determination of a first point of entry may be expressed to have effect for a specified period. If there is a specified period, the Director who determined the first point of entry may vary the determination to extend or shorten the period.

The same policy reasoning in clause 226 applies to the determination of a first point of entry for a vessel.

**Clause 233                    Variation and revocation of determination etc.**

This clause provides that a Director who determined a port to be a first point of entry may vary or revoke the determination, or a condition specified in the determination, if he or she is satisfied that:

- one or more of the requirements prescribed by the regulations in relation to the port are no longer being met
- the level of biosecurity risk associated with the operations at the port has become unacceptable
- a condition specified in the determination has not been or is not being met
- the port is no longer required to be a first point of entry for vessels or goods to which the determination relates, or
- a circumstance prescribed by the regulations has occurred.

The same policy reasoning in clause 227 applies to varying or revoking the determination for a vessel.



#### **Clause 234**                    **Determination is a legislative instrument**

This clause states that a determination made under clause 229 or an instrument that varies or revokes a determination made under clause 229 is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

The same policy reasoning in clause 228 applies to a determination for a vessel.

### **Part 4—Entry points for incoming aircraft and vessels**

#### **Division 1—Introduction**

#### **Clause 235**                    **Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part provides the requirements for incoming aircraft and vessels to land or be moored at a first point of entry and if relevant, brought to a biosecurity entry point. It also provides an overview of powers for biosecurity officials to enter ports and landing places to exercise powers and functions.

#### **Division 2—Entry points for aircraft that intend to land in Australian territory**

#### **Clause 236**                    **Application of this Division**

This Division applies in relation to an aircraft that intends to land at a landing place in Australian territory.

#### **Clause 237**                    **Aircraft must land at first point of entry**

This clause provides that an aircraft must not land at a landing place in Australian territory that is not a first point of entry, unless permission has been given under clause 239 (permission from a Director) or a direction has been given under clauses 240 or 242 (direction from a biosecurity officer, chief human biosecurity officer or human biosecurity officer).

This is intended to ensure that aircraft and goods that arrive in Australian territory from overseas, arrive at a location that has the facilities available to assess any biosecurity risk and manage it to an acceptable level. Aircraft or goods arriving at a landing place that is not a first point of entry, and which does not have the capacity to manage the biosecurity risk, pose a threat that a disease or pest may enter, establish or spread and cause harm to Australia’s human, plant and animal health, the environment and the economy.

The person in charge or the operator of an aircraft that is subject to biosecurity control, who permits the aircraft to land at a landing place that is not a first point of entry for the aircraft without permission (under clause 239) or being directed to do so (under clause 240 or 242), commits an offence and is liable to a civil penalty. In addition, the person in charge commits an offence and is liable to a civil penalty if the operator contravenes this clause and the operator commits an offence and is liable to a civil penalty if the person in charge contravenes this clause. The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

Making the person in charge and the operator jointly liable ensures that both persons who are responsible for the conduct of the aircraft can be held responsible for the landing of the aircraft. For example the person in charge might be an airline carrier staff who is responsible for scheduling flights and determining where an aircraft lands, while the operator might be a pilot who lands the aircraft. Both are responsible for the movement of the aircraft and for ensuring that any directions are complied with.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If an aircraft lands at a landing place that is not a first point of entry, that landing place is unlikely to have the facilities or operational capacity to manage the potential biosecurity risk satisfactorily and a significant biosecurity risk may establish and spread. This could result in serious damage to human, plant and animal health, the economy and the environment.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 238                      Aircraft must be brought to relevant biosecurity entry point (if any) at first point of entry**

This clause provides that if an aircraft that is subject to biosecurity control has landed at a first point of entry for the aircraft and there is a biosecurity entry point for that aircraft, the aircraft must be brought to that biosecurity entry point (see clause 224) as soon as practicable.

The person in charge or the operator of the aircraft that is subject to biosecurity control, who permits the aircraft to land at a first point of entry with a designated biosecurity entry point for the aircraft, but does not ensure the aircraft is brought to that point as soon as practicable, commits an offence and is liable to a civil penalty.

In addition, the person in charge commits an offence and is liable to a civil penalty if the operator contravenes this clause and the operator commits an offence and is liable to a civil penalty if the person in charge contravenes this clause (the policy reasoning for joint liability is the same as clause 237). The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The reasoning is consistent with clause 237.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 239                      Permission for aircraft to land at landing place that is not first point of entry for aircraft**

This clause provides that the person in charge or the operator of an aircraft may request (in writing) permission from the Director of Biosecurity or the Director of Human Biosecurity for the aircraft to land at a specified landing place in Australian territory that is not a first point of entry for that aircraft. The person in charge or operator may also request permission for goods to be unloaded at the specified landing place (see clause 146).

The relevant Director may grant permission and provide a written notice to the person in charge or operator to inform them of this. A Director may consider any relevant factors he or she considers appropriate in deciding whether or not to grant permission for an aircraft to land at a landing place that is not a first point of entry. This may include whether the biosecurity risk associated with the aircraft can be managed to a satisfactory level, the location of the landing place, the surrounding environment, the facilities available, the accessibility of biosecurity officers to the landing place and any national interest, economic or defence considerations.

The permission may be for one arrival or multiple arrivals over a specified period of time. This is intended to allow for greater flexibility, so that a person in charge or operator of an aircraft can

apply for a standing permission and not be required to make multiple applications for entry at the same location if the activities being undertaken and the biosecurity risks are the same. For example, an offshore gas and petroleum company has built a new drilling platform and seeks a standing permission to allow its aircraft (such as a helicopter), to travel between the platform and mainland Australia without being required to seek permission to arrive at a landing place that is not a first point of entry. The company and the department agree on a risk management strategy that ensures any biosecurity risks on board the installation are managed and will not be transported with the aircraft when it travels to the mainland. On this basis, the standing permission to enter a non-first point of entry is approved.

The permission can also be given subject to any conditions specified in the notice. This allows the Director to maintain control over how a specific biosecurity risk is dealt with and ensure it is managed to an acceptable level. An example might be a light aircraft that only operates three months of the year and requires access to landing places that are not first points of entry. A Director may give the aircraft permission to arrive at those landing places within the three month period and unload passengers, subject to a condition that the aircraft arrives at a specified location within the landing place where biosecurity officers are available to assess and manage the biosecurity risk associated with the people and goods on board.

The operator or person in charge who is given permission under this clause that is subject to a condition and he or she contravenes the condition, commits an offence and is liable to a civil penalty. In addition, the person in charge commits an offence if the operator contravenes this clause and the operator commits an offence if the person in charge contravenes this clause (the policy reasoning for joint liability is the same as clause 237). The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The reasoning is consistent with clause 237.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 240                      Direction requiring aircraft to land, or not land, at specified landing place**

This clause provides a biosecurity officer with the power to give a direction to the person in charge or the operator of an aircraft requiring the aircraft to land at a specified landing place or not to land at one or more specified landing places in Australian territory. The landing place is not required to be a first point of entry.

A direction can only be given if the biosecurity officer is satisfied that it is necessary to manage the biosecurity risk associated with the aircraft or any person or thing on board the aircraft. This ensures that a direction can only be given if there is a relevant biosecurity risk that needs to be managed via a direction.

This clause allows a biosecurity officer to prevent an aircraft from entering a particular landing place, or require an aircraft to enter a specific landing place, if it is necessary to manage a biosecurity risk on board. A direction will apply even if the landing place is otherwise approved to accept that class of aircraft or goods. This allows a biosecurity officer to make an independent assessment of the relevant biosecurity risk, particularly in unusual circumstances and direct an aircraft accordingly.

An example might be if a landing place temporarily does not have the facilities required to manage a particular type of biosecurity risk, or there are temporary environmental conditions (such as a large storm), that affect the level of biosecurity risk. A biosecurity officer can direct the aircraft to enter another landing place where the biosecurity risk can be managed to an acceptable level. Another example is if an aircraft is determined to have an unusual type of biosecurity risk that can only be managed at a particular landing place. A biosecurity officer can direct that aircraft to enter that landing place only.

A direction must not be given that requires the aircraft not to land at any landing place in Australian territory. This type of direction can only be given by the Director of Biosecurity (see clause 241).

The person in charge or the operator of the aircraft who does not comply with the direction commits an offence and is liable to a civil penalty (see clause 243).

A biosecurity officer must revoke a direction for an aircraft not to land at one or more specified landing places, if he or she is satisfied that it is no longer necessary to manage the biosecurity risk associated with the aircraft or any person or thing on board the aircraft. This ensures that if the biosecurity risk that led to the direction being given no longer exists or has been managed to an acceptable level, the aircraft is once again free to travel to any first point of entry. This requirement does not, by implication, acts as a limit on the power of a biosecurity officer to revoke a direction given under this clause for an aircraft not to land at one or more specified landing places.

**Clause 241                      Direction requiring aircraft not to land at any landing place in Australian territory**

This clause provides a biosecurity officer with the power to give the person in charge or the operator of an aircraft a direction not to land at any landing place in Australian territory. This may or may not be a first point of entry.

A decision not to allow an aircraft to enter any landing place effectively denies that aircraft the right to enter Australian territory. As a result, a biosecurity officer must not give a direction under this clause without the written approval of the Director of Biosecurity. Before giving approval, the Director must consider the principles in clause 32. The application of clause 32 means that the powers in this clause must be exercised in accordance with the principles set out in clause 32. This is to ensure that such an invasive decision is approved at the appropriate level, allowing for the consideration of more stringent requirements, such as whether a direction is necessary and proportionate and what the effect will be upon the health and safety of the persons on board (see clause 32).

The Director must not give approval unless he or she is satisfied on reasonable grounds that the level of biosecurity risk associated with the aircraft or any person or thing on board the aircraft is unacceptable and biosecurity measures cannot be taken to reduce that level of biosecurity risk to an acceptable level.

A direction will apply, even if the landing place is otherwise approved to accept that class of aircraft or goods. This allows a biosecurity officer to undertake an independent assessment of the relevant biosecurity risk and direct the movement of an aircraft on a case by case basis, if it is required.

A direction by the Director not to enter any landing place cannot be given only for the purpose of managing a human health risk. This ensures that any direction given is compliant with Australia's international obligations under the International Health Regulations.

The person in charge or the operator who fails to comply with a direction commits an offence and is liable to a civil penalty (see clause 243). The defence of sudden and extraordinary emergency in Division 10.3 of the *Criminal Code* applies to this clause.

A biosecurity officer must revoke a direction given under this clause if the Director is satisfied that the biosecurity risk associated with the aircraft or any person or thing on board the aircraft is no longer unacceptable, biosecurity measures can be taken to reduce the level of biosecurity risk associated with the aircraft or any person or thing onboard to an acceptable level, or the direction should be revoked for any other reason. This ensures that if the biosecurity risk that led to the direction being given no longer exists or can be managed to an acceptable level, the aircraft is once again free to travel to any first point of entry.

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

**Clause 242                      Direction requiring aircraft to land, or not land, at specified landing place – management of human health risks**

This clause provides a chief human biosecurity officer or a human biosecurity officer with the power to give the person in charge or the operator of an aircraft, a direction requiring the aircraft to land at a specified landing place in Australian territory or not to land at one or more specified landing places in Australian territory. The landing place is not required to be a first point of entry.

This power can only be exercised by a chief human biosecurity officer or a human biosecurity officer, if the officer is satisfied on reasonable grounds that the direction is necessary to manage a human health risk associated with the aircraft or any person or thing on board the aircraft.

A direction must not be given by a chief human biosecurity officer or a human biosecurity officer requiring the aircraft not to land at any landing place in Australian territory. Similar to clause 241, this ensures that any direction given is compliant with Australia's international obligations under the International Health Regulations.

The person in charge or the operator who fails to comply with a direction commits an offence and is liable to a civil penalty (see clause 243).

A chief human biosecurity officer or human biosecurity officer must revoke a direction requiring an aircraft not to land in one or more specified landing places, if he or she is satisfied that it is no longer necessary to manage the human health risk associated with the aircraft or any person or thing on board the aircraft. Similar to clause 241, this ensures that if the human health risk that led to the direction being given no longer exists or has been managed to an acceptable level, the aircraft is once again free to travel to any first point of entry. This requirement does not, by implication, acts as a limit on the power of a chief human biosecurity officer or human biosecurity officer to revoke a direction given under this clause for an aircraft not to land in one or more specified landing places.

**Clause 243                      Person who is given direction must comply with it**

This clause provides that a person who does not comply with a direction given under Division 2 of Part 4 (entry points for aircraft), commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The same policy reasoning as clause 237 applies.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

### **Division 3—Entry Points for vessels that intend to be moored in Australian territory**

#### **Clause 244 Application of this Division**

This Division applies in relation to vessels that intend to be moored at a port in Australian territory.

#### **Clause 245 Vessel must be moored at first point of entry**

This clause provides that a vessel must not be moored at a port in Australian territory that is not a first point of entry for the vessel, unless permission has been given under clause 247 (permission from a Director) or a direction has been given under clauses 248 or 250 (direction from a biosecurity officer, chief human biosecurity officer or human biosecurity officer).

This is intended to ensure that vessels and goods that arrive in Australian territory from overseas, arrive at a location that has the facilities available to assess any biosecurity risk and manage it to an acceptable level. Vessels or goods arriving at a landing place that is not a first point of entry, and which does not have the capacity to manage the biosecurity risk, pose a threat that a disease or pest may enter, establish or spread and cause harm to Australia's human, plant and animal health, the environment and the economy.

The person in charge or the operator of the vessel that is subject to biosecurity control, who permits the vessel to be moored at a port in Australian territory that is not a first point of entry for that vessel without permission (under clause 247) or being directed to do so (under clause 248 or 250), commits an offence and is liable to a civil penalty. In addition, the person in charge commits an offence if the operator contravenes this clause and the operator commits an offence if the person in charge contravenes this clause. The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

Making the person in charge and the operator jointly liable ensures that both persons who are responsible for the conduct of the vessel can be held responsible for the mooring of the vessel. For example, the person in charge might be a shipping company staff member who is responsible for scheduling vessels and determining which port the vessel travels to, while the operator might be a ship's pilot who brings the vessel into the port. Both are responsible for the movement of the vessel and for ensuring that any directions are complied with.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If a vessel is moored at a port that is not a first point of entry, that port is unlikely to have the facilities or operational capacity to manage the potential biosecurity risk satisfactorily and a significant biosecurity risk may establish and spread. This could result in serious damage to human, plant and animal health, the environment and the economy.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 246**                    **Vessel must be brought to relevant biosecurity entry point (if any) at first point of entry**

This clause provides that if a vessel subject to biosecurity control is moored at a first point of entry for the vessel and there is a biosecurity entry point for that vessel, the vessel must be brought to that biosecurity entry point (see clause 230) as soon as practicable.

The person in charge or the operator of the vessel that is subject to biosecurity control, who permits the vessel to be moored at a first point of entry with a designated biosecurity entry point for the vessel, but does not ensure that the vessel is brought to that entry point as soon as practicable, commits an offence and is liable to a civil penalty. In addition, the person in charge commits an offence if the operator contravenes this clause and the operator commits an offence if the person in charge contravenes this clause (see the policy explanation for joint liability in clause 245). The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The reasoning for this is consistent with the policy justification in clause 245.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 247**                    **Permission for vessel to be moored at port that is not first point of entry for vessel**

This clause provides that the person in charge or the operator of a vessel may request (in writing) permission from the Director of Biosecurity or the Director of Human Biosecurity for the vessel to be moored at a specified port in Australian territory that is not a first point of entry for that vessel. The person in charge or operator may also request permission for goods to be unloaded at the specified port (see clause 146).

The relevant Director may grant permission and provide a written notice to the person in charge or the operator to inform them of this. A Director may consider any relevant factors he or she considers appropriate in deciding whether or not to grant permission for a vessel to be moored at a port that is not a first point of entry. This may include whether the biosecurity risk associated with the vessel can be managed to a satisfactory level, the location of the port, the surrounding environment, the facilities available, the accessibility of biosecurity officers to the port and any national interest, economic or defence considerations.

The permission may be for one arrival or multiple arrivals over a specified period of time. The policy reasoning for this is the same as that for aircraft in clause 239. The permission can also be given subject to any conditions specified in the notice. This is intended to allow for greater flexibility, so that a person in charge or operator of a vessel can apply for a standing permission and not be required to make multiple applications for entry at the same location if the activities being undertaken and the biosecurity risks are the same.

The permission can also be given subject to any conditions specified in the notice. This allows the Director to maintain control over how a specific biosecurity risk is dealt with and ensure it is managed to an acceptable level. An example might be a cargo vessel that only requires access to ports that are not first points of entry for several months of the year. A Director may give the vessel permission to arrive at those ports within the specified period and unload goods, subject to a condition that the vessel arrives at a specified location within the port where biosecurity officers are available to assess and manage the biosecurity risk associated with the people and goods on board. For example, an offshore gas and petroleum company has built a new drilling platform and

seeks a standing permission to allow its vessels to travel between the platform and mainland Australia without being required to seek permission to arrive at a port that is not a first point of entry. The company and the department agree on a risk management strategy that ensures that any biosecurity risks on board the installation are managed and will not be transported with the vessel when it travels to the mainland. On this basis, the standing permission for entry into a non-first point of entry is approved.

The person in charge or the operator of the vessel, who has been given permission subject to a condition under this clause and contravenes the condition commits an offence and is liable to a civil penalty. In addition, the person in charge commits an offence if the operator contravenes this clause and the operator commits an offence if the person in charge contravenes this clause (the policy reasoning for joint liability is the same as clause 245). The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The reasoning is consistent with clause 245 above.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 248**                    **Direction requiring vessel to be moored, or not to be moored, at specified port**

This clause provides a biosecurity officer with the power to give a direction to the person in charge or the operator of a vessel, requiring the vessel to be moored at a specified port in Australian territory, or not to be moored at one or more specified ports in Australian territory. These may or may not be a first point of entry.

A direction can only be given if the biosecurity officer is satisfied that it is necessary to manage the biosecurity risk associated with the vessel or any person or thing on board the vessel. This ensures that a direction can only be given if there is a relevant biosecurity risk that needs to be managed via a direction.

This clause allows a biosecurity officer to prevent a vessel from entering a particular port, or require a vessel to enter a specific port, if it is necessary to manage a biosecurity risk on board. A direction will apply even if the port is otherwise approved to accept that class of vessel or goods. This allows a biosecurity officer to make an independent assessment of the relevant biosecurity risk, particularly in unusual circumstances and direct a vessel accordingly.

An example might be if a port temporarily does not have the facilities required to manage a particular type of biosecurity risk, or there are temporary environmental conditions (such as a large storm), that affect the level of biosecurity risk. A biosecurity officer can direct the vessel to enter another port where the biosecurity risk can be managed to an acceptable level. Another example is if a vessel is determined to have an unusual type of biosecurity risk that can only be managed at a particular port. A biosecurity officer can direct that vessel to enter that port only.

A direction must not be given that requires a vessel not to be moored at any port in Australian territory. This type of direction can only be given by the Director of Biosecurity (see clause 249).

The person in charge or the operator who fails to comply with a direction commits an offence and is liable to a civil penalty (see clause 251).



A biosecurity officer must revoke a direction for a vessel not to be moored at one or more specified ports, if he or she is satisfied that it is no longer necessary to manage the biosecurity risk associated with the vessel or any person or thing on board the vessel. This ensures that if the biosecurity risk that led to the direction being given no longer exists or has been managed to an acceptable level, the vessel is once again free to travel to any first point of entry. This requirement does not, by implication, act as a limit on the power of a biosecurity officer to revoke a direction given under this clause for a vessel not to be moored at one or more specified ports.

**Clause 249                      Direction requiring vessel not to be moored at any port in Australian territory**

This clause provides a biosecurity officer with the power to give the person in charge or the operator of a vessel, a direction not to moor at any port in Australian territory. This may or may not be a first point of entry.

A decision not to allow a vessel to enter any port effectively denies that vessel the right to enter Australian territory. As a result, a biosecurity officer must not give a direction under this clause without the written approval of the Director of Biosecurity. Before giving approval, the Director must consider the principles in clause 32 (the same policy reasoning in clause 241 applies). The application of clause 32 means that the powers in this clause must be exercised in accordance with the principles set out in that clause. This is to ensure that such an invasive decision is approved at the appropriate level, allowing for the consideration of more stringent requirements, such as whether a direction is necessary and proportionate and what the effect will be upon the health and safety of the persons on board (see clause 32).

The Director must not give approval unless he or she is satisfied on reasonable grounds that the level of biosecurity risk associated with the vessel or any person or thing on board the vessel is unacceptable and biosecurity measures cannot be taken to reduce that level of biosecurity risk to an acceptable level.

A direction will apply, even if the port is otherwise approved to accept that class of vessel or goods. This allows a biosecurity officer to undertake an independent assessment of the relevant biosecurity risk and direct the movement of a vessel on a case by case basis if it is required.

A direction by the Director not to enter any port cannot be given only for the purpose of managing a human health risk. This ensures that any direction given is compliant with Australia's international obligations under the International Health Regulations.

The person in charge or the operator who fails to comply with a direction commits an offence and is liable to a civil penalty (see clause 251). The defence of sudden and extraordinary emergency in Division 10.3 of the *Criminal Code* applies to this clause.

A biosecurity officer must revoke a direction given under this clause if the Director is satisfied that the biosecurity risk associated with the vessel or any person or thing on board the vessel is no longer unacceptable, biosecurity measures can be taken to reduce the level of biosecurity risk associated with the vessel or any person or thing onboard to an acceptable level, or the direction should be revoked for any other reason. This ensures that if the biosecurity risk that led to the direction being given no longer exists or can be managed to an acceptable level, the vessel is once again free to travel to any first point of entry.

Clause 572 applies to this clause, allowing a biosecurity officer to issue a direction orally or in writing (including electronically). It also ensures that any later directions override an earlier one if there is any inconsistency.

**Clause 250**                    **Direction requiring vessel to be moored, or not to be moored, at specified port – management of human health risks**

This clause provides a chief human biosecurity officer or a human biosecurity officer with the power to give the person in charge or the operator of a vessel, a direction requiring the vessel to be moored at a specified port in Australian territory, or not to be moored at one or more specified ports in Australian territory. The port is not required to be a first point of entry.

This power can only be exercised by a chief human biosecurity officer or a human biosecurity officer if the officer is satisfied on reasonable grounds that the direction is necessary to manage a human health risk associated with the vessel or any person or thing on board the vessel.

A direction must not be given by a chief human biosecurity officer or a human biosecurity officer requiring the vessel not to land at any port in Australian territory. Similar to clause 249, this ensures that any direction given is compliant with Australia's international obligations under the International Health Regulations.

The person in charge or the operator who does not comply with a direction commits an offence and is liable to a civil penalty (see clause 251).

A chief human biosecurity officer or human biosecurity officer must revoke a direction requiring a vessel not to be moored at one or more specific ports, if he or she is satisfied that it is no longer necessary to manage the human health risk associated with the vessel or any person or thing on board the vessel. Similar to clause 249, this ensures that if the human health risk that led to the direction being given no longer exists or has been managed to an acceptable level, the vessel is once again free to travel to any first point of entry. This requirement does not, by implication, act as a limit on the power of a chief human biosecurity officer or human biosecurity officer to revoke a direction given under this clause for a vessel not to be moored at one or more specific ports.

**Clause 251**                    **Person who is given direction must comply with it**

This clause provides that a person who does not comply with a direction given under Division 3 of Part 4 (entry points for vessels), commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The same policy reasoning clause 245 applies.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Division 4—Miscellaneous**

**Clause 252**                    **Biosecurity officer etc. may enter landing places or ports**

This clause provides that a biosecurity officer or a biosecurity enforcement officer may enter premises at a landing place or port that an aircraft or vessel subject to biosecurity control has landed or moored or intends to land or to be moored, at any time. Entry must be for the purpose of performing functions or exercising powers under the Act. This ensures that an officer can only enter for relevant purposes under the Act. For the purpose of this clause, a premise does not include a conveyance.

Before entering premises at a landing place or port, the biosecurity official must be satisfied of the principles outlined in clause 32. The application of clause 32 means that the powers in this clause

must be exercised in accordance with the principles set out in that clause. This ensures that the decision to enter premises without a warrant or consent must be made in light of protections designed to ensure a person's rights are adequately considered (see clause 32).

A biosecurity officer is not authorised to enter premises at a landing place or port (first point of entry) unless he or she is accompanied by a biosecurity enforcement officer. This ensures that an officer with the appropriate level of training and expertise is responsible for establishing entry. The obligations and powers of biosecurity enforcement officers entering premises under this clause are contained in Part 5 of Chapter 9.

Biosecurity officers require the ability to enter premises at a port or landing place without a warrant or consent in order to establish whether a biosecurity risk exists, and if so, undertake biosecurity measures that are necessary to address the risk. Those premises are the subject of a regulatory arrangement with the Commonwealth, where the first point of entry is approved to be a place where goods, people and conveyances can arrive in Australia from overseas. As a result, premises at a first point of entry are an area of high risk for biosecurity risks entering, establishing and spreading in Australia and causing damage to human, animal and plant health, the environment, local industries and the economy. It is important that these risks are managed as quickly and efficiently as possible.

## **Part 5—Ship sanitation**

### **Division 1—Introduction**

#### **Clause 253                    Simplified outline of this Part**

This outline sets out the Part's objectives. The Part provides for the regulations of the Ship Sanitation Certification Scheme, a requirement of the International Health Regulations, to control the international spread of disease through the surveillance and inspection of international vessels.

### **Division 2—Ship sanitation**

#### **Clause 254                    Application of this Division**

This clause defines 'international vessels' for the purposes of the scheme. An international vessel is a vessel that has arrived from a voyage outside Australia or intends to leave Australia.

#### **Clause 255                    Regulations may prescribe scheme in relation to ship sanitation**

This clause allows for the making of regulations to prescribe the detail of the scheme. The regulations may provide for:

- the meaning of sanitation health risk
- determining the level of vessel sanitation health risk associated with an international vessel
- circumstances in which the level of vessel sanitation health risk is deemed to be unacceptable
- the issuance of internationally recognised certification relating to sanitary conditions on board an international vessel
- recognition of certificates issued by, or on behalf of, competent authorities (e.g. authorities of foreign countries)
- designation of ports where inspections may be performed for the purposes of the scheme
- measures which may be taken to manage vessel sanitation health risks associated with the vessel, and
- the sharing of information obtained under the scheme with other States party to the International Health Regulations.

Articles 19 and 20 of the International Health Regulations require States party to the International Health Regulations to designate landing places and ports with the capacity to manage and respond to public health risks and public health emergencies of international concern. This includes the capability to perform inspections and issue Ship Sanitation certificates.

The International Health Regulations sets out a scheme with two different certificates. A Ship Sanitation Control Exemption certificate is issued when sanitary conditions aboard a vessel do not present a public health risk. A Ship Sanitation Control Certificate is issued when there is evidence of factors which present a public health risk, and control measures have been undertaken to manage those risks.

Consistent with Articles 24 and 27 of the International Health Regulations, the regulations will provide the Commonwealth with the capability to inspect ships and apply measures such as disinfect, disinsect, de-rat or decontaminate the conveyance in order to manage potential risks to human health.

The regulations will provide for the issuance of Ship Sanitation certificates at Australian ports consistent with Annex 3 (Model Ship Sanitation Exemption Certificate/Ship Sanitation Control Certificate) and Article 39 of the International Health Regulations.

**Clause 256                      Declaring ports at which vessels may be inspected for the purposes of the scheme**

This clause allows the Director of Human Biosecurity to designate those ports in Australia where inspections may be performed, and certificates issued, in accordance with the scheme.

Articles 19 and 20 of the IHR require each State party to the International Health Regulations to designate landing places and ports with the capacity to manage and respond to public health risks and public health emergencies of international concern. This includes designation of ports with the capability to perform inspections and issue Ship Sanitation certificates. Article 20 of the IHR also requires that member states provide the World Health Organization with a list of ports authorised to offer ship sanitation certificates. The list of authorised ports is published to inform both member states and operators of international vessels regarding ports where inspections may be performed and certificates issued.

This clause states that a declaration made under this clause is a legislative instrument, but is not subject to disallowance under the *Legislative Instruments Act 2003*.

The decision to declare a port where vessels may be inspected for the purposes of the scheme is a technical and scientific decision based on whether the sanitation health risk is able to be assessed and satisfactorily managed. Therefore, it is appropriate for the Parliament to delegate to the Director of Human Biosecurity the power to make this declaration. Subjecting these declarations to disallowance could undermine the technical and scientific based decision making and frustrate risk management processes. In addition, disallowance of a declaration made under this clause could lead to inadequate management of the risks posed to human health.

**Clause 257                      Assessing and managing sanitation health risks**

This clause links the Ship Sanitation Certification Scheme to the powers and functions in Part 2 of Chapter 4, which provide for inspection and treatment of international vessels. Where there is evidence of a human biosecurity risk, the powers in Part 2 of Chapter 4 give the Commonwealth the power to inspect vessels and require measures to be taken to manage human health risks.

Some clauses contained in Part 2 of Chapter 4 which apply to vessels generally are specifically excluded from the operation of the Ship Sanitation Certification Scheme. These are expressly

excluded as they are not required for the operation of the scheme and they are outside the scope of the scheme provided for by the International Health Regulations.

## **Chapter 5—Ballast water and sediment**

### **Part 1—Application and interpretation**

#### **Division 1—Introduction**

##### **Clause 258                    Simplified outline of this Part**

This outline sets out the Part’s objectives. The Part outlines how the scheme for the management of ballast water and sediment will operate. This Part also sets out special measures for this Chapter and outlines the relationship between these provisions and the operation of other Commonwealth, state and territory laws relating to managing biosecurity risks associated with ballast water and sediment.

#### **Division 2—Application and interpretation**

##### **Clause 259                    Extension of Chapter to every external Territory**

This clause provides that this Chapter extends to all external territories of Australia. This includes Ashmore and Cartier Islands, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, Heard Island the McDonald Islands and Norfolk Island. It does not however include the Australian Antarctic Territory, which is specifically excluded under clause 261.

##### **Clause 260                    Vessels in dry dock in Australia**

This clause outlines that the ballast water management scheme applies to a vessel in dry dock in Australia. A dry dock in Australia is taken to be in Australian seas. Dry docks are docks that can be drained to allow the vessel to come to rest on a dry platform. They are used for the construction, maintenance, and repair of vessels.

##### **Clause 261                    Foreign vessels in waters adjacent to Australian Antarctic Territory**

This clause provides that a vessel within the outer limits of the territorial sea (12 nautical mile zone) of the Australian Antarctic Territory is not in Australian seas. This is consistent with Australia’s obligations pursuant to Article 4 of the *Antarctic Treaty 1961*.

##### **Clause 262                    References to the person in charge of a vessel do not include persons exercising certain powers**

This clause provides that references to a person in charge of a vessel in this Chapter do not include a person exercising powers under an Australian law. The purpose of this clause is to exempt Commonwealth, state and territory officers who are in control of a vessel—such as a ship’s pilot or a person piloting a ship in a law enforcement or maritime rescue capacity—from the requirements in this Chapter.

##### **Clause 263                    Permanent ballast water in sealed tanks not subject to this Chapter**

This clause provides that the ballast water management scheme does not apply to permanent ballast water which is in a sealed tank of a vessel and cannot be discharged from the vessel. It is not appropriate to include this type of ballast water in the scheme as it cannot be discharged and therefore does not pose an unacceptable biosecurity risk to Australia’s marine environment.

##### **Clause 264                    Relationship with other Commonwealth laws**

This clause provides that the Chapter complements other Commonwealth laws and does not substitute other current Commonwealth laws. This clarifies that this Chapter does not replace other Commonwealth marine environmental laws and recognises that there is a broader scheme of

Commonwealth laws that protect the marine environment from pollution from vessels in Australian seas such as the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Protection of the Sea (Harmful Anti-fouling Systems) Act 2006*.

#### **Clause 265 Relationship with State and Territory laws**

This clause indicates Parliament's intention that Chapter 5 covers the field in relation to biosecurity risks associated with ballast water or sediment. Accordingly, the Act will operate to exclude any state or territory law that purports to deal with ballast water or sediment.

The clause does not exclude or limit the concurrent operation of state or territory laws in respect of the treatment or disposal of ballast water or sediment after it has been removed from a vessel. This is to recognise that state and territory environmental protection laws may impose additional requirements once the ballast water or sediment has been released or removed from the vessel.

Section 109 of the Constitution invalidates a state law to the extent that it is inconsistent with a Commonwealth law. Determining whether a state law is inconsistent with a Commonwealth law involves interpreting both laws. If the Commonwealth law is interpreted as operating to the exclusion of state law, the state law will be inconsistent with the Commonwealth law and invalid. A provision such as clause 265, which sets out Parliament's intention to exclude the operation of state laws will be used in interpreting the Commonwealth law to determine whether it does exclude a particular state law.

It is intended that ballast water will be managed under an Australian-wide ballast water and management regime, providing a comprehensive system for ballast water management that covers both international and domestic vessels, ensuring that Australia can give effect to the Ballast Water Convention.

This clause applies to territory laws in the same way as it applies to state laws. While section 109 of the Constitution does not apply to territory laws, similar principles apply in relation to the inconsistency or repugnancy of territory laws with Commonwealth laws.

### **Part 2—Notice of discharge of ballast water in Australian seas**

#### **Division 1—Introduction**

##### **Clause 266 Simplified outline of this Part**

This outline sets out the Part's objectives. This Part outlines the circumstances in which an operator of a vessel must give a report. These circumstances are if it is intended that the vessel discharge, or the vessel discharges, ballast water in Australian seas. The operator must ensure the report is correct after giving the report by providing additional or corrected information, if necessary.

#### **Division 2—Reporting ballast water discharges**

##### **Clause 267 Reporting ballast water discharges in Australian seas**

This clause provides that the operator of a vessel must give a report if the vessel intends to discharge or does discharge ballast water in Australian seas, to allow for any associated biosecurity risks to be managed more efficiently and effectively.

The obligation to provide a report rests with the operator of the vessel as he or she is the person who has access to the required information. (Clause 21 provides that the operator of a conveyance also includes the body corporate or unincorporated body responsible for the operation of the conveyance).

A report must:

- include the information in relation to the vessel that is prescribed by the regulations
- be given in the manner, and to the person prescribed by the regulations
- be given during the period prescribed by the regulations (which may end at any time before or after the vessel enters Australian seas), and
- be in a form or forms approved by the Director of Biosecurity.

Details of each of these requirements are prescribed in the regulations, as this gives the Commonwealth flexibility to amend the information required as well as how and when that information is to be given. This may change over time in response to changes in the different levels of biosecurity risk associated with the ballast water. In recognition that different classes of vessels may pose different levels of biosecurity risk, the regulations may also prescribe different requirements for reports for different classes of vessels.

A person will be required to give the report regardless of whether they are in Australian territory or overseas when the report is required to be given. This ensures that biosecurity officers will have access to the report when required to make an assessment of the level of biosecurity risk associated with the ballast water.

A person who contravenes the requirement to give a report commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is two years imprisonment, or 120 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Act create offences and civil penalties for providing false or misleading information or documents.

The regulations may also prescribe exceptions to the requirement for a report to be provided. This allows reporting by exception to occur, where a report is only required if certain criteria are met. For example, vessels may be exempted from repeatedly reporting intended discharges where they only travel between certain ports and the uptake and discharge of ballast water is similar for each journey.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as collecting accurate and timely information through a notice will allow biosecurity officers to determine whether ballast water poses an unacceptable biosecurity risk and ensure that any ballast water intended for discharge is managed to address any risk.

Allowing a person to use the privilege and refuse to provide important information, could result in a significant biosecurity risk remaining unmanaged. It would also undermine the management of biosecurity risks, as officers would be forced to rely on warrants to obtain routine information required in a report. This is impractical and time consuming, particularly given the significant number of vessel capable of carrying ballast water within Australian seas (this includes both international and domestic vessels).

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

**Clause 268                      Reporting ballast water discharges in Australian seas—requirement to give additional or corrected information**

This clause requires an operator of a vessel that has reported under clause 267 to provide additional or corrected information as soon as practicable if he or she becomes aware the information provided in the original report is incomplete or incorrect.

A person who contravenes the requirement to provide additional or corrected information as soon as practicable, commits an offence and is liable to a civil penalty. The maximum penalty for contravention of this clause is two years imprisonment, or 120 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Act create offences and civil penalties for providing false or misleading information or documents.

A person will be required to give additional or corrected information regardless of whether they are in Australian territory or overseas when the report is required to be given. This ensures that biosecurity officers will have access to the report when required to make an assessment of the level of biosecurity risk associated with the ballast water.

This information will allow a more accurate assessment of biosecurity risks associated with ballast water that is intended to be discharged in Australian seas. As this requirement relates specifically to the report provided under clause 267, the requirement to provide additional or correct information is also not subject to the privilege against self-incrimination (the same reasoning in clause 267 above applies).

**Part 3—Management of discharge of ballast water**

**Division 1—Introduction**

**Clause 269                      Simplified outline of this Part**

This outline sets out the Part's objectives. The Part creates an offence of discharging ballast water in Australian seas. There are six exceptions available to the offence which are provided for in Divisions 3 to 8 in this Part.

**Division 2—Offence of discharging ballast water**

**Clause 270                      Offence—discharging ballast water in Australian seas**

This clause creates a fault-based offence where the person in charge or operator of a vessel discharges ballast water from the vessel in Australian seas. The maximum penalty for contravention is 2000 penalty units.

A person commits a strict liability offence if the person contravenes this clause. The maximum penalty for a contravention is 500 penalty units. This clause imposes a higher maximum penalty which departs from the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

This is appropriate as it reflects the severity of the potential consequences of an offence. It should be noted that the offence and level of penalty are consistent with the offences in section 21 of the Protection of the Sea (Prevention of Pollution from Ships) Act which relate to discharging



substances into the sea. These provisions are consistent with the Australian Government's international obligations to protect the marine environment.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

A strict liability offence is appropriate as there are public safety and public interest benefit in ensuring that this requirement is met, and the person in charge or operator of a vessel can be reasonably expected to know about the restrictions imposed on the discharge of ballast water because of their professional expertise. For this strict liability offence to apply, the prosecution will have to prove the conduct of the accused person in charge or operator of a vessel, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (Section 9.2) of honest and reasonable mistake of fact, or the exceptions provided in this chapter.

To allow vessels to discharge ballast water in Australian seas, there are a number of exceptions to the offence in this clause outlined in clauses 271, 276, 277, 279, 282 and 283 which are discussed below. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

The provisions have been drafted as exceptions, rather than defences, as this reflects the evidentiary burden being placed on the defendant to adduce evidence of the exception and not a legal burden to prove the defence.

### **Division 3—Exceptions: ballast water management**

#### **Subdivision A—Exception**

##### **Clause 271                    Exception—ballast water has been managed for discharge**

This clause provides that an exception to the offence in clause 270 is that the ballast water discharged from the vessel has been 'managed for discharge' in accordance with this Division. Subdivision B of this Division sets out a range ways that ballast water can be managed for discharge. This exception recognises where appropriate management techniques have been applied to ballast water discharge, risks of harmful organism or pathogens being in the ballast water can be sufficiently reduced to an acceptable level.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

## **Subdivision B—Methods of ballast water management**

### **Clause 272 Approved method of ballast water management**

This clause provides one definition of ‘managed for discharge’ for the purposes of ballast water management (see also clause 275). For ballast water to be considered to be managed for discharge under this clause, the vessel must:

- use a method of ballast water management approved by the Director of Biosecurity (see clauses 273 and 274)
- have a current ballast water management plan, a ballast water management certificate that is in force and appropriate ballast water records
- have carried out the management of the ballast water in accordance with the ballast water management plan, and
- meet any requirements prescribed in the regulations about managing and discharging ballast water.

In line with the Ballast Water Convention, meeting these requirements will contribute to the management of the transfer of harmful aquatic organisms and pathogens by assuring that ballast water is managed in an appropriate way.

### **Clause 273 Method of ballast water management—application for approval**

This clause sets out the process for an application to be made to the Director of Biosecurity for approval of a method of ballast water management. Ballast water management may be a ballast water treatment system, a prototype ballast water treatment system or some other method. This clause will enable new methods of ballast water management to be approved and utilised to manage the biosecurity risk associated with ballast water in Australian seas.

An application for approval of a method of ballast water management must be made in accordance with the regulations. On receiving an application the Director of Biosecurity must make a decision within 28 days of the application being made and in accordance with the process set out in regulations. The decision of the Director to reject a method of ballast water management is a reviewable decision under clause 574. If a decision is not made within 28 days, the application is taken to be refused. This ensures that the applicant can seek an internal review of the decision.

If the Director of Biosecurity requests additional information regarding the application, the 28 day period stops on the day the notice is given, the period begins again on the day the information is provided. This ensures that if the Director requires additional information in order to properly assess an application (particularly applications for complex ballast water treatment systems) and make a decision regarding whether to approve or reject the system, he or she has time to request and receive this information before the 28 day period runs out and a decision to refuse the application is considered to have been made.

As the methods of ballast water management may be used by other vessels, this clause requires that a notice of approval is published on the Agriculture Department’s website. This ensures efficiency in assessing applications and will reduce costs for industry as they will be able to use an approved method without having to go through the approval process again.

### **Clause 274 Method of ballast water management—approval of method approved by foreign country**

This clause provides the Director of Biosecurity with the ability to approve methods of ballast water management which have been approved by foreign countries in accordance with the Ballast Water Convention (whether or not the foreign country has signed the Convention). The Director must make this decision in accordance with the regulations. This approval process ensures that the

Director and Parliament have appropriate oversight of all methods of ballast water management used in Australian seas.

This approval is a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act 2003*.

### **Subdivision C—Ballast water exchange**

#### **Clause 275 Management by ballast water exchange**

This clause provides another definition of ‘managed for discharge’ for the purposes of ballast water management (see also clause 272). For ballast water to be considered to be managed for discharge under this clause, the vessel must:

- ensure that the prescribed proportion (by volume) of the ballast water in the tank immediately before the discharge had been taken up in an acceptable ballast water exchange (that is, the ballast water in the tank of a vessel is discharged at an ‘acceptable location’ and replaced by refilling the ballast water tank), and
- have appropriate ballast water records.

The clause also defines the concept of an ‘acceptable ballast water exchange’ as one where the exchange is conducted in an area declared by the Director of Biosecurity as an ‘acceptable location’ for ballast water exchange and in any prescribed circumstances for that area as set out in the declaration. This means that the Director can consider and provide particular areas where the discharging and taking up of ballast water is adequately controlled, or where the risks of harmful organisms or pathogens spreading is low, consistent with the Ballast Water Convention.

A declaration made under this clause is a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act*.

The regulations may also prescribe any other additional requirements for an acceptable ballast water exchange including the circumstances in which the prescribed proportion (by volume) of the ballast water in the tank of a vessel is taken to have been taken up in an acceptable ballast water exchange. In line with the Ballast Water Convention, meeting these requirements will contribute to the management of the transfer of harmful aquatic organisms and pathogens by assuring that ballast water is managed in an appropriate way.

This clause allows a vessel to conduct a ballast water exchange without having a ballast water management plan or ballast water management certificate as required by clause 272. This provides an option for managing ballast water without having to have a ballast water treatment system or another method of ballast water management. This will assist with the implementation of this Chapter, as it provides an option for vessels to manage ballast water for discharge and provides time for these vessels to install a method of ballast water management or be surveyed in order to get a ballast water management certificate.

#### **Division 4—Exception: discharge as part of acceptable ballast water exchange**

##### **Clause 276                    Exception—discharge as part of acceptable ballast water exchange**

This clause provides an exception to the offence under clause 270 where the discharge of ballast water is carried out as part of an acceptable ballast water exchange in accordance with clause 275. This clause ensures that a vessel is able to discharge ballast water in conducting a ballast water exchange (the ballast water initially discharged as part of an acceptable ballast water exchange will not meet the requirements as ‘managed for discharge’ under clause 275).

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

#### **Division 5—Exception: approved discharge to ballast water reception facility**

##### **Clause 277                    Exception—approved discharge to ballast water reception facility**

This clause provides an exception to the offence under clause 270 where the discharge of ballast water is made to a ballast water reception facility approved under clause 278. The ballast water must be treated or disposed of at the facility in accordance with the approval. A ballast water reception facility may include a land based facility or a vessel (see clause 9 for definition of ballast water reception facility).

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

##### **Clause 278                    Discharge to ballast water reception facility—application for approval**

This clause outlines the process for an application to be made to the Director of Biosecurity for approval of a discharge of ballast water to a ballast water reception facility and the manner in which the ballast water is to be treated or disposed of at the facility. A ballast water reception facility may include a vessel.

This clause allows the person in charge or operator of a vessel which is unable to make use of other exceptions to propose ways for managing their ballast water for discharge at a ballast water reception facility.

An application for approval of a discharge to a ballast water reception facility must be made in accordance with the regulations. On receiving an application the Director of Biosecurity must make a decision within 28 days of the application being made and in accordance with the process set out in regulations. The decision to reject the application is a reviewable decision under clause 574. If a decision is not made within 28 days, the application is taken to be refused. This ensures that the applicant can seek an internal review of the decision.

There is an obligation on the Director of Biosecurity to not approve a manner of treating or disposing of ballast water that would contravene a law of a state or territory. This is in recognition

that a ballast water reception facility may be on the land or in coastal waters of a state or territory and subject to environmental protection laws.

If the Director of Biosecurity requests additional information regarding the application from the applicant, the 28 day period stops on the day the notice is given, and the period begins again on the day the information is provided. This ensures that if the Director requires additional information in order to properly assess an application and make a decision regarding whether to approve or reject the ballast water reception facility, he or she has time to request and receive this information before the 28 day period runs out and a decision to refuse the application is considered to have been made.

### **Division 6—Exception: discharge covered by exemption**

#### **Clause 279                    Exception—discharge covered by exemption**

This clause provides an exception to the offence under clause 270 where the discharge of ballast water is exempt under clause 280 and any conditions of the exemption have been complied with.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

#### **Clause 280                    Director of Biosecurity may grant exemptions**

This clause outlines the process for making an application to the Director of Biosecurity for an exemption of one or more discharges of ballast water that are part of a vessel's voyage between specified ports or locations, where the ballast water is taken up in one or more of those ports or locations. For example, the Director may grant an exemption to a vessel which only travels between ports that have a low risk of harmful aquatic organisms and pathogens. Exemptions may only be granted for a specified period, may be in whole or in part, and may be subject to conditions.

On receiving an application the Director must make a decision within 28 days of the application being made and in accordance with the process set out in the regulations. The decision to refuse to grant an exemption under this clause is a reviewable decision under clause 574. If a decision is not made within 28 days, the application for an exemption is taken to be refused. This ensures that the applicant can seek an internal review of the decision.

The clause also provides that the Director may use a computer program to make a decision to grant an exemption or impose any conditions on an exemption.

#### **Clause 281                    Variation and revocation of exemption**

This clause outlines the grounds on which the Director of Biosecurity can vary or revoke an exemption granted under clause 280. This must be done in writing, to the owner, person in charge or operator of the vessel or an agent of the vessel.

This clause provides the flexibility for the Director to actively manage biosecurity risks of ballast water in situations where significant non-compliance with the conditions of the exemption has occurred or an unacceptable biosecurity risk has been identified after the exemption has been granted. Decisions made under this clause are reviewable decisions under clause 574.

This clause is intended to exclude the general powers of variation and revocation under section 33(3) of the *Acts Interpretation Act 1901* (as it is intended that an exemption will only be varied or revoked under this clause, and that a decision to use the power in this clause is reviewable).

### **Division 7—Exception: taking up and discharging ballast water at same place**

#### **Clause 282                    Exception—taking up and discharging ballast water at same place**

This clause provides an exception to the offence under clause 270 where the discharge of ballast water occurs in the same port or point where the ballast water had been taken up. This exception is available because ballast water from the same port or point poses a low risk of spreading harmful aquatic organisms or pathogens. For the exception to apply, the ballast water taken up must not be mixed with ballast water that has not been managed in accordance with Division 3 of this Part.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

### **Division 8—Exceptions and reporting requirements relating to safety, accidents and pollution**

#### **Clause 283                    Exceptions—safety, accidents and pollution**

This clause provides an exception to the offence under clause 270 where the discharge has occurred for reasons of safety, an accident or avoiding or minimising pollution.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

It will be an exception to the offence in clause 270 to discharge ballast water for reason of ensuring the safety of the vessel in an emergency, or for saving life at sea. An example of this would be where a vessel is in distress due to extreme weather conditions and the release of the ballast water would ensure the vessel would remain seaworthy.

It will also be an exception to the offence in clause 270 to discharge ballast water as a result of damage to the vessel or equipment on the vessel. To establish the exception the owner, person in charge or operator of the vessel must demonstrate that all reasonable precautions to prevent or minimise the discharge were taken before and after; occurrence of the damage, the discovery of the damage and the discovery of the discharge. The person in charge, owner and operator of the vessel must not have intentionally caused the damage or been reckless as to the occurrence of the damage. An example of being reckless as to the occurrence of the damage would be where the owner of the vessel does not ensure the proper maintenance of the ballast water tanks and ballast water treatment systems resulting in damage to the tanks or system.

It will also be an exception to the offence in clause 270 to discharge ballast water where the discharge has occurred to avoid or minimise pollution from the vessel. An example of this would

be vessel carrying oil or hazardous substances that were in danger of capsizing or breaking up due to extreme weather conditions. In this instance releasing ballast water to enable the vessel to be stabilised or to reduce structural stresses on the vessel would be acceptable.

**Clause 284 Report of discharge relating to safety, accident or pollution**

This clause outlines the requirement to provide a report to the Director of Biosecurity in the event of a discharge of ballast water in Australian seas under clause 283 due to an emergency or accident or to avoid or minimise pollution.

This clause includes a strict liability offence where the person in charge or operator of the vessel does not make a report as required. The maximum penalty for contravention is 500 penalty units.

It is acknowledged that the penalties available are higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. It should be noted that the offence and level of penalty are consistent with the offence in section 22 of the Protection of the Sea (Prevention of Pollution from Ships) Act which relate to reporting discharges. These provisions are consistent with the Australian Government's international obligations to protect the marine environment.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

A strict liability offence is appropriate in this context as there are public safety and public interest benefits in ensuring that this requirement is met and the person in charge or operator of a vessel can be reasonably expected to know about the requirement to report the discharge of ballast water because of their professional expertise. For this offence, the prosecution will have to prove the conduct of the accused person in charge or operator of a vessel, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (Section 9.2) of honest and reasonable mistake of fact, or the exceptions provided in this Chapter.

The report must set out the reasons for the discharge and must be made as soon as practicable, and in any case within 24 hours, after a member of the vessel's crew becomes aware of the discharge.

A report is not required if the discharge of ballast water is covered by one of the exceptions in clauses 271, 276, 277, 279 or 282, as these discharges are managed and pose a low risk. Discharges under these clauses will also be recorded in the ballast water records of the vessel (see Part 5 of this Chapter).

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

## **Part 4—Ballast water management plans and ballast water management certificates**

### **Division 1—Introduction**

#### **Clause 285 Simplified outline of this Part**

This outline sets out the Part's objectives. The Part provides for ballast water management plans and ballast water management certificates for vessels to be issued, endorsed and recognised. Division 2 outlines the requirements of ballast water management plans and provides a regulation-making power to prescribe a scheme for the Director of Biosecurity to approve ballast water management plans for Australian vessels. Division 3 outlines the requirements of ballast water management certificates and provides a regulation-making power to prescribe a scheme for the Director and survey authorities to survey vessels for the purposes of certification.

### **Division 2—Ballast water management plans**

#### **Clause 286 Ballast water management plan**

This clause outlines the requirements of ballast water management plans for Australian and foreign vessels. For an Australian vessel, a management plan deals with both the ballast water management for the vessel and the disposal of sediments from the vessel's ballast water. The plan must be approved by the Director of Biosecurity (see clause 287 for approval of ballast water management plans).

For a foreign vessel, a management plan deals with ballast water management for the vessel and the disposal of sediments from the ballast water which meets the requirements prescribed by the regulations and has been approved by the Administration of the vessel (see clause 9 for the definition of Administration).

A ballast water plan is required to be onboard the ship and available to guide personnel in safe operation of the ballast water management system employed on a particular ship. It will provide a detailed description of how the ballast water will be managed including safety procedures for the ship and the crew associated with managing ballast water using the treatment system.

#### **Clause 287 Approval of ballast water management plan for Australian vessel**

This clause provides that regulations may prescribe a scheme for the Director of Biosecurity to approve, amend or cancel a ballast water management plan of an Australian vessel. A decision made by the Director to approve, amend or cancel a ballast water management plan is a reviewable decision under clause 574. It is envisaged that ballast water management plans will be approved, amended or cancelled consistent with any International Maritime Organization guidelines under the Ballast Water Convention.

The approval of ballast water management plans under this clause is highly technical and specialised and will be based on the guidance and standards developed by the International Maritime Organization. It is appropriate that this scheme is prescribed in the regulations as the guidelines may be subject to change as technology and systems relating to ballast water develop.

### **Division 3—Ballast water management certificates**

#### **Clause 288 Ballast water management certificate**

This clause outlines the requirements for ballast water management certificates for Australian and foreign vessels. A ballast water management certificate verifies that a vessel has an approved ballast water management plan under clause 287, and that any equipment on the vessel, such as ballast water treatment systems, is capable of giving effect to the plan. For foreign vessels, the regulations may also prescribe additional requirements. It is envisaged that ballast water



management certificates will be consistent with any International Maritime Organization guidelines under the Ballast Water Convention. This ensures that all certificates are issued in accordance with the Ballast Water Convention.

A ballast water management certificate can be issued or endorsed by the Director of Biosecurity or a survey authority, or in the case of a foreign vessel, by their Administration (see clause 9 for definition of ‘Administration’).

**Clause 289                    Director of Biosecurity may authorise person to be survey authority**

This clause provides the Director of Biosecurity with the power to authorise, in writing, a person to be a survey authority. In making this decision, the Director must be satisfied that the person has suitable qualifications to perform the functions of a survey authority.

Authorisation of survey authorities under this clause will enable certain activities to be undertaken by a survey authority on behalf of the Commonwealth (see clause 290). It is appropriate that the Director can authorise a person to be survey authority as they will have the facilities, skills and technical expertise required to survey a vessel. An example of a survey authority may be a member of a vessel’s classification society (a society that collects and records technical data relevant to ships).

The clause clarifies that an authorisation is not a legislative instrument for the purposes of section 5(1) of the Legislative Instruments Act. This is to recognise the fact that authorisation is administrative in nature.

A survey authority will be able to charge a fee for any services and activities they carry out under this Division, such as surveying a vessel to verify that a ballast water treatment system is properly installed. This ensures that a survey authority can receive reasonable payment in return for its services. Although the survey authority can charge a fee under this Division, it cannot amount to taxation.

**Clause 290                    Issue or endorsement etc. of ballast water management certificate on behalf of the Commonwealth**

This clause sets out a regulation-making power to prescribe a scheme for the Director of Biosecurity or a survey authority to do any of the following in relation to an Australian vessel, on behalf of the Commonwealth:

- survey a vessel to determine whether a ballast water management certificate should be issued or endorsed for the vessel
- issue, endorse or withdraw a ballast water management certificate for the vessel
- extend the period the ballast water management certificate is in force, and
- amend the expiry date on a ballast water management certificate.

The regulations may also prescribe a scheme for the Director or a survey authority to do, on behalf of the Commonwealth, any of the following in relation to a foreign vessel, on request by the vessel’s Administration (see clause 9 for definition of ‘Administration’):

- survey a vessel to determine whether a ballast water management certificate should be endorsed for the vessel, and
- issue or endorse a ballast water management certificate for the vessel.

For instance, a foreign vessel’s Administration may make a request for a ballast water management certificate to be issued when the vessel is undergoing repairs in Australia.

It is appropriate that a survey authority is able to perform these tasks on behalf of the Commonwealth given the facilities, skills and technical expertise required.

The issuing of ballast water management certificates under this clause is highly technical and specialised and is based on the guidance and standards developed by the International Maritime Organization. It is appropriate that this scheme is prescribed in the regulations as the guidelines may be subject to change as technology and systems relating to ballast water develop.

Decisions made by the Director of Biosecurity or a survey authority to refuse to issue, endorse or amend a ballast water management certificate or to refuse to extend the period during which such a certificate is in force or a decision to withdraw such a certificate for an Australian vessel are reviewable decisions under clause 574. Decisions made by the Director or a survey authority to refuse to issue or endorse a ballast water management certificate for a foreign vessel are also reviewable decisions under clause 574.

The clause clarifies that a ballast water certificate is not a legislative instrument for the purposes of section 5(1) of the Legislative Instruments Act. This is to recognise the fact that certificate is administrative in nature and providing evidence that any equipment on the vessel, such as ballast water treatment systems, is capable of giving effect to the vessel's ballast water management plan.

## **Part 5—Ballast water records**

### **Division 1—Introduction**

#### **Clause 291                      Simplified outline of this Part**

The outline sets out the Part's objectives. This Part sets out how vessels are to keep records of their ballast water operations and that there are different record-keeping requirements for Australian and foreign vessels (see clause 9 for definition of 'Australian vessel' and 'foreign vessel').

Australian and foreign vessels will have different record keeping requirements reflecting the jurisdictional limitations of the Bill. Australian vessels will be required to record any ballast water operation whether or not the vessel is outside Australian seas. It is inappropriate to require foreign vessels to record ballast water operations. However, in order to discharge ballast water in Australian seas, foreign vessels will be required to keep records of ballast water operations to allow biosecurity officers to appropriately assess any biosecurity risks.

This Part imposes strict liability offences, which is appropriate in this context as there are public safety and public interest benefit in ensuring that this requirement is met, and the person in charge or operator of a vessel can be reasonably expected to know about the requirements to record ballast water operations because of their professional expertise. For these offences, the prosecution will have to prove the conduct of the accused person in charge or operator of a vessel, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (Section 9.2) of honest and reasonable mistake of fact, or the exceptions provided in this Chapter.

It is acknowledged that the penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. It should be noted that the offence and level of penalty are consistent with offences in sections 12 and 14 of the Protection of the Sea (Prevention of Pollution from Ships) Act which relate to record keeping requirements. These provisions are consistent with the Australian Government's international obligations to protect the marine environment through strict enforcement of a verifiable record-keeping scheme.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

## **Division 2—Australian vessels**

### **Clause 292 Australian vessel must have ballast water record system**

This clause requires Australian vessels capable of carrying ballast water to have onboard a ‘ballast water record system’ that complies with the requirements (if any) prescribed by the regulations. The clause notes that a ballast water record system is a system for making and keeping records of details about the vessel’s ballast water and ballast water operations (see clause 9 for definition of ballast water record system).

This clause creates an offence of strict liability against the person in charge of an Australian vessel if the vessel does not have a compliant ballast water record system onboard. The maximum penalty for contravention is 200 penalty units. See clause 291 for further information on this strict liability offence.

### **Clause 293 Recording ballast water operations and disposal of sediment**

This clause provides the mandatory record-keeping requirements for an Australian vessel conducting ‘ballast water operations’ or disposing of sediment. A vessel conducts a ballast water operation if ballast water is taken up into the vessel, discharged from the vessel, or treated or circulated on the vessel for the purposes of ballast water management (see clause 9 for definition of ballast water operation).

A record required to be kept by this clause must:

- be made using the vessel’s ballast water record system
- be made as soon as practicable after the operation is conducted or the sediment is disposed of, and
- comply with any requirements prescribed by the regulations.

The clause creates an offence of strict liability where the person in charge of an Australian vessel does not make a ballast water record in accordance with this clause. The maximum penalty for contravention is 200 penalty units. See clause 291 for further information on this strict liability offence.

The clause also provides that a person may commit a fault-based offence if they make a false or misleading record using an Australian vessel’s ballast water record system. The maximum penalty for contravention of this offence is 200 penalty units.

### **Clause 294 Records must be retained**

This clause requires that ballast water records must be retained for a total of five years—including that the records must be retained onboard the vessel for two years after a record is made. After this two year period, records can be retained either onboard the vessel or in the control of the owner of the vessel. The retention of ballast water records allows for the tracing of uptake and discharge of ballast water and assists in carrying out risk assessments on the vessel’s ballast water.

To ensure that an Australian vessel being towed by another vessel can meet its ballast water record obligation in situations where there is no crew on board the vessel to maintain the ballast water records, a record on board the towing vessel is taken to be on board the Australian vessel.

This clause creates an offence of strict liability against the owner of an Australian vessel if the clause requires a record to be retained and it is not retained in accordance with this clause. The

maximum penalty for contravention of this offence is 200 penalty units. See clause 291 for further information on this strict liability offence.

The clause provides an exception to the offence in circumstances where the record was lost or destroyed, and the loss or destruction was beyond the control of the present owner of the vessel or the person who was the owner of the vessel at that time.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

#### **Clause 295                    Appropriate ballast water records for Australian vessel**

This clause outlines the circumstances in which an Australian vessel has ‘appropriate ballast water records’. The clause defines appropriate ballast water records as records that:

- are made in accordance with clause 293—that are sufficient to allow any biosecurity risk associated with the vessel’s ballast water or sediment to be identified and assessed, and
- are not false or misleading.

By having onboard appropriate ballast water records, an Australian vessel can use certain methods of ballast water management to deal with ballast water discharged in Australian seas under Division 3 of Part 3 of this Chapter.

To ensure that an Australian vessel being towed by another vessel can meet its ballast water record obligation in situations where there is no crew on board the vessel to maintain the ballast water records, a record on board the towing vessel is taken to be on board the Australian vessel.

### **Division 3—Foreign vessels**

#### **Clause 296                    Appropriate ballast water records for foreign vessel**

This clause outlines the circumstances in which a foreign vessel has ‘appropriate ballast water records’. The clause defines appropriate ballast water records as records that:

- are sufficient to allow any biosecurity risk associated with the vessel’s ballast water or sediment to be identified and assessed
- meet the requirements (if any) that are prescribed by the regulations, and
- are not false or misleading.

This clause provides a regulation-making power for any additional requirements for an appropriate ballast water record for foreign vessels. This will ensure that the records are in the appropriate format and contain the correct information to allow for an assessment of biosecurity risks associated with the ballast water.

The jurisdiction of the Bill does not extend to foreign vessels outside Australian seas. However, this requirement will apply to foreign vessels in Australian seas and will ensure that by having onboard appropriate ballast water records, the requirements of this Chapter will be met. Where a foreign vessel has appropriate ballast water records they can use certain methods of ballast water management to deal with ballast water discharged in Australian seas.

To ensure that a foreign vessel being towed by another vessel in Australian seas can meet its ballast water record obligation in situations where there is no crew on board the vessel to maintain

the ballast water records, a record on board the towing vessel is taken to be on board the foreign vessel.

## **Part 6—Offence of disposing of sediment**

### **Division 1—Introduction**

#### **Clause 297                    Simplified outline of this Part**

This outline sets out the Part’s objectives. The Part creates an offence of disposing of sediment in Australian seas and the exceptions to the offence.

### **Division 2—Offence of disposing of sediment**

#### **Clause 298                    Offence—disposing of sediment in Australian seas**

This clause creates a fault-based offence and a strict liability offence where the person in charge or operator of a vessel discharges sediment from the vessel in Australian seas. The maximum penalty for contravention of the fault-based offence is 2000 penalty units. The maximum penalty for contravention of the strict liability offence is 500 penalty units.

Sediment includes all matter settled out of ballast water within the ships tanks (see clause 9 for definitions of sediment’ and ‘tank).

It is acknowledged that the penalties available are higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. It should be noted that the offence and level of penalty are consistent with the benchmarks under the Protection of the Sea (Prevention of Pollution from Ships) Act. These provisions are consistent with the Australian Government’s international obligations to protect the marine environment.

A court will still be able to consider the significance of the offence and the intent of the person to determine whether a lesser penalty than the maximum should be applied.

A strict liability offence is appropriate in this context as there are public safety and public interest benefits in ensuring that this requirement is met and the person in charge or operator of a vessel can be reasonably expected to know about the restrictions imposed on the discharge of sediment because of their professional expertise. For this offence, the prosecution will have to prove the conduct of the accused person in charge or operator of a vessel, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (Section 9.2) of honest and reasonable mistake of fact, or the exceptions provided in this Chapter.

#### **Clause 299                    Exception—safety, accidents and pollution**

This clause provides a number of exceptions to the offence under clause 298. These exceptions provide that it will not be an offence to dispose of sediment due to an emergency, accident or to avoid or minimise pollution.

It will be an exception to the offence to dispose of sediment under clause 298 if the disposal has occurred for reason of ensuring the safety of the vessel in an emergency or saving life at sea.

It will also be an exception to the offence under clause 298 if the disposal has been accidental or as a result of damage to the vessel, or equipment on the vessel. To establish the exception, the person in charge, owner and the operator of the vessel must demonstrate that all reasonable

precautions to prevent or minimise the discharge were taken and that the damage was not intentional or reckless.

It will also be an exception to the offence under clause 298 if the disposal of the sediment has occurred to avoid or minimise pollution from the vessel. An example of this would be a vessel carrying oil or hazardous substances that were in danger of capsizing or breaking up due to extreme weather conditions. In this instance releasing sediment to enable the vessel to be stabilised or to reduce structural stresses on the vessel would be acceptable.

The defendant bears the evidential burden in relation to these exceptions, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

## **Part 7—Compliance and enforcement**

### **Division 1—Introduction**

#### **Clause 300                    Simplified outline of this Part**

This outline sets out the Part's objectives. Under this Part the Director of Biosecurity and biosecurity officers are conferred enforcement powers, to require the production of ballast water records; issue directions not to discharge ballast water; and issue directions on the movement of the vessel.

### **Division 2—Power to require owner of Australian vessel to provide ballast water records**

#### **Clause 301                    Power to require owner of Australian vessel to provide ballast water records**

This clause provides that a biosecurity officer may require the owner of an Australian vessel to provide a ballast water record that is required to be retained under clause 294. A biosecurity officer may make copies of, or take extracts from, a record and may remove the record for this purpose. A person who is required to produce a record under this clause must do so as soon as reasonably practicable. Australian vessels are subject to this requirement whether they are in Australian seas or not.

The clause creates strict liability offence for failing to comply with the requirement to provide ballast water records. The maximum penalty for contravention is 80 penalty units.

It is acknowledged that the penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. It should be noted that the offence and level of penalty are consistent with the offence in subsection 27(2) of the Protection of the Sea (Prevention of Pollution from Ships) Act which relates to complying with requirements of inspectors. These provisions are consistent with the Australian Government's international obligations to protect the marine environment.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

A strict liability offence is appropriate in this context as there are public safety and public interest benefits in ensuring that this requirement is met, and the person in charge or operator of a vessel can be reasonably expected to know about the restrictions imposed on the discharge of sediment because of their professional expertise. For this offence, the prosecution will have to prove the conduct of the accused person in charge or operator of a vessel, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (Section 9.2) of honest and reasonable mistake of fact, or the exceptions provided in this Chapter.

### **Division 3—Directions powers**

#### **Clause 302                    Directions not to discharge ballast water**

This clause provides that the Director of Biosecurity or a biosecurity officer may issue a direction to the person in charge of a vessel in Australian seas not to discharge ballast water. This power can be exercised if the Director or a biosecurity officer is satisfied that a sample of the ballast water indicates that the ballast water poses an unacceptable level of biosecurity risk, or if the procedures required in the ballast water management plan have not been implemented by the person in charge of the vessel or crew. There is a corresponding power to revoke or vary the direction.

The Director of Biosecurity or biosecurity officer may direct the person in charge of the vessel not to discharge ballast water until conditions specified in the direction are met. These conditions must be for the purposes of reducing the biosecurity risks associated with the vessel to an acceptable level. These conditions may include, for example, carrying out a maintenance check on any ballast water treatment system to ensure that the system is working or requiring the person in charge of the vessel or crew demonstrate any ballast water procedures.

This clause provides that the person in charge of the vessel must comply with the direction. A person who fails to comply with a direction given under this clause may commit an offence under clause 305. A direction may also be varied or revoked under clause 306.

#### **Clause 303                    Directions about movement of vessel**

This clause provides that if the Director of Biosecurity has clear grounds for believing that an offence against this Chapter (except against clauses 267 or 268) has been committed by an Australian vessel; or a foreign vessel in, or proceeding to, a port in Australian territory then the Director can direct the person in charge of the vessel in certain ways. Directions can relate to:

- removing a vessel from a port as soon as practicable
- keeping the vessel out of a port
- taking the vessel to a repair yard or sediment reception facility as soon as practicable, and
- keeping the vessel in a specified location.

A direction will be given to ensure the appropriate management of biosecurity risks associated with ballast water. For example, if a vessel's ballast water treatment system is damaged, the Director may give a direction to take the vessel to a repair yard to have the ballast water treatment system repaired. The direction power will not apply in relation to offences against clauses 267 or 268 as these clauses assist with the assessment of risks associated with ballast water.

Before issuing a direction under this clause the Director must take into account the principles affecting decisions to exercise certain powers (clause 32). The person in charge of the vessel must comply with the direction. A person who fails to comply with a direction given under this clause may commit an offence under clause 305. A direction issued under this clause is a reviewable decision under clause 574.

**Clause 304                    Directions about movement of vessel—variation or revocation**

This clause permits the Director of Biosecurity to either vary or revoke a direction in relation to the movement of the vessel made under clause 303. A decision to vary or revoke a decision under this clause is a reviewable decision under clause 574. See clause 306 for the manner of giving directions under this clause.

This clause also permits the Director to require payment of a security by the person in charge of the vessel as a prerequisite for the variation or revocation of a direction. The criteria for the amount of security are also specified. A security may cover the cost of all penalties, and other costs and expenses that could be payable by the owner or person in charge of the vessel, in respect of each offence that was the basis of the direction given under clauses 302 or 303.

Securities may be used to ensure that penalties or expenses payable in relation to a vessel are recoverable. For example, if a foreign vessel discharges untreated ballast water due to a faulty treatment system, a security may be obtained to cover the penalty, and the direction varied to allow the vessel to continue to a port outside of Australian territory for repairs. If the person in charge or operator is found to be at fault, the security could be used to cover the penalty (for a fault-based offence). If the person or operator is found to not be at fault, the security would be returned to the person or operator.

**Clause 305                    Offence—contravening a direction**

This clause provides that a contravention of a direction from the Director of Biosecurity or a biosecurity officer under this Division is a strict liability offence. The maximum penalty for contravention is 2000 penalty units.

It is acknowledged that the penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. It should be noted that the offence and level of penalty are consistent with the offence in subsection 27A(5) of the Protection of the Sea (Prevention of Pollution from Ships) Act. These provisions are consistent with the Australian Government's international obligations to protect the marine environment.

A court would still be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

A strict liability offence is appropriate in this context as there are public safety and public interest benefit in ensuring that this requirement is met, and the person in charge or operator of a vessel can be reasonably expected to know about the direction. For this offence, the prosecution will have to prove the conduct of the accused person in charge or operator of a vessel, but not the fault elements of the offence (intention, knowledge, recklessness or negligence). However, the accused person will still be able to rely on the defence in the *Criminal Code* (Section 9.2) of honest and reasonable mistake of fact, or the exceptions provided in this Chapter.

This clause outlines the exceptions available for the person in charge of a vessel for reasons of safety, or saving life at sea. This clause also outlines that an offence does not occur if the contravention was accidental and resulted from damage to the vessel or its equipment, all reasonable efforts were made to comply with the direction and that the damage was not intentional or reckless.

The defendant bears the evidential burden in relation to these exceptions, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable



possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 306 Manner of giving directions etc.**

This clause sets out that a direction or notice of revocation of a direction may be given or varied by any means of communication (including electronic means). If the direction is given, varied or revoked by a means other than in writing, a written notice setting out the direction, variation or revocation must be provided to the recipient. The clause clarifies that a written direction is not a legislative instrument for the purposes of section 5(1) of the Legislative Instruments Act. This is to recognise the fact that notice is administrative in nature.

**Part 8—Miscellaneous**

**Clause 307 Compensation for undue detention or delay of vessel**

This clause implements Article 12 of the Ballast Water Convention which requires a reasonable amount of compensation to be paid to the owner of a vessel where a vessel is unduly detained or delayed under this Chapter (see clause 9 for definition of unduly detained or delayed).

The purpose of this clause is to safeguard owners against financial loss if the vessel is detained longer than was required to ensure compliance or if there was no basis for the detention. The delay or detention of a vessel may cost the owner of the vessel a large amount of money for each day the vessel is not in service. This clause ensures that where a vessel is unduly detained or delayed the owner of the vessel can seek compensation for any costs of the delay, for example, any costs associated with not meeting delivery deadlines.

This clause also provides that the owner may institute proceedings in a relevant court if the owner of the vessel and the Commonwealth do not agree on the amount of compensation (see clause 9 for the definition of relevant court). The court would then determine the reasonable amount of compensation for recovery from the Commonwealth.

**Clause 308 Prescribing matters by reference to other instruments**

This clause sets out an exception to the limitation on the incorporation by reference rule in section 14(2) of the Legislative Instruments Act as in force or existing from time to time.

This is to allow the incorporation by reference of international instruments from the International Maritime Organization (such as guidelines issued under the Ballast Water Convention that are updated after meetings of the technical committees) into regulations. These may include guidelines on assessing methods of ballast water management, approving ballast water management plans or issuing ballast water management certificates.

This is important as all decisions will be based on the latest guidelines, ensuring that Australia remains compliant with the Ballast Water Convention. It will also ensure that the regulations do not need to be amended each time an International Maritime Organization guideline changes.

Instruments incorporated in the regulations under this clause are available on the International Maritime Organization's website.

## **Chapter 6—Managing biosecurity risks: monitoring, control and response**

### **Part 1—Introduction**

#### **Clause 309 Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part modifies the definition of biosecurity risk for this Chapter only, sets out the main objects of this Chapter and provides that this Chapter does not apply in relation to certain goods and conveyances.

This outline also notes that this Chapter may apply in a modified way during a biosecurity emergency period.

#### **Clause 310 Modified meaning of biosecurity risk**

This clause amends the definition of ‘biosecurity risk’ for the purposes of this Chapter to include the concept of ‘emergence of a disease or pest’. The addition of ‘emerge’ in the definition of biosecurity risk will expand the coverage of the powers available in this Chapter to cover emerging pests and diseases that are found or already established in some parts of Australia and spread to other parts of Australia, such as Hendra virus.

This Part also includes a separate definition of biosecurity risk relating to invasive pests. The amended definition of biosecurity risk relating to ‘invasive pests’ is consistent with the *Convention on Biological Diversity 1992* (Biodiversity Convention). In particular, the clause refers to the potential for invasive pests to cause harm to ‘ecosystems habitats or species’. This definition gives effect to Articles 7 and 8 of the Biodiversity Convention and allows the Commonwealth’s post-border powers to deal with quarantine pests and invasive pests (with some limitations—see clauses 25 and 26).

The wording of this amended definition has been agreed to by the Department of Foreign Affairs and Trade and the Attorney-General’s Department’s Office of International Law.

#### **Clause 311 Objects of this Chapter**

This clause provides a concise overview of the Chapter’s objectives. The Chapter provides powers to assess, monitor and manage biosecurity risks posed by a disease or pest that may be present in or on goods and premises within Australian territory. The powers in this Chapter will not apply to all goods or conveyances in Australian territory (see clause 312).

Note 2 outlines that unless otherwise stated in the provision, a reference to premises also includes conveyances or a part thereof (see paragraph (a) of the definition of ‘premises’ in clause 9). Note 4 outlines that before exercising a power under this Chapter a biosecurity official must be satisfied of the matters referred to in clause 32 (the principles).

#### **Clause 312 Application of this Chapter**

This clause limits the circumstances in which the powers in this Chapter can be used. This Chapter does not apply to goods which are subject to biosecurity control; the biosecurity risks associated with these goods will be managed under the provisions in Chapter 3, nor exposed goods in relation to which an exposed goods order is in force (see Division 9 of Part 1, Chapter 3). The biosecurity risks associated with conveyances which are subject to biosecurity control will be managed under Chapter 4. This limitation reflects the additional powers available in Chapter 3 and Chapter 4 and the different sources of risk caused by goods and conveyances that come into Australia from overseas (and are subject to biosecurity control).

The powers in this Chapter may be used in relation to all other goods, conveyances and premises where a biosecurity officer suspects on reasonable grounds that a disease or pest may pose an

unacceptable level of biosecurity risk. For example, the powers would be available to assess and manage biosecurity risk associated with a horse stable that a biosecurity officer reasonably suspects may be contaminated with Hendra virus.

## **Part 2—Assessment of level of biosecurity risk**

### **Division 1—Introduction**

#### **Clause 313 Simplified outline of this Part**

The outline sets out the Part's objectives. The Part provides powers to assess the level of biosecurity risk posed by a disease or pest that may be in or on goods or premises in Australian territory. This Part also sets out the circumstances in which the powers may be exercised, the threshold test for exercising the powers and the purposes for which the powers can be exercised. In addition, it provides offences for contravening directions or requirements made in line with the biosecurity risk assessment powers.

### **Division 2—Circumstances in which biosecurity risk assessment powers may be exercised**

#### **Clause 314 Reasonable suspicion that disease or pest may pose unacceptable level of biosecurity risk**

This clause outlines the circumstances in which a biosecurity officer can use the powers within Division 3 of this Part to establish the presence of a disease or pest, identify the disease or pest (if possible) or assess the level of biosecurity risk posed by the disease or pest. Before a power can be exercised under Division 3 of this Part, a biosecurity officer must suspect on reasonable grounds that a disease or pest is present in or on goods or premises and that the disease or pest may pose an unacceptable level of biosecurity risk.

The threshold test for using the assessment powers in this Chapter is different from the tests in Chapter 3 and Chapter 4, where a biosecurity officer can assess a good or conveyance because it is subject to biosecurity control without having to form a suspicion about the risk associated with that particular good or conveyance. The higher threshold reflects that the powers in this Part are used to assess biosecurity risks associated with goods and premises within Australian territory and has been set at a level that considers the impact of the powers on an individual, goods or premises.

In exercising the powers set out in Division 3 of this Part, a biosecurity officer or a biosecurity enforcement officer may be assisted by other people, for example, someone can assist by setting up monitoring equipment (see note 4 of this clause, and clause 536).

The application of clause 312 means that the assessment powers in this Chapter must not be exercised in relation to goods or conveyances that are subject to biosecurity control or goods in relation to which an exposed goods order is in force.

The application of clause 32 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

#### **Clause 315 Exercise of biosecurity risk assessment powers in premises**

This clause outlines that a biosecurity officer or biosecurity enforcement officer may enter any premises in Australian territory (noting that a premises may include a conveyance which is not subject to biosecurity control), for the purposes outlined in clause 314. These purposes are to establish whether a disease or pest is present in or on the goods or premises, to identify the disease or pest (if possible) and to assess the level of biosecurity risk posed by the disease or pest.

This clause also provides that a biosecurity officer or a biosecurity enforcement officer will not be authorised to enter a premises unless the occupier of the premises has consented to the entry, or where the entry is made under a biosecurity risk assessment warrant (see Part 3 and Division 3 of Part 4, of Chapter 9). If the occupier of the premises has required that identification be shown, an officer cannot enter premises by consent unless the officer has shown their identity card. This is intended to assure an occupier of the identity of the officer.

This clause notes that if the premises can only be accessed by entering other premises, the officer may require an adjacent premises warrant (see Division 2 of Part 4, Chapter 9). This type of warrant will allow an officer to enter adjacent premises to get to other premises where the officer needs to exercise biosecurity risk assessment powers.

### **Division 3—Biosecurity risk assessment powers**

#### **Clause 316 Application of this Division**

This clause provides that the biosecurity risk assessment powers set out in this Division may be exercised in relation to goods or premises for any of the purposes referred to in clause 314. The powers can be used to:

- establish whether a disease or pest is present in or on the goods or premises;
- identify the disease or pest (if possible), and
- assess the level of biosecurity risk posed by the disease or pest.

#### **Clause 317 Directions to secure goods or conveyance**

This clause provides a biosecurity officer with the power to secure goods or a conveyance. A biosecurity officer may direct the person in charge of goods or a conveyance to secure the goods or conveyance in accordance with the biosecurity officer's instructions. Securing the goods or conveyances will allow a biosecurity officer to exercise the other assessment powers in this Division and ensures that any biosecurity risks associated with the goods or conveyance do not spread.

A direction to secure a conveyance must not be for a period longer than 48 hours, but another direction can be given once this period expires under subsection 33(1) of the *Acts Interpretation Act 1901*. Placing a time period over how long a conveyance can be secured ensures that the conveyance is only secured for as long as is necessary to assess the level of biosecurity risk and inconveniences the person in charge or the operator as little as possible.

This power cannot be exercised in relation to premises (other than a conveyance) such as a building, structure or piece of land. Entry and exit requirements for premises (other than a conveyance) can only be imposed when managing biosecurity risks—either through a biosecurity control order (see subclause 353(2)) or if a biosecurity response or activity zone has been determined (see subclauses 365(2) and 399).

A person who contravenes a direction to secure the goods or conveyance is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

Where a person is given a direction to secure the goods or conveyance in accordance with a biosecurity control order or a biosecurity response zone determination and the person contravenes that direction, he or she may commit an offence under clause 327.

### **Clause 318                    Inspections and taking samples of goods or premises**

This clause provides a biosecurity officer with the power to inspect and take samples of goods and premises (including a conveyance). It allows a biosecurity officer to inspect goods or premises. The meaning of inspect is not defined in the legislation so has its ordinary dictionary meaning. A biosecurity officer may inspect, search and physically examine the goods or premises.

This clause allows a biosecurity officer to take samples of the goods or premises personally. Alternatively, the officer may direct a person in charge of the goods or premises to deliver samples of the goods or premises, or arrange for a person with appropriate qualifications or expertise to take samples of the goods or premises. For example, where a premises or goods are in a remote location, the biosecurity officer may arrange for a person to take samples and send them to the biosecurity officer to be tested. A person in charge of a premise (other than a conveyance) means the owner or the occupier of the premises. See clause 22 for definition of person in charge of goods or a conveyance.

This clause also allows for a biosecurity officer, or another appropriately qualified person as arranged by a biosecurity officer, to carry out tests on any samples taken or delivered as directed

A person who contravenes a direction to provide or deliver a sample as directed is liable to a civil penalty. The maximum civil penalty for a contravention of this clause is 120 penalty units.

Where a person in charge of goods or premises is given a direction to take a sample of a good or premises in accordance with a biosecurity control order or a biosecurity response zone determination and the person contravenes that direction, he or she may also commit an offence under clause 327.

### **Clause 319                    Asking questions about goods or premises**

This clause provides a biosecurity officer with the power to require a person to answer questions or provide information in writing in relation to goods or premises (including conveyances) where the biosecurity officer reasonably suspects the person has information in relation to the goods or premises.

This power will be used to gather relevant information that may contribute to the effective identification of the pest or disease, assessment of whether the pest or disease is present in or on the goods or premises or the management of the level of biosecurity risk posed by the pest or disease. For example, a biosecurity officer may ask questions or seek information about the previous movements of goods or a conveyance in order to determine where the suspected pest or disease came from, or whether the disease or pest has spread to these locations.

A person who contravenes the requirement to answer questions or provide information is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. In addition, section 137.1 of the *Criminal Code* and clause 532 of this Act create an offence and civil penalty for providing false or misleading information.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this provision is high, as it will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address that risk.

Given the potential seriousness of the biosecurity risk and the need for a timely response it is not preferable to wait for a warrant to be issued to obtain this information. For example, an outbreak of a disease such as foot-and-mouth has the potential to cause significant and long term damage to the reputation of Australian industries and the reputation of Australia overseas. This could also

have adverse impacts on other industries and communities not affected by the initial outbreak. It may also result in increased costs associated with controlling pests and diseases.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person (see clause 635).

Where a person is required to answer questions or provide information in writing in accordance with a biosecurity control order or a biosecurity response zone determination and the person contravenes that requirement, he or she may also commit an offence under clause 328.

**Clause 320                    Requiring documents relating to goods or premises to be produced**

This clause provides biosecurity officers with the power to require a person to produce documents in relation to goods or premises (including conveyances). Where a biosecurity officer suspects on reasonable grounds that a person has custody or control of documents in relation to the goods or premises, the biosecurity officer may require that person to produce those documents to the biosecurity officer.

This power will be used to gather relevant documents relating to the goods or premises (such as previous import permits, or receipts providing proof of purchase) that will contribute to the purposes of the Chapter outlined in clause 312.

A person who contravenes the requirement to produce documents is liable to a civil penalty. The maximum civil penalty for a contravention of this clause is 120 penalty units. In addition, section 137.2 of the *Criminal Code* and clause 533 of this Act create an offence and civil penalty for providing false or misleading information.

Clause 320 is not subject to the privilege against self-incrimination (see clause 635). For the reasons discussed in clause 319, the privilege against self-incrimination is abrogated to allow biosecurity officers to effectively assess risks by ensuring timely access to documents and information to ensure that appropriate measures are in place to manage the entry, emergence, establishment or spread of the disease or pest. The protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person also applies (clause 635).

Where a person is required to produce documents in accordance with a biosecurity control order or a biosecurity response zone determination and the person contravenes that requirement, he or she may commit an offence under clause 329.

**Clause 321                    Movement etc. of goods or conveyance**

This clause provides a biosecurity officer with the power to give directions to a person in charge of goods or a conveyance. A biosecurity officer will be able to give a direction to not move, deal with or interfere with the goods or a conveyance. This power will be used to ensure that the biosecurity risk posed by any potential pests or diseases in or on the goods or conveyance are contained and not spread.

In addition, a biosecurity officer may give a direction that the goods or conveyance be moved, as soon as practicable, to a place specified by a biosecurity officer, or any direction relating to the movement of the goods or conveyance. This will allow a biosecurity officer to direct goods or a conveyance be moved to any area to lower the level of biosecurity risk posed (such as directing timber products to be moved away from forested areas).

A biosecurity officer will also have the ability to cause goods or a conveyance to be moved. This means that a biosecurity officer will be able to direct another person to carry out the movement instruction. This power can be used where a person in charge contravenes a direction to move the good or conveyance.

This clause does not apply to premises (other than a conveyance), such as a building or areas of land, as it is not possible for these premises to be moved to another location.

A person who contravenes a direction relating to the goods or conveyance is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

Where a person in charge of goods or a conveyance is given a movement direction in relation to the goods or conveyance in accordance with a biosecurity control order or a biosecurity response zone determination and the person contravenes that direction, he or she may also commit an offence under clause 327.

**Clause 322                      Biosecurity officer may affix notice to goods or conveyance**  
**Clause 323                      Unauthorised persons must not move etc. goods or conveyance to which notice has been affixed**

Clause 322 allows a biosecurity officer to affix a notice to, or as near as reasonably practicable to, goods or conveyances that are subject to a direction to be secured or a movement direction (see subclauses 317(1) or, paragraphs 321(1)(a) or (b)).

Under clause 322 the notice is required to state that:

- a disease or pest may be present in or on the goods or conveyance
- the disease or pest may pose an unacceptable biosecurity risk
- the goods or conveyance have been secured or moved in accordance with this Chapter, to enable a biosecurity officer to exercise powers under this Chapter, and
- a person may be liable to a civil penalty or offence if that person does any of the conduct that is outlined under subclauses (3) and (4) of this clause, clause 323 or clause 330 (for example remove or deface the notice without authorisation).

The notice is designed to inform people that a good or conveyance may pose a biosecurity risk and to provide a mechanism to communicate to people that the good or conveyance is subject to a direction to be secured, or subject to a movement direction. The notice also ensures that a person is aware of the potential penalties associated with contravention of this clause and related clauses.

The clauses also provides that a person who interferes with, removes or defaces the notice (clause 322), or moves, deals or interferes with goods or conveyances to which a notice is affixed (clause 323) without authorisation or permission is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units. It will be an exception to be authorised under this Act or another Australian law to move, interfere or deal with the goods. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

Where a notice has been affixed to, or as near as practicable to, goods or a conveyance in accordance with a biosecurity control order or a biosecurity response zone determination and the person moves or interferes with the good or conveyance, he or she may also commit an offence under clause 330.

### **Clause 324                    Operating electronic equipment on premises**

This clause provides for a biosecurity enforcement officer to operate electronic equipment on the premises for a purpose for which the premises was entered and use a disk, tape or other storage device that is on the premises and can be used with the equipment or is associated with it.

If any relevant data is found on the electronic equipment or associated or compatible disk, tape or other storage device, a biosecurity enforcement officer can exercise the powers outlined in subclause (4). ‘Relevant data’ means information relevant to a purpose for which the premises were entered. The data stored or accessed through electronic equipment may be relevant to assessing the level of biosecurity risk.

Additional powers of biosecurity enforcement officers are outlined in subclause (4), which also allows a biosecurity enforcement officer to:

- operate electronic equipment on the premises to put the relevant data into documentary form and remove the documents from the premises, and
- operate electronic equipment on the premises to transfer the relevant data to a disk, tape or other storage device (that is brought to the premises for the exercise of the power or is on the premises and the use of which for that purpose has been agreed in writing by the occupier of the premises) and remove the disk, tape or other storage device from the premises.

Under subclause (4) a biosecurity enforcement officer may only operate electronic equipment as outlined above if the officer believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment. This ensures that officers take due care with equipment that is likely to be valuable to the occupier of the premises when obtaining the information required to effectively assess biosecurity risks. If a biosecurity enforcement officer causes damage to electronic equipment, clause 326 outlines the circumstances when the Commonwealth is liable to pay compensation.

### **Clause 325                    Expert assistance to operate electronic equipment**

This clause allows a biosecurity enforcement officer to exercise the power to secure electronic equipment on the premises if the officer enters premises under a relevant warrant (that is, a biosecurity risk assessment, biosecurity control order or biosecurity response zone warrant) and that warrant authorises the officer to exercise those powers.

A biosecurity enforcement officer may secure electronic equipment on premises if the officer suspects on reasonable grounds that:

- there is relevant data on the premises
- the relevant data may be accessible by operating the equipment
- expert assistance is required to operate the equipment, and
- the relevant data may be destroyed, altered or otherwise interfered with if action to secure the equipment is not taken.

The equipment may be secured by locking it up, placing it under guard or any other means. This allows a biosecurity enforcement officer to secure equipment that may have relevant information on it but requires a person with a higher level of expertise than the officer to access it.

A biosecurity enforcement officer must give notice to the occupier of the premises, or another person who apparently represents the occupier, of the intention to secure the equipment and the fact that it may be secured for up to 24 hours. This ensures that the occupier of the premises is informed about what actions are being taken with regard to their property and for how long. This also gives the biosecurity enforcement officer time to locate an expert and for that expert to



access the relevant information the officer suspects is on the premises or accessible by operating the equipment.

The equipment may then be secured for up to 24 hours, or until it has been operated by an expert, whichever occurs earlier. This ensures that the equipment is only secured, and the occupier inconvenienced, for as long as is necessary to obtain the relevant information. If a biosecurity enforcement officer causes damage to electronic equipment, clause 326 outlines the circumstances when the Commonwealth is liable to pay compensation.

A biosecurity enforcement officer may apply to an issuing officer for an extension of the 24-hour period if the officer believes on reasonable grounds that the equipment needs to be secured for longer than 24 hours. Before making an application for an extension, the biosecurity enforcement officer must give notice to the occupier of the premises, or another person who apparently represents the occupier, of the officer's intention to apply for an extension. The occupier or other person is entitled to be heard in relation to that application.

Allowing the occupier a chance to be heard in relation to an application ensures procedural fairness by allowing the occupier to provide information that might be relevant to the issuing officer's final decision.

The 24-hour period may be extended more than once. An extension to the 24-hour period is intended to give the biosecurity enforcement officer more time to locate an expert and for that expert to access the information if it is required.

#### **Clause 326 Compensation for damage to electronic equipment**

This clause provides for the circumstances in which persons can be paid reasonable compensation for damage done to electronic equipment. The Commonwealth is liable to pay a reasonable amount of compensation where electronic equipment has been operated as mentioned in this Division and as a result:

- the equipment is damaged
- data recorded on the equipment is damaged
- programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted, or
- damage or corruption occurs:
  - because insufficient care was exercised in selecting the person who was to operate the equipment, or
  - because insufficient care was exercised by the person operating the equipment.

If the Commonwealth and the owner, or user, of the equipment, data, or programs cannot agree to the compensation amount, the owner, or user, may institute proceedings in a relevant court, for the Court to determine the reasonable amount to be recovered from the Commonwealth. This ensures fair procedures are in place if the owner or user disagrees with a determination of the compensation amount by the Commonwealth. However, in determining the amount of compensation payable regard is to be had to whether the occupier provided any appropriate warning or guidance on the operation of the equipment. This ensures that the occupier provides sufficient warning or guidance when electronic equipment is being operated so as to minimise the circumstances when damage would occur and compensation would then become payable.

## **Division 4—Offences**

<b>Clause 327</b>	<b>Contravention of direction</b>
<b>Clause 328</b>	<b>Contravention of requirement to answer questions etc.</b>
<b>Clause 329</b>	<b>Contravention of requirement to produce documents</b>
<b>Clause 330</b>	<b>Unauthorised persons must not move etc. goods or conveyance to which notice has been affixed</b>

This Division creates offences for contravening a direction or requirement under this Part. These clauses modify the civil penalty provisions within Division 3 of this Part to create fault based offences in certain circumstances (see subclauses 317(2), 318(4), 319(2), 320(3), 321(2) and 323(1) for civil penalties).

These offences only apply in relation to contraventions relating to powers that are exercised in accordance with a biosecurity control order or a biosecurity response zone determination. For example, it will be an offence to contravene a direction to secure a good where that direction was given in relation to a biosecurity response zone. This distinction reflects the greater potential consequences for not complying with a requirement or direction when a biosecurity officer is using their powers to manage biosecurity risk rather than using their powers to assess whether there is a risk to manage.

A person who contravenes one of these clauses commits an offence. The maximum penalty for contravention of these clauses is five years imprisonment, or 300 penalty units, or both. It will be an exception to be authorised under this Act or another Australian law to move, interfere or deal with the goods. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

The criminal penalties available are higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the environment and the economy.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

## **Part 3—Biosecurity measures to manage unacceptable level of biosecurity risk**

### **Division 1—Introduction**

#### **Clause 331                    Simplified outline of this Part**

This outline sets out the Part's objectives. This Part provides a list of powers, including biosecurity measures, which may be used for the purpose of managing biosecurity risks posed by a disease or pest that may be present in or on the goods or premises in Australian territory. These powers include the ability to impose entry or exit requirements in relation to premises, to direct treatment and destruction of goods and premises, powers provided for in the regulations and other powers.

These powers can only be exercised if the power is specified in a:

- biosecurity control order that relates to the goods or premises, or
- biosecurity response zone determination that relates to the goods or premises (and the goods or premises are within the biosecurity response zone).

The application of clause 32 means that the powers in this Division must be exercised in accordance with the principles set out in that clause. Additionally, the Part sets out offences and civil penalty provisions that apply for contraventions of the clauses in this Part.

## **Division 2—Powers that may be exercised: general**

### **Subdivision A—Circumstances in which powers may be exercised**

#### **Clause 332                    Circumstances in which powers set out in this Division may be exercised**

This clause outlines that powers can be exercised in relation to goods or premises in Australian territory under a biosecurity control order, or goods and premises within a biosecurity response zone. In order to exercise these powers, the powers must relate to the goods or premises and be listed in the biosecurity control order (see clause 353) or in the biosecurity response zone determination (see clause 365).

A power that is listed in a biosecurity control order or a biosecurity response zone determination must be exercised for the purpose of managing the biosecurity risks posed by a disease or pest to which the order or zone determination relates. The application of clause 32 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

Subclause (2) notes that this clause has effect subject to subclause 399(2) which allows the powers set out in clauses 333 and 334 relating to entry and exit requirements to be exercised in a biosecurity activity zone.

### **Subdivision B—Powers relating to entry to and exit from premises**

#### **Clause 333                    Entry and exit etc. requirements—persons**

This clause outlines the powers that a biosecurity officer may exercise in relation to premises (including conveyances). This clause provides that a biosecurity officer may, by notice in writing, impose requirements, in relation to the premises including that:

- people enter or leave the premises at specific places
- specified classes of people not enter the premises
- people entering or in the premises wear specified clothing or equipment or both, and
- people not interfere with the premises.

A notice under this clause must be affixed at each entry and exit point of the premises.

This clause clarifies that the notice is not a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act 2003*. This is to recognise the fact that the notice is administrative in nature.

If there is a requirement imposed that people wear specified clothing or equipment it must be designed to prevent a disease or pest from emerging, establishing itself or spreading in the premises, the notice advising of this requirement must also specify the circumstances and the timing or period the person is required to wear the clothing or equipment, or both (for example, disposable covers to place over a person's shoes). This power will be used to manage the risks associated with people spreading a pest or disease from the premises.

This clause also imposes a limitation on the exercise of this power. Except as permitted by this clause, a notice cannot require an individual to be subject to a measure of a kind that is set out in Subdivision B of Division 3 of Part 3, Chapter 2. The measures in that subdivision can only be included in a human biosecurity control order. These limitations ensure that the processes and safeguards in relation to requiring biosecurity measures under Chapter 2 remain in place. The Director of Biosecurity or biosecurity officers will be able to require decontamination measures under Subdivision B of Division 2 of Part 4 of Chapter 10.

A person may commit an offence or be liable to a civil penalty for contravention of a requirement under this clause (see clause 349).

#### **Clause 334                    Entry and exit etc. requirements—goods and conveyances**

This clause outlines the powers that a biosecurity officer may exercise in relation to premises (including conveyances). This clause provides that a biosecurity officer may, by notice in writing, impose requirements in relation to the premises including that:

- a person brings goods on to the premises at specified places
- specified classes of goods not be brought on to the premises
- conveyances enter or leave the premises at specified places, and
- specified classes of conveyances are not to enter the premises.

Similar to clause 333, this power will be used to manage the risks associated with people spreading a pest or disease from premises. A notice under this clause must be affixed at each entry and exit point of the premises.

The clause clarifies that an exposed goods order is not a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act 2003*. This is to recognise the fact that the notice is administrative in nature.

A person may commit an offence or be liable to a civil penalty for contravention of a requirement under this clause (see clause 349).

#### **Subdivision C—Powers relating to treatment of goods, conveyances and other premises**

##### **Clause 335                    Treatment of goods**

This clause provides biosecurity officers with the power to require goods to be treated in a specified manner. If the goods are high-value goods—that is the value of the goods is greater than the amount prescribed in the regulations—the goods must not be treated in a way that the biosecurity officer reasonably suspects may damage the goods without the written approval of the Director of Biosecurity. This extra step reflects the impact that ordering such a treatment might have on the owner of the goods and the potential loss of value caused by the treatment.

Regardless of the value of the goods, if the treatment might damage the goods, a person in charge must be asked to agree to the treatment (see clause 336).

This power ensures that biosecurity officers can order necessary treatments for goods to manage biosecurity risks and reduce those risks to an acceptable level. For example, a biosecurity officer may require goods with an ant infestation to be fumigated.

##### **Clause 336                    Treatment that may damage goods**

This clause outlines the notification requirements where treatment may damage goods. Where a biosecurity officer suspects on reasonable grounds that a treatment specified under clause 335 may damage goods, the officer must provide a notice in writing to a person in charge of the goods

informing them that the goods are required to be treated and the goods may be damaged. The notice will also request that the person agree to the treatment.

A biosecurity officer will be able to carry out the specified treatment without having to meet the notification requirements if:

- the officer suspects, on reasonable grounds, that a disease or pest that may be present in or on the goods poses an high level of biosecurity risk, and
- the officer is satisfied that the goods must be treated as soon as practicable to reduce the biosecurity risk to an acceptable level.

This recognises that in certain circumstances, the delay caused by following the notification process outlined in this clause would mean that pests or diseases that potentially pose a high biosecurity risk may have the opportunity to emerge, establish or spread in Australian territory.

If a notice is given requesting agreement to treatment and a person in charge of the goods does not agree to the treatment in writing within 30 days of receiving the notice, a biosecurity officer may request in writing that the person arrange for the goods to be dealt with, or destroyed, in a manner and within the period specified in the request. This period allows adequate time for the person in charge of the goods to decide how to deal with the notice and any subsequent request. If the goods are not dealt with, or destroyed, in a manner and within the period specified in the request then a biosecurity officer may take possession of the goods and cause them to be destroyed or otherwise disposed of.

These notification processes give a person in charge of goods a reasonable opportunity to address the biosecurity risks associated with the goods, with appropriate consequences if the biosecurity risks have not been managed as required.

This clause excludes a biosecurity industry participant from the definition of ‘person in charge’ of goods, if the biosecurity industry participant is in possession or control of goods only because of a direction given to the participant by a biosecurity officer. This reflects that it would not be appropriate for the biosecurity industry participant to agree to treatment that may damage goods where they do not have a relationship to the owner of the goods and the goods are only in their possession because of the actions of the biosecurity officer.

### **Clause 337 Treatment of conveyance**

This clause provides a biosecurity officer with the power to require a conveyance to be treated in a specified manner.

If the conveyance is a high-value conveyance—that is the value of the conveyance is greater than the amount prescribed in the regulations—the conveyance must not be treated in a way that the biosecurity officer reasonably suspects may damage the conveyance without the written approval of the Director of Biosecurity. This extra step reflects the impact that ordering such a treatment might have on the owner of the conveyance and the potential loss of value caused by the treatment.

Regardless of the value of the conveyance, if the treatment might damage the conveyance, a person in charge or operator of the conveyance must be asked to agree to the treatment (see clause 338).

### **Clause 338 Treatment that may damage conveyance**

This clause outlines the notification requirements where treatment may damage a conveyance. Where a biosecurity officer suspects on reasonable grounds, that a treatment specified under clause 337 may damage a conveyance, the officer must provide a notice in writing to a person in

charge or the operator of the conveyance informing them of the treatment requirement and that the conveyance may be damaged. The notice will also request that the person agree to the treatment.

A biosecurity officer will be able to carry out the specified treatment without having to meet the notification requirements if:

- the officer suspects, on reasonable grounds, that a disease or pest that may be present in or on the conveyance which poses an high level of biosecurity risk, and
- the officer is satisfied that the conveyance must be treated as soon as practicable to reduce the biosecurity risk to an acceptable level.

This recognises that in certain circumstances, the delay caused by following the notification process outlined in this clause would mean that pests or diseases that potentially pose a high biosecurity risk have the opportunity to emerge, establish or spread in Australian territory.

If a notice is given requesting agreement to treatment and a person in charge or operator of a conveyance does not agree to the treatment in writing within 30 days of receiving the notice, a biosecurity officer may request in writing that the person in charge or the operator arrange for the conveyance to be dealt with, or destroyed, in a manner and within the period specified in the request. This period allows adequate time for the person in charge or operator to decide how to deal with the notice and any subsequent request.

If the conveyance is not dealt with, or destroyed, in a manner and within the period specified in the request then a biosecurity enforcement officer may take possession of the conveyance. Once a biosecurity enforcement officer is in possession of the conveyance, a biosecurity officer may cause the conveyance to be disposed of or—with the written approval of the Director of Biosecurity—destroyed. However, a biosecurity enforcement office must not take possession of a conveyance unless the owner of the conveyances has consented to the possession in writing, or the possession is authorised by a conveyance possession warrant (for issue of these warrants see Part 3, and Division 3 of Part 4, of Chapter 9). A biosecurity enforcement officer is required for this process given a warrant may be required.

These notification processes give a person in charge or operator of a conveyance a reasonable opportunity to address the biosecurity risks associated with the conveyance, with appropriate consequences if the biosecurity risks have not be managed.

If the conveyance is to be destroyed under this clause, a biosecurity officer may cause any goods on board the conveyance to be removed before the conveyance is destroyed. This power may be used in circumstances where the risk posed by the conveyance is not transferred to the goods and also recognises that the goods may be owned by a different person to the conveyance.

### **Clause 339 Treatment of premises (other than a conveyance)**

This clause provides biosecurity officers with the power to require premises (other than conveyances) to be treated in a specified manner. This clause applies in relation to premises that are a structure or building or part of a structure or building. Conveyances are treated under clause 337.

Premises under this clause must not be treated in a way that the biosecurity officer reasonably suspects may damage the premises, without the written approval of the Director of Biosecurity. This extra step reflects the impact ordering such a treatment might have on the owner of the premises and the potential loss of value caused by the treatment. If the treatment might damage the premises, the owner of the premises must be asked to agree to the treatment (see clause 340).

**Clause 340 Treatment that may damage premises (other than a conveyance)**

This clause outlines the notification requirements where treatment may damage premises. This clause outlines the requirements for notifying the owner of premises (other than a conveyance) where a biosecurity officer suspects on reasonable grounds that the treatment required under clause 339 is likely to damage the premises. This clause provides that the officer must give notice in writing to the owner of the premises informing them of the requirement of treatment of the premises in a specified manner and the likelihood of damage to the premises. The notice will also request that the owner agree to the treatment of the premises.

If a biosecurity officer cannot, despite making reasonable efforts, locate the owner of the premises and the owner of the premises is not the occupier of the premises, then the officer must give the written notice to the occupier. This notice must inform the occupier that the premises is required to be treated in a specified manner and the treatment is likely to damage the premises and request the occupier to agree to the treatment of the premises.

A biosecurity officer will be able to carry out the specified treatment without having to meet the notification requirements to either the owner or the occupier if:

- the officer suspects, on reasonable grounds, that a disease or pest may be present in or on premises which poses an high level of biosecurity risk, and
- the officer is satisfied that the premises must be treated as soon as practicable to reduce the biosecurity risk to an acceptable level.

This recognises that in certain circumstances, the delay caused by following the notification process outlined in this clause would mean that pests or diseases that potentially pose a high biosecurity risk have the opportunity to emerge, establish or spread in Australian territory.

If the biosecurity officer cannot, despite making reasonable efforts, give notice to the owner or occupier of the premises, or the treatment must be carried out as soon as practicable due to an unacceptable level of biosecurity risk, the biosecurity officer must affix a notice to, or as near as reasonably practicable to, the premises, stating that:

- a pest or disease may be present in or on the premises
- the disease or pest may pose an unacceptable level of biosecurity risk
- the premises are required to be treated in a specified manner for the purpose of managing the biosecurity risk, and
- the treatment is likely to damage the premises.

This process ensures that there is appropriate notification about a treatment that may damage premises, even if the owner or occupier cannot be given the notice.

The notification processes also give an owner or occupier of the premises a reasonable opportunity to address the biosecurity risks associated with the premises, with appropriate consequences if the biosecurity risks have not be managed as required.

**Clause 341 Dealing with premises (other than a conveyance) if owner does not agree to treatment etc.**

This clause provides options to a biosecurity officer in a situation where the owner of the premises (other than a conveyance) does not consent to treatment requested in a notice issued under clause 340.

If notice is given to an owner requesting agreement to treatment, and the owner does not agree to the treatment or does not respond to the notice within 30 days, a biosecurity officer may request that the owner arrange for the premises to be dealt with, or destroyed, in a manner and within the period specified in the request. This period allows adequate time for the owner to decide how to

deal with the notice and any subsequent request. A request to arrange for premises to be destroyed may only relate to premises that are a structure or building or part of a building or structure.

If the premises is not dealt with, or destroyed, in a manner and within the period specified in the request then a biosecurity enforcement officer may take possession of the premises.

Where notice has been affixed to, or as near as practicable to, the premises in accordance with subclause 340(6) (if the owner or occupier cannot be located), a biosecurity enforcement officer may—at any time after the end of 30 days after the notice is affixed—take possession of the premises.

Once a biosecurity enforcement officer is in possession of the premises, a biosecurity officer may cause the premises to be treated or—with the written approval of the Director of Biosecurity—destroyed. However, a biosecurity enforcement officer must not take possession of premises unless the owner of the premises has consented in writing or the taking of possession is authorised by a premises possession warrant (see Part 3, and Division 3 of Part 4, Chapter 9). This extra step is required in the case of premises because of the monetary value of premises and the potential loss of value caused by the treatment. Ensuring that this process is completed with consent, or through a warrant process, provides further protection for the people affected by this decision. A biosecurity enforcement officer is required in these circumstances given a warrant may be required.

This clause further provides that if there are goods in or on premises that are going to be destroyed, the biosecurity officer may cause these goods to be removed first. This power may be used in circumstances where the risk that is posed by the premises is not transferred to the goods and also recognises that the goods may be owned by someone different to the premises.

These notification processes give an owner reasonable opportunity to address the biosecurity risks associated with the premises, with appropriate consequences if the biosecurity risks have not been managed.

## **Subdivision D—Powers relating to destruction of goods, conveyances and other premises**

### **Clause 342                      Destruction of goods**

This clause provides biosecurity officers with the power to require—subject to the notification requirements and review period—that goods be destroyed, where the biosecurity officer suspects on reasonable grounds that the goods cannot be effectively treated to reduce the biosecurity risk to an acceptable level.

If the goods are high-value goods—that is the value of the goods is greater than the amount prescribed in the regulations—the goods must not be destroyed without the written approval of the Director of Biosecurity. The decision to give approval for high-value goods to be destroyed is a reviewable decision under clause 574.

Before taking action under clause 347 for the high-value goods to be destroyed, a biosecurity officer must give notice to the owner of the goods stating that the goods are to be destroyed and the reasons for destruction. However high-value goods may be destroyed without this notice being given to the owner if a biosecurity officer has:

- not been able, despite making reasonable efforts, to locate the owner of the goods, and
- certified in writing to that effect.

If a biosecurity officer cannot—despite making reasonable efforts—locate the owner of the goods, the goods may be forfeited to the Commonwealth (see clause 627).



Unless the biosecurity officer has not been able to locate the owner, high-value goods must not be destroyed until after any review or related proceedings (including any appeal) have been finalised. This reflects the monetary value of high-value goods, and that their destruction may cause monetary loss to the owner (see clause 345). In addition, the owner of the destroyed goods may be entitled to compensation (see clauses 633 and 634). It is appropriate that compensation is available in these situations so that persons are not discouraged from reporting biosecurity risks from concerns over loss of their property.

**Clause 343                      Destruction of conveyance**

This clause provides biosecurity officers with the power to require—subject to the notification requirements and review period—that a conveyance be destroyed, where the biosecurity officer suspects on reasonable grounds that the conveyance cannot be effectively treated.

The conveyance cannot be destroyed without the written approval of the Director of Biosecurity. The decision to give approval for the conveyance to be destroyed is a reviewable decision under clause 574.

Before taking action under clause 347 for the conveyance to be destroyed, a biosecurity officer must give notice to the owner or operator of the conveyance stating that the conveyance is to be destroyed, the reasons for destruction and requesting the owner or the operator of the conveyance arrange for the conveyance to be destroyed within the period specified on the notice. However, the conveyance may be destroyed without this notice being given to the owner or operator if a biosecurity officer has:

- not been able, despite making reasonable efforts, to locate the owner or operator of the conveyance, and
- certified in writing to that effect.

If a biosecurity officer cannot—despite making reasonable efforts—locate the owner or operator of the conveyance, the conveyance may be forfeited to the Commonwealth (see clause 630).

Unless the biosecurity officer has not been able to locate the owner or operator of the conveyance, the conveyance must not be destroyed until after any review or related proceedings (including any appeal) have been finalised (see clause 345). This reflects the monetary value of the conveyance and that its destruction may cause monetary loss to the owner. In addition, the owner of the destroyed conveyance may be entitled to compensation (see clauses 633 and 634). It is appropriate that compensation is available in these situations so that persons are not discouraged from reporting biosecurity risks from concerns over loss of their property.

If notice has been given to an owner or operator of the conveyance and the conveyance has not been destroyed in the specified manner, or a biosecurity officer has certified the owner or operator cannot be located, a biosecurity enforcement officer may take possession of the conveyance and with the written approval of the Director of Biosecurity— take action under clause 347 for the conveyance to be destroyed.

A biosecurity enforcement officer will only be able to take possession of a conveyance—to destroy the conveyance—with the consent of the owner or operator of the conveyance or under a conveyance possession warrant (see Part 3, and Division 4 of part 4, Chapter 9). This requirement does not apply in relation to a conveyance which has been forfeited to the Commonwealth.

Ensuring that this process is completed with consent or oversighted through a warrant process provides further protection for the people affected by a decision to destroy a conveyance.

Before the conveyance is destroyed, a biosecurity officer may cause any goods on board the conveyance to be removed. This power may be used in circumstances where the risk posed by the conveyance is not transferred to the goods. This power recognises that the goods on board the conveyance may be owned by a different person to the conveyance.

**Clause 344                      Destruction of premises**

This clause applies to structures, buildings or a part of a structure or building. It does not apply to a place that is not enclosed or built on or a place situated underground or under water. This recognises that those ‘premises’ that are excluded cannot be destroyed.

This clause provides biosecurity officers with the power to require—subject to the notification requirements and review period—that a premises be destroyed, where the biosecurity officer suspects on reasonable grounds that the premises cannot be effectively treated to lower the biosecurity risk associated with the premises to an acceptable level.

The premises cannot be destroyed without the written approval of the Director of Biosecurity. The decision to give approval for the premises to be destroyed is a reviewable decision under clause 574.

Before taking action under clause 347 for the premises to be destroyed, a biosecurity officer must give notice to the owner of the premises stating that premises are to be destroyed and the reasons for destruction.

However, the premises may be destroyed without this notice being given to the owner or operator if a biosecurity officer has:

- not been able, despite making reasonable efforts, to locate the owner of the premises, and
- certified in writing to that effect.

Unless the biosecurity officer has not been able to locate the owner of the premises after making reasonable efforts and has certified this fact in writing, the premises must not be destroyed until after any review or related proceedings (including any appeal) have been finalised (see clause 345). This reflects the monetary value of the premises and that its destruction may cause monetary loss to the owner. In addition, the owner of the destroyed premises may be entitled to compensation (see clauses 633 and 634). It is appropriate that compensation is available in these situations so that persons are not discouraged from reporting biosecurity risks from concerns over loss of their property.

A biosecurity enforcement officer will only be able to take possession of premises—to destroy the premises—with the consent of the owner of the premises or under a premises possession warrant (Part 3, and Division 3 of Part 4, of Chapter).

Before premises are destroyed, a biosecurity officer may cause any goods in or on the premises to be removed. This power may be used in circumstances where the risk posed by the premises is not transferred to the goods. This power recognises that the goods in or on the premises may be owned by a different person to the premises.

**Clause 345                      High-value goods, conveyances or premises must not be destroyed during review period**

This clause applies if a biosecurity officer has given a notice in relation to high-value goods, a conveyance or other premises in accordance with subclauses 342(3), 343(5) or 344(4). These notices must be given to the owner (or operator in the case of conveyances), notifying them of the requirement and reasons for destruction.

This clause provides that a biosecurity officer must not take action under clause 347 for destruction of high-value goods, conveyances or premises until the end of the period which an application may be made for review and if an application is made—after the review or any related proceeding has been finally determined. This includes applications for both merits and judicial review.

A biosecurity officer will be able take action under clause 347 for the destruction of the high-value goods, conveyance or premises without having to wait for the end of the review period or the final determination, if the biosecurity officer is satisfied that:

- a disease or pest that may be present in or on the goods, conveyance or premises poses a high level of biosecurity risk, and
- the biosecurity risk cannot be managed for long enough to allow a review of the destruction of the goods, conveyance or premises, and any related proceedings to be finally determined.

If the goods, conveyance or premises have been destroyed because the biosecurity risks cannot be managed for the duration of any review or appeal, no application for review can be made and any review or related proceedings is taken to be discontinued. Once the goods or premises have been destroyed, there is no value in continuing such proceedings as the destruction has taken place and the decision cannot be changed.

### **Division 3—Powers provided by regulations**

#### **Clause 346 Regulations may provide for other biosecurity measures**

This clause outlines that the regulations may provide that a biosecurity officer may require a specified kind of biosecurity measure (a prescribed biosecurity measure) in relation to goods or premises. In this clause, a premise includes a conveyance. These measures cannot apply to certain goods or conveyances as outlined in clause 312.

Subclause (2) limits the biosecurity measures that can be prescribed in the regulations. This subclause precludes the listing of any of the following types of biosecurity measures:

- those measures that may be included in a human biosecurity control order (Division 3 of Part 3, Chapter 2)
- those measures that are named as biosecurity risk assessment powers (Division 3 of this Part)
- those measures that provide powers to require measures to be taken (Division 2 of this Part, and
- those measures relating to decontamination (Division 2 of Part 4, Chapter 10).

This ensures that the regulations do not contain biosecurity measures already available in the primary legislation. It also ensures that any notification or processes in place already in the legislation are not circumvented (for example certain timeframes for notification or requirements to affix notices).

This clause also allows for other matters relating to a prescribed biosecurity measure to be set out in the regulations. This can include matters such as notification requirements and limitations on measures during review periods.

An example of an additional biosecurity measure that may be prescribed in the regulations is the power to impose movement restrictions in relation to animals during an outbreak (for example, equine influenza). This may mean that no domestic or livestock animals are able to move within a biosecurity response zone while the zone determination is in place (see Part 5 of this Chapter for biosecurity response zones).

The powers in this clause can only be exercised in relation to goods or premises if the power is specified in a biosecurity control order that relates to the goods or premises or the power is specified in a biosecurity response zone determination that relates to goods or premises within a biosecurity response zone.

#### **Division 4—Other powers**

##### **Clause 347 Powers of a biosecurity officer if biosecurity measures are required**

This clause provides that a biosecurity officer can direct the person in charge, owner or operator, or arrange for an appropriately qualified person or expert, to carry out the biosecurity measures required under Subdivision C (treatment powers) or Subdivision D (destruction powers) of Division 2 of this Part, or under a regulation made for the purposes of clause 346. The biosecurity officer can also carry out the biosecurity measure themselves.

A biosecurity officer may require biosecurity measures are carried out by:

- in relation to goods—the person in charge of the goods
- in relation to conveyances—person in charge or operator of the conveyance or if the biosecurity measure is destruction, the operator or owner of the conveyance, and
- in relation to premises—direct the owner of the premises.

Where a biosecurity officer gives a direction to a person to carry out a biosecurity measure, or arranges for an appropriately qualified person or expert to carry out the biosecurity measure, the biosecurity officer may supervise the taking of the biosecurity measure. This ensures that the biosecurity measures are carried out properly, and where they have not been carried out in accordance with the directions, the biosecurity officer can take action to manage the biosecurity risks.

A person who is given a direction to carry out biosecurity measures, and contravenes that direction, may be liable to a civil penalty and may commit an offence (see clause 350).

##### **Clause 348 Biosecurity officer may affix notice to goods or premises**

This clause allows a biosecurity officer to affix a notice to, or as close as reasonably practical to, goods or premises (including a conveyance) when biosecurity measures to manage unacceptable levels of biosecurity risk (Division 2 of Part 3 of this Chapter) or a regulation made for the purposes of clause 346 have been required.

The notice affixed to goods or premises must state that:

- a pest or disease may be present in or on the goods or premises
- the disease or pest may pose an unacceptable level of biosecurity risk
- biosecurity measures have been required to manage biosecurity risks posed by the disease or pest associated with the goods or premises, and
- a person may be liable for a civil penalty or offence if they move or interfere with the goods or premises to which the notice relates under this clause or clause 351.

This requirement ensures that there is appropriate notification, even if the person in charge, owner or occupier cannot be located. If it is not possible to affix the notice to the goods or premises, the person exercising the power may affix the notice as near as reasonably practicable.

The notice is designed to inform people that a good or premises may pose a biosecurity risk and to provide a mechanism to communicate to people that biosecurity measures are required. The notice also ensures that a person is aware of the potential penalties associated with contravention of this and related clauses.

A person who interferes with, removes or defaces the notice is liable for a civil penalty (unless the person is authorised to do so under an approved arrangement or he or she has been given a direction by a biosecurity official or permission under clause 557). The maximum civil penalty for a contravention is 120 penalty units. It will be an exception to be authorised by an Australian law to interfere with, remove or deface a notice.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

## **Division 5—Offences and civil penalty provisions**

### **Clause 349                    Contravention of requirement relating to entering or leaving etc. premises**

This clause creates an offence for contravening an entry or exit requirement issued under clause 333 or 334. A person who contravenes entry or exit requirements commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the environment and the economy.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

### **Clause 350                    Person must comply with direction**

This clause creates an offence for contravening a direction given under clause 347. A person who does not comply with a direction under clause 347 commits an offence and is liable to civil penalty. The maximum penalty for contravention is five years imprisonment, 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the environment and the economy.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

### **Clause 351                    Unauthorised persons must not move etc. goods or conveyance to which notice has been affixed**

Where a notice has been affixed to or as near as reasonably practicable to, goods or a conveyance under subclause 348(1) a person will contravene this clause if the person moves, deals with or interferes with the goods or conveyance. This will be a contravention unless the person is

authorised to do so under an approved arrangement or he or she has been given a direction by a biosecurity official or permission under clause 557.

It will be an exception to be authorised by an Australian law to move, deal or interfere with goods or conveyances to which a notice is affixed. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

A person who moves, deals or interferes with a good or conveyance to which a notice is affixed commits an offence and is liable to civil penalty. The maximum penalty for contravention is five years imprisonment, 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

These powers are required to ensure a biosecurity officer can restrict the movement of goods and conveyances so that assessment and biosecurity activities can be conducted. This will allow the officer to establish the level of biosecurity risk posed and manage risks to reduce the threat or harm,

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

## **Part 4—Biosecurity control orders**

### **Division 1—Introduction**

#### **Clause 352                      Simplified outline of this Part**

This outline sets out the Part's objectives. A biosecurity control order can be made where a biosecurity officer suspects on reasonable grounds that a pest or disease may be present in or on goods or premises within Australian territory and that pest or disease poses an unacceptable level of biosecurity risk. The Director of Biosecurity must also be satisfied that measures need to be taken to manage the risk before making a biosecurity control order.

The biosecurity control order will specify the particular biosecurity measures or powers that a biosecurity officer can use to manage the identified risk (see Part 3 of this Chapter). In making a biosecurity control order, the Director will have the flexibility to select the most appropriate powers to manage the specific risk. This means that the response can be tailored to the specific disease or pest.

The application of clause 32 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

## **Division 2—Making, varying and revoking biosecurity control orders**

### **Clause 353                    The Director of Biosecurity may make biosecurity control order to manage an unacceptable level of biosecurity risk**

This clause provides the Director of Biosecurity with the power to make a biosecurity control order in relation to goods or premises (including conveyances) in Australian territory. This order can be made where a biosecurity officer suspects on reasonable grounds that:

- a disease or pest may be present in or on goods or premises in Australian territory, and
- the disease or pest poses an unacceptable level of biosecurity risk.

The order can only be made where the Director is satisfied that biosecurity measures are necessary to manage the biosecurity risk posed by the disease or pest.

The ability to make a biosecurity control order is given to the Director rather than a biosecurity officer to ensure that there is appropriate oversight of the exercise of powers under an order.

A biosecurity control order can relate to more than one disease or pest if the above tests are satisfied in relation to those diseases or pests.

The application of clause 312 means that powers in a biosecurity control order must not be used in relation to goods or conveyances that are subject to biosecurity control or exposed goods in relation to which an exposed goods order is in force.

A biosecurity control order may be varied under clause 358 to add or remove additional powers, or may be revoked under clause 359 where the pest or disease no longer poses an unacceptable level of biosecurity risk. To limit the circumstances in which a biosecurity control order can be varied or revoked, subsection 33(3) of the *Acts Interpretation Act 1901* does not apply in relation to this clause.

### **Clause 354                    Content of a biosecurity control order**

This clause outlines the content requirements of a biosecurity control order made under clause 353. The biosecurity control order must state that:

- a biosecurity officer suspects on reasonable grounds that a disease or pest may be present in or on the goods or premises and that the disease or pest poses an unacceptable level of biosecurity risk, and
- the Director of Biosecurity is satisfied that biosecurity measures need to be taken in relation to the goods or premises for the purposes of managing the biosecurity risks posed by the disease or pest.

In addition, the biosecurity control order must specify the goods or premises to which the order relates, each disease or pest which poses an unacceptable level of biosecurity risk which has been identified and the nature of the biosecurity risks to be managed. The inclusion of details about the nature of the biosecurity risks to be managed means that a biosecurity control order can be used where the disease or pest has not been identified and all that can be identified are the signs and symptoms of the disease or pest. This will allow an order to be made in relation to a newly discovered or unidentifiable disease or pest or in circumstances where the tests have proved inconclusive or are yet to be finalised.

The biosecurity control order must also specify each of the powers that will be used to assess and manage the risk. Powers which must be included, if they may be exercised in relation to the goods or premises in accordance with the listed division or relevant regulations, are biosecurity risk assessment powers (Division 3 of Part 2), powers to require biosecurity measures to be taken (Division 2 of Part 3) and powers set out in a regulation made for the purposes of clause 344.

Listing the powers which are available each time a biosecurity control order is made means that only the powers which are necessary for those particular circumstances are allowed to be exercised. The notice will also provide notification to the public about the powers which are available to biosecurity officers in relation to the goods or premises.

A biosecurity control order can be in force for up to 12 months, but must not be in force for any longer than the Director of Biosecurity considers necessary to manage the biosecurity risk to which the biosecurity control order relates. The period for a biosecurity control order cannot be extended. If the biosecurity risk posed after 12 months is still unacceptable, another biosecurity control order will need to be made. This clause puts an obligation on the Director to consider whether the biosecurity risk posed still justifies a biosecurity control order in order to manage it to an acceptable level. The potentially invasive nature of powers that can be exercised under a biosecurity control order, such as the power to stop people from entering a premises (potentially their residence or place of business) should only be available for as long as is necessary to manage the biosecurity risks associated with the disease or pest specified on the control order.

This clause also outlines that a power must not be listed in the order unless the Director is satisfied that the exercise of that power is appropriate and adapted to managing the biosecurity risk posed by the disease or pest. This means that the use of the power is a proportionate response to the management of biosecurity risk.

Where the biosecurity control order is made in relation to a conveyance, it will also apply to all the goods in or on the conveyance. Similarly where the biosecurity control order is made in relation to premises, it will also apply to all the conveyances and goods in or on the premises.

**Clause 355                      Form of a biosecurity control order**

This clause outlines the form of the biosecurity control order made under clause 353, which must be in writing and be in a form approved by the Director of Biosecurity. The clause clarifies that a biosecurity control order is not a legislative instrument for the purposes of section 5(1) of the *Legislative Instruments Act 2003*. This is to recognise the fact that the order is administrative in nature.

**Clause 356                      Biosecurity control order to be given to person in charge etc. of goods or premises or affixed to goods or premises**

This clause outlines the notice requirements for a biosecurity control order. For a biosecurity control order made in relation to goods or conveyances, a biosecurity officer must—where it is practicable to do so—give a copy of the order to the person in charge of the goods or conveyance. Where it is not practicable to do so, a biosecurity officer must affix a copy of the order, as near as practicable to the goods or conveyance.

For biosecurity control orders made in relation to premises other than a conveyance, a biosecurity officer must—if practicable to do so—give a copy of the order to the occupier of the premises or a person who apparently represents the occupier. Where it is not practicable to do so, a biosecurity officer must affix a copy of the order, as near as practicable to the premises.

This notification requirement is intended to notify the person in charge or the occupier about the biosecurity control notice. The notice will also provide notification to the public about risk and the powers to manage the risk which are available in relation to the goods or premises.

A person who interferes with, removes or defaces a biosecurity control order may be liable to a civil penalty (see clause 363).



**Clause 357**                    **Circumstances in which biosecurity control order ceases to be in force**

This clause sets out the circumstances in which a biosecurity control order ceases to be in force. An order will cease to be in force if the order expires or is revoked. Alternatively, a biosecurity control order ceases to be in force when the goods or premises to which the order relates have been destroyed.

This ensures that a biosecurity control order is only in place for as long as it is required to manage biosecurity risks posed by the disease or pest to which it relates.

**Clause 358**                    **Variation of a biosecurity control order**

This clause provides that the Director of Biosecurity may vary a biosecurity control order in certain circumstances if the Director is satisfied that the level of biosecurity risk posed by the disease or pest is no longer unacceptable, or to vary the powers available in the order to manage the biosecurity risk posed by the disease or pest. This allows for flexibility—if a particular approach has not effectively managed the risk—to include additional powers to achieve that purpose. For example, the original order may not have restricted the movement of goods into or out of a property, however the disease or pest has now spread so that power is now required to effectively manage the risk.

Additionally, a biosecurity control order can be varied where another disease or pest, posing an unacceptable level of biosecurity risk, may be present in or on the goods or premises to which the order relates and biosecurity measures are required to manage the biosecurity risks associated with the new disease or pest. The ability to add additional diseases or pests to a biosecurity control order ensures that biosecurity risks can be managed efficiently, through allowing action in a timely manner by having a single biosecurity control order.

The order may also be varied if the variation is of a minor technical nature to ensure administrative changes can be made.

Any additional powers listed in the varied biosecurity control order must be deemed appropriate by the Director for managing the biosecurity risk posed by the disease or pest to which the biosecurity control order relates. A variation to a biosecurity control order must be in writing, is not a legislative instrument and will take effect immediately after it is made.

The notification requirements for a variation of a biosecurity control order are the same as those set out in clause 356—with notices given to the person in charge or occupier as relevant or affixed to or as near as practicable to the goods, conveyance or premises. A biosecurity officer must remove all copies of the original order that were affixed to, or as near as reasonably practicable to, the goods, conveyance or premises when replacing with the varied biosecurity control order.

A person, who interferes with, removes or defaces a biosecurity control order which is affixed to, or as near as practicable to may be liable to a civil penalty (see clause 363).

**Clause 359**                    **Revocation of a biosecurity control order**

This clause provides that the Director of Biosecurity must revoke a biosecurity control order when the risk posed by each disease or pest to which the order relates is no longer unacceptable. The potentially invasive nature of powers that can be exercised in a biosecurity control order, such as the power to stop people from entering a premises (potentially their residence or place of business) should only be available for as long as is necessary to manage the biosecurity risks.

A revocation must be in writing, is not a legislative instrument and will take effect immediately after it is made.

This clause also outlines the notice requirements for the revocation of the biosecurity control order. The revocation notice must be given to the person in charge of the goods or conveyance, or to the occupier of the premises. A biosecurity officer must remove any copies of the original order that were affixed to, or as near as reasonably practicable to the goods, conveyance or premises.

This ensures that if the Director determines that there is no longer an unacceptable level of biosecurity risk posed by the diseases or pests to which the order relates, the order is revoked, rather than allowing the order to lapse. This reflects the potentially invasive nature of powers that can be exercised under a control order.

### **Division 3—Powers that may be exercised under biosecurity control order**

#### **Clause 360 Powers that may be exercised—general**

This clause outlines the powers that may be exercised in relation to goods or premises (including a conveyance) under a biosecurity control order. For the purpose of managing the biosecurity risk posed by the disease or pest, powers specified in the order under paragraphs 352(2)(d), (e) or (f) or a power set out in Division 4 of Part 3 (clauses 347 and 348) may be exercised.

The application of clause 312 means that powers in a biosecurity control order must not be used in relation to goods or conveyances that are subject to biosecurity control or exposed goods in relation to which an exposed goods order is in force. In exercising the powers set out in Division 3 of this Part, a biosecurity officer or a biosecurity enforcement officer may be assisted by other persons (for example, someone setting up monitoring equipment).

The application of clause 32 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

#### **Clause 361 Exercise of powers in premises**

This clause outlines that a biosecurity officer or biosecurity enforcement officer may enter any premises (including a conveyance) within Australian territory for the purpose of exercising powers in accordance with clause 360.

This clause provides that a biosecurity officer or a biosecurity enforcement officer will not be authorised to enter a premises unless the occupier of the premises has consented to the entry, or where the entry is made under a biosecurity control order warrant (see Part 3, and Division 3 of Part 4, of Chapter 9). If the occupier of the premises has required that identification be shown, an officer cannot enter premises by consent unless the officer has shown their identity card. This is intended to assure an occupier of the identity of the officer.

This clause notes that if the premises can only be accessed by entering other premises, the officer may require an adjacent premises warrant (see Division 3 of Part 4, Chapter 9). This type of warrant will allow an officer to enter adjacent premises to get to other premises where the officer needs to exercise biosecurity risk assessment powers.

#### **Clause 362 Power to secure goods or premises to deal with another disease or pest**

This clause outlines the circumstances in which a biosecurity officer will be able to secure a good or premises to deal with another disease or pest.

If a biosecurity control order is in force under clause 353 in relation to goods or premises and a biosecurity officer enters in accordance with the requirements of clause 361, then the biosecurity officer may secure those goods or premises.

A biosecurity officer may secure goods or premises that are subject to a biosecurity control order for up to 24 hours if:

- the biosecurity officer suspects, on reasonable grounds, that another disease or pest (other than which the biosecurity control order relates) may be present
- that the other disease or pest may pose an unacceptable level of biosecurity risk, and
- the biosecurity officer believes, on reasonable grounds, that it is necessary to secure these goods or premises, without the authority of a biosecurity risk assessment warrant or a biosecurity control order warrant, in order to manage the biosecurity risks posed by the other disease or pest.

This ensures, that where a biosecurity officer suspects that another disease or pest is present in or on a good or premises, these goods or premises can be secured until the biosecurity control order is varied (see clause 358).

Where entry to premises is made under a warrant, a new warrant may be needed to authorise the biosecurity officer to exercise the powers specified in the varied biosecurity control order.

#### **Division 4—Civil penalty provision**

##### **Clause 363                      Unauthorised persons must not interfere with etc. biosecurity control order affixed to goods or premises**

The clause states that if a person interferes with, removes or defaces a biosecurity control order the person is liable for a civil penalty (unless the person is authorised to do so under an approved arrangement or, or he or she has been given a direction by a biosecurity official or permission under clause 557). The maximum civil penalty for a contravention is 120 penalty units.

It will be an exception to be authorised by an Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

#### **Part 5—Biosecurity response zones**

##### **Division 1—Introduction**

##### **Clause 364                      Simplified outline of this Part**

This outline sets out the Part's objectives. This Part allows the Director of Biosecurity to determine an area of Australian territory as a biosecurity response zone to manage the unacceptable level of biosecurity risk posed by a disease or pest in relation to the area and the conditions under which the Director may establish a zone.

The biosecurity response zone determination will specify the particular biosecurity measures or powers that a biosecurity officer can use to manage the identified risk (see Parts 2 and 3 of this Chapter and clause 367 for a list of powers). In determining a biosecurity response zone, the Director will have the flexibility to select the most appropriate powers to deal with the pest or disease.

## **Division 2—Biosecurity response zone determinations**

### **Clause 365 Director of Biosecurity may determine biosecurity response zone**

This clause provides that the Director of Biosecurity may determine that a specified area in Australian territory is a biosecurity response zone if:

- a biosecurity officer suspects on reasonable grounds that a disease or pest may be present in or on goods or premises (including a conveyance) in the area, and the disease or pest poses an unacceptable level of biosecurity risk, and
- the Director is satisfied that it is necessary to make the determination for the purposes of managing the biosecurity risk posed by the disease or pest.

The zone determination may also relate to more than one disease or pest if the above tests are also satisfied in relation to those diseases or pests. The Director may determine that a specified area in Australian territory is part of a biosecurity response zone, even if the area is already part of another biosecurity response zone, a monitoring zone or a biosecurity activity zone.

The ability to determine a biosecurity response zone is given to the Director rather than a biosecurity officer to ensure that there is appropriate oversight over the exercise of powers under a zone determination.

The application of clause 312 means that powers in a biosecurity response zone determination must not be used in relation to goods or conveyances that are subject to biosecurity control or exposed goods in relation to which a biosecurity response zone determination is in force.

A zone determination will be able to be varied or revoked in line with section 33(3) or the *Acts Interpretation Act 1901*. A determination made under clause 365 is exempt from disallowance under section 42 of the *Legislative Instruments Act 2003*.

It is appropriate for the Parliament to delegate to the Director the power to make this determination as it involves technical and scientific decisions to manage risks to Australia's biosecurity. Subjecting this determination to disallowance could undermine the technical and scientific based decision making involved in this process and frustrate risk management processes.

A determination made under this clause is critical to the adequate and timely management of biosecurity risks. If this determination were to be disallowed, the Commonwealth's ability to manage biosecurity risks relating to a disease or pest incursion will be limited. This could have a significant impact on the economy and could likely lead to restrictions being put on Australia's exports by Australia's trading partners. In addition, disallowance of a determination made under this clause could lead to inadequate management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy.

### **Clause 366 Content of a biosecurity response zone determination**

This clause outlines the content requirements of a biosecurity response zone determination made under clause 365. The biosecurity response zone determination must state that:

- a biosecurity officer suspects on reasonable grounds that a disease or pest may be present in or on goods or premises in the zone and the disease or pest poses an unacceptable level of biosecurity risk, and
- the Director of Biosecurity is satisfied that it is necessary to make the determination for the purposes of managing the biosecurity risk posed by the disease or pest.

Additionally, the determination must specify each disease or pest which has been identified and poses an unacceptable level of biosecurity risk and the nature of the biosecurity risks to be managed. The inclusion of details about the nature of the biosecurity risks to be managed means

that a biosecurity response zone can be used where the disease or pest has not been identified and all that can be identified are the signs and symptoms of the disease or pest. This will allow a biosecurity response zone to be determined in relation to a newly discovered or unidentifiable disease or pest or in circumstances where the tests have proved inconclusive or are yet to be finalised.

The determination must also specify each of the powers that will be used to assess and manage the risk. Powers which may be included are biosecurity risk assessment powers (Division 3 of Part 2), powers to require biosecurity measures to be taken (Division 2 of Part 3), powers set out in a regulation made for the purposes of clause 346 and the additional biosecurity response zone powers set out in clause 367. The determination must also set out the period for which the determination is to be in force.

Listing the powers which are available each time a biosecurity response zone determination is made means that only the powers which are necessary for those particular circumstances are allowed to be exercised. The notice will also provide tangible communication to the public about the powers which are available in relation to the zone.

A biosecurity response zone determination can be in force for up to 12 months, but must not be in force for any longer than the Director of Biosecurity considers necessary to manage the biosecurity risk. A determination cannot be extended. If the biosecurity risk posed after 12 months is still unacceptable, another biosecurity response zone determination will need to be determined. This clause puts an obligation on the Director to consider whether the risk posed still justifies a biosecurity response zone determination. The potentially invasive nature of powers that can be exercised in a biosecurity response zone, such as the power to stop people from entering a premises (potentially their residence or place of business) should only be available for as long as is necessary to manage the biosecurity risks.

Additionally, this clause outlines that a power must not be listed in the determination unless the Director is satisfied that the exercise of this power is appropriate and adapted to managing the biosecurity risk posed by the disease or pest. This means that the use of the power is a proportionate response to the management of biosecurity risk.

#### **Clause 367                    Additional powers that may be specified in a biosecurity response zone determination**

This clause outlines additional powers that can be used in a biosecurity response zone. These powers include:

- the power to cause the biosecurity response zone to be identified (including by affixing notices or markings)
- the power to cause goods or premises (including conveyances) within the zone to be identified (including by affixing notices or markings)
- the power to direct a person in the biosecurity response zone to leave the zone for up to 24 hours, and
- the power to set up traps or set up equipment or other structures within the zone.

These powers will assist with the management of biosecurity risk. By identifying the zone and the goods and premises within the zone identified, a biosecurity officer will be able to quickly identify any goods or premises which may have a pest or disease present. In addition, the notice will inform the public of the potential biosecurity risks associated with the area, goods or premises. The power to direct persons out of the zone will assist with treatment or destruction of goods and premises within the zone. The 24 hour time period is adequate to ensure that biosecurity measures can be carried out.

### **Clause 368 Consultation requirements**

This clause outlines the requirement to consult with relevant state and territory government bodies. Before determining a biosecurity response zone, the Director of Biosecurity must consult the head of the body in each of the states or territories that are responsible for biosecurity matters in which the proposed biosecurity zone will lie.

This clause provides for a mechanism to reduce jurisdictional uncertainties and facilitate activities where matters cross state and territory boundaries. However, a failure by the Director of Biosecurity to consult as required in this clause, does not affect the validity of the determination.

### **Clause 369 Notification requirements**

This clause requires the Director of Biosecurity to ensure that the biosecurity response zone determination is made public in any way that he or she sees fit. This is in addition to the requirements for registration under the *Legislative Instruments Act 2003*. For example, the Director may advertise in the local media in the area where the zone has been determined or may put the determination on the Agriculture Department's website. This ensures that the public will be aware of the biosecurity response zone and any powers or requirements associated with it.

A biosecurity response zone determination is not invalidated by a failure to meet the notification requirements in this clause.

## **Division 3—Powers that may be exercised in biosecurity response zones**

### **Clause 370 Powers that may be exercised—general**

This clause outlines the powers that may be exercised when a biosecurity response zone determination is in force. For the purpose of managing the biosecurity risk posed by the disease or pest specified in the determination, the powers specified in the order under paragraphs 366(2)(c), (d), (e) or (f) or a power set out in Division 4 of Part 3, Chapter 6 (clauses 347 and 348) may be exercised.

The application of clause 312 means that powers in a biosecurity response zone must not be used in relation to goods or conveyances that are subject to biosecurity control or goods in relation to which an exposed goods order is in force.

In exercising the powers set out in Division 3 of this Part, a biosecurity officer or a biosecurity enforcement officer may be assisted by other persons (for example, someone setting up monitoring equipment).

The application of clause 32 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

If an area within a biosecurity response zone overlaps with part of a biosecurity monitoring or activity zone that has been previously determined, then the powers available under that other zone determination can be still be exercised in the overlapping area. This makes it clear that the determination of a biosecurity response zone does not affect the powers that were previously available under the original zone determination.

Division 4 of this Part sets out offences and civil penalty provisions in relation to biosecurity response zones.

### **Clause 371 Exercise of powers in premises**

This clause outlines that a biosecurity officer or biosecurity enforcement officer may enter premises in a biosecurity response zone for the purpose of exercising powers in accordance with clause 370.

This clause provides that a biosecurity officer or a biosecurity enforcement officer will not be authorised to enter a premises unless the occupier of the premises has consented to the entry, or where the entry is made under a biosecurity response zone warrant (see Part 3, and Division 3 of Part 4, Chapter 9). If the occupier of the premises has required that identification be shown, an officer cannot enter premises by consent unless the officer has shown their identity card. This is intended to assure an occupier of the identity of the officer.

### **Clause 372 Power to secure goods or premises to deal with another disease or pest**

This clause outlines the circumstances in which a biosecurity officer will be able to secure a good or premises to deal with another disease or pest which is suspected by the officer to be present in or on the relevant goods or premises.

A biosecurity officer may secure relevant goods or premises for up to 24 hours in accordance with this clause if:

- a biosecurity officer enters premises in a biosecurity response zone as authorised by clause 371—for the purpose of exercising powers in accordance with clause 370
- the biosecurity officer suspects, on reasonable grounds, that another disease or pest (other than which the biosecurity response zone determination relates) may be present and that the other disease or pest may pose an unacceptable level of biosecurity risk, and
- the biosecurity officer believes, on reasonable grounds, that it is necessary to secure these goods or premises, without the authority of a biosecurity risk assessment warrant or a biosecurity response zone warrant, in order to manage the biosecurity risks posed by the other disease or pest.

This ensures that where a biosecurity officer suspects that another disease or pest is present in or on a good or premises where a biosecurity zone determination is already in force, these goods or premises can be secured until the zone determination is varied (see subsection 33(3) of the *Acts Interpretation Act 1901*). Alternatively, a biosecurity control order can be made in relation to the goods or premises.

Where entry to premises is made under a warrant, a new warrant may be needed to authorise the biosecurity officer to exercise the powers specified in the varied biosecurity response zone determination to manage the biosecurity risk posed by the other disease or pest.

### **Division 4—Offences and civil penalty provisions**

This division creates offences and civil penalties relating to the biosecurity response zone powers listed in clause 367. The offences and civil penalty provisions within Division 4 of Part 2 and Division 5 of Part 3 will also apply within a biosecurity response zone.

### **Clause 373 Unauthorised persons must not interfere with etc. notices or markings identifying biosecurity response zone**

### **Clause 374 Unauthorised persons must not interfere with etc. notices or markings identifying goods or premises in biosecurity response zone**

These clauses states that if a person interferes with, removes or defaces a notice or markings identifying the biosecurity response zone (clause 373) or goods or premises within the zone (clause 374)—the person is liable to a civil penalty (unless the person is authorised to do so under an approved arrangement and has been given a direction by a biosecurity official or permission

under clause 557). The maximum civil penalty for a contravention of either clause is 120 penalty units.

It will be an exception to be authorised by an Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 375                      Person must comply with direction**

This clause creates an offence for contravening a direction to leave a biosecurity response zone (paragraph 367(c)). A person who fails to comply with a direction commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the environment and the economy.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

**Clause 376                      Unauthorised persons must not interfere with etc. equipment etc. set up in biosecurity response zone**

This clause outlines the circumstances when a person is prohibited from interfering with equipment set up within a biosecurity response zone (see paragraph 367(d)).

The clause provides that if a person interferes with, removes or defaces any trap equipment or structure set up in a biosecurity response zone—the person commits an offence and is liable to a civil penalty (unless the person is authorised to do so under an approved arrangement, or has been given a direction by a biosecurity official or permission under clause 557). The maximum penalty for contravention is five years imprisonment, 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

It will be an exception to be authorised by an Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the environment and the economy.



A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

## **Part 6—Biosecurity monitoring zones**

### **Division 1—Introduction**

#### **Clause 377 Simplified outline of this Part**

This outline sets out the Part's objectives. This Part allows the Director of Biosecurity to determine a biosecurity monitoring zone to establish whether a disease or pest which poses an unacceptable level of biosecurity is likely to or has entered, emerged, established itself or spread in, the zone. The outline explains there are two types of biosecurity monitoring zones; permanent biosecurity monitoring zones and temporary biosecurity monitoring zones and briefly describes the difference.

### **Division 2—Permanent biosecurity monitoring zones**

#### **Subdivision A—Areas that are permanent biosecurity monitoring zones**

##### **Clause 378 Permanent biosecurity monitoring zones**

This clause outlines the areas within Australian territory which are permanent biosecurity monitoring zones. Permanent biosecurity monitoring zones will be established at areas which have an elevated level of biosecurity risk, such as first points of entry (See Part 3 of Chapter 4), international mail centres, biosecurity activity zones and other places as prescribed by the regulations.

This clause outlines that permanent biosecurity monitoring zones can be established at the places described and includes both the area within the place of high biosecurity risk and the area within the permissible distance of the outer boundary of these areas. Permissible distance means 400 metres or a greater distance as prescribed in the regulations. The permanent monitoring zone covers the area within these locations as well so that biosecurity officers can exercise their monitoring powers in relation to any biosecurity activities taking place inside or outside these locations.

The regulations must not prescribe an additional place as a biosecurity monitoring zone under the regulations, unless the Director of Biosecurity is satisfied that there is a high level of biosecurity risk associated with the area. It is appropriate that places with a high level of biosecurity risk should be permanently monitored.

#### **Subdivision B—Powers that may be exercised in permanent biosecurity monitoring zones**

##### **Clause 379 Powers that may be exercised—general**

This clause outlines the powers that may be exercised in a permanent biosecurity monitoring zone in relation to goods and premises. Biosecurity risk assessment powers (Division 3 of Part 2, Chapter 6) may be exercised—excluding the powers available under clauses 321, 324 and 325 which relate to movement of goods and conveyances and operating electronic equipment. As there is not necessarily a risk present, it would be inappropriate for biosecurity officers to move goods or conveyances in the zone, or operate electronic equipment in the zone. If additional powers are required because of a biosecurity risk, alternative management measures (such as a biosecurity control order or biosecurity response zone) will need to be established.

This clause outlines additional powers which can be exercised in a permanent biosecurity monitoring zone. These powers include:

- the power to cause the permanent biosecurity monitoring zone to be identified (including by affixing notices or markings)
- the power to cause goods or premises (including conveyances) within the zone to be identified (including by affixing notices or markings)
- the power to set up traps or set up equipment or other structures within the zone, and
- any powers prescribed in the regulations for the purposes of this clause.

These powers will assist with the assessment and monitoring of biosecurity risk in areas which have a higher biosecurity risk because of the nature of activities undertaken at that location. Additionally, demarking the zone will notify the public of the potential biosecurity risks associated with the area, goods or premises.

Subclause (3) limits the biosecurity measures that can be prescribed in the regulations. This subclause precludes the listing of:

- those measures that may be included in a human biosecurity control order (Division 3 of Part 3, Chapter 2)
- those measures that are named as biosecurity risk assessment powers (Division 3 of Part 2, Chapter 6)
- those measures that provide powers to require measures to be taken (Division 2 of Part 3, Chapter 6) of this Part, and
- those measures relating to decontamination (Division 2 of Part 4, Chapter 12).

This ensures that the regulations do not contain provisions for biosecurity measures already available in the Act. It also ensures that any notification or processes in place already in the legislation are not circumvented (for example, certain timeframes for notification or requirements to affix notices).

The powers in this clause may only be exercised in relation to goods or premises within a permanent biosecurity monitoring zone for the purposes of monitoring whether a disease or pest that a biosecurity officer suspects on reasonable grounds may pose an unacceptable level of biosecurity risk and has or is likely to enter, emerge, establish itself or spread in the zone.

The application of clause 32 means that the powers in this Division must be exercised in accordance with the principles set out in that clause.

### **Clause 380 Exercise of powers in premises**

This clause outlines that a biosecurity officer or biosecurity enforcement officer may enter any premises within a permanent biosecurity monitoring zone for the purposes of exercising powers in accordance with clause 379.

This clause provides that a biosecurity officer or a biosecurity enforcement officer will not be authorised to enter a premises unless the occupier of the premises has consented to the entry, or where the entry is made under a biosecurity monitoring zone warrant (see Part 3 and Division 3 of Part 4, Chapter 9). If the occupier of the premises has required that identification be shown, an officer cannot enter premises by consent unless the officer has shown their identity card. This is intended to assure an occupier of the identity of the officer.

### **Subdivision C—Civil penalty provisions**

This division creates civil penalties relating to the permanent biosecurity monitoring zone powers listed in subclause 379(2). The offences in Division 2 of Part 3 will also apply within a permanent biosecurity monitoring zone.

- Clause 381**            **Unauthorised persons must not interfere with etc. notices or markings identifying permanent biosecurity monitoring zone**
- Clause 382**            **Unauthorised persons must not interfere with etc. notices or markings identifying goods or premises in a permanent biosecurity monitoring zone**
- Clause 383**            **Unauthorised persons must not interfere with etc. equipment etc. set up in a permanent biosecurity monitoring zone**

These clauses state that a person who interferes with, removes or defaces a notice or markings identifying the permanent biosecurity monitoring zone (clause 381) or goods or premises within the zone (clause 382) or any trap equipment or structure set up in a permanent biosecurity monitoring zone (clause 383) is liable to a civil penalty (unless the person is authorised to do so under an approved arrangement or has been given a direction by a biosecurity official or permission under clause 557). The maximum civil penalty for a contravention is 120 penalty units.

These powers are required to ensure that a biosecurity officer can carry out his or her functions, by setting up equipment and affixing notices to goods or conveyances restricting their movement so that assessment and monitoring can be conducted to determine if a pest or disease has or is likely to enter, emerge, establish itself or spread in the zone.

It will be an exception if the conduct is authorised by an Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

### **Division 3—Temporary biosecurity monitoring zones**

#### **Subdivision A—Temporary biosecurity monitoring zone determinations**

**Clause 384**            **Director of Biosecurity may determine temporary biosecurity monitoring zone**

This clause allows the Director of Biosecurity to determine, by legislative instrument, a temporary biosecurity monitoring zone. The Director may determine an area if satisfied that it is necessary for the purpose of monitoring whether a disease or pest that may pose an unacceptable level of biosecurity risk, has or is likely to, enter, emerge, establish itself or spread in the area.

For example, it is envisaged that temporary biosecurity monitoring zones will be determined around biosecurity response zones, to ensure that the disease or pest has not spread. The temporary biosecurity monitoring zone may cover the whole or part of specified premises—but cannot include a conveyance. A zone can be declared over an area which is part of another temporary biosecurity monitoring zone.

The ability to determine a temporary biosecurity monitoring zone is given to the Director rather than a biosecurity officer to ensure that there is appropriate oversight over the exercise of powers under a zone determination.

A zone determination will be able to be varied or revoked in line with section 33(3) or the *Acts Interpretation Act 1901*. A determination made under clause 384 is exempt from disallowance under section 42 of the *Legislative Instruments Act 2003*.

It is appropriate for the Parliament to delegate to the Director the power to make this determination as it involves technical and scientific decisions to manage risks to Australia's biosecurity. Subjecting this determination to disallowance could undermine the technical and scientific based decision making process and frustrate risk management processes.

A determination made under this clause is critical to the management of biosecurity risks. If this determination were to be disallowed, the Commonwealth's ability to manage biosecurity risks relating to a disease or pest incursion will be limited. This would have a significant impact on the economy and would likely lead to comparable restrictions being put on Australia's exports by Australia's trading partners. In addition, disallowance of a determination made under this clause could lead to inadequate management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy.

**Clause 385                      Content of a temporary biosecurity monitoring zone determination**

This clause outlines the content requirements of a temporary biosecurity monitoring zone determination.

The determination must specify each of the powers that will be used to monitor the risk. Powers which may be included in a determination are biosecurity risk assessment powers (Division 3 of Part 2) and powers in clause 386 that may be exercised in relation to goods or premises (including conveyances). However, the powers set out in clauses 321, 324 and 325 relating to the movement of goods and conveyances and the operation of electronic equipment must not be specified in the determination. As there is not necessarily a risk present it would be inappropriate for biosecurity officers to move goods or conveyances in the zone, or operate electronic equipment in the zone. The determination must also set out the period for which it is to be in force.

Listing the powers which are available each time a temporary biosecurity response zone determination is made means that only the powers which are necessary for those particular circumstances are allowed to be exercised. The notice will also provide notification to the public about the powers which are available in relation to the zone.

A temporary biosecurity monitoring zone can be in force for up to 12 months, but must not be in force for any longer than the Director of Biosecurity considers necessary to monitor the biosecurity risk. A temporary monitoring zone determination cannot be extended. If the biosecurity risk posed after 12 months still requires monitoring, this clause outlines that another zone determination can be made over the same area. This clause puts an obligation on the Director to consider whether the risk posed still justifies a temporary biosecurity monitoring zone. The potentially invasive nature of powers that can be exercised in a zone, such as the power to leave a premise for up to 24 hours, should only be available for as long as is necessary to monitor the biosecurity risks.

Additionally, this clause outlines that a power must not be listed in the determination unless the Director is satisfied that the exercise of these powers is appropriate and adapted to managing the biosecurity risk posed by the disease or pest. This means that the use of the power is a proportionate response to the management of biosecurity risk.

**Clause 386                      Additional powers that may be specified in a temporary biosecurity monitoring zone determination**

This clause outlines additional powers that may be exercised in a temporary biosecurity monitoring zone. These include:

- the power to cause the biosecurity monitoring zone to be identified
- the power to cause goods or premises (including conveyances) within the zone to be identified

- the power set up traps or set up equipment or other structures within the zone, and
- any powers set out in the regulations.

These powers will assist with the assessment and monitoring of biosecurity risk.

Subclause (2) limits the biosecurity measures that can be prescribed in the regulations. The powers in the regulations must not be measures that may be included in a human biosecurity control order in Division 3 of Part 3 of Chapter 2, the biosecurity risk assessment powers in Division 3 of Part 2 of this Chapter, the powers to require biosecurity measures to be taken in Division 2 of this Part, a biosecurity measure listed in the regulations made under clause 346 and the decontamination powers in Division 2 of Part 4 of Chapter 10. This ensures that the regulations do not contain biosecurity measures already available in the legislation. It also ensures that any notification or processes required by other provisions in the legislation are not circumvented.

### **Clause 387                      Consultation requirements**

This clause outlines the requirement to consult with relevant state and territory bodies. Before determining a temporary monitoring zone, the Director of Biosecurity must consult the head of the body in each of the states or territories that are responsible for biosecurity matters, in which the proposed biosecurity zone will lie.

This clause provides for a mechanism to reduce jurisdictional uncertainties and facilitate activities where matters cross state and territory boundaries. However, a failure by the Director to consult as required in this clause, does not affect the validity of the determination.

### **Clause 388                      Notification requirements**

This clause requires the Director of Biosecurity to ensure that the temporary biosecurity monitoring zone determination is made public in any way that he or she sees fit. This is in addition to the requirements for registration under the *Legislative Instruments Act 2003*. For example, the Director may advertise in the media local to the area where the zone has been determined. This ensures that the public will be aware of the temporary biosecurity monitoring zone and any powers or requirements associated with it.

A temporary biosecurity monitoring zone determination is not invalidated by a failure to meet the notification requirements in this clause.

## **Subdivision B—Powers that may be exercised in temporary biosecurity monitoring zones**

### **Clause 389                      Powers that may be exercised—general**

This clause outlines the powers that may be exercised when a biosecurity response zone is in force. For the purpose of monitoring biosecurity risk that may be posed by entry, emergence, establishment or spread of the disease or pest, the powers specified in the temporary biosecurity monitoring zone determination made under paragraphs 385(1)(a) or (b) may be exercised.

The application of clause 312 means that powers in a biosecurity monitoring zone must not be used in relation to goods or conveyances that are subject to biosecurity control or goods in relation to which an exposed goods order is in force.

In exercising the powers set out in Division 3 of this Part, a biosecurity officer or a biosecurity enforcement officer may be assisted by other persons (for example, someone setting up monitoring equipment). In addition, the application of clause 32 means that powers in this Division must be exercised in accordance with the principles set out in that clause.

### **Clause 390**                    **Exercise of powers in premises**

This clause outlines that a biosecurity officer or biosecurity enforcement officer may enter premises within a temporary biosecurity monitoring zone for the purpose of exercising powers in accordance with clause 389.

This clause provides that a biosecurity officer or a biosecurity enforcement officer will not be authorised to enter a premises unless the occupier of the premises has consented to the entry, or where the entry is made under a biosecurity monitoring zone warrant (see Part 3 and Division 3 of Part 4, Chapter 9). If the occupier of the premises has required that identification be shown, an officer cannot enter premises by consent unless the officer has shown their identity card. This is intended to assure an occupier of the identity of the officer.

### **Subdivision C—Civil penalty provisions**

**Clause 391**                    **Unauthorised persons must not interfere with etc. notices or markings identifying temporary biosecurity monitoring zone**

**Clause 392**                    **Unauthorised persons must not interfere with etc. notices or markings identifying goods or premises in temporary biosecurity monitoring zone**

**Clause 393**                    **Unauthorised persons must not interfere with etc. equipment etc. set up in a temporary biosecurity monitoring zone**

These clauses state that a person who interferes with, removes or defaces a notice or markings identifying the temporary biosecurity monitoring zone (clause 391) or goods or premises within the zone (clause 392) or any trap equipment or structure set up in a temporary biosecurity response zone (clause 393) is liable to a civil penalty (unless the person is authorised to do so under an approved arrangement or has been given a direction by a biosecurity official or permission under clause 557). The maximum civil penalty for a contravention is 120 penalty units.

It will be an exception to be authorised by an Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

These powers are required to ensure a biosecurity officer can carry out his or her functions, by setting up equipment and affixing notices to goods or conveyances restricting their movement so that assessment and monitoring can be conducted to monitor biosecurity risks.

## **Part 7—Biosecurity activity zones**

### **Division 1—Introduction**

#### **Clause 394**                    **Simplified outline of this Part**

This outline sets out the Part's objectives. This Part allows the Director of Biosecurity to determine a biosecurity activity zone where powers are exercised or functions or duties are performed by, or on behalf of, the Commonwealth. The Director must be satisfied it is necessary for the purpose of managing biosecurity risk before making a determination.

Biosecurity activity zones may be determined over premises such as an approved arrangement premises or over a biosecurity facility (such as a quarantine station).

## **Division 2—Biosecurity activity zone determinations**

### **Clause 395 Director of Biosecurity may determine biosecurity activity zone**

This clause provides that the Director of Biosecurity may determine that a specified area in Australian territory is a biosecurity activity zone if:

- the area is a place where powers are exercised or functions or duties are performed under the Act by the Commonwealth or on behalf of the Commonwealth (for example, a place where an approved arrangement is located), and
- the Director is satisfied that it is necessary to make the determination for the purposes of managing the biosecurity risk associated with exercising those powers or performing those functions or duties.

The Director may determine that a specified area of Australian territory is part of a biosecurity activity zone even if the area is already part of a biosecurity response zone or a biosecurity monitoring zone. The biosecurity activity zone may consist of the whole or part of specified premises (other than a conveyance), including premises on which a biosecurity industry participant carries out biosecurity activities as authorised by an approved arrangement covering the biosecurity industry participant.

The ability to determine a biosecurity activity zone is given to the Director rather than a biosecurity officer to ensure that there is appropriate oversight over the exercise of powers under a zone determination.

A zone determination will be able to be varied or revoked in line with section 33(3) or the *Acts Interpretation Act 1901*. A determination made under clause 395 is exempt from disallowance under section 42 of the *Legislative Instruments Act 2003*.

It is appropriate for the Parliament to delegate to the Director the power to make this determination involving technical and scientific decisions in order to manage risks to Australia's biosecurity. Subjecting this determination to disallowance could undermine the technical and scientific based decision making process and frustrate risk management processes.

A determination made under this clause is critical to the management of biosecurity risks. If this determination were to be disallowed, the Commonwealth's ability to manage biosecurity risks relating to a disease or pest incursion will be limited. This would have a significant impact on the economy and would likely lead to comparable restrictions being put on Australia's exports by Australia's trading partners. In addition, disallowance of a determination made under this clause could lead to inadequate management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy.

### **Clause 396 Consultation requirements**

This clause outlines the requirement to consult with relevant state and territory bodies. Before determining a biosecurity activity zone, the Director of Biosecurity must consult the head of the body in each of the states or territories that are responsible for biosecurity matters in which the proposed biosecurity zone will lie.

This clause provides for a mechanism to reduce jurisdictional uncertainties and facilitate activities where matters cross state and territory boundaries. However, a failure by the Director to consult as required in this clause, does not affect the validity of the determination.

### **Clause 397 Notification requirements**

This clause requires the Director of Biosecurity to ensure that the biosecurity activity zone determination is made public in any way that he or she sees fit. This is in addition to the requirements for registration under the *Legislative Instruments Act 2003*. For example, the Director may advertise in the local media in the area where the zone has been determined. This ensures that the public will be aware of the biosecurity activity zone and any powers or requirements associated with it.

A biosecurity activity zone determination is not invalidated by a failure to meet the notification requirements in this clause.

### **Clause 398 Revocation of biosecurity activity zone determination**

The Director of Biosecurity must revoke a biosecurity activity zone determination, where it is no longer necessary for powers to be exercised in a zone in accordance with clause 399. For example, the Director may revoke a biosecurity activity zone determination if an approved arrangement no longer operates in a specified area. The Director would not revoke the determination until all the biosecurity risks have been managed to an acceptable level.

A revocation of a biosecurity activity zone determination will be a legislative instrument, but is exempt from disallowance under section 42 of the *Legislative Instruments Act 2003*. This is consistent with the disallowance exemption for the determination itself. It will take effect immediately after it is made.

## **Division 3—Powers that may be exercised in biosecurity activity zones**

### **Clause 399 Powers that may be exercised**

This clause outlines the powers that may be exercised in a biosecurity activity zone in relation to goods and premises.

This clause outlines additional powers which can be exercised in a biosecurity activity zone. These powers include:

- the power to cause the biosecurity activity zone to be identified (including by affixing notices or markings)
- the power to cause goods or premises (including conveyances) within the zone to be identified (including by affixing notices or markings)
- the power to direct a person in the zone to leave the zone for up to 24 hours, and
- any powers prescribed in the regulations for the purposes of this clause.

The powers provided in relation to entry and exit requirements (see clauses 333 and 334) may also be exercised in a biosecurity activity zone.

These powers will assist with the assessment and monitoring of biosecurity risk in areas which have a higher biosecurity risk because of the nature of activities undertaken at that location. Additionally, demarking the zone will notify the public of the potential biosecurity risks associated with the area, goods or premises.

Subclause (3) limits the biosecurity measures that can be prescribed in the regulations. This subclause precludes the listing of:

- those measures that may be included in a human biosecurity control order (Division 3 of Part 3, Chapter 2)
- those measures that are named as biosecurity risk assessment powers (Division 3 of Part 2, Chapter 6)



- those measures that provide powers to require measures to be taken (Division 2 of Part 3, Chapter 6)
- those measures relating to decontamination (Division 2 of Part 4, Chapter 10), and
- those measures provided for by the regulations made under clause 346.

This ensures that the regulations do not contain biosecurity measures already available in the Act. It also ensures that any notification or processes already in the Act are not circumvented (for example, certain timeframes for notification or requirements to affix notices).

The powers in this clause may only be exercised in relation to goods or premises within a biosecurity activity zone for the purposes of managing biosecurity risk.

In addition, the application of clause 32 means that powers in this division must be exercised in accordance with the principles set out in that clause.

#### **Clause 400                    Use of force**

This clause provides for the use of force by a biosecurity enforcement officer performing functions and exercising powers in a biosecurity activity zone against things must be necessary and reasonable in the circumstances. The use of force may allow, for example, the forceful opening of a door or the movement of things to assist with the execution of a warrant.

This clause does not authorise the use of force against a person. This is to ensure protection to individuals and to clarify that physical force on an individual cannot be used in the exercise of powers authorised by a warrant under this Act.

### **Division 4—Offences and civil penalty provisions**

#### **Clause 401                    Unauthorised persons must not interfere with etc. notices or markings identifying biosecurity activity zone**

#### **Clause 402                    Unauthorised persons must not interfere with etc. notices or markings identifying goods or premises in a biosecurity activity zone**

These clauses state that if a person interferes with, removes or defaces a notice or markings identifying the biosecurity activity zone (clause 401) or goods or premises within the zone (clause 402), the person is liable to a civil penalty (unless the person is authorised to do so under an approved arrangement or has been given a direction by a biosecurity official or permission under clause 557). The maximum civil penalty for a contravention is 120 penalty units.

It will be an exception if the conduct is authorised by an Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

#### **Clause 403                    Person must comply with direction**

A person who fails to comply with a direction given under paragraph 399(1)(c) to leave a biosecurity activity zone commits an offence and is liable to a civil penalty. The maximum penalty for contravention is five years imprisonment, 300 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement*

*Powers.* This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the environment and the economy.

A court would be able to consider the significance of the offence, the intent of the person and determine whether a lesser penalty than the maximum should be applied.

## **Chapter 7—Approved arrangements**

### **Part 1—Introduction**

#### **Clause 404                    Simplified outline of this Chapter**

This clause provides an overview of the approved arrangements scheme (see clause 9 for the definition of approved arrangement). Key provisions include approving, varying and suspending approved arrangements, the powers and obligations of biosecurity industry participants (BIPs) and audit powers.

### **Part 2—Approval of proposed arrangement**

#### **Clause 405                    Person may apply to relevant Director for approval of proposed arrangement to carry out biosecurity activities**

This clause allows a person (including a non-natural person such as a corporation) to apply to the Director of Biosecurity or the Director of Human Biosecurity (relevant Director) for approval of an arrangement that allows the person to carry out specified activities (biosecurity activities) to manage the biosecurity risks associated with specified goods, premises or other things (see clause 9 for the definition of relevant Director).

The nature of activities covered by an arrangement will be consistent with the rest of the Act. For example an arrangement should not allow a biosecurity industry participant to manage an invasive pest onshore in a way that is not consistent with the *Convention on Biological Diversity* (consistent with Chapter 6).

#### **Clause 406                    Relevant Director must decide whether or not to approve proposed arrangement**

This clause allows the relevant Director, upon receiving an application under clause 405, to approve an arrangement or refuse to approve an arrangement. The relevant Director may approve an arrangement if satisfied that the arrangement meets the requirements set out in the regulations, the applicant is a fit and proper person (see clause 530) and the level of biosecurity risk associated with the arrangement is acceptable. These requirements are intended to ensure that applicants have the relevant facilities and expertise to manage biosecurity risks effectively and that the applicants are suitable persons to be entering into an agreement with the Commonwealth.

When deciding whether he or she is satisfied, the relevant Director can consider any relevant matter. The relevant Director may also approve an arrangement subject to any conditions he or she considers appropriate. For example, a condition may be that goods are treated to an agreed upon standard and that suitable records are kept to verify that this has occurred. The conditions that are put in place will depend upon the nature and level of biosecurity risk associated with the approved arrangement and what measures are required to manage the risks to an acceptable level.

#### **Clause 407                    Proposed arrangement may be approved subject to condition requiring security to be given**

This clause allows the relevant Director—having regard to the criteria (if any) prescribed by the regulations—to require a security be given as a condition of approval for an approved arrangement

(for example, a monetary amount). This means that the arrangement is not considered valid until the BIP has provided the security. Providing a security is a compliance tool that ensures if a BIP does not manage biosecurity risks in accordance with its arrangement, the security may be forfeited to the Commonwealth.

For example, if a BIP with a history of low-level non-compliance proposes an arrangement (such as non-compliance with administrative requirements) the relevant Director may approve the arrangement subject to a security being paid. The BIP then enters into an arrangement that requires the BIP to maintain accurate records that demonstrate biosecurity risks are being managed to an acceptable level. If the BIP is non-compliant with these requirements, the security may be forfeited to the Commonwealth.

The regulations may set out criteria that the relevant Director must have regard to when requiring that a security to be given. The form of the security, the amount, who must give the security, when the security must be given, the circumstances in which the security may be retained and the circumstances in which the security, or any part of the security must be repaid, will also be set out in the regulations.

#### **Clause 408                      Notice of decision**

This clause requires the relevant Director to notify an applicant for a proposed arrangement whether or not the application has been approved. The notification must be in writing. If the arrangement has been approved, it must specify any conditions to which the approved arrangement is subject and the period for which the approved arrangement is to be in force. If the arrangement has not been approved, the notice must state the reasons why the arrangement was not approved.

This ensures that if an application is approved, the BIP knows exactly when the approved arrangement commences and any conditions that it must be compliant with when operating under the approved arrangement. If the application has been refused, the notification ensures procedural fairness by informing the applicant that the application has been refused, the reasons for that refusal and information notifying the application about any relevant appeal processes.

#### **Clause 409                      Period of effect of approved arrangement**

This clause provides that an approved arrangement takes effect on the day that the notice is given by the relevant Director to the BIP under clause 408 (the date of the signature on the notice) or if applicable, a later day specified in that notice. An approved arrangement remains in force for the period of time specified in the notice, unless it is revoked earlier.

This clause provides clarity on when an approved arrangement comes into effect. It also allows the relevant Director to determine that an approved arrangement should take effect immediately or at a later date, depending upon the nature of the biosecurity activities under the arrangement.

#### **Clause 410                      Restrictions on applications for approval of proposed arrangements etc.**

This clause provides that if a person's application for an arrangement is refused or a BIP's approved arrangement is revoked under Part 5, (referred to as the 'first person'), the relevant Director may do both or either of the following on one or more occasions:

- refuse an application for a proposed arrangement under clause 405 by an associate of the first person, or
- issue an associate of the first person who is a BIP or becomes a BIP with a notice requesting he or she show cause within 14 days why his or her approved arrangement should not be suspended in whole or in part, or revoked.

This clause allows the relevant Director to consider whether a person who applies for an approved arrangement is an associate of the first person. If the person is an associate (see clause 11 for the definition of associate), the relevant Director can use this as a basis to refuse his or her application for a proposed arrangement. If the associate already has an arrangement, the relevant Director can commence the process of suspending or revoking his or her arrangement by issuing a notice to show cause why the approved arrangement should not be suspended or revoked.

The purpose of this clause is to prevent the first person (a person that the relevant Director has determined is not a suitable person to hold an approved arrangement) from obtaining a new arrangement through an associate acting on his or her behalf. It also ensures that a person involved in the original behaviour that resulted in the non-compliance of the first person, can be refused an arrangement or have his or her approved arrangement suspended or revoked.

A notice issued under this clause must be in writing, state the grounds upon which the notice is given and request that the associate provides a written statement to the relevant Director within 14 days showing cause why the approved arrangement or part thereof, should not be suspended or revoked. The notice must also include a statement setting out the associate's right to seek review of a decision to suspend or revoke his or her approved arrangement.

Issuing a notice ensures that the process for decision making is fair and transparent, by informing the associate of the basis for a potential decision affecting his or her interests and allowing him or her to bring further information to the relevant Director's attention that might impact upon the final decision. It also informs the associate of his or her right to appeal the decision if he or she chooses.

#### **Clause 411                      Transfer of approved arrangement**

This clause provides that an approved arrangement cannot be transferred to another person except in the circumstances outlined in the regulations. This is to ensure that, except under specified circumstances, every BIP is required to meet fit and proper person requirements in clause 530 to establish whether he or she is a suitable person to enter into an arrangement with the Commonwealth.

### **Part 3—Variation of approved arrangement**

#### **Division 1—Application by biosecurity industry participant**

##### **Clause 412                      Application for approval of varied arrangement**

This clause allows a BIP to apply to the relevant Director to vary an approved arrangement. The BIP must not implement a varied arrangement it has applied for unless the relevant Director has approved the arrangement and given the BIP written notice of the approval. This is to ensure that a BIP does not change its operations before the relevant Director has determined whether the biosecurity risks associated with the proposed variation can be managed to an acceptable level.

An application for a variation will be assessed using the same considerations and criteria for a new application in clauses 406-409. This allows the relevant Director to assess whether the proposed variation to the approved arrangement will continue to manage the biosecurity risks associated with the relevant biosecurity activities to an acceptable level (with or without conditions), and refuse to approve the variation if it does not. It also allows the relevant Director to require a security under clause 407 if it is warranted by the variation and requires the relevant Director to provide notice under clause 408.

## **Division 2—Variation required by relevant Director**

### **Clause 413            Relevant Director may vary or require variation of approved arrangement**

This clause allows the relevant Director to give the BIP a written notice varying the conditions of its approved arrangement (including imposing new conditions), or requiring the BIP to vary its approved arrangement as specified in the notice.

The relevant Director can give the BIP a notice if he or she is satisfied:

- the arrangement no longer meets the requirements on the basis of which the approval was given
- the BIP is no longer a fit and proper person (clause 530)
- a condition of the arrangement has been contravened
- the level of biosecurity risk associated with the operation of the arrangement has changed
- a change needs to be made to the arrangement to correct a minor or technical error in the arrangement, or
- the arrangement needs to be varied for any other reason.

Allowing the relevant Director to require variations to an arrangement and its conditions is intended to ensure that the biosecurity risks associated with the biosecurity activities under the approved arrangement continue to be managed to an acceptable level. If the relevant Director is not satisfied that this is the case, he or she can require that a BIP's arrangement be varied.

If a person no longer meets the fit and proper person requirements, contravenes a condition of approval, or is an associate of a first person, the relevant Director may determine that the BIP is still a suitable person to hold an agreement with the Commonwealth, but in a reduced capacity, and require the approved arrangement be varied to reflect this.

In addition, a change in the level of biosecurity risk associated with the approved arrangement may mean that measures previously used to manage the biosecurity risk to an acceptable level are no longer achieving this aim. This clause allows the relevant Director to require that an arrangement is varied to reflect this. For example a pest or disease outbreak in another country may increase the level of biosecurity risk associated with the importation of a particular good and additional measures are required to reduce that risk to an acceptable level. The approved arrangement may be varied to include conditions that additional measures are carried out.

This clause also allows the relevant Director to vary the arrangement to correct minor or technical errors. These variations are intended to be administrative in nature, such as correcting the spelling of a name or the address details of where the biosecurity activities will take place.

### **Clause 414            Notice varying conditions of approved arrangement**

This clause provides that a notice varying the conditions of an approved arrangement issued under paragraph 413(1)(a) must specify the conditions that are to be varied, details of the variation and any new conditions that will be imposed on the approved arrangement (if applicable).

This ensures that the BIP is aware of any changes to the conditions that apply to the operation of the approved arrangement.

**Clause 415                    Date of effect of variation of conditions of approved arrangement**

This clause provides that a variation of an approved arrangement by notice under paragraph 413(1)(a) takes effect on the day that notice is given (the date of the signature on the notice) or, if applicable, a later day specified in the notice.

This clause provides clarity on when a variation to the arrangement comes into effect. It also allows the relevant Director to determine that a variation should take effect immediately or at a later date, depending upon the nature of the biosecurity activities under the arrangement and the variation made.

**Clause 416                    Notice requiring approved arrangement to be varied**

This clause provides that a notice under paragraph 413(1)(b) requiring a BIP to vary its approved arrangement, must state the variations required and require the BIP to give the relevant Director a varied arrangement by a specified date. This ensures that the BIP is aware that it needs to vary its arrangement, how the arrangement needs to be varied and when the proposed variation is required by.

This is intended to allow the relevant Director to identify that a particular arrangement needs to be varied, but then provide flexibility by allowing the BIP to propose how this can be achieved in the most cost effective way within its business operations. This also reflects the voluntary nature of the approved arrangements scheme.

The varied arrangement will be treated similarly to a new application and subject to the requirements in clauses 406-409. This allows the relevant Director to assess the BIP's varied arrangement and determine whether it will manage the biosecurity risks to an acceptable level and whether any further conditions are required. It also allows the relevant Director to require a security under clause 407 and requires the relevant Director to provide notice of the decision to the BIP under clause 408.

This allows the relevant Director to assess whether the proposed variation to the approved arrangement will continue to manage the biosecurity risks associated with the relevant biosecurity activities to an acceptable level and refuse to approve a variation if it does not.

**Part 4—Suspension of approved arrangement**

**Division 1—Suspension requested by biosecurity industry participant**

**Clause 417                    Biosecurity industry participant may request relevant Director to suspend all or part of approved arrangement**

This clause allows a BIP to request that the relevant Director suspends all or part of its approved arrangement. This request must be in writing, specify whether the whole arrangement or part of an arrangement is to be suspended, the proposed date the suspension is to take effect, the period of the suspension and include any other information prescribed by the regulations. The proposed suspension date cannot take place before the end of a notice period specified in the regulations. This is to ensure that the relevant Director has adequate time to consider the application before the BIP changes its operations and ensure that biosecurity risks continue to be managed appropriately.

If the relevant Director receives a request from the BIP to suspend its approved arrangement, the Director must, by written notice, suspend the approved arrangement. If the BIP requests that the relevant Director suspend part of its approved arrangement, the relevant Director must decide whether to suspend the approved arrangement as requested and notify the BIP in writing of his or her decision.

The relevant Director must approve a request from a BIP to suspend its approved arrangement. This reflects the voluntary nature of the approved arrangements scheme. This may be because the BIP no longer has the facilities or expertise to manage the biosecurity risks or the BIP determines there is no longer a financial or commercial advantage in continuing to operate under its approved arrangement.

The relevant Director can determine exactly when the suspension of the approved arrangement will take effect. This ensures that the relevant Director can assess any biosecurity risks associated with the suspension and make certain risks continue to be managed to an acceptable level after the arrangement is suspended.

However, the relevant Director may refuse a request from a BIP to suspend part of its approved arrangement. Suspending part of an arrangement is essentially a variation and may change how biosecurity risks are managed under the arrangement as a whole. It is appropriate that the relevant Director can refuse to approve the suspension of part of an arrangement if he or she is not satisfied that biosecurity risks can continue to be managed to a satisfactory level under the remaining arrangement. The BIP will still have the option to apply for its approved arrangement to be suspended in a different way, suspended completely or to have its arrangement revoked if it is not satisfied with the relevant Director's decision.

If a relevant Director receives a request from a BIP to suspend part of an approved arrangement covering the BIP and does not make a decision within the period prescribed by the regulations, the relevant Director is taken to have refused the request at the end of that period. This is to ensure there is a definitive point where a decision is taken to have been made and the BIP can apply for a review of the decision under clause 574 if it chooses.

## **Division 2—Suspension by relevant Director**

**Clause 418**                    **Relevant Director may suspend approved arrangement**

**Clause 419**                    **Notice of suspension**

**Clause 420**                    **Period of suspension**

Clause 418 allows the relevant Director—of his or her own initiative—to suspend all or part of an approved arrangement for a period if the Director is satisfied that:

- the arrangement or part of the arrangement no longer meets the requirements on the basis of which the approval was given
- the BIP is no longer a fit and proper person (see clause 530)
- a condition of the arrangement has been contravened
- the level of biosecurity risk associated with the arrangement has changed
- the BIP is liable to pay a cost-recovery charge that is due and payable, or
- the BIP is an associate of a either a person who has been refused an approved arrangement or a person who was a BIP covered by an approved arrangement that has been revoked (for the definition of 'associate' see clause 11).

The relevant Director must not suspend an approved arrangement unless he or she has given written notice to the BIP that specifies the grounds upon which the arrangement or part of the arrangement is to be suspended, requests that the BIP provide a written statement within 14 days showing cause why the arrangement or part of the arrangement should not be suspended and includes a statement setting out the BIP's right to seek a review of the decision.

If the relevant Director is satisfied that the grounds for the suspension of all or part of an approved arrangement are serious or urgent, he or she does not have to issue a notice and delay taking action until after the BIP's period of time to show cause. This ensures that the relevant Director can take

action immediately to manage any biosecurity risks that pose a high level of risk, in order to reduce the threat or harm posed as quickly and efficiently as possible.

Clause 419 provides that if the relevant Director decides to suspend an approved arrangement or part of an approved arrangement under clause 418, the Director must give the BIP written notice stating that the arrangement or part of the arrangement is suspended for the period specified in the notice. This ensures that the BIP is aware that its arrangement has been suspended and that it is no longer authorised to operate in accordance with its agreement.

Clause 420 provides that the suspension of an approved arrangement, or part of an approved arrangement, takes effect on the day the notice is given under clause 419 (the date of the signature on the notice) or, if applicable, a later day specified in the notice. If the relevant Director issued the BIP with a notice requesting the BIP provide a written statement showing cause under clause 418, or issues the BIP with a notice under clause 410, the suspension must not take effect until 14 days after that notice was given. This is to ensure that the BIP has enough time to respond in writing to the relevant Director, and for its response to be considered, before any suspension takes effect.

The relevant Director may further vary the period during which an approved arrangement or part of an approved arrangement is suspended, or revoke the suspension of an approved arrangement or part of an approved arrangement by issuing the BIP with a written notice. This ensures the relevant Director can extend the suspension of an arrangement or remove the suspension if required.

### **Division 3— Management of biosecurity risks during suspension**

#### **Clause 421 Management of biosecurity risks during suspension**

Clause 421 provides that if an approved arrangement or part of an approved arrangement covering a BIP is suspended (regardless of whether the BIP or the relevant Director initiated the suspension), the relevant Director may issue the former BIP with a direction in writing to take a specified action within a specified period to manage any biosecurity risks associated with the goods, premises or other thing the former BIP would have been authorised to deal with if the approved arrangement had not been suspended. This clarifies that even though the BIP's arrangement has been suspended, the relevant Director can still direct a former BIP to manage the biosecurity risks associated with goods, premises or other things under the BIP's control.

If the relevant Director issues a former BIP with a direction to take specified action to manage biosecurity risks, the former BIP does not take the action within the period and the former BIP is not the owner of the goods, premises or other thing, the relevant Director may instead direct the owner in writing to take the specified action within a specified period. This ensures that if the former BIP does not comply with a direction, there is another person with responsibility for the goods, premises or other thing that can be directed to undertake the action and manage the biosecurity risk posed.

A person who does not comply with a direction given under this clause commits an offence and is liable to a civil penalty. The maximum penalty is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.



## **Part 5—Revocation of approved arrangement**

### **Division 1—Revocation requested by biosecurity industry participant**

#### **Clause 422                    Biosecurity industry participant may request relevant Director to revoke approved arrangement**

This clause allows a BIP to request that the relevant Director to revoke its approved arrangement. This request must be in writing, specify a proposed date the revocation is to take effect and include any other information prescribed by the regulations. The proposed revocation date cannot be before the end of a notice period specified in the regulations. This is to ensure that the relevant Director has adequate time to consider the request before the BIP ceases its operations and ensures that biosecurity risks continue to be managed appropriately.

The relevant Director must approve a request from a BIP to revoke its approved arrangement. This reflects the voluntary nature of the approved arrangements scheme. This may be because the BIP no longer has the facilities or expertise to manage the biosecurity risks or the BIP determines there is no longer a financial or commercial advantage in continuing to operate under its arrangement.

The relevant Director can determine the date that the revocation of the arrangement will take effect. This ensures that the arrangement is not revoked before the relevant Director has considered any outstanding risks biosecurity risks associated with the arrangement and make sure they are appropriately managed.

### **Division 2—Revocation by relevant Director**

#### **Clause 423                    Relevant Director may revoke approved arrangement**

#### **Clause 424                    Notice of revocation**

#### **Clause 425                    Date of effect of revocation**

Clause 423 allows the relevant Director—of his or her own initiative—to revoke an approved arrangement if satisfied of any of the following:

- that the arrangement no longer meets the requirements on the basis of which the approval was given
- the BIP is no longer a fit and proper person (see clause 530)
- a condition of the arrangement has been contravened
- the level of biosecurity risk associated with the operation of the arrangement has changed
- the BIP is liable to pay cost-recovery charge that is due and payable, or
- the BIP is an associate of either a person who has been refused an approved arrangement or a person who was a BIP covered by an approved arrangement that has been revoked (for the definition of ‘associate’ see clause 11).

The relevant Director must not revoke an approved arrangement unless he or she has given written notice to the BIP that specifies the grounds upon which the arrangement is to be revoked, requests that the BIP provide a written statement within 14 days showing cause why the arrangement should not be revoked and includes a statement setting out the BIP’s right to seek a review of the decision.

If the relevant Director is satisfied that the grounds for the revocation of an approved arrangement are serious or urgent, he or she does not have to issue a notice and delay taking action until after the BIP’s period of time to show cause. This ensures that any biosecurity risks that pose a high level of risk can be managed immediately in order to reduce the threat or harm posed as quickly and efficiently as possible.

Clause 424 provides that if the relevant Director decides to revoke an approved arrangement under clause 423, the relevant Director must give the BIP written notice stating that the arrangement is revoked. This ensures that the BIP is aware that its arrangement has been suspended and that it is no longer authorised to operate in accordance with its agreement.

Clause 425 provides that the revocation of an approved arrangement takes effect on the day the notice is given under clause 424 (the date of the signature on the notice) or, if applicable, a later day specified in the notice.

If the relevant Director issues the BIP a notice requesting the provision of a written statement showing cause under clause 423, or provides the BIP with a notice under clause 410, the revocation must not take effect until 14 days after the notice is given. This is to ensure that the BIP has enough time to respond in writing to the relevant Director, and for the BIP's response to be considered, before any revocation takes effect.

### **Division 3— Management of biosecurity risks after revocation**

#### **Clause 426 Management of biosecurity risks after revocation**

Clause 426 provides that if an approved arrangement covering a BIP is revoked (regardless of who instigated the revocation), the relevant Director may issue the former BIP with a direction in writing to take a specified action within a specified period of time to manage any biosecurity risks associated with the goods, premises or other thing the former BIP would have been authorised to deal with. This ensures that even though the former BIP's arrangement has been revoked, the relevant Director can still direct the former BIP to manage the biosecurity risks associated with goods, premises or other things under its control.

If the relevant Director issues the former BIP with a direction to take specified action to manage biosecurity risks, the former BIP does not take the action within the specified period and the former BIP is not the owner of the goods, premises or other thing, the relevant Director may issue the owner with a direction in writing to take the specified action within a specified period. This ensures that if the former BIP does not comply with a direction, there is another person with responsibility for the goods, premises or other thing that can be directed to undertake the action and manage the biosecurity risk posed.

A person who does not comply with a direction given under this clause commits an offence and is liable to a civil penalty. The maximum penalty is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.

## **Part 6—Powers and obligations of biosecurity industry participants**

### **Division 1—General**

**Clause 427**                    **Authorisation to carry out biosecurity activities in accordance with approved arrangement**

**Clause 428**                    **Biosecurity industry participant must carry out biosecurity activities in accordance with approved arrangement etc.**

Clause 427 provides that a BIP is authorised to carry out biosecurity activities in accordance with the approved arrangement for the purposes of the Act, except for the extent to which its approved arrangement is suspended under Part 4 or if carrying out the activities is inconsistent with a direction given to the BIP by a biosecurity officer under clause 429 or a written direction by a relevant Director under subclause 421(2). If the BIP's approved arrangement has been revoked under Part 5, the former BIP is not authorised to carry out biosecurity activities in accordance with the approved arrangement for the purposes of the Act at any time after the revocation takes effect unless directed by a relevant Director under subclause 426(2).

This clarifies that a BIP is only authorised to carry out biosecurity activities in accordance with its approved arrangement when the arrangement is in effect and covering the BIP, not during a period when it has been suspended or if it has been revoked (unless the BIP is specifically directed to by a biosecurity officer or the relevant Director).

Clause 428 provides that if a BIP is authorised to carry out biosecurity activities by an approved arrangement covering the BIP and the BIP fails to carry out those biosecurity activities in accordance with its arrangement or contravenes any requirements or conditions specified in the arrangement, the BIP commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for contravention is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If requirements or conditions are contravened, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.

**Clause 429**                    **Biosecurity officer may give direction to biosecurity industry participant to manage biosecurity risks**

Clause 429 allows a biosecurity officer to give a direction to a BIP in relation to the operation of its approved arrangement, if the biosecurity officer is satisfied it is necessary to do so to manage the biosecurity risks associated with the operation of the arrangement. A direction may require the BIP to carry out an activity that is not covered by its approved arrangement or require the BIP not to carry out an activity in accordance with its approved arrangement. A biosecurity officer may not however require a BIP to carry out an activity that it does not have the qualifications, expertise or resources to.

This means that regardless of what biosecurity activities have been authorised in a BIP's approved arrangement, the BIP is still required to follow the direction of a biosecurity officer in relation to the operation of an arrangement. This is the case, even if the direction is not consistent with the BIP's approved arrangement. This ensures that biosecurity officers have ultimate responsibility for the management of biosecurity risks and can require a BIP to manage the risks associated with the operation of its approved arrangement in a different way if the biosecurity officer deems it necessary. A biosecurity officer can only issue a direction however if the BIP has the facilities and

expertise to comply with the direction. This ensures that a BIP is not given a direction outside the scope and capacity of its arrangement that it is unable to comply with.

A BIP commits an offence and is liable to a civil penalty if the BIP does not comply with a direction given under this clause. The maximum penalty is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.

#### **Clause 430                      Biosecurity industry participant may charge fee in relation to biosecurity activities carried out**

This clause allows a BIP who is authorised to carry out biosecurity activities under an approved arrangement to charge a fee in relation to those activities. A BIP may also charge a fee for any activities carried out when complying with a direction from a biosecurity officer under clause 429. This is to ensure that a BIP can receive reasonable payment in return for its services. Consistent with the Bill, any fees charged by the BIP for functions performed on behalf of the Commonwealth must not amount to taxation.

### **Division 2—Biosecurity Incidents**

#### **Clause 431                      Reporting biosecurity incidents**

This clause provides that if an act, omission or event occurs (known as a reportable biosecurity incident), that is specified in a BIP's approved arrangement or is a condition of its approved arrangement; the BIP must report the incident to the relevant Director. An example of a reportable biosecurity incident might be the detection of a particular pest in goods that are being managed under the approved arrangement. Requiring biosecurity incidents to be reported ensures that the Commonwealth is made aware of the biosecurity risk posed and can direct the BIP or undertake urgent actions to manage that risk to an acceptable level if required.

The way the report must be made and the information that must be included in the report will be determined by the relevant Director by legislative instrument. If the report does not comply with these requirements, the report is taken not to have been made. A BIP may commit an offence or be liable to a civil penalty if the BIP fails to comply with any requirements specified in an approved arrangement covering the BIP or a condition of an approved arrangement (see clause 428).

This clause does not limit the operation of Division 8 of Part 1 of Chapter 3, which deals with the reporting of biosecurity incidents in relation to goods that are subject to biosecurity control. BIPs will still be required to comply with these requirements, if applicable.

#### **Clause 432                      Costs of dealing with biosecurity incidents**

This clause allows the relevant Director to apply to a relevant court for a costs order if a current or former BIP:

- failed to carry out biosecurity activities in accordance with its arrangement
- a biosecurity incident occurred in relation to the operation of the arrangement
- this was caused by the BIP's failure to comply with its arrangement, and
- the Commonwealth incurred costs dealing with the biosecurity incident.

The court may, upon the application of the relevant Director, make a costs order and require the BIP to pay to the Commonwealth all or part of the costs incurred by the Commonwealth. The

relevant Director must apply for a costs order within six years of the biosecurity incident occurring. This ensures that there is a set period of time during which the BIP may be held liable.

In deciding whether to make a costs order, the relevant court may have regard to:

- the nature and extent to which the BIP failed to comply with its approved arrangement
- the circumstances in which the biosecurity incident occurred
- the nature and extent of any damage caused by the BIP's failure to comply
- the level of biosecurity risk associated with the incident
- the amount of costs incurred by the Commonwealth in dealing with the incident
- whether the BIP has previously had a costs order made against it in relation to a biosecurity incident, or
- any other matter the court considers relevant.

This ensures that the court can consider a range of different factors relevant to the BIP's level of responsibility and how the Commonwealth's costs were incurred when making its decision.

## **Part 7—Other provisions**

### **Division 1—Applications for approval**

#### **Clause 433 Applications to which this Division applies**

#### **Clause 434 Requirements for applications**

These clauses state that an application for an approved arrangement, made under Part 2 or an application to vary an approved arrangement under Division 1 of Part 3, must be in the form approved by the relevant Director (if any), and include the information prescribed in the regulations. The application must also be accompanied by a copy of the arrangement or varied arrangement that is to be approved and any other documents prescribed by the regulations (this may include personal information required under subclause 531(1)).

This ensures that the relevant Director receives all of the relevant information required to determine if he or she is satisfied the applicant can manage the biosecurity risks associated with its proposed arrangement and that the applicant is a suitable person to enter into an agreement with the Commonwealth.

An application for an approved arrangement may require an application fee, as outlined in paragraph 592(4)(e). This allows the Commonwealth to recover any costs incurred when administering the approval process.

The relevant Director may approve different requirements for different types of applications. This is intended to allow the relevant Director to differentiate between more straight forward and complex categories of approved arrangements and establish different requirements for each. This reflects the broad nature of the approved arrangements scheme, which allows for a diverse range of biosecurity activities to be managed under an arrangement.

#### **Clause 435 Dealing with applications**

This clause provides that the relevant Director must make a decision in relation to an application within a consideration period prescribed by the regulations for an application of that kind. This allows the relevant Director to identify a specific period of time in which a category of applications must be considered. This is required because of the broad nature of activities that can be applied for under the approved arrangements scheme. Some applications will be straight forward and require a shorter consideration period. Others will cover facilities at different

locations with different risk management activities and require a longer consideration period for the relevant Director to consider whether the biosecurity risks can be managed appropriately.

The consideration period begins on the day the application was received by the relevant Director. If the relevant Director does not make a decision within the consideration period, he or she is taken to have refused the application. This is to ensure there is a definite end point where a decision is taken to have been made and the applicant can apply for a review of the decision if they choose.

For the purpose of making a decision regarding an application, the relevant Director can issue a written notice requesting that the applicant, or any other person the relevant Director considers may have information relevant to the application, provide specified information or documents relevant to the application within a specified period.

The initial consideration period identified in the regulations is extended every time the relevant Director makes a request for information. The period of time for the extension commences when the additional request is made and ends the day the additional information or documents are received by the relevant Director, or the last day of the period identified by the relevant Director in his or her request if the information or documents are not received.

This ensures that if the relevant Director requires additional information in order to properly assess an application (particularly more complex applications) and make a decision regarding whether the biosecurity risks can be managed to a satisfactory level, he or she has time to request and receive this information before the consideration period runs out and a decision to refuse the application is considered to have been made (which attracts review rights under clause 574).

## **Division 2—Audit powers**

### **Clause 436                    Relevant Director may require audit to be carried out**

This clause provides that the relevant Director may require an audit to be carried out:

- in relation to whether a BIP is acting in accordance with, or complying with any requirements or conditions for an approved arrangement that covers the BIP, or
- for the purposes of considering:
  - an application under clause 405 for approval of a proposed arrangement, or
  - an application under clause 412(1) for approval of a varied arrangement.

The ability to conduct an audit of an approved arrangement is an important compliance tool. It can be used by the relevant Director to determine whether the BIP is being compliant with the requirements or conditions of its existing arrangement and managing its biosecurity risks appropriately. If the BIP is not compliant, the relevant Director may decide to start the process of suspending or revoking its arrangement.

Auditing powers can also be used to assess an application for a new arrangement or a varied arrangement and help the relevant Director determine whether, if approved, a BIP has the appropriate facilities or personnel to manage biosecurity risks appropriately.

An audit must be carried out by a biosecurity officer or an auditor approved in writing by the relevant Director. All approved auditors must be appropriately qualified and experienced. This is intended to ensure auditors have the skills required to conduct audit activities correctly. For example, the appropriate skills to complete an audit that involves highly specialised equipment in a university research laboratory.

The regulations may include requirements in relation to audits. This may include reporting requirements to the relevant Director by the auditor carrying out an audit. This ensures that the relevant Director is aware of any outcomes from the audit and can take appropriate action if required.

**Clause 437 Powers of auditors**

This clause states that a person carrying out an audit under clause 436 may require any person to produce any documents, records or things that the auditor is satisfied are relevant to the audit. This ensures that the auditor has access to all the relevant information that he or she needs in order to conduct a comprehensive and effective audit.

A person who fails to produce any documents, records or things as required commits an offence and is liable to a civil penalty. The maximum penalty is six months imprisonment or 30 penalty units, or both. The maximum civil penalty is 30 penalty units. In addition, section 137.2 of the *Criminal Code* and clause 533 of this Act create an offence and civil penalty for providing false or misleading documents.

This clause is not subject to the privilege against self-incrimination (see clause 635). Removing the privilege in these circumstances is justified, because there is a strong public interest in ensuring that auditors are able to obtain accurate and timely information to determine whether biosecurity risks are or can be managed appropriately. Allowing a person to use the privilege against self-incrimination and refuse to provide important information, could result in a significant biosecurity risk not being identified and remaining unmanaged.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person (see clause 635).

An auditor may also require any person to provide the auditor with reasonable facilities and assistance for the effective exercise of powers under this Division. This ensures that the auditor can efficiently carry out the audit without undue delay caused by seeking facilities elsewhere or requiring other persons to provide assistance.

A person commits an offence and is liable to a civil penalty if the person contravenes this requirement. The maximum penalty for a contravention is six months imprisonment or 30 penalty units, or both. The maximum civil penalty for a contravention is 30 penalty units.

**Division 3—Miscellaneous**

**Clause 438 Giving false or misleading information to a biosecurity industry participant**

**Clause 439 Giving false or misleading documents to a biosecurity industry participant**

These clauses provide that a person is liable to a maximum civil penalty of 120 penalty units if that person knowingly gives false and misleading information or documents to a BIP and the information is given in connection with biosecurity activities that are being, or are to be, carried out by the BIP in accordance with an approved arrangement. The person is also liable to the same civil penalty if he or she omits any matter or thing without which the information or documents are misleading.

This ensures that a person is required to provide the same accurate information and documents to a BIP operating under an approved arrangement that he or she would be required to provide to a

biosecurity officer. This ensures that biosecurity risks can be assessed and managed appropriately by the BIP and that a person can be held liable if he or she provides inaccurate or misleading information or documents. If a BIP relies upon false or misleading information, this has the potential to increase the level of biosecurity risk associated with its activities and may cause serious consequences.

A person is not liable for a civil penalty if the information that he or she provides is not false or misleading in a material particular. This means that a person will not be liable for providing false or misleading information which is trivial or inconsequential. An exception also applies if person omitted information but the exclusion of that information did not result in the overall information being misleading in a material particular.

A person is also not liable if the BIP does not take reasonable steps to inform the person that he or she may be liable to a civil penalty if the information provided is false or misleading before he or she provides the information. This ensures that the person is aware of his or her obligation to provide accurate information or documents at the time it is provided and the potential consequences of failing to do so.

A person is also not liable if he or she produces a document that is accompanied by a written statement stating that to his or her knowledge the document is false or misleading in a material particular and identifying where it is false or misleading. This is to ensure that if a person is required to provide a document, the person knows it contains false or misleading material but he or she does not have the ability to produce a document with the correct information, that person is not liable if he or she took steps to provide the correct information together with the required document.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

#### **Clause 440                      Obstruction or hindrance of person acting in accordance with approved arrangement**

This clause provides that it is an offence for a person to obstruct or hinder another person carrying out biosecurity activities in accordance with an approved arrangement, a person under an approved arrangement acting in accordance with a direction from a biosecurity officer, or a person acting in accordance with the relevant Director in relation to an approved arrangement that has been suspended or revoked.

A person who contravenes this clause commits an offence and is liable to a civil penalty. The maximum penalty is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If a person hinders or obstructs compliance with an approved arrangement, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.



This ensures that a BIP operating under an approved arrangement is able to carry out biosecurity activities in accordance with its arrangement, free from interference. If a BIP or former BIP is hindered, this may result in biosecurity risks not being identified or managed appropriately and has the potential to cause serious consequences.

#### **Clause 441                      Protection from civil proceedings**

This clause provides that no civil proceedings may lie against the Commonwealth, or a person who is or was a BIP, for anything done or omitted to be done in good faith when carrying out biosecurity activities in accordance with an approved arrangement, complying with a direction from a biosecurity officer under clause 429 or by another person who was providing assistance to the BIP or former BIP in carrying out the activities or complying with the direction.

In addition, no civil proceedings may lie against the Commonwealth, or a person who is or was a BIP, in relation to anything done by an animal used to carry out biosecurity activities under an approved arrangement or when complying with a direction from a biosecurity officer under clause 429.

This ensures that a BIP is able to carry out biosecurity activities under its approved arrangement without being subjected to civil proceedings, as long as it performed those activities in good faith. A BIP is considered to have acted in good faith when acting in accordance with its approved arrangement or a valid direction given under the Act.

This clause is subject to clause 27 (acquisition of property), clause 307 (undue detention or delay of vessel) and clause 326 (damage to electronic equipment). This is consistent with the Commonwealth's obligations under the Act, where particular conduct may lead to reasonable compensation being paid.

### **Chapter 8—Biosecurity emergencies and human biosecurity emergencies**

#### **Part 1—Biosecurity emergencies**

##### **Division 1—Introduction**

#### **Clause 442                      Simplified outline of this Part**

This outline sets out the Part's objectives. The Part provides powers to deal with biosecurity emergencies of national significance. This Part also sets out the circumstances in which the powers may be exercised, the requirements for using the powers and the purposes for which the powers can be exercised. These powers include the power to make a declaration of a biosecurity emergency, to make emergency requirements, take action and give directions, to declare national response agencies to assist with managing biosecurity emergencies and entry permissions to premises during a declared biosecurity emergency period. This Part also sets out the modifications of the Act in the case of a declared biosecurity emergency period.

##### **Division 2—Declaration of biosecurity emergency**

#### **Clause 443                      Governor-General may declare that a biosecurity emergency exists**

This clause allows the Governor-General to declare that a biosecurity emergency exists, known as a biosecurity emergency declaration (see clause 9). The biosecurity emergency declaration must only be made if the Agriculture Minister is satisfied that:

- a disease or pest is posing a severe and immediate threat, or is causing harm, to animal or plant health, the environment, or economic activities related to animals, plants or the environment
- the threat or harm must be on a nationally significant scale, and

- the declaration is ‘necessary’ to prevent or control the spread or establishment of the disease or pest in Australian territory, or a part of Australian territory.

The threshold test is consistent with the World Trade Organization SPS Agreement, in particular the reference to ‘economic activities related to animals, plants or the environment.’

This means that an assessment has been made that a particular disease or pest poses a nationally significant threat or is causing nationally significant harm and the activation of emergency powers is necessary to manage it. The intent of this test is to ensure that emergency powers under clauses 445, 446, 450 and 451 are exercised only when they are necessary to prevent or control the spread or establishment of the pest or disease that is specified in the declaration.

A biosecurity emergency declaration must specify the disease or pest that led to the declaration (the declaration disease or pest), the nature of the biosecurity emergency and the conditions that gave rise to the emergency and specify the period (known as the biosecurity emergency period) during which the emergency declaration is in force. A biosecurity emergency period must be no longer than the Minister considers necessary to prevent or control the establishment or spread of the declaration disease or pest in Australian territory, or a part of Australian territory, or in any case, no longer than three months. This period can be extended under clause 444.

The biosecurity emergency period is limited to a maximum of three months to ensure there is a fixed point in time where the emergency declaration is evaluated to determine whether the circumstances that led to the declaration still exist and emergency powers provided by the declaration are still required. The potentially invasive nature of powers that can be exercised during an emergency period, such as the power for a biosecurity officer to enter premises without a warrant or consent, mean that a biosecurity emergency declaration should only be in force for as long as is necessary to manage the nationally significant threat or harm posed by the disease or pest.

The Governor-General must revoke a biosecurity emergency declaration if the Minister is no longer satisfied that the declaration disease or pest poses a severe and immediate threat or is causing harm on a nationally significant scale to animal or plant health; the environment; economic activities related to animals, plants or the environment, or; the declaration is no longer necessary to prevent or control the establishment or spread of the disease or pest in Australian territory or part of Australian territory.

This ensures that if the Minister determines that the circumstances that led to the biosecurity emergency declaration no longer exist, the declaration is revoked rather than allowing the biosecurity emergency period to lapse. As discussed above, this reflects the potentially invasive nature of powers that can be exercised during a biosecurity emergency period, which should only be available for as long as is necessary to manage the nationally significant threat or harm posed by the disease or pest.

The clause notes that biosecurity emergency declarations cannot be made in relation to invasive pests (see subclause 25(2)). This is because invasive pests, by definition, are not capable of infesting humans, animals or plants or acting as a vector for disease and do not warrant the use of the potentially invasive powers in Chapter 8.

A biosecurity emergency declaration is a legislative instrument, but disallowance under section 42 of the *Legislative Instruments Act 2003* does not apply. This is because the decision whether to declare an emergency should be scientifically based and made in accordance with an assessment of the relevant biosecurity risks. If an emergency declaration was disallowed, nationally significant biosecurity risks could go unmanaged and the Commonwealth would be unable to take

the fast and urgent action necessary to manage a threat or harm to Australia's local industries, economy and the environment.

**Clause 444 Governor-General may extend biosecurity emergency period**

This clause allows the Governor-General to vary a biosecurity emergency declaration in order to extend the biosecurity emergency period for up to three months if recommended to do so by the Agriculture Minister. In making this recommendation, the Minister must be satisfied that:

- the declaration disease or pest continues to pose a severe and immediate threat, or is continuing to cause harm, to animal or plant health
- the environment; economic activities related to animals, plants or the environment on a nationally significant scale, and
- the extension is necessary to prevent or control the establishment or spread of the disease or pest in Australian territory or part of Australian territory.

The Governor-General may extend a biosecurity emergency period more than once.

This means that if the Minister evaluates the biosecurity emergency declaration at the end of the biosecurity emergency period and determines that the circumstances that led to the declaration still exist and emergency powers are still required, the biosecurity emergency period can be extended for up to three months. Depending on the nature of the declaration disease or pest and the level of biosecurity risk posed by that disease or pest, an extended period of time might be required to manage the threat or harm posed. For example, a nationally significant scale outbreak of foot-and-mouth disease may require a biosecurity emergency period of 12 months or more to manage. On this basis there is no limit on the number of extensions that can be made by the Governor-General.

An emergency declaration variation under this clause is a legislative instrument, but disallowance under section 42 of the *Legislative Instruments Act 2003* does not apply. This is because the decision whether to extend an emergency period should be scientifically based and made in accordance with an assessment of the relevant biosecurity risks. If an emergency declaration to extend the emergency period was disallowed, nationally significant biosecurity risks could go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's local industries, economy and the environment.

**Division 3—Emergency requirements, directions and actions**

**Clause 445 Agriculture Minister may determine emergency requirements during biosecurity emergencies**

This clause provides for the Agriculture Minister, during a declared biosecurity emergency period, to determine any requirement that the Minister is satisfied is appropriate and adapted to preventing or controlling the establishment or spread of the declaration disease or pest in Australian territory or a part of Australian territory.

Requirements are broad directions issued by the Minister to manage the response to a declaration disease or pest. Requirements may include:

- specifying how people, goods or conveyances enter or leave a specified place
- restricting their movement between specified places
- evacuation or removal of goods and/or conveyances from specified places, and
- treatment or destruction of goods.

For example, the Minister may determine that every person inside a biosecurity response zone wear protective shoes and when leaving a biosecurity response zone discards those shoes and exits through a foot bath.

The Minister is not limited in the requirements he or she can make during a declared biosecurity emergency period as long as the Minister is satisfied the requirement is appropriate and adapted to preventing or controlling the establishment or spread of the declaration disease or pest. The power to determine biosecurity emergency requirements is intended to allow the Minister to determine any requirement that is needed to manage the declaration disease or pest on a national scale.

The specific requirements that are determined by the Minister will depend upon a range of factors such as the origin, nature and scale of biosecurity risk associated with the declaration disease or pest and its location within Australian territory. Some examples are listed under subclause (3) to give an indication of the types of requirements that might be determined by the Minister, but this is not intended to limit the types of requirements that may be determined.

The words ‘appropriate and adapted’ have been used to create the appropriate link between the Minister exercising the power to determine an emergency requirement and the quarantine constitutional head of power (section 51(ix) of the Constitution).

‘Appropriate and adapted’ also incorporates the international law principle of proportionality. The use of these words is further intended to ensure that the exercise of the power to give directions or take actions is consistent with Australia’s international human rights obligations, such as the right not to be subjected to arbitrary or unlawful interferences with a person’s privacy under Article 17 of the *International Covenant on Civil and Political Rights*.

The determination of a biosecurity emergency requirement is a legislative instrument, but disallowance under section 42 of the *Legislative Instruments Act 2003* does not apply. This is because the decision of whether to impose an emergency requirement should be scientifically based and made in accordance with an assessment of the relevant biosecurity risks. If an emergency requirement was disallowed, nationally significant biosecurity risks could go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia’s local industries, economy and the environment.

This power may be delegated to the executive head of a national response agency (see clause 453). Limitations apply to the exercise of powers in relation to individuals (see clause 448), and failure to comply with a determined requirement under this clause may constitute an offence or incur a civil penalty (see clause 449).

A biosecurity emergency requirement determined by the Minister will have effect despite any provision of any other Australian law. This ensures that during a biosecurity emergency period any person who acts in accordance with a requirement from the Agriculture Minister (or a delegate as provided for in this Act) will not be liable for an offence under that Australian law in circumstances where their actions would ordinarily be in contravention of that law. However, this clause does not override any other Australian law, which means that unless a person’s compliance with the requirement conflicts with another law, that law will continue to be in force.

The determination of a biosecurity emergency requirement will have effect until the end of the biosecurity emergency period, unless the requirement is revoked earlier. This is to ensure that when a biosecurity emergency period ends, people are no longer required to comply with requirements specifically determined to address the threat or harm posed by the declared disease or pest.

**Clause 446                    Agriculture Minister may give directions and take actions during biosecurity emergencies**

This clause allows the Agriculture Minister, during a biosecurity emergency period, to give a direction to any person or take any action the Minister is satisfied is appropriate and adapted to prevent or control the establishment or spread of the declaration disease or pest in Australian territory or a part of Australian territory. This power may be delegated to the executive head of a national response agency and subdelegated to a national response agency employee. Clauses 447 and 448 set out limitations to this power.

Directions related to the management of the declaration disease or pest can be issued directly to a person by the Minister or by a delegate. For example, a direction can be given to a person requiring them to secure a good or conveyance so it can be treated. ‘Actions’ refers to specific actions to give effect to a requirement or a direction, for example, moving goods or a conveyance.

The words ‘appropriate and adapted’ have been used to create the appropriate link between the Minister exercising the power to give directions or take action and the quarantine constitutional head of power (section 51(ix) of the Constitution).

‘Appropriate and adapted’ also incorporates the international law principle of proportionality. The use of these words is further intended to ensure that the exercise of the power to give directions or take actions is consistent with Australia’s international human rights obligations, such as the right not to be subjected to arbitrary or unlawful interferences with a person’s privacy under Article 17 of the *International Covenant on Civil and Political Rights*.

The power to issue directions or undertake actions is intended to allow the Minister to give any direction or take any action that is necessary to manage the declaration disease or pest on a national scale. The specific directions issued or actions undertaken by the Minister will depend upon a range of factors such as the origin, nature and scale of biosecurity risk associated with the declaration disease or pest and its location within Australian territory. Some examples are listed under subclauses (2) and (3) to give an indication of the types of direction or actions that might be issued or undertaken by the Minister, but this is not intended to limit the types of actions or directions available to the Minister.

This clause allows the Minister to give a direction of a general or specific nature to the Director of Biosecurity or an officer or employee of the Commonwealth (including a biosecurity enforcement officer or a biosecurity officer) about the performance of his or her functions or exercise of his or her powers. This is to ensure that the Minister is the sole person in charge of coordinating the national biosecurity emergency response. Otherwise conflicting directions or actions might be undertaken during a declared biosecurity emergency, limiting the effectiveness of the response. The power to give directions or take action in this way cannot be delegated (see clause 453), as it would not be appropriate for the executive head of a national response agency or a national response agency employee to be able to issue the Director, a biosecurity enforcement officer or a biosecurity officer with a direction about how he or she performs his or her functions or exercise his or her powers.

A direction may be given or an action taken despite any provision of any other Australian law. This ensures that any person who acts in accordance with a direction given under this clause, or undertakes an action in accordance with this clause, will not be liable for an offence or non-compliance under another Australian law. However, this clause does not override any other Australian law, which means that unless compliance with the direction or undertaking the action conflicts with another law, that law will continue to be in force.

A direction under this clause to a biosecurity officer or a biosecurity enforcement officer can be given despite any restriction specified in the officer's instrument of authorisation under subclauses 550(2) or 551(2). This is to ensure that officers can be given additional functions and powers that are usually restricted, but required during a biosecurity emergency, to respond to the threat or harm posed by the declaration disease or pest.

A direction ceases to have effect at the end of the biosecurity emergency period, unless revoked earlier. This ensures that once a biosecurity emergency period has ended, people are no longer required to comply with directions specifically given to address the threat or harm posed by the declared disease or pest.

Merits review to the Administrative Appeals Tribunal is not available for a decision to issue an emergency direction or undertake an action during a biosecurity emergency. This is to ensure the Commonwealth can undertake the fast and urgent actions necessary to manage the threat or harm posed by the declaration disease or pest to Australia's local industries economy and environment without waiting for a review period to pass.

#### **Clause 447                      Limits on power to give directions and take actions**

This clause establishes limitations over the Agriculture Minister's power to give a direction or undertake an action under clause 446. Before exercising this power, the Minister must be satisfied that:

- exercising the power is likely to be effective in, or contribute to, achieving the purpose for which it is being exercised
- that the manner in which it is exercised is no more restrictive or intrusive than required in the circumstances
- that, when exercised in relation to an individual, it is no more restrictive or intrusive than required in the circumstances
- that, if exercised during a period, the period is only for as long as necessary, and
- that, if exercised in relation to a conveyance, the Minister has considered the impact upon the health and safety of any persons on board the conveyance.

These limitations also apply to a person who exercises a power in accordance with a delegation or subdelegation (see clauses 453 or 454) from the Minister. The limitations do not apply to directions of either a general or specific nature given to the Director of Biosecurity and other Commonwealth officers or employees about the performance of his or her functions or the exercise of his or her powers, because this type of direction does not directly impact upon a person or his or her rights.

Limitations have been inserted to ensure that any direction given or action undertaken is necessary and proportionate and does not impact on a person or his or her rights any more than is necessary to manage the level of biosecurity risk posed. This is consistent with international treaties such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*.

The person exercising the power provided for in this clause must be satisfied that any direction given or action undertaken is likely to be effective in or contribute to achieving its purpose (paragraph (1)(a)) and that the period in which it is exercised is only for as long as necessary (paragraph(1)(d)). The direction given or action undertaken must also be no more intrusive or restrictive than is required under the circumstances (paragraph (1)(b)). While already covered by paragraph (1)(b), for clarity a separate paragraph (1)(c) has been included requiring that, when exercised in relation to an individual, a direction given or action undertaken is no more intrusive or restrictive than is required under the circumstances. This ensures that a person's rights and the

impact of the decision upon them are one of the factors considered when the decision to issue a direction or undertake an action is made.

The person exercising the power must also be satisfied that when giving a direction or undertaking an action the impact upon the health and safety of the people on board is considered (subclause (2)). This is consistent with Article 6 of the ICCPR which provides for the right to life. For example, the decision to issue a direction for an aircraft or vessel not to enter Australia should consider whether the conveyance has adequate fuel and supplies to comply with this direction and whether any persons on board require life saving medical treatment.

**Clause 448                    Limit on requiring individuals to be subject to certain biosecurity measures**

This clause prevents the Agriculture Minister (or delegate or subdelegate as allowed for in this Act) from requiring or directing, under clause 445 or 446, an individual to be subject to a human biosecurity measure of a kind set out in Subdivision B of Division 3 of Part 3 of Chapter 2. These are measures that may be included in a human biosecurity control order, such as examinations, requiring body samples for analysis and receiving vaccinations, medications or treatment.

These types of biosecurity measures should not be implemented during a biosecurity emergency period as they are specifically designed to manage human health risks, not biosecurity risks relevant to a declared disease or pest. If such a measure does need to be implemented, it will be provided for using the powers in Chapter 2 (human health) or the powers in Part 2 (human biosecurity emergencies) of this Chapter.

This clause does not prevent a requirement being made or a direction given by the Agriculture Minister (or delegate or subdelegate), for an individual to wear specified clothing or equipment (or both), designed to prevent a disease or pest from establishing or spreading. It also does not prevent the Director of Biosecurity or a biosecurity officer from exercising his or her powers under Subdivision B of Division 2 of Part 4 of Chapter 10. Those powers allow for an individual to be decontaminated or for an individual's clothing and/or personal effects to be decontaminated and are not specific to addressing a human health risk. Decontamination may be required in a declared biosecurity emergency to manage the threat or harm posed by the declaration disease or pest.

**Clause 449                    Person must comply with emergency requirements and directions**

A person must comply with a requirement determined under clause 445 or a direction given under clause 446 that applies to that person. If the person is subject to a requirement or a direction under those clauses and engages in conduct that contravenes the requirement or the direction, the person commits an offence and is liable to a civil penalty.

The criminal penalty for contravention of this clause is up to a maximum of five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for a contravention of this clause is 120 penalty units. This clause is intended to ensure people comply with requirements and directions given to them during a declared biosecurity emergency.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If directions are not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment. These penalties reflect the high level of threat or harm posed by the declaration disease or pest and the potential consequences of non-compliance.

#### **Clause 450                    Asking questions relating to biosecurity emergencies**

This clause allows the Agriculture Minister to require a person, who is suspected on reasonable grounds of having information relating to the declared biosecurity emergency, to answer questions or provide information in writing. This power may be delegated to the executive head of a national response agency and subdelegated to a national response agency employee.

This power is necessary to allow information to be gathered about the declaration disease or pest (such as where a conveyance with a declaration disease or pest onboard has travelled to) and to enable a more informed assessment of whether there is a biosecurity risk, what level of biosecurity risk is posed and what biosecurity measures are required to manage it.

A requirement imposed under this clause continues to have effect whether or not the biosecurity emergency period has ended, until the person complies with the requirement or the person is informed by the Minister or a biosecurity officer that the answer or information is no longer required.

This ensures that activities to assess and manage the declaration disease or pest can continue if required, even if the biosecurity emergency declaration is no longer in effect. In particular assessment and monitoring activities are likely to be required to determine if the declaration disease or pest is still present or has spread, what level of biosecurity risk is posed and to inform a decision whether an emergency declaration is extended or required in the future.

A person who is subject to a requirement under this clause and fails to comply with the requirement commits an offence and is liable to a civil penalty. The penalty for a contravention is up to a maximum of five years imprisonment, or 300 penalty units, or both. The maximum civil penalty is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If information is not provided, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment. These penalties reflect the high level of threat or harm posed by the declaration disease or pest and the potential consequences of non-compliance.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this clause is high as it will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address that risk. Given the potential seriousness of the biosecurity risk and the need for a timely response, the information being gathered under these clauses is required urgently in a declared biosecurity emergency to allow for the assessment and management of a significant threat or harm to Australia's local industries, economy and the environment.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Act provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person (see clause 635). In addition, section 137.1 of the *Criminal Code* and clause 532 of this Act create an offence and civil penalty for providing false or misleading information.



#### **Clause 451                    Requiring documents relating to biosecurity emergencies**

This clause allows the Agriculture Minister to require a person whom the Minister suspects on reasonable grounds has the custody or control of documents relating to a declared biosecurity emergency to produce those documents as specified to the Minister. The Minister or a biosecurity officer may also make copies of or take extracts from the documents produced and may remove the original documents from the place at which it was produced to make copies or take extracts. These powers may be delegated to an executive head of a national response agency or subdelegated to a national response agency employee.

A requirement imposed under this clause continues to have effect whether or not the biosecurity emergency period has ended, until the person complies with the requirement or the person is informed by the Minister or a biosecurity officer that the specified document is no longer required. This ensures that activities to assess and manage the declaration disease or pest can continue if required, even if the biosecurity emergency declaration is no longer in effect. In particular assessment and monitoring activities are likely to be required to determine if the declaration disease or pest is still present or has spread, what level of biosecurity risk is posed and to inform a decision whether an emergency declaration is extended or required in the future.

A person who is subject to a requirement under this clause and fails to comply with the requirement commits an offence and is liable to a civil penalty. The penalty for a contravention is up to a maximum of five years imprisonment, or 300 penalty units, or both. The maximum civil penalty is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If documents are not provided, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment. These penalties reflect the high level of threat or harm posed by the declaration disease or pest and the potential consequences of non-compliance.

This clause is not subject to the privilege against self-incrimination (see clause 635). The public benefit of abrogating the privilege against self-incrimination in relation to this clause is high as it will allow biosecurity officers to determine whether an unacceptable biosecurity risk is present and put appropriate biosecurity measures in place to address that risk. Given the potential seriousness of the biosecurity risk and the need for a timely response, the information being gathered under these clauses is required urgently in a declared biosecurity emergency to allow for the assessment and management of a significant threat or harm to Australia's local industries, economy and the environment.

Whilst the privilege against self-incrimination is abrogated in relation to this clause, the Act provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person (see clause 635). In addition, section 137.2 of the *Criminal Code* and clause 533 of this Act create an offence and civil penalty for providing false or misleading documents.

## **Division 4—National response agencies**

### **Clause 452 Agriculture Minister may declare national response agency**

This clause allows the Agriculture Minister to declare a national response agency for the purposes of the Act. This may include the Australian Defence Force, a Commonwealth body or a part of a Commonwealth body.

The Agriculture Department is included in the definition of a national response agency (see clause 9) and therefore the department, including the Director of Biosecurity, biosecurity officers and biosecurity enforcement officers, will automatically become a national response agency when the Act comes into effect.

The Australian Defence Force has been listed in this clause as its personnel have specific training and expertise that can be utilised to assist with a biosecurity emergency response, for example, issuing directions, manning biosecurity zones or closing down roads and diverting traffic. Any power exercised must be performed in accordance with the Australian Defence Force's delegation or subdelegation. Australian Defence Force officers will not be subdelegated powers that are outside of their existing skills or areas of expertise, such as powers to assess biosecurity risk.

The clause also requires the Agriculture Minister to consult the Minister responsible for the Australian Defence Force before declaring the Australian Defence Force as a national response agency. This will ensure the Australian Defence Force's responsibilities as a national response agency do not undermine or hamper its other national priorities. However, a failure by the Director of Biosecurity to consult as required in this clause, does not affect the validity of the determination. This will ensure the Commonwealth has continuous ability to appropriately manage the risks of a biosecurity emergency.

A national response agency emergency declaration is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This information has been included in the Bill to assist readers and is not intended in itself to provide an exemption.

### **Clause 453 Agriculture Minister may delegate certain emergency powers**

This clause allows the Agriculture Minister to delegate any or all of the powers to determine emergency requirements, issue directions, take actions, ask questions or require documents to the executive head of a national response agency during a biosecurity emergency. As the Agriculture Department is a national response agency, this may include the Minister delegating powers to the Director of Biosecurity.

The executive head of a national response agency can only exercise those powers and functions that have been specifically delegated to them by the Minister. Unlike the Minister, the executive head will not be able to issue a direction of a specific or general nature to the Director of Biosecurity or an officer or employee of the Commonwealth. This is because it would not be appropriate for the executive head of a national response agency to issue the Director of Biosecurity, a biosecurity enforcement officer or a biosecurity officer with a direction about how he or she performs his or her functions or exercises his or her powers.

### **Clause 454 Executive head of national response agency may subdelegate certain emergency powers**

This clause allows the executive head of a national response agency to subdelegate a power delegated to them by the Agriculture Minister to a person performing duties or functions in his or her agency (a national response agency employee) who has the appropriate qualifications and expertise during a biosecurity emergency. As the Agriculture Department is a national response agency, this may include the Director of Biosecurity subdelegating powers to biosecurity officers

or biosecurity enforcement officers. The executive head cannot subdelegate the power to determine requirements during an emergency period, as the power to issue broad requirements on how a biosecurity emergency sits more appropriately at a higher level of authority.

The executive head can only subdelegate a power to issue directions, take actions, ask questions or require documents to a national response agency employee if the executive head is specifically authorised by his or her delegation from the Minister and has the appropriate qualifications and expertise. The national response agency employees can only exercise those powers that have specifically been subdelegated to them. This ensures that the Minister retains control over the person or category of person that is delegated and subdelegated each type of power.

When performing functions or exercising powers, the national response agency executive head must comply with any direction from the Minister and the national response agency employee must comply with any direction from the Minister or the executive head of their employing agency. This is to ensure that the Minister is the sole person in charge of coordinating the national biosecurity emergency response. Otherwise conflicting directions or actions might be undertaken during a biosecurity emergency, limiting the effectiveness of the response.

This delegations scheme has been established to give the Minister access to enough personnel to conduct potentially nation-wide biosecurity activities required to manage the threat or harm posed by an emergency disease or pest as quickly and effectively as possible. When the Minister's powers are delegated, they will have restrictions placed upon them to ensure they are exercised appropriately.

For example, a national biosecurity emergency to address an animal disease outbreak may require personnel on a national scale to assess risks, undertake activities to manage risks, issue directions, manage biosecurity zones and exercise a range of other powers under the Act. The Minister can delegate the ability to give a direction about the management of goods or conveyances during a biosecurity emergency to the executive head of a national response agency. The Minister can limit this delegation by directing that the power can only be exercised in a biosecurity response zone for the purposes of ensuring that animals affected by the declaration disease are not moved. The executive head can then delegate this power (in its limited form) to employees within its agency, but limit it to relevant people who have the appropriate training or skills to use the power.

Particular powers may remain solely with biosecurity officers because they have the requisite training and expertise to exercise them (for example, Chapter 6 powers to assess the level of biosecurity risk associated with goods, a conveyance or premises). Other powers can be delegated to agencies that have expertise in a particular area that is useful during a biosecurity emergency response (for example, restricting movement of conveyances).

The subdelegation of a power to a biosecurity officer or a biosecurity enforcement officer may state that a restriction specified in the officer's instrument of authorisation does not apply for the purposes of exercising that power. This is to ensure that during a biosecurity emergency response, biosecurity officers and biosecurity enforcement officers can be given additional functions and powers that are usually restricted, but are required during the biosecurity emergency response.

A reference to a person performing duties in a national response agency includes a person performing duties under contract, a person performing temporary duties within the agency and volunteers. This is to ensure that all of the resources of the national response agency are available to assist with the biosecurity emergency response if the relevant person has the necessary skills or qualifications.

**Clause 455                    Delegation does not limit other powers**

This clause provides that a delegation or subdelegation does not affect any other function or power the executive head or national response agency employee is otherwise authorised to perform. This clarifies that being a national response agency does not prevent a Commonwealth body or part of a Commonwealth body from performing its usual functions or activities.

**Clause 456                    Notice may be affixed to goods or a conveyance**

This clause allows a person exercising powers or functions under a delegation or a subdelegation during a biosecurity emergency to affix a notice to goods or a conveyance that has been moved, or is the subject of a direction to secure, a direction not to move, be dealt or interfered with, or any other direction relating to its movement under clause 446. This notice must state that a biosecurity emergency has been declared, the nature of the power that has been exercised in relation to the good or conveyance and that civil penalties and a criminal offence (clause 457) apply if a person contravenes the notice. If it is not possible to affix the notice to the goods or conveyance, the person exercising the power may affix the notice as near as reasonably practicable.

A person who interferes with, removes or defaces the notice during a biosecurity emergency period commits an offence and is liable to a civil penalty. The penalty for a contravention is up to a maximum of five years imprisonment, or 300 penalty units, or both. The maximum civil penalty is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If the notices are removed, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment. The person does not contravene this clause if the person is authorised to interfere with, remove or deface the notice under the Act or another Australian law, or have been given a direction or permission under the Act.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 457                    Moving or interfering with goods or conveyance**

This clause provides that a person who interferes with, moves or deals with the goods or conveyance specified in a notice (clause 456) without authorisation or permission commits an offence and is liable to a civil penalty. The penalty for a contravention is up to a maximum of five years imprisonment, or 300 penalty units, or both. The maximum civil penalty is 120 penalty units.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If the goods or conveyances are moved or interfered with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment.

The person does not contravene this clause if the person is authorised to move or deal with the goods or conveyance under the Act or another Australian law, or have been given a direction or permission under the Act.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

The high penalty level reflects the level of threat or harm posed by the declaration disease or pest and the potentially high consequences if a person does not comply with a notice.

These powers are required to ensure that national response agency employees are able to assist with a biosecurity emergency response by affixing notices to goods or conveyances to restrict their movement so that biosecurity risk associated with the goods or conveyances can be assessed and managed.

## **Division 5—Exercise of powers during biosecurity emergencies**

### **Clause 458                      Modification of this Act during biosecurity emergencies**

During a biosecurity emergency period, this Division allows for particular powers under the Act to be exercised in a specifically modified way. This clause clarifies that any modified powers exercised in a biosecurity emergency under these Divisions may also be exercised during a biosecurity emergency period without that modification. This is because some powers do not require modification in order to be used effectively during a biosecurity emergency period and may be required to manage biosecurity risks unrelated to the declaration disease or pest.

This clause also clarifies that any exemptions or modifications made to the Act under clause 616 (exemptions from and modifications of this Act) are not limited by Division 5 of this Chapter. For example, if an exemption or modification is made to the Act to exempt warships and government vessels from the ballast water requirements, these exemptions or modifications will not be limited by any modifications made under this Division (that is, they will continue to operate as they did outside of the emergency period). These exemptions and modifications can continue to operate despite the biosecurity emergency as they will still be required to manage biosecurity risks unrelated to the declaration disease or pest.

This clause also provides that the application and limitations set out in clause 312 apply to the exercise of a power under this Division. This means that powers in this Division must not be exercised in relation to goods or conveyances that are subject to biosecurity control or exposed goods in relation to which a biosecurity control order is in force. This is because the relevant powers to deal with those goods or conveyances are located in other provisions of the Act.

In exercising the powers set out in Division 5 of this Part, a biosecurity officer or a biosecurity enforcement officer may be assisted by other persons (for example, someone setting up monitoring equipment). In addition the application of clause 32 means that powers in this Division must be exercised in accordance with the principles.

**Clause 459**                    **Biosecurity risk assessment powers**

This clause allows a biosecurity officer to exercise biosecurity risk assessment powers contained in Division 3 of Part 2 of Chapter 6 in relation to the declaration disease or pest without having to suspect that a disease or pest may be present on or in the goods or premises and posing an unacceptable level of biosecurity risk.

These risk assessment powers have been modified so that during a biosecurity emergency, a biosecurity officer can exercise risk assessment powers (such as inspecting goods or premises and taking samples) without being required to suspect that the declaration disease or pest is present and assess the level of biosecurity risk posed. The reduction of the threshold test for this power in a biosecurity emergency is necessary to allow biosecurity officers to quickly and effectively monitor biosecurity risks to determine whether they have spread to a new location, assess potential biosecurity risks and determine whether biosecurity measures are required to manage them. This reflects the serious and urgent nature of the threat or harm posed to Australia's local industries, economy and the environment during a biosecurity emergency.

**Clause 460**                    **Application of offences during emergencies**

This clause makes a person liable for criminal as well as civil offences during a biosecurity emergency if he or she contravenes a requirement under a biosecurity assessment power in Division 3 of Part 2 of Chapter 6 in relation to a declaration disease or pest. These offences apply even if there is no biosecurity control order or biosecurity response zone determination in force.

In non-emergency circumstances an offence in Chapter 6 only applies if the power is exercised in accordance with a biosecurity control order or a biosecurity response zone determination. The application of criminal penalties in these circumstances reflects the more serious and urgent nature of the threat or harm posed during a biosecurity emergency period and the possible consequences of non-compliance.

**Clause 461**                    **Biosecurity control orders—making orders**

This clause allows the Director of Biosecurity, during a biosecurity emergency period, to make a biosecurity control order under clause 353 in relation to goods and premises if satisfied that measures are necessary to prevent or control the establishment or spread of the declaration disease or pest in Australian territory or a part of Australian territory.

This modifies the test in subclause 353(1) where a biosecurity officer is required to suspect that a disease or pest is present in or on the goods. The reduction of the threshold test in a biosecurity emergency to remove the suspicion that the disease or pest is present is required to allow the Director to more quickly and effectively implement biosecurity measures if satisfied they are necessary to manage the declaration disease or pest. This reflects the serious and urgent nature of the threat or harm posed to Australia's local industries, economy and the environment.

A biosecurity control order can only be made in accordance with this clause if it specifies the declaration disease or pest. This is to ensure that the power is only exercised in a biosecurity emergency for diseases or pests relevant to the biosecurity emergency.

This clause does not prevent biosecurity control orders from being made in their unmodified form under Chapter 6 during a biosecurity emergency period.

The powers specified in a biosecurity control order can be exercised on premises entered without a warrant or consent in accordance with clause 470.

**Clause 462                      Biosecurity control orders—varying orders**

This clause allows the Director of Biosecurity to vary a biosecurity control order made in a biosecurity emergency period that relates to the declaration disease or pest. The Director must be satisfied that the powers specified in the order need to be varied to prevent or control the establishment or spread of the declaration disease or pest, or that a power specified in the order no longer contributes to preventing or controlling the establishment or spread of the declaration disease or pest, or managing the biosecurity risk posed by the declaration disease or pest.

This clause allows a biosecurity control order that relates to the declaration pest or disease to be varied, whether it was made under the modified or the unmodified Chapter 6 powers. This ensures that the Director can manage all biosecurity control orders relating to the declaration pest or disease during the emergency period and ensure that the most appropriate and effective response is being undertaken.

The Director may also vary a biosecurity control order, despite the requirements in subclause 358(1), which the Director must ordinarily be satisfied of outside of an emergency period. Similar to clause 461, this is required to ensure that the Director can more quickly and efficiently implement biosecurity risk measures if satisfied they are necessary to manage the declaration pest or disease.

This clause does not prevent biosecurity control orders from being varied in their unmodified form under Chapter 6 during a biosecurity emergency period.

**Clause 463                      Biosecurity control orders—revoking orders**

This clause allows the Director of Biosecurity to revoke a biosecurity control order made in a biosecurity emergency period that relates to the declaration disease or pest. The Director can do so if he or she is satisfied that the order no longer contributes to preventing or controlling the establishment or spread of the declaration disease or pest, or managing the biosecurity risk posed by the declaration disease or pest.

This clause allows a biosecurity control order that relates to the declaration pest or disease to be revoked, whether it was made under the modified or the unmodified Chapter 6 powers. This ensures that the Director can manage all biosecurity control orders relating to the declaration pest or disease during the emergency period and ensure that the most appropriate and effective response is being undertaken.

This clause modifies the test in subclause 359(1) which requires the Director to revoke a biosecurity control order under these circumstances, to make it a discretionary power instead. This allows the Director to be more flexible in the response to the emergency disease or pest and reflects the serious and urgent nature of the threat or harm posed to Australia's local industries, economy and the environment.

If the biosecurity control order does not cease to be in force earlier (for example if the three month time limit expires), it ceases to be in force at the end of the biosecurity emergency period, unless that period is extended under clause 444. This ensures that once a biosecurity emergency period has ended, powers can no longer be exercised that are specifically designed to address the threat or harm posed by the emergency circumstances.

This clause does not prevent biosecurity control orders from being revoked in their unmodified form under Chapter 6 during a biosecurity emergency period.

**Clause 464**                    **Modification of Part 4 of Chapter 6 in relation to biosecurity control orders**

This clause clarifies that the provisions in Part 4 of Chapter 6 (biosecurity control orders) apply in relation to a biosecurity control order that is made, varied or revoked under clauses 461, 462 and 463 as if a reference to managing the biosecurity risk posed by a disease or pest included a reference to preventing or controlling the establishment of the declaration disease or pest. This ensures that provisions in Part 4 of Chapter 6 that are relevant to the content, form and notification of biosecurity control orders, as well as the powers that can be exercised, apply to biosecurity control orders made during a biosecurity emergency.

**Clause 465**                    **Biosecurity response zones**

This clause allows the Director of Biosecurity, during a biosecurity emergency, to determine that a specified area in Australian territory is a biosecurity response zone, if satisfied that it is necessary to make the determination to prevent or control the establishment or spread of the declaration disease or pest in Australian territory or a part of Australian territory.

This clause modifies the test in subclause 365(1), allowing the Director to determine a biosecurity response zone without having to establish that a pest or disease is present. The reduction of the threshold test in a biosecurity emergency is required to allow the Director to more quickly and effectively declare a biosecurity response zone and implement biosecurity measures if satisfied they are necessary to manage the declaration disease or pest. This reflects the serious and urgent nature of the threat or harm posed to Australia's local industries, economy and the environment.

A biosecurity response zone can only be declared in accordance with this clause if it specifies the declaration pest or disease. This is to ensure that this power is only exercised in a biosecurity emergency for diseases or pests relevant to the biosecurity emergency.

This clause also clarifies that the provisions in Part 5 of Chapter 6 apply in relation to a biosecurity response zone that is declared under this clause as if a reference to managing the biosecurity risk posed by a disease or pest included a reference to preventing or controlling the establishment of the declaration disease or pest in Australian territory or a part of Australian territory. This ensures that other relevant provisions in Part 5 of Chapter 6 apply to these declarations during a biosecurity emergency. For example, powers relating to the content of a biosecurity response zone determination and the powers that can be exercised.

A biosecurity response zone ceases to be in effect at the end of the biosecurity emergency period if it was made during the biosecurity emergency period, it relates to the declaration pest or disease and the biosecurity emergency period has not been extended under clause 444. This ensures that once a biosecurity emergency period has ended, powers can no longer be exercised that are specifically designed to address the threat or harm posed by the emergency circumstances.

There is nothing to prevent a biosecurity response zone from being declared without modification during a biosecurity emergency period or a biosecurity response zone determination being made in relation to the declaration disease or pest after the emergency period has ceased.

**Clause 466**                    **Setting traps and setting up equipment and other structures**

This clause allows a biosecurity officer to set up traps, equipment or other structures in relation to the declaration pest or disease during a biosecurity emergency period without a biosecurity response zone having been determined, for the purpose preventing or controlling the establishment of the declaration disease or pest.

This is required to allow widespread activities to monitor for the declaration disease or pest to take place during the biosecurity emergency period more quickly and establish whether the biosecurity



risk has spread to a new location or the level of biosecurity risk has increased at an existing location. This will help inform a decision whether other emergency powers need to be exercised to address the threat or harm posed.

Civil and criminal offences in clause 376 will apply to an unauthorised person who interferes with, removes or defaces the trap, equipment or other structure.

**Clause 467 Notice requirements during biosecurity emergencies**

During a biosecurity emergency period, the Director of Biosecurity or a biosecurity officer may give notices, approvals or make requests orally, instead of in writing, relating to the destruction of premises, high-value goods or conveyances; treatments that may damage goods, conveyances or premises; the movement of aircraft and vessels to a place outside Australian territory; decontamination, and; abandoned goods or conveyances. This is required to allow the biosecurity risk management activities to occur as quickly as possible during a biosecurity emergency and help reduce the threat or harm posed by the declaration disease or pest.

If a person is given an oral notification, approval or a request is made in accordance with this clause, a written notice must be given to them within 48 hours of an oral notice or approval being given or an oral request being made. This is to ensure that in addition to the oral notification, the relevant person has a written record to inform him or her of exactly what the person is required to do and by when. It also provides physical evidence that the person was notified of the relevant matter.

A person who is given notice regarding a treatment that may damage his or her goods, conveyance or premises has seven days from which the first notification was given (whether this was orally or in writing) to notify the Director in writing if he or she agrees to the treatment of the goods, conveyances or premises. The period has been reduced to seven days during a biosecurity emergency to allow biosecurity risk management activities to occur as quickly as possible and help reduce the threat or harm posed by the declaration disease or pest. All other parts of the relevant clauses apply, such as the ability to manage serious and urgent biosecurity risks without providing notice.

**Clause 468 Other biosecurity measures during biosecurity emergencies**

This clause allows for regulations to be made to modify any regulations made under clause 346 during a biosecurity emergency period. This allows any other biosecurity measures contained in the regulations made under clause 346 to be modified during a biosecurity emergency period, for example shortening the notice period or allowing notice to be given orally instead of in writing. This is required to allow biosecurity risk management activities to occur as quickly as possible and help reduce the threat or harm posed by the declaration disease or pest.

**Clause 469 Merits review during biosecurity emergencies**

During a biosecurity emergency, a person is not entitled to seek review under the Act or the *Administrative Appeals Tribunal Act 1975* for certain decisions. These include a decision to require destruction of high value goods under subclause 136(2) or subclause 342(2); a decision requiring a conveyance to be destroyed under clause 210 or subclause 343(2); a decision requiring premises to be destroyed under subclause 344(3); or a decision relevant to approving, varying, placing conditions upon, suspending or revoking a proposed arrangement or a approved arrangement (see items 20-31 of the table in subclause 574(1)).

This is required to allow these decisions to be implemented and the biosecurity risks addressed as quickly as possible in a biosecurity emergency. This reflects the serious and urgent nature of the threat or harm posed to Australia's local industries, economy and the environment.

## **Division 6—Entry to premises without warrant or consent during biosecurity emergencies**

### **Clause 470 Entry to premises without warrant or consent during biosecurity emergencies**

This clause allows biosecurity enforcement officers and biosecurity officers, with the appropriate level of training and qualifications in investigations, during a declared biosecurity emergency period to enter any premises without a warrant or consent for the purposes of:

- exercising biosecurity risk assessment powers under Division 3 of Part 2 of Chapter 6 in relation to the declaration disease or pest, in the absence of a control order made during the emergency period and relating to the declaration disease or pest
- exercising powers in relation to premises or goods for orders made under a modified or unmodified biosecurity control order made during the declared emergency period for preventing or controlling the establishment or spread of the declaration disease or pest
- exercising powers listed in a modified or unmodified biosecurity response zone determination which has been determined during the declared biosecurity emergency period and relates to the declaration disease or pest, and/or
- setting up traps, equipment or other structures in accordance with clause 466.

The power to enter without a warrant or consent in a declared biosecurity emergency is required to allow biosecurity enforcement officers and biosecurity officers to quickly enter premises where they suspect the declaration disease or pest may be present, carry out an assessment of the biosecurity risks associated with the declaration pest or disease and then, if required, urgently manage the biosecurity risks associated with them to help reduce the threat or harm posed.

Before exercising any of these powers, a biosecurity officer or biosecurity enforcement officer must be satisfied of the principles affecting decisions to exercise certain powers (clause 32). This is to ensure the use of any powers allowed for in this Division is only as is necessary and proportionate and does not impact on the person who owns the premises or his or her rights any more than is necessary to manage the level of biosecurity risk posed.

Outside of a biosecurity emergency, Chapter 6 powers can only be exercised by a biosecurity officer or biosecurity enforcement officer if the occupier of the premises has consented to the entry or the entry is made under a warrant. However in a declared biosecurity emergency period, there is a nationally significant threat or harm is being posed by the declaration disease or pest to Australia's plant health, animal health, the environment or related economic activities. The severe and immediate threat posed by a declaration pest or disease creates exceptional circumstances where the use of entry powers by suitably trained and qualified officers is justified without a warrant or consent to exercise the biosecurity risk assessment powers provided for in Chapter 6. For example, if there was a relatively small foot-and-mouth disease outbreak in only one state, it is estimated to cost Australia \$5.64 billion to \$6.26 billion.<sup>8</sup> A large multi-state outbreak is estimated to have a total direct cost of \$49.62 billion to \$52.21 billion.<sup>9</sup>

Biosecurity officers are only authorised to enter the premises without a warrant or consent if they suspect on reasonable grounds that the declaration disease or pest may be present in or on the premises or goods on the premises and they are accompanied by a biosecurity enforcement officer.

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<sup>8</sup> Australian Bureau of Agricultural and Resource Economics and Sciences 2013, *Potential socio-economic impacts of an outbreak of foot-and-mouth disease in Australia*, Department of Agriculture, pp. 9, accessed at: [http://data.daff.gov.au/data/warehouse/research\\_reports/9aab/2013/RR13.11PotSocEcoImpctOfFMD/RR13.11PotSocEcoImpctOfFMD\\_v1.0.0.pdf](http://data.daff.gov.au/data/warehouse/research_reports/9aab/2013/RR13.11PotSocEcoImpctOfFMD/RR13.11PotSocEcoImpctOfFMD_v1.0.0.pdf)

<sup>9</sup> Australian Bureau of Agricultural and Resource Economics and Sciences 2013, *Potential socio-economic impacts of an outbreak of foot-and-mouth disease in Australia*, Department of Agriculture, pp. 9, accessed at: [http://data.daff.gov.au/data/warehouse/research\\_reports/9aab/2013/RR13.11PotSocEcoImpctOfFMD/RR13.11PotSocEcoImpctOfFMD\\_v1.0.0.pdf](http://data.daff.gov.au/data/warehouse/research_reports/9aab/2013/RR13.11PotSocEcoImpctOfFMD/RR13.11PotSocEcoImpctOfFMD_v1.0.0.pdf)

This restriction ensures that access to premises is gained only for the purposes of managing risks associated with the declaration disease or pest. It also ensures a biosecurity enforcement officer with appropriate training in establishing entry and using force is present for the purposes of assisting in entering the premises and exercising powers. The biosecurity enforcement officer must adhere to the obligations and powers set out for entering premises without a warrant or consent (Division 3 of Part 5 of Chapter 9).

For the purposes of this clause, the definition of ‘premises’ includes a conveyance. If the premises are a conveyance, then a biosecurity enforcement officer may stop and detain the conveyance for the purposes outlined above.

In exercising the powers set out in Division 5 of this Part, a biosecurity officer or a biosecurity enforcement officer may be assisted by other persons, for example, someone setting up monitoring equipment.

Administrative arrangements will be put in place to ensure that senior executive authorisation is given before entry powers are exercised and there are appropriate reporting requirements. Further to this, all officers and employees of the Agriculture Department who are to be involved in investigations are required to meet minimum levels of training and/or qualifications and the Department must meet minimum standards for effective and efficient management of investigations, including record keeping, under the Australian Government Investigations Standards. The Agriculture Department is required to meet these standards and comply with the Commonwealth Fraud Control Guidelines. Quality assurance reviews of investigations carried out by departmental officers and employees can be undertaken to establish whether the investigation was conducted in a way that complied with the Australian Government Investigations Standards. A quality assurance review is conducted by the Australian Federal Police in relation to criminal investigations and in relation to non-criminal investigations can be conducted by another agency with the necessary skills and capacity.

#### **Clause 471                      Modification of Chapter 6**

This clause provides that clause 325 (relating to expert assistance to operate electronic equipment) applies in relation to a biosecurity enforcement officer who enters premises without a warrant or consent under clause 470, as if the entry were made under a relevant warrant under clause 325 authorising the biosecurity enforcement officer to exercise listed powers.

This ensures that the powers in clause 325 relating to securing electronic equipment for a particular period and seeking extensions to that period can be exercised by biosecurity enforcement officers as if they had entered the premises with a warrant or consent.

Similarly, this clause provides that clause 362 (power to secure goods or premises) applies in relation to a biosecurity officer who enters premises under subclause 470, as if the entry were authorised by clause 361.

This ensures that a biosecurity officer can secure goods or premises without a warrant in order to manage the biosecurity risks posed by the pest or disease on or in the goods or premises during a biosecurity emergency. This reflects the serious and urgent nature of the threat or harm posed to Australia’s local industries, economy and the environment.

**Clause 472                    Entry to adjacent premises without warrant or consent during biosecurity emergencies**

This clause allows biosecurity officers and biosecurity enforcement officers, during a declared biosecurity emergency period, to enter adjacent premises without a warrant for the purpose of gaining access to other premises to exercise powers in accordance with clause 470. Premises in this clause do not include a conveyance.

Biosecurity officers are only authorised to enter the premises if they are accompanied by a biosecurity enforcement officer. This is to ensure that an officer (the biosecurity enforcement officer) with appropriate training in establishing entry and using force is present.

For the obligations and powers of biosecurity enforcement officers in entering premises under this clause, see Division 3 of Part 5 of Chapter 9.

**Part 2—Human biosecurity emergencies**

**Division 1—Introduction**

**Clause 473                    Simplified outline of this Part**

This clause sets out the Part’s objectives. The Part provides powers and requirements to deal with human biosecurity emergencies of national significance. This Part also sets out the circumstances, the requirements and the purposes in which the powers may be exercised. These include the power to make a declaration of a human biosecurity emergency, to determine emergency requirements and issue directions during a human biosecurity emergency period. The powers in this Part are in addition to those generally available under Chapter 2.

**Division 2—Human biosecurity emergency powers**

**Clause 474                    Health Minister to exercise human biosecurity emergency powers personally**

This clause expressly requires the Health Minister to exercise human biosecurity emergency powers and prevents the Minister from delegating his or her powers under this Part of the Act. This does not prevent section 34AAB of the *Acts Interpretation Act 1901* from having effect, allowing the Health Minister to authorise other Ministers or members of the Executive Council to exercise powers under this Part.

**Clause 475                    Governor-General may declare that a human biosecurity emergency exists**

This clause permits the Governor-General to declare an emergency on the recommendation of the Health Minister. In making this recommendation, the Health Minister must be satisfied that:

- a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale, and
- the proposed declaration is necessary to control, reduce or remove the threat or harm in Australian territory, or a part of Australian territory.

Any human biosecurity emergency declaration must specify the listed human disease to which it relates and specify the period in which the human biosecurity emergency declaration is in force (known as the human biosecurity emergency period). The declaration must also specify the nature of the human biosecurity emergency and the conditions that gave rise to it.

In the event that a new human disease has emerged, the Director of Human Biosecurity would first be required to declare the disease to be a Listed Human Disease. Once this declaration has been

made, the Minister must consider the tests above and, if the Minister is satisfied the tests have been met, he or she may make a recommendation to the Governor-General to declare a human biosecurity emergency.

The period of a human biosecurity emergency declaration must be no longer than is necessary to control, reduce or remove the threat or harm, and in any case the declaration must not be more than three months. This period can be extended under clause 476.

The human biosecurity emergency period is limited to a maximum of three months to ensure there is a fixed point in time where the human biosecurity emergency declaration is evaluated to determine whether the emergency powers are still required. If a human biosecurity emergency declaration is no longer required, the Governor-General may vary or revoke the declaration using section 33(3) of the *Acts Interpretation Act 1901*. A human biosecurity emergency declaration may only be varied under clause 476.

A human biosecurity emergency declaration is a legislative instrument, but disallowance under section 42 of the *Legislative Instruments Act 2003* does not apply. This is because the decision to declare a human biosecurity emergency should be made in accordance with an assessment of the relevant human biosecurity risks. If an emergency declaration was disallowed, nationally significant human biosecurity risks might go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's human health.

#### **Clause 476                    Governor-General may extend a human biosecurity emergency period**

This clause permits the Governor-General to extend the human biosecurity emergency period for up to three months, if recommended to do so by the Health Minister. In making this recommendation, the Minister must reconsider the tests in clause 475 and continue to be satisfied that the declaration of the human biosecurity emergency is necessary. The Governor-General may extend a human biosecurity emergency period more than once.

This means that if the Minister evaluates the human biosecurity emergency declaration at the end of the human biosecurity emergency period (no longer than three months) and determines that the emergency powers provided by the declaration are still required, the human biosecurity emergency period can be extended for up to three months. There is no limit on the number of extensions that can be made by the Governor-General.

A variation to a human biosecurity emergency declaration is a legislative instrument, but disallowance under section 42 of the *Legislative Instruments Act 2003* does not apply. This is because the decision to declare a human biosecurity emergency should be scientifically based and made in accordance with an assessment of the relevant human biosecurity risks. If an emergency declaration was disallowed, nationally significant human biosecurity risks might go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's human health.

#### **Clause 477                    Health minister may determine emergency requirements during human biosecurity emergency period**

This clause provides for the Health Minister, during a declared human biosecurity emergency period, to set requirements to respond to a human biosecurity emergency. The Minister must be satisfied that the proposed requirements are necessary to:

- control, reduce or remove the threat of harm posed by a Listed Human Disease
- prevent or control the spread of disease to another country, or

- give effect to a recommendation given by the WHO under Part III of the International Health Regulations.

Requirements are broad directions issued by the Minister to manage the response to a declaration listed human disease. This power allows the Minister to set a requirement that applies to a class of people, goods or conveyances, to manage the disease risk. For example, the Minister may determine requirements that apply to people, goods or conveyances entering or leaving a specified place; restrict or prevent the movement of people, goods or conveyances between specified places; or require a specified place to be evacuated. Some examples are listed under subclause (3) to give an indication of the types of requirements that might be determined by the Minister, but this is not intended to limit the types of requirements that may be determined. In addition, the Minister may set requirements to ensure that Australia does not facilitate the spread of a listed human disease to neighbouring countries.

During an emergency, the Director-General of the WHO may issue temporary recommendations under Part III of the International Health Regulations, if it is determined that a public health emergency of international concern is occurring. This determination is made according to Articles 12 and 49, and using the decision tool in Annex 2 of the International Health Regulations. The criteria to be considered by the Director-General when issuing temporary recommendations are outlined in Article 17, and measures which may be included in a temporary recommendation are listed in Article 18.

This power allows the Minister to implement temporary recommendations made under Article 15 of the International Health Regulations. These recommendations comprise health measures to prevent or reduce the international spread of disease. Health measures are defined by the International Health Regulations to be measures applied to prevent the spread of disease or contamination, but do not include law enforcement or security measures.

Any requirements set by the Minister must not require individuals to be subject to the types of measures that may be included in a human biosecurity control order. If an individual poses a human health risk these measures must still be applied using a human biosecurity control order, and the associated protection of civil rights, and rights to seek review, would continue to apply.

The determination of a requirement is a legislative instrument, but disallowance under section 42 of the *Legislative Instruments Act 2003* does not apply. This is because the decision to determine a requirement should be made in accordance with an assessment of the relevant human health risks. If a requirement was disallowed, nationally significant human health risks might go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's human health.

A human biosecurity emergency requirement determined by the Minister will have effect despite any provision of any other Australian law. This ensures that during a human biosecurity emergency period any person who acts in accordance with a requirement from the Minister will not be liable for an offence under that Australian law in circumstances where their actions would ordinarily be in contravention of that law.

The determination of a human biosecurity emergency requirement will have effect until the end of the human biosecurity emergency period, unless the requirement is revoked earlier. This is to ensure that when a human biosecurity emergency period ends, people are no longer required to comply with requirements specifically determined to address the threat or harm posed by the declared listed human disease.

Failure to comply with a determined requirement under this clause may constitute an offence or incur a civil penalty (see clause 479).

**Clause 478                      Health Minister may give directions during human biosecurity emergency period**

This clause allows the Health Minister, during a human biosecurity emergency period, to give a direction to any person to respond to human biosecurity emergency. In giving the direction, the Minister must be satisfied that the proposed direction is necessary:

- to control, reduce or remove the threat of harm posed by a listed human disease
- to prevent or control the spread of disease to another country, or
- to give effect to a recommendation given by the WHO under Part III of the International Health Regulations.

This would allow the Minister to give a direction to a person who is in a position to give effect to the requirements in clause 477, such as direct a person in charge to close specified places or prevent public access to specified places. Some examples are listed under subclause (2) to give an indication of the types of direction that might be issued by the Minister but this is not intended to limit the type of directions available to the Minister.

Directions must not be given to an officer or employee of a state, territory or state or territory body unless an agreement is in place between the Commonwealth and the state, territory, or body and any directions given must be in accordance with that agreement.

This power is for the large scale direction of people during an emergency, rather than for the management of individuals. As in clause 477, any directions that are given by the Health Minister must not require individuals to be subject to the types of measures that may be included in a human biosecurity control order. A direction ceases to have effect at the end of the human biosecurity emergency period, unless revoked earlier. This ensures that once a human biosecurity emergency period has ended, people are no longer required to comply with directions specifically given to address the threat or harm posed by the declared listed human disease.

A human biosecurity emergency direction given by the Health Minister will have effect despite any provision of any other Australian law. This ensures that during a human biosecurity emergency period any person who acts in accordance with a direction from the Health Minister will not be liable for an offence under that Australian law in circumstances where their actions would ordinarily be in contravention of that law.

Failure to comply with a direction under this clause may constitute an offence (see clause 479).

**Clause 479                      Person must comply with emergency requirements and directions**

This clause provides that a person must comply with a requirement determined under clause 477 or a direction given under clause 478 that applies to that person. If the person is subject to a requirement or a direction under those clauses and engages in conduct that contravenes the requirement or the direction, the person commits an offence and is liable to a criminal penalty.

The criminal penalty for contravention of this clause is up to a maximum of five years imprisonment, or 300 penalty units, or both. This clause is intended to ensure people comply with requirements and directions given to them during a declared human biosecurity emergency.

The criminal penalty available is higher than the maximum penalty stipulated in the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This reflects the severity of the potential consequences of an offence. If the directions are

not complied with, significant biosecurity risks may ensue and result in serious damage to plant and animal health, Australia's local industries, the economy and the environment. These penalties reflect the high level of threat or harm posed by the declaration listed human disease and the potential consequences of non-compliance.

## **Chapter 9—Compliance and enforcement**

### **Part 1—Monitoring**

#### **Division 1—Introduction**

##### **Clause 480                    Simplified outline of this Part**

This outline sets out the Part's objectives. This Part allows a biosecurity enforcement officer to monitor whether the Biosecurity Act has been, or is being, complied with or whether information given in compliance or purported compliance with the Biosecurity Act is correct. Key provisions include the ability for a biosecurity enforcement officer to enter premises by consent, or with a warrant, and to exercise monitoring powers under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). This clause outlines that a biosecurity enforcement officer may be assisted by other persons in exercising powers under this Part.

This clause also notes that the rules for obtaining a monitoring warrant and the obligations and powers of biosecurity enforcement officers in entering premises under a monitoring warrant or with consent are contained under this Part.

#### **Division 2—Monitoring under Part 2 of the Regulatory Powers Act**

##### **Clause 481                    Basic monitoring powers under Part 2 of the Regulatory Powers Act**

This clause provides officers with monitoring powers by triggering Part 2 of the Regulatory Powers Act. Part 2 of the Regulatory Powers Act creates a framework for monitoring whether the Biosecurity Act has been complied with and whether information given in compliance or purported compliance with the Biosecurity Act is correct.

This clause also aligns provisions and definitions with corresponding provisions and definitions of the Regulatory Powers Act, including:

- making biosecurity enforcement officers authorised applicants and authorised persons, and
- aligning issuing officers and relevant courts.

The modifications ensure that the Regulatory Powers Act will be appropriately adapted to specific biosecurity circumstances. For example, modifications will provide for authorised persons to be assisted by other persons when performing functions under Part 2 of the Regulatory Powers Act and for the application of this Part to extend to external territories. This creates the necessary linkages between this Bill and the Regulatory Powers Act to make monitoring powers available to biosecurity enforcement officers.

##### **Clause 482                    Modifications of Part 2 of the Regulatory Powers Act**

This clause provides for additional monitoring powers beyond those provided for under Part 2 of the Regulatory Powers Act, including:

- the power to sample any thing on a premises entered under a monitoring warrant or with appropriate consent under Part 2 of the Regulatory Powers Act, and
- the power for a biosecurity officer or biosecurity enforcement officer to use an animal to assist them carry out a power or powers.



A monitoring warrant that provides a biosecurity officer or biosecurity enforcement officer with the power to use an animal to assist them carry out a power must define how that animal may be used. This will ensure animals used in this circumstance are used appropriately by the relevant officer and that people who may be affected by the exercise of the monitoring warrant are aware of how animals may be used.

These additional monitoring powers are necessary to ensure that biosecurity officers and biosecurity enforcement officers can take the necessary measures to monitor biosecurity risk and take into consideration the special requirements that may be needed by officers to effectively monitor biosecurity risk.

The clause further modifies the application of Part 2 of the Regulatory Powers Act to ensure consistency with the provisions of the Bill, by:

- modifying the meaning of premises so that monitoring powers can be applied to vessels and aircraft and so that the monitoring powers under this clause operate effectively, and
- departing from the Regulatory Powers Act requirements for identity cards, which are inconsistent with this Bill.

Finally, this clause provides authorised persons with powers to use necessary and reasonable force against things to ensure they have the capability to successfully monitor biosecurity risks under this clause and to help prevent biosecurity risks entering or establishing in Australia.

This clause does not authorise the use of force against a person. This is to ensure protection of individuals and to clarify that physical force on an individual cannot be used in the exercise of powers authorised by a warrant.

The operation of clause 511, as it applies in accordance with this Part, widens the application of Part 2 of the Regulatory Powers Act to include premises entered under that clause. This ensures that all types of premises that may be the subject of a monitoring warrant, including conveyances, are able to be subject to the provisions under this clause.

## **Part 2—Investigation**

### **Division 1—Introduction**

#### **Clause 483                      Simplified outline of this Part**

This outline sets out the Part's objectives. This Part allows a biosecurity enforcement officer to gather material relating to the contravention of offence and civil penalty provisions under the Biosecurity Act, *Crimes Act 1914* or the *Criminal Code*. Powers under this Part must be exercised in accordance with Part 3 of the Regulatory Powers Act (except where modifications are specified in this Part).

Key provisions under this Part include the ability of biosecurity enforcement officers to enter premises, with consent or under an investigation warrant and exercise investigation powers if there are reasonable grounds for suspecting that there may be material that relates to the contravention of offence and civil penalty provisions under the Biosecurity Act on the premises. Provision is also made for a biosecurity enforcement officer to be assisted by other persons in exercising powers under Part 3 of the Regulatory Powers Act and notes that the rules for obtaining an investigation warrant and the obligations and powers of biosecurity enforcement officers in entering premises under an investigation warrant or with consent.

The modifications ensure that the Regulatory Powers Act will be appropriately adapted to specific biosecurity circumstances. For example, modifications will provide for authorised persons to be

assisted by other persons when performing functions under Part 3 of the Regulatory Powers Act and for the application of this Part to extend to external Territories.

## **Division 2—Investigating under Part 3 of the Regulatory Powers Act**

### **Clause 484 Basic investigation powers under Part 3 of the Regulatory Powers Act**

This clause provides officers with investigation powers by triggering Part 3 of the Regulatory Powers Act. Any offence or civil penalty provision under the Biosecurity Act, or an offence against the *Crimes Act 1914* or the *Criminal Code* that relates to the Biosecurity Act, will be subject to investigation under Part 3 of the Regulatory Powers Act. This Part creates a framework for gathering material relating to the contravention of offence and civil penalty provisions.

Subclause 484(2) sets out the specifics to enable application of the Regulatory Powers Act to the specific circumstances of the biosecurity environment.

This clause also aligns provisions and definitions with corresponding provisions and definitions of the Regulatory Powers Act, including:

- aligning the meaning of evidential material
- making biosecurity enforcement officers authorised applicants and authorised persons
- aligning issuing officers and relevant courts, and
- specifying that the Director of Biosecurity is the relevant chief executive.

Provision is also made under this clause for an authorised person to assist a biosecurity enforcement officer in exercising functions or duties under Part 3 of the Regulatory Powers Act and for Part 3 of the Regulatory Powers Act, to extend to those external territories to which the Biosecurity Act applies.

### **Clause 485 Modifications of Part 3 of the Regulatory Powers Act**

This clause provides for additional investigation powers to apply, beyond those provided for under Part 3 of the Regulatory Powers Act, including:

- the power to sample any thing on premises entered under an investigation warrant or with appropriate consent under Part 3 of the Regulatory Powers Act, and
- the power for a biosecurity officer or biosecurity enforcement officer to use an animal to assist them carry out a power or powers.

An investigation warrant that provides a biosecurity officer or biosecurity enforcement officer with the power to use an animal to assist them carry out a power, must define how that animal may be used. This will ensure animals used in this circumstance are used appropriately by the relevant officer and that people who may be affected by the exercise of the investigation warrant are aware of how animals may be used.

These additional investigation powers are necessary to ensure that biosecurity officers and biosecurity enforcement officers have appropriate tools to investigate biosecurity risk and take into consideration the special requirements that may be needed by officer to effectively investigate biosecurity risk.

The clause further modifies the application of Part 3 of the Regulatory Powers Act to ensure consistency with the provisions of the Bill, including:

- modifying the meaning of premises so that investigation powers can be applied to vessels and aircraft and so that the investigation powers under this clause operate effectively, and
- departing from the Regulatory Powers Act requirements for identity cards, which are inconsistent with the Bill.

Finally, this clause provides authorised persons with powers to use necessary and reasonable force against things to ensure they have the capability to successfully investigate biosecurity risks under this clause and to help prevent biosecurity risks entering or establishing in Australia.

This clause does not authorise the use of force against a person. This is to ensure protection of individuals and to clarify that physical force on an individual cannot be used in the exercise of powers authorised by a warrant.

### **Part 3—Warrants for purposes other than monitoring and investigation**

#### **Division 1—Introduction**

##### **Clause 486                    Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part allows a magistrate or Judge of a court of a state or territory or of the Federal Court or Federal Circuit Court to issue a warrant to authorise entry to premises for the taking of possession of premises or a conveyance under certain circumstances. This Part also provides for warrants to be issued by telephone or fax in urgent and other cases.

#### **Division 2—Issue of warrants**

##### **Subdivision A—Ordinary issue of warrants**

##### **Clause 487                    Warrants this Subdivision applies to**

This clause provides that Subdivision A applies to biosecurity risk assessment warrants, biosecurity control order warrants, biosecurity response zone warrants, biosecurity monitoring zone warrants, adjacent premises warrants, conveyance possession warrants and premises possession warrants. Notes to this clause clarify the circumstances in which these warrants may be issued. Information about what the warrants listed above may authorise is explained in clauses 489 and 490.

The warrants provided for under this Division cover the unique requirements and measures in place to effectively manage biosecurity risk. These are not provided by standard monitoring and investigation warrants under the Regulatory Powers Act and so are included separately and in addition to those warrants covered in Parts 1 and 2 of this Chapter.

##### **Clause 488                    Application and issue of warrant**

This clause provides that a biosecurity enforcement officer may apply to an issuing officer for a warrant listed in clause 487. The power to apply for a warrant sits with biosecurity enforcement officers as they will have the appropriate expertise and training. Accordingly, biosecurity officers will not have the ability to apply for a warrant under these clauses. Biosecurity officers will however be able to exercise powers under some warrants, once issued, where it is appropriate for them to do so (see clause 489 for further information).

Before issuing a warrant, the issuing officer must be satisfied, by information on oath or affirmation, that the relevant test corresponding to the warrant under clause 489 is met. For particular classes of warrants, such as a biosecurity risk assessment warrant, the information provided must be sworn or affirmed by a biosecurity officer. This is because biosecurity officers have the appropriate level of expertise and knowledge to assess the level of biosecurity risk that is required in the issuing of these warrants. The types of warrants to which this requirement applies are:

- biosecurity risk assessment warrant authorising entry to premises
- biosecurity control order warrant authorising entry to premises
- biosecurity response zone warrant authorising entry to premises, and
- biosecurity monitoring zone warrant authorising entry to premises.

By having the information provided in an application for a warrant listed above sworn or affirmed by a biosecurity officer, an issuing officer will be able to feel confident that the warrant being applied for is for the purpose of addressing an unacceptable level of biosecurity risk that has been assessed by an officer with the appropriate training to make that assessment.

#### **Clause 489                      Test to be met for issue of warrant**

This clause sets out the threshold tests that must be met in order for a particular type of warrant to be issued under clause 488. The threshold tests vary for each type of warrant to reflect the purpose each warrant is to be issued for and provide a biosecurity enforcement officer or biosecurity officer with appropriate powers to manage different biosecurity risks.

Item 1 provides the test for issuing a biosecurity risk assessment warrant. This warrant allows biosecurity enforcement officers and biosecurity officers to enter premises in order to assess biosecurity risk and exercise powers under Division 3 of Part 2, Chapter 6 (such as securing goods or conveyances or taking samples of goods or premises).

Before issuing the warrant, the issuing officer must be satisfied that:

- there are reasonable grounds for suspecting that a pest or disease may be present in or on goods on the premises, or the premises themselves, and that the disease or pest may pose an unacceptable level of biosecurity risk, and
- it is reasonably necessary that the relevant officer should have access to the premises to:
  - establish whether a disease or pest is present
  - if possible, to identify the disease or pest, or
  - assess the level of biosecurity risk posed by the disease or pest.

Item 2 provides the test for issuing a biosecurity control order warrant. This warrant allows biosecurity enforcement officers and biosecurity officers to enter premises in which goods or premises are subject to a biosecurity control order, in order to carry out biosecurity measures and exercise powers in accordance with a biosecurity control order (see Division 2 of Part 4, Chapter 6).

Before issuing a warrant, the issuing officer must be satisfied that:

- there are reasonable grounds for suspecting that a pest or disease may be present in or on goods on the premises, or the premises themselves, and that the disease or pest poses an unacceptable level of biosecurity risk,
- a biosecurity control order is in force (under clause 353) in relation to the goods or premises and the disease or pest, and
- it is reasonably necessary for a biosecurity enforcement officer or a biosecurity officer to have access to the premises to (as set out in clause 360):
  - assess the level of biosecurity risk posed by the disease or pest, and
  - manage the biosecurity risk posed by the disease or pest.

Item 3 provides the test for issuing a biosecurity response zone warrant. This warrant allow a biosecurity enforcement officers and biosecurity officers to enter premises within a biosecurity response zone to carry out biosecurity measures and exercise powers in accordance with a biosecurity response zone determination (see Division 3 of Part 5, Chapter 6).

Before issuing the warrant, the issuing officer must be satisfied that:

- the premises are within a biosecurity response zone
- there are reasonable grounds for suspecting that a pest or disease may be present in or on goods on the premises, or the premises themselves, and that the disease or pest may pose an unacceptable level of biosecurity risk
- the biosecurity response zone determination relates to the disease or pest, and
- it is reasonably necessary for a biosecurity enforcement officer or biosecurity officer to have access to the premises to (as set out in clause 370):
  - assess the level of biosecurity risk posed by the disease or pest, and
  - manage the biosecurity risk posed by the disease or pest.

Item 4 provides the test for issuing a biosecurity monitoring zone warrant. This warrant allows biosecurity enforcement officers and biosecurity officers to enter premises within a temporary or permanent monitoring zone to carry out biosecurity measures and exercise monitoring and assessment powers under Part 6 of Chapter 6.

Before issuing the warrant, the issuing officer must be satisfied that:

- the premises is within a permanent or temporary biosecurity monitoring zone, and
- it is reasonably necessary for a biosecurity enforcement officer or a biosecurity officer to have access to the premises to monitor whether a disease or pest (that the biosecurity officer suspects on reasonable grounds may pose an unacceptable biosecurity risk) has, entered, established, emerged or spread, or is likely to enter, establish, emerge or spread within the zone.

Item 5 provides the test for issuing an adjacent premises warrant. This warrant allows biosecurity enforcement officers to enter premises adjacent to premises of biosecurity concern for the purposes of performing functions or exercising powers. This warrant also allows a biosecurity enforcement officer to accompany a biosecurity officer who needs to gain access to other premises for the purposes of performing functions or exercising powers.

Before issuing the warrant, the issuing officer must be satisfied that:

- it is reasonably necessary to gain access to other premises to perform functions, or exercise powers, as a biosecurity enforcement officer, or
- it is reasonably necessary for the biosecurity enforcement officer to accompany a biosecurity officer who needs to gain access to other premises to perform functions, or exercise powers.

Item 6 provides the test for issuing a conveyance possession warrant. This warrant allows a biosecurity enforcement officer to apply for a warrant to take possession of a conveyance in order to carry out treatment or destroy the conveyance in accordance with clauses 209, 210, 338 or 343.

Before issuing the warrant, the issuing officer must be satisfied that:

- a biosecurity officer has, under clause 209, requested the person in charge or the operator of the conveyance to arrange for the conveyance to be dealt with or destroyed, or removed from Australian territory, within the period specified in the request, and the request has not been complied with,

- a biosecurity officer has, under clause 338, requested the person in charge or the operator of the conveyance to arrange for the conveyance to be dealt with or destroyed within the period specified in the request, and the request has not been complied with,
- a notice has been given to the owner or the operator of the conveyance in accordance with clause 209 and clause 341, or
- such a notice would have been required to have been given had clause 210 or 343 not applied.

Item 7 provides the test for issuing a premises possession warrant. This warrant allows a biosecurity enforcement officer to take possession of premises (other than a conveyance) in order to carry out treatment or destroy the premises in accordance with clauses 341 and 344.

Before issuing the warrant, the issuing officer must be satisfied that:

- a biosecurity officer has, under clause 341, requested the owner of a premises to arrange for the premises to be dealt with, or destroyed, in a manner and within the period specified in the request, and the request has not been complied with
- a notice has been issued to the owner of the premises in accordance with clause 344, or
- the biosecurity officer has issued a certificate in relation to the premises in accordance with 344.

#### **Clause 490**                      **Content of warrant**

This clause outlines the required content of a warrant. A warrant must have the following information:

- a description of the premises or conveyance to which it relates
- the type of warrant that it is
- the purpose for which the warrant is issued
- whether entry is authorised (if warrant is an entry warrant) or possession is authorised (if warrant is a possession warrant) at any time of the day or during specified hours of the day
- the date on which the warrant ceases to be in force
- contain the information listed in subclause 490(4) that authorises biosecurity officers or biosecurity enforcement officers to do certain things, depending on the warrant, and
- an authorisation for a biosecurity enforcement officer or biosecurity officer to use a specified kind of animal while exercising powers under the warrant, if the officers may be assisted by an animal.

These requirements ensure that the owner or occupier of premises is fully informed about why the warrant has been issued and is made aware of the scope of the authorisation for a biosecurity enforcement officer or biosecurity officer to enter a premise and exercise certain powers.

Certain warrants must cease after a timeframe specified in subclauses 490(2) or 490(3). An adjacent premises warrant or possession warrant must cease to be in force no later than 14 days after the warrant has been issued. All other warrants listed in clause 487 must cease to be in force no later than one month after the day the warrant is issued. These timeframes are consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and ensure that persons and premises are not affected more than is necessary to execute a warrant and effectively manage biosecurity risk.

To ensure that matters authorised under a warrant are appropriate to the purpose for which that warrant is being applied, this clause also sets out what each class of warrant must authorise biosecurity officers or biosecurity enforcement officers to do, as described below.

Item 1 provides that a biosecurity risk assessment warrant must authorise, on any one or more occasions while the warrant remains in force, one or more of both biosecurity officers and biosecurity enforcement officers:

- to enter the premises, and
- to exercise the powers in accordance with Division 3 of Part 2 of Chapter 6 (biosecurity risk assessment powers).

Item 2 provides that a biosecurity control order warrant must authorise, on any one or more occasions while the warrant remains in force, one or more of both biosecurity officers and biosecurity enforcement officers:

- to enter the premises, and
- to exercise the powers in accordance with clause 360 (including biosecurity risk assessment powers, powers to take biosecurity measures and powers as prescribed in the regulations).

Item 3 provides that a biosecurity response zone warrant must authorise, on any one or more occasions while the warrant remains in force, one or more of both biosecurity officers and biosecurity enforcement officers:

- to enter the premises, and
- to exercise the powers in accordance with clause 370 (including biosecurity risk assessment powers, powers to take biosecurity measures and additional powers specified in a biosecurity response zone determination).

Item 4 provides that a biosecurity monitoring zone warrant must authorise, on any one or more occasions while the warrant remains in force, one or more of both biosecurity officers and biosecurity enforcement officers:

- to enter the premises
- if the premises are in a permanent biosecurity monitoring zone—to exercise the powers set out in subclause 379(1) (including most biosecurity risk assessment powers and the power to operate electronic equipment) and subclause 379(2) (powers specific to a permanent biosecurity monitoring zone), and
- if the premises are in a temporary biosecurity monitoring zone—to exercise the powers in accordance with clause 389 (including biosecurity risk assessment powers and powers specific to a temporary biosecurity monitoring zone).

Item 5 provides that an adjacent premises warrant must authorise, on any one or more occasions while the warrant remains in force, one or more biosecurity enforcement officers to enter the premises, and to remain on the premises for such a period as is reasonably necessary, for the purpose of:

- gaining access to adjacent premises to perform functions, or exercise powers, as a biosecurity enforcement officer, or
- accompanying a biosecurity officer who needs to gain access to adjacent premises to perform functions, or exercise powers.

Item 6 provides that a conveyance possession warrant must authorise, while the warrant remains in force, one or more biosecurity enforcement officers to take possession of the conveyance for the purpose of allowing it to be dealt with or destroyed under clauses 209 and 338 (treatment that may damage conveyance), and 210 and 343 (destruction of conveyance) (as the case requires).

Item 7 provides that a premises possession warrant must authorise, while the warrant remains in force, one or more biosecurity enforcement officers to take possession of the premises for the purpose of allowing it to be dealt with or destroyed under clauses 341 (dealing with premises) or 344 (destruction of premises).

Each item under this clause provides for the authorisation of a biosecurity officer or biosecurity officer under a warrant to remain in force whether or not that officer is named in the warrant. This ensures that the validity of a warrant is not reliant on a particular officer being present to execute it, but that any officer with the appropriate training and expertise may execute the warrant.

The items listed under this clause ensure that activities to manage biosecurity risk are available when required, while ensuring that a person's right to privacy are adequately protected.

### **Subdivision B—Issue of certain warrants by telephone, fax etc.**

#### **Clause 491 Application of this Subdivision to certain warrants**

This Subdivision applies in relation to classes of warrants to be issued by telephone, fax or other electronic means in urgent and other circumstances as set out in clause 492.

Specific warrants that this Division applies to include:

- biosecurity risk assessment warrants
- biosecurity control order warrants, and
- biosecurity response zone warrants

The ability to receive warrants by electronic means allows a biosecurity enforcement officer to receive a warrant in a timely manner, and ensure that biosecurity risks can be assessed and managed efficiently and effectively. This limits the ability for a pest or disease to enter, spread or establish in goods or premises.

#### **Clause 492 Issue of certain warrants by telephone, fax etc.**

This clause provides that a warrant may be issued to a biosecurity enforcement officer by electronic means, including telephone and fax, in certain circumstances and sets out the requirements for doing so. This is intended for circumstances in which a biosecurity enforcement officer or biosecurity officer may urgently require a warrant to effectively manage biosecurity risks.

A biosecurity enforcement officer can only apply for a biosecurity risk assessment warrant, a biosecurity control order warrant or a biosecurity response zone warrant in relation to premises by telephone, fax or other communication means if one of the following applies:

- the circumstances are urgent, or
- if the delay caused by seeking the warrant in person would frustrate the effective execution of the warrant.

If it is practical in the circumstances, the issuing officer may require the biosecurity enforcement officer to communicate by voice during the application for the warrant. This allows the issuing officer to confirm identity by voice where confirming identity by electronic means is not possible, such as when the officer is in a remote location without immediate computer access.

Before applying for a warrant to be issued by electronic means, a biosecurity enforcement officer must still supply information that sets out the grounds on which the warrant is sought (that is, information of the kind required by subclauses 488(2) and (3)). However, if necessary, a biosecurity enforcement officer may apply for the warrant before the information is sworn or affirmed, provided the biosecurity enforcement officer or a biosecurity officer subsequently sends the information to the issuing officer which has been sworn or affirmed. This provision ensures that the management of biosecurity risks will not be compromised by swearing or affirming information that sets out the grounds on which a warrant is sought where the successful management of biosecurity risks is time critical. Providing that this information must be sworn or



affirmed subsequently ensures that the information provided must still be truthful and capable of being sworn or affirmed by the biosecurity enforcement officer.

The ability to receive warrants by electronic means allow biosecurity enforcement officers to receive a warrant in a timely manner, and so ensure that biosecurity risks can be assessed and managed efficiently and effectively. This limits the ability for the pest or disease to enter, spread, establish or emerge in goods or premises, or evidence of a contravention of the Biosecurity Act to be concealed or destroyed.

This clause also provides that the issuing officer may, after considering the terms of the information and after receiving any further information required, complete and sign a warrant that would have been issued ordinarily under clause 488. The issuing officer must inform the biosecurity enforcement officer, by telephone, fax or other electronic means, the terms of the warrant and the day and time the warrant was signed.

Following the issue of the warrant, the biosecurity enforcement officer must complete a form of warrant, which is a warrant in the form described to the biosecurity enforcement officer by the issuing officer. This form of warrant must be completed in the same terms as the warrant issued, and state on the form the name of the issuing officer and the day and time the warrant was signed. The biosecurity enforcement officer must also send the form of warrant to the issuing officer along with any sworn or affirmed information which sets out the grounds on which the warrant is sought. This clause ensures that the biosecurity enforcement officer applying for the warrant is informed and knows the conditions of the warrant, and ensures that the issuing officer receives the information supplied by the biosecurity enforcement officer via telephone or other electronic means to match against the warrant issued.

The sending of the above information must occur by the end of the day after the warrant ceases to be in force or the warrant is first executed, whichever occurs first.

The issuing officer must attach the documents sent by the biosecurity enforcement officer to the warrant signed by the issuing officer.

#### **Clause 493 Authority of warrant**

This clause provides that biosecurity enforcement officers in possession of a form of warrant completed under section 492 have the same powers as outlined by the signed warrant in the possession of the issuing officer as if the officers had that warrant in their possession.

In any proceedings where a court needs to be satisfied that the exercise of power by a biosecurity enforcement officer or biosecurity officer was authorised by a warrant, the exercise of power is taken not to be authorised if it was issued by electronic means, unless the warrant is produced in evidence to the court. This is to reflect that warrants issued by electronic means require evidence that the obligations to follow formal processes have been complied with and to ensure that the form of warrant is valid and not misused.

#### **Clause 494 Fault-based offence relating to warrants by telephone, fax etc.**

This clause outlines actions carried out by biosecurity enforcement officers that constitute an offence relating to warrants issued under clause 492. This clause provides for a maximum penalty of two years imprisonment or 120 penalty units, or both, if the elements of a fault-based offence are established.

A biosecurity enforcement officer commits an offence if the officer:

- states incorrect information about the name of the issuing officer in a document that purports to be a warrant issued electronically (under clause 492)

- states on a form of warrant a matter that, to the biosecurity enforcement officer's knowledge, departs in a material particular from the terms of the warrant signed by the issuing officer
- claims to execute, or present to another person, a form of warrant when a warrant (issued under clause 492) has not been completed and signed by an issuing officer, or
- gives an issuing officer a form of warrant that is not the form of warrant that the biosecurity enforcement officer purported to execute.

These requirements provide protections to ensure that powers exercised are consistent with the provisions of this Part and that inconsistency with a warrant issued electronically is an offence. These additional offence provisions recognise the higher potential for abuse of a warrant that is issued electronically under normal circumstances.

### **Division 3—Executing warrants relating to aircraft or vessels**

#### **Clause 495                    Executing warrants relating to aircraft or vessels**

This clause provides that a warrant issued under this Part may be executed in relation to premises or a conveyance that is an aircraft or vessel only when that aircraft or vessel is at a landing place or port (or for vessels, waiting to arrive at a port), or on land, in Australian territory. This ensures that a warrant issued under this Part is only able to be executed in Australian jurisdiction and in a place where it would be appropriate to execute the warrant and manage biosecurity risk.

### **Part 4—General rules about entry to premises under a warrant or consent**

#### **Division 1—Introduction**

#### **Clause 496                    Simplified outline of this Part**

This outline sets out the Part's objectives. This Part allows a biosecurity enforcement officer, or a biosecurity officer if accompanied by a biosecurity enforcement officer, to access premises through adjacent premises if authorised by a warrant.

This clause also prescribes rules that apply to consent for biosecurity enforcement officers to enter premises, to ensure consent is voluntary, as well as rules and certain powers that apply to a biosecurity enforcement officer acting under a warrant.

Rights of occupiers of premises entered under a warrant to observe the execution of the warrant and obligations to assist those executing it are also prescribed under this Part.

#### **Division 2—Entering adjacent premises to gain access to other premises**

#### **Clause 497                    Meaning of *premises***

This clause provides that the definition of premises for the purposes of this Division does not include a conveyance (that is, does not include aircraft, vessels, vehicles, trains, etc). This recognises that aircraft, vessels, vehicles, trains etc, are not premises that would need to be accessed as adjacent premises for the purposes of gaining access to other premises.

### **Clause 498            Entering adjacent premises to gain access to other premises**

This clause provides that a biosecurity enforcement officer may enter any adjacent premises if it is necessary for that officer or a biosecurity officer to gain access to other premises to perform functions or exercise powers. This includes authorised persons for the purposes of Part 2 or 3 of the Regulatory Powers Act as those Parts apply in relation to this Bill.

This may occur if the biosecurity enforcement officer or a biosecurity officer needs to exercise powers or perform functions in a premise that can only be accessed via the adjacent premises. For example, if a biosecurity enforcement officer needs to check compliance with the Act at a particular warehouse, but the only access to that warehouse is through the driveway adjacent to it.

A biosecurity enforcement officer is not authorised to enter an adjacent premises unless the occupier of the premises has consented to the entry and the biosecurity enforcement officer has shown his or her identity card if required by the occupier or entry is made under an entry warrant. If entry is made with consent of the occupier, the biosecurity enforcement officer must immediately leave the premises if that consent is revoked. The ability to revoke consent and have an officer leave the premises ensures the occupier's right to privacy is adequately protected.

If a biosecurity officer needs to enter adjacent premises in order to gain access to other premises for the above purposes, the officer may only do so if he or she is accompanied by a biosecurity enforcement officer who is authorised to access the premises. This ensures that an officer with the appropriate level of training is establishing entry and using force (for example to open a closed door) if required.

### **Clause 499            Entry under adjacent premises warrants**

This clause provides that a biosecurity enforcement officer or a biosecurity officer entering premises under an adjacent premises warrant must take reasonable steps to ensure that they cause as little inconvenience as possible to the occupier of the premises. This recognises that an adjacent premise is being accessed solely for the purpose of gaining access to other premises to perform functions or exercise powers.

## **Division 3—Obligations and powers of biosecurity enforcement officers**

### **Subdivision A—Obligations relating to consent**

#### **Clause 500            Consent**

This clause provides the rules that must be followed by biosecurity enforcement officers when entering premises following voluntary consent of the occupier of the premises. These rules apply to entry to premises to exercise powers under any of the following provisions:

- paragraph 315(2)(a) (biosecurity risk assessment)
- paragraph 361(2)(a) (biosecurity control orders)
- under paragraph 371(2)(a) (biosecurity response zones)
- paragraph 380(2)(a) (permanent biosecurity monitoring zones)
- paragraph 390(2)(a) (temporary biosecurity monitoring zones), and
- paragraph 498(2)(a) (adjacent premises).

Before obtaining the consent of an occupier of premises, a biosecurity enforcement officer must inform the occupier of the reasons for entering the premises and that the occupier may refuse consent. This ensures that entry without a warrant, which could constitute an invasion of personal privacy, is only allowed when the person consents with the request to enter their premises.

This clause outlines that consent must be voluntary to have effect and that it may be expressed to cover a particular period, unless withdrawn earlier. Further, consent may be withdrawn by the

occupier at any time, regardless of whether or not it was expressed for a particular time, and a biosecurity enforcement officer, a biosecurity officer, and a person assisting, must leave the premises if the consent has been withdrawn.

## **Subdivision B—Obligations and powers relating to warrants**

### **Clause 501                    Warrants this Subdivision applies to**

This clause clarifies that Subdivision B of Division 3 of Part 4 of Chapter 9 applies to warrants other than a monitoring warrant and an investigation warrant. This Subdivision does not apply to these types of warrants as Division 3 of both Parts 2 and 3 of the Regulatory Powers Act and Division 2 of both Parts 1 and 2 of this Chapter contain rules for monitoring and investigation warrants.

### **Clause 502                    Announcement before execution of warrant**

Subclause 502(1) provides that before a biosecurity enforcement officer or biosecurity officer enters premises under an entry warrant, the officer must announce that he or she is authorised to enter the premises. The officer must also give any person present an opportunity to consent to entry. The identity card of the biosecurity enforcement officer must be shown to the appropriate person and, if the warrant is a biosecurity risk assessment warrant, biosecurity control order warrant, biosecurity response zone warrant or biosecurity monitoring zone warrant, the biosecurity officer's identity card must also be shown. This ensures that, if an appropriate person is present when the premises are entered, they are made aware of who is entering the premises. Please see clause 9 for a definition of 'appropriate person'.

A biosecurity enforcement officer is not required to announce himself or herself or show their identity card if entry is to be made under an adjacent premises warrant to the extent that that warrant authorises entry for the purpose of executing an investigation warrant or monitoring warrant on other premises. Additionally, the biosecurity officer must believe on reasonable grounds that immediate entry is required to ensure the safety of a person or to ensure that the effective execution of the warrant is not frustrated. This allows for flexibility in situations where immediate entry is required, and is appropriate because biosecurity enforcement officers have the appropriate training and will likely be exercising this power in the context of enforcement, rather than assessment of biosecurity risk.

If a biosecurity enforcement officer enters without announcing, and an appropriate person is present, the biosecurity enforcement officer must show the identity card of the officer, as soon as practicable after entry, to the appropriate person. This subclause puts beyond doubt the intention of informing an appropriate person (where applicable) of the identity of the biosecurity enforcement officer.

If a biosecurity enforcement officer is taking possession of a premises or conveyance under a possession warrant, a biosecurity enforcement officer must announce that the officer is authorised to take possession and show the identity card of the officer to the appropriate person, if present. This ensures that, if an appropriate person is present, they are made aware of who is taking possession of the premises or conveyance and the circumstances in which they are authorised to do so.

**Clause 503                    Biosecurity enforcement officer to be in possession of warrant**

In executing a warrant, a biosecurity enforcement officer must be in possession of the warrant issued under clause 448—or if the warrant was received by electronic means—the form of warrant completed under subclause 492(6), or a copy of the form.

The requirement for the officer to be in possession of a warrant or the form of warrant ensures that the occupier of premises is able to view the warrant and is aware of the scope of the authorisation for an officer to enter premises and exercise certain powers.

**Clause 504                    Details of warrant etc. to be provided**

This clause provides that where a biosecurity enforcement officer is executing a warrant in relation to premises or a conveyance the officer must make a copy of the warrant available to the appropriate person. This includes where the appropriate person for the conveyance or premises is also an occupier or a person that apparently represents the occupier is present and applies to forms of warrants where warrants are issued by electronic means.

This obligation ensures that appropriate persons present during the execution of a warrant are granted an opportunity to examine the warrant and are made aware of the scope of the authorisation for a biosecurity enforcement officer to exercise certain powers.

The biosecurity enforcement officer must also inform the appropriate person of their rights and responsibilities under Division 4 of this Part. This ensures that the appropriate person is informed that they have the ability to observe the execution of the warrant and that they could be liable to a civil penalty if they do not provide appropriate assistance and facilities to biosecurity enforcement officers, biosecurity officers and any persons assisting where required.

**Clause 505                    Use of force in executing a warrant**

This clause provides that in executing a warrant (other than an adjacent premises warrant) a biosecurity enforcement officer or a person assisting a biosecurity enforcement officer may use force against things as is necessary and reasonable in the circumstances. Only a biosecurity enforcement officer may use force when executing an adjacent premises warrant. The use of force may allow, for example, the opening of doors or the movement of things to assist with the execution of a warrant. This clause does not authorise the use of force against a person. This is to ensure protection of individuals and to clarify that physical force on an individual cannot be used in the exercise of powers authorised by any warrant issued.

**Division 4—Appropriate person’s rights and responsibilities relating to warrants**

**Clause 506                    Warrants this Division applies to**

This clause clarifies that Division 4 of Part 4 of Chapter 9 applies to warrants other than a monitoring warrant and an investigation warrant. This Subdivision does not apply to these types of warrants as Division 4 of each of Parts 2 and 3 of the Regulatory Powers Act contain rules for monitoring and investigation warrants.

**Clause 507                    Appropriate person’s right to observe execution of warrant**

This clause allows an appropriate person on a premises or conveyance to observe the execution of a warrant if they are present, unless they impede that execution. However, this provision does not prevent the execution of the warrant in two or more areas of the premises at the same time.

This clause helps to ensure that the appropriate person may be satisfied that officers are not doing anything outside of what is permitted by the warrant and that the person is aware of anything that is happening on the premises. However, it clarifies that this clause does not enable an appropriate person to do anything that may disrupt the execution of the warrant.

### **Clause 508**                    **Appropriate person to provide facilities and assistance**

This clause provides that an appropriate person for a premises or conveyance (which includes an occupier or a person that apparently represents the occupier) must provide reasonable facilities or assistance for the effective exercise of the powers of biosecurity enforcement officers, biosecurity officers, or persons assisting. Reasonable facilities may include access to water facilities, and assistance could include opening locked doors. A person commits an offence if the person contravenes this clause. The maximum penalty for contravention of this clause is 30 penalty units.

This clause ensures that biosecurity enforcement officers or biosecurity officers can efficiently execute the warrant without undue delay by having to seek facilities elsewhere or finding other people.

## **Part 5—Entering and exercising powers on premises without a warrant or consent**

### **Division 1—Introduction**

#### **Clause 509**                    **Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part allows a biosecurity enforcement officer to enter premises without a warrant where a biosecurity industry participant carries on biosecurity activities under an approved arrangement, or at a first point of entry. Entry to a premise in these circumstances recognises that the nature of the unique activities at these premises may require entry for a biosecurity enforcement officer without a warrant or consent to manage biosecurity risks.

After entry, biosecurity officers and biosecurity enforcement officers may exercise monitoring and investigation powers. The officers may use reasonable force against things to enter premises and while on the premises. This ability will ensure that biosecurity officers and biosecurity enforcement officers have the necessary powers to manage biosecurity risks appropriately. To ensure that the exercise of these powers is done consistently with other entry provisions, occupiers of premises entered without warrant, and their representatives, may observe the exercise of powers there, and occupiers must provide reasonable assistance to biosecurity enforcement officer and biosecurity officers while they are exercising powers.

### **Division 2—Monitoring and searching relevant premises**

#### **Clause 510**                    **Meaning of *relevant premises***

This clause defines ‘relevant premises’ as premises at which biosecurity activities are carried out by a biosecurity industry participant covered by an approved arrangement and any place (such as a port or landing place) determined to be a first point of entry.

#### **Clause 511**                    **Monitoring relevant premises**

This clause provides that a biosecurity enforcement officer may enter relevant premises without a warrant or consent to determine:

- whether the Biosecurity Act has been, or is being, complied with
- whether the information supplied is correct, or
- whether a power should be exercised.

If the relevant premises are a conveyance the officer may stop and detain the conveyance for the purposes of exercising a monitoring power available under Part 1 of this Chapter. This is so the monitoring powers under this Part are able to be exercised as efficiently and effectively as possible and to ensure that the conveyance remains in Australian jurisdiction.

Biosecurity enforcement officers may enter premises during normal business hours. If monitoring activities are to occur outside of these times, then a warrant will have to be sought and obtained for entry. This ensures that the owner or occupier of the premise is only impacted in circumstances where it is appropriate and necessary to do so, and not usually in hours where business would not normally be conducted and would not be able to be monitored.

This clause provides that, having entered the premises, a biosecurity officer may exercise monitoring powers as provided under Subdivision A of Division 2 of Part 2 and section 29 of the Regulatory Powers Act in accordance with Part 1 of this Chapter. This provides biosecurity enforcement officers with monitoring powers as if they had the authority of a monitoring warrant, so that they have the capability to monitor biosecurity risk. This clause also activates protections for people as applicable to monitoring warrants, including requiring a biosecurity officer to make an announcement before entering premises. This ensures people's privacy and other rights are observed while allowing appropriate monitoring of biosecurity risk to be undertaken.

### **Clause 512                    Offence-related searches and seizures**

This clause gives biosecurity enforcement officers the power to enter relevant premises at any time without consent or a warrant, if the officer has reasonable grounds to suspect that there may be a particular thing or evidence on the premises to which an offence provision or a civil penalty provision has been contravened or is reasonably suspected to have been contravened. The power to enter relevant premises under this clause will also operate if a biosecurity enforcement officer has reasonable grounds for suspecting that a particular thing on the premises is intended to be used for the purpose of contravening an offence provision or a civil penalty provision. This clause uses the definition of evidential material under section 39 of the Regulatory Powers Act.

This clause enables biosecurity enforcement officers to investigate offences in relevant premises in accordance with Division 2 (Powers of authorised persons) and Division 5 (General provisions relating to seizure) of Part 3, and section 61 (Compensation for damage to electronic equipment) of the Regulatory Powers Act, in accordance with Part 2 of this Chapter. This is appropriate because the ability to enter the relevant premises at any time is necessary in order to prevent the concealment or destruction of evidence that a biosecurity enforcement officer suspects to be on the premises. If the relevant premise is a conveyance the officer may stop and detain the conveyance.

Entry for the purposes of this provision is limited to relevant premises and must be based on reasonable grounds for their being on the premises a particular thing that may contravene, provide evidence of a contravention or may be intended to be used in the contravention of an offence provision or a civil penalty provision. The exercise of powers under this clause is justified on the basis that the appropriate management of biosecurity risk in certain circumstances and the nature of biosecurity risk itself may necessitate search and seizures without consent or a warrant in order to be effective.

This clause also ensures that Division 2 (powers of authorised persons) and Division 5 (general provisions relating to seizure) of Part 3, and section 61 (compensation for damage of electronic equipment) of the Regulatory Powers Act apply to this clause. This ensures that powers of biosecurity enforcement officers to exercise search and seizure powers are limited by the Regulatory Powers Act and to make sure that these powers are only exercised when necessary. Compensation provisions apply where appropriate.

Powers exercised on the premises, including in relation to conveyances, are to be done so as if the entry was made under an investigation warrant. This clause also activates protections for people if the entry is made under an investigation warrant, including requiring a biosecurity officer to make an announcement before entering premises. This ensures people's privacy and other rights are observed while allowing appropriate investigation of offences.

## **Division 3—Powers, rights and responsibilities relating to entry**

### **Subdivision A—Application of this Division**

#### **Clause 513 Application of this Division**

This clause provides that this Part sets out the rules that apply if a biosecurity enforcement officer or a biosecurity officer is to enter, or enters, premises without a warrant or consent when:

- entering landing places or ports (subclause 252(2))
- entering during biosecurity emergencies (subclause 470(1))
- entering adjacent premises during biosecurity emergencies (subclause 472(1))
- monitoring relevant premises (clause 511), or
- searching relevant premises (clause 512).

Setting out the rules ensures that biosecurity enforcement officers and biosecurity officers are aware of the scope of their powers and act appropriately.

### **Subdivision B—Obligations and powers of biosecurity enforcement officers in entering premises**

#### **Clause 514 Announcement before entry**

This clause requires a biosecurity enforcement officer or biosecurity officer to announce they are authorised to enter the premises before entering premises under a provision listed at clause 513. If the appropriate person for the premises is present, the biosecurity enforcement officer must show their identity card to the appropriate person and explain the reasons for entering the premises.

The identity card of the biosecurity officer must also be shown to the appropriate person if entering a landing place or port for the purpose of exercising powers under subclause 252(2), or during a biosecurity emergency (subclause 470(1) or 472(1)).

This is to ensure that if an appropriate person is present when the premises are entered, they are made aware of who is entering the premises and for what purpose. By providing announcement before entry it gives the appropriate person an opportunity to facilitate entrance to the premises without the officers using force on the door to enter or to make arrangements to protect their privacy (if appropriate to do so).

#### **Clause 515 Use of force in entering premises**

This clause provides that in entering premises under subclause 252(2) (landing place or port), subclause 470(1) (biosecurity emergency), subclause 472(1) (adjacent premises during an emergency) or clause 512 (searching relevant premises) and while on those premises, a biosecurity enforcement officer or a person assisting the officer may use force against things as is necessary and reasonable in the circumstances.

This clause does not provide for use of force against a person. This is to ensure protection to individuals and to clarify that physical force on an individual cannot be used in the exercise of powers to enter premises.



## **Subdivision C—Appropriate person’s rights and responsibilities on entry**

### **Clause 516                    Appropriate person is entitled to observe exercise of powers**

This clause allows an appropriate person, present at a premises entered under a provision referred to in clause 513, to observe the exercise of powers under that clause. If a person impedes the exercise of those powers the right to observe ceases. This provision does not prevent powers being exercised in two or more areas of the premises at the same time or a direction requiring the appropriate person to leave the premises during a biosecurity emergency to be given (under clause 446).

This clause ensures that the appropriate person may be satisfied that officers are acting within their powers and that the person is aware of anything that is happening on the premises. In addition, it also ensures that officers can assess and manage biosecurity risk without impediment.

### **Clause 517                    Appropriate person to provide officers etc. with facilities and assistance**

For premises entered under a provision referred to in clause 513, this clause requires that the appropriate person must provide reasonable facilities or assistance to biosecurity enforcement officers, biosecurity officers, or persons assisting the officers to allow the effective exercise of their powers. There is a fault based offence of 30 penalty units if the appropriate person contravenes this clause.

This clause ensures that biosecurity enforcement officers and biosecurity officers can efficiently exercise their powers without undue delay by having to seek facilities elsewhere or requiring other persons to provide assistance. Reasonable facilities could include access to water facilities, and assistance could include opening locked doors.

## **Part 6—Civil penalties**

### **Division 1—Introduction**

#### **Clause 518                    Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part deals with the application for civil penalty orders for contraventions of civil penalty provisions. Under this Part the executive officer of a body corporate is liable to a civil penalty if he or she knew, or was reckless or negligent, about contravention of a civil penalty provision by the body and fails to take reasonable steps for prevention.

### **Division 2—Civil penalties under Part 4 of the Regulatory Powers Act**

#### **Clause 519                    Basic operation of civil penalties under Part 4 of the Regulatory Powers Act**

This clause provides that each civil penalty provision of the Bill is enforceable under Part 4 of the Regulatory Powers Act. The clause provides that the Director of Biosecurity and Director of Human Biosecurity are ‘authorised applicants’ of the purposes of Part 4 of the Regulatory Powers Act. Provision is also made under this Part for relevant courts and extension of civil penalties to external territories for the purposes of Part 4 of the Regulatory Powers Act. This ensures the proper operation of this Part of the Regulatory Powers Act to civil penalty provisions under the Bill.

#### **Clause 520                    Modifications of Part 4 of the Regulatory Powers Act**

This clause provides for modification of the applications of Part 4 of the Regulatory Powers Act as it applies to the Bill. These modifications provide for that Part to apply only when appropriate and to take into consideration the operation of civil penalty provisions under the Bill. It is appropriate

that the normal operation of the Regulatory Powers Act is modified in this circumstance as there are similar offences at Commonwealth and state and territory law.

This clause provides that a court may not make a civil penalty order under Part 4 of the Regulatory Powers Act against a person for a contravention of a civil penalty provision where the person has been convicted of an offence under an Australian law or been found by a court to have contravened a civil penalty provision under an Australian law that is the same, or substantially the same as constituting the contravention under the Biosecurity Act. This protects a person from being penalised twice for the same conduct under Australian law.

Similarly, this clause also provides for a stay of proceedings for a civil penalty order during corresponding criminal or civil proceedings. The biosecurity proceedings are dismissed if the person is found guilty of corresponding proceedings. These proceedings may be resumed where the person is not convicted of the offence, or a court does not find that the person has contravened the civil penalty provision. This ensures that proceedings are not prevented from being instituted against a person where it would be appropriate to do so.

Finally, this clause also protects a person from being held liable under Part 4 of the Regulatory Powers Act for a civil penalty order for conduct that was carried out in the reasonable belief that circumstances of sudden or extraordinary emergency exist and contravening the provisions is the only reasonable way to deal with the emergency and the conduct is a reasonable response to the emergency. This will ensure that the management of a biosecurity risk in an emergency situation is not undermined by the concern of potential court proceedings at a later date and encourages the appropriate management of biosecurity risks in all circumstances. The defendant bears the evidentiary burden for demonstrating this exemption under section 96 of the Regulatory Powers Act.

All subclauses under this clause have effect despite the operation of Part 4 of the Regulatory Powers Act.

### **Division 3—Civil penalties for executive officers of bodies corporate**

#### **Clause 521 Civil penalties for executive officers of bodies corporate**

This clause deals with circumstances where executive officers of bodies corporate may be liable for the contravention by a body corporate of a civil penalty provision.

Under this clause an executive officer of a body corporate contravenes the clause if:

- the body corporate contravenes a civil penalty provision
- the executive officer knew, was reckless or negligent as to whether the contravention would occur
- the officer was in a position to influence the conduct of the body corporate, and
- the officer did not take all reasonable steps to prevent the contravention.

The clause also sets out the standards of recklessness and negligence that the officer would need to have displayed to be found liable. If found liable, a maximum civil penalty of 120 penalty units applies.

When determining whether an executive officer of a body corporate failed to take all reasonable steps to prevent a contravention the court may have regard to all relevant matters. These include any action taken by the officer directed towards arranging professional assessments of compliance, implementation of recommendations arising from any assessments, and ensuring staff have relevant knowledge and understanding of any requirements to comply with civil penalty

provisions. Additionally, the court may consider any action taken by the officer once the officer became aware of the contravention.

These clauses recognise the extra responsibility that executive officers have in ensuring the appropriate conduct of a body corporate and their duty to take actions to prevent contraventions of the Biosecurity Act.

## **Part 7—Infringement notices**

### **Division 1—Introduction**

#### **Clause 522                    Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part provides that a person can be given an infringement notice under Part 5 of the Regulatory Powers Act in relation to a contravention of an infringement notice provision under the Biosecurity Act.

A person who is given an infringement notice under this Part can choose to pay an amount as an alternative to having court proceedings brought against them for the contravention.

### **Division 2—Infringement notices under Part 5 of the Regulatory Powers Act**

#### **Clause 523                    Basic provisions for infringement notices under Part 5 of the Regulatory Powers Act**

This clause identifies provisions which are subject to an infringement notice under Part 5 of the Regulatory Powers Act. Consistent with Commonwealth guidelines for infringement notice schemes, infringement notices will be used to deal with less serious and less factually complex contraventions of a provision, where initiating court proceedings would be disproportionately costly (see Chapter 6 of the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*).

For the purposes of Part 5 of the Regulatory Powers Act, the Director of Biosecurity is an infringement officer and the relevant chief executive for the purposes of these provisions. The clause extends to infringement notice provisions and to external territories if the provision is extended to that territory.

#### **Clause 524                    Modifications of Part 5 of the Regulatory Powers Act**

This clause modifies certain matters under Part 5 of the Regulatory Powers Act.

Subclause (1) modifies matters mentioned in paragraphs 104(1)(d) and (h) of the Regulatory Powers Act that must be included in an infringement notice. Modifications under this clause ensure that the information that must be included in an infringement notice is appropriate.

Modifications under this clause from Part 5 of the Regulatory Powers Act include:

- requiring the infringement notice to state how the person has power under the Biosecurity Act to issue the infringement notice. This is to provide the recipient of the notice with a proper understanding of the authority the issuer has to issue the notice, and
- allowing the regulations to state a specified time shorter than 28 days which is standard under the Regulatory Powers Act. This is to allow for the regulations to determine a period shorter than 28 days, for instance allowing ‘on the spot’ fines to be settled before a person leaves the airport.

This clause also defines the amount payable under paragraph 104(1)(f) of Part 5 of the Regulatory Powers Act. This modification provides a degree of flexibility in how an amount that may be

prescribed under an infringement notice can be calculated and takes into consideration the wide range of offences and circumstances.

To ensure that there is sufficient flexibility in the maximum penalty payable under an infringement notice this clause also provides that the amount imposed must be the least of one fifth of the maximum penalty that a court could impose, 12 penalty units for an individual person or 60 penalty units for a body corporate or as prescribed by the regulations. This flexibility will ensure that any penalty applied under this clause adequately reflects the particular contravention of an infringement notice provision.

## **Part 8—Enforceable undertakings**

### **Division 1—Introduction**

#### **Clause 525                    Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part provides that the Director of Biosecurity may accept an undertaking relating to compliance with a provision of this Bill and enforce that undertaking under Part 6 of the Regulatory Powers Act.

### **Division 2—Accepting and enforcing undertakings under Part 6 of the Regulatory Powers Act**

#### **Clause 526                    Enforceable undertakings**

This clause makes enforceable undertakings available to enforce provisions of the Bill. This provides an additional tool with which government can enforce compliance.

This clause provides that the provisions of this Bill are enforceable under Part 6 of the Regulatory Powers Act. Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with offence provisions and civil penalty provisions.

This clause provides that the Director of Biosecurity is an authorised person for the purposes of Part 6 of the Regulatory Powers Act and a relevant court (as defined in clause 9) is a relevant court for the purposes of Part 6 of the Regulatory Powers Act.

This clause also provides that Part 6 of the Regulatory Powers Act as it applies to enforceable provisions under the Bill extends to every external territory to which the provision extends.

## **Part 9—Injunctions**

### **Division 1—Introduction**

#### **Clause 527                    Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part provides that injunctions (including interim injunctions) under Part 7 of the Regulatory Powers Act may be used to restrain a person from contravening a provision of this Bill, or to compel compliance with a provision of this Bill. Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.

## **Division 2—Injunctions under Part 7 of the Regulatory Powers Act**

### **Clause 528 Injunctions**

This clause makes injunctions available to enforce provisions of the Bill. This provides an additional tool with which government can enforce compliance.

This clause provides that the provisions of this Bill are enforceable under Part 7 of the Regulatory Powers Act. Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.

This clause provides that the Director of Biosecurity and the Director of Human Biosecurity are authorised persons for the purposes of Part 7 of the Regulatory Powers Act. This clause also provides that a relevant court (as defined in clause 9 of this Act) is a relevant court for the purposes of Part 7 of the Regulatory Powers Act.

The clause also provides that Part 7 of the Regulatory Powers Act as it applies to provisions to which an injunction may be applied extends to every external territory to which the Biosecurity Act extends.

## **Part 10—Miscellaneous**

### **Division 1—Introduction**

#### **Clause 529 Simplified outline of this Part**

This outline sets out the Part's objectives. This Part deals with:

- provisions allowing the Director of Biosecurity or the Director of Human Biosecurity to determine whether a person is a fit and proper person
- personal information to be provided by some applications
- provisions enforcing a civil penalty for providing misleading information or documents
- the impact of judicial review on certain directions as well as the special rules that apply to offence provisions and civil penalty provisions
- other matters relating to persons and biosecurity officers in certain circumstances, and
- the role of magistrates and certain Judges performing functions.

### **Division 2—Fit and proper person test**

#### **Clause 530 Fit and proper person test**

This clause provides guidance to the Director of Biosecurity or Director of Human Biosecurity for the determination of whether a person is a fit and proper person for the purposes of relevant decision. If the Director determines that a person is not a fit and proper person under this clause, the Director may refuse to grant a permit; refuse to approve a proposed arrangement; or vary, suspend or revoke an arrangement. The regulations may prescribe other situations where the test may be applied.

In determining whether a person is a fit and proper person, the Director of Biosecurity, or the Director of Human Biosecurity, must have regard to the following matters:

- whether a person has been convicted of an offence, or ordered to pay a pecuniary penalty under the specified Acts, including those contained in regulations
- whether a debt is due and payable by a person to the Commonwealth under the specified Acts, including those contained in regulations
- whether a person has had an application for an approved arrangement under the Biosecurity Act or an application for a quarantine approved premises under 46A of the *Quarantine Act 1908* refused, or

- whether a person has had an agreement revoked, suspended, or cancelled under the Biosecurity Act, or under the Quarantine Act.

Consideration of the above matters are important when the relevant Director is determining whether a person is a fit and proper person because such a person might be involved in the importation of high risk goods, or be approved to undertake activities to manage their own biosecurity risk with oversight by the Commonwealth.

An import permit or an approved arrangement is a privilege rather than a right and means that the person is allowed to do certain things the general public are not allowed to do. It is important that such persons are considered fit and proper to be able to conduct these activities and that there is no reason to believe that the person will not operate within the scope of their approval or adhere to any conditions or requirements that are placed upon it.

Nothing in this clause affects the operation of Part VIIC of the *Crimes Act 1914* which allows, in certain circumstances, that the person does not need to disclose spent convictions and requires persons who are aware of the spent convictions to disregard them.

### **Division 3—Personal information for applications**

#### **Clause 531 Personal information for applications**

This clause provides that the Director of Biosecurity can, by legislative instrument, specify kinds of personal information that are required to be provided with an application made:

- when applying for a permit to import conditionally non-prohibited goods
- approval of a proposed arrangement, or
- any other provision prescribed by the regulations.

This is intended to work in conjunction with the fit and proper persons test by allowing the Director of Biosecurity to require information that will allow a person's identity and other details to be confirmed. This will help prevent persons from pretending to be another person to gain an import permit or an approved arrangement. This will assist in the reduction of biosecurity risk by helping to ensure persons who would normally be denied an import permit or approved arrangement do not obtain one under another name.

The types of personal information required to be provided by the applicant will be outlined by legislative instrument. Information required and received for the purposes of this clause is subject to the confidentiality of information clauses in Part 2 of Chapter 11.

An application is taken not to have been made if the personal information specified is not provided with the application. This is to ensure that the relevant Director receives a complete application that can be considered, without having to stop the approval process while requesting that all of the required information is provided. This is particularly important for an approved arrangement application, which must be considered and approved or not approved by the relevant Director within a timeframe specified in the regulations.

## **Division 4—Civil penalty provisions for false and misleading information or documents**

### **Clause 532 Civil penalty provision for false or misleading information**

### **Clause 533 Civil penalty provision for false or misleading documents**

These clauses provide that a person is liable to a maximum civil penalty of 60 penalty units if a person knowingly provides false and misleading information or documents in compliance or purported compliance with the Biosecurity Act. The person is also liable to the same civil penalty if he or she omits any matter or thing without which the information is misleading.

Exceptions to liability for a civil penalty under these clauses exist and a person will be able to rely on them if he or she:

- provides information or documents that are not false or misleading in a material particular
- omits information but the exclusion of that information did not result in the overall information being misleading in a material particular
- produced a document that is signed by the person, (or in the case of a body corporate, a competent officer of the body corporate), stating that to their knowledge the document is false or misleading in a material particular and setting out the information in the document that is to their knowledge false or misleading, or
- gave information to another person (the official, such as a biosecurity officer or other official) and they do not take reasonable steps to inform the person that they may be liable to a civil penalty before they provide information.

False or misleading information or documents relating to a material particular means false or misleading information or documents which are not trivial or inconsequential.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

These clauses are intended to dissuade persons from providing false or misleading information to an official for the purposes of complying with the Biosecurity Act, thereby ensuring that officials have access to information that is relevant, reliable and correct. If an official relies upon false or misleading information it has the potential to reduce the official's ability to assess or manage biosecurity risk.

## **Division 5—General rules about offences and civil penalty provisions**

### **Clause 534 Physical elements of offences**

There are a number of clauses in the Bill that provide that a person commits an offence if the person contravenes another provision of the Bill (generally an earlier subsection in the same section).

For example, subclauses 120(5) and (6) are as follows:

(5) A person contravenes this subsection if:

(a) goods are unloaded as referred to in subsection (1); and

- (b) the person is a person prescribed for the purposes of subsection (2) in relation to the goods; and
- (c) the person does not give a notice in relation to the goods in accordance with subsection (3); and
- (d) no other person gives a notice in relation to the goods in accordance with that subsection.

Note: See section 534 in relation to the physical elements of an offence.

#### *Fault-based offence*

- (6) A person commits an offence if the person contravenes subsection (5).

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

As a result of subsection 4D(1) of the *Crimes Act 1914*, the offence is the subsection with the word 'Penalty' at its foot (in this case, subclause 118(6)). However, clause 534 clarifies that the physical elements of the offence (which are relevant for the purposes of Chapter 2 of the *Criminal Code*) are not to be found in the offence, but in the subsection that sets out the conduct that is prohibited (that is, subclause 118(5)).

#### **Clause 535 Contravening offence and civil penalty provisions**

This clause clarifies that for various clauses of the Bill, such as clause 214 of Chapter 4, or clause 269 of Chapter 5, a person is liable for civil or criminal penalties if the person contravenes the obligation set out in this clause. This clause is required because of the style of drafting in various clauses, which in certain circumstances state an obligation in a particular way.

For example, clause 215 states: 'A person who is given a direction in relation to a conveyance under a provision of this Division must comply with the direction', whereas clause 270 states:

- (1) A person contravenes this subclause if:
  - (a) the person is the person in charge or operator of a vessel; and
  - (b) the vessel is in Australian seas; and
  - (c) the vessel discharges ballast water.

To remove any doubt, this clause clarifies that contravention of these obligations constitutes a criminal offence, or gives rise to a civil penalty (as the case requires).

#### **Division 6—Miscellaneous**

##### **Clause 536 Persons assisting biosecurity officers or biosecurity enforcement officers**

This clause allows biosecurity enforcement officers and biosecurity officers to be assisted by other persons. Officers must consider the assistance to be necessary and reasonable in the exercise of the powers and functions of the officer under the provisions listed in subclause (1), which include:

- Division 3 of Part 2 of Chapter 6 (biosecurity risk assessment powers)
- clause 360 (biosecurity control order powers)
- clause 370 (biosecurity response zone powers)
- subclauses 379(1) or (2) (permanent biosecurity monitoring zone powers)



- clause 389 (temporary biosecurity monitoring zone powers)
- subclauses 399(1) or (2) (biosecurity activity zone powers)
- Division 5 or 6 of Part 1 of Chapter 8 (exercise of powers during biosecurity emergencies), and
- Parts 3, 4 and 5 of this Chapter.

It is important that biosecurity enforcement officers and biosecurity officers can be assisted. For example, there may be circumstances where no other officers are available to assist, where there may be a large amount of material found that needs to be secured quickly, where another person is more familiar with specific premises, or where an officer needs assistance to move a heavy item that the officer cannot move on their own.

A person assisting a biosecurity officer may enter premises and may exercise powers as referred to in subclause 536(1). Persons assisting must enter premises and exercise powers in accordance with any direction given by the biosecurity officer. Any direction given in writing under this clause is not a legislative instrument, as it is administrative in nature and does not have legislative character.

A person assisting a biosecurity enforcement officer may enter the premises and may exercise any powers of the biosecurity enforcement officer for the purposes of assisting and must do so in accordance with any direction given by the biosecurity enforcement officer. A person assisting may use such force against things as is necessary and reasonable (clause 505). If direction is given in writing under this clause, it is not a legislative instrument as it is administrative in nature and does not have legislative character.

Any power exercised by the person assisting either a biosecurity officer or biosecurity enforcement officer is taken to have been exercised by the relevant officer. This ensures that responsibility for the actions of a person assisting lies with the biosecurity officer or biosecurity enforcement officer. It also ensures that the relevant officer will provide sufficient instruction and supervision to the person assisting, so that anything they do is within the powers that the relevant officer would be able to exercise themselves.

#### **Clause 537 Powers of issuing officers**

This clause provides that the power conferred on the issuing officer under Part 2 of Chapter 6 or Part 3 of this Chapter is in a personal capacity and not as a court or a member of the court. The issuing officer does not have to accept the power conferred upon him or her.

Where an issuing officer exercises a power, the issuing officer will have the same protection and immunity as if the officer were exercising the power as the court of which the issuing officer is a member, or as a member of the court of which the issuing officer is a member. This recognises that issuing a warrant is an executive function and not an exercise of judicial power.

#### **Clause 538 Judicial review of directions to secure goods or conveyances**

This clause provides that where judicial review by a court is sought, a direction to secure goods under clauses 124 or 317, or a direction to secure a conveyance under clauses 198 or 317, will remain in force pending the final decision of the courts. For example, a biosecurity officer may assess a conveyance as representing an unacceptable risk, issuing a direction to secure the conveyance and then issuing a further direction to have the conveyance treated. The owner of the conveyance may seek judicial review of both the direction to secure the conveyance and the direction to treat the conveyance. In this circumstance this clause allows the direction to secure the conveyance to remain, pending the final outcome of the judicial review application.

It is noted that under section 23 of the *Federal Court of Australia Act 1976* and section 15 of the *Federal Magistrates Act 1999*, the Federal Court and Federal Circuit Court respectively have jurisdiction to make the orders they consider appropriate within their jurisdiction. This clause is not intended to limit the Federal Court or the Federal Circuit Court's ability to make interlocutory injunctions, or any other orders that the courts consider appropriate. Rather, the intention of this clause is to ensure a conveyance or good that has been assessed as presenting an unacceptable biosecurity risk is secured appropriately pending the final outcome of a judicial review application. The objective of a direction to secure a good or conveyance remaining in force prevents the unacceptable biosecurity risk from spreading during the time the court takes in handing down its decision.

This provision takes effect despite any other law. In addition, this clause allows for the biosecurity officer having given the direction to revoke that direction at any time (for example, if the biosecurity risk is brought down to an acceptable level and there is no longer a need to secure the good or the conveyance).

## **Chapter 10—Governance and officials**

### **Part 1—Introduction**

#### **Clause 539                    Simplified outline of this Chapter**

This outlines sets out the Chapter's objectives, including key provisions regarding the role of the Director of Biosecurity and the Director of Human Biosecurity; biosecurity officers, biosecurity enforcement officers, chief human biosecurity officers and human biosecurity officers. Miscellaneous matters are also covered under this Chapter.

### **Part 2—Director of Biosecurity**

#### **Clause 540                    Director of Biosecurity**

This clause provides that the Director of Biosecurity is the person who is, or is acting, as the Agriculture Secretary. Having the Agriculture Secretary perform the role ensures that the position of Director is held by a person with appropriate seniority and appropriate experience to exercise the powers conferred by the Bill and any other legislation.

#### **Clause 541                    Functions and powers of Director of Biosecurity**

This clause sets out the functions and powers conferred on the Director of Biosecurity. The clause is designed to give flexibility to the Director to ensure that the functions and powers can be exercised to their full effect whilst also ensuring the powers conferred on the Director are exercised within the scope and objects of the Bill (see clause 4).

The clause provides that, subject to the Bill, the Director has the power of general administration of the Bill in order to provide guidance to staff and the general public and ensure the smooth introduction, transition and application of the legislation. For example, the Director may use the general administration power to issue public administration statements to assist in the interpretation of the Bill and its provisions. Such statements may include:

- which powers the statement refers to and the scope of the statement
- an explanation of the statement including the purpose
- the principles and activities guiding the application of the relevant power, and
- an outline of how the statement will be applied.

The power of general administration is for the purposes of guidance only and is subject to the principles of administrative law. The power cannot be exercised by the Director to interfere with the intention of Parliament or to remedy any defects in the law.

The Director also has the powers and functions conferred by the Bill and may do anything incidental or conducive to these functions or powers. This is intended to give flexibility to the Director to ensure that the functions and powers of the Director can be exercised to their full effect.

The clause outlines that, in performing functions or exercising powers under the Bill, the Director must have regard to the objects of the Bill. Providing for this explicitly clarifies that the Director must consider the purpose of the Bill in the course of any actions or decisions that are undertaken. It also recognises that the Director is Secretary of the Agriculture Department and has other functions.

The Director must also comply with directions given by the Agriculture Minister. This includes general directions given under clause 543 and directions to commence a Biosecurity Import Risk Analysis (BIRA) in relation to particular goods under clause 168. This clarifies that the Bill intends to operate in line with administrative law principles; that is, despite the ability of the Director of Biosecurity to exercise powers and functions under the Bill, the Director is still subject to the direction of the Agriculture Minister.

In performing a function or exercising a power in relation to a BIRA process (Part 2 of Chapter 3) or a risk assessment conducted for the purpose of determining whether particular goods can be brought or imported into Australian territory (Part 3 of Chapter 3), the Director of Biosecurity must apply Australia's Appropriate Level of Protection (ALOP; see definition in clause 5).

#### **Clause 542                    Delegation and subdelegation**

This clause provides that the Director of Biosecurity may delegate in writing any functions or powers that are conferred on the Director under the Bill to employees of the Agriculture Department holding, or acting in, the position of a Senior Executive Service (SES) employee (as defined by clause 2B of the *Acts Interpretation Act 1901*). This is to ensure that decision-making powers under the Bill are still carried out efficiently and effectively in an operational environment where the Director may not have the capacity to undertake all functions and powers conferred upon him or her by the Bill.

Powers that cannot be delegated by the Director are the power of general administration of the Bill (see clause 541), and the power to declare parts of Australian territory as areas where biosecurity risk can be managed differently (see clause 618). This is to ensure the powers more appropriately remain the responsibility of the Director.

SES employees that are delegated powers by the Director are then able to subdelegate those powers to the following persons for the purposes of administrative necessity:

- biosecurity officers,
- biosecurity enforcement officers, and
- employees of the Agriculture Department who hold, or acting in, an Executive Level 1 or 2 position or equivalent.

In an operational context, many of the powers that are delegated to SES staff may need to be completed by staff at a lower classification level as a matter of administrative necessity. This arises from the volume and timeliness of decision making and availability of SES officers who have broad responsibilities. For example, the Director is able to take possession of goods (under clause 134 (which deals with treatment that may damage goods) or clause 626 (which deals with abandoned goods)—however in an operational context officers below SES level require the ability to take possession of the goods (particularly low value goods) on the Director's behalf.

This subclause is not intended to allow every power to be subdelegated to every individual in every class listed; functions which may be subdelegated to each particular class of persons will be determined administratively.

This clause provides that a number of powers cannot be subdelegated by SES employees to ensure that responsibility for powers with more serious implications remain at a senior level. The following powers are not able to be subdelegated:

- the power to determine that a person has demonstrated that information is commercial-in-confidence (see clause 15)
- the power to prohibit, suspend or put conditions on the bringing or importation of goods into Australian territory or vary a suspension period (see clause 173, 174, 182 and 183)
- the power to approve directing or causing an aircraft or vessel to move out of Australian territory (see clause 206)
- the power to approve a conveyance being removed from Australian territory, destroyed or otherwise dealt with (see clause 209)
- the power to approve a direction requiring an aircraft not to land at any landing place in Australian territory (see clause 241)
- the power to approve a direction requiring a vessel not to be moored at any port in Australian territory (see clause 249)
- the power to approve high value goods, or conveyances or premises to be treated in a way that is likely to cause damage (see clauses 133, 208, 335, 337 and 339)
- the power to approve the destruction, to require the destruction or to destroy goods, premises or a conveyance (see clauses 136, 210, 338, 341, 342, 343, 344, 629 and 630)
- the power to declare zones under Chapter 6 (see clauses 365, 384 and 395), and
- the power to approve the kind of information and the manner in which information is required to be provided by persons intending to enter or entering Australian territory (see clause 196).

In performing functions or exercising powers delegates or subdelegates must comply with any directions of the Director (or the person who delegated the function or power), to ensure that powers exercised by the delegate or the subdelegate are exercised appropriately and consistently.

Sections 34AA, 34AB and 34A of the *Acts Interpretation Act 1901* apply in relation to a subdelegation in the corresponding way to which they apply in relation to a delegation. These sections of the Acts Interpretation Act deal with delegation to persons holding, occupying or performing the duties of an officer or position, the effect of delegation and the exercise of powers and performance of functions or duties that depend upon the opinion etc. of the delegate.

#### **Clause 543                    Agriculture Minister may give general directions to Director of Biosecurity**

This clause provides that the Agriculture Minister may, by legislative instrument, give directions of a general nature to the Director of Biosecurity about the performance of the Director's functions or powers. This clarifies that the Bill intends to operate in line with administrative law principles; that is, despite the ability of the Director to exercise powers and functions under the Bill, the Director is still subject to the direction of the Agriculture Minister.

This clause also provides limitations on directions that the Agriculture Minister can give to the Director. The Agriculture Minister must not give direction to the Director on the conduct of a Biosecurity Import Risk Analysis (BIRA) (see clause 166) in relation to particular goods, or a decision relating to a specific permit to bring or import goods or a class of goods into Australian territory. This is to ensure that each BIRA process and individual import decisions are based on

technical and scientific decision making and not subject to other interference. This does not prevent the Agriculture Minister from directing the Director to commence a BIRA (clause 168).

### **Part 3—Director of Human Biosecurity**

#### **Clause 544 Director of Human Biosecurity**

This clause provides that the Director of Human Biosecurity is the person who is, or is acting as the Commonwealth Chief Medical Officer. This ensures that the functions and powers of the Director, which can be intrusive, are vested in an individual with appropriate competencies to make decisions under the Bill and is bound by the appropriate professional standards when exercising functions or powers under the Bill.

### **Part 4—Biosecurity officers and biosecurity enforcement officers**

#### **Division 1—Authorisation**

##### **Subdivision A—Authorisation by Director of Biosecurity**

#### **Clause 545 Authorisation by Director of Biosecurity of persons as biosecurity officers**

This clause provides that the Director of Biosecurity may, in writing, authorise a person to be a biosecurity officer.

The persons who can be authorised to be a biosecurity officer include:

- an officer or employee of a Commonwealth body
- an officer or employee of a state or territory body
- a member of the Australian Defence Force, and
- any other person who the Director considers it necessary to authorise to be a biosecurity officer under this Bill.

The authorisation may state the period during which it has effect and can be varied or revoked by the Director at any time.

The Director is required to determine in writing training and qualification requirements for biosecurity officers to ensure that biosecurity officers have adequate training and qualifications to conduct biosecurity operations effectively and respond to incidents where necessary. For example, the training and qualification requirements for biosecurity officers may include completing a biosecurity based course accredited by the Agriculture Department. These training and qualification requirements must be met before a person is authorised to be a biosecurity officer.

This clause also provides that the Director

must not authorise an officer or employee of a state or territory body to be a biosecurity officer, unless an arrangement is in force in relation to the officer or employee (see clause 547). It is intended that the Director will consult with relevant Commonwealth bodies and the Australian Defence Force prior to authorising its employees, officers or members as a biosecurity officer.

This clause clarifies that a determination made in relation to training and qualification requirements is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This reflects that the determination of training requirements is administrative in nature.

**Clause 546**                    **Authorisation by Director of Biosecurity of persons as biosecurity enforcement officers**

This clause provides that the Director of Biosecurity may authorise a person to be a biosecurity enforcement officer if the person is a biosecurity officer (or someone who would be eligible to be authorised as a biosecurity officer under clause 545), and where the person satisfies the training and qualification requirements determined for biosecurity enforcement officers. Training and qualification requirements must be determined, in writing, by the Director.

Biosecurity enforcement officers authorised under this Chapter will be required to be authorised, or be eligible to be authorised, as biosecurity officers first. This ensures that biosecurity enforcement officers have adequate training and qualifications to conduct biosecurity operations effectively and respond to incidents where necessary. Additional qualification and training requirements for biosecurity enforcement officers will likely be based on enforcement experience, to ensure that enforcement and compliance powers across the Bill are exercised safely and effectively. The authorisation may state the period during which it has effect and can be varied or revoked by the Director.

This clause also provides that the Director must not authorise an officer or employee of a state or territory body to be a biosecurity officer unless an arrangement is in force in relation to the officer or employee (see clause 547). It is intended that the Director will consult with relevant Commonwealth bodies and the Australian Defence Force prior to authorising its employees, officers or members as a biosecurity enforcement officer.

This clause clarifies that a determination made in relation to training and qualification requirements is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This is justified, as the determination of training requirements is administrative in nature.

This clause also provides that if a biosecurity officer is authorised to be a biosecurity enforcement officer under this clause, the officer's authorisation under clause 545 ceases to have effect immediately after being authorised as a biosecurity enforcement officer. This is to ensure that an officer cannot be authorised as a biosecurity officer and a biosecurity enforcement officer at the same time.

**Clause 547**                    **Arrangements for State and Territory officers or employees to be biosecurity officers or biosecurity enforcement officers**

This clause provides that the Director of Biosecurity may enter into an arrangement with a state or territory body for officers or employees of the body to be authorised as biosecurity officers or authorised as biosecurity enforcement officers (subject to clause 546). Arrangements with state or territory bodies may be entered into in order to minimise duplication of efforts in the biosecurity sphere. For example, the Commonwealth may enter into an agreement with a state or territory government to have the state or territory's biosecurity officers also become Commonwealth biosecurity officers so they are able to perform both functions. This has multiple benefits, including preventing duplication of services or inspections to meet both Commonwealth and state and territory biosecurity requirements. It also allows biosecurity services to be provided in locations where the Commonwealth does not have facilities.

This clause clarifies that an arrangement made with a state or territory body is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This is justified as the arrangements are administrative in nature.

## **Subdivision B—Authorisation by Director of Human Biosecurity**

### **Clause 548 Authorisation by Director of Human Biosecurity of persons as biosecurity enforcement officers**

This clause provides that the Director of Human Biosecurity may authorise, in writing, the appointment of biosecurity enforcement officers for the purposes of ensuring compliance with measures specified in a determination under clause 51 relating to a listed human disease. The Director of Human Biosecurity may only authorise a person to be appointed under this clause, if that person:

- is an officer or employee of a state or territory body
- is not a biosecurity officer, and
- satisfies the training and qualification requirements of a biosecurity enforcement officer under subclause 546(5).

Prior to appointing an officer or employee of a state or territory body as a biosecurity enforcement officer, an arrangement must be in place with that state or territory body under clause 549. The appointment of biosecurity enforcement officers is only valid for the duration of the determination under clause 51, and may be varied or revoked in writing at any time by the Director of Human Biosecurity.

### **Clause 549 Arrangements for State or Territory officers or employees to be biosecurity enforcement officers**

This clause provides that the Director of Human Biosecurity may enter into an arrangement with a state or territory body, to allow for the appointment of officers and employees of that body as biosecurity enforcement officers under clause 548.

This is a power to appoint temporary, short term officers to enforce preventative measures that have been specified in a determination under clause 51 relating to a listed human disease. Preventative measures may only be specified by the Health Minister following agreement with the relevant state or territory body. Due to the temporary and specific nature of these appointments, this power to appoint officers to enforce measures agreed by Ministers has been vested with the Director of Human Biosecurity.

This clause clarifies that an arrangement made with a state or territory body is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This is justified as the arrangements are administrative in nature.

## **Division 2—Functions and powers**

### **Subdivision A—General**

#### **Clause 550 Functions and powers of biosecurity officers**

This clause provides that a biosecurity officer will have the functions and powers conferred on the officer by this Bill, subject to any restrictions in the instrument of authorisation.

This clause also provides that, while performing functions or exercising powers under this Bill, biosecurity officers must comply with any directions of the Director of Biosecurity.

Restrictions specified in a biosecurity officer's instrument of authorisation are for practical purposes, as certain levels or classes of biosecurity officers are able to do certain things. For example, a higher level officer is needed to sign off on treatment for goods of a high value rather than a more junior officer.

**Clause 551                    Functions and powers of biosecurity enforcement officers**

This clause provides that a biosecurity enforcement officer has the functions and powers conferred on a biosecurity enforcement officer and may perform the functions and exercise the powers conferred on biosecurity officers by this Bill, subject to any restrictions that are specified in the officer's instrument of authorisation.

While performing functions or exercising powers under this Bill, biosecurity enforcement officers must comply with any directions of the Director of Biosecurity.

A biosecurity enforcement officer's instrument of authorisation is for practical purposes authorising specific biosecurity enforcement officers to do different things. For example, a biosecurity enforcement officer may be able to execute a warrant for the purposes of investigating non-compliance with the Bill, while another biosecurity enforcement officer with different training or experience may not.

**Clause 552                    Directions to assist persons performing functions etc. under this Act**

This clause provides that a biosecurity official, or a human biosecurity official (see clause 9), may direct a person who is either in charge of the goods or conveyance or an agent of the person in charge of the goods, to assist them in performing functions or exercising powers under this Bill in relation to goods or conveyances subject to biosecurity control. The official may only do so where the official is satisfied on reasonable grounds that the person is able to provide reasonable assistance.

This clause recognises that assistance may be necessary to allow biosecurity officials or human biosecurity officials to perform functions or exercise powers under the Bill. Circumstances where directions can be given include where a biosecurity official or human biosecurity official is performing functions or duties or exercising powers in relation to goods that are subject to biosecurity control, a conveyance subject to biosecurity control or in relation to a person or thing on the conveyance which is subject to biosecurity control.

A person who does not comply with a direction commits an offence and is liable to a civil penalty. The maximum penalty for a contravention of a direction is six months imprisonment, or 30 penalty units, or both. The maximum civil penalty for contravention is 30 penalty units.

The term 'biosecurity official' includes biosecurity officers, biosecurity enforcement officers and the Director of Biosecurity. The term encompasses all persons who have had the required qualifications or training to perform biosecurity activities under this Bill. This clause clarifies that, for the purposes of this clause, 'human biosecurity official' includes human biosecurity officers, chief human biosecurity officers and the Director of Human Biosecurity. The term 'human biosecurity official' is used to encompass all persons who have had the required qualifications or training to perform human biosecurity activities under this Bill.

**Clause 553                    Biosecurity officers and biosecurity enforcement officers may be assisted by animals**

This clause provides the circumstances in which a biosecurity officer or a biosecurity enforcement officer may be assisted by an animal. The officer may only be assisted by an animal if authorised by the Director of Biosecurity to handle animals in the officer's performance of functions or duties or the exercise of powers under the Bill and if the animal is under the effective control of the biosecurity officer or biosecurity enforcement officer.

Animals may only be used to accompany biosecurity officers and biosecurity enforcement officers in certain circumstances. These circumstances include entering and exercising powers:



- at a landing place in Australian territory where an aircraft that is subject to biosecurity control has landed or intends to land
- at a port in Australian territory where a vessel that is subject to biosecurity control has been moored or intends to be moored
- on premises that may be entered with the consent of the occupier or under an entry warrant
- on any premises in a biosecurity response zone, biosecurity monitoring zone or biosecurity activity zone
- on any premises where biosecurity activities are carried out by a biosecurity industry participant in accordance with an approved arrangement covering the biosecurity industry participant
- on premises entered in accordance with Division 6 of Part 1 of Chapter 8 during a biosecurity emergency period, or
- at any other place where goods may be held under this Bill.

Other circumstances where a biosecurity officer or biosecurity enforcement officer may use an animal include inspecting any goods, conveyances, or other premises for the purposes of the Bill.

This clause is included in the Bill to acknowledge that animals may be used to assist in situations to detect biosecurity risk. For example, trained dogs are used at airports and mail centres to detect a range of biosecurity risks that may include plant material or meat. Additionally, this clause clarifies that animals may accompany officers in areas where animals are ordinarily not permitted, such as in places of food preparation, import, packaging and redistribution facilities, where the officer has visited for the purposes of performing their functions or duties or to exercise of powers under the Bill.

This clause does not apply to the exercise of a power by a biosecurity officer or a biosecurity enforcement officer under an entry warrant unless the use of the animal by the officer is authorised by the warrant.

**Clause 554                      Carrying out tests on samples**

This clause provides that if a biosecurity officer has the power to carry out tests on samples, the officer may carry out tests that damage, destroy or reduce the value of the sample or any packaging or goods associated with the sample. The officer may also arrange for a person with appropriate qualifications or expertise to carry out the tests.

This recognises that the damage, destruction or lowering the value of a sample or a good (as well as the packaging it arrives in and any other goods in that packaging), may be unavoidable when testing to determine whether a biosecurity risk is present.

This clause also allows for regulations to provide for how samples may be stored.

**Clause 555                      Biosecurity officer may direct person in charge of conveyance to permit biosecurity officer to board**

This clause applies to conveyances that are subject to biosecurity control or conveyances that are carrying goods that are subject to biosecurity control. This clause outlines the circumstances in which a biosecurity officer may direct the operator or person in charge of a conveyance to permit the biosecurity officer to board and to facilitate that boarding.

This clause is intended to allow a biosecurity officer to safely board a conveyance in order to conduct biosecurity powers or functions. However, a biosecurity officer may only give a direction to permit and facilitate their boarding for the purposes of exercising powers to manage the biosecurity risks of goods (under Part 1 of Chapter 3) or of conveyances (under Part 2 of Chapter 4).

A person who does not comply with a direction commits an offence and is liable to a civil penalty. The maximum penalty for contravention is two years imprisonment, 120 penalty units, or both. The maximum civil penalty for contravention is 120 penalty units.

**Clause 556 Powers that may be exercised by biosecurity officer after boarding a conveyance**

This clause provides that if a biosecurity officer boards a conveyance under clause 555 the officer may remain on the conveyance for any period necessary to perform functions or duties or exercise powers. Additionally the officer may direct the person in charge of the conveyance to provide suitable and sufficient food and sleeping accommodation. This clause is required for situations where an officer is required to stay on the conveyance for a number of days. In such circumstances, it is appropriate and practical that the person in charge of the conveyance provide food and accommodation for the biosecurity officer so the officer can effectively exercise his or her powers under the Bill.

A person who does not comply with a direction commits a strict liability offence. The maximum penalty for contravention of this clause is ten penalty units.

This is a strict liability offence, which means that the prosecution will have to prove that the person contravened the provision, but not the fault elements of the offence. However, the accused person will still be able to rely on the defence in the *Criminal Code* (section 9.2) of honest and reasonable mistake of fact.

See the Human Rights Compatibility Statement for further information on this strict liability offence.

**Clause 557 Biosecurity officer may give permission to engage in certain conduct**

This clause provides for a range of circumstances in which a biosecurity officer may give a person permission to engage in certain conduct. These circumstances include giving a person permission to:

- interfere with, remove or deface notices (see clauses 129,139, 203, 214, 322, 348, 363, 373, 374, 381, 382, 391, 392, 401, 402 and 456)
- move, deal with or interfere with goods or conveyances (see clauses 130, 141, 204, 216, 323, 330, 351, 457, 601 and 607)
- unload goods that are subject to biosecurity control from a vessel displaying the prescribed quarantine signal (see clause 151)
- receive or possess goods that are subject to biosecurity control which have been unloaded from a vessel displaying the prescribed quarantine signal (see clause 152), and
- interfere with, remove or deface traps, equipment or other structures (see clauses 376, 383 and 393).

This clause is intended to allow biosecurity officers to allow or ask others to do certain things so that the biosecurity officer is not required to do everything personally when it is not practicable to do so.

## **Subdivision B—Decontamination**

### **Clause 558            Decontaminating an individual**

This clause provides for a biosecurity officer to request an individual to be decontaminated, subject to the protections provided to the individual within this clause and in other clauses of the Bill. Before requesting decontamination, the biosecurity officer must reasonably suspect that the individual has been exposed to a disease or pest and must be satisfied on reasonable grounds that decontamination is likely to either be effective in—or contribute to—the management of biosecurity risk.

In addition the application of clause 32 means that powers in this clause must be exercised in accordance with the principles. The requirement for a biosecurity officer to consider the principles before making a request ensures that decontamination of an individual is only requested where there is a reasonable suspicion of a biosecurity risk, and that decontamination will assist or be successful in managing the risk. These requirements ensure that any invasion of personal privacy is only to the extent that is reasonable, proportionate and necessary to managing the biosecurity risk posed.

Where the above requirements have been satisfied and a request for decontamination is made, this clause further requires a biosecurity officer to provide written notice to the individual as soon as practicable. The written notice must detail the following information:

- who is to conduct the decontamination
- how the decontamination is to be conducted
- where and when the decontamination takes place; and
- that the person may consent to the decontamination but where the individual refuses consent, the Director of Biosecurity may direct the individual to be decontaminated (see clause 559).

An example of a request under this clause might be requiring an individual to take a shower. The purpose of this written notice is to ensure that the individual is properly informed, about what is required and the reasons why it is necessary.

In the case of children and/or incapable persons, clauses 36 to 40 apply.

### **Clause 559            Direction to individual to be decontaminated**

This clause provides for circumstances where an individual has been given a direction by a biosecurity officer to be decontaminated and the individual refuses to give their consent under clause 558. As a result the biosecurity officer may request the Director of Biosecurity to give a direction for decontamination of the individual.

Before being able to exercise the power to give a direction for decontamination, the Director is required to take into account any reason the individual gives for refusing consent and any factors that may affect the health of the individual. These requirements ensure that the Director is made to consider issues relevant to the protection of the individual in balance with the biosecurity risk posed. The Director may also consider any other matter the Director believes to be relevant.

Additionally, this clause contains a test which must be satisfied before the Director can give a direction, to ensure further protection for the individual against improper use of the power. Under the test, the Director must:

- suspect on reasonable grounds that the individual may have been exposed to a disease or pest, and
- be satisfied on reasonable grounds that decontamination is likely to either be effective in, or contribute to, the management of biosecurity risk.

The Director must adhere to the principles in clause 32 deciding whether or not to give a direction.

In addition to the requirements placed on the Director, this clause provides a further safeguard against improper use of power by clarifying that an individual directed to be decontaminated may be able to apply for judicial review of the direction.

If a person refuses the direction by the Director to decontaminate, the Director may apply for an injunction under Part 7 of the Regulatory Powers Act applying in relation to this Bill, to ensure that the biosecurity risk posed is managed appropriately.

This clause also provides that on receiving a request to direct a person to decontaminate from a biosecurity officer, the Director must within a 72 hour timeframe provide a notice to the individual specifying whether or not the individual is required to be decontaminated and the reasons for the decision. The notice provides transparency and ensures that the individual understands what is required of them and why it is necessary.

A person who does not comply with a direction to be decontaminated commits an offence. The maximum penalty for contravention is two years imprisonment, 120 penalty units, or both.

#### **Clause 560                      Decontaminating clothing and personal effects**

This clause provides that a biosecurity officer may require an individual to allow the decontamination of his or her clothing and/or personal effects.

Before requesting decontamination, the biosecurity officer must reasonably suspect that the individual's clothing or personal effects have been exposed to a disease or pest and must be satisfied on reasonable grounds that decontamination is likely to either be effective in—or contribute to—the management of biosecurity risk. The biosecurity officer must consider the principles in clause 32 before making a requirement. For the purposes of this clause personal effects include baggage that the individual has in their possession while on an aircraft, vessel or other conveyance, such as a suitcase.

If an individual's clothing is required to be decontaminated, this clause provides protections for that individual. The biosecurity officer must as soon as possible take the individual to a place that, in the officer's opinion, affords the individual adequate personal privacy. The biosecurity officer must also provide the individual with suitable clothing if the individual does not have alternative clothing.

For example, a biosecurity officer may request an individual's pants to be decontaminated. Under this clause a biosecurity officer would be required to provide the individual with adequate personal privacy and suitable pants for the individual's use whilst his or her pants are being decontaminated if the individual does not have alternate clothing. These requirements on the biosecurity officer are for the purpose of protecting the individual from undue interference of his or her personal privacy.

A person who contravenes a requirement for their clothing or personal effects to be decontaminated commits an offence. The maximum penalty for contravention is two years imprisonment, 120 penalty units, or both.

### **Clause 561                    Other protections in relation to decontamination**

This clause provides protections for the individual in relation to decontamination, in addition to protections contained in clauses 558, 559 and 560 (the decontamination provisions).

The Commonwealth is liable to pay for reasonable expenses incurred in relation to the individual's clothing or personal effects, where the clothing or personal effects have been required to be decontaminated. For example, damage caused to clothing by the decontamination process.

This clause also provides that force cannot be used against the person in relation to directions given by the Director of Biosecurity for an individual to be decontaminated (paragraph 559(4)(a)), or when an individual has refused consent to personal decontamination and the biosecurity officer has requested the Director issue a direction for decontamination (subclause 558(5)). This is to protect the individual, even when he or she contravenes a direction. It also clarifies that biosecurity officers and the Director cannot use physical force on an individual to be decontaminated.

This clause provides that in issuing a direction for decontamination of clothing or personal effects, biosecurity officers may use force against things as is reasonable or necessary in the circumstances. For example, picking up or moving clothing if the biosecurity officer requires the clothing to be decontaminated.

The intention of this clause is to safeguard against improper use of the decontamination power by the Director and biosecurity officers, and to ensure that any potential invasion of an individual's personal privacy is only to the extent that is reasonable, necessary and proportionate to the objective of managing biosecurity risk.

This clause also provides that decontamination under this Subdivision must not be for the purposes of managing human health, as decontamination for human health is provided for in clause 89. This is to ensure that where decontamination is for human health, it is the responsibility of a human biosecurity control officer or the Director of Human Biosecurity, who have appropriate competencies to make decisions under the Bill and are bound by appropriate professional standards when exercising functions or powers under the Bill.

## **Part 5—Chief human biosecurity officers and human biosecurity officers**

### **Division 1—Authorisation**

#### **Clause 562                    Authorisation of chief human biosecurity officers**

This clause provides that the Director of Human Biosecurity may authorise, in writing, the appointment of chief human biosecurity officers for a state or territory. The Director of Human Biosecurity may only authorise a person to be appointed under this clause, if that person is a medical practitioner employed by the state or territory body responsible for administering health services in that state or territory.

The powers of chief human biosecurity officers have the potential to be personally invasive and restrictive. Chief human biosecurity officers must be medical practitioners, ensuring that these officers have appropriate competencies to make decisions regarding the management of ill individuals and are bound by appropriate professional standards when exercising functions or powers under the Bill.

Any authorisation under this clause may specify the period of the appointment and the appointment may be varied or revoked at any time in writing. Prior to appointing officers or employees of a state or territory body as a chief human biosecurity officer, an arrangement must

be in place with that state or territory body under clause 564. The Director of Human Biosecurity must determine, in writing, training and qualification requirements for chief human biosecurity officers.

This clause clarifies that a determination made in relation to training and qualification requirements is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This is justified as the determination of training requirements is administrative in nature.

The powers of a chief human biosecurity officer are not restricted in application to a particular state or territory.

**Clause 563                      Authorisation of human biosecurity officers**

This clause provides that the Director of Human Biosecurity may authorise, in writing, the appointment of human biosecurity officers. The Director may only authorise a person to be appointed under this clause, if the Director is satisfied the person has appropriate clinical experience and:

- is an employee of the Commonwealth Health Department
- is an officer or employee of a state or territory body responsible for administering health services in that state or territory, or
- is a member of the Australian Defence Force.

The Director is required to specify training and qualification requirements for human biosecurity officers in writing, and must be satisfied that any person to be appointed under this clause has appropriate clinical expertise.

The powers of human biosecurity officers are potentially personally invasive and restrictive. Human biosecurity officers must have appropriate competencies to make decisions regarding the management of ill individuals and are bound by appropriate professional standards when exercising functions or powers under the Bill.

Any authorisation under this clause may specify the period of the appointment, and the appointment may be varied or revoked at any time in writing. Prior to appointing officers or employees of a state or territory body as a human biosecurity officer, an arrangement must be in place with that state or territory body under clause 564.

This clause clarifies that a determination made in relation to training and qualification requirements is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This is justified as the determination of training requirements is administrative in nature.

**Clause 564                      Arrangements for State or Territory officers or employees to be chief human biosecurity officers or human biosecurity officers**

This provision permits the Health Minister to enter into an arrangement with a state or territory body, to allow for the appointment of officers and employees of that body as chief human biosecurity officers, or human biosecurity officers, under clause 562 or 563.

This power is vested with the Health Minister as the appointment of chief human biosecurity officers and human biosecurity officers are ongoing, supported by Commonwealth and state or territory funding arrangements.

This clause clarifies that an arrangement made with a state or territory body is not a legislative instrument for the purposes of subsection 5(1) of the *Legislative Instruments Act 2003*. This is justified as the arrangements are administrative in nature.

## **Division 2—Functions and powers**

### **Clause 565 Functions and powers of chief human biosecurity officers**

A chief human biosecurity officer has the functions and powers conferred by this Bill, and must comply with any directions given by the Director of Human Biosecurity when performing functions and exercising powers under this Bill.

### **Clause 566 Functions and powers of human biosecurity officers**

Human biosecurity officers have the functions and powers conferred by this Bill and must comply with any directions given by the Director of Human Biosecurity when performing functions and exercising any powers under this Bill. The powers of individual human biosecurity officers may also be restricted by the officer's instrument of authorisation.

## **Part 6—Ministerial reviews**

### **Clause 567 Agriculture Minister may review administration of provisions**

This clause provides that the Agriculture Minister may review the performance of functions, or exercise of powers, by biosecurity officials under one or more provisions of this Bill. The review powers will allow the Agriculture Minister to conduct reviews into the biosecurity system to identify opportunities for improvement in the assessment and management of biosecurity risks.

To ensure that the scope of the review is focussed on the effectiveness of the biosecurity system in general, the clause provides that a review cannot be conducted into the single performance of a function, or a single exercise of a power by a single biosecurity official. It is intended that reviews will be general in nature and of the whole or specific parts of the biosecurity system. The limitation that a review cannot be conducted into the single performance of a function, or a single exercise of a power by a single biosecurity official does not prevent the Minister requiring a person to give information or documents under clause 568 about a single performance of a function or single exercise of a power, as long as the review for which the information or document was sought was of a more general nature.

This is appropriate as a person may have information only on a particular performance of a function or a particular exercise of a power (the one that affected them personally), and not performance of functions, or exercise of powers, more generally.

This clause also clarifies that it does not affect or limit any powers of review the Agriculture Minister has apart from this clause. The specific review powers in this clause are not intended to interfere with the principles of responsible government.

A review conducted by the Minister is different from a review of a reviewable decision under Part 1 of Chapter 11. Although this clause lets the Agriculture Minister review an exercise of power under a provision of this Act that may involve a reviewable decision, the Agriculture Minister cannot affirm, vary or set aside the decision.

The Minister may delegate the review powers to an appropriately qualified or experienced person such as the Inspector-General of Biosecurity (see clause 643). As the review powers are provided to the Minister, reviews will be conducted independently from the department, ensuring independence between the subjects of the review (biosecurity officials) and the powers of the person conducting the review.

The review powers will contribute to Australia's biosecurity system by providing for an independent review of the performance of functions and exercise of powers by biosecurity officials. It is intended that the system will be regularly reviewed resulting in overall system improvements and provide an assurance framework for stakeholders of the system. This will ensure that Australia's biosecurity system maintains its integrity and continues to improve into the future.

**Clause 568                    Agriculture Minister may require information etc. for review**

This clause provides the Agriculture Minister with the power to require a person to answer questions or provide documentation if the Minister believes on reasonable grounds has information or documents relevant to a review under clause 567.

The Agriculture Minister, may by written notice, require the person to:

- answer questions, or give information in writing, about the relevant information or documents by the time specified in the notice, or
- produce the documents to the Minister by the time specified in the notice.

The time specified in the notice must be a minimum of 14 days after the notice is given, to allow the person adequate time to answer questions, give information or provide documents.

A person who contravenes a requirement to answer questions, give information or produce documents is liable to a civil penalty. The maximum penalty for contravention is 30 penalty units. In addition, sections 137.1 and 137.2 of the *Criminal Code* and clauses 532 and 533 of this Act contain offences and civil penalties for providing false or misleading information or documents.

The Agriculture Minister may make copies of, or take extracts from any document that has been produced, and may remove the document from the place where it was produced in order to make copies or take extracts.

These information gathering powers ensure that the reviewer has access to the necessary information to appropriately review processes within the biosecurity system (through the performance of functions or exercise of powers under this Bill) to allow for continual improvement in the assessment and management of biosecurity risk.

**Part 7—Miscellaneous**

**Clause 569                    Identity cards—biosecurity officers etc.**

This clause provides that the Director of Biosecurity must issue an identity card to every biosecurity officer and biosecurity enforcement officer. Identity cards must be in the form approved for that kind of officer by the Director, contain a photograph no more than five years old of the officer, and be carried by the officer at all times when performing functions or duties under this Bill. This provision aims to ensure that only authorised officers perform functions and exercise powers under this Bill, and that these officers can be readily and easily identified.



**Clause 570 Identity cards—human biosecurity officers etc.**

This clause provides that the Health Secretary must issue an identity card to the Director of Human Biosecurity, each chief human biosecurity officer and every human biosecurity officer. Identity cards must be in the form approved for that kind of officer by the Health Secretary, contain a photograph no more than five years old of the officer and be carried by the officer at all times when performing functions or duties under this Bill. This provision aims to ensure that only authorised officers perform functions and exercise powers under this Bill and that these officers can be readily and easily identified.

**Clause 571 Offence—failure to return identity card**

This clause provides a penalty for individuals who fail to return their identity card within 14 days after their appointment as an officer under this Bill ceases. This aims to ensure that officers cannot continue to purport to perform functions and exercise powers under this Bill when appointments cease, or are revoked. This clause also provides defences for individuals not returning identity cards, which includes the identity card being lost or destroyed.

This clause makes it a strict liability offence for failing to return an identity card with a penalty of one penalty unit. This means that the prosecution will have to prove that the person contravened the provision, but not the fault elements of the offence. However, the accused person will still be able to rely on the defence in the *Criminal Code* (section 9.2) of honest and reasonable mistake of fact. For this clause, the prosecution will have to prove the identity card was not returned. It will be an exception if the identity card was lost or destroyed.

See the Human Rights Compatibility Statement for further information on this strict liability offence.

The defendant bears the evidential burden in relation to this defence, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 572 General provisions relating to directions**

This clause provides that, unless otherwise stated; a permitted direction under this Bill may be given orally or in writing (including by electronic means); and unless otherwise provided, a direction that is given under this Bill is not a legislative instrument. This clause also provides that a later direction overrides an earlier direction to the extent of any inconsistencies, to ensure that any errors in the original direction are easily rectified.

In circumstances where a direction given to a member of the Australian Defence Force under this Bill is inconsistent with an order or other exercise of command given under the *Defence Act 1903* (Defence Act), this clause provides that a member of the Australian Defence Force is not required to comply with that direction. This will only extend to the extent that any inconsistency may exist and only to the extent that that member is acting in his or her capacity as a member of the Australian Defence Force.

This ensures that the command and control structure of the Australian Defence Force is maintained and protects Australian Defence Force members from contravening a clause under the Bill when following a direction under the Defence Act.

## **Chapter 11—Miscellaneous**

### **Part 1—Review of decisions**

#### **Division 1—Introduction**

##### **Clause 573                    Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part allows certain decisions (known as ‘reviewable decisions’) to be reviewed internally and by the Administrative Appeals Tribunal. This Part ensures that a person who is affected by a reviewable decision and believes an incorrect decision has been made is able to apply to have the decision reviewed.

Consistent with the *Australian Administrative Law Policy Guide*, an internal review of a decision is done by another person in the same agency as the original decision maker. External merits review is conducted by the Administrative Appeals Tribunal.

#### **Division 2—Review of decisions**

##### **Clause 574                    Reviewable decisions**

This clause lists the decisions made under this Act that are reviewable decisions, and who may request a review of the decision (the ‘relevant person’). The relevant person for each reviewable decision is listed in this clause, and is generally the person whose interests are affected by the decision, or the person who applied for, or requested an approval for, an approval or permission under a provision listed in this clause. This clause also provides that the regulations may prescribe additional decisions made under this Act that are reviewable decisions, and the relevant persons for those decisions.

Internal review and merits review are not available if a decision is not listed in the table or the regulations as a reviewable decision. However, this does not limit the rights of a person who is affected by a decision from seeking judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* or common law principles.

##### **Clause 575                    Notice of decision**

This clause provides that after a reviewable decision is made, the person who made the decision must give a written notice to the relevant person for the decision (clause 574 provides a list of relevant persons for reviewable decisions). This notice must contain the terms of the decision, the reasons for the decision and notice of the person’s right to have the decision reviewed. Failure to provide this notice does not affect the validity of the decision.

This notice requirement ensures that a person is able to understand the reasons for the decision and is aware of his or her right to review. However, as decisions made under the Act are made to give effect to the objects of the Act—that is for the management of biosecurity and associated risks—it is not appropriate for such decisions to be found invalid because notice was not provided to the person whose interests are affected by the decision.

##### **Clause 576                    Internal review of reviewable decisions**

This clause outlines the requirements for internal review of decisions made under this Act. A relevant person may apply to the Director of Biosecurity for review of a reviewable decision unless the decision was made by the Director of Biosecurity or the Director of Human Biosecurity personally (clause 574 provides a list of relevant persons for reviewable decisions). Clause 578 outlines the process for review of a decision that has been personally made by the Director of Biosecurity or the Director of Human Biosecurity.

The relevant person must make an application for an internal review in writing to the Director of Biosecurity. The application must be made within 30 days after the day the original decision first came to the notice of the applicant, or within a longer period if allowed by the Director of Biosecurity. The application for review must state the reasons why the review has been requested. The Director of Biosecurity may require further information in relation to the application under clause 577.

On receiving the application, the Director of Biosecurity must either review the decision personally or cause the reviewable decision to be reviewed by another person (the ‘internal reviewer’). The internal reviewer must be someone to whom the Director’s power to make the decision has been delegated to, who was not involved in the original decision and who is in a more senior role than the person who made the original decision. This separates the review from the original decision and ensures the person who is undertaking the review has the independence and authority to review the decision.

The Director of Biosecurity or the internal reviewer may affirm, vary or set aside the decision. If the Director or internal reviewer sets aside the decision they may make another decision as appropriate. The decision of the Director of Biosecurity or the internal reviewer is known as the ‘decision on review’. The decision on review takes effect on the day specified in the decision on review, or if the day is not specified, the day the decision on review was made.

After a decision is made under this clause, the person who made the decision must give the applicant a written notice containing the terms of the decision, the reasons for the decision and details of the person’s right to have the decision reviewed by the Administrative Appeals Tribunal. Failure to provide this notice does not affect the validity of the decision. This notice requirement ensures that a person is able to understand the decision and is aware of his or her rights. As explained in the notes for clause 575, it is not appropriate for a decision to be considered invalid because the notice requirement is not met.

This clause also provides that for the purposes of having the decision reviewed by the Administrative Appeals Tribunal (pursuant to clause 578), the Director of Biosecurity is taken to have affirmed the reviewable decision if the applicant does not receive notice of the decision on review within 90 days after the application for review was made. This ensures that any delays in internal review, or in providing notification of the decision on review, can be redressed by having the decision reviewed by the Administrative Appeals Tribunal.

**Clause 577                      Director of Biosecurity may require further information from applicants**

This clause enables the Director of Biosecurity to require the person who made an application for review under clause 576, to provide further information about the application. This request must be made by written notice. This clause also allows the Director of Biosecurity to refuse to consider the application until the information is provided. This will enable the Director to obtain additional information to assist in reviewing the decision, if that is required in the circumstances, and ensures any automatic time periods in the legislative process do not get triggered (for example, the 90 day period after which the Director is taken to have affirmed a decision under subclause 576(7)).

**Clause 578                      Review by the Administrative Appeals Tribunal**

This clause enables the relevant person for a decision to make an application to the Administrative Appeals Tribunal for review of a reviewable decision made by the Director of Biosecurity or the Director of Human Biosecurity personally, and decisions made by the Director of Biosecurity or internal reviewers under clause 576.

An application under this clause may only be made by, or on behalf of, the relevant person for the reviewable decision (clause 574 provides a list of relevant persons for reviewable decisions). This clause enables a relevant person who is not satisfied with a decision made by the Director of Biosecurity or the Director of Human Biosecurity, or a decision on review, to have the decision reviewed by the Administrative Appeals Tribunal.

A review may not be made by any person whose interests are affected by the decision, which differs from section 27(1) of the *Administrative Appeals Tribunal Act 1975*. This is because in some cases it is only appropriate for the relevant person to do so. For example, a permit holder should be able to apply for review of the decision to suspend a permit to bring in goods, however it would be burdensome to allow any member of the public who is affected by the decision (because they can no longer purchase the goods) to apply for review of the decision.

Subdivision D of Division 2 of Part 3 of Chapter 2 provides for the Administrative Appeals Tribunal review of a direction given by the Director of Human Biosecurity for a person to comply with an isolation or traveller movement measure.

## **Part 2—Confidentiality of information**

### **Division 1—Introduction**

#### **Clause 579                      Simplified outline of this Part**

This outline sets out the Part's objectives. This Part provides the confidentiality of information provisions for the Bill. It sets out the circumstances in which personal and commercial-in-confidence information may be collected, recorded, used or disclosed under the Bill. It will be an offence to disclose personal or commercial-in-confidence information other than in certain circumstances.

### **Division 2—Confidentiality of information**

#### **Clause 580                      Disclosure of protected information**

This clause provides that protected information may be disclosed under this Bill, and sets out the circumstances in which the protected information may be recorded, disclosed or used. It allows the Director of Biosecurity to authorise persons to make records of, use or disclose protected information for a permissible purpose (a purpose that promotes the objects of the Act) in specific circumstances.

Protected information, as defined under clause 9, includes personal information, or commercial-in-confidence information that is obtained under or in accordance with the Act, derived from a record of information made under or in accordance with the Act, or derived from a disclosure or use of information under or in accordance with the Act (clause 9 provides the definition of personal information, and clause 15 provides the definition of commercial-in-confidence information).

Personal and commercial-in-confidence information will be collected under the Act to allow biosecurity risks to be assessed in relation to people, goods and conveyances. For example, information relating to a pest or disease incursion in a state or territory (including relevant commercial-in-confidence information relating to a property) may be shared with the state or territory government to facilitate management of the incursion.

A person may make a record of, disclose or use protected information for a permissible purpose, in performing functions or duties and exercising powers under the Act. To record, disclose or use protected information, subclause 580(2) requires two tests to be met. First, the person must be:

- an officer or employee of the Commonwealth, a state, the Australian Capital Territory or the Northern Territory
- an officer or employee of a Commonwealth body, or a state or territory body
- a person engaged by the Commonwealth, a state, the Australian Capital Territory or the Northern Territory, to perform public health work or to manage biosecurity risks in relation to plant or animal health
- a person engaged by a Commonwealth body, or a state or territory body, to perform public health work or to manage biosecurity risks in relation to plant or animal health, or
- a biosecurity industry participant or a survey authority, or their officer or employee.

Second, that the information recorded, used, or disclosed is done so in performing functions or duties, or exercising powers, for a permissible purpose. For example, a contact number recorded on a permit application may be disclosed by one officer to another officer for the purpose of calling the person about the application.

This clause also allows the Director of Biosecurity or the Director of Human Biosecurity to authorise a person to make a record of or use protected information, or to disclose protected information to a specified person or to a specified class of persons, for a permissible purpose. This authorisation must be in writing. This will enable information to be disclosed to persons who are not listed above, in cases where it is necessary. For example, the Director may authorise protected information relating to an incapable person to be disclosed to the incapable person's guardian, if it is necessary for the wellbeing of the incapable person.

Records, disclosures and uses permitted by this clause constitute an authorisation for the purposes of the *Privacy Act 1988* and other laws.

Clause 531 is also relevant in relation to this Part as it allows the Director of Biosecurity to specify, by legislative instrument, kinds of personal information that is required to be provided with certain applications made pursuant to the Act (see clause 531 for further information).

**Clause 581 Use in accordance with clause 580 does not contravene laws etc.**

This clause provides that a person who is authorised to make a record of, use or disclose protected information in accordance with clause 580 will be protected from committing offences or being liable to any penalty under the provisions of an Act of the Commonwealth, or of a state or territory (or instruments made under an Act of the Commonwealth, or of a state or territory) as a result of making records of, disclosing, or using information. This protection extends to not being liable to civil proceedings for loss or damage caused by making records of, disclosing or using information in accordance with clause 580.

However, protected information may not be recorded, used, or disclosed in contravention of the *Australian Security Intelligence Organisation Act 1979* or the *Intelligence Services Act 2001*. This clause also provides that authorised persons making records of, using or disclosing information will not contravene any relevant professional standards.

These protections ensure that the Commonwealth has access to all relevant information required to effectively assess and manage any biosecurity risk without exposing persons acting in accordance with Part 2 of Chapter 11 to civil or criminal prosecution.

**Clause 582 Authorisation to use information for purposes of proceedings**

This clause provides that a person who obtains protected information for a permissible purpose (a purpose that promotes the objects of this Act) may disclose the information to a court, tribunal or coronial inquiry in accordance with an order of a court, tribunal or coroner. The person who

receives the information for the purpose of the court, tribunal or coronial enquiry may make a record of, disclose or use the information for the purposes of the inquiry.

For example, a biosecurity officer would be authorised under this clause to disclose information obtained in a permit application to a court official for the purposes of court proceedings against the applicant. The court official would also be authorised under this clause to use the information for the purposes of the court proceedings.

The *National Security Information (Criminal and Civil Proceedings) Act 2004* may apply to proceedings under this Division. It contains offences for disclosing information of national security significance.

This clause constitutes an authorisation for the purposes of the *Privacy Act 1988* and other laws.

**Clause 583                      Authorisation to use information that is also received from another source, and use of information by prescribed agencies**

This clause authorises a person to use protected information that is received from another source. It also sets out the circumstances in which protected information can be used by prescribed intelligence agencies.

A person (the ‘first person’) may make a record of, disclose or use protected information for a permissible purpose (a purpose that promotes the objects of the Act) if the first person is:

- an officer or employee of the Commonwealth, a state, the Australian Capital Territory or the Northern Territory
- an officer or employee of a Commonwealth body, or a state or territory body
- a person engaged by the Commonwealth, a state, the Australian Capital Territory, or the Northern Territory, to perform public health work or to manage biosecurity risks in relation to plant or animal health
- a person engaged by a Commonwealth body, or a state or territory body, to perform public health work or to manage biosecurity risks in relation to plant or animal health, or
- a biosecurity industry participant or a survey authority, or their officer or employee.

The first person is authorised to make a record of, disclose or use the information, including substantially similar information received from another source, if this use is authorised or not prohibited by a law of the Commonwealth, state or territory. This allows information to be shared across jurisdictions. For example, where a biosecurity officer receives information about a pest or disease incursion on a property from a state officer (including relevant commercial-in-confidence information about the property), the biosecurity officer may make a record of, use or disclose the information.

This clause also outlines the use of information by intelligence agencies. It authorises a person to make a record of, disclose or use protected information if it is disclosed to an officer or employee of an intelligence agency prescribed by the regulations. The officer or employee of the intelligence agency may make a record, use or disclose this information in the performance of his or her functions or duties, or in exercising his or her powers.

A person who receives this information may record, use or disclose the information for the purposes for which the information was disclosed (under subclause 583(3)) or as prescribed in the regulations (under subclause 583(2)). This clause allows for information sharing with intelligence agencies, and ensures that they are able to use information collected under this Act.

This clause constitutes authorisations for the purposes of the *Privacy Act 1988* and other laws.

**Clause 584**                    **Authorisation to use information required by another law**

This clause authorises a person to make a record of, disclose or use protected information for a permissible purpose (a purpose that promotes the objects of this Act) if the record, disclosure or use is required by a law of the Commonwealth, a state or territory.

This clause allows information to be disclosed (shared) across the Australian Government and with state and territory governments to manage biosecurity risks and to allow for monitoring, compliance and enforcement activities to be conducted under other Acts and regulations. This clause only allows a person to make a record of, use or disclose protected information for a permissible purpose. This ensures that information can be recorded, disclosed or used for the purposes of performing functions or duties or exercising powers under this Act.

For example, if the department receives information on an outbreak of a plant disease in a particular region of Australia, it may disclose this information to the relevant state or territory government department for the purposes of managing the biosecurity risk. These provisions are consistent with the *Privacy Act 1988*.

This clause constitutes an authorisation for the purposes of the *Privacy Act 1988* and other laws.

**Clause 585**                    **Offence relating to protected information**

This clause creates an offence where a person obtains protected information, and makes a record of, discloses or uses the information without being authorised under clause 580, 582, 583 or 584. A maximum penalty of two years imprisonment or 120 penalty units, or both, applies for contravention of the authorisation provisions, which is considered appropriate due to the damage that could be done to a person or company as a result of unauthorised disclosure of protected information. Exceptions to this offence are provided in clauses 586 to 589.

**Clause 586**                    **Exception for use of information in good faith**

This clause provides an exception to the offence under clause 585 if the person obtains protected information for a permissible purpose (a purpose that promotes the objects of the Act) and the person discloses, makes a record of or uses the information in good faith in performing or purportedly performing functions under the Act, or exercising or purportedly exercising powers under the Act.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply. That is, the defendant must provide evidence that they were acting in good faith to meet the exception.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 587**                    **Exception for person who does not know that information is commercial-in-confidence**

This clause provides an exception to the offence under clause 585 if the person makes a record of, discloses, or uses protected information that is commercial-in-confidence and the person does not know that the information is commercial-in-confidence.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this

exception does not apply. That is, the defendant must provide evidence that they did not know that the information is commercial-in-confidence to meet the exception.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 588**                    **Exception for disclosing to the person to whom information relates, or if the person to whom information relates consents**

This clause provides an exception to the offence under clause 585 if the person obtains protected information for a permissible purpose (a purpose that promotes the objects of the Act) and discloses the information to the person to whom the information relates. This clause also provides an exception to the offence if a person obtains protected information and makes a record, discloses or uses the information with the consent of the person to whom the information relates.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply. That is, the defendant must provide evidence that the information was disclosed to the person to whom information relates, or with their consent, to meet the exception.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 589**                    **Exception for disclosure to person who provided the information**

This clause provides an exception to the offence under clause 585 if the person obtains protected information for a permissible purpose (a purpose that promotes the objects of the Act) and discloses the information to the person who provided the information.

The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply. That is, the defendant must provide evidence that the disclosure was to the person who provided the information to meet the exception.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 590**                    **Annual report**

This clause requires the Director of Biosecurity and the Director of Human Biosecurity to each prepare a report on the use of protected information by the Commonwealth over the preceding 12-month period, at the end of a financial year. This information will be included in the annual report prepared by the Agriculture Department (in the case of the Director of Biosecurity) and the Health Department (in the case of the Director of Human Biosecurity). This will provide transparency in relation to the use of protected information by the Agriculture Department and the Health Department.

**Part 3—Cost recovery**

**Division 1—Introduction**

**Clause 591**                    **Simplified outline of this Part**

This outline sets out the Part's objectives. This Part provides the cost recovery provisions of the Bill. It allows the Commonwealth to charge fees in relation to activities carried out under this Act.



It also covers how unpaid fees and other cost-recovery charges may be dealt with, including provisions which enable the Director of Biosecurity to sell certain goods and conveyances to recover unpaid cost-recovery charges. ‘Cost-recovery charges’ includes both fees prescribed under this Act, and charges payable under related biosecurity legislation (see clause 9 for definition of ‘cost-recovery charge’). This Part also contains miscellaneous provisions, including the power to remit or refund a cost-recovery charge.

## **Division 2—Fees**

### **Clause 592 Fees and other rules for fee-bearing activities**

This clause provides that the regulations may prescribe fees for activities (‘fee-bearing activities’) carried out by, or on behalf of, the Commonwealth in performing functions and exercising powers under the Act. It will enable fees to be charged when goods or a service is provided directly to a specific individual or organisation (in line with the Australian Government *Cost Recovery Guidelines*). For example, the Commonwealth will be able to recover the cost of reviewing applications and carrying out biosecurity measures in relation to goods, conveyances, and premises.

The regulations may also include rules for deposits relating to fee-bearing activities, and rules relating to application fees. Any fees set out in the regulations will reflect the cost of providing the product or service. See clause 613 for circumstances in which cost-recovery charges may be remitted or refunded.

This clause will allow the Commonwealth to recover the costs of a range of services provided by the Commonwealth. Fees prescribed under this clause may include the cost incurred by the Commonwealth in arranging and paying another person to carry out the activity. For example, the fee charged for a biosecurity measure, such as fumigation, to be carried out by a third party may include the cost of arranging and paying for the third party to carry out the fumigation.

A survey authority or biosecurity industry participant may also charge a fee in relation to performing functions as a survey authority or carrying out biosecurity activities, under subclause 289(3) or clause 430 respectively. The fee should be charged for the purpose of recovering the costs of providing the services or activities only and not amount to taxation.

The clause is consistent with the Australian Government *Cost Recovery Guidelines* and compliant with constitutional requirements about taxation legislation by requiring that any fees set out in the regulations do not amount to taxation.

## **Division 3—Payment of cost-recovery charges**

### **Clause 593 Paying cost-recovery charges**

This clause provides for rules relating to the payment of cost-recovery charges to be set out in regulations. Cost-recovery charges include fees prescribed in the regulations (see clause 592), charges imposed by certain related biosecurity legislation, and late payment fees relating to those fees and charges (see section 9 the definition of cost-recovery charge).

This clause provides that the regulations may prescribe the time when a specified cost-recovery charge is payable and prescribe one or more persons who are liable to pay a cost recovery charge. It also enables the regulations to prescribe rules relating to liability of agents to pay fees on a person’s behalf, and recovery of cost-recovery charges from agents.

**Clause 594**                    **Notional payments by the Commonwealth**

This clause provides that the Commonwealth (or parts of the Commonwealth) is notionally liable to pay cost-recovery charges prescribed in the regulations. It empowers the Finance Minister to give written directions to give effect to this notional liability, including for the transfer of money between or within Commonwealth financial accounts. The intent for this clause is that, under the Finance Minister’s direction, the department will have the legal authority to charge agencies and other Commonwealth bodies for biosecurity activities performed under the Act, and those bodies will have the legal authority to make payments to the department for biosecurity functions performed.

**Division 4—Unpaid cost-recovery charges**

**Subdivision A—General**

**Clause 595**                    **Late payment fee**

This clause allows the regulations to specify a late payment fee that is due and payable if a cost-recovery charge, which is specified in the regulations (the ‘basic charge’), is not paid at or before the time it is due. A late payment fee may relate to each day or part day that the basic charge remains unpaid. The late payment fee will be used as a compliance tool to encourage on time payment of cost-recovery charges and ensure that the Commonwealth can recover costs for services already provided.

**Clause 596**                    **Recovery of cost-recovery charges**

This clause provides the Commonwealth with the ability to recover any cost-recovery charge that is due and payable through action in a relevant court. The recovery of cost-recovery charges through a relevant court will be used as a compliance tool to ensure that the Commonwealth can recover costs for services already provided.

**Clause 597**                    **Suspending or revoking permits etc. because of unpaid cost-recovery charges**

This clause outlines the power of the Director of Biosecurity to suspend or revoke approvals or authorisations made under this Act if a person is liable to pay a cost-recovery charge and has not paid that charge when it is required (on-time).

This provision allows for the Director to suspend or revoke a permit to bring in or import goods into Australian territory by a written notice to a person who has an unpaid cost-recovery charge. The Director may also suspend or revoke any other permit, authorisation or other permission held by the person under this Act, which is prescribed in the regulations. For example, an approved arrangement may be suspended completely or in part, or other permits held by the person may be revoked.

This clause also provides that the Director may direct biosecurity officers not to carry out specified activities or kinds of activities under the Act until the cost-recovery charge has been paid.

Parts 4 and 5 of Chapter 7 also provide for the relevant Director to suspend or revoke an approved arrangement or part of an approved arrangement because of unpaid cost-recovery charges. This provision is intended to be used to deal with significant debts or repeated non-payment of cost-recovery charges.

A decision to suspend or revoke a permit, authorisation or other permissions under this clause is a reviewable decision (see clause 574 for reviewable decisions).

## **Subdivision B—Dealing with goods to recover unpaid cost-recovery charges**

### **Clause 598    Creation of charge on goods**

This clause outlines the circumstances in which a charge can be created on goods. ‘Charge’ refers to an interest established over the goods to secure the payment of an outstanding cost-recovery charge. A charge may be placed on goods where the owner of the goods has an unpaid cost-recovery charge under the Act, which is due and payable. The unpaid cost-recovery charge does not have to relate to the goods on which the charge is placed. The creation of a charge on goods triggers a number of powers in this subdivision to become available in relation to the goods (for example, the power to withhold goods under clause 600).

A charge can only be placed on goods that are subject to biosecurity control, under an exposed goods order or a biosecurity control order, or goods to which biosecurity measures have been required within a biosecurity response zone, as the Commonwealth is able to exercise powers in relation to these goods.

The charge will be used to secure payment of any cost-recovery charges from the owner of the goods. The charge itself protects the Commonwealth’s right to be paid for the costs of the activities or services which have incurred the cost-recovery charges.

### **Clause 599                    Effect of charge on goods**

This clause outlines the effect of a charge on goods created under clause 598. It provides that a charge on goods has priority over any other interest in the goods, including a security interest within the meaning of the *Personal Property Securities Act 2009*. This means that in the event the goods are sold, the charge created by clause 598 will take priority over another security interest in the goods, allowing the Commonwealth to recover cost-recovery charges before any other interest.

This clause also provides that subsection 73(2) of the *Personal Property Securities Act 2009* applies to the charge, which means that priority of interests in the goods is determined under this Act. This means that where there is an inconsistency in priorities created under both Acts, this Act will prevail.

The charge will remain in force until the cost-recovery charge is paid, or the goods are sold under clause 610. This clause also outlines that a charge will not be affected by changes in the status of the goods, such as a change in ownership or the goods ceasing to be subject to biosecurity control.

### **Clause 600                    Biosecurity officer may withhold goods that are subject to charge**

This clause allows a biosecurity officer to withhold goods which are subject to a charge created under clause 598. It provides that a biosecurity officer may refuse to release the goods from biosecurity control or take possession of the goods for the purpose of withholding the goods. Additionally, in withholding them, the biosecurity officer may give a direction relating to the movement of the goods to the person in charge of the goods. The direction may be to secure the goods in a specified manner; not move, deal or interfere with the goods; move the goods to a specified place; or any other direction relating to the movement of the goods. A person who fails to comply with a direction given is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

This clause also outlines the notice requirements that the biosecurity officer must undertake before withholding goods. A biosecurity officer must, by written notice to the owner of the goods, state that the goods have been withheld and may be sold under clause 610 if the cost-recovery charge has not been paid within the period specified in the notice (which must be at least 30 days after the notice is given). A failure to give written notice does not affect the withholding of the goods or the ability of a biosecurity officer to give a direction in relation to the goods.

This clause protects the Commonwealth's right to be paid for the costs of the activities or services which have incurred a cost-recovery charge, and provides the opportunity for a person to pay the cost-recovery charge before any action is taken in relation to the goods (such as the Director of Biosecurity selling them under clause 603).

**Clause 601                    Moving or interfering with withheld goods**

This clause provides that a person must not move, deal or interfere with goods in relation to which a direction has been given under subclause 600(5), unless the person is authorised to do so under an approved arrangement, or has been given a direction by a biosecurity official or permission under the Act. The maximum civil penalty for contravention of this clause is 120 penalty units.

It is an exception if the person is authorised to engage in the conduct under this Act of under another Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply. For example, a person could provide evidence that they are authorised under another Australian law by producing a current identification card.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 602                    When goods stop being withheld**

This clause sets out when goods stop being withheld. A biosecurity officer must stop withholding goods if the goods cease to be subject to a charge created under clause 598 (for example, when all cost-recovery charges are paid). This clause also allows a biosecurity officer to stop withholding goods if the officer thinks it is appropriate. For example, the biosecurity officer may release the goods if the person liable for a cost-recovery charge enters into a payment plan. Once the goods are released, all directions given under clause 598 cease to have effect.

When goods stop being withheld, it does not affect other powers that may be exercised in relation to the goods require them to be released from biosecurity control, require for an exposed goods order or a biosecurity control order (in relation to those goods) to be revoked, or prevent them from being withheld again.

**Clause 603                    Sale of withheld goods**

This clause sets out the circumstances in which the Director of Biosecurity can sell goods under clause 610. A good can only be sold if it has been withheld under clause 600 because it is subject to a charge under clause 598, due to unpaid cost-recovery charges.

The goods may be sold if a biosecurity officer has given notice to the owner of the goods under clause 600, and at the end of the day specified in the notice, the cost-recovery charge has not been paid. If the officer has not been able to give notice to the owner, despite making reasonable efforts, and has certified in writing to this effect, the goods may be sold if the cost-recovery charge remains unpaid after 30 days of the first attempt to give the notice.

This clause protects the Commonwealth's right to be paid for the costs of the activities or services which have incurred a cost-recovery charge, and provides the opportunity for a person to pay the cost-recovery charge before any action is taken in relation to the goods.

## **Subdivision C—Dealing with a conveyance to recover unpaid cost-recovery charge**

### **Clause 604                    Creation of charge on conveyance**

This clause outlines the circumstances in which a charge is created on a conveyance. There are two circumstances in which this will occur. The first circumstance is where a fee-bearing activity has been carried out in relation to the conveyance, the regulations specify a cost-recovery charge, and the cost-recovery charge is due and payable by the owner or operator of the conveyance. In this circumstance the charge is created only on the conveyance that the cost-recovery charge relates to.

In the second circumstance, a charge will be created on a conveyance is where the owner of a conveyance has an unpaid charge:

- imposed by the *Biosecurity Charges Imposition (Customs) Act 2014*
- imposed by the *Biosecurity Charges Imposition (Excise) Act 2014*
- imposed by the *Biosecurity Charges Imposition (General) Act 2014*, or
- a fee for late payment relating to any of the above charges.

For the charge to be created the conveyance must be subject to biosecurity control, have a biosecurity control order in force relating to it, or have had a biosecurity measure exercised in relation to it under clause 370. In this circumstance the charge is created on the conveyance whether or not the unpaid charge or fee relates to the conveyance. This is because charges imposed under the above biosecurity charges legislation may relate to an activity undertaken to assess or manage risk in relation to a number of conveyances (such as pest and disease monitoring at a port where the conveyances are moored).

Charges will be used to secure payment of any cost-recovery charges in relation to conveyances. The charge itself protects the Commonwealth's right to be paid for the costs of the activities or services which have incurred the cost-recovery charges.

### **Clause 605                    Effect of charge on conveyance**

This clause outlines the effect of a charge on a conveyance. It provides that a charge created under clause 604 has priority over any other interest in the conveyance, including a security interest within the meaning of the *Personal Property Securities Act 2009*. This means that in the event the conveyance is sold, the charge created by clause 604 will take priority over any other interest in the conveyance, allowing the Commonwealth to recover cost-recovery charges to the extent of the charge before any other interest.

This clause also provides that subsection 73(2) of the *Personal Property Securities Act 2009* applies to the charge, which means that priority of interests in the conveyance is determined under this Act. This means that where there is an inconsistency in priorities created under this Act and another Act, this Act will prevail.

The charge will remain in force until the cost-recovery charge is paid, or the conveyance is sold under clause 610. The effect of this clause is to allow the Commonwealth to sell a conveyance to recover unpaid cost-recovery charges.

This clause provides that any change in ownership of the conveyance has no impact on the charge. This ensures that where the owner sells a conveyance, the charge remains on the conveyance, and the Commonwealth can still recover cost-recovery charges from the new owner of the conveyance.

**Clause 606                    Director of Biosecurity may detain conveyance that is subject to charge**

This clause allows the Director of Biosecurity to detain a conveyance (in Australian territory) which is subject to a charge created under clause 604.

This clause outlines the notice requirements that the Director of Biosecurity must take before detaining the vessel. The Director must, by written notice to the owner and the operator of the conveyance, state that the conveyance has been detained, and if the owner is liable to pay the cost-recovery charge, that the conveyance may be sold if the cost-recovery charge has not been paid within the specified period (which must be more than 30 days after the notice is given). A failure to give written notice does not affect the detention of the conveyance or the power to give a direction for the purposes of detaining the conveyance.

This clause provides that in detaining a conveyance, the Director may give a direction relating to the movement of the conveyance (including a direction to cause the conveyance to stop) to the person in charge of the conveyance. The Director may also give a direction requiring the conveyance to be left at a specified place in a specified manner, or requiring goods on board the conveyance to be unloaded at a specified place in a specified manner.

A person commits an offence or is liable to a civil penalty for contravention of a direction given under this clause. The maximum penalty for contravention is five years imprisonment, or 300 penalty units, or both. The maximum civil penalty for contravention is 120 penalty units. This penalty is higher than the equivalent penalty for contravention of a direction relating to the movement of goods under clause 600. This higher penalty is due to the need to ensure the specific conveyance to which the cost-recovery charge relates can be detained (noting that under clause 598 a charge can be placed on any goods owned by an owner that has an unpaid cost-recovery charge under the Act, not just the goods to which the charge relates). It also reflects the relatively higher value of conveyances compared to goods.

**Clause 607                    Moving or interfering with detained conveyance**

This clause provides that a person must not move, deal or interfere with a conveyance in relation to which a direction has been given under clause 606, unless the person is authorised to do so under an approved arrangement, or has been given a direction by a biosecurity official or permission under the Act. The maximum civil penalty for contravention of this clause is 120 penalty units.

It is an exception if the person is authorised to engage in the conduct under this Act or under another Australian law. The defendant bears the evidential burden in relation to this exception, which means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception has been met. It is then up to the prosecution to establish that this exception does not apply. For example, evidence that the person is authorised under another Australian law, such as a current identification card.

See the Human Rights Compatibility Statement for further information on this reverse burden provision.

**Clause 608                    Release of detained conveyance**

This clause provides for when a conveyance detained under clause 606 is released. The conveyance must be released from detention if the conveyance ceases to be subject to a charge under clause 604, for example, when all the cost-recovery charges are paid or the conveyance is sold under clause 610.

This clause also allows the Director of Biosecurity to release the conveyance in circumstances the Director thinks are appropriate. For example, the Director may release the conveyance where the

person liable for a cost-recovery charge enters into a payment plan with the department regarding how and when outstanding cost-recovery charges will be paid.

Once a conveyance is released all directions given under clause 606 cease to have effect. Releasing a conveyance does not affect any power that has been or may be exercised in relation to that conveyance under another clause of this Act, require the conveyance to be released from biosecurity control or prevent the conveyance from being detained again under clause 606.

#### **Clause 609                      Sale of detained conveyance**

This clause sets out the circumstances in which the Director of Biosecurity can sell a detained conveyance under clause 610. A conveyance can only be sold where the conveyance has been detained under clause 606 because a cost-recovery charge that is due and payable by the owner has not been paid. If the owner is also the operator, this clause also applies to them. The conveyance may be sold if the Director has given notice to the owner of the conveyance under clause 606, and the cost-recovery charge has not been paid within the specified period.

This clause also provides for a conveyance to be sold where notice cannot be given to the owner of a conveyance under clause 606. If the Director has not been able to give the notice to the owner, despite making reasonable efforts, and has certified this in writing, the Director may sell the conveyance under clause 610 if the cost-recovery charge has not been paid within 30 days of first attempting to give the notice.

Prior to selling a conveyance, the Director may cause any goods on the conveyance to be unloaded. This ensures that the owners of the goods are not disadvantaged due to the actions of the owner of the conveyance.

### **Division 5—Power to sell goods and conveyances**

#### **Clause 610                      Sale of goods and conveyances**

This clause gives the Directory of Biosecurity the power to sell goods and conveyances that are withheld, detained or abandoned under clause 603, 609, 626 or 629. Goods and conveyances may be sold under this clause to recover unpaid cost-recovery charges, which are due and payable to the Commonwealth or because the owner or person in charge of the goods or conveyance has indicated he or she does not want to take possession of the goods or conveyance (abandonment).

In selling the goods or conveyance, the Director may give full and effective title to the goods or conveyance, free of all other interests. This extinguishes all other interest in the goods or conveyance, allowing the purchaser to have full title.

This clause will allow the Director to make and execute documents that are necessary for the sale of the goods or conveyance to proceed. This may include transfer of title documents and contracts of sale.

This clause ensures that the Commonwealth can dispose of goods and conveyances where the owner has indicated they do not want to take possession of the goods. It protects the Commonwealth's right to be paid for the costs of the activities or services which have incurred a cost-recovery charge.

#### **Clause 611                      Dealing with the proceeds of sale**

This clause outlines how the Director of Biosecurity may apply the proceeds of the sale of goods or conveyances sold under clause 610. The proceeds of sale may be applied to any unpaid cost-recovery charges relating to the goods or conveyance sold, and any other cost-recovery charge that is due and payable by the owner under the Act.

Once any unpaid cost-recovery charges have been recovered, the Director must pay the remainder of the proceeds to the owner of the goods or conveyance. This ensures that the Commonwealth only recovers cost-recovery charges that have not been paid.

This clause provides that where the owner of the goods or conveyance which has been sold cannot be located, the remaining proceeds are forfeited to the Commonwealth. These funds will become the property of the Commonwealth. However, this may give rise to acquisition of property by the Commonwealth, for which compensation may be payable by the Commonwealth (see clause 27).

This clause does not limit the ability of the Commonwealth to recover costs by other means, such as through a relevant court.

This clause protects the Commonwealth's right to be paid for the costs of the activities or services which have incurred a cost-recovery charge, but also ensures that any additional proceeds of the sale of the goods or conveyance are provided to the owner.

## **Division 6—Miscellaneous**

### **Clause 612 Providing sustenance for animals and plants**

This clause outlines the circumstances in which the Commonwealth can enter into agreements with persons to provide sustenance for animals or plants. The Commonwealth will only be able to enter into an agreement if the animal or plant is in the possession or control of the Commonwealth or a biosecurity industry participant, and:

- the animal or plant is, or is going to be, subject to biosecurity control, or
- an exposed goods order or a biosecurity control order is in force in relation to the animal or plant, or
- the animal or plant is in a biosecurity response zone and biosecurity measures have been required in relation to the animal or plant under a power that is specified in the biosecurity response zone determination (under paragraph 366(2)(c)).

An agreement may be entered into for part or all of the period during which the animal or plant is in the control or possession of the Commonwealth or biosecurity industry participant, and may be entered into before the animals or plants become subject to biosecurity control. For example, the Director of Biosecurity may enter into an agreement with a person to provide food to cats and dogs that are being kept in a biosecurity facility (such as a quarantine facility). The Director is also able to direct the owner to provide sustenance to such an animal. This ensures that the animal's health and welfare is maintained while it is subject to biosecurity control, or is required to undergo biosecurity measures.

A person commits an offence or is liable to a civil penalty if the person contravenes the direction to provide sustenance given under this clause. The maximum penalty for a contravention is 50 penalty units. The maximum civil penalty for a contravention is 50 penalty units.

### **Clause 613 Agriculture Minister may remit or refund cost-recovery charges**

This clause allows the Agriculture Minister to remit or refund all or part of a cost-recovery charge prescribed in the regulations if the Minister is satisfied there are exceptional circumstances that justify doing so. This will be at the Minister's discretion. This may be done at the Minister's initiative or on written application by a person.

This power is provided to the Minister rather than the Director of Biosecurity for consistency with the *Public Governance, Performance and Accountability Act 2013*.



#### **Clause 614 Extraterritorial operation of this Part**

This clause provides for Part 3 of Chapter 11 to extend to acts, omissions, matters and things outside of the Australian territory. This ensures that cost-recovery charges can be recovered by the Commonwealth where, for example, the owner of goods that are subject to a charge is outside of Australian territory.

### **Part 4—Exemptions from and modifications of this Act**

#### **Division 1—Introduction**

#### **Clause 615 Simplified outline of this Part**

This outline sets out the Part’s objectives. This Part provides for exemptions from and modifications to the Act. It allows declarations to be made that trigger a modified operation of the Act in relation to specified conveyances, persons, or goods in order to enable regulation of areas of Australian territory that would not be effectively managed through the general provisions of the Bill. It also allows regulations to be made to modify the operation of the Act in order to implement the Torres Strait Treaty.

#### **Division 2—Exemptions from and modifications of this Act**

##### **Subdivision A—Exemption and modification by regulation**

#### **Clause 616 Exemptions from and modifications of this Act**

This clause allows regulations to be made to exempt any one or more conveyances, persons or goods (or classes of these) from any or all provisions of the Act or to make modifications of any provision of the Act in relation to any conveyance, person or goods. Section 2B of the *Acts Interpretation Act 1901* defines the term ‘modification’ in relation to a law to include additions, omissions and substitutions. An exemption or modification may apply only for a specified period, apply only in relation to a specified area and may be subject to one or more conditions.

The regulations made under this clause will assist with compliance with Australia’s international obligations. For example, it is intended to allow compliance with the Ballast Water Convention through exempting warships and government owned ships from the ballast water provisions in Chapter 5.

Exemptions through the regulations will also allow for disaster relief (for example, by exempting vessels or aircraft from information gathering requirements if they are temporarily transporting goods and people to and from an area affected by a natural disaster) and ensure compliance with international agreements by, for example, exempting military aircraft, vessels and personnel from certain provisions of the Bill.

#### **Clause 617 Exemptions for Torres Strait Treaty**

This clause allows regulations to be made to exempt protected zone vessels (and persons and goods on board protected zone vessels) from all or any provisions of the Bill while the vessel is in the protected zone established under the *Torres Strait Treaty*. Goods may be exempt from all or any provisions of the Bill if the goods:

- are owned by, or under the control of a traditional inhabitant who is on board a protected zone vessel
- have been used, are being used, or are intended to be used by the traditional inhabitant in the performance of traditional activities in the protected zone area, or
- are the personal belongings of a traditional inhabitant or an employee of the Commonwealth, Queensland, or Papua New Guinea entering a part of Australian territory in the protected zone area in connection with the performance of their functions

or duties, or the exercise of their powers. These exemptions may be subject to one or more conditions. An exemption only has effect while the vessel, persons, or goods remain in the protected zone area.

This clause provides for exemptions from provisions of the Bill to be made to meet Australia's obligations under the *Torres Strait Treaty*. The legislation also provides for exemptions from and modifications to the Bill that relate to the management of the unique biosecurity risks present in the Torres Strait region (see the notes to clauses 618 to 624).

The protected zone was established under the *Torres Strait Treaty* in order to acknowledge and protect the traditional way of life and livelihood of traditional inhabitants, including their free movement. Traditional inhabitants are Torres Strait Islanders who are Australian citizens that live in the protected zone or the adjacent coastal area of Australia, or citizens of Papua New Guinea that live in the protected zone or the adjacent coastal area of Papua New Guinea, and who maintain traditional customary associations with areas or features in or in the vicinity of the protected zone in relation to their subsistence or livelihood or social, cultural or religious activities.

The protected zone means the zone established under Article 10 of the *Torres Strait Treaty*, which is the area bounded by the line described in Annex 9 to the Treaty. The protected zone area includes the protected zone and the area in the vicinity of the protected zone that is prescribed by regulations. 'Traditional activities' and 'traditional inhabitant' have the same meaning in this Bill as in the *Torres Strait Treaty*.

Protected zone vessels are vessels that are used to transport traditional inhabitants in the protected zone that meet the following conditions:

- the vessel is of a kind used in navigation by sea and is owned or operated by a traditional inhabitant
- the vessel enters a part of Australian territory that is in a protected zone area
- there is at least one traditional inhabitant on board the vessel who is entering that part of Australian territory in connection with the performance of traditional activities in the protected zone area
- the only persons on board the vessel are:
- one or more traditional inhabitants (who are entering that part of the Australian territory in connection with the performance of traditional activities in the protected zone area), or
- one or more employees of the Commonwealth, Queensland, or Papua New Guinea, or of a body of the Commonwealth, Queensland or Papua New Guinea, who are entering that part of Australian territory in connection with the performance of his or her functions or duties, or the exercise of his or her powers.

Subject to the other provisions of the *Torres Strait Treaty*, each Party (i.e. Australia and Papua New Guinea) is obliged to permit free movement and the performance of lawful traditional activities (activities performed by the traditional inhabitants in accordance with local tradition) in and in the vicinity of the protected zone by the traditional inhabitants of the other Party. This includes applying immigration, customs, quarantine and health procedures in such a way as not to prevent or hinder free movement or the performance of traditional activities. The *Torres Strait Treaty* also states that each Party reserves its right to apply immigration, customs, health and quarantine measures, temporary or otherwise, that it considers necessary to meet problems which may arise. In particular, each Party may apply measures to limit or prevent free movement, or the carriage of goods, in the case of a disease or pest outbreak in or in the vicinity of the protected zone.

It is intended that this clause will be used in order to meet Australia's obligations under the *Torres Strait Treaty* in relation to free movement of traditional inhabitants. For example, it is intended that the regulations will exempt protected zone vessels (and persons on board a protected zone vessel) from:

- the requirement for vessels subject to biosecurity control to moor at a first point of entry (clause 245)
- the requirement to provide a pre-arrival report (clause 193)
- the requirement to provide a notice of goods to be unloaded in Australian territory (clause 120), and
- the requirement for goods to be unloaded at first point of entry for those goods or with permission (clause 145).

These exemptions will enable free movement of traditional inhabitants in line with the *Torres Strait Treaty* by allowing them to moor in the protected zone (in which there are no first points of entry) and remove goods associated with traditional activities in order to participate in those traditional activities.

The *Torres Strait Treaty* also makes clear that the term 'traditional' should be interpreted liberally and in light of the prevailing custom, except in relation to activities of a commercial nature. This means that activities of a commercial nature, such as selling or trading goods (outside of barter and market trade) in the protected zone are not covered by the *Torres Strait Treaty*, and therefore exemptions from provisions of this Bill are not intended to provide for selling or trading goods by traditional inhabitants, other than barter or market trade.

#### **Subdivision B—Modifications relating to declared movements between parts of Australian territory**

##### **Clause 618 Modified operation of this Act in relation to declared movements between parts of Australian territory**

Clauses 618 to 624 set up a scheme to enable the management of specific areas of Australian territory that have a different risk status than the rest of Australian territory, and would not be effectively managed through the general provisions of the Bill. Areas intended to be regulated under this scheme include Christmas Island, the Cocos (Keeling) Islands, and the Torres Strait region. The scheme is flexible and will enable the regulation of additional areas in the future, if required.

These provisions will enable regulatory schemes currently set out in the *Quarantine Act 1908* to continue. Under the Quarantine Act, a regime is set out to maintain mainland Australia, Christmas Island, and the Cocos (Keeling) Islands as separate quarantine entities. The Quarantine Act sets out movement restrictions in relation to goods in two separate proclamations relating to these external territories—the *Quarantine (Christmas Island) Proclamation 2004* and the *Quarantine (Cocos Islands) Proclamation 2004*. Under this Bill, continued regulation of the movement of goods, vessels and people between the two territories—and between these territories and the rest of Australian territory—is necessary to continue to manage the unique biosecurity status and associated biosecurity risks of these territories.

Similarly, the Torres Strait region is dealt with through a complicated arrangement of provisions that are located in several of parts of the Quarantine Act. The islands in the Torres Strait provide a pathway for exotic animal and plant pests and diseases to enter mainland Australia from countries north of Australia. Regulation of the movement of goods, vessels and people between the Torres Strait region and the rest of Australian territory under this Bill is necessary in order to manage the biosecurity risks associated with the region.

Managing the risks associated with these regions through modifications to the Bill is appropriate as it removes the necessity for complicated additions to the primary legislation, provides clear and transparent policy in relation to parts of Australian territory that require different management approaches, and provides the flexibility to manage biosecurity risks which may emerge in other regions in Australian territory in the future. This approach is preferable because the geographical areas covered by these modifications are small, and only a small subset of clients and stakeholders will be working within the modified legislation.

The provisions broadly function as follows:

- clause 618 enables the Director of Biosecurity and the Director of Human Biosecurity to jointly make a declaration that the affected provisions (set out in clause 619) apply to people, goods or vessels, or classes of people, goods or vessels, which move from an ‘origin part’ to a ‘destination part’ of Australian territory
- clause 619 sets out which provisions have a modified application in relation to the declared movements (the ‘affected provisions’)
- clause 620 provides that the affected provisions apply as if only the destination part was Australian territory and the origin part is not Australian territory
- clause 621 sets out how goods are released from biosecurity control after undertaking a movement from a declared origin part to a declared destination part
- clause 622 sets out how vessels are released from biosecurity control after undertaking a movement from a declared origin part to a declared destination part
- clause 623 sets out how exit provisions are affected by the scheme, and
- clause 624 sets out administrative matters that ensure the scheme functions in harmony with the general provisions of the legislation.

Together, these provisions interact to trigger provisions that would normally be triggered by entering Australian territory from an international origin (or in the case of exit provisions, a journey from Australian territory to an international destination).

Clause 618 includes a table of origin and destination parts that may be specified in a declaration under the clause. Only the external territories to which the Bill applies are included in the table of origin and destination parts listed under clause 618. This is because formal pest and diseases surveys have been undertaken in relation to these places and they are known to have a different pest and disease status to the rest of Australian territory. For other places to be declared as origin and destination parts under clause 618, criteria specified under subclause 618(4) must be applied by the Directors. These criteria include that there must be an unacceptable level of biosecurity risk associated with the movements if they are not regulated, and that the application of the affected provisions is appropriate and adapted to managing biosecurity risks associated with the movements. These criteria will ensure that the scheme cannot be applied more broadly than necessary to manage biosecurity risk associated with the origin part.

Additional technical criteria included under subclause 618(5) will ensure that the modifications can function correctly. These include that the origin part and destination part cannot overlap, and that persons, goods, or conveyances cannot be moved between the origin part and destination part by land. Paragraph 618(5)(a) is included because if an origin part and a destination part overlapped, trigger points such as when goods become subject to biosecurity control under clause 119 would not function correctly when modified. Similarly, paragraph 618(5)(b) is included to avoid imposing requirements on conveyances (such as trucks) that could—if a declaration were in place between two places on land—be required to meet requirements such as arriving at a first point of entry by land. It is also unlikely that two places joined by land would have a significantly different pest and disease status.

More than one declaration can be made under clause 618, which will allow more than one area of Australian territory to be regulated differently. For example, separate declarations could be made to regulate movement of goods and conveyances:

- from Christmas Island to anywhere else in Australian territory
- from anywhere else in Australian territory to Christmas Island
- from Christmas Island to the Cocos (Keeling) Islands, and
- from the Torres Strait region to anywhere else in Australian territory.

Clause 618 does not limit how the origin and destination parts are described in the declaration. This provides flexibility so that, for example, parts can be declared based on boundaries existing in other legislation, such as the territorial sea of an island, or a set of coordinates that are unique to the declaration.

This clause states that a declaration made under this clause is a legislative instrument, but is not subject to disallowance under the *Legislative Instruments Act 2003*. The decision to make a declaration under this clause is a technical and scientific decision based on whether the biosecurity risk is able to be satisfactorily managed. Therefore it is appropriate for the Parliament to delegate to the Director of Biosecurity and the Director of Human Biosecurity the power to make this declaration. Subjecting these declarations to disallowance could undermine the technical and scientific based decision making and frustrate risk management processes.

These declarations are critical to the management of biosecurity risks in relation to areas of Australian territory that have a different risk status than the rest of Australian territory. In addition, disallowance of a declaration made under this clause could lead to inadequate management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy. If these declarations were to be disallowed, goods and conveyances that pose a biosecurity risk would be able to move freely to all parts of Australian territory.

#### **Clause 619                      Affected provisions and exit provisions**

Clause 618 enables the Director of Biosecurity and the Director of Human Biosecurity to make a declaration to enable regulation of the movement of people, goods or vessels from an 'origin part' to a 'destination part' of Australian territory (see clause 618 for a detailed description of this scheme). Clause 619 sets out which provisions have a modified application in relation a declaration made under clause 618 ('the affected provisions').

The affected provisions include Part 2 of Chapter 2, Parts 1 and 3 of Chapter 3, and Parts 1, 2 and 5 of Chapter 4. The modified versions of these provisions will operate to trigger goods and vessels to which a declaration applies to become subject to biosecurity control on entering the declared destination part. They may also trigger a range of requirements, powers and offence and penalty provisions, including:

- notice requirements of goods to be unloaded in the destination part
- pre-arrival reports in relation to vessels and aircraft
- assessment powers in relation to goods and conveyances
- management powers in relation to goods and conveyances
- restrictions on when and where goods may be unloaded
- restrictions on boarding and leaving conveyances
- reporting requirements relating to biosecurity incidents
- prohibited and conditionally non-prohibited goods (including enabling different prohibited and conditionally non-prohibited goods to be determined in relation to different declarations)

- permits to bring in goods (including enabling different permit requirements to be set out in relation to different declarations), and
- a range of offence and civil penalty provisions relating to the above requirements and powers.

The modification also affects clauses that are related to the affected provisions. For example, if a defined term used in Part 1 of Chapter 3 includes a reference to Australian territory, that reference would also be modified to refer to the destination part instead of Australian territory.

This clause also lists a range of provisions to which clause 623 applies (the ‘exit provisions’). See clause 623 for how these provisions apply because of the modification scheme.

**Clause 620                    How the affected provisions (except for the exit provisions) apply because of this Subdivision**

Clause 618 enables the Director of Biosecurity and the Director of Human Biosecurity to make a declaration to enable regulation of the movement of people, goods or vessels from an ‘origin part’ to a ‘destination part’ of Australian territory (see clause 618 for a detailed description of this scheme). Clause 620 provides that the affected provisions (except for the exit provisions) apply in relation to the actual or intended movement of persons, goods and conveyances from the origin part to the destination part as if only the destination part were Australian territory. This triggers the affected provisions to apply as if the people, goods or conveyances were entering from outside Australian territory.

The words ‘actual or intended movement’ are used to ensure that reporting requirements relating to a movement, such as pre-arrival reporting under clause 193, are triggered within an appropriate timeframe to enable them to be complied with. That is, if a vessel intends to make a movement to which a declaration applies, and the class of vessel is required to provide a pre-arrival report at least 12 hours before arriving at a first point of entry, the requirement will apply 12 hours beforehand even if the vessel has not yet left the origin part.

Subclause 620(2) provides that references in any of the affected provisions to ‘export’ of the goods from Australian territory or ‘removal of conveyances’ from Australian territory also includes a reference to return of the goods or remove the conveyance to the origin part respectively. For example if goods arrived at the destination part and were assessed as posing an unacceptable biosecurity risk that cannot be effectively managed, a biosecurity officer could require them to be exported from Australian territory or returned to the origin part under clause 135. Similarly a reference to requiring the removal of a conveyance from Australian territory also includes a reference to returning the conveyance to the origin part.

This clause also sets out a number of clauses or subclauses where the meaning of Australian territory is not modified. This is because, in some cases, modification of Australian territory to mean the destination part does not produce the desired regulatory outcome and instead causes undesired outcomes, circular references or negates parts of clauses.

**Clause 621                    Release from biosecurity control if goods leave destination part**

**Clause 622                    Release from biosecurity control if aircraft or vessel leaves destination part**

Clause 618 enables the Director of Biosecurity and the Director of Human Biosecurity to make a declaration to enable regulation of the movement of people, goods or vessels from an ‘origin part’ to a ‘destination part’ of Australian territory (see clause 618 for a detailed description of this scheme). These clauses set out how goods, vessels and aircraft that became subject to biosecurity

control due to undertaking a movement specified in a declaration under clause 618 are released from biosecurity control.

Goods, vessels and aircraft are taken to be released from biosecurity control under clause 162 (for goods) or clause 218 (for vessels and aircraft) when they leave the destination part declared under clause 618. For example, a vessel travelling from a place in Australian territory other than Christmas Island (the origin part for the movement), to Christmas Island (the destination part for the movement), would be released from biosecurity control on leaving Christmas Island. This clause does not prevent goods, vessels or aircraft being released from biosecurity control in another way, for example, by leaving a biosecurity control release area at a first point of entry (under paragraph 162(1)(c)) or by notice from a biosecurity officer (under paragraph 162(1)(a)).

This clause provides that where the goods, vessels or aircraft also leave Australian territory when they leave the destination part, they do not become subject to biosecurity control again as they would have under the unmodified operation of subclauses 119(4) or 191(4). This is because declarations will be made under clause 618 to manage the risk associated with the goods, vessel or aircraft moving from the origin to destination part, not the origin part to a place other than the destination part. For this reason, they will be released from biosecurity control once they leave the destination part.

These clauses only release goods, vessels and aircraft from being subject to biosecurity control due to undertaking a movement listed in a declaration under 618. If goods, vessels or aircraft become subject to biosecurity control prior to undertaking a declared movement (for example through the unmodified operation of clauses 119 or 191 because they have entered Australian territory) they will not be released under clauses 162 or 218 respectively. This is so that goods that enter Australian territory from outside Australian territory, then move from an origin part to a destination part declared under clause 618 but are not released from biosecurity control (because, for example, they are not unloaded from the aircraft or vessel), remain subject to biosecurity control. This will ensure they can be assessed and managed on arrival at another port or landing place in Australian territory.

#### **Clause 623                    How the exit provisions apply because of this Subdivision**

Clause 618 enables the Director of Biosecurity and the Director of Human Biosecurity to make a declaration to enable regulation of the movement of people, goods or vessels from an ‘origin part’ to a ‘destination part’ of Australian territory (see clause 618 for a detailed description of this scheme). Clause 623 provides that certain provisions to which the modified application of the Act applies, known as the ‘exit provisions’, apply as if only the origin part were Australian territory, and any other part of Australian territory were another country. This will enliven requirements such as pre-departure reporting for vessel or aircraft under clause 50 when a vessel or aircraft leaves an origin a part declared under clause 618 to travel to the destination part for the movement.

#### **Clause 624                    Relationship between this Subsection and other provisions of this Act**

Clause 618 enables the Director of Biosecurity and the Director of Human Biosecurity to make a declaration to enable regulation of the movement of people, goods or vessels from an ‘origin part’ to a ‘destination part’ of Australian territory (see clause 618 for a detailed description of this scheme). This clause clarifies the relationship between the modified versions of the affected provisions, and the unmodified versions of the provisions.

This clause makes clear that the application of the affected provisions is in addition to the normal operation of the unmodified operation of the affected provisions. This means that the modified provisions effectively create an extra layer of regulation in some places, but do not replace the ordinary, unmodified operation of the affected provisions. It also makes clear that any reference to

the affected provisions in another part of the Bill includes reference to both the modified and unmodified versions of the provision.

The scheme set out in 618-624 does not limit the operation of clause 616 (Exemptions from and modifications of this Act), or vice versa.

## **Part 5—Miscellaneous**

### **Division 1—Introduction**

#### **Clause 625                    Simplified outline of this Part**

This outline sets out the Part's objectives. This Part deals with abandoned or forfeited goods and conveyances and additional offences that apply in relation to this Act. It also provides for compensation to be paid in relation to goods damaged under this Act, and goods, conveyances or other premises destroyed under this Act. This Part allows the Agriculture Minister or the Health Minister to enter into an arrangement with a relevant Minister of a state or territory for the purposes of the Act, and protects certain persons who are performing functions or exercising powers under the Act from civil proceedings.

### **Division 2—Abandoned or forfeited goods and conveyances**

#### **Clause 626                    Abandoned goods**

This clause sets out the circumstances in which goods are abandoned. This clause applies if:

- biosecurity measures have been required in relation to the goods under Part 1 of Chapter 3, or any part of Chapter 6, and
- the goods are in the possession or control of the Commonwealth or a biosecurity industry participant authorised by an approved arrangement, and
- a person in charge of the goods gives notice (either in writing or orally) to the Director of Biosecurity stating that the person does not wish to take possession of the goods.

If these conditions apply, a biosecurity officer may request, in writing, for the owner of the goods to arrange for the goods to be dealt with in a specified manner and time period. This may include requesting that the person in charge pick up the goods, or that the goods be treated or destroyed.

If the goods have not been dealt with in the specified manner and time period, the Director of Biosecurity may take possession of the goods and cause them to be sold under clause 610, destroyed or disposed of. Before the goods are sold, destroyed or disposed of, the Director may cause the goods to be treated in an appropriate manner to manage any biosecurity risk associated with them.

This clause provides the Commonwealth with the ability to dispose of goods in situations where the person in charge has abandoned them. This ensures goods do not remain in the Commonwealth's possession indefinitely. However, the Commonwealth does not take ownership of the goods—the person in charge or owner of the goods remains responsible for covering the costs of any treatment or biosecurity activities carried out after abandonment. The Commonwealth will be able to recover costs for these activities under Part 3 of this Chapter.

For the purpose of this clause, the person in charge does not include a biosecurity industry participant who is in possession or control of the goods only because of a direction given by a biosecurity officer. This is because it would not be appropriate for a biosecurity industry participant to give notice of the abandonment of another person's goods.



### **Clause 627 Forfeited goods**

This clause sets out the circumstances in which goods may be forfeited. This clause applies if:

- biosecurity measures have been required in relation to the goods under Part 1 of Chapter 3, or any part of Chapter 6, and
- the goods are in the possession or control of the Commonwealth or a biosecurity industry participant authorised by an approved arrangement.

Goods will be forfeited to the Commonwealth if the Director of Biosecurity notifies the owner of the goods, in writing, that the goods may be collected, and the goods are not collected within 90 days. It also applies if the Director has not been able to locate the owner of the goods, despite making reasonable efforts, and has certified in writing to that effect.

If the goods are forfeited to the Commonwealth, the Director may cause the goods to be sold, destroyed, or disposed of. Before the goods are sold, destroyed, or disposed of, the Director may cause the goods to be treated in an appropriate manner to manage any biosecurity risk associated with them.

Under this clause the Commonwealth will become the new owner of the goods. This ensures that the Commonwealth can deal with the goods in the most appropriate manner. Similar to the abandonment provisions, the Commonwealth may use this forfeiture power to ensure that goods are not left in the possession of the Commonwealth, by selling or disposing of the goods. Where goods are forfeited, the owner of the goods may be able to seek compensation under clause 27.

### **Clause 628 Prohibited goods etc. may be forfeited to the Commonwealth**

This clause sets out the circumstances in which prohibited goods, conditionally non-prohibited goods or suspended goods may be forfeited to the Commonwealth.

A biosecurity officer may take possession of goods if they are brought or imported into Australian territory and the goods are:

- prohibited (see clause 173)
- conditionally non-prohibited and an applicable condition applying to the goods has not been complied with (see clauses 174 and 180), or
- suspended goods (see clause 182).

An applicable condition includes both a condition placed on a permit (granted under clause 179) and those set out in a determination (made under clause 174).

The Director of Biosecurity may determine that these goods are forfeited to the Commonwealth. This determination is not a legislative instrument. Before making this determination, the Director must inform (in writing or orally) the person in charge of the goods:

- that a biosecurity officer may take possession of the goods
- that the goods will be forfeited to the Commonwealth, unless the person in charge arranges for the goods to be destroyed or exported, or dealt with in a manner specified by the Director, and
- of any other requirements specified by the Director to be complied with, within a specified period.

A failure by the Director to inform the person of this does not affect the validity of the determination or the forfeiture of the goods.

Once the Director makes a determination that the goods are forfeited, a biosecurity officer may take possession of the goods (if they are not already in possession of the Commonwealth) and

cause them to be sold, destroyed, exported or disposed of. Where the goods are forfeited, the owner of the goods may be able to seek compensation under clause 27.

The ability for biosecurity officers to take possession of prohibited goods, conditionally non-prohibited where conditions have not been complied with and suspended goods—and for those goods to be forfeited to the Commonwealth—will enable the biosecurity risk in relation to these types of goods to be managed. It is appropriate that the Commonwealth takes possession of these goods as the possession of them is a serious offence and could cause significant damage as all these categories of goods are considered to have an unacceptable biosecurity risk and are not allowed in Australian territory.

This clause enables these goods to be forfeited to the Commonwealth without the notification requirement and 90 day collection period set out under clause 627. Once the goods are forfeited, they will become the property of the Commonwealth. This will ensure that the Commonwealth can deal with the goods in the most appropriate manner. This reflects that prohibited goods, conditionally non-prohibited goods and suspended goods pose a high level of biosecurity risk and that biosecurity measures will need to be carried out as soon as possible to manage the risk to an acceptable level.

For the purpose of this clause, a person in charge does not include a biosecurity industry participant, who is in possession or control of the goods only because of a direction given by a biosecurity officer. This is because it would not be appropriate for a biosecurity industry participant to arrange for another person's goods to be destroyed, removed from Australian territory or disposed of.

#### **Clause 629                      Abandoned conveyances**

This clause sets out the circumstances in which conveyances may be abandoned. This clause applies if:

- biosecurity measures have been required in relation to the conveyance under Part 2 of Chapter 4, or in any part of Chapter 6, and
- the conveyance is in the possession or control of the Commonwealth or a biosecurity industry participant authorised by an approved arrangement, and
- either the Director of Biosecurity receives a written notice from the owner of the conveyance stating that the owner does not wish to take possession of the conveyance, or the Director of Biosecurity has in writing, requested the owner of the conveyance to take possession of the conveyance within the specified period and the owner has not taken possession of the conveyance.

If these conditions apply, the Director of Biosecurity may request, in writing, for the owner of the conveyance to arrange for the conveyance to be dealt with, or destroyed, in a specified manner and time period.

If the conveyance has not been dealt with or destroyed, in the specified manner and time period, the Director may take possession of the conveyance and cause it to be sold under clause 610, destroyed or disposed of. The power to take possession and deal with an abandoned conveyance cannot be subdelegated below SES level (see clause 542 for delegation of powers), as the value of most conveyances necessitates a higher level of approval. Before exercising this power, a biosecurity official must be satisfied of the principles set out in clause 32.

Before the conveyance is sold, destroyed, or disposed of, the Director may cause the conveyance to be treated in an appropriate manner to manage any biosecurity risk associated with it. This clause also provides that the Director may cause the goods on board the conveyance to be

removed before the conveyance is destroyed. This recognises that the owner of the goods being carried on the conveyance may be a different person to the owner of the conveyance.

This clause provides the Commonwealth with the ability to dispose of conveyances in situations where the owner has abandoned them. This will ensure that these conveyances do not remain in the Commonwealth's possession indefinitely. When a conveyance is abandoned, the Commonwealth does not take ownership of it—the owner remains responsible for covering the costs of any treatment or biosecurity activities carried out after abandonment. The Commonwealth will be able to recover costs for these activities under Part 3 of this Chapter.

If a charge has been created on the conveyance to secure the payment of an unpaid cost-recovery charge that is due and payable, the conveyance may be dealt with under Subdivision C of Division 4 of Part 3 of this Chapter.

#### **Clause 630 Forfeited conveyances**

This clause sets out the circumstances in which conveyances may be forfeited. This clause applies if:

- biosecurity measures have been required in relation to the conveyances under Part 2 of Chapter 4, or in any part of Chapter 6, and
- the conveyance is in the possession or control of the Commonwealth or a biosecurity industry participant authorised by an approved arrangement.

This clause provides that a conveyance will be forfeited to the Commonwealth if the Director of Biosecurity has not been able to locate the owner of the conveyance, despite making reasonable efforts and has certified in writing to that effect. If the conveyance is forfeited to the Commonwealth, the Director of Biosecurity may cause the conveyance to be sold, destroyed, or otherwise disposed of. This power cannot be subdelegated below SES level (see clause 542 for delegation of powers), as the value of most conveyances necessitates a higher level of approval. Before exercising these powers, a biosecurity official must be satisfied of the principles set out in clause 32.

This clause also provides that the Director may cause the goods on board the conveyance to be removed before the conveyance is destroyed. Before the conveyance is sold, destroyed or disposed of, the Director may cause the conveyance to be treated in an appropriate manner to manage any biosecurity risk associated with the conveyance.

If a conveyance is forfeited, the Commonwealth will become the owner. This ensures that the Commonwealth can deal with the conveyance in the most appropriate manner. Similar to the abandonment provisions, the Commonwealth may use this forfeiture power to ensure that the conveyance is not left in the possession of the Commonwealth. Where conveyances are forfeited, the owner of the conveyance may be able to seek compensation under clause 27.

### **Division 3—Damaged and destroyed goods etc.**

#### **Clause 631 Person complying with direction or request must not damage or destroy goods**

This clause provides that a person who is given a direction or request to do something in relation to goods by the Agriculture Minister, the Director of Biosecurity, a biosecurity officer or a biosecurity enforcement officer, must not do anything that causes the destruction of or damage to the goods. A person who contravenes this clause is liable to a civil penalty. The maximum civil penalty for a contravention is 120 penalty units.

The person will not be liable to the civil penalty if he or she acted in good faith in doing the thing (or omitting to do the thing) that destroyed or damaged the goods, or if the destruction or damage was a reasonable or necessary result of complying with the direction or request. This clause is intended to prevent any unnecessary damage to or destruction of goods.

This clause does not apply to a biosecurity officer, a biosecurity enforcement officer, a chief human biosecurity officer, a human biosecurity officer or a person in charge of the goods. See also clauses 441 and 644 for protection from civil proceedings for Biosecurity Industry Participants and for Commonwealth and protected persons respectively.

### **Clause 632 Compensation for damaged goods**

This clause allows the Director of Biosecurity to approve the payment of compensation for goods damaged by a person in the course of performing functions or duties, or exercising powers, under this Act (see clause 634 for how a claim for compensation may be made). This clause is intended to allow compensation where, for example, a biosecurity officer accidentally damages goods during a routine inspection.

Compensation is not payable in relation to goods that are damaged as a result of treatment carried out under clause 133, 134, 335 or 336. This is because some treatments may cause damage to goods, but treatment is required to manage the biosecurity risk associated with the goods. A person that brings goods into Australian territory does this with the understanding that the goods may be damaged whilst they are subject to biosecurity control. If the Director does not approve the payment of compensation under this clause, the owner of the goods may be able to seek compensation under clause 27.

This clause provides an additional level of protection to goods brought into Australian territory, because less rigorous criteria apply to assessment and management of goods compared to premises or conveyances. This difference in approach is due to the comparatively low value and high volume of goods brought into Australian territory, and the need for an operationally viable mechanism for the assessment and management of goods. Compensation is not available in relation to conveyances or premises under this clause because Chapters 4 and 6 provide other protections in relation to them (for example, the criteria under clause 209 apply before a conveyance can be treated).

The owner of a damaged conveyance or premises may be able to seek compensation under clause 27 (compensation for acquisition of property).

### **Clause 633 Compensation for destroyed goods, conveyances or other premises**

This clause allows the Director of Biosecurity to approve the payment of compensation for goods, conveyances, or other premises (comprising buildings or other structures) destroyed under the Act. For example, payment of compensation may be considered where goods are accidentally destroyed during a routine inspection. Clause 634 provides for how compensation may be claimed.

Compensation will not be payable if the goods were prohibited or suspended goods, or conditionally non-prohibited goods and the conditions applying to the goods have not been complied with, as bringing in these goods would be in contravention of subclauses 185(1) or 186(1). Compensation will also not be payable in respect to goods that were subject to biosecurity control at all times between being brought in and destroyed, or aircraft or vessels that were subject to biosecurity control at all times between entering Australian territory and being destroyed. A person that brings goods or a conveyance into Australian territory does this with the understanding that there is potential for goods or conveyance to be destroyed whilst they are subject to biosecurity control if a biosecurity risk is found that cannot be managed by treatment. The regulations may prescribe exceptions to this, for example, they could allow the Director of

Biosecurity to approve compensation with respect to goods or conveyances subject to biosecurity control that were destroyed due to a biosecurity officer not acting in good faith.

Even if the Director does not approve the payment of compensation under this clause, the owner of the goods, conveyances or premises may be able to seek compensation under clause 27 (compensation for acquisition of property).

**Clause 634                      Claims for, and amount of, compensation**

This clause outlines who may make a claim for compensation, and how the claim must be made for goods, conveyances or premises ('compensable items') in relation to which the Director of Biosecurity may approve a payment of compensation under clause 632 or 633.

A claim for compensation must be made by, or on behalf of, the owner of the item within 12 months of the item being damaged or destroyed, and the claim must be in the form and be accompanied by any documents prescribed in the regulations. The amount of compensation is to be a reasonable amount prescribed by, or determined in accordance, with the regulations.

This clause provides that compensation for damaged goods, or destroyed goods, conveyances or other premises, is payable to the owner. For the purposes of this clause, owner means a person who, or a partnership which, had an interest in the goods, conveyance, or premises at the time of their damage or destruction. Owner does not include a person who had an interest in the goods, conveyance, or premises because he or she was entitled to the benefit of a mortgage or other charge in relation to the goods or premises, or a person who held a security interest within the meaning of the *Personal Property Securities Act 2009*, unless that person was in possession or control of the item at the time of damage or destruction. If there are two or more owners, the regulations will prescribe how compensation is to be divided among the owners.

**Division 4—Miscellaneous**

**Clause 635                      Privilege against self-incrimination**

This clause lists the provisions in which the privilege against self-incrimination is abrogated.

The Bill provides the person with immunity such that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court (known as 'use' immunity) or indirectly to gather other evidence against the person (known as 'derivative use' immunity). An exception to this is in relation to proceedings under or arising out of sections 137.1 or 137.2 of the *Criminal Code* or clauses 532 or 533 of this Bill (false and misleading information and documents).

For example, if conditionally non-prohibited goods were found without a permit during the inspection of a shipping container on an incoming vessel, a biosecurity officer may ask questions about them (using the power provided in clause 126). If the right to the privilege against self-incrimination applied, the person would legally be allowed to withhold self-incriminating information, such as details of other shipments of conditionally non-prohibited goods. However, as the privilege against self-incrimination is abrogated (that is, it does not apply) in relation to clause 126, the person in charge would be legally obliged to provide the information to the biosecurity officer. This self-incriminating information would not be admissible as evidence in court proceedings against that person. However, access to the information would mean that the biosecurity officer may be able to manage the biosecurity risk posed by the other shipments. If the person still did not provide the information, he or she would be liable to the penalty set out in clause 126.

The clause provides that except for the listed provisions, nothing in this Bill will affect the right of an individual to refuse to answer a question or provide information, on the grounds that the answer might incriminate himself or herself.

Given the potential seriousness of the biosecurity risk, biosecurity officers require timely access to documents and information offshore, at the border, and onshore to ensure that appropriate measures are in place to manage this risk. Upholding the privilege against self-incrimination in relation to individuals who have information regarding a potential biosecurity risk could have significant consequences such as reduced agriculture, fisheries, or forestry productivity, and increased costs associated with controlling pests and diseases. In addition, a disease outbreak has the potential to cause long term damage to the reputation of Australian industries and the reputation of Australia as a trading nation. Abrogating the privilege against self-incrimination in relation to these provisions will allow officers to effectively assess and manage biosecurity risks posed by pests and diseases to plant and animal health, the environment, and the economy of Australia.

Whilst in some cases it may be technically feasible to obtain information by other means that do not impinge on the right to the privilege against self-incrimination, the additional time taken to obtain the information may significantly increase the risk of a disease or pest entering, establishing or spreading to Australia, or within Australia. Assessing and managing biosecurity risk in such situations is a priority over the prosecution and resulting penalties for those involved. Abrogation of the privilege against self-incrimination will ensure assessment and management of biosecurity risks can occur as urgently as necessary, and reflects the magnitude of the potential impacts biosecurity risks pose to Australia.

Note that the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that the privilege against self-incrimination only applies to natural persons and does not extend to bodies corporate.

**Clause 636                      Offence—hindering compliance with the Act etc.**

This clause provides that a person must not engage in conduct that hinders or prevents another person from performing functions or duties, or exercising powers under the Act, or from complying with the Act or a direction given under the Act.

A person who contravenes this clause commits an offence and is liable to a civil penalty. The maximum penalty for a contravention is two years imprisonment, or 120 penalty units, or both. The maximum civil penalty for a contravention is 120 penalty units.

This provision is intended to ensure biosecurity officials and other authorised persons (such as biosecurity industry participants) are not hindered in performing their functions or duties or exercising powers under this Act to manage biosecurity risks.

**Clause 637                      Certificates given by analyst**

**Clause 638                      Admission of analyst’s certificate in proceedings**

Clause 637 allows the Director of Biosecurity to appoint a person to be an analyst for the purposes of the Act, who may give a written certificate stating certain matters (for example, results of the analysis of a substance or thing). The purpose of this certificate is to obtain an independent verification of an analysis that can be used as evidence, if any issue related to the analysis is considered by a court. The certificate may be given in relation to a number of matters, such as testing to determine what a particular pest or disease is, or what a particular good is made out of, or the analysis of a substance or thing. This certificate can be used to settle technical matters of

fact and be presented as evidence in any proceedings in relation to contravention of this Act. A certificate must be in a form approved by the Director.

Clause 638 outlines the process and procedures for issuing an analyst certificate. A copy of the analyst certificate and a notice of intention to use the certificate as evidence in court proceedings must be given to the person who is alleged to have contravened this Act (the defendant), or a legal practitioner who has appeared for the defendant in those proceedings, at least 14 days before the certificate is admitted as evidence in the proceedings.

The defendant may require the analyst who gave the certificate to be called as a witness for the prosecution or to be cross examined. However, an analyst can only be called for a witness for the prosecution if the prosecutor has been given at least four days notice of the defendant's intention to require the analyst to be called or the court, by order, allows the defendant to require the analyst to be called.

This clause makes clear that, for the purposes of this Act, a document purporting to be a certificate given under clause 637 is taken to be a certificate given in accordance with that clause, unless established otherwise.

**Clause 639                    Power or requirement to do or cause a thing to be done**

This clause provides that if a person has the power, or is required under the Act to do something, that person is taken to have done that thing if he or she causes someone else to do that thing on his or her behalf. If a person has the power or is required under the Act to cause or direct a thing to be done, the person is taken to have caused or directed the thing to be done as if the thing has been done by him or herself. This ensures that it is clear who is responsible and accountable for using powers or complying with directions under the Act.

**Clause 640                    Treatment of partnerships**

**Clause 641                    Treatment of unincorporated associations**

These clauses explain how the Bill applies to partnerships and unincorporated associations. They make clear that the Bill applies to a partnership or an unincorporated association as if they were a person, with certain changes to allow the application to be effective. A change in the composition of a partnership does not affect the continuity of the partnership. An obligation that would otherwise be imposed on a partnership or unincorporated association by this Act is imposed on each partner or member of the association's committee of management instead, but may be discharged by any of the partners or members. An offence is taken to have been committed by each partner or member at the time the offence was committed, who did the relevant act or made the relevant omission; or aided, abetted, counselled or procured the relevant act or omission; or was in any way knowingly concerned in, or party to, the relevant act or omission. The operations of these clauses also apply in the same way to the contravention of a civil penalty provision under the Act.

**Clause 642                    Arrangements with States and Territories to assist in carrying out this Act**

This clause allows the Agriculture Minister or Health Minister to enter into an agreement with a state or territory government for the purposes of the Act. This may include using a place (and the control and management of the place) in a state or territory, and making any necessary or convenient arrangements to help the Commonwealth, state and territory governments assist each other to do certain things for the purposes of the Act. If the Commonwealth is a party to any international agreements requiring certification of products for export, it may also include any matters necessary or convenient to assist authorities of a state or territory to enable or report on that certification.

This allows the Commonwealth, state and territory governments to work together on biosecurity or export certification activities. For example, an agreement may be entered into for the provision of biosecurity services by state biosecurity officers.

The Director of Biosecurity and the Director of Human Biosecurity may also enter into arrangements with state or territory bodies, for officers or employees of those bodies to be officers under this Act (see clauses 547, 549 and 564).

#### **Clause 643                    Delegation of powers by Agriculture Minister**

This clause allows the Agriculture Minister to delegate any or all of his or her powers and functions under the Act (and any regulations made under the Act) to the Director of Biosecurity, a SES employee, or acting SES employee in the Agriculture Department, except for those relating to the Minister:

- giving general directions to the Director of Biosecurity (under clause 543 in Chapter 10)
- making an arrangement with a state or territory (under clause 642 of this Chapter).

This may be required for practical reasons, for example, the Minister may delegate certain powers to the Director of Biosecurity, a SES or acting SES employee, when the Minister is required to focus on other portfolio responsibilities. It also means that some powers and functions may be exercised, upon subdelegation by the Director of Biosecurity, SES or acting SES employee, by certain Agriculture Department staff. Section 2B of the *Acts Interpretation Act 1901* defines SES employee and acting SES employee as having the same meanings as in the Public Service Act 1999. Clause 542 lists the powers that may be delegated by the Director of Biosecurity and subdelegated by the SES or acting SES employee. This ensures that decisions that require significant authority ultimately remain with the Agriculture Minister.

This clause also allows the Agriculture Minister to delegate his or her functions or powers under clauses 567 and 568 of the Act, to a person (the ‘Minister’s delegate’) who the Minister considers has appropriate qualifications or expertise to perform the function or exercise the power. For example, it is envisaged that the powers will be delegated to the Inspector-General of Biosecurity to assist in conducting reviews into the biosecurity system.

Clauses 567 and 568 relate to the Minister being able to review the performance of functions or exercise of powers by biosecurity officials under one or more provisions of the Bill, and to request a person to produce documents, answer questions or give written information relevant to such a review. The Minister’s delegate may, in writing, subdelegate the function of power to another person who the Minister’s delegate considers has the appropriate qualifications or expertise to perform this function or exercise this power, and who is responsible to the Minister’s delegate. This allows the most qualified person to conduct a review of biosecurity officials’ performance of functions and exercise of powers under the Act.

This clause does not apply to the delegations and subdelegations of functions and powers of the Agriculture Minister under Part 1 of Chapter 8 (biosecurity emergencies), as these are provided for under clauses 453 and 454 in Chapter 8.

In performing functions or exercising powers under a delegation under this clause, the delegate or subdelegate must comply with any directions of the Agriculture Minister or the person who made the delegation. The operation of this clause is consistent with the provisions on delegation under sections 34AA, 34AB and 34A of the *Acts Interpretation Act 1901*.



#### **Clause 644                      Protection from civil proceedings**

This clause provides that those exercising powers under the Act will have protection from civil proceedings. Civil proceedings involve legal disputes between individuals based on one person claiming that the other has failed in his or her legal duty. Protection from civil proceedings allows those required under the Act to make decisions and take action to manage biosecurity risk appropriately, to do so without the fear of being sued.

The clause provides that no civil proceedings lie against the Commonwealth or a ‘protected person’ in relation to anything done, or omitted to be done, in good faith:

- by a protected person in the performance or purported performance of a function, or the exercise or purported exercise of a power under this Act, or
- by a person, providing or purporting to provide assistance, information or documents to a protected person (as requested or directed by the protected person) in the performance or purported performance of functions, or the exercise or purported exercise of powers under this Act.

A protected person includes:

- the Agriculture and Health Ministers
- Director of Biosecurity
- Director of Human Biosecurity
- biosecurity officers
- biosecurity enforcement officers
- chief human biosecurity officers
- human biosecurity officers
- officers or employees of the Agriculture Department or the Health Department
- a person who is authorised to perform functions and exercise powers under Chapter 8 (biosecurity emergencies)
- a person appointed as an analyst under clause 637, and
- a person performing functions or exercising powers under clause 567 or 568 as a delegate or subdelegate of the Agriculture Minister.

The protection under this clause also extends to anything done by an animal used by a protected person in the performance or purported performance of a function, or the exercise or purported exercise of a power under this Act, to a person assisting a protected person (as requested or directed by the protected person), and to a person complying with emergency directions given under clause 446.

The term ‘in good faith’ means without malice or without intent to defraud. Protection from civil proceedings does not extend to criminal offences—for example theft or intentional destruction of documents or property.

This protection operates together with clause 27 (acquisition of property), clause 307 (about undue detention of vessel) and clause 326 (compensation for damage to electronic equipment). This means while people covered by this clause are protected from civil proceedings, their rights to seek compensation for undue detention of vessels, acquisition of property, or destruction of goods or premises are not limited.

Biosecurity industry participants will also have protection from civil proceedings if they are carrying out biosecurity activities in good faith and in accordance with their approved arrangement, as per clause 441 and clause 631.

**Clause 645                      Regulations**

This clause provides the ability for the Governor-General to make regulations prescribing matters required or permitted by the Bill, or necessary or convenient to be prescribed for carrying out or giving effect to this Bill. This will allow for more detailed and specific aspects of the Bill relating to the operation of provisions to be included in the regulations, instead of the Bill.

The regulations may also outline offences and penalties that will apply if the regulations are not complied with, however the maximum penalty that may be prescribed for an offence is 50 penalty units and for a civil penalty is 50 penalty units (or 250 penalty units for a body corporate). This ensures that disincentives are available for non-compliance with the regulations.

## ***Addendum to the Regulation Impact Statement on the Australian Government's biosecurity legislation***

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### **Regulation Impact Statement**

This Regulation Impact Statement (Reference 16609) has been approved by the Office of Best Practice Regulation.

#### *Introduction*

The Regulation Impact Statement (RIS) on the Australian Government's biosecurity legislation was finalised on 21 May 2014 and publicly released on 25 July 2014. Based on the analysis undertaken in the RIS, adopting the proposed biosecurity legislation was assessed as being the option with the highest net benefit and was the preferred option for government consideration.

This addendum describes how the government's policy has evolved since the finalisation of the RIS.

#### *Revisions to the biosecurity legislation based on government policy*

The Australian Government has committed to reducing unnecessary or inefficient regulation imposed on individuals, business and community organisations.

Several recent reviews and inquiries highlighted the importance of undertaking independent reviews of the department's biosecurity activities and risk management in order to maintain or improve the integrity of the biosecurity system as a whole. The position of the Interim Inspector-General of Biosecurity was administratively established in 2009.

The Interim Inspector-General of Biosecurity undertakes reviews of the biosecurity system. In bringing legislation forward, the government decided to continue the current administrative arrangements in line with the government's policy not to create an unnecessary statutory position. The role of the Interim Inspector-General of Biosecurity will remain and continue to provide constructive recommendations to improve Australia's biosecurity system.

There are clauses within the legislation that provide powers to review the system to allow for a level of external scrutiny. The Agriculture Minister may choose to delegate these powers to an appropriate person. These powers ensure access to the necessary information to appropriately review processes within the biosecurity system to allow for continual improvement in the assessment and management of biosecurity risk.

#### *Recommended policy response*

On the basis of the matters considered in this RIS and government policy, it is recommended that the government utilise the status quo approach for the Inspector-General of Biosecurity. The status quo option would maintain the role of the Interim Inspector-General of Biosecurity as an administrative position, which would maintain independent oversight of the biosecurity system whilst not creating unnecessary regulation. This conclusion is supported by consideration of the costs and benefits and effectiveness of the policy options available to the government.

## ***Regulation Impact Statement***

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The Regulation Impact Statement, entitled *Regulation Impact Statement Biosecurity Legislation* been assessed as adequate by the Office of Best Practice Regulation.

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## Glossary

ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
AQIS	Australian Quarantine and Inspection Service
Ballast Water Management RIS	A Regulation Impact Statement approved by the OBPR in May 2007
Business	In this Regulation Impact Statement, 'business' includes any private organisation that aims to make a profit (including sole traders), the commercial activities or transactions of not-for-profit organisations, and any government business enterprise
CIE	Centre for International Economics
Commonwealth, the	The Commonwealth of Australia
Compliance cost	A cost incurred by a business, individual or non-government organisation in order to comply with new regulations
Convention, the	International Convention for the Control and Management of Ships' Ballast Water and Sediments
department, the	Australian Government Department of Agriculture
FPoE	First Point of Entry
GDP	Gross Domestic Product
IGB	Inspector-General of Biosecurity
IMO	International Maritime Organization
NIMPCG	National Introduced Marine Pests Coordination Group
OBPR	The Office of Best Practice Regulation

Proposed biosecurity legislation	Refers to the draft Biosecurity Bill and the Inspector-General of Biosecurity Bill
PwC	PricewaterhouseCoopers
RIS	Regulation Impact Statement
QAP	Quarantine Approved Premises
Quarantine Act	The <i>Quarantine Act 1908</i>

## Executive summary

Australia's biosecurity system protects our unique environment and agricultural sector and supports our reputation as a safe and reliable trading nation. Biosecurity involves managing risks where there is a likelihood of a disease or pest entering Australia and establishing itself or spreading and potentially causing harm to human, animal, or plant health, the environment; or causing economic consequences. This has significant economic, environmental and community benefits for all Australians.

The *Quarantine Act 1908* ('the Quarantine Act') provides the legislative basis for human, plant and animal quarantine activities in Australia and provides a national approach to protecting Australia from pests and diseases.

Since the Quarantine Act was first drafted over a century ago, Australia's biosecurity risks have changed significantly. Shifting global demands, growing passenger and trade volumes, increasing imports from a growing number of countries, population expansion and changing pests and diseases all contribute to the need for better regulation. Australia's biosecurity system focuses on targeting what matters most with resources focused on stopping the pests and diseases that can cause the most harm from entering Australia. This approach targets risk where it is most effective to do so and reduces the burden on clients who comply with biosecurity rules for example allowing for faster clearance of their goods.

In this context, new legislation has been developed that aims to manage biosecurity risks more flexibly than the current legislation, whilst still ensuring a robust set of powers and mechanisms to protect Australia's unique biosecurity status and environment. The Biosecurity Bill and the Inspector-General of Biosecurity Bill, have been drafted to replace the Quarantine Act and associated legislative instruments.

The proposed biosecurity legislation is designed to reduce unnecessary red tape and provide a more flexible risk based approach to compliance which will assist with reducing costs and regulatory burden for clients and the department. By reducing unnecessary regulatory and administration burden, it is expected that biosecurity resources will be better focused on biosecurity risks that may cause the most harm and therefore the effectiveness of biosecurity risk management. It will reduce administrative burden, provide regulatory certainty in administering the legislation and allow for modern and efficient service delivery. This Regulatory Impact Statement (RIS) is focussed only on those parts of the proposed legislation that could be expected to generate substantive costs or benefits for businesses, individuals and the wider community, relative to the current situation.

It has been illustrated in this RIS that whilst the overall compliance costs on businesses results in a reduction of more than \$6.9 million, the compliance cost burden on some industry participants is estimated to increase. This is primarily through the increased regulation to manage the biosecurity risk associated with ballast water by domestic vessel movements.

This RIS builds on the analysis contained in the Ballast Water Management RIS undertaken in 2007 and the Biosecurity Legislation RIS undertaken in 2012.

This RIS concludes that the best course of action is adopting the proposed biosecurity legislation to replace the existing regulatory framework.



## Scope of this RIS

A RIS for the adoption of the proposed biosecurity legislation was approved by the Office of Best Practice Regulation (OBPR) in November 2012.<sup>10</sup> Prior to this, a RIS on ballast water management, a specific area of the proposed biosecurity legislation, was prepared separately and approved by OBPR in May 2007.<sup>11</sup> This RIS has been developed to address new government requirements and draw together information from the previous RIS' in a single document.

This RIS is based on the significant, and still relevant, consultation that occurred for the Ballast Water Management RIS in 2007, the biosecurity legislation development from 2009 to 2012 and the biosecurity legislation RIS in 2012. Specific stakeholder comments regarding the costs and benefits of adopting the proposed biosecurity legislation are incorporated into the document.

This RIS does not evaluate the need for government quarantine activities at Australia's border. This issue was addressed in two reviews, the *Australian Quarantine: A shared responsibility* (the Nairn review) in 1995 and *One biosecurity: a working partnership* (the Beale review) in 2008, which illustrate the nature of biosecurity risks to Australia, the potentially severe consequences should an incursion occur, and the need for government intervention.

This RIS focuses on the following parts of the proposed biosecurity legislation that will increase or mitigate regulatory burden.

- Approved arrangements
- The Quarantine Act allows industry participants and the Commonwealth to enter into a compliance agreement (s66B), authorising the industry participant to apply particular procedures to goods (i.e. treatments).
- The Quarantine Act then requires that each place where goods will be treated or dealt with is approved as a quarantine approved premise (QAP)(s46A).
- Ballast water management
- In May 2005, Australia signed the International Convention for the Control and Management of Ships' Ballast Water and Sediments (the Convention), subject to ratification.
- Implementing the Convention requires Australia to adopt a different system of ballast water management, where Australian vessels and foreign vessels in Australian seas are required to have a ballast water management plan, a ballast water management certificate and to keep ballast water records.
- Inspector-General of Biosecurity
- The Inspector-General of Biosecurity is a statutory body responsible for the independent review of Australia's biosecurity system. Decisions and systems will be regularly reviewed resulting in overall system improvements and provide greater confidence to stakeholders by establishing a clearly independent, statutory role to examine biosecurity functions and processes.
- First point of entry

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<sup>10</sup> The 2012 RIS is available at <https://ris.govspace.gov.au/files/2012/12/03-Biosecurity-Legislation-RIS-20121206.pdf>.

<sup>11</sup> CIE (2007) Ballast water management, A regulation impact statement, prepared for Department of Agriculture, Forestry and Fisheries by the Centre for International Economics Canberra & Sydney.

- The Quarantine Act currently requires overseas vessels and aircraft entering Australia to arrive at a first port of entry, currently listed in the *Quarantine Proclamations 1998*.
- The Quarantine Act allows the Governor-General to proclaim a port or a landing place as a first port of entry, which may include conditions or restrictions, (e.g. a port may be limited to receiving a specific class of goods, vessels or aircraft).

In most cases the proposed biosecurity legislation provides the enabling powers for government, with specific details around requirements, implementation and compliance to be included in regulations and administrative guidelines and processes.

There are also provisions within the proposed legislation where there will be neither an increase nor decrease in regulatory burden in comparison to the current legislation. These have not been discussed in this RIS.

## Context

Biosecurity is about managing risks in an environment characterised by the continual movement of living things and goods by natural and human processes. Australia's geographical isolation means our country is free from many harmful pests and diseases that exist in other parts of the world.

As globalisation continues to enable passenger and trade volumes to grow and as new products from a wider variety of countries become available, there will be increasing complexity in Australia's biosecurity risk management both in the marketplace and at the border. Effective biosecurity management requires activities offshore, at the border and within Australia.

The Australian Government is committed to maintaining Australia's favourable pest status, which is vital to the future of agricultural production in Australia. It is the role of the government to appropriately regulate importing industries to protect this status. A strong biosecurity system which underpins the production of pest and disease free quality produce, goods, commodities, food and the ability to market this produce, is integral to a profitable agriculture sector.

Australia's favourable biosecurity status underpins Australian exports as it makes Australian products more attractive to international markets. With the number of incursions of pests and diseases increasing, there is an increased demand from international trading partners for greater levels of assurance in relation to exports. In 2012–13, the value to Australia's economy from agriculture, fisheries and forestry production was over \$51 billion with more than 76 per cent (\$39 billion) exported.<sup>12</sup>

Preventing incursions of exotic pests and diseases not only contributes to our clean and green status, it also protects our local industries and economy, providing flow on benefits for businesses and farmers. It is difficult to measure the economic benefits generated by Australia's biosecurity status. However, recent estimates suggest that in the event of a large

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<sup>12</sup> ABARES 2013, *Agricultural commodities: September quarter 2013*, Australian Bureau of Agricultural and Resource Economics and Sciences, Canberra.

multi-state foot-and-mouth disease outbreak revenue losses of between \$49.3 billion and \$51.8 billion (in present value terms) may be experienced over 10 years.<sup>13</sup>

Our biosecurity status also prevents pests and disease from establishing in Australia that could threaten our human health and Australia's unique natural environment.

Much has changed since the Quarantine Act was written in 1908. International travel is rapid and routine, there are increasingly coordinated international efforts to respond to disease, and human rights have become paramount in domestic and international law. Today's public health system is much more sophisticated and has adapted to manage cases of disease, or exposure to disease.

An effective and adaptive range of biosecurity measures is therefore required to manage the public health risk posed by serious communicable diseases. It is also important that these measures are balanced with individual rights.

Managing biosecurity risk has become more challenging and complex with the level of risk having increased substantially. This has resulted in the need for a new approach to the management of biosecurity risks. For example, over the last decade aircraft passengers have increased by 80 per cent<sup>14</sup>, the number of sea containers imported has increased by 82 per cent<sup>15</sup> and bulk cargo imports are up 16 per cent.<sup>16</sup> In 2012-13, the Department of Agriculture assessed, screened, inspected and /or cleared approximately:

- 186 million international mail articles
- 16 million arriving international passengers
- 16 000 arriving international sea vessels
- 1.7 million sea cargo consignments
- 26 million air cargo consignments.

It is expected that these figures will continue to increase.

New biosecurity legislation, comprising the Biosecurity Bill and Inspector-General of Biosecurity Bill, was developed and released for public consultation in mid-2012.

The proposed biosecurity legislation provides an overarching legislative framework for managing biosecurity. Much of this framework is common, in practical terms, to the existing one or provides the ability to make more detailed regulations, and in isolation does not represent substantive change from current policy or practice.

The Biosecurity Bill is divided into chapters that deal with various aspects of biosecurity risk including:

- assessing and managing the risk of people, goods, aircraft and vessels entering Australian territory

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<sup>13</sup> ABARES (2013), *Potential socio-economic impacts of an outbreak of foot-and-mouth disease in Australia*.

<sup>14</sup> Bureau of Infrastructure, Transport & Regional Economics, 2013, *International scheduled traffic to/from Australia by financial year* ([https://www.bitre.gov.au/publications/ongoing/international\\_airline\\_activity-time\\_series.aspx](https://www.bitre.gov.au/publications/ongoing/international_airline_activity-time_series.aspx))

<sup>15</sup> Ports Australia (<http://www.portsaustralia.com.au>)

<sup>16</sup> Ports Australia (<http://www.portsaustralia.com.au>)

- monitoring for, responding to and controlling exotic pests and diseases that may be present within Australian territory
- voluntary arrangements between stakeholders and the department to share the responsibility of managing certain biosecurity risks
- managing biosecurity emergencies
- monitoring, investigation and compliance.

The Inspector-General of Biosecurity Bill creates the statutory position of the Inspector-General of Biosecurity to review the performance of functions and exercise of powers under the Biosecurity Bill.

Issues arising from the proposed repeal of the Quarantine Act and the subsequent transition to the Biosecurity Act will be addressed in the Biosecurity (Consequential Amendments and Transitional Provisions) Bill. This will ensure that biosecurity operations and the management of biosecurity risks can continue uninterrupted on and after the commencement of the Biosecurity Act.

### ***Managing biosecurity***

In Australia, the management of biosecurity is achieved through collaboration between the Australian Government, state and territory governments, industry participants and the wider community.

Australia's biosecurity system is based on a "risk based" approach to managing biosecurity risk. This approach focuses on the goods and entities that are assessed as being the highest risk and puts a greater emphasis on compliance.

This approach is the most effective and efficient way of managing biosecurity risk while facilitating the movement of goods and people across Australia's borders. High levels of compliance mean that government intervention can be kept to a minimum.

The Australian Government Department of Agriculture is responsible for managing plant and animal biosecurity risks offshore and at the national border, while state and territory governments have primary responsibility for managing pest and disease incursions onshore (i.e. past the national border). This partnership was formalised in 2012 when the Commonwealth and the states and territories (with the exception of Tasmania) signed the Intergovernmental Agreement on Biosecurity.

Other Commonwealth agencies who participate in the biosecurity system:

- The Department of Health is responsible for managing human health biosecurity risks offshore and at the border. It collaborates with state and territory government health agencies and other relevant agencies to develop maintain and provide direction for human health issues and policies to protect Australia from the introduction of serious communicable diseases.<sup>17</sup>
- The Department of Environment is involved in respect of matters about pests that affect Australia's unique environment and to ensure a strategic, effective and consistent approach is used to manage environmental threats.

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<sup>17</sup> Department of Health and Ageing, 'Annual Report, Outcome 14 – Biosecurity and Emergency Response', <http://www.health.gov.au/internet/annrpt/publishing.nsf/Content/annual-report-0809-toc~0809-2~0809-2-3~0809-2-3-14>.

- The Department of Immigration and Border Protection have shared responsibility with the Department of Agriculture to regulate and control movement into and out of Australia of people, cargo and vessels at airports, sea ports and mail centres.

### Scope of the problem

Biosecurity risks are changing and in the future Australia's biosecurity system will need to adapt and respond to:

- increasing volume of products and passengers travelling internationally, and the consequential risk of pests and diseases entering Australia
- more frequent severe weather events due to climate change assisting the spread of pests and disease, and changing environmental conditions making it easier for some species to establish in Australia
- decreasing boundary between urban, rural and natural environments making pest and disease management more complicated.

The Quarantine Act has provided for the protection of Australia's biosecurity system and has served successive governments well. However, it has been amended more than 50 times, is not aligned to modern business realities, and has become complex and outdated meaning it is difficult for clients to understand and comply with and for the department to administer efficiently. Issues with the Quarantine Act include:

- Duplication and overlapping powers – there are ten different powers to order goods into quarantine. This causes confusion for importers and others seeking to do the right thing and comply with the requirements of the Quarantine Act.
- Over regulation – the overregulation and lack of flexibility can make it difficult for the Commonwealth to attract some types of partnerships with industry members to manage their own biosecurity risks. This is due to the current arrangements not reflecting the operation and structure of their business. This is particularly true for larger companies with streamlined supply chains and end-to-end processes who may be subject to multiple agreements to cover their operations.
- Lack of civil penalties – limited powers to address the risk posed by people or companies that repeatedly breach the Quarantine Act.
- Limited clarity around first points of entry – all overseas vessels must enter a first point of entry or a proclaimed port, however within the Quarantine Act there is no transparent process for how ports come to be proclaimed or how they can be removed from the list.

Further, there are limited powers in the Quarantine Act that allow for the management of invasive pests onshore. The Commonwealth tends to rely on varying powers in state and territory legislation which are inconsistent and may be insufficient to manage invasive pests effectively. Invasive pests have the potential to significantly reduce farming production, diminish quality of produce and increase pest management costs. For example, the Commonwealth, state and territory governments are working towards the eradication of red imported fire ants. From 2001 to 2012, governments have collectively spent \$411 million (real 2012 dollars) controlling this invasive environmental pest in south-east Queensland.<sup>18</sup>

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<sup>18</sup> Hafi A, Spring D, Croft L, Kompas T & Morey K, 2013, *Cost-effectiveness of biosecurity response options to red imported fire ants in South East Queensland*, ABARES report to client prepared for the National Biosecurity Committee, Canberra, June.

In addition, under the current regulatory framework Australia cannot give effect to the International Maritime Organization's Ballast Water Management Convention it signed in 2005. Should the Convention be ratified Australia will not be able to implement this Convention.

## **Objectives**

The Australian Government is committed to supporting a vibrant, innovative and competitive agricultural sector. Maintaining a strong biosecurity system is vital and it protects farmers from incurring higher costs of production and/or loss of markets, both domestically and internationally.

The Australian Government is committed to reducing unnecessary regulatory and administrative burden on users of the biosecurity system, whilst still ensuring a robust set of powers and mechanisms to protect Australia's unique biosecurity status and environment.

In order to meet these commitments Australia's biosecurity system needs:

- to manage Australian biosecurity risks to an acceptable level and subsequently manage the impact associated with biosecurity incidents (such as the introduction of pests and diseases into Australia)
- to maximise the economic efficiency of the management of biosecurity risks
- greater legislative coverage and coordination between state and territories and the Commonwealth for combating incursions of pests and diseases within Australia during an outbreak, for example, of avian influenza or an incursion of Asian gypsy moth
- flexibility and the provision of regulatory certainty to businesses, industry and government
- greater shared responsibility between the Australian, state and territory governments, and between government, business and the wider community.

## **Options**

Three options have been explored to address the scope of the problem with the Quarantine Act and meet the objectives of the Australian Government. These options are:

### ***Option one: maintain the status quo***

The status quo involves maintaining the current regulatory approach, which is the Quarantine Act and associated subordinate instruments. For the purposes of analysis for this RIS, the status quo is assumed to maintain:

- industry participants partnership arrangements administered under two separate sections in the Quarantine Act (sections 46A and 66B)
- the current approach to designating first ports of entry, whereby overseas vessels must enter Australia at a first port of entry proclaimed under the Quarantine Act
- the current governance arrangements
- limited powers in post-border space
- a rigid enforcement regime with only the ability to undertake criminal prosecution.

### ***Option two: new biosecurity legislation***

The proposed biosecurity legislation would replace the century old Quarantine Act and aims to create a responsive and flexible operating environment. It is based on five key themes; managing risk effectively, improving productivity, strengthening partnerships, sound administration, increased transparency.

The proposed new legislation will allow for better management of the risks of animal and plant pests and diseases entering, establishing and spreading in Australia and potentially causing harm to people, the environment and the economy. The proposed biosecurity legislation will:

- reduce complexity and provide certainty, making it easier for the Commonwealth to regulate and for stakeholders to understand their obligations (i.e. by removing duplicative provisions and clarifying powers)
- introduce new powers to address all biosecurity risks, including the risks posed by ballast water and new onshore powers
- have powers to more effectively penalise people and entities that breach biosecurity laws and prevent them from gaining approvals to undertake activities without Commonwealth supervision (i.e. range of penalty options; fit and proper persons test; associates test)
- reduce regulatory burden for some businesses and people who do the right thing and target resources to the areas of highest risk (i.e. whole of supply chain approved arrangements, service delivery).

### ***Option three: no regulation or self regulation***

This option would involve no government biosecurity controls and no measures to mitigate biosecurity risks to Australia.

A ‘self regulation’ option would involve industry participants leading risk mitigation measures and taking responsibility for managing these risks. As self regulation measures can have no legal basis, their success relies on there being sufficient incentive to business to act in a way that mitigates risk (such as potential loss of revenue). However, market forces are not sufficient incentives for businesses to mitigate and appropriately manage many of the biosecurity risks as they may limit their management activities to identifying and preventing harm to their own business rather than identifying and preventing harm to other industries, the Australian environment and public health.

No regulation or a reliance on self regulation is not the preferred option as it fails to adequately manage biosecurity risk. For this reason this option is not addressed in the impact analysis and compliance costs chapter.

### **Impact analysis and compliance costs**

This section will examine the costs and benefits of the two feasible options presented in the Options chapter: maintaining the status quo, and adopting the proposed biosecurity legislation. It also estimates the compliance costs of the proposed legislation compared to business as usual under the current legislation.

This chapter is divided into the following subheadings:

- Approved arrangements
- Ballast water management
- Inspector-General of Biosecurity
- First points of entry

These subheadings represent the areas of the proposed legislation that will either impose a cost or result in savings for businesses, individuals and the wider community.

There are several minor impacts associated with the proposed legislation which are qualitatively described in [Appendix A: Minor impacts of adopting the proposed biosecurity legislation](#).

### ***Approved Arrangements***

#### *Nature of the problem*

The Quarantine Act requires that quarantine related activities are performed by officers or under their direct supervision. Sections 46A and 66B of the Quarantine Act create an exemption where approved industry participants can voluntarily enter into arrangements with the Commonwealth to perform some of these functions themselves.

- Section 46A: allows the Director of Quarantine to approve a premise for the purpose of receiving, storing and dealing with goods subject to quarantine, referred to as a quarantine approved premises (QAP).
- Section 66B: allows the Director to enter into a compliance agreement with an industry participant, which requires the participant to perform specific tasks in relation to goods that are subject to quarantine in an agreed manner.

These partnerships allow the responsibility for management of biosecurity risks to be shared between government and industry participants. The industry participant may choose to enter into an arrangement and perform particular biosecurity activities themselves, if they conclude there is a benefit in doing so (such as savings in time and money).

In practice, some industry participants that enter into an arrangement are required to seek a QAP approval for each location where they operate. Some may also be required to enter into one or more compliance agreements to cover their different biosecurity activities. The complexity and duplication caused by the overlapping schemes creates an unnecessary regulatory burden for industry participants and imposes a significant administrative burden on the department. It can also hinder the Commonwealth from taking into account different business systems that already exist within industry, even though they may achieve the desired result of managing biosecurity risks.

The overregulation and lack of flexibility can also make it difficult for the Commonwealth to attract some types of partnerships with industry members to manage their own biosecurity risks, because the current arrangements do not reflect the operation and structure of their business. This is particularly true for larger companies with streamlined supply chains and end-to-end processes.

Current levels of industry participation mean that responsibility for protecting Australia's international borders primarily falls on the Commonwealth, which can increase the risk of 'moral hazard'. Moral hazard occurs when an individual or organisation is insulated from a risk or does not bear the cost of a risk occurring. Consequently the individual or organisation



behaves differently, with a tendency to act less carefully than they otherwise would to mitigate the risk (as they have less incentive to work to reduce the probability of the risk occurring). For example, a company that imports goods may not adequately ensure the packaging for their goods contains no pests or disease before it enters Australia, because the responsibility for checking the goods falls on the Commonwealth.

This issue with the Quarantine Act was noted in a submission from the Quarantine and Exports Advisory Council to the Beale review, stating:

“The responsibility of managing risk should not be a sole AQIS responsibility but be spread across corporate Australia. There should be a legislative mechanism to ensure corporate Australia and importers take responsibility for managing the risk by ensuring appropriate systems and procedures are in place.”<sup>19</sup>

The expected increase in the volume of goods, aircraft, vessels and people coming into and out of Australia means the pressure on the Commonwealth will continue to increase in the future. It is therefore in the Commonwealth’s interests to seek out better and more productive working relationships with industry to share the responsibility for managing Australia’s biosecurity risks.

#### *Why the change is being proposed?*

Under the new biosecurity legislation it is proposed that the QAP and compliance agreement sections of the Quarantine Act are merged into a single approved arrangements scheme, covering both premises and the activities undertaken to manage biosecurity risks.

Industry members would be able to make a single application to enter into one arrangement with the Commonwealth that covers all of their business locations and activities. This removes the current complexity and duplication in the Quarantine Act, reduces the unnecessary regulatory burden experienced by industry and allows the Commonwealth to better recognise business practices that can meet Australia’s biosecurity requirements through other means.

By encouraging more industry members to share the responsibilities for managing biosecurity risks, the approved arrangements process can also help reduce the ‘moral hazard’ risk discussed above.

#### *Options to address the problem*

##### *Option 1: maintain the status quo*

Under the Quarantine Act, some QAPs and compliance agreements are already in place that achieve, to some extent, the benefits of partnerships between industry participants and the Commonwealth. However, a number of aspects of the current arrangements are sub-optimal and do not achieve the full potential benefits or participation levels possible from these types of partnerships. For example, the two schemes can overlap and contain duplicative and unnecessarily complex processes. This means that some large importers are subjected to unnecessary levels of regulation and administrative complexity in order to take advantage of partnership arrangements.

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<sup>19</sup> Quarantine and Exports Advisory Council submission to the Beale review, p.3.

The duplication between the schemes and the complexities that can be involved in seeking an approval or entering into an arrangement can mask some of the potential advantages industry members perceive in having an arrangement. As a result, they are less likely to enter into an arrangement, their expertise is not being utilised and there may be higher costs to participants and government because biosecurity activities are instead being performed by the Commonwealth as an additional activity and not built into existing processes.

Continuing the current legislation would lead to the continuation of these problems and therefore is not considered optimal and may lead to issues which inhibit biosecurity risk management.

*Option 2: adopt the proposed biosecurity legislation*

The proposed approved arrangement provisions will consolidate the existing QAP and compliance agreements provisions into a single approved arrangement scheme. This will remove the unnecessary complexities and administrative burden, broaden the scope and flexibility of the types of arrangements that can be entered into between industry and the Commonwealth and better enable businesses to enter into an agreement that reflects the operation and structure of their business.

This option is preferred as it enables improved partnerships between industry and government, leading to better biosecurity risk management outcomes.

By reducing unnecessary regulatory and administration burden, it is expected that biosecurity resources will be better focused on biosecurity risks that may cause the most harm and therefore the effectiveness of biosecurity risk management.

*Compliance costs on business*

QAP and compliance agreements are voluntary under the Quarantine Act and would continue to be so under the proposed biosecurity legislation. Therefore, any costs associated with these arrangements are incurred voluntarily by businesses.

Industry participation is most beneficial where participants have an advantage over government in providing a particular service or facility and can save time and/or money by performing an activity themselves. For example, where industry participants are able to undertake activities that meet the Commonwealth's biosecurity requirements as part of their usual business processes, they can avoid the need for and cost of supervision by a biosecurity officer at that stage.

Participation in the proposed approved arrangements can occur through businesses transitioning from QAPs or compliance agreements to approved arrangements and from new partnerships being entered into when businesses see a net benefit. It is also possible that some businesses will choose not to continue in partnership and will decide not to apply for an approved arrangement where it is not advantageous to do so.

### *Benefits and costs to business transitioning to approved arrangements*

Under the proposed biosecurity legislation, businesses that are transitioning to an approved arrangement benefit from a reduction in the administrative costs faced each year, particularly when going from many arrangements to one. This is particularly the case where a business currently has to hold several agreements to cover their operations, such as multiple QAPs and compliance agreements. Currently, businesses must renew a QAP each year, completing a full application in order to do so. Compliance agreements are renewed regularly up to a maximum of every three years. Under the proposed approved arrangements, the department can move away from yearly renewals to a model where renewals are required less frequently. This can result in substantial administrative cost savings to businesses.

Businesses are also anticipated to benefit from reduced audit frequencies under the proposed legislation. Currently, QAPs are audited at least twice a year and compliance agreements similarly. Under the proposed legislation it is expected that the average business will be audited approximately once a year (Note: audit frequencies will ultimately depend on a range of factors including compliance and performance, and audit rates cannot be guaranteed).

During the transition to approved arrangements, it is likely that businesses will not face any substantial additional costs. The full operational details of the application processes, (such as the required content and supporting documents), and training requirements are currently being developed. However, transitioning businesses are likely to have much of the relevant documentation already at hand and will have previously completed relevant training. If current QAP arrangements with the department meet the requirements in the legislation for an approved arrangement, it is likely that they will be able to continue as an approved arrangement under the proposed biosecurity legislation. (Note: each arrangement will be considered on its individual merits, so approval cannot be guaranteed).

Compliance costs were discussed from a qualitative perspective with stakeholders and clients during the consultation process. This was due to the variety of participating clients, the number of existing agreements and the fact that approved arrangements are voluntary. Some stakeholders did indicate, during the consultation process, their preference to move to approved arrangements based on potential financial gains. The approved arrangements provisions also received very few opposing comments during the consultation. Based on this it seems likely that most businesses currently under QAPs or compliance agreements will apply to continue their arrangement with the Commonwealth through the proposed approved arrangements scheme in order to continue the financial benefits of the partnership.

This includes:

- companies with a single QAP or compliance agreement that will transition to an approved arrangement
- companies with multiple QAPs and/or compliance agreements that will transition to an approved arrangement
- benefits to business transitioning from single agreement.

Businesses with a single QAP or compliance agreement will benefit when transitioning to the proposed approved arrangements scheme. Based on 2014 departmental statistics and trends, there are nearly 1 600 businesses that are expected to transition to an approved arrangement from either a single QAP or compliance agreement. Noting the voluntary nature of approved arrangements only a few stakeholders provided feedback on the opportunities for regulatory

burden reduction and the decreased overall costs to industry during the general consultation undertaken in 2012. Under the proposed legislation, these businesses will have an overall reduction in regulatory cost of just over \$1.2 million a year averaged over ten years, compared to the status quo (Table 1).

**Table 1 Average annual compliance costs for businesses transitioning from single agreements**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost under proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	2 031 022	1 025 689	-1 005 333
Substantive compliance	502 387	231 358	-271 028
<b>Total average annual compliance costs</b>	<b>2 533 409</b>	<b>1 257 048</b>	<b>-1 276 361</b>

Note: Based on costs of an average business with a quarantine approved premises or compliance agreement under the current legislation. Under the proposed legislation, it is expected that 1 598 businesses with single agreements will transition to an approved arrangement. The majority of businesses will transition to approved arrangements during the first year following the Biosecurity Act's commencement, and all transitions must be finalised within 18 months. Those businesses that take the additional six months to transition may have a small delay in the realisation of the benefits under the proposed biosecurity legislation, which will have a negligible impact on overall costs. Costs have been averaged over ten years and do not include any delayed benefit for particular businesses.

Data source: Department statistics

*Benefits to business transitioning from multiple agreements*

Currently, in order to enter a partnership with the department, some businesses need to hold several agreements with the Commonwealth to cover their entire operations. The effects of the proposed biosecurity legislation can be explored by looking at an average business that has multiple agreements, on average such a business will have five QAPs and one compliance agreement under the Quarantine Act (Box 1).

**Box 1: Average business transitioning from multiple agreements**

Company A is a large business based in Sydney that imports a range of food and plant products into Australia before distributing its products to customers. Company A has entered into partnership agreements with the Commonwealth to reduce its costs by managing some of the biosecurity risk posed by the imported goods itself. Under the current legislation, the company has to hold multiple agreements – five QAPs to allow the receiving, storing and dealing with goods subject to quarantine; and one compliance agreement to allow the transport of these goods between ports and the QAPs.

Company A faces ongoing administrative costs to maintain its agreements. It has to renew each QAP annually and its compliance agreement every three years. Company staff undertake reaccreditation training each year as part of the agreement conditions. Each QAP and the compliance agreement are audited twice a year to ensure biosecurity risks are being managed appropriately.

Under the proposed biosecurity legislation, Company A would only require one agreement with Commonwealth – an approved arrangement. Company A has a history of complying with the legislation and has biosecurity risk management controls in place throughout its supply chain to manage the biosecurity risks associated with the goods it imports. As a result it is approved to transition to an approved arrangement.

Company A faces minimal cost to transition to an approved arrangement as it already has documents demonstrating its biosecurity risk management systems and has met training requirements. It then has reduced ongoing administrative costs under an approved arrangement, primarily as a result of not having to renew its agreements as frequently.

Table 2 shows the benefits to Company A of transitioning to an approved arrangement under the proposed biosecurity legislation. Over ten years, Company A saves an average of \$8 986 a year by transitioning to an approved arrangement.

**Table 2 Average annual compliance costs for Company A**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost under proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	8 035	642	-7 393
Substantive compliance	1 737	145	-1 593
<b>Total average annual compliance costs</b>	<b>9 773</b>	<b>787</b>	<b>-8 986</b>

Note: Company A is an average company with five quarantine approved premises and one compliance agreement under the current legislation. Under the proposed legislation, Company A can transition to a single approved arrangement. Costs have been averaged over ten years.

Data source: Department statistics

Based on 2014 departmental statistics of the number of businesses with multiple agreements and the average annual revocation of agreements, it is expected that 704 businesses holding multiple agreements will seek to transition to an approved arrangement. As the arrangements are voluntary it is assumed businesses would seek their lowest cost option. Overall these businesses will be better off by an average \$6.9 million a year over ten years (Table 3). This reduction in compliance costs is a result of lower administrative costs through reduced frequency of application renewals and audits.

**Table 3 Average annual compliance costs for businesses transitioning from multiple agreements**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost under proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	6 146 997	451 868	-5 695 129
Substantive compliance	1 329 080	101 925	-1 227 155
<b>Total average annual compliance costs</b>	<b>7 476 077</b>	<b>553 793</b>	<b>-6 922 284</b>

Note: Based on costs of an average business with five quarantine approved premises and one compliance agreement under the current legislation. Under the proposed legislation, it is expected that 704 businesses with multiple agreements will transition to a single approved arrangement. The majority of businesses will transition to approved arrangements during the first year following the Act's commencement, and all transitions must be finalised within 18 months. Those businesses that take the additional six months to transition may have a small delay in the realisation of the benefits under the proposed biosecurity legislation, which will have a negligible impact on overall costs. Costs have been averaged over 10 years and do not include any delayed benefit for particular businesses.

Data source: Department statistics

#### *Costs to business not transitioning*

Under the proposed legislation, some businesses may decide not to apply for an approved arrangement and instead let their approvals and agreements with the Commonwealth lapse. As a result, these businesses would no longer be able to manage their own biosecurity risks and would instead face the standard operational costs associated with inspection by department officers. However, given the large commercial benefit of having an arrangement, it is likely that only businesses who no longer receive that commercial benefit anymore (for example, they have changed their business structure) will decide to not apply for an arrangement under the proposed biosecurity legislation.

#### *New opportunities for business*

The new arrangements will improve the application process and make the scheme more attractive and will also clarify the requirements to have an arrangement for industry members, making the potential benefits for industry clearer and encouraging more to apply if they see a benefit to doing so.

The improved flexibility of approved arrangements is likely to encourage more industry members to apply. This applies in particular to larger industry participants that control the whole of supply process for their commodity or product that would have found it difficult to match the duplicative and more restrictive provisions under the Quarantine Act to their modern business practices. However, smaller industry participants are also expected to benefit under the proposed biosecurity legislation.

It is reasonable to assume that businesses who do not currently have a partnership agreement with the Commonwealth will apply for an approved arrangement in cases where they believe there is a net benefit from doing so (over a reasonable timeframe for investment) and they can effectively manage biosecurity risks using their own systems. This would not occur if an industry participant thought that moving to a broader arrangement under the new model would be too costly or not deliver the benefits in the long term to justify the implementation costs.

The following scenario gives an indication of the types of benefits a larger importing company may see under the proposed biosecurity legislation (Box 2).

**Box 2: Example of large importer entering an approved arrangement**

Company B is a large importer of goods, which it has been importing into Australia for many years without any breaches of the Quarantine Act. On average Company B imports 20 000 containers each year. The goods that Company B imports pose a potential biosecurity risk to Australia. Under the Quarantine Act, these containers are subject to inspection and screening by quarantine officers on arrival, regardless of the company's compliance history or the biosecurity controls it has in place. While the containers are being inspected, Company B faces expenses for container hire, wharf fees and other cargo-based costs.

Company B could conduct its own inspections of the containers, and hence reduce its costs, by entering into a partnership arrangement with the Commonwealth. However, under the current legislation Company B would need to hold multiple QAPs approvals and compliance agreements in order to cover its entire supply chain. The duplication, complexity and administrative burden in these processes, (and the costs associated with them), reduce the potential benefits that could be realised by Company B and deters the company from entering into a partnership with the Commonwealth. This means the expertise that Company B holds in managing biosecurity risk is not utilised and Company B does not reduce the costs accrued while its containers are being inspected.

Under the proposed biosecurity legislation, Company B would only require one agreement with the Commonwealth – an approved arrangement. The company can clearly understand and assess the potential benefits of an arrangement and chooses to apply for one. As the company has a history of general compliance with the legislation and has biosecurity risk management controls in place throughout its supply chain to manage the biosecurity risks associated with the goods it imports, it is approved.

Under an approved arrangement, Company B can inspect its own containers for biosecurity risks. This can be done as part of its existing processes and therefore presents a reduced cost compared to the inspections being conducted by a biosecurity officer. It is likely some containers will still be inspected at random by biosecurity officers to confirm that biosecurity risks are being managed appropriately.



Table 4 shows the benefits to Company B under the proposed biosecurity legislation compared to business as usual. Under the proposal, Company B is better off by around \$19 000 a year averaged over ten years.

**Table 4 Average annual compliance costs – example of a large importer**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost under proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	0	627	627
Substantive compliance	25 000	5 246	-19 754
<b>Total average annual compliance costs</b>	<b>25 000</b>	<b>5 874</b>	<b>-19 126</b>

Note: Company B imports 20 000 containers. Under the current legislation, Company B is deterred from entering an agreement with the government because the current system is not suited to their business structure and would result in large administrative costs. Under the proposed biosecurity legislation, Company B can enter an approved arrangement that covers their entire supply chain and as a result faces lower cargo-based expenses. Costs include administrative costs and cargo-based expenses and are averaged over ten years.

Data source: Department and industry statistics

*Approved Arrangements overall compliance costs*

Under the proposed biosecurity legislation, the compliance cost burden on industry is estimated to be reduced by at least \$8.2 million a year averaged over ten years (Table 5). This is the benefit to transitioning businesses, primarily through reduced administrative costs from lower renewal frequencies. It is expected that the actual savings to business will be even higher as more businesses are likely to be attracted to enter a partnership with the department. This estimate is based on general feedback received during the consultation undertaken in 2012.

**Table 5 Average annual compliance costs for existing businesses – approved arrangements**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost under proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	8 178 019	1 477 557	-6 700 462
Substantive compliance	1 831 467	333 284	-1 498 183
<b>Total average annual compliance costs</b>	<b>10 009 486</b>	<b>1 810 841</b>	<b>-8 198 645</b>

Note: Based on costs of businesses with a quarantine approved premises, compliance agreement or multiple of these under the current legislation. Under the proposed biosecurity legislation, it is expected that around 2 300 businesses with single or multiple agreements will transition to an approved arrangement. It is likely that more businesses will seek an agreement for the first time under the proposal, which will reduce the net cost to business further. Costs have been averaged over ten years.

Data source: Department statistics

*Regulatory benefit of approved arrangements*

The proposed biosecurity legislation broadens the responsibility for biosecurity risk management, leading to better outcomes for business and Australia’s biosecurity risk management. It builds on and expands the existing benefits to the Commonwealth and industry members by improving partnerships to manage biosecurity risk and allowing industry to contribute to managing biosecurity risk in return for a commercial advantage. As well as better risk management outcomes, the proposed biosecurity legislation is also likely to reduce the costs of compliance for industry participants, largely through reduced administrative burden. By reducing unnecessary regulatory and administration burden, it is expected that biosecurity resources will be better focused on biosecurity risks that may cause the most harm and therefore the effectiveness of biosecurity risk management.

Currently, some industry participants are required to hold multiple approvals and agreements with the Commonwealth. These can be rolled into one approved arrangement process covering the different locations and biosecurity activities being conducted by an industry participant, thereby reducing costs. Further, businesses may experience less disruption to their business processes as the audit and compliance program could be aligned with a single approved arrangement, rather than having multiple audits for multiple existing agreements. Both existing and prospective businesses will benefit through lower compliance costs as a

result of the simplified application and renewal process for arrangements under the proposed biosecurity legislation.

## **Ballast water management**

### *Nature of the problem*

Ballast water is carried in vessels to maintain safety and stability at sea. It is vital to most cargo loading and unloading activities. Vessels take up or discharge ballast water to compensate for change in cargo and fuel loads or weather conditions.

When ballast water is taken up, marine organisms can be picked up with it and then released when the ballast is discharged. Because of this, ballast water is recognised as a major source of the spread of marine pests around the world, including pests such as bacteria, microbes, small invertebrates, eggs, cysts and larvae of various species. It has been estimated that 10 000 different species are moved around the world in ballast water tanks each day.<sup>20</sup>

Introduced marine pests can cause serious environmental and economic damage. For example, an invasion of comb jelly in the Baltic Sea led to the collapse of most of the region's fishing industries, valued at an estimated \$US500 million a year.<sup>21</sup> In Australia, the Northern Pacific seastar was introduced to Tasmania through ballast water from Japan in the 1980s and into Victoria through ballast water in the 1990s.<sup>22</sup> It has reduced shellfish production in Tasmania and damaged marine ecosystems in both locations.

The biosecurity risks associated with ballast water can be managed by the vessel using fresh water, conducting a ballast water exchange or using a ballast water treatment system. Fresh water as ballast water has a low risk of introducing marine pests. Ballast water exchange reduces the likelihood that coastal aquatic species will be transferred to a new area, as the ballast water is discharged by replacing ballast water (usually coastal water taken up at a port) with deep ocean or open sea water during a voyage. A ballast water treatment system treats ballast water onboard to reduce risk, and includes systems using ultraviolet radiation or chemicals.

Commonwealth powers to manage biosecurity risks associated with ballast water are currently contained within section 78A(3)(a)(ii) of the Quarantine Act, which allows for a direction to be given in relation to the storing, discharging, or treating of ballast water; and section 78(3)(a)(iv), which allows for a direction to be given in relation to an exchange of ballast water. Section 22 of the *Quarantine Regulations 2000* also details the record keeping requirements for vessels that are capable of discharging and exchanging ballast water.

Australia has taken a lead role in seeking international measures to manage the biosecurity risk posed by ballast water, first raising the issue at the International Maritime Organization (IMO) in 1991. After negotiations between IMO member states, the *International Convention for the Control and Management of Ships' Ballast Water and Sediments* (the Convention) was adopted in 2004. The Convention has been developed to provide a global framework for countries to prevent, reduce and control the harm caused to the marine environment by invasive marine pests contained in ballast water (and ballast water sediment).

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<sup>20</sup> Low T. (ed) 2003, *Ballast Invaders: the Problem and Response*, prepared for Invasive Species Council.

<sup>21</sup> *Ibid.*

<sup>22</sup> Ronald E. Thresher (1999) Diversity, Impacts and Options for Managing Invasive Marine Species in Australian Waters, *Australian Journal of Environmental Management*, 6:3, 137-148.

Australia signed the Convention, subject to ratification, in May 2005 and as a signatory is obliged to refrain from actions that would defeat the object and purpose of the Convention. The Convention will enter into force and become mandatory 12 months after it is adopted by 30 countries representing 35 per cent of the world merchant shipping tonnage. As of 9 January 2014, the Convention had been adopted by 38 countries representing just over 30 per cent of world merchant shipping tonnage.

The proposed biosecurity legislation implements the majority of the Convention by introducing stricter ballast water management requirements than currently in place under the Quarantine Act. The proposed biosecurity legislation will need to be amended to fully implement the Convention when it is ratified. Until the Convention comes into force, a more flexible transitional scheme will be in place that allows vessels to meet the requirements of the proposed biosecurity legislation through ballast water exchange and it will not be mandatory for all vessels to have a ballast water treatment system. This gives business the flexibility to choose their most cost-effective option to meet the requirements.

#### *Why the change is being proposed?*

In order to implement the Convention, Australia needs to adopt a different system of ballast water management to manage all ballast water – not just international ballast water – and place particular requirements on all vessels capable of carrying ballast water. The current drafting of the Quarantine Act does not clearly support the implementation of the Convention and it would most likely need extensive structural reforms to give full effect to its requirements.

#### *Options to address the problem*

##### *Option 1: maintain the status quo*

As outlined above, the current legislation cannot fully give effect to Australia's international obligations under the Convention. While sections 78A(3)(a)(ii) and (iv) of the Quarantine Act allow quarantine officers to direct vessels for the management of their ballast water, this only applies in relation to international vessel arrivals and does not cover domestic ballast water. Similarly, section 22 of the Quarantine Regulations requires only international vessels to keep a record of their ballast water operations. The Quarantine Act has no specific provisions requiring vessels to have a ballast water management plan or a ballast water certificate.

Currently only international ballast water is managed by the Commonwealth. Domestic ballast water, with the exception of within Victoria's state jurisdiction, is not regulated and there is no consistent Australia-wide approach. This can encourage separate jurisdictions to create their own schemes, potentially leading to duplication and confusion in the regulation of ballast water movements, rather than effective safeguards. The states and territories, recognising this, have supported the development of the proposed ballast water legislation by the Commonwealth.

Continuing to regulate under the current Quarantine Act would restrict Australia's ability to implement its international obligations and make it more difficult to introduce a nationally consistent biosecurity risk management approach to ballast water. On this basis, it is not the preferred option.

### *Option 2: adopt the proposed biosecurity legislation*

The proposed biosecurity legislation manages both domestic and international ballast water as required by the Convention. However, to make the transition easier for businesses, the proposed biosecurity legislation gives greater flexibility to businesses in the way they choose to manage ballast water.

Under the proposed biosecurity legislation, it will be an offence for the person in charge of a vessel to discharge ballast water in Australian seas unless one of the following is met:

- it has been managed for discharge using an approved method, such as a ballast water treatment system
- it has been exchanged in an acceptable location, such as outside Australian territorial seas
- it has been discharged at an approved reception facility
- the vessel has received an exemption from the Director of Biosecurity (as the Secretary of the Department of Agriculture) for one or more discharges of ballast water that are part of the vessel's voyages between specified ports or locations
- an exception applies as the discharge of ballast water occurs in the same port or point where the ballast water had been taken up, or
- an exception applies as the discharge has occurred for reasons of safety, an accident or avoidance of pollution.

All vessels capable of carrying ballast water must have a ballast water record system that complies with the requirements as prescribed by the regulations.

Once the Convention is ratified, vessels will need to have a ballast water treatment system installed after a transition period (based on the vessel's age and size) identified in the Convention. The proposed biosecurity legislation does not require businesses to install a ballast water treatment system in their vessels, but establishes a framework that can continue to be used in the future once the Convention is ratified and the legislation amended. Under the Convention, vessels with onboard ballast water treatment systems must have a current ballast water management plan and a ballast water management certificate. Accordingly, the proposed biosecurity legislation provides for management plans and certificates. The plan must be approved by the Director of Biosecurity. A ballast water management certificate certifies that a vessel has an approved ballast water management plan, and that any equipment on the vessel, (such as a ballast water treatment system), is capable of giving effect to the plan. The Director of Biosecurity has the power to authorise a person with appropriate expertise to be a survey authority to issue certificates.

The proposed biosecurity legislation will cover the field in relation to ballast water and avoid the development of separate, fragmented, and potentially conflicting state-based systems. However, it is not intended to exclude or limit the concurrent operation of State or Territory laws in respect of the treatment or disposal of ballast water after it has been removed from a vessel. This recognises that State and Territory environment protection laws may impose additional requirements once the ballast water has been released or removed from the vessel.

Overall, these new powers will help ensure that all Australian and foreign flagged vessels in Australian seas manage their ballast water in a way that helps reduce the risk posed to Australia's marine environments and is consistent with the principles of the Convention. This makes it the preferred option.

### *Compliance costs on business*

Under the current arrangements, vessel operators must manage their ballast water if they intend to discharge ballast water after entering Australian seas from an overseas port or waters, or enter Victorian state waters from Australian port or waters.

The proposed legislation will require vessel operators to manage their ballast water when the vessel is:

- entering Australian seas from an overseas port or waters, and
- travelling domestically from Australian ports or waters.

Under the current and proposed biosecurity legislation, ballast water can be managed by exchanging the vessel's ballast water in deep ocean outside of Australian territorial seas. Under the proposed biosecurity legislation, vessels may also manage their ballast water by using a wider range of options, including a ballast water treatment system.

If a vessel wishes to rely on a treatment system to manage its biosecurity risks, it will be required to have a ballast water management plan and a ballast water certificate to discharge in Australian waters. However, it is not currently mandatory for vessels to have a ballast water treatment system under the proposed biosecurity legislation, and the option to use ballast water exchange to manage their risks will be available. Vessels may retro-fit a ballast water treatment system to their vessel if they see a commercial advantage in doing so, but this is not required.

Ballast water treatment systems tend to be a more feasible option for new-build vessels, as businesses would incur a substantial cost to retrofit a system. Given the average age of a vessel in the Australian trading fleet is 16.7 years,<sup>23</sup> it is unlikely that any Australian vessels currently have a ballast water treatment system.

#### *Vessels entering Australian seas (international arrivals)*

Under both the current and proposed biosecurity legislation, vessels arriving from overseas ports or waters must manage their ballast water. Different vessels will face different costs. This is explored further in Box 3.

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<sup>23</sup> BITRE 2013, *Australian Sea Freight 2011–12*, Bureau of Infrastructure, Transport and Regional Economics, Canberra.

### **Box 3: Example of vessel without a ballast water treatment system**

Vessel A begins travel from China to the port of Newcastle, Australia. The vessel carries ballast water originating from the waters of China. Vessel A is an older vessel that does not have an inbuilt ballast water treatment system. Before arriving at Newcastle, Vessel A fills out a questionnaire issued by the Department of Agriculture, noting that it has ballast water tanks able to discharge ballast water.

Under section 78A of the Quarantine Act, a quarantine officer may give Vessel A a particular direction to deal with its ballast water. In this instance, the officer directs Vessel A to exchange its ballast water prior to entering Australian territory, in order to manage the biosecurity risk.

Under the proposed biosecurity legislation, Vessel A is subject to the new ballast water requirements. It does not need a ballast water management plan because it does not have a ballast water treatment system on board. Therefore Vessel A also does not need a certificate stating that the system is operating effectively (as this is only compulsory for vessels that have a treatment system).

Under the proposed biosecurity legislation, Vessel A<sup>1</sup> may do any of the following:

- exchange its ballast water in an acceptable location and manner
- discharge its ballast water at a reception facility approved by the Director of Biosecurity.

Vessel A chooses to exchange its ballast water shortly before entering Australian territory. The operator of the vessel records the discharge of ballast water from China and the uptake of new ballast water just outside of Australian waters, as required under the legislation.

<sup>1</sup>Assuming Vessel A does not meet one of the safety, accidents or pollution exceptions in the proposed biosecurity legislation.

There are unlikely to be significant additional compliance costs for international arrivals under the proposed biosecurity legislation before the Convention comes into effect. The current requirements placed on vessels – including record-keeping, completing a questionnaire and managing ballast water – are the same under the proposed biosecurity legislation. It is only vessels that already have a ballast water treatment system (of which there are few if any) that will face the additional cost in order to obtain a ballast water management plan and certificate. As discussed above, vessels will not yet be required to have a treatment system and are only expected to install one if they see a commercial benefit in doing so.

### *Vessels moving within Australian seas (domestic movements)*

Vessels travelling within Australian waters are not regulated under the Quarantine Act with regard to ballast water. Domestic vessel movements are only regulated under Victorian legislation when they enter Victorian state waters. Vessels intending to discharge water in Victorian state waters must complete an online risk assessment tool to establish whether its ballast water is high risk (i.e. the ballast water they have picked up is likely to contain exotic marine pests that are capable of establishing in Victorian waters). Vessels that have high-risk ballast water commit an offence if this water is discharged in Victorian waters. To avoid this, vessels may exchange ballast water outside 12 nautical miles. This involves discharging the high risk ballast water and taking up new, low-risk ballast water. Vessel masters must keep a record of all ballast water operations.

The proposed biosecurity legislation makes it an offence to discharge ballast water in all Australian seas. Vessel operators must complete a pre-arrival report with information on the number and volume of ballast water tanks, the date and volume of ballast water uptake and proposed date of discharge in the port of destination. This allows the biosecurity risk of the ballast water to be assessed. If a vessel's ballast water poses a high biosecurity risk, it must be managed in an approved way, such as exchange outside 12 nautical miles from the shoreline. If the ballast water is low risk, a vessel operator may apply to the Director of Biosecurity for an exemption to cover one or more discharges as part of specified voyages. Box 4 gives an example of the compliance costs faced by a vessel travelling domestically.

#### **Box 4: Example of a vessel travelling domestically**

Vessel C originates from Tasmania, Australia. It has ballast water onboard and undertakes a number of voyages between Australian ports for commercial purposes.

Vessel C must travel from the Port of Devonport to the Port of Melbourne and then on to Fremantle Port. Under the Quarantine Act, domestic vessels are not regulated and Vessel C is only subject to regulation when it enters Victorian State waters. Prior to reaching the Port of Melbourne, Vessel C's operator completes a ballast water report form and a ballast water log and submits the report electronically to the Victorian authorities. Vessel C is not able to discharge ballast water unless Victorian authorities have received this paperwork and provided written authorisation.

The Victorian authorities assess Vessel C as having low risk domestic ballast water, which means it can discharge its ballast water in Victorian state waters. If Victorian authorities assess Vessel C as having high-risk domestic ballast water, Vessel C would be subject to a penalty under Victorian legislation if it discharged ballast water within Victorian State waters. This can be avoided if it discharges its ballast water and takes up new ballast water, shortly before entering Victorian state waters as part of its journey.

Under the proposed biosecurity legislation, Vessel C is regulated when travelling between all states and is required to maintain records of any ballast water operations. Before arriving at the Port of Melbourne, Vessel C fills out an electronic pre-arrival report issued by the Department of Agriculture, noting that it has exchanged its ballast water with low-risk ballast water outside 12 nautical miles en route, and has maintained ballast water records. Based on the answers to the report, Vessel C is assessed as low biosecurity risk. When Vessel C docks at the Port of Melbourne, an officer requests the operator of Vessel C provide the ballast



water records for checking. The operator of Vessel C complies. After inspecting the records the officer is satisfied that Vessel C is complying with the legislation.

Vessel C then departs for Fremantle Port. Prior to arriving, Vessel C fills out the same pre-arrival report by the Department of Agriculture, and is again assessed as low risk. An officer at the port requests evidence in the form of records again, which Vessel C produces. The officer is again satisfied that Vessel C is complying with legislation.

As of December 2012, there were approximately 73 Australian commercial vessels making domestic voyages to which the proposed legislation would apply (excluding international vessels continuing on domestic movements). These vessel operators will face additional costs under the proposed legislation, primarily through any costs they might incur to manage high risk ballast water. Vessel operators may also face administrative costs to complete pre-arrival reporting or to apply for an exemption if their ballast water is low risk and they choose to do so.

The majority of domestic voyages are low biosecurity risk.<sup>24</sup> When a voyage is low risk, it is expected that a vessel operator will apply for an exemption under the proposed biosecurity legislation, allowing the vessel to discharge ballast water in Australian seas. It is expected that an application for an exemption will be an online form that will rely on information already gathered or known by the vessel operator (i.e. locations of ballast water uptake and intended discharge). (Note: operational details are still being confirmed).

Where a voyage is high risk, vessels will be required to manage this risk, for example, through ballast water exchange outside 12 nautical miles from the shoreline. Vessels exchanging ballast water face time and pumping costs. The average cost per vessel depends on the vessel's ballast water capacity and pumping capacity. It is assumed that any vessels crossing 12 nautical miles will choose to exchange their ballast water while outside 12 nautical miles en route, as this will be the most efficient way. Vessels not crossing 12 nautical miles will need to deviate from their route and so will incur additional costs for this extra time as well as the additional costs whilst performing the exchange.

Overall, the compliance cost to industry is just over \$1.2 million a year, averaged over 10 years (Table 6).

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<sup>24</sup> Centre for International Economics 2007, *Ballast water management: A regulation impact statement*, March, Canberra.

**Table 6 Average annual compliance costs for businesses**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost of proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	1 115	25 707	24 592
Substantive compliance	31 547	1 281 032	1 249 485
<b>Total average annual compliance costs</b>	<b>32 662</b>	<b>1 306 739</b>	<b>1 274 077</b>

Note: Under the proposed biosecurity legislation, all vessels travelling domestically must manage their ballast water. Costs are based on the ballast water capacity and pumping capacity of an average vessel in the Australian trading fleet and the number of low and high risk domestic voyages made by Australian-owned vessels. Time costs are estimated using average shipping charter rates. Additional costs for vessels not travelling outside 12 nautical miles were based on average route deviation<sup>25</sup>. Costs have been averaged over ten years.

Data source: Department statistics; Australian Maritime Safety Authority data 2012; Centre for International Economics 2007, Ballast water management: A regulation impact statement; industry data.

#### *Ballast water overall compliance costs*

Under the proposed biosecurity legislation, the compliance cost burden on industry is estimated to increase by just over \$1.2 million a year, averaged over 10 years. This is primarily through increased regulation to manage the biosecurity risk associated with domestic vessel movements. There is likely to be no additional compliance costs for those businesses with vessels making international arrivals, as the current legislation already provides for the management of this biosecurity risk.

#### *Regulatory benefit of ballast water*

The proposed biosecurity legislation allows better management of the biosecurity risk associated with ballast water by recognising that invasive marine pests can travel in both international and domestic ballast water sources. While businesses will have increased compliance costs under the proposed biosecurity legislation (primarily because all domestic vessel movements will be covered) the scheme has been designed to be less intrusive for business than immediately implementing the Convention and allows for the greater amount of flexibility in the management of ballast water risks. This allows a business to choose the most

<sup>25</sup> Ibid.

cost-effective option to suit their business structure, while still managing their biosecurity risks to an acceptable level.

### ***Inspector-General of Biosecurity***

#### *Nature of the problem*

The operation of Australia's biosecurity systems require that some powers be exercised that have considerable influence over trade and domestic industry. The extent of these powers mean that an independent review process is needed to maintain, improve and demonstrate the integrity of the biosecurity system. The role of the Inspector-General of Biosecurity is to review the biosecurity activities undertaken by the department. This does not include the activities undertaken by industry participants.

Several recent reviews and inquiries have highlighted the importance of undertaking independent audits of the department's biosecurity activities and risk management in order to maintain or improve the integrity of the biosecurity system as a whole.<sup>26</sup> As part of its preliminary response to the most recent review, the position of the Interim Inspector-General of Biosecurity was established as an interim arrangement with the expectation that enabling legislation would follow. Without this legislation, the position of the Interim Inspector-General lacks some powers required to conduct effective reviews of the biosecurity system.

#### *Why the change is being proposed?*

Currently, reviews of the biosecurity system are managed administratively through the Interim Inspector-General of Biosecurity. However, the current administrative arrangements cannot provide the Interim Inspector-General of Biosecurity with the power to compel compliance with requests for information or access to premises. These powers are needed to accurately assess the department's biosecurity risk activities and processes. While the Interim Inspector-General of Biosecurity currently experiences high levels of compliance with such requests, enforcement options are necessary to ensure that relevant information can be gathered if information sources are limited, the review is into an urgent biosecurity risk pathway or if the review is time sensitive.

The proposed biosecurity legislation will establish the Inspector-General of Biosecurity as an independent auditor and reviewer of the department's biosecurity activities and processes. The Inspector-General of Biosecurity will have the power to compel persons to provide particular information or access to particular premises to assist with a review.

#### *Options to address the problem*

##### *Option 1: maintain the status quo*

Continuing with the current administrative arrangements would maintain the role of the Interim Inspector-General of Biosecurity, which has already provided constructive recommendations to improve Australia's biosecurity systems.

If there were no legislation and the Interim Inspector-General of Biosecurity were to continue administratively, this would restrict the powers available to the Interim Inspector-General of

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<sup>26</sup> Beale et al. 2008, *One biosecurity*; Senate Standing Committee on Rural and Regional Affairs and Transport 2006, *The administration by the Department of Agriculture, Fisheries and Forestry of the citrus canker outbreak*; the Hon. Ian Callinan AC 2008, *Report of the Equine Influenza Inquiry*

Biosecurity when conducting a review. The Interim Inspector-General of Biosecurity can currently request that a person provide particular information or request access to specified premises to assist with a review. If a person declines to cooperate, the Interim Inspector-General of Biosecurity does not have powers available to compel them to do so. This means that if there is a particular biosecurity risk of concern with limited options to collect critical information about the systems in place to manage that risk, the Interim Inspector-General of Biosecurity would be unable to accurately assess the risk and make recommendations for future risk management.

This option is not preferred as it does not provide the Interim Inspector-General of Biosecurity with all of the powers that may be required to gather information and accurately assess the department's biosecurity risk activities and processes.

#### *Option 2: adopt the proposed biosecurity legislation*

Establishing the role of the Inspector-General of Biosecurity through legislation would ensure that there is a statutory officeholder responsible for the independent audit, review and assessment of the department's biosecurity activities and processes. The role and function of the Inspector-General of Biosecurity would align with the Beale Review's recommendation that an effective risk management system should include formal auditing activities.

The Inspector-General of Biosecurity would be able to gather information in situations where a person has not complied with a request for particular information or allowed access to particular premises, with the power to compel persons to provide information relevant to a review or to use warrants to access premises for the purpose of conducting a review. (Note: The Inspector-General of Biosecurity will only audit or review the activities of the department, not industry participants).

The Inspector-General of Biosecurity would be appointed as a statutory officeholder with an office staffed by the department, reporting directly to the Minister of Agriculture. The Inspector-General of Biosecurity would additionally take on the responsibilities of the Import Risk Analysis Appeals Panel, and would review the process of an individual import risk analysis where required and requested by a stakeholder who believes they have been adversely affected by the outcome.

This option is preferred, as it would help assure stakeholders and Australia's trading partners of the integrity of the department's processes and provide an independent, systematic approach towards maintaining and improving the biosecurity system.

#### *Compliance cost for business*

Under the current legislation, the Interim Inspector-General of Biosecurity is responsible for the review of the department's biosecurity activities. In order to achieve this, on some occasions the Interim Inspector-General of Biosecurity may need to inspect particular facilities to see how the department's biosecurity activities work in conjunction with Commonwealth-industry partnerships. (For example, businesses with quarantine approved premises or compliance agreements). However, the Interim Inspector-General of Biosecurity cannot currently compel businesses to provide information to assist with a review or enter premises without consent.

Under the proposed biosecurity legislation, the Interim Inspector-General of Biosecurity will be replaced by the Inspector-General of Biosecurity, a statutory body or office holder with

the same primary function of reviewing the department's biosecurity activities. When conducting reviews or audits into these activities, the Inspector-General of Biosecurity may request documents from or inspect the facilities of industry members. If a business refuses, the Inspector-General of Biosecurity would have the power to compel them to comply. This includes, but is not limited to, businesses with approved arrangements and other persons where the Inspector-General of Biosecurity has reason to believe that the person has information relevant to a review (and are capable of giving evidence).

It is anticipated that most businesses will comply with a request, as they understand the importance of biosecurity risk management (this is currently the case). If a business does not wish to comply with a request, the Inspector-General of Biosecurity would first examine other alternatives and only compel a business to comply in particular circumstances where there are limited options available to gather the information. This is examined further in Box 5.

#### **Box 5: Review by the Inspector-General of Biosecurity**

Identified cases of the spread of 'citrus canker', a disease causing serious harm to plants and damage to fruit, has multiplied significantly in New Zealand within a month. Hearing the news, the Agriculture Minister directs the Inspector-General of Biosecurity to include as a priority in his review program a review of certain identified entry pathways for the disease, now considered to be of high biosecurity risk to Australia. While speaking to biosecurity officers from the department, the Inspector-General of Biosecurity has been made aware that particular used fruit handling machines imported from overseas are an entry pathway for the disease.

Sarah is the owner of a business operating under an approved arrangement. The Inspector-General of Biosecurity identifies Sarah's business as one of the few undertaking fruit handling via these particular used and imported fruit machines—the business premises are a warehouse where the fruit handling machines are housed.

The Inspector-General of Biosecurity requests access to the premises in a letter to Sarah, explaining that he'd like to visit her business for the purposes of a general review into citrus canker pathways, rather than monitoring her individual business or her employees. Sarah denies the request.

Given the importance of the biosecurity risk posed by the citrus canker and the limited access to businesses which use the identified machines, the Inspector-General of Biosecurity applies for a warrant to gain access Sarah's business premises. On arrival, the Inspector-General of Biosecurity requests to look at the fruit handling machines, and when asks Sarah whether he can take a look at the risk management processes for the machines. Sarah takes him to her office in the same building, as all the information and plans are located on her office computer. The Inspector-General of Biosecurity asks Sarah some further questions about the machines, and to help him transfer the information from her computer to a data storage device he provides her, which she does.

The Inspector-General of Biosecurity ensures that the information contained on the data storage device is kept confidential and not released to the public, as Sarah's competitors may use the information for their own practices and affect her business takings.

The Inspector-General of Biosecurity assesses the information he received from Sarah and needs to ask some further questions in order to finalise the review. He requests that Sarah appear before him in 14 days' time, and asks her the additional questions.

The Inspector-General of Biosecurity uses the information gathered from visiting Sarah's business and answers to the additional questions in his final report, making sure he does not use the confidential information. The information forms part of the Inspector-General of Biosecurity's recommendation to the Minister of Agriculture on improvements that could be made to the fruit handling process, to further limit the risk of citrus canker entry in Australia.

#### *Inspector-General of Biosecurity overall compliance costs*

The primary difference under the proposed biosecurity legislation is that the Inspector-General of Biosecurity will have the power to compel businesses to provide information and can seek a warrant to enter premises without permission. The number of businesses that will be affected will ultimately depend on the Inspector-General of Biosecurity's work program. The majority of information will continue to be provided by the department's internal data systems, so it is expected that the cost to business will be limited.

From 2009 to 2014, the Interim Inspector-General of Biosecurity conducted five audits a year on average and four businesses were inspected per audit on average. Typically, the Interim Inspector-General of Biosecurity takes four hours to inspect a premise and gather relevant information. A staff member from the business will accompany the Interim Inspector-General at all times and assist in accessing particular areas or equipment.

Under the proposed biosecurity legislation, the number of businesses that the Inspector-General of Biosecurity will request or require a similar number of businesses to provide information will depend on the work program. For illustration purposes it is estimated that a similar number to be inspected. There is a small additional cost to industry of \$3 861 a year, averaged over ten years (Table 7).

**Table 7 Average annual compliance costs for business – Inspector-General of Biosecurity**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost under proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	0	3 861	3 861
Substantive compliance	3 861	3 861	0
<b>Total average annual compliance costs</b>	<b>3 861</b>	<b>7 722</b>	<b>3 861</b>

Note: From 2009 to 2014 the Interim Inspector-General of Biosecurity conducted five audits a year on average, with an average of four businesses inspected per audit. Under the proposed Biosecurity legislation, a similar number of businesses may be required to provide information and a similar number to be inspected. Costs have been averaged over ten years.

Data source: Department statistics

#### *Regulatory benefit of the Inspector-General of Biosecurity*

The proposed biosecurity legislation helps to maintain the integrity of Australia's biosecurity system by enacting the Inspector-General of Biosecurity as a statutory position. There is likely to be a small additional compliance cost to business, which will vary according to the Inspector-General of Biosecurity's work program. However, there will be greater benefits to businesses and the community from improving Australia's biosecurity systems through the provision of independent means to maintain, improve and demonstrate the integrity of the system. A demonstrably independent audit and review process will become more important as Australia's biosecurity operating environment becomes increasingly complex, increasing the need to ensure consistent, systematic processes for oversight and continual improvement.

#### *First points of entry*

##### *The nature of the problem*

The Quarantine Act currently requires vessels and aircraft that enter Australian territory from overseas to arrive at a port or landing place that is a first port of entry. Under section 13, the Governor-General has the power to proclaim a port (including sea ports and airports) to be a first port of entry, and may place conditions or restrictions on that approval (for example, a port may be limited to receiving a specific class of goods, vessels or aircraft). The first points of entry scheme is designed to ensure that when vessels and aircraft enter Australia, they arrive at ports and landing places that have the appropriate facilities and personnel available to assess and manage any biosecurity risks associated with them.

Currently first ports of entry are listed in the *Quarantine Proclamation 1998*, *Quarantine (Cocos Islands) Proclamation 2004* and the *Quarantine (Christmas Island) Proclamation 2004*. However, there is no transparent process in the Quarantine Act setting out new port or landing places to be proclaimed, or any requirements (including associated infrastructure requirements) that the port or landing place must meet to be proclaimed.

Likewise, there is no clear mechanism to remove a first port status even if the level of biosecurity risk is not being adequately managed, a condition of approval has been contravened or the first port of entry has been decommissioned. There are some proclaimed first ports of entry that are no longer operational and not in use at all. This means that vessels and aircraft could potentially enter Australia through first ports of entry that do not have the infrastructure or personnel available and/or are not properly maintained for adequate assessment and management of their biosecurity risks.

As a result of investment and business needs, aircraft and vessels may wish to apply to the Agriculture Minister for permission under section 20AA of the Quarantine Act to enter a landing place or port that is not a first port of entry. (Permission to land a good can also be sought under section 20DD of the Quarantine Act). If given, this permission is only valid for a specified entry and may be given subject to conditions. This means that some businesses that have an ongoing need to enter a non-first port of entry (non-proclaimed port of entry) must make multiple one-off applications in a given year. This imposes an administrative cost on these aircraft and vessel operators.

#### *Why the change is being proposed?*

The proposed biosecurity legislation replaces the term ‘first port of entry’ with ‘first point of entry’. As with the original term, ‘first point of entry’ includes both sea ports and landing places (airports).

The proposed biosecurity legislation will clearly state the process for becoming a first point of entry, by specifying the requirements that must be met in order for a port or landing place to be determined (for example, managing biosecurity risks to an acceptable level). This provides clarity for ports and landing places that wish to be declared as a first point of entry.

The proposed biosecurity legislation will also clarify the circumstances in which a first point status may be varied or revoked (for example, if biosecurity risks are not being managed, a condition of approval is not being met, or the first point is no longer in use). This ensures that first point of entry operators are aware of what is required to maintain this status over time and the circumstances in which it may be revoked.

The vessel or aircraft intending to enter a non-proclaimed port of entry will still be required to receive permission before entry, similar to section 20AA of the Quarantine Act. However a standing permission may be given to allow multiple entries over a specified period of time, rather than a separate permission for each entry.

#### *Options to address the problems*

##### *Option 1: maintain the status quo*

Under the Quarantine Act, there is no clear articulation of how ports or landing places may meet the Commonwealth requirements to be designated a first port of entry. This creates uncertainty for port operators, who are unable to make an accurate assessment of whether the



costs and benefits of seeking first port status are worthwhile without directly consulting the department.

Further, there is no clear mechanism in the Quarantine Act to remove a first port's status if the level of biosecurity risk is not being adequately managed or a restriction or condition of approval is not being complied with. Under the current legislation, an aircraft or vessel intending to enter a non-proclaimed port of entry must request permission each time it wishes to enter the port or landing place. This can be time consuming and costly if the aircraft or vessel frequently uses a port or landing place and must apply for permission for every arrival.

Continuing the current legislation would lead to the continuation of these problems and therefore is not the preferred option.

#### *Option 2: adopt the proposed biosecurity legislation*

Under the proposed biosecurity legislation, the Director of Biosecurity or the Director of Human Biosecurity (the Commonwealth Chief Medical Officer) (the relevant Director) can determine a first point of entry, if satisfied that the level of biosecurity risk associated with the port or landing place is acceptable and the requirements specified in the regulations are met. This will ensure that a first point of entry has the facilities available to manage biosecurity risk at an acceptable level. A first point of entry can be determined subject to conditions, (for example a first point of entry may only be authorised to receive timber).

Setting out the requirements to be determined a first point of entry in legislation and regulations provides a transparent framework and an accountable decision making process. It clarifies the requirements for port operators to be determined a first point of entry and the requirements to maintain this status over time. It will also ensure port operators are aware of the circumstances under which a first point of entry status may be revoked.

The proposed biosecurity legislation will also allow the relevant Director to suspend or revoke a first point of entry determination in specified circumstances, such as the level of biosecurity risk not being adequately managed, a condition of approval has been contravened, a requirement in the regulations is no longer being met or the port or landing place is no longer operational.

Vessels and aircraft may seek permission from the relevant Director to arrive at a port or landing place that is not a first point of entry, or to unload cargo at a port or landing place not determined to receive those goods. Instead of requiring permission for each entry however, the relevant Director may grant the applicant a standing permission which will be valid for multiple entries over a specified period of time.

#### *Compliance costs on business*

Currently under the Quarantine Act, the process for a port or landing place to be proclaimed is unclear, as are any requirements (including associated infrastructure requirements) that must be met by a port or landing place in order to be proclaimed. The proposed biosecurity legislation will clarify the process to be determined for a first port of entry, which is not expected to significantly increase or decrease the compliance costs for business. Instead it will give certainty to port and landing place operators who wish to become a first port of entry about what will be required.

The proposed biosecurity legislation and regulations will also clarify the requirements to be determined a first point of entry (and to keep that status). These requirements could potentially impose an additional cost for businesses that operate at an existing port or landing place and wish to continue operating under the first points of entry scheme. However, this will depend upon a number of factors, such as the type of approval being sought and the existing infrastructure at the first point that allows biosecurity risk to be managed appropriately. First points that wish to retain their existing status (i.e. not receive new types of aircraft, vessels, or goods) and already have the infrastructure in place to manage the biosecurity risks are not expected to be subjected to additional costs.

The proposed biosecurity legislation will also allow an aircraft or vessel that wishes to enter Australia at a non-proclaimed port of entry to apply for a standing permission, which allows multiple entries over a specified period of time. This will decrease the compliance burden of businesses that previously were required to seek permission for each entry.

#### *Benefits and costs to business: Determination of a first point of entry*

Under the Quarantine Act, the department considers each first port of entry proposal, and the biosecurity risks posed, on a case by case basis. It then makes a recommendation to the Governor-General, who can proclaim the port to be a first port of entry.

There are no requirements in the Quarantine Act that a port must meet in order to be proclaimed. Administratively, when considering a first port of entry proposal, the department takes into account the types of aircraft, vessels or goods that would arrive at the port or landing place, the volume or traffic, the potential biosecurity risk posed, as well as the location of the port or landing place and available facilities.

Under the proposed biosecurity legislation, the department will still take into account the above when considering a first point of entry proposal. However, these requirements will be clearly outlined in the legislation and regulations. Under the proposal, businesses may be affected in one of three ways. Businesses may:

- transition to a first point of entry
- decide not to retain first point of entry status
- become a first point of entry (for the first time).

The first point of entry requirements specified in the proposed biosecurity legislation must be met by businesses transitioning from a first port of entry to a first point of entry, and by businesses becoming a first point of entry (for the first time). There would be a cost to businesses operating at a port or landing place that wish to be determined as a first point of entry. These include: the time costs associated with providing information to the department, including information on the port's or landing place's facilities, risk management processes, record keeping practices, the products being imported and so on.

To be determined as a first point of entry a business will need to demonstrate that it can manage the biosecurity risks associated with its operations. This may be done through submitting detailed documentation and/or hosting inspections of the port or landing place. It is expected that businesses would incur a cost to undertake activities to compile evidence demonstrating their capabilities. Where possible, the intention is to mitigate these costs by building upon or using existing information already provided to other regulatory agencies such as the Department of Immigration and Border Protection.

Under the proposed biosecurity legislation there are also likely to be some businesses that choose not to transition from a first port of entry to a first point of entry. For instance, a business may decide that there is no benefit in maintaining a first point of entry status after comparing the potential cost of upgrading facilities to the expected benefit it would receive if a first point status were to be maintained. This is more likely to occur in smaller or more remote ports.

#### *Benefits to businesses transitioning to a first point of entry*

It is anticipated that the majority of proclaimed ports will seek to be determined as a first point of entry under the proposed biosecurity legislation because of the commercial advantage that can be gained. It is expected that most will incur a one-off administrative cost to complete paperwork that demonstrates the port or landing place's capacity to manage biosecurity risk to the relevant Director's satisfaction.

Where a business cannot demonstrate it has the capacity or facilities to adequately manage biosecurity risk, it may need to upgrade. Upgrades may include biosecurity waste management and/or inspection facilities for biosecurity officers. However, businesses will be able to choose the way in which to manage biosecurity risk that is best suited to their business structure. For example, if a business does not have adequate waste management facilities it may choose to install an on-site facility, transport the waste off-site in an approved manner or use a third party contract to manage the waste. The management activities required by the port or landing place to manage risk depends upon a range of factors such as its size, environs, the type of operations and the type of goods, vessels, aircraft and people it is allowed to receive.

Most first ports of entry will already have the appropriate facilities to allow biosecurity risk to be assessed and managed under the proposed biosecurity legislation. Large and busy ports or landing places in particular are likely to have maintained their biosecurity management facilities to the required level, as these facilities are in constant use and receive a commercial advantage from being a first port of entry.

Similarly, in circumstances where a port or landing place approval is limited to receiving specific goods, vessels or aircraft, the port operators are likely to seek a continuation of their restricted first point status under the proposed legislation, unless they see a commercial advantage to seeking a broader approval. The majority of these ports and landing places will already have the facilities in place to manage the biosecurity risks associated with these specified goods, vessels or aircraft.

Under the proposed biosecurity legislation there is a small additional cost to transitioning businesses, as businesses will incur some administration costs. However, the cost is low – estimated at a total of \$1 991 a year averaged over 10 years (Table 8). Costs may be higher for a very small number of particular ports that need to upgrade their facilities. However, these businesses will be able to upgrade in a way that best suits their existing business arrangements while achieving the department's goals of biosecurity risk management. It is not possible to estimate these costs as these costs are business specific and will depend on a range of variables. The businesses will choose the option that makes the most commercial sense for them.

**Table 8 Average annual compliance costs for existing businesses transitioning to first points of entry**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost of proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	0	1 991	1 991
Substantive compliance	0	0	0
<b>Total average annual compliance costs</b>	<b>0</b>	<b>1 991</b>	<b>1 991</b>

Note: It is anticipated 55 ports (including sea ports and airports) currently operating as a first port of entry are likely to choose to transition to a first point of entry under the proposed biosecurity legislation (based on departmental data). Under the proposed legislation, there will be a delay in when the costs are realised because businesses will be able to transition to first points of entry over a three year period following the Act's commencement. Costs have been averaged over ten years and do not include this delay.

Data source: Department statistics

*Businesses not transitioning to a first point of entry*

Under the proposed biosecurity legislation, the department would be able to vary or revoke a port or landing place's first point of entry status. These provisions are only expected to impact upon ports or landing places that no longer receive a substantive volume of international vessels (for a variety of reasons) or are no longer operational. If a first point of entry status is revoked, this would mean that the port or landing place would no longer be able to receive international vessels or aircraft when they arrive in Australia (unless they receive permission from the relevant Director).

The costs for those ports and landing places that choose to not seek first point of entry status under the proposed biosecurity legislation would be the loss of any profitable activities forgone. These costs will vary considerably. However, the port and landing places most likely to have their first point status withdrawn are expected to be those that are currently not being utilised and that will not receive a significant commercial advantage from maintaining a first point status.

Businesses that rely on the use of a particular port or landing place that does not continue on as a first point of entry under the proposed biosecurity legislation, may incur additional costs associated with using a different port or landing place to receive goods. The extent to which this occurs will depend on which ports and landing places no longer continue as first points of entry, and which businesses rely on them. As noted above, the ports and landing places that

are most likely not to continue as a first point of entry are those which currently have limited or no use and provide a narrow range of services. It may be that some businesses still rely on these ports or landing places because of their remoteness to other first points of entry (that is, the next nearest port is a substantive distance away). However, these businesses still have the option to seek permission to enter a port or landing place that is not a first point of entry. The process to do this would also be improved under the proposed biosecurity legislation.

#### *Benefits to businesses becoming a new first point of entry*

The changes under the proposed biosecurity legislation may result in some new ports and landing places seeking to become a first point of entry. However general consultation undertaken in 2012 did not indicate whether any ports or landing places would seek to become a first point of entry. Under both the current and proposed biosecurity legislation, ports and landing places will need to provide the department with information about how biosecurity risks will be assessed and managed and how the requirements in the regulations will be met. This includes information about facilities, risk management processes, record keeping practices, the products being imported, what they are made of, country of origin and so on. Under the Quarantine Act this information was provided as part of the department's administrative requirements. The main difference in the proposed biosecurity legislation is that the requirements will be clearly articulated in the legislation and the regulations. As a result, the costs for business are not expected to change significantly under the proposed biosecurity legislation.

It is possible that some administrative costs to businesses seeking to proclaim a port or landing place will be reduced under the proposed biosecurity legislation because of the improved transparency of the process. For example, reduced time spent seeking clarification of the requirements.

#### *Benefits and costs to business: Vessels arriving at a non-proclaimed port*

Investment and business needs (such as a new mine that commences operation) can result in some locations being used intensively over a short period of time, but the closest port or landing place has not been proclaimed as a first port of entry. Under the Quarantine Act an aircraft or vessel must apply for permission each time it wishes to enter a non-proclaimed port or landing place.

This application requires the relevant business to provide information about the locations an aircraft or vessel has visited and intends to visit, the anticipated people and goods on board, the aircraft or vessel's biosecurity risk management processes, and so on. If given, the approval is only valid for a single entry and may be subject to conditions. As a result some locations can be the subject of many one-off applications in a given year. This imposes administrative costs on aircraft and vessel operators. Under section 20D of the Quarantine Act, permission can also be sought to land a good at a port not proclaimed to receive that good (which may also be subject to conditions).

Under the proposed biosecurity legislation, an aircraft or vessel intending to enter a non-proclaimed port is still required to request permission. However, a standing permission may be given to the aircraft or vessel allowing them to enter a landing place or port over a specified period of time. Whether or not an application is approved and the length of the period of time specified will depend on the associated biosecurity risks.

The following example demonstrates the potential benefits to business under the proposed biosecurity legislation (Box 6).

**Box 6: Example of a vessel entering a non-first point of entry multiple times**

Company C is a liquid natural gas (LNG) company based in Australia. Company C owns a port in Western Australia (Port C) that has a wharf where vessels can be loaded with LNG. Company C wishes to use one of its vessels to transport LNG from Port C to Singapore at an average rate of 10 voyages a year over the next 10 years. However, its vessels cannot enter Port C because it is not proclaimed as a first port of entry, a result of its remoteness and the potential risks posed by other vessels visiting the port.

Under the current legislation, Company C applies for permission to enter a non-first port of entry under section 20AA of the Quarantine Act. The application requires a Company C to collect information to satisfy application requirements, including the locations the vessel has visited, the anticipated people and goods on board, the vessel's biosecurity risk management processes and its record keeping practices. The department undertakes a risk profile based on this information and considers the risk posed by Company C to be low. The department approves Company C's request. Under the Act, Company C must apply for permission each time its vessel enters Port C.

Under the proposed biosecurity legislation, Company C can apply for permission for its vessel to enter Port C over a specified period of time. The application requires a Company C to collect information to satisfy application requirements. This is the same information that would need to be provided for a section 20AA permission above.

The department undertakes a risk profile based on this information and considers the risk posed by Company C to be low. The department grants Company C a standing permission, allowing its vessel to enter the port over a three year period without having to reapply for permission. [Note: the actual period will vary according to the biosecurity risk associated with the port and vessel.]

Under the proposed biosecurity legislation, Company C saves time and money because it no longer has to complete multiple section 20AA application forms. Company C is now better off by \$234 a year, averaged over 10 years (Table 9).

**Table 9 Average annual compliance costs to Company C**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost of proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	241	7	-234
Substantive compliance	0	0	0
<b>Total average annual compliance costs</b>	<b>241</b>	<b>7</b>	<b>-234</b>

Note: Company C intends to use one of its vessels to operate out of a non-first port of entry. Under current legislation, Company C needs to apply for permission each time its vessel needs to enter the port. Under the proposed biosecurity legislation, Company C is better off because it can apply once and have standing permission for its vessel to enter the port for three years. Costs have been averaged over 10 years.

According to department statistics, in 2013 there were 510 applications under the Quarantine Act for 350 vessels who visited a non-proclaimed first port of entry. Of these, there were 30 vessels that had three or more visits (with an average of 4.7 visits each). These businesses are likely to benefit from applying for standing permission under the proposed biosecurity legislation.

There is anticipated to be a savings across businesses of \$3 185 a year, averaged over 10 years (Table 10).

**Table 10 Average annual compliance costs for businesses**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost of proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	12 282	9 097	-3 185
Substantive compliance	0	0	0
<b>Total average annual compliance costs</b>	<b>12 282</b>	<b>9 097</b>	<b>-3 185</b>

Note: In 2013, 320 vessels applied to visit a non-proclaimed first port of entry, with an average of 1.15 visits per vessel. Another 30 vessels had an average of 4.7 visits each to a non-proclaimed first port of entry. These vessels are likely to benefit under the proposed legislation. Costs have been averaged over ten years.

Data source: Department statistics

*First point of entry overall compliance costs*

Under the proposed biosecurity legislation, the overall compliance cost burden on business is estimated to be negligible (Table 11). The compliance costs of transitioning to a first point of entry are anticipated to be low. There will be some reduced administration costs for businesses that frequently seek permission to enter ports and landing places that are not a first point of entry and as a result, need to make fewer applications.

The cost to some businesses may be higher if they are required to make substantial upgrades to meet regulated first point of entry standards. As discussed above, it is not possible to estimate these costs as these sorts of costs are business specific and will depend on a range of variables. Businesses will choose the option that makes the most commercial sense for them.



**Table 11 Average annual compliance costs for existing businesses – first points of entry**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost under proposed legislation</b>
<b>Cost type</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Administrative	12 282	11 088	-1 194
Substantive compliance	0	0	0
<b>Total average annual compliance costs</b>	<b>12 282</b>	<b>11 088</b>	<b>-1 194</b>

Note: Based on costs of businesses transitioning to first points of entry and using standing permissions under the proposed legislation. There are 55 ports (including sea ports and airports) currently operating as a first port of entry that are expected to transition to a first point of entry under the proposed legislation. In 2013, there were 30 vessels that visited a non-proclaimed port twice or more and that are likely to benefit under the proposed biosecurity legislation. Costs have been averaged over ten years.

Data source: Department statistics

#### *Regulatory benefit of first points of entry*

The proposed biosecurity legislation will improve biosecurity risk management at the border by making the responsibilities at the border clear and ensuring departmental officers can effectively and efficiently complete operational tasks at proclaimed and non-proclaimed ports. Some businesses are expected to be better off under the proposed biosecurity legislation because of reduced administrative compliance costs, as identified above, associated with aircraft and vessels applying for permission to enter non-proclaimed ports. Other businesses will face some costs to be determined as first points of entry under the proposed biosecurity legislation. It is likely this will be mostly low and administrative, though some businesses may face costs to upgrade their facilities to the required standards. As previously discussed, this will depend on how the business chooses to build risk management into its business as well as a range of factors influencing the biosecurity risk at the port or landing place.

The improved transparency and clarity around the process to be proclaimed a first point of entry should ultimately benefit businesses. While the benefits of improved transparency and certainty are difficult to quantify, they are important for future business and strategic planning. The required investment in facilities for port operators to maintain first point of entry status is an important element in their forward investment planning – understanding what is required to maintain this status allows operators to determine the value of this status compared with the costs associated with maintaining the infrastructure over time. For some

ports and landing places, this decision will make business sense, while for others it may not. For all of these decisions, certainty around government decision making helps to reduce risks associated with investment.

One consultation participant (a practising Customs Broker) stated that:

“[Most first points of entry are already] established and should not need a lot of work/cost to meet the new conditions that could be applied. It is more likely to be ‘country’ ports that would require more cost to meet the guidelines and conditions to operate as a first point. Correcting the current approved list and adjusting resources to suit should see cost reductions and thereby allow resources to be better used. Often ports have surplus or under used infrastructure so there should not be a need for a lot of new and expensive infrastructure to be built, rather upgrading what already existing – again a cost savings to port operators and DAFF [now the Department of Agriculture].”

Some businesses may avoid or mitigate the costs involved in transitioning to a first point of entry under the proposed biosecurity legislation by applying for and being granted permission to land at a non-proclaimed port of entry. This will particularly benefit businesses that do not find it cost-effective to become a first point of entry and businesses that use the port.

### ***Summary of overall compliance costs***

The proposed biosecurity legislation results in a reduction in compliance costs on business of more than \$6.9 million (Table 12). This is primarily through improved processes for industry partnerships that are better supported by the proposed biosecurity legislation. Overall the proposed biosecurity legislation will help reduce unnecessary regulatory burden on business and improve business productivity whilst ensuring that Australia’s biosecurity risk is managed at an appropriate level.

**Table 12 Average annual compliance costs for business – proposed legislation**

	<b>Current legislation</b>	<b>Proposed legislation</b>	<b>Net cost under proposed legislation</b>
	<b>\$</b>	<b>\$</b>	<b>\$</b>
Approved arrangements	10 009 486	1 810 841	-8 198 645
Ballast water	32 662	1 306 739	1 274 077
Inspector-General of Biosecurity	3 861	7 522	3 661
First points of entry	12 282	11 088	-1 194
<b>Total average annual compliance costs</b>	<b>10 058 291</b>	<b>3 136 190</b>	<b>-6 922 101</b>

Note: Costs have been averaged over ten years.

### 1.1.1 Regulatory Burden and Cost Offset (RBCO) Estimate Table

Average Annual Compliance Costs (from Business as usual)				
Costs (\$m)	Business	Community Organisations	Individuals	Total Cost
<b>Total by Sector</b>	\$ -6 922 101	\$	\$	\$ -6 922 101
Cost offset (\$m)	Business	Community Organisations	Individuals	Total by Source
<b>Agency</b>	\$	\$	\$	\$
<b>Within portfolio</b>	\$	\$	\$	\$
<b>Outside portfolio</b>	\$	\$	\$	\$
<b>Total by Sector</b>	\$	\$	\$	\$
<b>Proposal is cost neutral?</b> <input checked="" type="checkbox"/> <b>yes</b> <input type="checkbox"/> <b>no</b>				
<b>Proposal is deregulatory</b> <input checked="" type="checkbox"/> <b>yes</b> <input type="checkbox"/> <b>no</b>				
<b>Balance of cost offsets</b>	\$			

#### Consultation

This RIS is based on the significant and still relevant consultation that occurred for the Ballast Water Management RIS in 2007, the biosecurity legislation development from 2009 to 2012 and the Biosecurity Legislation RIS in 2012, which included further consultation on the ballast water provisions.

From 2012 until August 2013 the department continued to communicate and consult with stakeholders, industry and international trading partners on issues raised during the consultation processes mentioned above. This occurred through: teleconferences, consultative committees, presentations at events, international meetings, and meetings with departmental officials.

Information on stakeholder issues and perspectives was also gathered during the Senate inquiry by Rural and Regional Affairs and Transport Legislation Committee into the Biosecurity Bill 2012 and Inspector-General of Biosecurity Bill 2012.

The Biosecurity Bill 2012 and Inspector-General of Biosecurity Bill 2012 lapsed with the prorogation of the 43rd Parliament on 5 August 2013. Since this time the proposed biosecurity legislation has been a matter for the government to consider and the department has not undertaken further consultation.

During the Biosecurity legislation RIS in 2012 the department received few comments relating to any potential costs of the new legislation on businesses.

This section records the nature of the formal consultation activities and the participants.

### ***Ballast Water Management RIS consultation***

A two-phase consultation for the Ballast Water Management RIS was conducted by the department in conjunction with the Centre for International Economics (CIE) in 2007. This two-phase strategy was developed based on feedback from the National Introduced Marine Pests Coordination Group (NIMPCG) that there may be merit in considering key (i.e. NIMPCG) stakeholders' comments prior to the Consultation RIS being released for general public comment.

#### *Phase one*

On 15 August 2006 the draft Ballast Water Management RIS was presented by the authors, CIE, to NIMPCG at the groups' 20th meeting, held in Melbourne. Written responses to the draft RIS were received from the stakeholders listed in Table 13. A meeting was held in Sydney on 28 September 2006 to further discuss issues with key industry representatives and Australian Government agencies.

Several cost estimations were recalculated as a result of feedback received from stakeholders, and incorporated into a revised draft Ballast Water Management RIS.

### **Table 13 Stakeholders who provided written responses to the phase one draft Ballast Water Management RIS, 2006.**

Association of Australian Ports and Marine Authorities Incorporated

Australian Maritime Safety Authority

Australian Shipowners Association

Australian Quarantine and Inspection Service

Department of Transport and Regional Services

NSW Department of Primary Industries

NSW Department of Environment and Conservation

Queensland Environment Protection Agency

Tasmanian Department of Primary Industries and Water

Victorian Environment Protection Authority

Western Australian Department of Fisheries

#### *Phase two*

The revised draft Ballast Water Management RIS was available for public comment from 24 November 2006 to 22 December 2006. Written responses were received from:

- Pearl Producers Association
- The Association of Australian Ports and Marine Authorities Incorporated
- Australian Shipowners Association
- National Bulk Commodities Group
- Victorian Government
- Australian Conservation Foundation.

Two late submissions were also received.

Most of the comments in the second consultation phase related to estimates of the various costs and benefits. In many cases respondents agreed that the estimated benefits were understated, or related to costs that have little overall impact on total cost. These underestimates are described in the impact analysis of the Business Cost Calculator.

After the end of the phase two consultation, industry stakeholders were in general support of the preferred option 2, sub-option 3, with a strong desire for regulation, in whatever form it takes, to be nationally consistent.

#### ***Biosecurity Legislation and RIS consultation***

Consultation on policies surrounding the biosecurity legislation was initially undertaken in 2008 as part of the Beale Review on Australia's quarantine and biosecurity systems.

#### *The draft Biosecurity Legislation*

The department began consultation on the new legislation in 2009. During the development process, the department consulted with industry representatives from the cargo, shipping, ports, supply chain and logistics, airline, airport, customs, environment, animal, plant, invasive species, primary production and petroleum/exploration sectors through working groups, primarily the Industry Legislation Working Group.

There were 13 industry working group meetings held from April 2009 to July 2012. In May 2012, the draft 2012 Biosecurity Legislation RIS was provided to the Industry Legislation Working Group for consideration.

#### **Table 14 Members of the Industry Legislation Working Group**

Animal Health Australia

AQIS Industry Cargo Consultative Committee

Australian Petroleum Production and Exploration Association Limited

Board of Airline Representatives of Australia

Brisbane Airport Corporation

Carnival Australia Conference of Asia Pacific Express Carriers

Customs Brokers and Forwarders Council of Australia Inc

DHL Invasive Species Council

Invasive Animals Cooperative Research Centre

National Farmers Federation

Plant Health Australia

Ports Australia

Qantas Airways

Shipping Australia

Consultation for the Biosecurity Legislation RIS was conducted by PricewaterhouseCoopers (PwC) on behalf of the department.

The department and PwC facilitated an industry roundtable on 8th July, 2011. This provided an opportunity for industries that are likely to be affected by the adoption of the proposed biosecurity legislation. Sixteen industry associations attended (Table 15) and had the opportunity to provide additional information via email after the roundtable.

#### **Table 15 Attendees at the Industry Roundtable, July 2011.**

##### **Shipping and Aviation Group**

Airports Association

AQIS Industry Cargo

Consultative Committee

Australian Petroleum Production and Exploration Association

Board of Airline Representatives Australia

Carnival Australia Conference of Asia Pacific Express Carriers

Ports Australia

Qantas Airways

Shipping Australia

### **Industry Legislation Group**

Animal Health Australia

AQIS Industry Cargo

Consultative Committee

Custom Brokers and Forwarders Council

Invasive Species Council

Invasive Species CRC

National Farmers Federation

Plant Health Australia

Data and costings obtained through this workshop contributed to the development of the initial RIS.

Following agreement to the draft legislation by the previous government there was a public consultation period from 4 July 2012 until 24 October 2012. This included:

- 11 meetings in all capital cities with state/territory governments and peak industry representatives – approximately 150 people participated
- nine public consultation meetings in capital cities (excluding Darwin) and Newcastle – approximately 200 people attended
- an embassy briefing attended by representatives from 33 governments. International trading partners were also kept informed through the World Trade Organization
- biosecurity legislation website pages – viewed 32 541 times and with over 12 000 visitors to the consultation pages

At the meetings, the department presented an outline of the proposed provisions in the draft Biosecurity Bill and Inspector-General of Biosecurity Bill and PricewaterhouseCoopers, the consultant engaged to develop the RIS, outlined possible impacts of the provisions in the Bills on stakeholders.

The department received 78 submissions from a variety of organisations and industries which were generally supportive of the need for new legislation. Issues raised revolved predominantly around the biosecurity import risk analyses, the inclusion of the Appropriate Level of Protection, the role of the Inspector-General of Biosecurity and the Director of Biosecurity and environmental biosecurity.



It should be noted that the majority of the Biosecurity Bill, including provisions to support border operations such as enforcement and compliance measures, emergencies and human health, received little or no comment or were accepted as drafted.

Few comments related to any potential costs of the new legislation on businesses. Submissions on approved arrangement provisions were supportive as the changes provided opportunities for regulatory burden reduction, decreased overall costs to industry and government and streamlining of systems. With regards to first points of entry one consultation participant stated that:

“Often ports have surplus or under used infrastructure so there should not be a need for a lot of new and expensive infrastructure to be built, rather upgrading what already existing.”

Consultation in relation to the management of human health risks and interventions revealed that the impact of these changes will be minor as there will be little practical change to current procedures despite greater clarity and flexibility in the legislation. Further, only a small number of people are likely to be affected as the changes do not affect the list of human disease for which interventions are applied.

A number of written submissions touched on the impact of the proposed biosecurity legislation and the associated cost benefit analysis. In general, the majority of submissions sought additional detail which the subordinate legislation and supporting policy and administrative guidance material is likely to address.

Many stakeholder groups representing diverse perspectives recommended a wide range of proposals they felt would better address the government’s aims for biosecurity reform. The department considered all submissions and notes that, as can be expected with most regulatory systems, there are some stakeholders calling for more stringent regulation such as in environmental biosecurity and other stakeholders calling for less stringent regulations such as industry groups from the trading sector.

On introduction, the Biosecurity Bill 2012 and Inspector-General of Biosecurity Bill 2012 were referred to the Senate Rural and Regional Affairs and Transport Legislation Committee for reporting. The Committee held four public hearings in Canberra, Perth, Melbourne and Sydney and published 39 submissions.

The majority of issues raised in the published submissions to the Inquiry were consistent with, or identical to, those provided to the department. Over two-thirds of the submissions were generally supportive of the Biosecurity Bill although the support was qualified by concerns with parts of the legislation, in particular the biosecurity import risk analyses process and the inclusion of the Appropriate Level of Protection.

### ***Consultation with states and territories***

Consultation with states and territories occurred throughout the biosecurity legislation drafting process, and during the consultation period following release of the Biosecurity Bill.

Preliminary provisions in the Act include commencement, the objects of the Act, extension of the Act to external territories and concurrent operation with state and territory laws. The Act

does not limit concurrent operation of state and territory laws except in relation to the regulation of the importation of goods and ballast water.

The Australian Government will cover the field with respect to importation into Australia and Australian import conditions will be based on the outcomes of a national risk assessment process, taking into account regional differences in pest and disease status. The Australian Government may also choose to prohibit the importation of goods into part of Australia (e.g. particular states or territories), where scientifically justified.

Additional biosecurity measures can be taken at a state level to respond to regional differences in pest and disease status. States and territories will continue to be consulted through a series of workshops to define this policy and through the Intergovernmental Agreement on Biosecurity.

### **Recommended option**

Since the Quarantine Act was first drafted over a century ago, Australia's biosecurity risks have changed significantly. This RIS has identified and considered a range of problems with the Quarantine Act.

This RIS illustrates the anticipated costs and benefits of the proposed biosecurity legislation compared to the current situation, and demonstrate the potential for improved business processes through approved arrangements, better targeting of resources and greater administrative efficiency.

The proposed biosecurity legislation builds on and expands the responsibility for biosecurity risk management, leading to better outcomes for business and Australia's biosecurity risk management. It allows for a better management of the biosecurity risk associated with ballast water by recognising that invasive marine pests can travel in both international and domestic ballast water sources.

The proposed biosecurity legislation maintains the integrity of Australia's biosecurity system by enacting the Inspector-General of Biosecurity. It will improve biosecurity risk management at the border by making the responsibilities at the border clear and ensuring departmental officers can effectively and efficiently complete operational tasks at proclaimed and non-proclaimed ports.

Moreover there is a broad, unquantifiable benefit of the proposed biosecurity legislation from improving the overall quality of the legislative framework for biosecurity, including:

- Reducing the burden on international passengers and trade while remaining responsive to the threat of infectious disease.
- Removing the complex regulatory requirements and administrative practices.
- Being flexible and reflect contemporary industry practice to meet changing demands and provide regulatory certainty to businesses, industry and the government.
- Additional powers for government to monitor and manage biosecurity risks when they are detected.

Furthermore, the proposed biosecurity legislation will allow for better management of the risks of animal and plant pests and diseases entering, establishing and spreading in Australia and potentially causing harm to people, the environment and the economy.

It has been illustrated in this RIS that whilst the overall compliance costs on businesses results in a reduction of more than \$6.9 million, the compliance cost burden on some industry participants is estimated to increase. This is primarily through the increased regulation to manage the biosecurity risk associated with ballast water by domestic vessel movements.

By reducing unnecessary regulatory and administration burden, it is expected that biosecurity resources will be better focused on biosecurity risks that may cause the most harm and therefore the effectiveness of biosecurity risk management. It is expected that the proposed biosecurity legislation will ensure a robust set of powers and mechanisms to protect Australia's unique biosecurity status and environment.

Based on the analysis undertaken in this RIS, the proposed biosecurity legislation is assessed as being the option with the highest net benefit and is the preferred option for government consideration.

### **Implementation and review**

Once adopted, the proposed biosecurity legislation is expected to commence one year after Royal Assent. This delay will provide time for the department to transition between the operations under the Quarantine Act to the proposed biosecurity legislation, which requires a range of implementation and training activities to occur.

Transitional arrangements will apply in some instances, such as for approved arrangements. Upon commencement of the Biosecurity Act, existing QAPs and compliance agreements provisions will remain valid for an 18 month period so that businesses that already have an agreement with the department have time to apply for and transition to an approved arrangement. It is expected that the majority of existing agreements will be transitioned to approved arrangements during the first year following commencement, and all transitions will be finalised within 18 months of commencement. Existing first port of entry provisions will remain valid for a period of three years to allow for the transition of these ports to a first point of entry be transitioned.

The delegated legislation will clarify and provide further information on what is contained in the proposed biosecurity legislation. It is anticipated that delegated legislation will be similar to existing delegated legislation currently sitting underneath the Quarantine Act. The department will work with the Office of the Best Practice Regulation to determine the need for future RISs for the delegated legislation and implementation of the proposed biosecurity legislation.

## **Appendix A: Minor impacts of adopting the proposed biosecurity legislation**

This section qualitatively describes potential changes expected if option three is adopted: proceeding with the proposed biosecurity legislation.

### ***Travel movement restrictions***

There is a need for the Commonwealth to act to mitigate the risk of spreading communicable diseases to ensure that Australia complies with its international health obligations.

Under the Quarantine Act, Human Quarantine Officers have limited powers to restrict the movement of people out of Australia when there is an increased threat of communicable diseases.

Under the proposed biosecurity legislation, the Director of Human Biosecurity will be able to restrict people suspected of having a listed human disease from travelling on international passenger aircrafts and vessels. The proposed biosecurity legislation would allow the Director of Human Biosecurity to issue an alert to all border agencies and relevant operators, advising them of the travel restrictions in place. This alert would be used to ensure suspected individuals subject to a traveller movement restriction are not allowed to board an aircraft or vessel.

The new legislation seeks to further implement the International Health Regulations (2005) and provide the Commonwealth Government with powers to prevent, protect against, control and provide a public health response to the international spread of disease.

### ***Impact analysis***

The cost of travel movement restrictions is expected to be minimal due to the low expected frequency with which the power is expected to be invoked and the associated impact. While it is difficult to estimate the exact number of times this is likely to be used each year, it might be in the range of around 2-3 times per year on average.

This minor change will affect individuals, as people subject to travel movement restrictions will not be allowed to board an aircraft or vessel. If these individuals are identified at the primary line, they may:

- forfeit some or all of payments made to the airline or vessel and other associated travel costs (e.g. accommodation at destination)
- have their baggage removed from the aircraft or vessel, and have their boarding pass voided.

Importantly, biosecurity interventions would be tailored to accommodate an individual's circumstances (e.g. their health, travel history or future movements), with the ability to escalate to broader responses as information becomes available. For example, an ill passenger could be ordered into isolation, ordered to undergo treatment or vaccination, ordered to stay at home for a period, ordered to report their health status regularly, or simply required to provide accurate contact details.

### *Management of human remains*

Under the *Quarantine Proclamation 1998*, a permit is required to import human remains that are: not accompanied by a death certificate stating the cause of death; not of a high risk nature; or the result of death during transit. Currently, permits require staff input from the Department of Health, the Department of Agriculture, and the Department of Foreign Affairs and Trade.

Under the proposed biosecurity legislation, human remains will generally be permitted to enter Australia without restriction and a permit would no longer be required. Requirements will still apply to specific classes of remains, as specified by the Director of Human Biosecurity. Biosecurity risks associated with individuals who have died in transit will continue to be managed by State or Territory Police and the Coroner.

The proposed changes are not expected to affect the national human health risks associated with imported human remains. The risks associated with imported human remains are negligible due to the:

- low number of imported human remains each year (it is estimated that approximately 500 human remains are repatriated to Australia each year with less than 250 of these currently requiring an import permit)
- the low likelihood of death from communicable disease of an Australian travelling overseas;
- low global incidence or prevalence of the diseases which present a risk to human health in Australia
- high standards of infection control in Australia, particularly for funeral industry participants which are regulated under occupational, health and safety legislation
- high levels of vaccination, sanitation, hygiene and water safety in most Australian areas
- high standards of health care available in Australia, and the speed and effectiveness of public health action.

Given the negligible level of human health risk, regulation associated with an ongoing permit system does not represent an efficient use of Australian Government resources. In the unlikely event that there is a communicable disease outbreak in Australia resulting from imported human remains, public health measures are likely to be successful in managing and preventing the spread of most diseases.

### *Impact analysis*

These proposed changes represent a reduction in regulation which will benefit individuals needing to repatriate remains into Australia in two main ways:

1. Removing fees and time cost associated with applying for a permit, which are estimated as follows:

- lodgement of import permit application fee
- assessment of import permit application fee
- average time to fill out the required documentation online (approximately 30 minutes).

2. Reducing the emotional cost incurred by those who may have recently suffered the death of a family member and must spend the time and effort navigating government processes when quite often these processes are not related to biosecurity risk and are unnecessary.

It is noted that extenuating circumstances which alter the above mentioned factors may lead to changes in the human health risk associated with importing human remains. For example, the import volume and likelihood of death from communicable disease may be increased during wartime; or a large scale outbreak of a communicable disease may occur overseas. In those circumstances, the Australian Government can respond to changes in the human health risk level by placing import requirements on particular classes of human remains.

### ***Sanctions and offences***

The proposed biosecurity legislation has been designed so that the most appropriate sanction for non-compliance can be applied. One major change from the Quarantine Act is the introduction of a civil penalty regime in addition to existing criminal offences, which provides the department with greater opportunity to take action where non-compliance has been identified. Submissions provided as part of the consultation process were generally supportive of the civil penalty regime.

The maximum penalties have been developed to respond to acts of serious non-compliance where significant biosecurity harm is caused to animal, plant or human health. The maximum penalty may not be appropriate in all circumstances and it is a decision for the courts to determine the most appropriate penalty during sentencing.

Additionally, the proposed biosecurity legislation maintains the existence of an infringement notice scheme from the Quarantine Act for high volume, low complexity offences and introduces an enforceable undertaking scheme as an alternative to a civil or criminal penalty.

### ***Abandoned goods***

The proposed biosecurity legislation will create a trigger for being able to deem potentially hundreds or thousands of goods as abandoned or forfeited each year. The current requirement to hold goods if an owner cannot be identified takes considerable time and resources for departmental staff to store goods for extended periods of time (sometimes up to three months). For each of the goods, it can take staff a total of a few days in sending letters, providing response periods, and following up.

### ***Covering the field for imports***

The proposed biosecurity legislation means that Commonwealth legislation will “cover the field” in respect of the prohibition or restriction of bringing in or importing goods into Australia. This means that the Act will override state or territory laws that relate to bringing in or importing goods to the extent they are inconsistent with Commonwealth laws and that state and territories will not be able to impose measures that are more restrictive than those imposed by the Commonwealth.

The proposed biosecurity legislation provides considerable flexibility. For example, bringing in certain types of goods could be completely prohibited or could be allowed with conditions. Conditions imposed on the import of goods will be based on the outcomes of a national risk assessment process which takes into account regional differences in pest and disease status.

### *Impact analysis*

This clarity in the proposed legislation will increase industry certainty by eliminating any risk of inconsistent requirements imposed by states and territories. States and territories are already restricted, to an extent, from imposing more restrictive conditions as these can place Australia in violation of its international obligations with subsequent risks to trade. However, clarity in the proposed biosecurity legislation removes any doubt. Overall, this is expected to provide a benefit to Australia's trade relationships without losing the flexibility to accommodate regional differences.

### ***Imported goods***

Under the proposed biosecurity legislation goods become subject to biosecurity control automatically as they enter Australian territory, enlivening the powers within the legislation to manage those goods. This means that biosecurity officers can inspect a good and if it is found to pose an unacceptable biosecurity risk it can be treated without first having to order the good into quarantine. This will reduce delays in treating and releasing imported goods that do require intervention, and help those imported goods move through the border faster.

### ***Entity risk***

The proposed biosecurity legislation contains a 'fit and proper person' and an 'associates test', which allow a person or company's history of compliance to be considered by the Director of Biosecurity when deciding whether to issue an import permit or allow them to enter into an approved arrangement with the Commonwealth. This addresses the risks created by the current legislation, which has limited powers to address the risk posed by people or companies that have breached the Quarantine Act or other relevant Commonwealth or state and territory legislation. Evidence of entity risk will be required for approved arrangements and may be required for import permits.

### *Impact analysis*

It is expected that businesses will be complete a 'fit and proper person' or an 'associates test' by making a declaration as part of an application form. This is a form businesses will already be required to fill out, and so the proposed biosecurity legislation is likely to pose a negligible additional cost on businesses that import goods or that seek to enter into an approved arrangement. Overall, these tests will benefit Australia by ensuring that particular activities with higher biosecurity risk are being conducted by appropriate persons.

### ***Emergency powers***

Under the current legislation, if there is an incursion of national significance the Governor-General can declare an emergency. Once an emergency has been declared, a range of powers become available to the Minister to give directions, take actions, declare a national response agency, delegate powers and declare a temporary quarantine station. The proposed biosecurity legislation will largely contain the same powers.

### *Impact analysis*

These powers are broad-reaching and, if enacted, are likely to have a substantial impact on business, individuals and community and pose additional costs for them. However, the nature of these costs will depend heavily upon the nationally significant disease or pest that led to the emergency declaration, how far it has spread and what actions and measures are necessary to manage it. It is also important to note that these powers are only used in extremely urgent circumstances and have never been used to manage an agricultural-related threat.



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