

## Seizure of things under the *Biosecurity Act 2015*

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### Purpose

The purpose of this procedure is to provide guidance to authorised officers when using seizure functions under Part 8 of the *Biosecurity Act 2015* (the Act).

### Scope

This procedure applies to NSW Department of Primary Industries (DPI) within Regional NSW, Local Land Services (LLS), Local Control Authorities and other authorised persons responsible for exercising seizure functions under Part 8 of the Act.

### *Interaction with other Acts*

### Collection, use and disclosure of information

The collection, use and disclosure of information in accordance with this procedure, including any internal and external discussion of information, must follow 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.

The NSW DPI policy and procedure on Collection, Use and Disclosure of Information should be consulted for further information.

### Safety Requirements

The *Work Health and Safety Act 2011* places an obligation on the agencies (e.g. NSW DPI, Local Land Services, Local Control Authorities) as a person conducting a business or undertaking and workers to provide a safe and healthy workplace. Safe work method statements that support activities included in this policy must be used in identifying, assessing and controlling risks.

The agency will work together to create a safe and supportive work environment when undertaking any activities in this procedure.

### Delegations

Authorised officers should ensure that they consult with the most recent instrument of delegation when undertaking their functions under Part 8 of the Act. Refer to the Delegations page on the Intranet.

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# **Procedure – Seizure of things under the Biosecurity Act 2015**

## **1. Roles and Responsibilities**

Authorised officers who seize things under Part 8 of the Act are to ensure:

- full compliance with all relevant provisions under the Act,
- all necessary evidence is collected,
- verification of the correct entity is undertaken,
- where possible, consultation with their manager and the relevant technical unit before exercising power to seize any thing,
- appropriate handling (returning/destroying/disposal/sale) of seized thing/s,
- demonstration they are being fair and reasonable at all times,
- maintenance of appropriate records, and
- with regard to NSW DPI (BFS) compliance staff, there is an additional requirement to provide information to BFS Digital Services Coordinator to ensure the Seizure Register is maintained.

Line managers, senior officers and team leaders are to ensure that they:

- demonstrate procedural fairness and reasonableness at all times, and
- interpret the information provided by authorised officers and make administrative decisions.

The Secretary (or delegate):

- may declare any seized thing to be forfeited and give notice of forfeiture where required (in accordance with [s110](#));
- may charge a recoverable fee to the liable person in relation to any costs and expenses incurred in connection seizure.

## **2. Seizure**

### **2.1 Identify the authorised purpose**

An authorised officer may exercise their functions under Part 8 of the Act, including the powers to seize any thing, if before acting, they identify an authorised purpose for their action. An authorised purpose includes:

- investigating, monitoring and enforcing compliance with the requirements imposed by or under the Act (s89)(1)(a)),
- obtaining information or records for purposes connected with the administration of the Act (s89)(1)(b)),
- preventing, eliminating, minimising or managing biosecurity risks or suspected biosecurity risks (s89)(1)(e)),
- preventing, managing or controlling a biosecurity impact (s89)(1)(f)),
- enforcing, administering or executing the Act (including any instrument made under the Act)(s89)(1)(g)).

After an authorised officer had identified an authorised purpose, the authorised officer may, at any premise lawfully entered, do anything in the opinion of the authorised officer that is necessary to be done for an authorised purpose. With respect to seizure, powers an authorised officer can exercise include (but are not limited to):

- seizing any biosecurity matter or other thing if the authorised officer has reasonable grounds for believing the seizure is necessary to prevent, eliminate or minimise a biosecurity risk posed by or in relation to the biosecurity matter or thing; (s102)(2)(o))
- seizing any thing that the authorised officer has reasonable grounds for believing it is connected with an offence against the Act or the Regulations (s102)(2)(p));
- moving any seized thing from the place where it is seized or leave it at the place where it is seized and take reasonable action to restrict access to the thing (s102)(2)(q));
- directing the occupier of the premises where a thing is seized to retain it at those premises or at another place under the control of the occupier (s102)(2)(r)).

When referring to the power to seize any thing connected with an offence, this includes the power to seize:

- a thing with respect to which the offence has been committed, and
- a thing that will afford evidence of the commission of the offence, and
- a thing that was used for the purpose of committing the offence (s102(4))

The power to seize a thing may be exercised without the consent of the owner of the thing (s102(6)).

## 2.2 “Reasonable grounds” for seizure

An authorised officer must form the belief or opinion that there are reasonable grounds that justify exercising their power to seize a thing. Reasonable grounds may include, but not limited to:

- the thing is prohibited matter or it is reasonably suspected of being infected or infested with prohibited matter, or
- the thing is an animal listed as a prohibited dealing in Schedule 3, Part 2, Division 1 or Schedule 3 Part 3 of the Act, or
- the thing is a carrier, or reasonably suspected of being a carrier, of biosecurity matter. For example, the animal was from a herd which is known to be infected with a disease or the thing is a bee hive and the bees are infected with American Foul Brood, or
- the seizure is necessary to prevent, eliminate or minimise a biosecurity risk (as defined in s13 and 14).
- the thing is connected with an offence against this Act or the regulations.

“Reasonable suspicion” is used often in legislation. It requires enough facts and that a reasonable person is inclined to accept the subject matter of the belief. The Act provides further guidance on how an authorised officer may form an opinion and reasonable suspicion that:

- an animal, plant, place or thing may reasonably be suspected of being a carrier of biosecurity matter (see section 399)
- an animal, plant, place or thing may reasonably be suspected of being infested with a disease (see section 400)
- an animal, plant, place or thing may reasonably be suspected of being infested with a pest (see section 401).

Case law has also identified that three things that must be present, which a Court will take into account in a prosecution:

- (1) The authorised officer must have an actual subjective belief. Belief is more than "suspicion", "apprehension" or "fear"; it is an actual "inclination of the mind".
- (2) The subjective belief of the authorised officer must be a belief that is formed by the authorised officer by reference to objective circumstances known to and taken into account by the authorised officer – including information provided to the authorised officer by someone else – and can include an element of surmise or conjecture on the part of the authorised officer.
- (3) The court must be able to determine that a reasonable person would form the same belief based on the objective circumstances. (*Prior v Mole* [2017] HCA 10)

## 2.3 Seizure of a thing

Before seizing a thing, the authorised officer should seek approval from a team leader, senior officer or their line manager.

There are a number of functions the authorised officer should undertake in relation to seized things. This includes:

- receipt for seized things (s106)
- retention of seized thing (s105(2))
- returning of seized thing (s107)
- certification of inability to return seized thing (s108)
- forfeiture of seized thing (s110)
- dealing with forfeited things (s111).

These tasks are described below.

### 2.3.1 Approval for Seizure

The authorised officer should, prior to seizing a thing:

- discuss with a team leader, senior officer or their line manager the objective circumstances of the biosecurity matter, carrier or thing and the risk or potential biosecurity risk it poses. Circumstances include where the thing is being seized from, the quantity of the thing, and whether it has special classification under the Act (eg. prohibited matter).
- discuss the grounds for seizure and identify the desired outcomes (i.e. in particular whether the things should be forfeited to the Secretary and destroyed).

The authorised officer should also discuss with the team leader, senior officer or line manager practicalities such as where the seized thing will be retained and kept safe, but these practicalities are not relevant to the decision to seize the thing.

Before any decision to destroy or require the destruction of a thing under Part 8 of the Act, an authorised officer must ensure the thing does not fall within the restrictions set out in section 115 of the Act. Refer to *Destruction, Disposal or Sale of things under the Biosecurity Act 2015 Procedure*.

A decision to seize is to be proportionate to the circumstances found; sufficient evidence should be gathered; observations recorded; and reasonable effort made to identify the owner of the thing.

A team leader, senior officer or line manager will analyse the evidence and circumstances provided by the authorised officer and advise the authorised officer whether the decision to seize is appropriate.

### 2.3.2 Seizing the thing

When the decision to seize a thing is made, the owner or responsible person in possession of the thing should be notified by the authorised officer. The authorised officer should:

- explain to the person the reasons the thing has been seized, and
- advise the person of their right to make an application to the court under section 109 of the Act for an order for the seized thing to be returned.

Note, a court cannot make an order under section 109 of the Act in respect of a thing that has been seized:

- by an authorised officer in the case of an emergency, unless the Secretary (or delegate) has given notice of the Secretary's intention to declare the seized thing to be forfeited to the Secretary, or
- that has been forfeited to the Secretary (or delegate).

If the authorised officer is threatened by the owner or any person present at the premises, they are to leave the property immediately, report the situation to their line manager and, if required, obtain the assistance of the police.

The authorised officer should:

- plan appropriate resourcing for handling, transportation and storage of the seized thing, and
- ensure the seized thing, or container/box/cage of the seized thing is marked to indicate the thing has been seized under the Act, and
- with regard to NSW DPI (BFS) compliance staff, there is an additional requirement to comply with the NSW DPI Chain of Custody Procedure (INT17/78964) and completing the **Chain of Custody form** (INT17/81443).

### 2.3.3 Receipt of seized thing

In accordance with section 106 of the Act, the authorised officer must prepare and issue a **Receipt for Seized Thing** (PUB17/380) form to the responsible person. The receipt must describe generally the seized thing and its condition.

The receipt must be given to the responsible person as soon as practicable after the thing has been seized (s106(1)). If this is not practicable, the authorised officer may instead leave the receipt at the place of seizure in a conspicuous position and in a reasonably secure way (s106(2)).

A receipt is not required if:

- the thing is seized in a public place and the apparent owner cannot be located after reasonable inquiry (s106(3)), or
- it is impracticable or would be unreasonable to give one having regard to the nature, condition or value of the seized thing (s106(5)).

The authorised officer should document and record any circumstance where a receipt is unable to be given.

### 2.3.4 Location / Storage of seized thing

Where possible, a seized thing should be secured offsite from the place where the seizure has occurred. When removed from the premises, the thing is to be stored in either a secured evidence room or another secured place and under the control of the authorised officer. With regard to NSW DPI (BFS) compliance staff, the authorised officer must do this in accordance with the NSW DPI Chain of Custody Procedure (INT17/78964).

If the seized thing cannot be secured offsite, the matter should be discussed with the senior officer, team leader or manager at the time of approval. If a seized thing is to be detained on the premises where it was found, options for the authorised officer may include issuing an Individual Biosecurity Direction to direct the owner/occupier to:

- retain the thing/s to be seized at those premises or another place under the owner/occupier's control; and
- all reasonable actions must be taken to restrict unnecessary access to the seized thing.

As soon as practical, the authorised officer should arrange for the removal of the seized thing from the property.

### 2.3.5 Retention of seized thing

The continued retention of a seized thing must be justified.

In accordance with section 105(2), continued retention is **not justified** if these two factors are present:

- it is no longer necessary to retain the thing to prevent, eliminate, or minimise a biosecurity risk posed by or in relation to the thing, and
- it is not or is no longer necessary to retain the thing as evidence of an offence.

Before returning a seized thing, the authorised officer must be satisfied that it is lawful for the owner to have possession of the thing and continued retention of the thing is not justified (s107(1)).

### 2.3.6 Return of seized thing

If the authorised officer is satisfied that the seized thing is able to be lawfully in possession of the owner and the continued retention of the seized thing is not justified, the seized thing must be returned to the owner as required by section 107(1) of the Act.

A **return of seized thing** (PUB20/230) form should be completed by the authorised officer in this instance and arrangements made to return the seized thing.

Note: The Local Court or the Land and Environment Court, may on application by any person, make an order directing that a seized thing to be delivered to the person. In accordance with section 109 of the Act, a court may make an order only if satisfied that:

- the person is the owner of the seized thing, and
- it is lawful for the person to have possession of the thing, and
- the continued retention of the seized thing in custody is not justified.

### 2.3.7 Inability to return seized thing

Section 108 of the Act allows an authorised officer to certify in writing that they are unable to return a seized thing to its owner if:

- the authorised officer cannot find the owner of the thing after making all reasonable inquiries and efforts to do so, or
- the authorised officer cannot, for any other reason, return the thing to its owner after making all reasonable efforts to do so.

Other reasons include (but are not limited to) if it is unlawful for the owner to have possession of the thing because:

- it is prohibited matter, or
- it is an animal the possession of which is a prohibited dealing without a permit, registration or authority to have possession.
- It is classified as a 'pest' in accordance with section 15 of the Act. No inquiries or efforts are to be made to return the seized thing to the owner. Sufficient evidence, such as written advice from the relevant technical unit, must be provided to verify the thing is a 'pest'.

Section 107(3) provides that an authorised officer is not required to return a seized thing if they certify that they are unable to return the seized thing to its owner. In the case of prohibited matter, a pest, or an animal the possession of which requires a permit that has not been obtained, the authorised officer is unable to return a seized thing to its owner because it is unlawful for the person to have the thing (ie. s107(1) does not apply). There is no inquiry or effort that is reasonable in the circumstances. The authorised officer must certify in writing that they are unable to return the seized thing to its owner because it is unlawful for the owner to have possession of the thing, and the continued retention of the thing in custody is not justified.

In other circumstances, before a certificate is given under section 108, due regard is to be given to the thing's nature, condition and value in deciding what inquiries are reasonable to make in the circumstances. The Secretary (or delegate) may give directions as to what reasonable inquiries and efforts are to be made by authorised officers in relation to the return of any seized thing or class of things. For example, specific directions may be given for items of high value; and if the thing is a pest, sufficient evidence will need to be provided that verifies that the thing is a 'pest' (ie a written advice from the relevant technical unit).

**A Certification of Inability to Return Seized Thing** (PUB17/379) notice template must be completed by the authorised officer. A copy of this notice should be provided to the owner of the thing, where possible.

### 2.3.9 Forfeiture to the Secretary

Section 110 of the Act allows the Secretary (or delegate) to declare by order in writing the forfeiture of a seized thing to the Secretary (**Order for Seized Thing to be Forfeited** (PUB17/378) order template). The Secretary (or delegate) may make such an order if the Secretary (or delegate) is satisfied the continued retention of the thing in custody cannot be justified and the thing cannot be returned to its owner (s110(2)). A thing cannot be returned to its owner if the Secretary is satisfied that it is not lawful for the owner of the seized thing to have possession of the thing, or if an authorised officer certifies in writing (under s108) that the authorised officer is unable to return the seized thing to its owner (See sections 2.3.5 and 2.3.7 above)

Notice must be given at least 21 days before the order is made. This means "clear days". For example, if the notice is given on 1 July, the order can be made on 23 July. The Secretary (or delegate) gives notice by completing the **Notice of intention to declare a seized thing forfeited** (PUB17/377) template, publishing the notice on the agency's website, and serving the notice on the owner or the responsible person of the thing (following the service rules in s392 of the Act). The authorised officer must also arrange publication of a copy of the served Notice on the Department's website by sending a copy of the Notice to [quarantin@dpi.nsw.gov.au](mailto:quarantin@dpi.nsw.gov.au) - 'Attention: Manager Compliance Investigations'..

The authorised officer is not required to serve the notice on the owner or responsible person if the authorised officer has already certified in writing that they are unable to find the owner of the thing after making any inquiries it is reasonable to make in the circumstances (see section 2.3.7 above). However, the Secretary must still give notice on the Department's website, and this notice must be given at least 21 clear days before the order is made.

In instances where an authorised officer certifies in writing (under s108) that the authorised officer is unable to return the seized thing to its owner, an authorised officer may destroy a thing, in accordance with section 113 and section 114 without undertaking this process to forfeit the thing to the Secretary.

### 2.3.10 Dealing with forfeited things

When a seized thing is forfeited to the Secretary, it becomes the property of the Secretary. The Secretary (or delegate) may deal with the thing in any way they consider appropriate, including destruction, selling or disposal of the thing or authorise its destruction, sale or disposal.

Authorised officers should consult a senior officer, team leader or line manager regarding the appropriate management of the forfeited thing, including the destruction, disposal or sale of the forfeited thing. Before any decision to destroy or require the destruction of a thing under Part 8 of the Act, an authorised officer must ensure the thing does not fall within the restrictions set out in this Part and any decision is in accordance with the Secretary (or delegate) powers. Refer to *Destruction, Disposal or Sale of things under the Biosecurity Act 2015 Procedure*. Section 113 and s114 do not prevent to the destruction of a thing that has been forfeited to the Secretary.

In accordance with section 115 of the Act, authorised officers must not destroy or harm any of the following:

- destroy any living thing that is a protected animal or protected plant with the meaning of the *Biodiversity Conservation Act 2016*, or
- destroy any living thing that is a threatened species within the meaning of the *Biodiversity Conservation Act 2016*,
- clear any native vegetation with the meaning of Part 5A of the *Local Land Services Act 2013*, or
- harm (within the meaning of the *Heritage Act 1977*) any building, work, relic, moveable object or place the subject of an interim heritage order or listing on the State Heritage Register under that Act.

## 2.4 Scenarios

*Scenarios address actions that should be taken after a thing has been seized.*

### **Scenario 1: A seized thing is lawful to hold and can be returned.**

It must be returned if it is lawful for the owner to have possession of the thing, and the continued retention of the thing in custody is not justified (section 107(1)).

### **Scenario 2:**

**2a. A seized thing is lawful to hold but unable to be returned (for example cannot find the owner); or**

**2b. Seized thing is unlawful for the person to have, but the seized thing will not be destroyed under section 113 and section 114 of the Act.**

After the Authorised Officer has given the **Certification of Inability to Return Seized Thing (PUB17/379)** under section 108(1), the Secretary may give 21 days' notice of the intention to forfeit the thing (s110(4)(5)). The Authorised Officer gives notice of the intention to forfeit the thing by completing the **Notice of intention to declare a seized thing forfeited (PUB17/377)**, publishing the notice on the agency's website, and serving the notice on the owner or the responsible person of the thing (following the service rules in s392 of the Act).

The authorised officer is not required to serve the notice on the owner or responsible person if the authorised officer has already certified in writing that they are unable to find the owner of the thing after making any inquiries it is reasonable to make in the circumstances. However, notice may be published on the agency's website.

At the conclusion of 21 days, the Secretary may make an order to forfeit the thing (s110(1)) and make instructions with respect to how the thing will be dealt with (s111(3)).



**Scenario 3: It is not lawful for the person to have the seized thing, and the thing can be destroyed under section 113 and section 114 of the Act.**

An Authorised Officer must certify in writing (using the **Certification of Inability to Return Seized Thing (PUB17/379)**) under:

- Section 107(1) and section 108(1) that they are unable to return the seized thing to its owner because it is unlawful for the owner to have possession of the thing, and the continued retention of the thing in custody is not justified; or
- Section 108 that cannot return the thing to its owner after making all reasonable efforts to do so because it is unlawful for the owner to have possession of the thing. If section 108 is used, the Authorised Officer must show that they have given regard to the thing's nature, condition and value in deciding what inquiries are reasonable it make in the circumstances. The Secretary (or delegate) may give directions as to what reasonable inquires and efforts are to be made by authorised officers in relation to the return of any seized thing or class of things.

Once Authorised Officer has issued the certificate under section 108, the Authorised Officer can immediately take actions to destroy the thing in accordance with section 113 and section 114. Refer to the Destruction, Disposal or Sale of Things Procedure.

### **3. Record keeping and Fees**

All information and records of seizure and any receipts or invoices for costs incurred for the enforcement action are to be retained by the Authorised Officer.

With regard to NSW DPI (BFS) compliance staff, there is an additional requirement for all information and records to be electronically attached to the relevant BYTE record.

### **4. Recoverable Fees**

Costs and expenses incurred by or on behalf of a government agency in connection with action taken by an authorised officer under by Part 8, Division 4 (Investigation and risk management powers) can be recovered if it was reasonable do so having regard to:

- any biosecurity duty of the liable person under the Act
- any contravention or likely contravention by the liable person of a requirement imposed under the Act

The Secretary (or delegate) may charge a fee in accordance with section 104 of the Act, to the liable person that is to be no more than is reasonable to cover the costs and expenses incurred in connection with any action/s imposed.

Authorised officers should consult with their line Manager and refer to the 'Recoverable Costs Under the Biosecurity Act 2015 Guidelines' which can be found on the Intranet.

### **5. Definitions and acronyms**

*Authorised Officer:* means a person who is appointed as an authorised officer under the Act authorised by that appointment to exercise the function in relation to which the expression is used.

*Department:* means the Department of Primary Industries within Regional NSW

*LLS:* Local Land Services

*Owner of a thing:* includes a person entitled to possession of the thing.

*Pest:* Section 15(1) of the Act defines 'pests' as "a plant or animal (other than a human) that has an adverse effect on, or is suspected of having an adverse effect on, the environment, the economy or the community...". Clause 4A of the Regulation declares certain things to be pests.

*Prohibited dealing:* Any dealing with an animal listed in Schedule 3, Part 2, Division 1 of the Act is prohibited. Additionally, any dealing with an animal listed in Schedule 3, Part 3 of the Act is prohibited unless the dealing is authorised under the *Exhibited Animals Protection Act 1986*, the *Animal Research Act 1985*, or a biosecurity permit issued under the Act. Note: it is the policy of NSW DPI, (as in all Australian jurisdictions) not to issue new biosecurity permits to allow animals listed as prohibited dealings to be kept in a private capacity.

All animals listed in Division 1 of Part 2 of Schedule 3 to the Act and Part 3 of Schedule 3 of the Act, for which certain dealings are prohibited dealings, are 'pests' for the purposes of section 15(1) of the Act (clause 4A of the Regulation). A 'dealing' incorporates a wide range of activities including: keep, possess, produce, import, buy, move, release or breed as defined in section 12 of the Act.

*Responsible person:* for a seized thing means the apparent owner of the thing or the apparent occupier of premises at which the thing is seized.

## 6. Legislation

- *Biosecurity Act 2015*
- Biosecurity Regulation 2017
- Biosecurity (National Livestock Identification System) Regulation 2017

## 7. Related policies

- Policy: BFS Compliance Policy
- Policy: BFS Enforcement Policy
- Policy: Record Management
- Policy: Information Security
- Policy: Code of Ethics and Conduct
- Policy: Biosecurity collection, use and disclosure of information

## 8. Other related documents

- Register: Seizure Register
- Form: Individual Biosecurity Direction
- Form: Chain of custody
- Form: Receipt for seized thing
- Form: Certification of inability to return seized thing template
- Form: Notice of Intention to Declare Thing to be Forfeited
- Form: Order of Seized Thing to be Forfeited
- Procedure: Cost Recovery
- Procedure: Biosecurity Direction
- Procedure: Biosecurity collection, use and disclosure of information
- Procedure: Chain of custody
- Destruction, Disposal or Sale of things under the *Biosecurity Act 2015* Procedure
- *Biosecurity Act 2015*- Instrument of Delegation (Secretary)

## 9. Revision history

Version	Date issued	Notes	By
1	1/9/20	New procedure under the <i>Biosecurity Act 2015</i>	Manager Compliance Investigations

## 10. Review date

The procedure is to be reviewed within 3 years of its implementation, or sooner if needed.

## 11. Contact

NSW DPI Biosecurity and Food Safety

Manager Compliance Investigations

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