

## Biosecurity - Compensation

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### Management of the risk

The purpose of this procedure is to identify the roles and responsibilities of NSW DPI Biosecurity and Food Safety staff in determining compensation for any animal, plant or property destroyed in accordance with an emergency order issued under the *Biosecurity Act 2015* (the Act).

### Scope

This procedure applies to:

- claims for compensation made subject to the provisions of the Act, and
- NSW Department of Primary Industries (DPI), a directorate within the NSW Department of Planning, Industry & Environment, Local Land Services (LLS) and Local Control Authorities (LCA), who are responsible for enforcing, administering and executing the Act.

This procedure does not apply to claims for compensation for losses as a result of a response to an outbreak of emergency biosecurity matter conducted under a national emergency response agreement.

This procedure should be read in conjunction with any relevant policy and procedure that is in place for the management of the relevant biosecurity risk.

### Biosecurity legislation summary

**Part 19** of the Act provides for the payment of compensation under the Act. Section 309 of the Act provides for the payment of compensation to the owner of any animal, plant or property:

- (a) destroyed in accordance with an emergency order for the purpose of minimising, eradicating or preventing the spread of emergency biosecurity matter, or
- (b) has been reported to the Secretary (or a delegate) or an authorised officer as being affected by, or as having died of, emergency biosecurity matter, and is certified by the Chief Veterinary Officer (in the case of an animal) or the Chief Plant Protection Officer (in the case of a plant) as having died of emergency biosecurity matter.

Emergency biosecurity matter is biosecurity matter that is the subject of an emergency order.

Compensation is only payable in the circumstances described in (b) if:

- there has been no unreasonable delay in reporting the death of the animal or plant, and
- the destruction of the animal or plant would have been required under this Act had the animal or plant not died.

An emergency order, made under Part 5 of the Act, is an order declared in writing by the Secretary (or delegate) to declare a biosecurity emergency or establish measures to respond to that biosecurity emergency.

Section 310 prescribes the amount payable as the **market value** of the animal, plant or property immediately before the relevant time.

In the case of destroyed property that is not an animal or plant, the **relevant time** is the time of destruction.

In the case of an animal or plant that has died or was destroyed on account of emergency biosecurity matter, the **relevant time** is the time of destruction or the time the Secretary or an authorised officer was notified that it was affected by or died of the emergency biosecurity matter, whatever time is earlier.

Section 310(6) of the Act allows the Secretary to come to an agreement with the owner about the amount of compensation payable, whether or not by reference to the market value. In these circumstances the amount payable is the amount as agreed by the parties.

Section 311(1) of the Act states that in assessing the market value the animal, plant or property is to be regarded as not suffering from or affected by the emergency biosecurity matter concerned.

Section 315 of the Act identifies grounds for the Secretary to refuse or reduce the amount of compensation payable. Section 316 provides for disputed claims and repayment if a decision to pay compensation has been reversed. Section 317 of the Act also creates an offence for lodging a claim for compensation that is false or misleading, or a fraudulent act or omission.

Section 318 of the Act provides for the Secretary to vary or reverse the decision in regards to a claim. A decision cannot be varied or reversed more than 5 years after it was made unless the decision was made on the basis of false or misleading information.

**Note:** The powers of the Secretary under Part 19 of the Act have been [delegated](#).

The collection, use and disclosure of information in accordance with this procedure, including any internal or external discussion or distribution of information, must be in compliance with the *Privacy and Personal Information Protection Act 1998* or be exempted by the operation of section 387 of the Act.

Section 387 (2) of the Act provides authority for the disclosure of information about a person, without the consent of the person: to a public sector agency or to any other person, but only if the disclosure is reasonably necessary for the purpose of exercising a biosecurity risk function.

### **Compensation, the *Biosecurity Act 2015* and the National Emergency Response Agreements**

Compensation provides an incentive for those impacted by an incursion of emergency biosecurity matter to notify immediately and cooperate with authorities tasked with eradicating the outbreak thereby significantly improving the success of control actions.

The national emergency response arrangements, the Emergency Animal Disease Response Agreement ('EADRA'), the Emergency Plant Pest Response Agreement ('EPPRD') and the National Environmental Biosecurity Response Agreement ('NEBRA') all make provision for cost-sharing of specified costs, including compensation where relevant.

While these agreements are important, their cost-sharing obligations are only triggered if the relevant parties agree that a national response to the particular outbreak is warranted. The agreements themselves do not give an individual any direct right to compensation in the event that property is destroyed as part of an emergency response.

In practice, a significant percentage of emergency responses undertaken in NSW may not be subject to these national agreements and therefore the cost-sharing arrangements may not apply. For example, even though Hendra virus is an emergency animal disease for the purposes of the EADRA, emergency responses to outbreaks of Hendra virus in NSW have to date not been conducted in accordance with EADRA as the parties to EADRA do not all agree that a national response is warranted.

There are also a number of pests and diseases that are not the subject of any of the national agreements but that would, in all likelihood, warrant an emergency response that may involve destruction of certain property.

The Act provides a compensation scheme that sets a base case for compensation irrespective of whether the response is coordinated nationally or not. This includes exclusions from compensation in situations where an individual's acts or omissions caused or contributed to the biosecurity risk being addressed or the owner is indemnified for the loss concerned under a contract of insurance.

The key objective of the compensation provisions of the Act are to encourage industry participation in cost-sharing arrangements whilst providing more equitable access to compensation for individuals who have suffered losses through no fault of their own.

### **Work health and safety**

The *Work Health and Safety Act 2011* places an obligation on the agency (NSW DPI and LLS) to provide a safe and healthy workplace. Safe Work Method Statements that support activities included in this procedure must be used in identifying, assessing and controlling risks.

NSW DPI and LLS work together to create a safe and supportive work environment when undertaking any activities for this procedure.

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# Biosecurity compensation procedure

## 1. Roles and responsibilities

Staff of the NSW DPI, LLS, and LCAs who are responsible for enforcing, administering or executing the Act must ensure that:

- compensation is paid to owners of animals, plants and property consistent with section 309 of the Act
- the powers provided in Part 19 of the Act for compensation are exercised by the Secretary or an officer with the appropriate delegation
- communication between the agencies and within the agencies occurs so that all relevant staff are informed of matters that may be the subject of a claim for compensation
- records of all claims for compensation and all related emergency orders that required the destruction of an animal, plant or property are maintained.

### Delegates must ensure that:

- claims for compensation are considered consistently with the officer's authorisation and their current role description except if the officer is directed otherwise or if they are required to act in an emergency situation
- claims for compensation are considered consistently with any relevant policy and procedure in place for the management of the biosecurity risk
- they demonstrate they are being fair and reasonable at all times.

## 2. Evaluating risk

Destruction of an animal, plant or property is required in certain circumstances to ensure emergency biosecurity matter is contained or eradicated. The power to require destruction should only be exercised when there are no practical alternatives as it carries with it significant reputation and financial risks for government as well as potentially significant emotional and economic impacts for property owners.

An emergency order cannot require or authorise the destruction of biosecurity matter or any other thing unless the Secretary (or a delegate) is of the opinion that the destruction is reasonably necessary to prevent, eliminate or minimise a significant biosecurity impact, or if the biosecurity matter to be destroyed is an animal, the Secretary is of the opinion that the destruction is necessary to ensure that the other emergency measures provided for by the emergency order do not have or continue to have an adverse effect on animal welfare.

To avoid doubt, distress or likely distress to an animal is an adverse effect on animal welfare. Part 2B of the *Prevention of Cruelty to Animals Act 1979* does not apply to the destruction of an animal as required or authorised by an emergency order.

An emergency order may require the destruction of any animal, plant or property without fewer limitations than other tools under the Act such as a control order or a biosecurity direction. For example there is no requirement under the Act for the Secretary when making an emergency order to consult with the head of another government agency when requiring for example, the destruction of native flora and fauna.

However, to minimise the potential risks and impacts arising from the destruction of native flora and fauna, the current [NSW DPI Procedure-Emergency Powers](#) requires the Secretary or a delegate to consult, if time permits, with the relevant head of the government agency responsible for native flora and fauna. The procedure also requires that the decision to require destruction must be supported by technical evidence.

The objective of the procedure is to ensure decisions to require destruction are supported and justifiable, minimise the risks and impacts of the actions to both NSW DPI and owners, provide

owners with an appropriate level of compensation for their losses and demonstrate the authority responsible for the actions has been fair and reasonable in what is likely to be, trying circumstances.

### **3. Compensation**

Compensation may be payable subject to the terms of a national emergency agreement and/or subject to a claim made under Part 19 of the Act. The Act does not exclude claims for compensation if compensation has already been paid under a national response agreement. The Act's intention is to provide people with access to an appropriate amount of compensation for the loss of their property therefore every claim should be assessed on a case by case basis.

#### **3.1 When is compensation payable under the Act?**

Section 309 of the Act provides for payment of compensation to:

- the owner of any animal, plant or property that has been destroyed in accordance with an emergency order for the purpose of minimising, eradicating or preventing the spread of emergency biosecurity matter (biosecurity matter that is the subject of an emergency order), and
- to the owner of any animal or plant that:
  - has been reported to the Secretary or an authorised officer as being affected by, or as having died of, emergency biosecurity matter, and
  - is certified (Part B of Application form) by the Chief Veterinary Officer (CVO) (in the case of an animal) or the Chief Plant Protection Officer (CPPO) (in the case of a plant) as having died of emergency biosecurity matter, and
  - only if the CVO or the CPPO is satisfied that there has been no unreasonable delay in reporting the death of the animal or plant, and the destruction of the animal or plant would have been required under the Act had the animal or plant not died.

As an aid to decision making **Appendix 1** contains a compensation decision making flowchart.

#### **3.2 Required records for compensation claims**

The Director responsible for making the emergency order, for example, the CVO in the case of animal pests and diseases or the CPPO in the case of plant pests and diseases, must ensure that they maintain accurate records of:

- the emergency order issued that required destruction of an animal, plant or property
- the technical evidence that supports the decision to destroy
- the time and date the animal, plant and property were destroyed, when applicable
- the notification that an animal or plant was affected or died of emergency biosecurity matter
- the market value of the property at the time of its destruction
- the market value of the animal or plant at the time of its destruction or when the Secretary or authorised officer was notified that it was affected by or died of the emergency biosecurity matter
- the total number/area (if crop) or any details that would quantify the animals, plants or property destroyed, including, species, breed, age, stage of maturity, any relevant details that could determine value
- witnessed records of animals, plants or property destroyed
- if required, copies of certification by the CVO or CPPO (Note: The option of certification is provided in Part B of the Application form)

- in the case of animals or plants that have died, the date and time of their death, and the date and time of reporting by the owner, and
- verification that destruction would have been required had the animal or plant not died. This could be the technical evidence and rationale that determined destruction was required.

### 3.3 Amount of compensation

Section 310 identifies the amount of compensation payable is the market value of the animal, plant or property immediately before the relevant time. The relevant time being:

- in the case of property, the time of its destruction or
- in the case of an animal or plant that has died or was destroyed, the time of its destruction or when the Secretary of authorised officer was notified that it was affected by or died of the emergency biosecurity matter.

**Appendix 2** includes a summary of how market value is determined under the national emergency response agreements.

Section 310(6) of the Act provides for the Secretary to come to an **agreement** with the owner of an animal, plant or property about the amount of compensation payable. In such cases the Secretary or the responsible delegate must maintain a written copy of the agreement, signed by both parties.

Any agreement between the Secretary and an owner should not negate the right of either party to dispute the claim, vary or reverse a decision in regards to a claim or require a claimant to repay the Secretary an amount that was paid as compensation in the circumstances set out in sections 317 or 318 of the Act. It should be noted that any agreement between the Secretary and the owner of an animal, plant or property or any settlement of a claim for compensation, cannot be the subject of an appeal to the Land and Environment Court by a person aggrieved by the decision.

The criteria for determining the amount of compensation under the national emergency response agreements can be used as a guide in determining the payable amount in the signed agreement. The amount payable should be determined on a case by case basis and may include consideration of any costs incurred by the owner to comply with the Emergency order and/or to contain or eradicate the emergency biosecurity matter.

See **Appendix 2** for a summary of how the amount of compensation or owner reimbursement costs, is calculated under a national emergency response agreement.

Section 311(1) of the Act states that in assessing the market value the animal, plant or property is to be regarded as not suffering from or affected by the emergency biosecurity matter concerned. This is broadly consistent with the method of determining the value for losses the subject of a response under a national response agreement.

The NSW Government Procurement Policy Framework provides a policy and operating framework to ensure government procurement activities achieve best value for money in supporting the delivery of government services. Accordingly the Secretary (or delegate) responsible for the issuing of the emergency order which required the destruction should obtain at least two independent valuations of the animal, plant or property to determine its value prior to destruction. This process should not delay the destruction of the animal, plant or property in question if it could exacerbate the emergency situation. Other records including the time, date and photographs should enable the valuation to occur post destruction.

Section 312 of the Act states that no compensation is payable for any loss of profit, loss occasioned by breach of contract, loss of production or any other consequential loss for example, future progeny of the animal or production from a vineyard in following years. In the case of the EPPRD, this does not exclude 'owner reimbursement of costs' associated with the loss of future production if land is required to be left fallow for an extended period of time. Similarly the NEBRA

does not exclude 'owner reimbursement of costs' associated with the cost of relocation, housing, breeding and rehabilitation of a native species.

Again, this could be considered if the Secretary negotiates an agreement (section 310(6)) with the owner of the property.

#### 4. How does a person claim for compensation?

Section 313 of the Act states that a claim for compensation for any animal, plant or property destroyed (subject to an emergency order) or has been certified by the CVO or CPPO as having died of emergency biosecurity matter must be:

- in an **approved form**, and
- lodged with the Secretary (or delegate) in a manner required by the Secretary within 90 days after the destruction or death or within such further time as the Secretary may in a particular case allow, and

The claim for compensation must include a covering brief prepared by staff from the CIS – Operational Policy and Legislation unit.

The claim must identify:

- the name, address, contact details of the claimant
- the animal, plant or property that was destroyed or died of emergency biosecurity matter (and was certified by the CVO or CPPO)
- proof of ownership of the animal/s, plant/s or property destroyed
- the time and date of destruction or death,
- valuation certificate or at least two independent valuations.

The processing officer, as appointed by the Emergency Management Team, must ensure a record is maintained of all claims for compensation. The record must include who processed the claim and made the relevant decisions.

The processing officer should notify the applicant that their application has been received and they will be given a decision within 60 days of the receipt of the claim (see section 4.1). A form **letter** is available for this purpose. The letter also provides for requesting additional information, if required.

If the information provided is incomplete the application cannot be processed. The processing officer should make a request to the applicant for the required information. If the applicant fails to provide the information within 60 days of the request, the application should be formally refused. A **form letter** is available for this purpose.

Section 314 of the Act provides for the **recovery of compensation**. Disputed claims for compensations may be recovered by an affected person by action against the Crown in any court of competent jurisdiction. The processing officer must ensure accurate records are maintained of all claims for compensation including the evidence which supported the claim and the decision in regards to the amount payable.

#### 4.1 Grounds for refusal or reduction of a claim

[Section 315 \(1\)](#) of the Act provides when the Secretary (or a delegate) may refuse a claim for compensation.

These provisions aim to ensure that compensation is only payable to individuals who have suffered losses through no fault of their own, the loss was not covered by an insurance policy and the owner has not made a claim that is false or misleading.



If for example, a person moved emergency biosecurity matter contrary to a requirement of the Act or Commonwealth legislation, and the movement resulted in the death or destruction of their animals, this would result in a refusal of a claim for compensation. Similarly, if a person failed to notify the presence or suspected presence of emergency biosecurity matter, this could be grounds for the refusal of a claim for compensation if it could be established they knew or ought reasonably to have known the biosecurity matter was present on their property.

The provisions of the Act do not exclude compensation payments if the owner is eligible for compensation for the same losses under a national response agreement. When determining compensation under the Act, the amount received under the national response agreement should be considered. For example if the owner is eligible for a compensation payment under a national response agreement equivalent to the market value of the animal, plant or property prior to its destruction, then it would not be appropriate for the owner to receive a compensation payment for the same loss, under the Act.

Subject to an agreement between the owner and Secretary (section 310(6)) the owner may be eligible for compensation for additional losses, for example the costs incurred to ensure compliance with the emergency order and/or the destruction of emergency biosecurity matter. However, the agreed compensation cannot include amounts for loss of profit, loss occasioned by breach of contract, loss of production or any other consequential loss (section 312). Again, the flowchart in **Appendix 1** may assist with the decision making process.

The processing officer and/or the relevant decision maker must ensure they maintain records of all claims for compensation and if the claim was refused or reduced, the grounds for the refusal or reduction. Procedural fairness requires the decision maker to notify the applicant of the reasons for refusal, and will require that the applicant be given the opportunity to make further submissions. The decision-maker must consider those submissions before deciding to exercise the powers under section 318.

It is recommended that the claimant be given notice of the decision to pay, refuse, reduce the claim or that the claim is still under consideration within 60 days of receipt of the claim.

#### **4.2 What if a doubt or dispute arises?**

Section 316 states that if any doubt or dispute arises as to the right or entitlement of a person to receive compensation, the Secretary may cause the amount payable, or part thereof, to be retained until a person has established a right or entitlement, to the satisfaction of the Secretary.

The processing officer and/or the relevant decision maker must ensure the doubt or dispute is documented and the claimant is informed either verbally or in writing that compensation has been retained or of any additional information the person may be required to provide.

#### **4.3 False or misleading claims**

Section 317 states that any person who lodges a claim for compensation knowing it is false or misleading in a material particular, or who practises or is concerned in any fraudulent act or omission for the purpose of obtaining compensation for the person or any other person, is guilty of an offence.

If the processing officer/relevant decision maker becomes aware or suspects a person has lodged a false or misleading claim for compensation or acted fraudulently before the compensation is paid, the processing of the claim should be suspended immediately and the matter referred as a complaint to NSW DPI Biosecurity and Food Safety's Compliance & Integrity Systems Unit for investigation.

If a person becomes aware of a false or misleading claim after compensation is paid, the matter is to be referred as a complaint to NSW DPI Biosecurity and Food Safety's Compliance & Integrity Systems unit for further investigation.

#### **4.4 What if a claim is the subject of an incorrect decision?**

Section 318 (1) of the Act provides for the Secretary to vary or reverse an incorrect decision with the exception of decisions made more than 5 years ago. The 5 year time limit does not apply to a decision that was made on the basis of false or misleading information.

Section 319 provides for the Secretary to direct a claimant by order in writing, to repay the Secretary or increase the amount paid by way of compensation, if the Secretary varies or reverses the decision under which the amount was paid. The amount to be repaid to the Secretary is a 'recoverable amount' for the purposes of the Act and may be recovered as provided in Part 20 of the Act.

#### **4.5 Act of grace payments**

The Minister has the authority to approve an act of grace payment in accordance with the NSW Treasury guidelines [NSW TC 11/02](#).

### **5. Record keeping**

The responsible authority and the authorised officer must maintain records of all biosecurity compensation claims. Records required are as follows.

Responsible authority:

- emergency orders made, revoked, amended or varied
- claims for compensation received
- results of claims for compensations
- all relevant information pertaining to a decision to pay or refuse compensation
- amount of compensation paid
- records of false or fraudulent claims for compensation,
- training of all relevant staff .

Processing officer/relevant decision maker:

- copies of all claims for compensation
- supporting evidence
- results of claims including amount paid,
- claims refused , varied or repaid

The processing officer/ relevant decision maker must ensure records of claims for compensation are maintained for a minimum of 7 years.

### **6. Definitions and acronyms**

LCA	Local Council Authority
LLS	Local Land Services
NSW DPI	NSW Department of Primary Industries.

### **7. Documentation**

Procedure – Emergency powers  
Procedure - Biosecurity collection, use and disclosure of information  
Procedure – Finance officer role: Cost shared emergency responses (INT19/22654)  
Procedure - Finance officer role: Non- cost shared emergency responses (INT19/31631)  
Policy - Information Security (IND-I-197)  
Policy – Code of Ethics Conduct  
Policy - Biosecurity collection, use and disclosure of information  
Approved template - Emergency Order

Approved form – Application for compensation under the Biosecurity Act 2015 (Includes in Part B the option for certification by the CVO or CPPO) (PUB18/710)

Approved form – Agreement between the Secretary and claimant for payment of compensation (INT19/73227)

Approved form – Receipt of application for compensation (Request for additional information). (INT19/71929)

## 8. Revision history

Version	Date issued	Notes	Issued By
1	12/11/2018	New procedure in response to the <i>Biosecurity Act 2015</i>	Policy, Legislation, Performance & Consultation
2	12/01/2020	Procedure reviewed and updated following the responses to <i>Salmonella enteridis</i> and compensation claims	Compliance, Integrity and Systems

## 9. Contact

Director – Compliance, Integrity and Systems

02 6391 3691

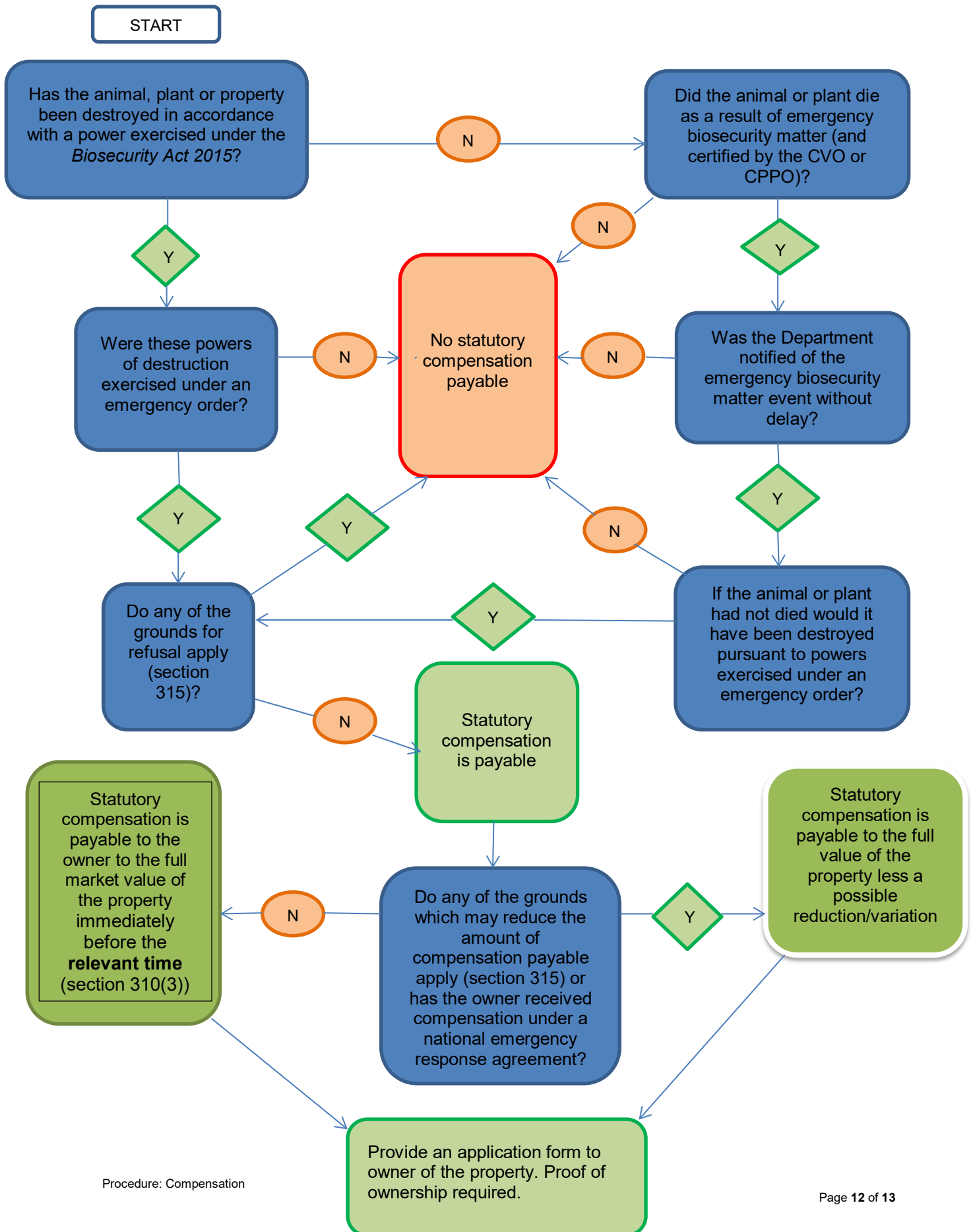
OR

Manager – Operational Policy and Legislation

Compliance and Integrity Systems

02 6391 3745

## Appendix 1: Compensation decision making flowchart



## Appendix 2: Amount of compensation (or equivalent) payable under the national emergency response agreements

In the case of the EADRA\* market value is:

- *calculated upon the basis of a sale at the place where the stock or property was when it was destroyed or where the stock was when it died of the disease, that is, farm gate value, and*
- *In the case of livestock, a second payment or 'top-up payment' may become due on the date the property where the livestock were located becomes eligible to be restocked provided the total value of livestock is greater on that date.*

In the case of the [EPPRD](#)\*\* 'owner reimbursement costs' include:

- *the direct eradication costs incurred by the owner*
- *the estimated farm gate value of the crop destroyed or of a crop the economic value of which is destroyed*
- *the loss of the estimated farm gate value of crops foregone, less the costs of production, resulting from a requirement for specified period, land be left fallow, and*
- *costs above normal operating costs such as additional pest control measures, cleaning of machinery, etc.*

In the case of [NEBRA](#)\*\*\* 'owner reimbursement costs' could include:

- *direct eradication costs arising from actions undertaken as part of a national response to a pest or disease*
- *direct costs arising from actions to prevent the spread of a pest or disease where the resulting impacts are predominantly relating to the environment*
- *the costs of property that has been destroyed as a result of actions undertaken as part of a response to an outbreak of a pest or disease that predominantly affects the environment*
- *costs arising from actions undertaken as part of a response, for example, additional pest control measures, special cleaning of machinery or equipment, slipway costs*
- *direct costs arising, in relation to a native species that is:*
  - A. *directly threatened by the pest or disease subject to the national response; or*
  - B. *directly threatened as a result of actions undertaken as part of the response from:*
  - C. *relocation*
  - D. *housing*
  - E. *breeding*
  - F. *rehabilitation; or*
  - G. *other related actions*