

BIOSECURITY ACT 2015 – DRAFT REGULATIONS

PORTS AUSTRALIA SUBMISSION

Ports Australia welcomes the opportunity to comment on the Exposure Draft of the Regulations to the Biosecurity Act 2015. Our prime interest sits with the *Biosecurity (General) Regulation 2015: First points of entry*.

We have also reviewed the document: *Proposed standards for ports and airports to meet prescribed requirements in the First Points regulation under the Biosecurity Act 2015* issued by the Department for discussion.

Ports Australia – Representation

Ports Australia is the peak industry body representing all port authorities and corporations, both publicly and privately owned, at the national level. Ports Australia is a constituted company limited by guarantee with a Board of Directors, comprising the CEOs of 10 member ports. Our website is at www.portsaustralia.com.au

Ports Australia consulted closely with all its Members in developing its views on the draft regulations.

General Position

Ports Australia acknowledges and appreciates the commitment made by the Department to ongoing engagement on the implementation of the regulations, including on a bilateral basis with our individual port Members, to ensure that they operate in the best interests of both parties. We have also previously articulated (see for example submission to Senate Committee) our view that the consultation process involved in developing the terms of the legislation via the *Industry legislation Working Group* was exemplary.

When reviewing regulation we do not however let any opportunity go by without stating our profound and justifiable concerns about the increasing impact of regulation on port costs and the consequent costs of our trades and impacts on our competitiveness. In this respect the Government constantly reminds us that it is serious about a deregulatory agenda but we have yet to see any measurable impact on port costs. Agencies give voice to the fact that they recognise we are a highly trade dependent nation but that is as far as it goes in terms of any serious effort to reduce regulatory impacts. This is in the context that such impacts could be readily reduced without changes to outcomes.

Any regulatory regime should pass the test that it will have positive impacts and effectiveness measured against the risks and costs. This is a threshold issue. We therefore have an expectation that the proposed regulatory measures and standards to be imposed on our Members have been measured against risk including some evidence that the type of approach envisaged is actually effective in detecting and addressing marine pest incursions. We would be particularly concerned if ports walked through the compliance process over the course of the next three years at significant costs if such regimes make little difference to outcomes.

Further Ports Australia has, in a number of contexts, made representations to government not only about the increasing cost of regulation, but also an increasing disposition of governments to shift the costs of the regulatory function itself on to industry. This can occur to the point where agencies also position our ports as quasi regulators. It is our position that our Members will use their best endeavours to cooperate with those who have the statutory responsibility, and do what any “good citizen” would do, to the extent that their resources and expertise will permit. We should not be expected however to fill any vacuum left by the regulator on the basis that they are strapped for resources or, for example, by meeting some sort of expectation that all operational staff will become instant experts in recognising biosecurity threats.

Accordingly we strongly urge that the Department utilise its best endeavours to minimise additional costs and to facilitate the folding of the requirements of the regulations into existing port management systems and plans, infrastructure and other port facilities where the opportunity is apparent. Further we would support the development of the consultative model based on ports utilising best endeavours to facilitate the regulatory function in preference to the application of prescriptive requirements.

In the documentation provided by the Department it states that *This Regulation is deliberately outcome focussed, rather than prescriptive, in order to accommodate the variation in business operations across different locations.*

This is encouraging and we would like to take this at face value not least because our experience and engagement with the Department on this legislation has suggested we can do so. We would seek however confirmation that the outcomes based approach will prevail, that requirements will be tailored to the individual nature and capabilities of each port and, importantly, that a strong outcomes and risk based focus will be evident at the coal face and not exclusive to the narrative of head office, which has been our experience in other contexts.

We acknowledge that at the at the highest level this approach is being exercised insofar as First Points of Entry are logically viewed as those locations where there exists an elevated risk and that is where regulatory resources should be focussed.

We have drawn particular attention to this point because elsewhere there is some ambiguity implied in the circulated documents. For example elsewhere reference is made to *prescribed requirements*, which indicates a propensity to get down into the weeds and importantly the circulated standards are highly prescriptive and costly with many responsibilities carried over directly to the operator. These standards will need to be the subject of considerable further discourse with Ports Australia and the Members before we collectively reach a measure of comfort with them.

Specific Issues

1. Transition period

It would be useful if clarification could be provided in due course about the transition arrangements, timetables etc, and the manner in which the department will work with each port to ensure they have every opportunity to be compliant within the required time frame. A number of Members have requested this clarification. They are concerned that they have every opportunity to work through the transition in an orderly fashion so that they can meet requirements consistent with their

operational requirements, and to the maximum extent possible, customise existing systems and facilities to ensure compliance.

We note the documentation specifies that temporary First Point determinations (which will expire on 15 June 2019) will be made for ports even if the requirements in the Regulation have not been met to allow for the continuity of business operations when the new legislation commences. We fully support this approach including because it will facilitate an effectively managed consultation and implementation process.

2. Management Plans

We are seeking regulatory certainty and transparency with the management plans. Our experience with management plans is that they can quickly lead to drawn out time lines, added costs, introduced iterative processes and ad hoc requirements (ie it seemed like a good idea at the time).

Our Members are also of the strong view that there should be provision for discretion to incorporate *Biosecurity Incident Management Plans* into ports' existing emergency or incident management plans without the need for a stand-alone plan. Normal emergency response processes already in place would meet the requirement for reporting Biosecurity incidents possibly through the addition of a small number of modules. Some of our Members are also concerned that the requirements as currently articulated implies the procurement of specialist response equipment and facilities that is unreasonable in terms of relative responsibilities.

This area is one that should also be the subject of further consultation.

3. Identifying Biosecurity Risks

Ports Australia supports the establishment of a reporting process of biosecurity risks where it is within the means of the port to identify them. While ports are willing to use their best endeavours to support the identification of, and create awareness of, biosecurity risks they are not in a position to provide across the board assurances on this matter and nor should absolute responsibility sit in any way with them on this matter.

The regulation requires that "*each person who carries out operations at the port is able to identify biosecurity risks associated with those operations.*" A requirement that every person working in an operational capacity is obliged to identify such risks specifically tied to his or her operational duties at its extreme could feasibly run counter to WHS obligations. It is untenable as currently couched.

It would be preferable for example for the department to provide and fund training to a certain set of designated operational staff who, **in the normal course of their duties**, could more readily identify possible risks. The identification of biosecurity risks is a specialist task; to our knowledge incursions such as they have occurred in Australia have usually been located by scientists and suchlike and rarely, if ever, by port staff in the normal course of their duties. Accordingly at the very least we would expect some departmental sponsored training to take place if the measure envisaged is to generate any sort of benefit.

Part (c) of Part 4 of the regulation is highly subjective and requires clarification and leaves it open for any officer, so authorised, to place virtually any biosecurity requirement that he or she thinks is a

good idea at the time. We are most familiar with this experience and wary of open ended regulation which can be the source of capricious, prescriptive and costly impositions.

This requirement has raised a significant level of concern among our Members, particularly our smaller regional ports, where the shifting of costs and a measure of regulatory responsibility has become problematic. The port is not the beneficiary of this type of regulation and we request the department be responsive to this concern.

4. Access

It needs to be acknowledged that unfettered access will not be allowed and nor is it necessarily consistent with other regulatory obligations and that common sense and coordination will be required in such cases.

5. Facilities and Amenities

The reference to “adequate facilities and amenities” referred to in the regulation is fleshed out in a highly prescriptive manner in the circulated standards. A literal interpretation of the standards suggests very substantial costs and is generating considerable concern particularly with our regional port Members. The notion of dedicated space and accommodations to be provided for biosecurity staff is not even an option for some ports and the shopping list of other requirements, eg data and communications facilities is clearly viewed as the responsibility of the regulator or at least something that will be provided by special arrangement. Generally the level of specific amenity required is excessive. Such facilities as training rooms can be made available on an “as required” basis and consistent with other competing requirements of the port business.

It is problematic for us that a regulatory agency would demand expensive and dedicated facilities as well as the necessary equipment to perform their statutory functions on behalf of the community, from a port service provider. This is a stark example of substantial cost shifting that has very significant implications and requires clear understanding between the department and our Members by way of further consultation.

Thank you for the opportunity to comment on the regulations. Ports Australia looks forward to further consultation on key aspects we have identified in our submission.

David Anderson
Chief Executive Officer.