



Biosecurity Undertaking

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Management of biosecurity risk

The purpose of this procedure is to provide guidance for authorised officers in the use of the biosecurity undertaking compliance tool to ensure compliance with the requirements of the *Biosecurity Act 2015* (the Act). This includes the identification of the roles and responsibilities of staff that are responsible for enforcing, administering and executing the Act. To ensure that biosecurity undertakings are used appropriately and proportionately in addressing biosecurity risk and biosecurity impacts.

Scope

This procedure applies to the staff of NSW Department of Primary Industries (DPI), an office within the NSW Department of Industry, Local Land Services (LLS), Local Control Authorities (LCA) and the Australian Plague Locust Commission (APLC), who are responsible for enforcing, administering or executing the Act.

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

Biosecurity legislation summary

Part 10, section 142 (1) of the Act provides for an authorised officer to accept a written undertaking (a biosecurity undertaking) given by a person if the person has contravened, is suspected or is likely to contravene a requirement imposed by or under the Act.

An authorised officer may accept a biosecurity undertaking from a person who advises they will take appropriate action to discharge their duties instead of giving the person a biosecurity direction.

Section 143(1) requires that a biosecurity undertaking must specify the contravention or the suspected likely contravention, the measures or actions the person has agreed to implement and the time period by which these are to be implemented.

In accordance with section 144 (1) a biosecurity undertaking will only take effect and is enforceable when a written instrument evidencing the terms of the undertaking are signed by both the person giving the undertaking and the authorised officer who is accepting the undertaking.

In accordance with section 145 a person who contravenes a biosecurity undertaking is guilty of a category 2 offence.

Refer to relevant policies and procedures for further guidance in relation to when an authorised officer may accept a biosecurity undertaking.

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.

Work health and safety

The *Work Health and Safety Act 2011* places an obligation on the agencies 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.

All agencies must work together to create a safe and supportive work environment when undertaking any activities for this procedure.

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Biosecurity undertaking procedure

1. Roles and responsibilities

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

- a biosecurity undertaking is accepted from a person who has contravened or is likely to contravene a requirement imposed by or under the Act
- the use of a biosecurity undertaking is in accordance with the relevant policy and procedures, or where these are not available, an assessment of risk is performed in consultation with the relevant technical and compliance staff
- the use of a biosecurity undertaking is appropriate and proportionate to the biosecurity risk or impact, and supports the principle, biosecurity is a shared responsibility and is outcome focused
- authorised officers are trained in the use of their powers in the context of accepting a biosecurity undertaking
- authorised officers understand the requirements imposed by or under the Act and all relevant policy and procedures when exercising their powers
- there is adequate communication between relevant agencies and within an agency so that all relevant staff are informed of matters the subject of a biosecurity undertaking
- records of biosecurity undertakings and all related enforcement actions are maintained.
- authorised officers inform their managers of any biosecurity undertakings accepted, and
- authorised officers demonstrate they are being fair and reasonable at all times.

2. The general biosecurity duty

An authorised officer may accept a biosecurity undertaking to ensure a person discharges their general biosecurity duty. This includes when a person has failed to discharge or the authorised officer suspects the person has failed to discharge or is likely to fail to discharge their general biosecurity duty.

An authorised officer must refer to the policy and procedure for the relevant biosecurity risk before accepting a biosecurity undertaking. If a policy and procedure is not in place for the biosecurity risk the authorised officer must consult with their Manager and relevant technical and compliance staff within NSW DPI, to determine the significance of the biosecurity risk or impact which has, is or is likely to occur, before giving a biosecurity direction.

Generally biosecurity undertakings should only be accepted from a person after the person has been informed of their general biosecurity duty and the biosecurity impact which is occurring or is likely to occur exceeds the significance threshold. That is, the impact of the biosecurity risk on the economy, environment or community is significant enough to require government intervention. The significance threshold should be determined by the unit responsible for the management of the biosecurity risk.

3. Biosecurity undertaking

Section 142(1) of the Act provides for an authorised officer to accept a written undertaking from a person who has contravened the Act or the authorised officer suspects that the person has contravened or is likely to contravene a requirement imposed by or under the Act.

Example: A land owner offers an authorised officer a written undertaking to eradicate alligator weed from her property. Alligator weed is the subject of a biosecurity zone regulation that requires land owners in certain parts of the State to eradicate the weed and suppress its spread.

Biosecurity undertakings may be accepted by an authorised officer in circumstances that are consistent with their role and responsibilities, policy, procedure and training.

Authorised officers must ensure correct usage of the template for a biosecurity undertaking, including capturing relevant measures or actions as specified by relevant technical and compliance staff. Template can be located on the Industry Intranet.

3.1 Evaluation of risk

The authorised officer needs to identify the risk and evaluate the seriousness and likelihood that a biosecurity risk is likely to occur, is occurring or has occurred.

If in the opinion of the authorised officer, a contravention or suspected contravention of requirements imposed under or by the Act is occurring or is likely to occur, the authorised officer has the power to give a biosecurity direction or accept a biosecurity undertaking.

3.2 Accepting a Biosecurity Undertaking

A biosecurity undertaking can be accepted by an authorised officer under section 142 (1) of the Act. An authorised officer may accept a biosecurity undertaking from a person instead of giving the person a biosecurity direction.

Section 144(1) requires that a biosecurity undertaking takes effect and becomes enforceable when a written instrument evidencing the terms of the undertaking is executed by both the person giving the undertaking and the authorised officer.

Authorised officers will be responsible for ensuring compliance with the requirements of the Act across the biosecurity spectrum. Authorised officers responsibilities may be limited by their authorisation so that, for example they may only be responsible for compliance within a discrete operational area, such as within a LCA to ensure weed control requirements are complied with. Other authorised officers may operate across multiple operational areas.

It is the responsibility of authorised officers to ensure that they only accept a biosecurity undertaking consistent with their authorisation and their current position description unless they have been directed to do so.

When an authorised officer explains to the person that a contravention or suspected contravention has been identified, they can accept a biosecurity undertaking from a person instead of giving a biosecurity direction. Biosecurity undertakings can only be used if the person agrees to provide an undertaking to take specific measures or actions to mitigate the risk or biosecurity impact. The authorised officer needs to explain clearly to the person that they are bound by that undertaking and the consequences should they fail to comply.

The authorised officer must decide as soon as possible to either accept or reject the undertaking, bearing in mind the nature of the contravention and the significance of the resulting biosecurity risk.

Note: The authorised should be aware that Section 150 of the Act states:

“A biosecurity undertaking does not prevent the taking or continuation of proceedings for an offence against this Act or the regulations in respect of any matter that is the subject of the undertaking.”

3.3 Refusal to accept a biosecurity undertaking

An authorised officer may refuse to accept a biosecurity undertaking from a person if they believe the actions will be insufficient to mitigate, manage or prevent the biosecurity risk. This could include for example if the person giving the undertaking is known to have a poor compliance history. The authorised officer can instead use their powers to give the person a biosecurity direction.

If an authorised officer is not satisfied that the measures proposed by the person will adequately address the contravention, or will not be implemented as quickly as required, for example, then the officer should not accept the undertaking. Agreement needs to be reached on the contents of the undertaking. If this does not happen then the officer can default to an individual biosecurity direction to address the contravention.

In circumstances when an authorised officer refuses to accept a biosecurity undertaking, the authorised officer must make a record of the reasons for their decision.

3.4 Identifying the contravention and measures required

In order to prepare a written biosecurity undertaking, the authorised officer and the person giving the undertaking need to discuss the contravention or suspected contravention and measures that are required or are appropriate, to remedy or prevent the contravention. Agreement needs to be reached about the measures to be undertaken and the timeframe. These measures will form the basis for the written agreement to be given by the person in the undertaking.

3.5 Preparation of a Biosecurity Undertaking

The written undertaking is given by the person to an authorised officer. A template for biosecurity undertakings is available on the Industry Intranet. The authorised officer will need to work with the person to ensure that the contents of the biosecurity undertaking clearly identify the contravention, the measures that have been agreed to and the period for implementation.

3.6 Contents of a biosecurity undertaking

When accepting a biosecurity undertaking from a person the authorised officer must ensure the following:

- the contravention or suspected contravention of the requirement imposed under or by the Act is identified on the undertaking, such as if the specific requirement that must be complied before their duty can be discharged
- the measures or actions required by the person and the date the actions are to be completed have been identified
- the time specified for the person to comply with the undertaking is no less than what would reasonably be required to carry out the actions required
- the biosecurity undertaking is signed by both the person and the authorised officer
- the acceptance of the biosecurity undertaking ensures that it is legally enforceable.

A biosecurity undertaking takes effect when it is signed by both the person giving the undertaking and the authorised officer accepting the undertaking.

In certain circumstances, for example weed control, a biosecurity undertaking is binding on owners and occupiers of land and their successors in title. In these circumstances the owner of the property should be supplied with copies of any undertakings given by the occupier.

The authorised officer must ensure they maintain copies of all biosecurity undertakings they accept.

4. Withdrawal or variation of biosecurity undertaking

The Act at section 149 provides for the withdrawal or variation of a biosecurity undertaking. For example, if the person who has given the biosecurity undertaking has carried out the required actions and no further action is required, the undertaking may be withdrawn. Alternatively a biosecurity undertaking may be varied to for example, to extend the time a person has to carry out the required actions if it is considered that they are making reasonable progress and/or circumstances outside of their control occurred that prevented them from undertaking the actions.

A person can withdraw an undertaking but only with the written agreement of the authorised officer. Alternatively an authorised officer can withdraw their acceptance of a biosecurity undertaking at any time, by notice in writing served on the person who gave the undertaking. Similarly, a biosecurity undertaking can be varied by either the person who gave the undertaking or the authorised officer but only with written agreement from both parties.

The responsible authority and the authorised officer must maintain records of all withdrawals and variations of a biosecurity undertaking.

To ensure clarity is maintained for both the person who is giving the undertaking and the authorised officer accepting the undertaking, if a variation is required, in most cases it would be preferable to withdraw the existing undertaking and request a new undertaking to avoid any misunderstandings.

When withdrawing or varying a biosecurity undertaking the authorised officer must issue the person with a written notice to inform the person of the withdrawal or variation using the approved template 'Notice of Withdrawal or Variation of a Biosecurity Undertaking'. See section 11 - Documentation.

5. Failure to comply with a biosecurity undertaking

When a person fails to comply with their biosecurity undertaking the authorised officer should consider the significance of the biosecurity impact that has, is or is likely to occur. The authorised officer's response should be escalated in response to the significance of the biosecurity impact. Consultation with the relevant technical experts, Biosecurity Compliance policy and Biosecurity Enforcement policies and the authorised officer's Manager should be undertaken to determine the appropriate action.

If a person has failed to comply with a biosecurity undertaking, there are a number of potential factors the authorised officer should consider when determining the action required, they include the following.

The significance of the biosecurity impact

This will determine the immediacy of the actions required. If the impact is significant then immediate action may be required by the person or the authorised officer. If immediate action is required by the person, then the authorised officer has two options. The authorised officer can either give the person more time to complete the actions required or the authorised officer can take the required actions and recover the costs (See Section 6).

The reasons for the person's failure to comply

This should be identified and recorded. The person may have a reasonable excuse and may just need more time.

Any relevant policy and procedure for the biosecurity risk present

The authorised officer must ensure their actions are consistent with any policy and procedure in place for the biosecurity risk present. If no policy and procedure is present then the authorised officer must consult with their Manager and/or relevant technical or compliance staff within NSW DPI to determine the actions required.

If the person has taken some action but has not completed the actions required to comply

It is potentially significant if the person has attempted the actions required even if they have failed to complete the actions. This may indicate that the person needs more time to comply. In this circumstance the significance of the biosecurity impact that is occurring needs to be considered when determining the immediacy of the actions required.

Being fair and reasonable

It is important that the authorised officer is fair and reasonable at all times. If we have time on our side it may be better to extend the time a person has to comply rather than push a prosecution and risk being seen as unreasonable.

A contravention of a biosecurity undertaking is an offence under section 145 (1) of the Act and is a penalty notice offence in Schedule 6 of the Biosecurity Regulation 2017.

An authorised officer must ensure they maintain accurate records of all the actions taken if evidence is required to support either the issuing of a penalty notice or the conduct of a prosecution. The evidence and supporting documentation required to establish that a person has committed an offence under section 145 have been included in section 9 Record Keeping.

6. Taking required actions and the recovery of costs

If a person fails to comply with a biosecurity undertaking, Section 147 of the Act provides for an authorised officer to enter the premises, or to authorise any person to enter the premises and take action if deemed appropriate. These are the actions required by the undertaking or to otherwise remedy that failure.

Taking required actions could include the following.

Entering the premises

The authorised officer may enter the premises at a reasonable time and if the premises is used for residential purposes, section 147 (6) of the Act requires the authorised officer to give written notice of an intention to enter. The written notice must specify the day and preferable the time the authorised officer proposed to enter, and that the notice must be given before that day. Note that section 147(8) states that notice is not required if entry is made with the consent of the occupier or entry is made under the authority of a search warrant.

Destruction of property

Taking the required action to destroy property will require some significant justification. It is rare that the destruction of property is required and it should be given careful consideration. Generally it should only be required after all efforts to achieve compliance have failed, the person is still failing to comply with an individual biosecurity direction, the biosecurity impact that is occurring or could occur, is significant and the authorised officer obtains the appropriate approval from their Manager and/or relevant technical or compliance staff within NSW DPI..

Recovery of costs

Taking required actions will also incur costs. The Secretary, LCA (or their delegate) may charge the liable person a fee for action taken under section 147 of the Act such as:

- (a) a recoverable amount that is payable to the Secretary, and
- (b) recoverable from the liable person.

Please note that the fee is to be no more than is reasonable to cover the costs and expenses incurred in connection with the action. Costs and expenses incurred include any costs and expenses incurred by or on behalf of any government agency.

Accordingly, the authorised officer should provide an estimation of the potential costs involved in order to obtain approval for this action.

Intention to 'take the required actions'

If approval is granted to take the required actions, an authorised officer must advise the occupier of the premises in writing of both the intention to enter the premises and to what actions will be required. This may achieve some cooperation from the liable person and identify any potential barriers to achieving the stated objective. It would also demonstrate that the authorised officer was being as fair and reasonable as possible in circumstances when it may be perceived that the actions are heavy handed.

Authorised officers may be guided in these circumstances by using relevant policy and procedure such as Biosecurity - Virulent Footrot procedure.

7. Fee for biosecurity undertaking

Section 146 of the Act provides for the charging of a fee for preparing and accepting a biosecurity undertaking. Please refer to the Biosecurity Fees and Charges procedure for further details.

8. Fee for compliance audits

A person who offers an undertaking that is accepted by an authorised officer can be the subject of an audit to ensure compliance with the stated measures or actions. Under the Act a person who has given a biosecurity undertaking is defined as a 'biosecurity participant' and as such, may be charged a reasonable fee for the conduct of the audit.

The charging of a fee for a compliance audit is discretionary, that is section 230(1) states that the person may charge the audit target. Whether a person should be the subject of a fee for a compliance audit will be determined by relevant technical and compliance staff within NSW DPI Compliance.

Please refer to Biosecurity Fees and Charges procedure for further details on fees and charges.

9. Record keeping

Responsible Authority:

- authorised officers and their training, roles and responsibilities
- biosecurity undertakings accepted
- enforcement actions undertaken
- charging a fee for compliance audits
- penalty notices issued, and
- prosecutions.

Authorised officer:

- authorisation, training roles and responsibilities
- investigations
- identify contraventions under or by the Act
- records of interview
- 'Letter of Advice'
- copies of all Biosecurity Undertakings accepted or refused (and reasons for refusal).
- records of withdrawal or variation of a biosecurity undertaking.
- interview following identification of a contravention of a biosecurity undertaking.
- recommendation for Penalty Notice or Prosecution:
 - elements of the Offence, Section 145(1)
 - statement of Facts
 - records of interviews
 - statement of Witness
 - relevant evidence such as photographs, test results.

10. Definitions and acronyms

DPI NSW Department of Primary Industries

LLS Local Land Services

LCA Local Control Authority

APLC Australian Plague Locust Commission

11. Documentation

Biosecurity undertaking template

Notice of Withdrawal or Variation of a Biosecurity Undertaking

Policy - Records Management (IND-I-177)

Policy - Information Security (IND-I-197)

Policy - Classified Information (IND-I-196)

Policy - Government Information (Public Access) (IND-I-178)

Policy - Biosecurity collection, use and disclosure of information

Procedure - Biosecurity collection, use and disclosure of information

13. Records

Not applicable

13. Revision history

Version	Date issued	Notes	Issued by
1.0	01/07/2017	New procedure developed in response to the <i>Biosecurity Act 2015</i> .	Compliance Systems Coordinator

14. Contact

Systems Coordinator

02 6391 3698