



Environmental Defenders' Office
AUSTRALIAN CAPITAL TERRITORY

ACT Biosecurity Manager
ACT Parks and Conservation Service
Environment, Planning and Sustainable Development Directorate
GPO Box 158
CANBERRA CITY 2601

10 August 2018

By email: ACTBiosecurity@act.gov.au

Dear ACT Biosecurity Manager,

ACT Biosecurity Act: Environmental Defenders Office ACT Submission

The Environmental Defenders Office (ACT) Inc ('EDO ACT') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental policy and law reform, and offer community legal educational publications and programs.

The EDO ACT welcomes the opportunity to comment on the new ACT Biosecurity framework (as set out in the consultation paper) and congratulates the ACT Parks and Conservation Service on drafting a cohesive and encompassing framework to deal with biosecurity in the ACT. In making this submission, we provide a number of overarching comments on the proposed framework with respect to interactions with the environment. We look forward to commenting in more detail on the new Biosecurity Bill.

1. Approach

The EDO ACT supports the consolidation of several legislative instruments (including the *Animal Diseases Act 2005*; *Plant Diseases Act 2002*; *Pest Plants and Animals Act 2005*; *Stock Act 2005*; and *Fertilisers (Labelling and Sale Act) 1904*) into one law regulating biosecurity. This is a necessary step to bring the ACT in line with Commonwealth and New South Wales (NSW) legislation.



2. Interaction with New South Wales Biosecurity Laws

The ACT is 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. It is therefore appropriate that the ACT adopt a similar approach to the *Biosecurity Act 2015* (NSW).

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. Recognising NSW issued licences, permits or authorities is also an important step, although care must be taken to ensure the best interests of the ACT, including its native flora and fauna, are considered.

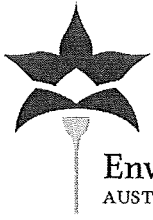
3. Key Concepts

The EDO ACT welcomes the following principles set out in the Framework:

- Risk-based decision making: through the identification, assessment and prioritisation of biosecurity risks;
- Shared responsibility: that everyone (including industry, community, natural resource managers, custodians and users) has responsibilities for biosecurity;
- General biosecurity duty: recognises each person's role in preventing, eliminating or minimising biosecurity risks based on their activities and level of knowledge and understanding. This principle has great potential, but must be supported by ongoing education and aware-raising programs and initiatives; and
- Management of biosecurity matter: consolidating fragmented laws into framework as a more flexible, strategic and proactive approach to the management of biosecurity.

These concepts are important and increasingly recognised and implemented throughout Australia. However, basic environmental principles should be included into the proposed Bill, recognising the impacts biosecurity risks have on the natural environment in the ACT. Such principles include ecologically sustainable development¹ and its associated components, including the precautionary

¹ See Gru Brundtland et al, 'Our Common Future' (Report, United Nations World Commission on Environment and Development, 1987). Australia's *National Strategy for Ecologically Sustainable Development* defines ecologically sustainable development as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'. Ecologically sustainable development policy is based on (1) intergenerational equity (2) the



principle² and intergenerational equity.³ These principles are not inconsistent with the objects of the Bill (as set out in the framework) and recognise the importance and interconnectedness of biosecurity on the environment.

The precautionary principle is particularly relevant to biosecurity. For example, one instance where the precautionary principle is relevant in the Biosecurity Bill, is where there is insufficient evidence in determining a biosecurity risk that is likely to have a threat of serious or irreversible environmental damage, then a lack of full scientific certainty cannot be used as a reason for postponing measures to prevent harm from occurring. Decision-makers must be required to apply this principle when making decisions.

4. Biodiversity and nature conservation in the Biosecurity Bill

Invasive species are one of the greatest threats to biodiversity in the ACT, including threatened species and ecological communities. The EDO ACT supports mechanisms that integrate both Commonwealth and ACT biodiversity protection and nature conservation laws into the Biosecurity Bill. This includes, for example, the proposal that a control order affecting native flora and fauna may only be made after consultation with the Conservator for Flora and Fauna.⁴ Given that community members often have expertise with respect to ecosystem functioning in their local geographical areas, opportunities for community members to participate in such a process is preferred.

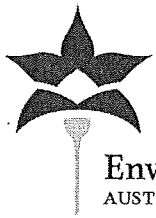
The proposed objects mention environment but do not outline the effect that biosecurity risks have on biodiversity, threatened species, and ecological communities. The impact that biosecurity has on the natural environment needs further emphasis in the proposed objects of the Biosecurity Bill, through integration of environmental principles (as discussed above).

precautionary principle (3) conservation of biological diversity and ecological integrity, and (4) valuation, pricing and incentive mechanisms. See Ecologically Sustainable Development Steering Committee 'National Strategy for Sustainable Development' (Report, Department of Environment and Energy, 1992).

² The precautionary principle means that, if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. (see, e.g. *Planning and Development Act 2007* (ACT) section 9(1)).

³ The inter-generational equity principle means that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations (see, e.g. *Planning and Development Act 2007* (ACT) section 9(1)).

⁴ Proposed Framework for ACT Biosecurity Legislation (2018) Section 4.1.



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Biodiversity (specifically native flora and fauna) must be prioritised as part of the proposed risk-based approach. Where there is a likelihood that a biosecurity risk will cause a significant adverse environmental impact, it must be prioritised. As a starting place, we recommend examining relevant actions plans (under the *Nature Conservation Act*) for an indication of the impacts of invasive species on threatened species and ecological communities. Particular risks to populations of threatened species or ecological communities must be prioritised.

5. Community engagement

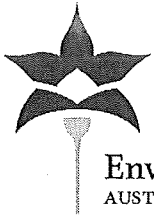
Community support is essential for the future ACT Biosecurity Bill to be effective. As stated above, community members and groups are often experts in their own local area, with familiarity of local species and ecological patterns and can contribute expert information and innovative ideas. The input of the general public is also necessary to balance the interests of business. Citizen scientists and non-government organisations in the ACT have a particular role in contributing to biosecurity services and expertise.

The EDO ACT supports the idea that “*regulations and regulatory standards will be developed in consultation with relevant stakeholders, including community groups, professional and industry associations and natural resource management bodies such as the ACT Parks and Conservation Service.*”⁵ This includes recognition in Principle 5 (Consultation with business and the community should inform regulatory development) in line with the Better Regulation Principles.

However, there is little discussion in the proposed framework about specific details of such consultations, including which stakeholders will be consulted at what times. There appears to be very little in the framework that clarifies consultation processes to be legislated in the proposed Biosecurity Bill itself (rather than in regulation).

The majority of key decisions in the proposed framework do not seem to include any provision for community engagement, publication of risk assessments, or third party appeal rights. While we understand that limited consultation is important in emergency circumstances, many of these decisions are not made in urgent circumstances. It is important for consultation opportunities to be made available under the proposed Biosecurity Bill for such decisions.

⁵ Proposed Framework for ACT Biosecurity Legislation (2018) Section 3.1.3.



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. The Biosecurity Bill must include third party appeal rights for decisions that impact the public.

6. Regulatory tools

The framework uses a number of regulatory tools such as prohibited matters, control orders, biosecurity zones, registration, certification and auditing and other mechanisms (summarised in the Biosecurity Management Toolbox at Appendix 1).

One method of developing and applying these tools has recently been suggested by the Australian Panel of Environmental Law Experts (APEEL).⁶ APEEL has supports the use of smart regulation principles in the design of environmental laws, including:⁷

- The policy mix principle: That a complementary range of instruments is desirable to address an issue. These should include regulatory tools, economic measures, information-based measures, self-regulatory alternatives (for low impact, low risk activities) and voluntary measures. The proposed framework includes a range of these instruments.
- The parsimony principle: The principle that less interventionist instruments or approaches should be applied first to achieve desired environmental outcomes (for example, through allowing self-certification of biosecurity certificates by accredited certifiers but using enforcement mechanisms and penalties where this is necessary).
- The escalation principle: The principle that regulatory measures should ascend a dynamic instrument pyramid to the extent necessary to achieve policy goals. At the lowest end of the hierarchy, this may involve education on the general biosecurity duty – at the highest end this involves the broad range of powers available to authorised people under the Biosecurity Bill).

A number of sections of the framework embody these principles. We encourage the bill to reflect these same principles throughout the bill.

⁶ Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

⁷ See also Neil Gunningham, Peter Grabosky & Darren Sinclair (1998) *Smart regulation: designing environmental policy*. Oxford University Press.



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We acknowledge the assistance of students from the University of Canberra, involved in the EDO ACT's winter internship program, in the preparation of these submissions. If you have any questions or wish to clarify any of the above, please do not hesitate to contact the EDO ACT on (02) 6243 3460 or Stephanie.Booker@edoact.org.au.

Yours faithfully,

Stephanie Booker

Principal Legal Officer