



Nature Conservation Council
The voice for nature in NSW



SUBMISSION TO
PROPOSED FRAMEWORK FOR A NSW BIOSECURITY ACT

BY

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Contents

Summary.....	3
1. Measures supported.....	3
2. Flaws and gaps in the proposed framework.....	4
3. Processes to develop and implement a Biosecurity Act.....	7
1. Measures supported.....	8
1.1 General biosecurity obligation.....	8
1.2 Control orders and biosecurity zones.....	8
1.3 Biosecurity emergencies.....	9
1.4 Tenure-neutral approach.....	9
1.5 Registration of biosecurity entities.....	9
2. Flaws and gaps in the proposed framework.....	10
2.1 Administration of the proposed Biosecurity Act.....	10
2.2 Prevention.....	11
2.3 Shared responsibility.....	12
2.4 Accountability and credibility.....	13
2.5 Risk assessments.....	14
2.6 Objects and principles.....	15
2.7 Review and enforcement.....	17
3. More framework detail needed.....	18
4. Response to consultation questions.....	18
5. Processes to develop and implement a Biosecurity Act.....	19

This submission:

This submission is a response to an invitation for public comment on the Framework for a NSW Biosecurity Act released by the NSW Department of Primary Industries in May 2014. The proposed framework outlines the legislative tools and powers required to manage pests, diseases, weeds and contaminants in NSW and will be used to form the basis of the NSW Biosecurity Act, which will support the national agreed principle that biosecurity is a shared responsibility.

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Summary

The Framework for a NSW Biosecurity Act provides a potentially powerful basis for improved management of biosecurity risks. However the proposed Biosecurity Act will rely heavily on subsidiary powers and regulatory tools, thus providing few legislative guarantees that the objectives of the state's biosecurity strategy can be met. Improvements are needed to promote prevention, better safeguard the public interest and involve the community, deal with the particular needs of the environment, avoid conflicts of interest and provide for accountability.

1. Measures supported

The following measures of the Framework for a NSW Biosecurity Act are conditionally supported.

General biosecurity obligation

We strongly endorse the concept of a 'general biosecurity obligation' to promote a shared responsibility for biosecurity. If it is rigorously and comprehensively applied, it has the potential to foster a culture of biosecurity awareness and responsibility, akin to that which exists for hygiene and public health. However, it will take considerable time, the development of clear, enforceable standards, extensive public education and strong enforcement. If it is not well-applied, it could lead to a considerable worsening of standards. It cannot replace the need for explicit prohibitions on risky species and activities.

A stakeholder working group, including with representatives from environmental NGOs, would assist the government in developing workable effective approaches.

Recommendations

1. Prior to introducing a biosecurity bill, develop in detail the approaches needed to ensure optimal application of the general biosecurity obligation, including standards, regulations, public education programs and enforcement.
2. Establish a stakeholder working group to assist with further development of the general biosecurity obligation. This group should include an equivalent number of environmental and industry stakeholder representatives.

Control orders and biosecurity zones

We support the proposal to improve capacity and flexibility to eradicate or otherwise manage new incursions through the use of control orders and biosecurity zones. However, there should be a systematic approach to their application based on biosecurity risk rather than being at the discretion of the Secretary of NSW Trade & Investment to ensure they will be used in the public interest to respond to incursions with environmental risks. Public reporting and risk assessments on all new incursions is essential. The precautionary principle should be applied in decision-making.

Recommendations

3. Invest power to declare biosecurity zones and issue control orders in response to incursions with environmental risks in the Director General Office of Environment and Heritage. Establish an expert advisory committee to make recommendations on responses to new incursions with environmental risks.
4. Develop and publish criteria to guide decisions on responses to new environmental incursions. Require application of the precautionary principle.
5. Maintain a public list of all incursions into NSW. Conduct and publish risk assessments of all new incursions as soon as possible after detection as a basis for determining the most appropriate management response.

Biosecurity emergencies

We support the proposed approach to biosecurity emergencies provided that equivalent powers are invested in environmental authorities to declare biosecurity emergencies for environmental reasons.

Recommendation

6. Invest power in the Director General Office of Environment and Heritage to make a biosecurity emergency declaration to respond to a biosecurity emergency where there are reasonable grounds to believe that without emergency management the biosecurity threat may have a significant adverse impact on the state's environment.

Tenure-neutral approach

We support the tenure-neutral approach that requires all land managers to manage biosecurity risks, regardless of whether the land is publicly or privately owned. To prevent perverse outcomes, biosecurity risks must be comprehensively identified and prioritised to ensure that the exercise of obligations by public land managers is in the public interest and results in optimal outcomes for the environment and economy.

Recommendation

7. Implement a tenure-neutral approach to biosecurity complemented by systematic risk assessments and management plans to ensure that public funds are directed to managing the highest priority invasive species based on both environmental and economic criteria.

Registration of biosecurity entities

We endorse the proposal to require registration of entities keeping certain biosecurity matter and the proposal to detail in the legislation what biosecurity matter and circumstances will trigger a requirement for registration. Registration should be based on a systematic assessment of risks across all keepers of biosecurity matter, with consultation on the development of these requirements. We support the potential to require a bond or insurance and advocate that this be applied consistently to reduce biosecurity risk. We strongly oppose the limitation of merits review to risk creators. Registration decisions should be open to merits review by third parties acting in the public interest.

Recommendations

8. Require the registration of entities keeping biosecurity matter and the conditions for the keeping of biosecurity matter based on a systematic assessment of the risks of all categories.
9. Develop conditions for keeping, including requirements for bonds or insurance, to reduce biosecurity risks.
10. Conduct consultation on the development of these categories and conditions.
11. Provide for merits review brought by third parties acting in the public interest.

2. Flaws and gaps in the proposed framework

The Framework for a NSW Biosecurity Act has numerous flaws and gaps, in particular the lack of focus on prevention, the discretionary nature of most decision-making and its investment in the Secretary of NSW Trade & Investment and the lack of accountability measures.

Administration of the proposed Biosecurity Act

The proposed institutional arrangements for biosecurity are deeply flawed and undermine the potential for effective environmental biosecurity. There exists a very high potential for conflicts of interest since the Secretary of NSW Trade & Investment, who has the majority of decision-making powers, has roles to promote agriculture and trade that potentially conflict with the biosecurity roles. Environmental risks will inevitably be given less priority than is warranted, particularly as the major focus of NSW Trade & Investment is 'economic development' and there are no environmentally relevant key performance indicators.

Given the extreme importance of biosecurity to the environment, OEH staff should have an integral role in biosecurity beyond an on-ground role as land managers. Biosecurity is at least as important (arguably more important) to the environmental portfolio as it is to the agriculture and considerably more challenging because of:

- The need to protect hundreds of thousands of species, their populations and ecosystem processes
- The irreplaceability of many conservation values under threat from invasive species
- The high number and complexity of invasive species threats to environmental values

- The limited knowledge about biodiversity and invasive species threats to the environment and the long timeframes over which invasive species establish and spread.
- The often limited management options in natural environments, and the lack of commercial incentives to manage environmental threats.
- The multitude of stakeholders, most with limited resources.

Optimally the biosecurity agency would be an independent agency or a joint environmental-agricultural agency.

Recommendations

12. Ensure that biosecurity decision-makers are independent from any role in agriculture and trade promotion or other roles that potentially conflict with biosecurity decisions and are not under the direction of any minister with those roles.
13. Ensure that the environmental agency has an equivalent role to the agricultural agency in administering the biosecurity act by either establishing an independent or joint environmental-agricultural agency for biosecurity.

Prevention

It is widely accepted that prevention is the most effective and least-cost approach to biosecurity but this measure is largely missing from the proposed framework. The reliance on declaration of 'prohibited matter' will perpetuate the current failed approach to weeds that imposes restrictions on a small subset of potential or known invasive species and allows the entry of thousands of species without risk assessment. The best and only feasible way to prevent new invasive species is to permit the entry of species assessed as a 'very low' risk. There is strong support for a 'permitted' (safe) list approach and it was recommended by the Natural Resources Commission for weed risks.

Recommendation

14. To prevent biosecurity risks, implement a permitted list approach to all non-indigenous organisms, including plants (as recommended by the Natural Resources Commission). This approach should be applied to all non-indigenous species, subspecies and variants, including those indigenous to Australia but not to NSW.
15. Make prevention a more explicit priority in the objects of the legislation.

Shared responsibility

The proposed framework stresses the importance of 'shared responsibility' for biosecurity but severely limits the scope of that responsibility as applied to the community and environmental sectors. The community role depicted in the framework is limited to abiding by the biosecurity obligation: 'eyes and ears' (detection) and 'brawn' (on-ground management). Apparently lacking is a similar respect for community 'brains'.

The community sector could be the government's greatest ally in achieving stronger environmental biosecurity. Considerable advantages that can be derived from meaningful community participation including increasing awareness and understanding, increasing innovation, ensuring that decisions are well justified, developing a strong stake in effective biosecurity and strengthening advocacy for investment in biosecurity. A strong role for the community is consistent with NSW 2021 State Plan goal 32: 'Involve the community in decision making on government policy, services and projects'

We propose that the biosecurity legislation establishes a state-wide biosecurity coordinating committee modelled on the NSW Bush Fire Coordinating Committee (BFCC) to develop and advise on biosecurity policy and develop new approaches to the state's many biosecurity challenges. This can be supported by environment-specific forums to foster a collaborative approach to protecting the natural environment from invasive species.

Recommendations

16. Include in the biosecurity legislation an object of promoting community participation in biosecurity including at the policy level.
17. Establish (under legislation) a statewide biosecurity coordinating committee based on the model of the Bush Fire Coordinating Committee with the details to be worked out in consultation with the main stakeholders.
18. Work with ENGOs to develop processes and forums to effectively engage the community sector in policy setting and decision-making in biosecurity. Establish an environmental forum to foster collaboration on the highest priority challenges in environmental biosecurity.

Accountability and credibility

The proposed framework lacks mention of measures essential for accountability such as requirements for public consultation and expert review, publication of risk assessments and decisions, and third party enforcement rights. It is proposed to grant rights to risk creators for self-regulation and merits review of certain biosecurity decisions, without providing a balancing capacity for third parties acting in the public interest to review, audit and enforce biosecurity provisions. This will potentially bias decisions and processes towards risk creation.

To engender confidence in their credibility, risk assessments and other analyses informing decisions should be published and scientifically reviewed. The concept of 'shared responsibility' should be underpinned by extensive information collection, publication and reporting so that the community can understand biosecurity risks and trends and the basis of decision-making and monitor progress.

Recommendations

19. Mandate reporting and publication requirements to optimise transparency and promote understanding of biosecurity.
20. Mandate consultation requirements to optimise community engagement and shared responsibility
21. Provide third parties acting in the public interest with the right to appeal decisions on their merits and to enforce compliance.

Risk assessments

We endorse the emphasis on risk assessment as the basis for biosecurity but there is a lack of or conflicting information about proposed approaches to risk assessment. For effective biosecurity, risk assessments should be scientifically robust and precautionary and applied comprehensively and systematically. The framework provides no information about processes to ensure that decisions will be based on these principles. It is also likely to see perpetuation of the current avoidance of dealing responsibly with contentious species such as deer and pasture grasses

A very low threshold of risk should be applied to identify environmental risks and only organisms assessed as very low risk should be permitted to be introduced into NSW. Higher levels of risk may be appropriate to trigger requirements for control of already established species with priority for resources accorded to those with higher levels of risk.

Recommendations:

22. Require systematic risk assessment of non-indigenous organisms already introduced or proposed to be introduced to NSW to identify the most appropriate response to prevent or eradicate biosecurity risk or minimise adverse consequences if it is too late for prevention or eradication.
23. Apply risk assessment to new variants or subspecies of already introduced organisms to prevent the introduction of more invasive cultivars or hybrids and limit the potential for combination with existing varieties to increase biosecurity risk.
24. In recognition of high levels of uncertainty and complexity in the natural environment, apply a low threshold of risk to identify environmental risks, and only permit organisms assessed as very low risk to be introduced into NSW (consistent with Australia's ALOP¹).

¹ ALOP: Appropriate level of protection.

² Beale R, Fairbrother J, Inglis A, Trebeck D. (2008). One Biosecurity: A working partnership, The Independent Review of

25. Ensure that there is scientific rigour and transparency in risk assessment, eg. by requiring that they be done (or at least overseen) by an independent scientific committee. Members should include those with expertise in disciplines relevant to environmental biosecurity (including ecology and conservation biology) appointed by the environment minister. The assessments should be published online.

Objects and principles

Invasive species are amongst the greatest threats to NSW biodiversity, but the proposed Biosecurity Act lacks important elements of best practice environmental law such as ecologically sustainable development (ESD) and its components: the precautionary principle, intergenerational equity, conservation of biodiversity and ecological integrity and improved valuation, pricing and incentive mechanisms.

Recommendation

26. Include ecologically sustainable development in the objects of the Biosecurity Act, requiring that ESD principles be applied. Define ESD to include standard ESD principles (precautionary principle, intergenerational equity, conservation of biodiversity and ecological integrity and improved valuation, pricing and incentive mechanisms) (eg. as in s 6(2) of the Protection of the Environment Administration Act 1997). Develop policy to explicate how ESD and its principles should be applied under the Act.

Review and enforcement

Enabling third party reviews and improving enforcement provisions will enhance the operation of the proposed Biosecurity Act. Consistent with the 'shared responsibility' concept, the public should be granted 'open standing' to allow any person to take civil proceedings to remedy or restrain a breach of the law. The public has multiple strong interests at stake: as landowners affected by invasive species, as taxpayers paying for control programs, as consumers of affected ecosystem services, and as enjoyers and defenders of the natural environment. Decision-making would also be enhanced and the public interest served by a broad public right to apply for merits review of decisions.

The Land and Environment Court would be the most appropriate court to hear cases involving breaches of biosecurity as its judges have the expertise and experience to assess environmental evidence and appreciate the potential impacts of breaches and apply appropriate penalties.

The proposed maximum penalties should be increased to be consistent with other environmental legislation and to reflect the potential for serious and ongoing environmental harm from breaches. Penalties should include the potential for remediation orders.

Recommendations

27. Provide broad access to merits review of decisions for applicants acting in the public interest.
28. Shift jurisdiction to the Land and Environment Court.
29. Provide open standing for community enforcement, with the relevant provisions and thresholds to be the subject of consultation.
30. Increase the level of penalties to reflect the seriousness of harm and include provisions for remediation orders

3. Processes to develop and implement a Biosecurity Act

It is important to properly engage the community in any further development of the Biosecurity Act.

Recommendations

31. Establish a consultative group, including representatives from NGOs, environmental experts and indigenous groups, to be involved in development of the Biosecurity Act.
32. Provide an exposure draft of the Biosecurity Bill and draft regulations to the public prior to their introduction to the Parliament.

1. Measures supported

1.1 General biosecurity obligation

We strongly endorse the concept of a 'general biosecurity obligation' to promote a shared responsibility for biosecurity. It is particularly appropriate for invasive species given the potential long-term and irreversible consequences of poor practices, the multiple pathways for their introduction and spread, and the limitations of explicit regulation to comprehensively mandate responsibility. However, our support is conditional on the yet to be developed regulations, standards, tools, public education etcetera that will determine its effectiveness.

If this biosecurity obligation is rigorously and comprehensively applied, it has the potential to foster a culture of biosecurity awareness and responsibility, akin to that which exists for hygiene and public health. However, it will take considerable time, the development of clear, enforceable standards, extensive public education and strong enforcement. If it is not well-applied, it could lead to a considerable worsening of standards. It cannot replace the need for explicit prohibitions on risky species and activities.

We strongly recommend the establishment of a stakeholder working group, including with representatives from environmental NGOs, to assist the government in developing workable effective approaches.

Recommendations

1. Prior to introducing a biosecurity bill, develop in detail the approaches needed to ensure optimal application of the general biosecurity obligation, including standards, regulations, public education programs and enforcement.
2. Establish a stakeholder working group to assist with further development of the general biosecurity obligation. This group should include an equivalent number of environmental and industry stakeholder representatives.

1.2 Control orders and biosecurity zones

We support the proposal to improve capacity and flexibility to eradicate or otherwise manage new incursions through the use of control orders and biosecurity zones.

However, there should be a systematic approach to their application based on biosecurity risk rather than being at the discretion of the Secretary of NSW Trade & Investment. Otherwise, the community cannot be confident they will be used optimally in the public interest to respond to incursions with environmental risks. At the very least, as with most other powers proposed in the framework, the Director General Office of Environment and Heritage should have equivalent powers to declare biosecurity zones and issue control orders to respond to incursions with environmental risks.

It is important to demonstrate that these powers are systematically applied in the public interest to protect the environment, by publicly reporting and conducting risk assessments on all new incursions to determine whether eradication or other management is warranted (based on risk) and feasible. The precautionary principle should be applied in decision-making (section 2.6).

Recommendations

3. Invest power to declare biosecurity zones and issue control orders in response to incursions with environmental risks in the Director General Office of Environment and Heritage. Establish an expert advisory committee to make recommendations on responses to new incursions with environmental risks.
4. Develop and publish criteria to guide decisions on responses to new environmental incursions. Require application of the precautionary principle.
5. Maintain a public list of all incursions into NSW. Conduct and publish risk assessments of all new incursions as soon as possible after detection as a basis for determining the most appropriate management response.

1.3 Biosecurity emergencies

We support the proposed approach to biosecurity emergencies with the same proviso as in section 1.2 that equivalent powers are invested in environmental authorities to declare biosecurity emergencies for environmental reasons.

Recommendation

6. Invest power in the Director General Office of Environment and Heritage to make a biosecurity emergency declaration to respond to a biosecurity emergency where there are reasonable grounds to believe that without emergency management the biosecurity threat may have a significant adverse impact on the state's environment.

1.4 Tenure-neutral approach

We support the tenure-neutral approach implied in the framework with the general biosecurity obligation applying to 'any person (including bodies corporate and government agencies)'. We endorse the concept that all land managers should be required to manage biosecurity risks, regardless of whether the land is publicly or privately owned. However, because of the implications for public funding, it's important that biosecurity risks are comprehensively identified and prioritised to ensure that the exercise of obligations by public land managers is in the public interest and results in optimal outcomes for the environment and economy.

Given the expense of invasive species management, there are potential perverse outcomes if public resources are diverted from management of invasive species that threaten the values of public land such as national parks because risk prioritisation processes do not give adequate weighting to environmental values. To ensure that public funds are directed to the highest environmental priorities, a tenure-blind approach needs to be complemented by systematic declarations (or their equivalent) of invasive species based on risk assessments and prioritisation to achieve the best public good outcomes, and on invasive species management plans for public lands with high natural values. It is appropriate that an independent expert body conduct or oversee the assessment and prioritisation of biosecurity risks (see section 2.5) to increase the likelihood that they will be comprehensive and impartial.

Recommendation

7. Implement a tenure-neutral approach to biosecurity complemented by systematic risk assessments and management plans to ensure that public funds are directed to managing the highest priority invasive species based on both environmental and economic criteria.

1.5 Registration of biosecurity entities

We endorse the proposal to require registration of entities keeping certain biosecurity matter and the proposal to detail in the legislation what biosecurity matter and circumstances will trigger a requirement for registration. This should be based on a systematic assessment of risks across all keepers of biosecurity matter. We request that we be consulted on the development of these requirements.

We endorse the proposal to detail in the legislation biosecurity matter that cannot be kept and the circumstances in which certain biosecurity matter cannot be kept. This should be based on a systematic assessment of risks.

Two high-risk categories of entities not mentioned in the framework that warrant registration and conditions are deer farms and plant breeders. The experience with myrtle rust demonstrated the high risks associated with permitting plant breeding near natural environment into which plant diseases can rapidly spread. Conditions to limit risks could include a requirement for a buffer.

We support the potential to require a bond or insurance and advocate that this be applied consistently to reduce biosecurity risk, not just for the purpose mentioned in the framework of being able to 'ensure continuity of care for a registered animal in the event that the registered person is no longer able to care for that animal'.

However, we strongly oppose the limitation of merits review to risk creators. Registration decisions should be open to merits review by third parties acting in the public interest.

Recommendations

8. Require the registration of entities keeping biosecurity matter and the conditions for the keeping of biosecurity matter based on a systematic assessment of the risks of all categories.
9. Develop conditions for keeping, including requirements for bonds or insurance, to reduce biosecurity risks.
10. Conduct consultation on the development of these categories and conditions.
11. Provide for merits review brought by third parties acting in the public interest.

2. Flaws and gaps in the proposed framework

The groups do not support the proposed framework in its current form because of some very serious flaws and gaps, in particular the lack of focus on prevention and the investment of most decision-making power in the Secretary of NSW Trade & Investment.

2.1 Administration of the proposed Biosecurity Act

The proposed institutional arrangements for biosecurity are deeply flawed and undermine the potential for effective environmental biosecurity. Environment NGOs strongly oppose the investment of the majority of decision-making in the Secretary of Trade & Investment and the lack of any legislative role for the Office of Environment & Heritage for the following reasons:

Very high potential for conflicts of interest: The main decision-maker under the proposed Biosecurity Act, the Secretary of NSW Trade & Investment, has many other roles, some of which (particularly in promotion of agriculture and trade) potentially conflict with the biosecurity role. The recent independent review of national biosecurity (the Beale review 2008) stressed the importance of separating the roles of trade promotion and biosecurity risk assessment and management.²

Likely lack of appropriate priority for environmental risks: Without intending this to be a reflection on any person, the investment of environmental decision-making within the trade and investment portfolio will inevitably mean that environmental risks are given less priority than is warranted, particularly where there is conflict with trade or investment goals or competition for agency resources. The major focus of NSW Trade & Investment is described as 'economic development' – the advancement of 'investment, trade, innovation, productivity and regional growth across all sectors'.³ In the agency's strategic plan, the desired outcome for biosecurity-relevant strategies is 'safe, healthy and biosecure industries' rather than an environmental outcome. There are no environmentally relevant key performance indicators. With its other priorities, including conflicting priorities, environmental protection will inevitably be a lower-order goal within the agency.

The need for an ecological approach: The only mention of the Office of Environment & Heritage in the proposed framework is it will 'play a key role alongside Biosecurity NSW in managing biosecurity threats to the environment', which implies that its role will be limited to on-ground control of invasive species (dealing with the consequences of inadequate prevention). Given the extreme importance of biosecurity to the environment and the environmental responsibilities, expertise and experience of OEH, it is self-evident that OEH staff should have an integral role and decision-making authority in aspects of biosecurity relevant to the environment. Without a legislative basis to their involvement, it remains at the discretion of Trade & Investment.

² Beale R, Fairbrother J, Inglis A, Trebeck D. (2008). One Biosecurity: A working partnership, The Independent Review of Australia's Quarantine and Biosecurity Arrangements', Report to the Australian Government.

³ <http://www.trade.nsw.gov.au/about>

Biosecurity is at least as important (arguably more important) to the environmental portfolio as it is to the agriculture and considerably more challenging because of:

- The need to protect hundreds of thousands of species, and their populations and interactions that constitute ecosystems and ecosystem processes (in contrast, industry biosecurity is mostly focused on protecting a small number of economically valuable species).
- The irreplaceability of many conservation values under threat from invasive species (in many cases organisms of value to industry can be replaced by new breeds or new enterprises).
- The greater number and complexity of invasive species threats to environmental values than production values, and their interaction with other environmental threats (fire regimes, habitat fragmentation, climate change).
- The limited knowledge about biodiversity and invasive species threats to the environment and the long timeframes over which invasive species establish and spread.
- The often limited management options in natural environments, and the lack of commercial incentives to manage environmental threats.
- The multitude of stakeholders, often with conflicting agendas, and limited resources compared to industry stakeholders.

We consider it vital that the agency responsible for the environment has a legislated central role in biosecurity policy setting and decision-making. The optimal structure for a biosecurity agency would be as an independent agency or a joint environmental-agricultural agency. The structure proposed in the proposed framework is one of the least optimal. We regard the following recommendations as foundational to all other reforms.

Recommendations

12. Ensure that biosecurity decision-makers are independent from any role in agriculture and trade promotion or other roles that potentially conflict with biosecurity decisions and are not under the direction of any minister with those roles.
13. Ensure that the environmental agency has an equivalent role to the agricultural agency in administering the biosecurity act by either establishing an independent or joint environmental-agricultural agency for biosecurity.

2.2 Prevention

It is widely accepted that prevention is the most effective and cost-effective approach to biosecurity. This is reflected in NSW's biosecurity strategy with the first 'broad objective' being to prevent the entry into the state of pest, disease and weed risks. However, it is mostly missing from the proposed framework.

Although the general biosecurity obligation is 'to take all reasonable and practical measures to prevent, eliminate or minimise the biosecurity risks associated with all biosecurity matter', the main tool to regulate the entry of organisms into the state seems to be via the declaration of 'prohibited matter'. This exclusive focus on prohibition perpetuates the current failed approach to weeds that imposes restrictions on a small subset of potential or known invasive species and allows the entry of thousands of species without risk assessment. There is no reference in the framework to the recommendation of the Natural Resources Commission to implement a permitted approach to weed risks. The best and only feasible way to prevent new invasive species is to only permit the entry of species assessed as a 'very low' risk (consistent with the national Appropriate Level of Protection (ALOP), see below in section 2.5 on risk assessments). The arguments for a permitted list approach are set out in the joint NGO submission to the Natural Resources Commission. There is strong support for a 'permitted' (safe) list approach by environment NGOs, bush regeneration groups, regional weed committees and local governments in other states and historically from within biosecurity agencies, as exemplified by a 2006 paper by biosecurity officers from six states recommending it.⁴

⁴ Csurhes S, Randall R, Goninon C, Beilby A, Johnson S and Weiss J (2006). "Turn the Tap Off before You Mop up the Spill": Exploring a Permitted-List Approach to Regulations over the Sale and Interstate Movement of Potentially Invasive Plants in the States and Territories of Australia. *Proceedings of the 15th Australian Weeds Conference*. C Preston, JH Watts and ND Crossman, Weed Management Society of South Australia Inc, Adelaide: 95-98.

We regard the following recommendation as an extremely high priority reform needed in the framework because the continued flow into NSW of new invasive species is highly damaging to the natural environment and agriculture and undermines the capacity to manage existing species.

Recommendation

14. To prevent biosecurity risks, implement a permitted list approach to all non-indigenous organisms, including plants (as recommended by the Natural Resources Commission). This approach should be applied to all non-indigenous species, subspecies and variants, including those indigenous to Australia but not to NSW.
15. Make prevention a more explicit priority in the objects of the legislation.

2.3 Shared responsibility

The proposed framework stresses the importance of 'shared responsibility' for biosecurity but severely limits the scope of that responsibility as applied to the community and environmental sectors. The community role depicted in the framework (and the state's biosecurity strategy) is limited to abiding by the biosecurity obligation: 'eyes and ears' (detection) and 'brawn' (on-ground management). Apparently lacking is a similar respect for community 'brains'. The framework lacks any defined roles for the community and non-government environmental sectors in policy-setting or decision-making (or enforcement, see section 2.4) and processes for meaningful engagement of the community in domains other than implementation.

Current engagement processes are inadequate but the proposed framework takes them backward by proposing to reverse even the minimal current requirements for advisory committees. (This presumably means the disbanding of the Noxious Weeds Advisory Committee, which is the one state-level formal body with environmental NGO representation.) Combined with the proposal to invest decision-making primarily in the Secretary of Trade & Investment without accountability measures (section 2.4), the proposed biosecurity regime will be severely compromised by its lack of meaningful community engagement.

The Biodiversity Convention, Article 14, requires that each contracting party, 'as far as possible and as appropriate' allow for public participation in procedures for impact assessments [which would include biosecurity risk assessments]. Australia's National Strategy for Ecologically Sustainable Development says that decisions and actions should provide for broad community involvement on issues which affect them. The recent Beale review of national biosecurity stressed the importance of extensive and meaningful community engagement: 'Engagement with business and the general community on biosecurity must occur consistently and continually at several levels, from policy setting through co-regulatory alternatives to actions by individuals and companies, before, at and after the border.'

Engagement of the community in policy-setting, decision-making and enforcement is essential for transparent, participatory and accountable governance. A strong role for the community is also consistent with NSW 2021 State Plan goal 32: 'Involve the community in decision making on government policy, services and projects'. The government's greatest ally in achieving stronger environmental biosecurity will be the community sector, and the considerable advantages that can be derived from meaningful community participation include:

- improving the transparency and integrity of decision-making
- availing decision-makers of information vital for sound decision-making (the community sector includes experts in many fields)
- ensuring that decisions are well justified on legal and scientific grounds and improving enforcement
- ensuring that the ENGO and other community sectors have a strong stake in effective biosecurity and will be motivated to work to improve biosecurity practices in the community
- increasing biosecurity awareness and understanding in the community
- strengthening advocacy for public and private investment in biosecurity
- increasing innovation in biosecurity policy due to involvement of community representatives with different perspectives, areas of expertise and ideas.

In 2013, primary industries minister Katrina Hodgkinson committed to managing feral animals based on the bushfire management model.⁵ One key element of this model is the NSW Bush Fire Coordinating Committee (BFCC), which has the following roles:⁶

The BFCC provides a forum through which a broad cross-section of Government and non-Government organisations with an interest in the prevention, mitigation and suppression of bushfires can come together to develop and progress policies and procedures aimed at ensuring a coordinated, agreed approach to major issues.

The BFCC also plays a key role in coordinating the work of District Bush Fire Management Committees in preparing plans for Operations, and Bush Fire Risk Management. This is most important given the responsibility under the Rural Fires Act to ensure that all activities are conducted with regard to the principles of ecologically sustainable development.

Many complex issues with the potential to cause conflict have been worked through and agreed at BFCC level, because the concerns and imperatives of each organisation are able to be explained and explored thus ensuring, as far as possible, agreed outcomes.

Perhaps the greatest benefit of the BFCC is in developing an understanding between the various member organisations of the various roles and concerns held.

The BFCC model has a great deal to recommend and its key elements are highly appropriate for biosecurity. We propose that the biosecurity legislation establishes a state-wide biosecurity coordinating committee to develop and advise on biosecurity policy and develop new approaches to the state's many biosecurity challenges.⁷ To make it work optimally for policy innovation, there will need to be consultation with key stakeholders (including environmental NGOs) about the best size, representation and support needed. Given the specific challenges associated with environmental biosecurity, as outlined in section 2.1, there will also need to be environment-specific forums to foster a collaborative approach to protecting the natural environment from invasive species.

Recommendations

16. Include in the biosecurity legislation an object of promoting community participation in biosecurity including at the policy level.
17. Establish (under legislation) a statewide biosecurity coordinating committee based on the model of the Bush Fire Coordinating Committee with the details to be worked out in consultation with the main stakeholders.
18. Work with ENGOs to develop processes and forums to effectively engage the community sector in policy setting and decision-making in biosecurity. Establish an environmental forum to foster collaboration on the highest priority challenges in environmental biosecurity.

2.4 Accountability and credibility

It appears that much of the decision-making under the proposed biosecurity legislation will be discretionary, opaque and non-reviewable by third parties. We support flexibility in the proposed Biosecurity Act to respond to biosecurity risk but it needs to be coupled with accountability measures to ensure there is consistent, systematic and effective use of the biosecurity measures in the public interest.

The proposed framework lacks mention of measures essential for accountability such as requirements for public consultation and expert review, publication of risk assessments and decisions, and third party enforcement rights. The scientific credibility of decisions is not assured, because of the lack of independence and potential conflicts of interest of the main decision-maker (the Secretary of Trade & Investment), and the lack of independent review of the merits of decisions. It is proposed to grant rights to risk creators for self-

⁵ Katrina Hodgkinson, Minister for Primary Industries: 'NSW Government Response to the Dunn Report' 4 Jul 2014.

⁶ NSW Rural Fire Service. 'Bush Fire Coordinating Committee' (http://www.rfs.nsw.gov.au/dsp_content.cfm?cat_id=1197)

⁷ In our joint submission to the Natural Resources Commission, we proposed the establishment of a high level cross-disciplinary 'solutions forum' to develop new approaches to high priority environmental biosecurity challenges, including ecological, social, legal and economic aspects.

regulation and merits review of certain biosecurity decisions, without providing a balancing capacity for third parties acting in the public interest to review, audit and enforce biosecurity provisions. This potentially biases decisions and processes towards risk creation.

Biosecurity decisions will engender the confidence of the community and affected industry only if decision-making processes are perceived to be independent (particularly of any agency or position with a potential conflict of interest such as responsibility for agricultural and trade promotion), transparent, scientifically credible and reviewable.

As discussed in section 2.1, the main decision-maker under the proposed framework lacks independence and has conflicting roles. There is little in the framework to suggest transparency in decision-making, with few requirements for decisions to be subject to consultation or published. (The one mention of consultation is that 'regulations and regulatory standards will be developed in consultation with relevant stakeholders'.) To engender confidence in their credibility, risk assessments and other analyses informing decisions should be published and scientifically reviewed (see section 2.5). The concept of 'shared responsibility' should be underpinned by extensive information collection, publication and reporting so that the community can understand biosecurity risks and trends and the basis of decision-making and monitor progress.

Recommendations

19. Mandate reporting and publication requirements to optimise transparency and promote understanding of biosecurity.
20. Mandate consultation requirements to optimise community engagement and shared responsibility
21. Provide third parties acting in the public interest with the right to appeal decisions on their merits and to enforce compliance.

2.5 Risk assessments

As the proposed framework says, 'Risk assessment and management are intrinsic to biosecurity'. However, there is a lack of or conflicting information about proposed approaches to risk assessment. The processes need to optimise rigour and accountability because of the potential for biases and selective application in biosecurity decision-making, the potential for which was highlighted by the Australian Weeds Committee (2002):⁸

Weed declarations have probably been influenced more by politics, institutional arrangements and community attitudes to weeds than scientific considerations ... compounded by ... the political nature of the process and competing interests for 'new' and 'better' plants adding to the number of weeds establishing and spreading.

For effective biosecurity, risk assessments should be scientifically robust and precautionary and applied comprehensively and systematically.

Scientifically credible: To engender confidence in their scientific robustness, risk assessments should be conducted by independent experts or subject to independent expert review. Although the proposed framework says that 'In a risk-based approach, the best science and intelligence is used to identify, assess and prioritise biosecurity risks', the framework provides no information about processes to ensure that decisions will be based on the best science. The extent of discretion in decision-making by the Secretary of Trade & Investment and the availability of merit review only for risk creators implies the potential for the opposite.

Comprehensive and systematic: There is no assurance in the proposed framework that risk assessment will be applied comprehensively to guide actions to all or most organisms that are a risk or could be a biosecurity risk in NSW. In particular, without a permitted list approach there is unlikely to be a systematic application of risk assessment to guide decisions about which organisms should be permitted into NSW. It is also likely to see perpetuation of the current avoidance of dealing responsibly with contentious species such as deer and pasture grasses. There is also no mention of the taxa level that will trigger risk assessment. A risk-based approach would require risk assessment of new subspecies or variants of already introduced species as they can have different risks or exacerbate the risk of established organisms.

⁸ Australian Weeds Committee (2002). Principles of Weeds Legislation Discussion Paper.

Acceptable levels of risk: The only information about levels of risk is in relation to ‘prohibited matter’, which is defined as ‘biosecurity matter that could have significant adverse consequences for the economy, environment or community’. ‘Significant’ is not defined but its meaning as applied under the Environment Protection & Biodiversity Conservation Act 1999 – ‘important, notable, or of consequence, having regard to its context or intensity’ – implies that the threshold of risk for prohibiting biosecurity matter is considerably higher than Australia’s national Appropriate Level of Protection (ALOP), the aim of which is to reduce risk to ‘a very low level, but not to zero’. [Relevant definition in NSW case law?] Prohibiting biosecurity matter only if it is likely to have ‘significant’ adverse consequences is not a preventative and precautionary threshold. Given the lack of knowledge and high levels of uncertainty about environmental impacts, the changing environment and the interactive nature of many threats, a very low threshold of risk should be applied to identify environmental risks (consistent with the ALOP), and only organisms assessed as very low risk should be permitted to be introduced into NSW. Higher levels of risk may be appropriate to trigger requirements for control of already established species with priority for resources accorded to those with higher levels of risk.

Precautionary: The treatment of uncertainty is particularly important in environmental biosecurity because of the lack of information about many aspects of biodiversity and biosecurity risks. The precautionary principle should apply (see section 2.6).

Recommendations:

22. Require systematic risk assessment of non-indigenous organisms already introduced or proposed to be introduced to NSW to identify the most appropriate response to prevent or eradicate biosecurity risk or minimise adverse consequences if it is too late for prevention or eradication.
23. Apply risk assessment to new variants or subspecies of already introduced organisms to prevent the introduction of more invasive cultivars or hybrids and limit the potential for combination with existing varieties to increase biosecurity risk.
24. In recognition of high levels of uncertainty and complexity in the natural environment, apply a low threshold of risk to identify environmental risks, and only permit organisms assessed as very low risk to be introduced into NSW (consistent with Australia’s ALOP).
25. Ensure that there is scientific rigour and transparency in risk assessment, eg. by requiring that they be done (or at least overseen) by an independent scientific committee. Members should include those with expertise in disciplines relevant to environmental biosecurity (including ecology and conservation biology) appointed by the environment minister. The assessments should be published online.

2.6 Objects and principles

The proposed framework says the ‘primary object’ of the Biosecurity Act will be to provide a flexible and responsive statutory framework to enable ‘the prevention, elimination or minimisation of the risk of adverse impacts on the NSW economy, environment and community caused by biosecurity matter’. Surely, the primary object should simply be the ‘prevention, elimination or minimisation of the risk of adverse impacts etcetera’ (the responsiveness or flexibility of a framework is a tool to assist with that not ends in themselves).

Invasive species are amongst the greatest threats to NSW biodiversity, so the proposed Biosecurity Act will be one of NSW’s most important environmental laws. But under the proposed framework it will lack important elements of best practice environmental law. The framework document notes ‘there are many nationally agreed policies that require legislative underpinning’. However, it neglects one of the most important of all nationally agreed policies – ecologically sustainable development (ESD).

ESD and biodiversity conservation: As law academic Doug Fisher points out, sustainability ‘in one form or another is the fulcrum around which environmental law is evolving and it is the nature of sustainability that is forcing environmental law to adopt new approaches and new mechanisms’.⁹ The Biosecurity Act should be made consistent with other state environmental laws¹⁰ by including ESD in its objects, with ESD defined to include its four well-recognised elements: the precautionary principle, intergenerational equity, conservation

⁹ Fisher D. (2003) *Australian Environmental Law*, Lawbook Co.

¹⁰ Including Environmental Planning and Assessment Act 1979, Protection of the Environment Administration Act 1997.

of biodiversity and ecological integrity, and improved valuation, pricing and incentive mechanisms. These principles are integral to sound decision-making about the environment and highly pertinent to biosecurity.

The proposal to include ESD as an objective should not be controversial. Many pieces of NSW legislation include ESD in the objects, and it has a considerable history of case law in NSW and elsewhere.

The precautionary principle is of particular importance in biosecurity because of the high levels of uncertainty about invasive species impacts on biodiversity and the natural environment, the long timeframes over which invasions occur and the often-limited management options. The guiding principle for Article 8(h) of the Biodiversity Convention requires the precautionary principle to be applied comprehensively to biosecurity decisions:¹¹

efforts to identify and prevent unintentional introductions as well as decisions concerning intentional introductions should be based on the precautionary approach, in particular with reference to risk analysis... The precautionary approach should also be applied when considering eradication, containment and control measures in relation to alien species that have become established. Lack of scientific certainty about the various implications of an invasion should not be used as a reason for postponing or failing to take appropriate eradication, containment and control measures.

The precautionary principle (or 'approach') is standard in environmental law and policy (although often poorly enacted) and it is applied in some biosecurity laws, for example in assessments of live animal imports under the EPBC Act, in New Zealand's *Hazardous Substances and New Organisms Act 1996* and Norway's *Nature Diversity Act 2009*.

Intergenerational equity is a highly pertinent consideration for biosecurity, with deficiencies of present approaches leading to a much greater weed and pest burden in the future. The reluctance to ban or restrict use of invasive species with current commercial value typically discount future economic interests. Many plants or animals with commercial value in the present will have no or little commercial value in future and/or the costs of control will outweigh their commercial value. It is an important consideration in managing the cultivation of invasive species as their full impacts are unlikely to be observed for generations. Potential impacts on future generations should be reflected in penalties for breaches of the Act.

Conservation of biodiversity and ecological integrity requires according appropriate priority to invasive species that threaten these values, taking a landscape approach, considering ecosystem processes, cumulative impacts and interactions with other threats (including climate change), regulating land management that exacerbates invasive species threats; and ensuring that control of invasive species and particular control methods do not themselves threaten biodiversity or exacerbate ecological harm.

Improved valuation, pricing and incentive mechanisms are vital for invasive species management, as currently most costs are externalised (borne by the public or the environment) and there are few economic incentives requiring people to take responsibility. ESD warrants application of the polluter pays (or 'risk creator pays') principle, eg. in the form of levies or bonds for species or practices with biosecurity risk. It requires that both long-term and short-term economic outcomes be considered in biosecurity decisions. The legislation should explicitly confirm the principle that the risk creator must bear responsibility for the creation of risk.

Recommendation

26. Include ecologically sustainable development in the objects of the Biosecurity Act, requiring that ESD principles be applied. Define ESD to include standard ESD principles (precautionary principle, intergenerational equity, conservation of biodiversity and ecological integrity and improved valuation, pricing and incentive mechanisms) (eg. as in s 6(2) of the Protection of the Environment Administration Act 1997). Develop policy to explicate how ESD and its principles should be applied under the Act.

¹¹ See <http://www.cbd.int/decision/cop/?id=7197>.

2.7 Review and enforcement

Merits review: The proposed provisions for merits review in the framework seem to be restricted to those who are risk creators and might wish to weaken restrictions (such as a requirement for registration of an entity or refusal of an application to keep prohibited matter) therefore potentially biasing decisions in favour of risk creators. Decision-making would be enhanced and the public interest served by a broad public right to apply for merits review of decisions.

Jurisdiction: Most environmental prosecutions are heard in the Land and Environment Court, a specialist court for cases to do with the environment, development and local government. It would be the most appropriate court to hear cases involving breaches of biosecurity as its judges have the expertise and experience to assess environmental evidence, appreciate the potential impacts of breaches and apply appropriate penalties. Having cases heard in the one specialist court would assist in achieving consistent outcomes and build a coherent body of case law. The Land and Environment Court is practiced at hearing cases initiated under open standing provisions, a reform recommended for biosecurity legislation.

Open standing for enforcement: Implementation of the Biosecurity Act should be strengthened by wide standing provisions to allow for community enforcement. This is a standard element of many environmental laws and a necessary part of enlisting the efforts of individuals and community groups. Such capacity is particularly appropriate for biosecurity laws given the serious environmental impacts and huge public costs of invasions and the current low rate of enforcement. It is consistent with the 'shared responsibility' concept. The public has multiple strong interests at stake: as landowners affected by invasive species, as taxpayers paying for control programs, as consumers of affected ecosystem services, and as enjoyers and defenders of the natural environment. In NSW most environmental legislation has 'open standing' to allow any person to take civil proceedings to remedy or restrain a breach of the law. This not only facilitates enforcement if governments fail to do so but the potential for community enforcement can motivate public authorities and prosecuting agencies to be more rigorous in their enforcement duty.

NSW has led the way in providing open standing under environmental laws including under the Environmental Planning and Assessment Act 1979 and the Protection of the Environment Operations Act 1997. The latter Act in s 253 provides that 'any person' may bring proceedings in the Land and Environment Court to restrain a breach or threatened breach of any Act if the breach is causing or is likely to cause harm to the environment.

Thirty years of experience in NSW has shown that community enforcement improves environmental outcomes and has not resulted in a flood of vexatious litigation. The former Chief Judge of the Land and Environment Court Justice Jerrold Cripps is one of many to observe this:

It was said when the legislation was passed in 1980 that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited.¹²

Penalties: Increase the proposed maximum penalties to reflect the potential for serious and ongoing environmental harm from breaches, to provide a commercial incentive for compliance and to be consistent with other environmental legislation. Increase the range of penalties, for example to include the potential for remediation orders.

Recommendations

27. Provide broad access to merits review of decisions for applicants acting in the public interest.
28. Shift jurisdiction to the Land and Environment Court.
29. Provide open standing for community enforcement, with the relevant provisions and thresholds to be the subject of consultation.
30. Increase the level of penalties to reflect the seriousness of harm and include provisions for remediation orders

¹² Cripps J. (1990). *People v The Offenders*. Dispute Resolution Seminar, Brisbane 6 July 1990.

3. More framework detail needed

There needs to be more detail on many aspects of the Framework for a NSW Biosecurity Act before we can assess their likely efficacy, including the following:

- Processes and criteria for declaring prohibited matter
- How restrictions on sale of invasive species or requirements to control particular species will be enacted through the general biosecurity obligation
- How the general biosecurity obligation will be applied to achieve the outcomes needed for protecting the environment.
- How the principle of 'polluter pays' (or rather risk creator pays) will be implemented.

4. Response to consultation questions

Brief responses to questions posed in the proposed Framework for a NSW Biosecurity Act.

4.1. Does the framework include all mechanisms, instruments and powers necessary for the government to deal effectively with biosecurity management and emergency response?

No. Prevention should be given a high priority, and permitted list approach is required. OEH should have a formal policy-setting and decision-making roles in biosecurity. Accountability measures are needed to ensure that biosecurity powers are consistently exercised in the public interest. See previous sections above: 1.2 Control orders and biosecurity zones, 1.3 Biosecurity arrangements, 2.1 Administration of the proposed Biosecurity Act and 2.7 Review and enforcement.

4.2. Does the framework enable industry and the broader community of NSW to fulfil their general biosecurity obligation?

Not really. The effectiveness of the general biosecurity obligation is highly dependent on further provisions and programs such as regulations, public education and enforcement. See section 1.1 General biosecurity obligation.

4.3. Will the framework achieve the desired outcome of shared responsibility for effective biosecurity management in NSW through, for example, legislative powers and the roles of DPI, LCAs and LLS and the community?

No. The role of the community is far too limited, largely consisting of on-ground participation. Accountability measures including transparency and meaningful community involvement need to be strengthened. See previous sections above: 2.3 Shared responsibility and 2.4 Accountability and credibility.

4.4. Is the interaction between the various management tools (e.g. biosecurity control orders, biosecurity zones and regulatory Standards) clear, and will these tools be effective?

These tools will potentially be effective if they are consistently and comprehensively applied. However, the discretionary nature of most decision-making and the lack of accountability measures make it difficult to determine if the tools are going to be effective, especially in the face of strong pressure from vested interests or when there are conflicts of interest in the role of Secretary, Trade and Investment. The tools are more likely to be used effectively for the environment if the D-G of the Office of Environment and Heritage has equivalent powers under the Biosecurity Act. See previous sections above: 1.2 Control orders and biosecurity zones, 2.1 Administration of the proposed Biosecurity Act, 2.4 Accountability and credibility and 2.5 Risk assessments.

5. Processes to develop and implement a Biosecurity Act

It is important to engage the community in the process of developing the Biosecurity Act. Further consultation is needed given the limited information about the detailed operation of the Biosecurity Bill in the framework document.

Recommendations

31. Establish a consultative group, including representatives from NGOs, environmental experts and indigenous groups, to be involved in development of the Biosecurity Act.
32. Provide an exposure draft of the Biosecurity Bill and draft regulations to the public prior to their introduction to the Parliament.