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New biosecurity laws for the Bush Capital

Nicola Silbert ENVIRONMENTAL DEFENDERS' OFFICE (ACT)

Introduction

Over half of the land in the ACT meets the definition of a “protected area” as defined by the International Union for Conservation of Nature (IUCN).¹ It is the origin of the capital’s bush character and home to a wide variety of native flora and fauna. However, this unique biodiversity faces an ever-looming threat from invasive species, one that is not sufficiently addressed by the ACT’s currently fragmented biosecurity laws.

Across Australia, invasive species threaten over three-quarters of listed threatened amphibians, birds and mammals in addition to more than half of listed threatened plants, fish, reptiles and invertebrates.² Where these species have significance to Aboriginal communities in the ACT, biosecurity issues also impact the cultural environment.³ Finally, invasive species pose a threat to primary industries including livestock, wool and vineyards, which make up a significant proportion of agricultural industries in the ACT.⁴

Biosecurity risks in the ACT and surrounds are exacerbated by climate change, rapid population growth, increasing trade and the expansion of Canberra Airport.⁵ The ACT is also geographically unique, being landlocked and entirely surrounded by NSW. There is no natural barrier between the ACT and NSW, meaning biosecurity risks in NSW are intertwined with those of the ACT.

New national and NSW biosecurity frameworks, including the updated Intergovernmental Agreement on Biosecurity (IGAB 2) and associated reviews, have prompted the ACT to develop new biosecurity laws. An overview of these proposed laws is outlined in the *ACT Biosecurity Act* (Consultation Paper) which was released for comment earlier in 2018. The proposed biosecurity framework consolidates several pieces of existing legislation and incorporates principles contained in updated biosecurity laws across Australia. However, the proposed framework does not integrate key environmental principles or ensure community engagement on biosecurity issues.

How does it affect you?

The proposed laws will directly affect relevant government agencies, industry groups, primary producers, and other key stakeholders in the ACT and surrounding

NSW. In addition, the Consultation Paper proposes a principle of shared responsibility and a general biosecurity duty, which imposes a responsibility to minimise or eliminate biosecurity risks on every person who deals with a biosecurity matter.

By its nature, biosecurity is a national issue that does not conform to state boundaries. Responsibility for biosecurity is shared between jurisdictions and thus the impact of this new legislation will extend beyond the immediate ACT region. The new ACT laws proposed in the Consultation Paper will complement biosecurity reform undertaken in other jurisdictions.

Context for reform

At the international level, biosecurity issues are dealt with in several instruments, including in the Convention on Biological Diversity (CBD) which requires parties to “prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species”.⁶ Australia is a party to the CBD and, as a consequence, develops law to implement provisions within the CBD. Although the ACT Government is not itself a party to international treaties, the role of state (or territory) and local governments is recognised as essential to their implementation.⁷

The proposal for new biosecurity legislation in the ACT follows an overhaul of biosecurity laws across Australia. The *One Biosecurity: A Working Partnership*⁸ (Beale Review) in 2008 proposed a new biosecurity system in Australia, underpinned by the principle of shared responsibility and a risk-based approach to biosecurity. The 2012 Intergovernmental Agreement on Biosecurity (IGAB 1) defined the shared biosecurity responsibilities of Commonwealth, state and territory governments and created a new biosecurity framework.

New Commonwealth biosecurity laws were introduced, replacing the Quarantine Act 1908 (Cth) with the Biosecurity Act 2015 (Cth). At a state level, the Biosecurity Act 2015 (NSW) and Biosecurity Act 2014 (Qld) were introduced. As a response to this national context, the ACT released the ACT Biosecurity Strategy 2016–2026 which identified the need for a single and consolidated biosecurity legislation in the ACT.

The independent IGAB review panel chaired by Dr Wendy Craik reviewed IGAB 1 and the national biosecurity system, presenting their final report in 2017.⁹ In April 2018, Ministers reviewed the draft IGAB 2. The Australian agriculture ministers' response to the independent panel's IGAB final report was recently released in November 2018.¹⁰ A National Biosecurity Statement is also being developed in response to a recommendation from the IGAB review.¹¹

Why does the ACT need new biosecurity legislation?

Biosecurity in the ACT is currently governed by several fragmented legislative instruments, including the Animal Diseases Act 2005 (ACT), Plant Diseases Act 2002 (ACT), Pest Plants and Animals Act 2005 (ACT), Stock Act 2005 (ACT) and Fertilisers (Labelling and Sale Act) 1904 (ACT). There are gaps and inconsistencies between these pieces of legislation. For example, the powers of inspectors and authorised people under the relevant Acts are inconsistent; the Animal Diseases Act and the Plant Diseases Act provide for different quarantine powers; and there are no quarantine powers under the Pest Plants and Animals Act. New legislation is needed to consolidate these pieces of legislation and conform to federal obligations.

Definitions and concepts in the new biosecurity laws

The Consultation Paper proposes key definitions and concepts that mirror those contained in new biosecurity laws introduced across Australia, particularly the NSW Biosecurity Act. There are some proposed changes that make provisions proposed in future ACT legislation more workable than its NSW equivalent. For example, the proposed definition of "biosecurity risk" is simpler than the NSW definition.¹²

Principles such as the principle of shared responsibility, as recommended by the Beale Review and integrated in new biosecurity legislation across Australia, are included within the proposed ACT framework. The proposed legislation introduces a general biosecurity duty that requires a person dealing with biosecurity matter to "take all reasonably practicable measures to prevent, eliminate or minimise the biosecurity risk posed by that matter."¹³ This duty will apply to any person who deals with biosecurity matter; deals with a carrier of biosecurity matter; or carries out an activity in relation to biosecurity matter; *and* knows or ought reasonably to know that the biosecurity matter or the carrier or activity poses or is likely to pose a biosecurity risk.

Where there is a higher likelihood of a biosecurity risk occurring, greater action is required to comply with the general duty and minimise the biosecurity risk.

Mandatory requirements will apply to high-risk matters and activities. Noncompliance with certain regulations will mean that general biosecurity duty has not been discharged and will be an offence under these regulations.

A new Biosecurity Management Toolbox

The suite of new mechanisms in the Consultation Paper mirrors the NSW Biosecurity Act. Biosecurity matters which have been found to pose a significant adverse risk to the economy, environment or community will be declared as prohibited matters. These are equivalent to "notifiable" pests and diseases referred to under current legislation.

The Director-General will have the power to make a "control order" and a "control zone" in which a particular biosecurity risk is prohibited or regulated. The purpose of control orders is to respond where there is a biosecurity risk but where an emergency response is not necessary. Importantly, a control order that affects native flora and fauna may only be made after consultation with the ACT Conservator of Flora and Fauna.

The new laws will provide for "biosecurity zones" to be defined by regulation. Biosecurity zones will be used for the long-term management of a biosecurity matter. Regulations may also impose obligations within a biosecurity zone that vary in proportion to the biosecurity risk.

As is the case under existing legislation, people keeping certain biosecurity matters will register as a biosecurity entity. A permit system will allow actions which would otherwise be a breach of the legislation, including control order and biosecurity zone permits, and permits for dealing with otherwise prohibited matters.

Where an emergency response to a biosecurity risk is required, a two-staged emergency response will apply. The first stage allows authorised people to exercise emergency powers, including the power to restrict or regulate the movement of people; the power to require people to apply specified hygiene procedures; and information gathering powers. The second stage allows the Minister to issue a biosecurity emergency declaration through an emergency order and activate the ACT Biosecurity Emergency Plan.

The legislation will be enforced by authorised people with broad powers, including powers of entry and search; powers to question and require information and records; powers to issue directions; and powers to manage and respond to biosecurity risks and suspected biosecurity risks. These powers include the power to

issue specific biosecurity directions such as a direction to discharge the general biosecurity duty and a direction to prevent, eliminate or minimise a confirmed or suspected biosecurity risk.

The extraterritorial application for biosecurity legislation and extraterritorial exercise of functions by the Minister are essential parts of a coordinated approach between the ACT and NSW. The Consultation Paper proposes a system for recognising NSW-issued licences, permits or authorities and providing short-term permits in situations where registration is required in the ACT but not in the state of origin.

A missed opportunity for the precautionary principle

As a progressive jurisdiction, the Consultation Paper currently represents a missed opportunity for the ACT to incorporate long-recognised environmental and biosecurity principles, including the precautionary principle. A precautionary approach is the first principle in the Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species¹⁴ (VI/23), to guide the implementation of Art 8(h) of the CBD.

However, the application of the precautionary principle in a biosecurity context is a longstanding issue in Australia. The IGAB review recommended further consideration of the precautionary principle in light of apparent inconsistency with World Trade Organization rules¹⁵ which allow only for temporary precautionary measures where there is lack of full scientific certainty.¹⁶ Yet there may be some room for the inclusion of the precautionary principle in a way which does not directly conflict with these rules, noting that state and territory decisions impact Australia's implementation of treaties.

Indeed, the precautionary principle has been included in other jurisdictions. The ACT could draw from Queensland's Biosecurity Act which states that the purposes of the Act are to be achieved by, amongst other principles:

... including in risk-based decision-making under this Act the principle that lack of full scientific certainty should not be used as a reason to postpone taking action to prevent a biosecurity event or to postpone a response to a biosecurity risk ...¹⁷

The failure of the Consultation Paper to explicitly adopt a precautionary approach limits its effectiveness, particularly in protecting the natural environment. The impact of a biosecurity risk on the natural environment is often more uncertain, complex and interrelated with other factors than the impact of the same biosecurity risk on the economy or human health. The level of acceptable risk to the environment under the precautionary principle is therefore often lower than under a general

risk-based approach to biosecurity. In order to adequately protect the natural environment through the biosecurity legislation, the precautionary principle should be included and decision-makers must be required to apply this principle when making decisions.

The importance of an ecosystem approach to biosecurity

The Consultation Paper contains no reference to an ecosystem approach to biosecurity. An ecosystem approach to biosecurity, where appropriate, is another guiding principle in VI/23.¹⁸ It is "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way."¹⁹ Whilst it is recognised that effective management of biosecurity risks helps to protect biodiversity, distinctive ecosystems and natural environment,²⁰ there is little to address an ecosystem approach to biosecurity risks, particularly where invasive introduced plants are now established in the ACT.

Failure to prioritise biodiversity

Although invasive species are one of the greatest threats to biodiversity in the ACT, the Consultation Paper contains limited mechanisms to explicitly protect the natural environment. The proposed framework fails to integrate ACT biodiversity protection and nature conservation laws. The objects mention the environment in a cursory way, but do not outline the effect that biosecurity risks have on biodiversity, threatened species and ecological communities.

A risk-based approach to biosecurity should specifically prioritise biodiversity protection. As a starting point, action plans that have been prepared under the Nature Conservation Act 2014 (ACT) could be examined for an indication of the impacts of invasive species on threatened species and ecological communities. Where there is a likelihood that a biosecurity risk will cause a significant adverse environmental impact, the risk should be prioritised within the biosecurity mechanisms.

Limited community engagement mechanisms

Community support is essential for future ACT biosecurity legislation to be effective. Community members and groups are often familiar with local species and ecological patterns and can contribute expert information and innovative ideas to limit biosecurity risks in their area. The input of the general public is necessary to broaden the range of voices discussing these issues. Citizen scientists and non-government organisations in the ACT have a historical role in contributing to biosecurity services and expertise.²¹

The Consultation Paper states that relevant stakeholders will be consulted;²² however, limited information is

provided on the specifics of such consultations, including information about when consultations would take place and which stakeholders would be consulted. There appears to be very little in the Consultation Paper that clarifies the consultation processes to be legislated in the proposed Biosecurity Bill itself. The importance of community engagement can be recognised through its inclusion in the objects of future biosecurity legislation, as has been done in the Nature Conservation Act.²³

The majority of key decisions set out in the Consultation Paper (such as a decision to make a control order and a biosecurity zone, or a decision to declare a prohibited matter) do not include any provision for community engagement. There is no requirement for community consultation, publication of risk assessments, or third-party merits appeal rights for decisions involving interested parties. Whilst it may be necessary to limit consultation processes in emergency circumstances, many of these decisions set out (eg control order and biosecurity zone decisions) are not made in urgent circumstances. Although the framework indicates the decisions for which merits review will be available, it does not specify who will have standing for merits review of these decisions (judicial review for decisions may be available under the Administrative Decisions (Judicial Review) Act 1989 (ACT)). For the legislation to truly provide for community input, it must include third-party appeal rights for decisions that impact the public — including registration decisions; control order decisions; and biosecurity zone decisions.

Conclusion

The new ACT biosecurity legislation is a long overdue consolidation of existing legislation that brings the ACT into line with Commonwealth and other states' legislation. The current ACT biosecurity framework currently omits core guiding principles with respect to the precautionary principle, ecosystem approaches and biodiversity protection, and consultation mechanisms. It is hoped that the draft Biosecurity Bill will incorporate these considerations.

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Footnotes

1. Department of Environment and Energy (Cth), CAPAD 2016, www.environment.gov.au/land/nrs/science/capad/2016. A "protected area", as defined by the IUCN (1994), is:
 2. Invasive Species Council, Submission No 27 to Senate Standing Committees on Environment and Communications, *Inquiry into Australia's Faunal Extinction Crisis*, 3 September 2018, 2.
 3. These impacts are not discussed in this article and remain an area for further discussion.
 4. Department of Agriculture and Water Resources, Australian Bureau of Agricultural and Resource Economics and Sciences, About my region — Australian Capital Territory, www.agriculture.gov.au/abares/research-topics/aboutmyregion/act.
 5. ACT Government and ACT Parks and Conservation Service *ACT Biosecurity Act Consultation Paper (2017) s 1.1.5* https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/7515/2842/3164/Proposed_Framework_for_an_ACT_Biosecurity_Act_-_Consultation_Paper.pdf.
 6. Convention on Biological Diversity, opened for signature 5 June 1992, [1993] ATS 32 (entered into force 29 December 1993) Art 8(h).
 7. See, eg, United Nations General Assembly, Agenda 21, "Local Authorities' Initiatives In Support Of Agenda 21" Ch 28, www.un-documents.net/a21-28.htm. See H Jaireth "Managing invasive species — a global/local assessment" (2011) 16(3) *Local Government Law Journal* 173–77 for an application of international principles to the Draft ACT Pest Animal Management Strategy 2011–2021.
 8. R Beale, J Fairbrother, A Inglis and T Trebeck *One Biosecurity: A Working Partnership* (2008) <http://apo.org.au/system/files/2926/apo-nid2926-81841.pdf>.
 9. W Craik, D Palmer and R Sheldrake *Priorities for Australia's Biosecurity System: An Independent Review of the Capacity of the National Biosecurity System and its Underpinning Intergovernmental Agreement* (2017) www.agriculture.gov.au/biosecurity/partnerships/nbc/intergovernmental-agreement-on-biosecurity/igabreview/igab-final-report.
 10. Agriculture Ministers' Forum "Priorities for Australia's biosecurity system: an independent review of the capacity of the national biosecurity system and its underpinning intergovernmental agreement — Response from Australian agriculture ministers" (November 2018) www.agriculture.gov.au/biosecurity/partnerships/nbc/intergovernmental-agreement-on-biosecurity/igabreview/ministers-response.
 11. Department of Agriculture and Water Resources, National Biosecurity Statement, 7 November 2018, <https://haveyoursay.agriculture.gov.au/national-biosecurity-statement>.
 12. In the NSW Biosecurity Act, biosecurity risk refers to the risk of a biosecurity impact occurring (ss 13 and 14). The ACT legislation proposes a simpler and more workable definition of biosecurity risk, which is "the risk caused by biosecurity matter which could adversely impact the economy, environment or community" (above n 5, s 1.2.2).

13. Above n 5, s 3.1.2.
14. Decision VI/23 Alien species that threaten ecosystems, habitats or species, UN Doc UNEP/CBD/COP/6/20, pp 249–61 (adopted at the Sixth Conference of the Parties to the Convention on Biological Diversity on 7–19 April 2002).
15. Above n 9, at 57.
16. Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (Agreement on the Application of Sanitary and Phytosanitary Measures) Art 5(7).
17. Biosecurity Act 2014 (Qld), s 5(c).
18. Above n 14.
19. Decision V/6 Ecosystem approach, UN Doc UNEP/CBD/COP/5/23, pp 103–4 (adopted at the Fifth Conference of the Parties to the Convention on Biological Diversity on 15–26 May 2000).
20. Above n 5, s 1.1.1.
21. Through a range of citizen scientist and landcare groups. See, for example, ACT Region Landcare Gateway, available at <https://actlandcare.org.au/volunteer>.
22. Above n 5, s 3.1.3.
23. Nature Conservation Act 2014 (ACT), s 6(2).