REPORT 7
STANDING COMMITTEE ON LEGISLATION


Presented by Hon Graham Giffard MLC (Chair)

April 2007
STANDING COMMITTEE ON LEGISLATION

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

4.1 A Legislation Committee is established.

4.2 The Committee consists of 5 members.

4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.

4.4 Unless otherwise ordered any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:
Hon Graham Giffard MLC (Chair) Hon Peter Collier MLC
Hon Giz Watson MLC (Deputy Chair) Hon Sally Talbot MLC
Hon Ken Baston MLC

Staff as at the time of this inquiry:
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**LIST OF ABBREVIATIONS AND DEFINED TERMS**

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<td>DEC</td>
<td>Department of Environment and Conservation</td>
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<td>declared pest</td>
<td>a prohibited organism or an organism for which a declaration under clause 21(2) of the Biosecurity and Agriculture Management Bill 2006 is in force</td>
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<td>DOF</td>
<td>Department of Fisheries</td>
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<td>green BAM Bill</td>
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<td>House</td>
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<td>Minister</td>
<td>Minister for Agriculture and Food; Minister who will be administering the Biosecurity and Agriculture Management</td>
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Bill 2006, the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 and the Biosecurity and Agriculture Management Rates and Charges Bill 2006

Minister for Fisheries
Minister administering the *Fish Resources Management Act 1994*

Minister for the Environment
Minister administering the *Environmental Protection Act 1986*

permitted organism
an organism for which a declaration is in force under clause 10 of the Biosecurity and Agriculture Management Bill 2006

PGA
Pastoralists and Graziers Association of WA (Inc)

prohibited organism
an organism for which a declaration is in force under clause 11 of the Biosecurity and Agriculture Management Bill 2006

Qd R
Queensland Reports

Repeal Bill
Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006

SA ERDC
South Australian Environment Resources and Development Court

SAT
State Administrative Tribunal

SPS Agreement
World Trade Organisation *Agreement on Sanitary and Phytosanitary Measures*

Taxing Bill
Biosecurity and Agriculture Management Rates and Charges Bill 2006

WAR
Western Australian Reports

WASCA
Western Australian Supreme Court, Court of Criminal Appeal

WALGA
Western Australian Local Government Association

WAWC
Western Australian Weeds Committee
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RECOMMENDATIONS

Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that clause 190 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to remove the power for regulations and management plans to adopt a code or subsidiary legislation as it exists from time to time.

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Recommendation 2: The Committee recommends that clauses 27, 36, 74 and 75 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to restrict the regulation-making power in those clauses to prescribing only circumstances of emergency or urgent need in which the right to seek a State Administrative Tribunal review does not apply.

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Recommendation 3: The Committee recommends that clauses 78, 80, 83 and 86 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to restrict the regulation-making power in those clauses to prescribing only circumstances of emergency or urgent need in which the right to seek a State Administrative Tribunal review does not apply.

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Recommendation 4: The Committee recommends that the Biosecurity and Agriculture Management Bill 2006 be amended by inserting an objects clause. The clause should explicitly state that the regulation of pests and diseases which affect only human health is not covered by the bill.

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Recommendation 5: The Committee recommends that clause 5 of the Biosecurity and Agriculture Management Bill 2006 be amended by inserting a definition of ‘biosecurity’.
Recommendation 6: The Committee recommends that clauses 6(c), 27(2), 36(2), 74(4), 75(2), 78(4), 80(4), 83(3), 86(4), 141(1)(a), 145(1) and (6), 147(1), 190(3), Schedule 1, Item 3, and Schedule 1, Item 52(b) of the Biosecurity and Agriculture Management Bill 2006 be amended by replacing the words ‘specified’ or ‘specify’ where they occur with the words ‘prescribed’ or ‘prescribe’, respectively.

Recommendation 7: The Committee recommends that clauses 23(1) and (3) of the Biosecurity and Agriculture Management Bill 2006 be amended so that a ‘potential carrier’ is ‘prescribed’ by regulations and ‘specified’ by management plans.

Recommendation 8: A majority of the Committee (comprised of Hon Graham Giffard, Hon Sally Talbot, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clause 12 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to:

(a) delete the express requirement to consult with the Minister administering the Environmental Protection Act 1986;

(b) delete the express requirement to consult with the Minister administering the Conservation and Land Management Act 1984; and

(c) delete the requirement for a unique consultation process for declarations relating to a fish.

Recommendation 9: A majority of the Committee (comprised of Hon Graham Giffard, Hon Sally Talbot, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clauses 21(4) and (5) of the Biosecurity and Agriculture Management Bill 2006 be amended so as to:

(a) delete the express requirement to consult with the Minister administering the Environmental Protection Act 1986;

(b) delete the express requirement to consult with the Minister administering the Conservation and Land Management Act 1984; and

(c) delete the requirement for a unique consultation process for declarations relating to a fish.
Recommendation 10: The Committee recommends that clause 158 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to require the declarations published pursuant to that clause to refer to organisms by both their common and scientific names, and to include a representative photograph or picture of, and any other aids for identifying, any named organisms.

Recommendation 11: The Committee recommends that clause 159 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to require the lists of organisms mentioned in that clause to refer to organisms by both their common and scientific names, and to include a representative photograph or picture of, and any other aids for identifying, any named organisms.

Recommendation 12: The Committee recommends that clause 28 of the Biosecurity and Agriculture Management Bill 2006 be amended so that it is compulsory for the Director General to include a summary of every failure by a public authority to comply with a pest exclusion notice in the Department of Agriculture and Food’s next annual report.

Recommendation 13: A majority of the Committee (comprised of Hon Giz Watson, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clause 28 of the Biosecurity and Agriculture Management Bill 2006 be amended so that public authorities are subject to a fine of up to $20,000 for failing to comply with a pest exclusion notice.

Recommendation 14: The Committee recommends that clause 29 of the Biosecurity and Agriculture Management Bill 2006 be amended so that it is compulsory for the Director General to include a summary of every failure by a public authority to comply with prescribed control measures in relation to a declared pest in the Department of Agriculture and Food’s next annual report.

Recommendation 15: A majority of the Committee (comprised of Hon Giz Watson, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clause 29 of the Biosecurity and Agriculture Management Bill 2006 be amended so that public authorities are subject to a fine of up to $20,000 for failing to comply with prescribed control measures in relation to a declared pest.
Recommendation 16: The Committee recommends that clause 31 of the Biosecurity and Agriculture Management Bill 2006 be amended so that it is compulsory for the Director General to include a summary of every failure by a public authority to comply with a pest control notice in the Department of Agriculture and Food’s next annual report.

Recommendation 17: A majority of the Committee (comprised of Hon Giz Watson, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clause 31 of the Biosecurity and Agriculture Management Bill 2006 be amended so that public authorities are subject to a fine of up to $50,000 (or up to $100,000 if the declared pest is a high impact organism) for failing to comply with a pest control notice.

Recommendation 18: The Committee recommends that the Environmental Protection Act 1986 be listed in clause 3(2) of the Biosecurity and Agriculture Management Bill 2006.

Recommendation 19: The Committee recommends that clause 44 of the Biosecurity and Agriculture Management Bill 2006 be amended so that:

(a) a proposed management plan in relation to a fish (or declared pest in an aquatic environment) can only be issued by the Minister after the Minister administering the Fish Resources Management Act 1994, the Minister administering the Environmental Protection Act 1986 and the Minister administering the Conservation and Land Management Act 1984 have first approved the proposed management plan; and

(b) a proposed management plan in relation to a declared pest that is an animal native to Australia (other than a fish) can only be issued by the Minister after the Minister administering the Environmental Protection Act 1986 and the Minister administering the Conservation and Land Management Act 1984 have first approved the proposed management plan.
Recommendation 20: The Committee recommends that clause 93 of the Biosecurity and Agriculture Management Bill 2006 be amended so that it is no longer necessary for a person to object to giving information in order for that information to be inadmissible in any civil or criminal proceedings against her or him except in proceedings for perjury or for an offence under the Bill arising out of the person giving false or misleading information.

Recommendation 21: The Committee recommends that clause 93 of the Biosecurity and Agriculture Management Bill 2006 be amended so that any information, document or thing obtained as a direct or indirect consequence of:

(a) the information; and

(b) the fact that the information was given,

is not admissible in any civil or criminal proceedings against the person giving the information, except in proceedings for perjury or for an offence under the Bill arising out of the person giving false or misleading information.

Recommendation 22: The Committee recommends that clause 95(3) of the Biosecurity and Agriculture Management Bill 2006 be deleted.

Recommendation 23: The Committee recommends that clause 98 of the Biosecurity and Agriculture Management Bill 2006 be amended to include a requirement that the power of sale should only be exercised after all other avenues of recovering the amount charged on land pursuant to clause 95 have been exhausted.

Recommendation 24: The Committee recommends that clauses 121(2) and (3) of the Biosecurity and Agriculture Management Bill 2006 be amended so that the matters provided for in those clauses are presumed only in the absence of evidence to the contrary.
Recommendation 25: The Committee recommends that clause 123(1) of the Biosecurity and Agriculture Management Bill 2006 be amended so that the matters provided for in those clauses are taken to be evidence only in the absence of evidence to the contrary.

Recommendation 26: The Committee recommends that clause 158 of the Biosecurity and Agriculture Management Bill 2006 be amended so that:

(a) a declaration made under clause 10, 11 or 21(2) must be published in the Government Gazette; and

(b) the publication of such a declaration may only be effected by publishing the full text of the declaration in the Government Gazette.

Recommendation 27: The Committee recommends that clause 187 of the Biosecurity and Agriculture Management Bill 2006 be amended so that an action in tort can be brought against the State for anything that an official has done in negligence in the performance or purported performance of a function under the proposed Act.

Recommendation 28: The Committee recommends that clause 188(2) of the Biosecurity and Agriculture Management Bill 2006 be amended by deleting the words ‘provide for’, ‘authorise’, ‘require’, ‘prohibit’, ‘restrict’ and ‘otherwise regulate’.

Recommendation 29: The Committee recommends that clause 193(2)(a) of the Biosecurity and Agriculture Management Bill 2006 be amended so as to authorise expressly the making of local laws which prescribe plants which are likely to adversely affect the environment in a local government district as pest plants.

Recommendation 30: The Committee recommends that clause 193(2)(c) of the Biosecurity and Agriculture Management Bill 2006 be amended so that the immunity from payment of compensation which is conferred on local governments is limited to situations where they and their agents have conducted the pest plant control measures in good faith and without negligence.
Recommendation 31: The Committee recommends that clause 194 of the Biosecurity and Agriculture Management Bill 2006 be amended so that the review of the proposed Act must be performed as soon as is practicable after every 10-year period after the Act’s commencement.

Recommendation 32: The Committee recommends that clause 4 of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 be amended so that the powers to make regulations of the type contemplated and authorised in clauses 4(5)(a) and (c) can be exercised for only as long a period as is reasonably and practicably necessary to identify the need for, and effect, such regulations.

Recommendation 33: The Committee recommends that clause 5 of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 be amended so that the power to make regulations of the type contemplated and authorised in clause 5(2) can be exercised for only as long a period as is reasonably and practicably necessary to identify the need for, and effect, such regulations.

Recommendation 34: The Committee recommends that clause 64 of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 be amended so that it also inserts a requirement for the officer entering an orchard pursuant to proposed section 12A to take reasonable steps to warn the owner or occupier of the orchard of the officer’s intention to enter the orchard, prior to the entry.
CHAPTER 1
INTRODUCTION

REFERRAL

1.1 On 7 December 2006, the Legislative Council referred the Biosecurity and Agriculture Management Bill 2006 (BAM Bill), the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 (Repeal Bill) and the Biosecurity and Agriculture Management Rates and Charges Bill 2006 (Taxing Bill) to the Standing Committee on Legislation (Committee) for inquiry with a reporting deadline of 3 April 2007.¹

1.2 The policy of the bills was also referred to the Committee for inquiry.

INQUIRY PROCEDURE

1.3 The Committee sought written submissions on the bills by:

- writing to several individuals and organisations which may have had views on the subject matter of the inquiry (a list of these individuals and organisations is attached as Appendix 1);

- advertising the inquiry in The West Australian on 16 December 2006; and


1.4 Eight written submissions were received by the Committee, the details of which are attached as Appendix 2.

1.5 A briefing on the bills, in the form that they took when they were introduced into the Legislative Council, was held with five representatives (their details appear in Appendix 3) of the Department of Agriculture and Food (DAF) on 31 January 2007. The Committee also obtained valuable information and responses from the DAF in a series of letters to and from that department. The questions and answers resulting from that correspondence have been consolidated into one document, which is attached as Appendix 4, in order to assist the House during debate.

1.6 In a letter dated 20 March 2007, the DAF provided the Committee with a list of proposed amendments to the BAM Bill and the Repeal Bill which had been approved

¹ Hon Kim Chance MLC, Minister for Agriculture and Food, Parliament of Western Australia, Legislative Council, Parliamentary Debates (Hansard), 7 December 2006, p9276.
by the Minister for Agriculture and Food (Minister) for placement on a supplementary notice paper. The letter also enclosed explanatory notes about the proposed amendments. One of the main areas of change contemplated by the proposed amendments is the replacement of the Western Australian Agriculture Ministerial Body (established under clause 150) with the Western Australian Agriculture Authority.

1.7 The Committee incorporated the proposed amendments and explanatory notes into the consolidated questions and answers attached as Appendix 4 in order to provide further assistance to the House during debate. It was noted by the Committee that these proposed amendments had not yet appeared in a supplementary notice paper at the time of finalising this Report, and as such, the amendments which may eventually appear in a supplementary notice paper pertaining to the bills may well differ from those which appear in Appendix 4.

1.8 The Committee extends its appreciation to the individuals and organisations which provided evidence and information as part of the inquiry.

BACKGROUND TO THE BILLS

1.9 The bills were first proposed in 1997/1998. At that time, the intent was to amalgamate 14 existing Acts, including the Soil and Land Conservation Act 1945 to form a single piece of modern legislation. The Committee was informed by the DAF that, when drafting the bills, it initially drew quite heavily from New Zealand’s Biosecurity Act 1993. However, the consultation undertaken by the DAF suggested that Western Australia was not yet at a point at which the New Zealand model would be adopted fully.

1.10 In conducting this inquiry, the Committee was conscious of the fact that a draft version of the bills (Green Bills) had already been released for public comment on 29 November 2005, when they were tabled in the Legislative Council by the Minister. The tabling of the Green Bills commenced a public consultation period which lasted until 31 March 2006.

1.11 An Overarching Reference Group was formed by the Minister in 2005 in order to oversee the finalisation of the bills, the public consultation process and to assist the

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2 Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p1.

3 New Zealand has a biosecurity Minister who has some directive powers across all sectors, and its Director General of the Ministry of Agriculture and Forestry has some power across all sectors, including public health and mosquitoes: Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p15.

4 Hon Kim Chance MLC, Minister for Agriculture and Food, Parliament of Western Australia, Legislative Council, Parliamentary Debates (Hansard), 29 November 2005, p7791.
DAF formulate recommendations resulting from that process.\(^5\) As part of the public consultation process, the DAF:

- wrote to approximately 500 key stakeholders;
- held six consultation forums throughout the State (one in the metropolitan area and five in regional areas);
- held various meetings with relevant government departments and primary producer and community organisations;
- released an information paper on the bills via its website and in hard copy; and
- briefed several Members of Parliament from both Houses.

1.12 Details of the public consultation process, including a copy of the written submissions received by the DAF and a summary of the outcomes of the process, appear in the DAF’s *Biosecurity and Agriculture Management Bill 2005: Public Consultation Report*, published in May 2006.

1.13 The DAF provided the Committee with a summary (which is attached as Appendix 5) of:

- the significant amendments which were made to the Biosecurity and Agriculture Management Bill 2005 (*green BAM Bill*) as a result of the DAF’s public consultation;
- the amendments which were made to the BAM Bill, in the form it took when it was introduced into the Legislative Assembly, as a result of its passage through that House; and
- the significant amendments to existing Acts which are proposed by the Repeal Bill.\(^6\)

1.14 As indicated in the *Explanatory Memorandum* for the BAM Bill, the bill is intended to provide for the “*effective biosecurity and agriculture management for Western Australia*”\(^7\) by:


\(^6\) Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 30 January 2007.

\(^7\) *Explanatory Memorandum* for Biosecurity and Agriculture Management Bill 2006, p1.
• controlling the entry, establishment, spread and impact of harmful pests and diseases;
• controlling the use of agricultural and veterinary chemicals; and
• generally ensuring the safety and integrity of agricultural products.\(^8\)

1.15 The Committee was advised by the DAF that the current, nationally-accepted definition for the term ‘biosecurity’ is “the protection of the economy, the environment and human health from negative impacts associated with pests, diseases and weeds”\(^9\). However, the DAF stressed that the BAM Bill does not apply to the control of human diseases;\(^10\) that area of regulation remains with the Health Act 1911.\(^11\)

1.16 If passed, the bills will result in the repeal and replacement of 17 existing Acts which provide biosecurity measures, controls over the use of veterinary chemicals and controls over various agricultural activities. The BAM Bill, and any regulations made pursuant to it after its enactment, will be the principal Act in these areas. The Repeal Bill largely provides for the repeal of the 17 existing Acts and any amendments to other existing Acts which are consequential to the process of consolidating the effects of several Acts into one piece of legislation. The Taxing Bill provides for the authority that is necessary to impose taxes under the BAM Bill, should, and to the extent that, any rates, fees or charges which are imposed under that bill, once it is enacted, amount to taxes.\(^12\) The Explanatory Memorandum for the Taxing Bill advises that it is not anticipated that a fee or charge which is imposed under the BAM Bill will impose a tax, but that the Taxing Bill is designed to protect the validity of a relevant fee or charge if necessary.\(^13\)

1.17 As explained by the DAF, the overarching purpose of the bills is to modernise and integrate the majority of legislation dealing with agriculture:

\[\text{Today we have legislation that dates back as far as 1914 and the Plant Diseases Act; legislation which was written at different times, in different ways and has different processes, starting right from the authorisation process}\]

\(8\) Explanatory Memorandum for Biosecurity and Agriculture Management Bill 2006, p1.
\(9\) Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 20 February 2007, p1.
\(10\) Ibid.
\(12\) Section 46(7) of the Constitution Acts Amendment Act 1899 requires that bills imposing taxation must deal only with the imposition of taxation.
\(13\) Explanatory Memorandum for the Biosecurity and Agriculture Management Rates and Charges Bill 2006.
through to operational processes. Of course, it impacts on landholders and producers in different ways. There is a great deal of inconsistency, which leads to confusion and inefficiency. It is also in parts quite antiquated. The Plant Diseases Act, when written in 1914, did not have any vision of rapid airfreight and passenger movement and the advent of electronic clearances and transactions etc. A number of things are simply missing from the legislation. It is also quite constrained in a number of areas. The agricultural resources protection legislation, which the Agriculture Protection Board oversees, is limited very rightly to agriculture, and yet animal pests do not impact only on agriculture. There have been a number of situations in which we have had to push the legislation right to its limits to be able to meet the community’s requirement to look after its assets.14

1.18 The Committee noted the pertinence of the bills, given that the State of the Environment report Western Australia draft 2006 lists introduced animals and weeds as two of the eight top priority environmental issues faced by the State. Introduced marine pests were also listed among the State’s 40 most important environmental issues.15

General feedback

1.19 It appeared to the Committee that the intent and many aspects of the bills are generally supported.16 In particular, many stakeholders welcome the integration of biosecurity and agriculture management legislation.17 However, stakeholders are still concerned by the State Government’s resourcing commitment to biosecurity, or perceived lack

14 Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p2.


16 For example, Submission from the Western Australian Local Government Association to the Department of Agriculture and Food, 31 March 2006, p1; Submission from the Pastoralists and Graziers Association of WA (Inc) to the Department of Agriculture and Food, 31 March 2006; Submission from the Shire of Gnowangerup to the Department of Agriculture and Food, 23 March 2006; Submission from the Agriculture Protection Board to the Department of Agriculture and Food, 24 March 2006, p1; Submission No 7 from the Department of Environment and Conservation, 5 February 2007, p1; Submission No 4 from the Department of Health, 30 January 2007, p1; Submission No 3 from The Western Australian Farmers Federation, January 2007, p3; and Submission No 2 from the Agriculture Protection Board, 23 January 2007, p1.

17 Submission from the Western Australian Local Government Association to the Department of Agriculture and Food, 31 March 2006, pp13 and 14; Submission from the Department of Conservation and Land Management to the Department of Agriculture and Food, 3 April 2006; Submission from the Agriculture Protection Board to the Department of Agriculture and Food, 24 March 2006, p1; Submission No 7 from the Department of Environment and Conservation, 5 February 2007, p1; Submission No 6 from the Environmental Defender’s Office, 5 February 2007, p1; and Submission No 4 from the Department of Health, 30 January 2007, p1.
thereof, and several organisations which provided comments on the Green Bills and the bills which were referred to the Committee were hesitant in fully supporting the bills without first having an opportunity to consider the regulations which will be drafted as a result of the bills (refer to paragraphs 2.1 to 2.21 in this Report).

SCOPE OF THIS REPORT

1.20 The evidence and information received by the Committee raised many issues in relation to the BAM Bill and the Repeal Bill. The Committee did deliberate each of these issues. However, where the Committee does not comment directly on a particular issue in this Report, it was satisfied that the issue had been either:

- considered and/or dealt with in the preparation of the bills; or
- otherwise adequately addressed by the DAF.

1.21 The Committee received no submissions, and makes no further comment, on the Taxing Bill.

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18 For example, Submission from the Western Australian Local Government Association to the Department of Agriculture and Food, 31 March 2006, p14; Submission from the Shire of Goomalling to the Department of Agriculture and Food, 31 March 2006; Submission from the Conservation Council of Western Australia to the Department of Agriculture and Food, 31 March 2006, p3; and Consultation forum held in South Perth by the Department of Agriculture and Food, 27 February 2006, Department of Agriculture and Food, Biosecurity and Agriculture Management Bill 2005: Public Consultation Report, May 2006, p56.
CHAPTER 2

BIOSECURITY AND AGRICULTURE MANAGEMENT BILL 2006

ENABLING BILL

Details to be found in executive instruments

2.1 The green BAM Bill was described by the Minister as “largely enabling legislation”\(^{19}\) because it enabled:

> various things to be done by regulations and other subsidiary instruments. Much of the operational detail currently found in the acts to be replaced will be prescribed by regulations made under the new act.\(^{20}\)

2.2 The Committee observed that the BAM Bill does not differ greatly from the green BAM Bill in this respect. The BAM Bill delegates legislative power to the Executive in the provisions listed below. In the Committee’s view, these provisions do not constitute Henry VIII clauses in the strictest sense\(^{21}\) but they should nevertheless be brought to the attention of the Legislative Council because they authorise and contemplate the making of executive instruments which can, at best, supplement, and, at worst, override, the intention of the Parliament as it will be expressed in the proposed Act:

- Clause 5 (paragraph (c) in the definition of ‘chemical product’, paragraph (e) in the definition of ‘fertiliser’, the definition of ‘high impact organism’,\(^{22}\) the definition of ‘maximum residue limit’, the definition of ‘stock’, paragraph (b) in the definition of ‘veterinary chemical product’. The definitions for these words are essentially delegated to Executive-made regulations\(^{23}\), which are disallowable instruments\(^{24}\).

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\(^{19}\) Hon Kim Chance MLC, Minister for Agriculture and Food, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 November 2005, p7791.


\(^{21}\) A Henry VIII clause is a provision in an Act of Parliament which authorises the Act or other Acts to be amended by delegated legislation, which is made by the Executive.

\(^{22}\) Also refer to the discussion on clause 189 of the Biosecurity and Agriculture Management Bill 2006 on page 11 of this Report.

\(^{23}\) Regulations may be made by the Governor: clause 188 of the Biosecurity and Agriculture Management Bill 2006.

\(^{24}\) Section 42 of the *Interpretation Act 1984*.
• Clauses 6(c) and (d). The meaning of ‘contaminated’ will be supplemented by regulations, which are disallowable instruments.\(^{25,26}\)

• Clause 8(1)(d). The meaning of ‘animal feed’ will be supplemented by regulations, which are disallowable instruments.\(^{27}\)

• Clause 8(2) (paragraph (c) of the definition of ‘by-product’). The meaning of ‘by-product’ for the purposes of clause 8 will be supplemented by regulations, which are disallowable instruments.\(^{28}\)

• Clause 10. The declaration of a ‘permitted organism’ by the Minister will not be disallowable,\(^{29}\) although the Minister must consult with various other Ministers before making the declaration.\(^{30}\)

• Clause 11. The declaration of a ‘prohibited organism’ by the Minister will not be disallowable,\(^{31}\) although the Minister must consult with various other Ministers before making the declaration.\(^{32}\)

• Clauses 14(3) and (4). For example, clause 14(3)(b) provides that a person must not import a prescribed potential carrier unless that carrier is imported in accordance with regulations. The Committee’s interpretation of that clause was that the relevant importing conditions which are to be adhered to when importing a prescribed potential carrier are to be contained in the text of the regulations. However, the *Explanatory Memorandum* contemplates that there will be a subdelegation of the prescription of importing conditions: it is intended that the importing conditions will be set by the Director General and published on the Department’s website.\(^{33}\) Importing conditions which are made in this way would not be disallowable.

• Clause 19(2). In this instance, the delegation is to regulations, which are disallowable instruments.\(^{34}\)

\(^{25}\) Section 42 of the *Interpretation Act 1984*.  
\(^{26}\) Also refer to the discussion on clause 6 at paragraphs 2.43 to 2.47 in this Report.  
\(^{27}\) Section 42 of the *Interpretation Act 1984*.  
\(^{28}\) *Ibid.*  
\(^{29}\) Clause 158 of the Biosecurity and Agriculture Management Bill 2006.  
\(^{30}\) Also refer to the discussion on clause 12 at paragraphs 2.51 to 2.55 in this Report.  
\(^{32}\) Also refer to the discussion on clause 12 at paragraphs 2.51 to 2.55 in this Report.  
\(^{34}\) Section 42 of the *Interpretation Act 1984*. 

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• Clauses 20(1) and (4). In these instances, the delegation is to regulations, which are disallowable instruments\(^{35}\).

• Clause 21(2). The declaration of a ‘declared pest’ by the Minister will not be disallowable,\(^{36}\) although the Minister must consult with various other Ministers before making the declaration.\(^{37}\)

• Clause 22(2). The prohibition on a person moving a declared pest from the place where it is found is delegated to regulations, which are disallowable instruments\(^{38}\).

• Clause 23. The prohibition of the introduction or supply of a declared pest is delegated to regulations and management plans, which are both disallowable instruments\(^{39}\).

• Clause 27(2). In this instance, the delegation is to regulations, which are disallowable instruments\(^{40}\)\(^{41}\).

• Clause 32(1). The apportionment of the costs of controlling declared pests on land is delegated to regulations and determinations by the Director General. Regulations are disallowable instruments\(^{42}\) but determinations by the Director General are not.

• Clause 36(2). In these instances, the delegation is to regulations, which are disallowable instruments\(^{43}\)\(^{44}\).

• Clause 56. The ways in which people may or may not deal with chemical products beyond the point of sale is delegated to regulations, which are disallowable instruments\(^{45}\). For example, regulations will prescribe which persons are required to have a prescribed qualification or authorisation in

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\(^{35}\) Section 42 of the Interpretation Act 1984.

\(^{36}\) Clause 158 of the Biosecurity and Agriculture Management Bill 2006.

\(^{37}\) Also refer to the discussion on clause 21 at paragraphs 2.71 to 2.75 in this Report.

\(^{38}\) Section 42 of the Interpretation Act 1984.

\(^{39}\) In relation to regulations, see section 42 of the Interpretation Act 1984. In relation to management plans, see clause 46 of the Biosecurity and Agriculture Management Bill 2006.

\(^{40}\) Section 42 of the Interpretation Act 1984.

\(^{41}\) Also refer to the discussion and comments at paragraphs 2.3 and 2.16 to 2.18 in this Report.

\(^{42}\) Section 42 of the Interpretation Act 1984.

\(^{43}\) Ibid.

\(^{44}\) Also refer to the discussion at paragraph paragraphs 2.3 and 2.16 to 2.18 in this Report.

\(^{45}\) Section 42 of the Interpretation Act 1984.
order to legally acquire, supply, use, store, handle or transport a chemical product after the point of sale.\textsuperscript{46}

- Clause 67(1)(b). In this instance, the delegation is to regulations, which are disallowable instruments\textsuperscript{47}.

- Clause 73(2)(d). This clause, when read with clause 188, authorises the making of regulations which prescribe how things seized by inspectors under clause 73 may be dealt with. Regulations are disallowable instruments.\textsuperscript{48}

- Clauses 74(4), 75(2), 78(4), 80(4), 83(3) and 86(4). In these instances, the delegation is to regulations, which are disallowable instruments\textsuperscript{49} \textsuperscript{50}.

- Clause 125. In this instance, the delegation is to regulations, which are disallowable instruments\textsuperscript{51}.

- Clause 130(1). This clause authorises the Minister to determine the rate that is to be collected from landowners (and other land users prescribed in clause 134) for credit to the Declared Pest Account. These determinations will be disallowable instruments\textsuperscript{52}.

- Clause 141. Regulations made under this clause will establish accounts, management committees and schemes for sectors of agricultural activity. The Committee notes that current examples of the types of accounts which may be established by these regulations, such as the cattle industry compensation fund and the skeleton weed fund, were established by Acts of Parliament.\textsuperscript{53} The regulations will be disallowable instruments\textsuperscript{54} and their operation and effectiveness are required to be reviewed every five years after their commencement\textsuperscript{55}.

\textsuperscript{46} Clause 56(1) of the Biosecurity and Agriculture Management Bill 2006.
\textsuperscript{47} Section 42 of the \textit{Interpretation Act 1984}.
\textsuperscript{48} \textit{Ibid}.
\textsuperscript{49} \textit{Ibid}.
\textsuperscript{50} Also refer to the discussion and comments at paragraphs 2.3 and 2.16 to 2.18 in this Report.
\textsuperscript{51} Section 42 of the \textit{Interpretation Act 1984}.
\textsuperscript{52} Clause 130(7) of the Biosecurity and Agriculture Management Bill 2006.
\textsuperscript{53} Part IV of the \textit{Cattle Industry Compensation Act 1985} and section 5 of the \textit{Plant Pests and Diseases (Eradication Funds) Act 1974}, respectively.
\textsuperscript{54} Section 42 of the \textit{Interpretation Act 1984}.
\textsuperscript{55} Clause 147 of the Biosecurity and Agriculture Management Bill 2006.
Clause 188. This clause provides for a general regulation-making power. Subclause (3) authorises yet another level of delegation as regulations made pursuant to the proposed Act may:

authorise any matter or thing to be from time to time determined, approved, applied or regulated by the Minister or the Director General.

It is unclear whether this further delegation is restricted to matters of an administrative nature, which can appropriately be left to executive action. Decisions of this sort are not disallowable instruments.

Clause 189. This clause authorises the making of regulations which prescribe a prohibited organism as a ‘high impact organism’. A prohibited organism can only be prescribed as a high impact organism if the Governor is satisfied that, among other things, “the organism has the potential to cause severe damage to human beings, animals, agricultural products, other aspects of the environment or economic activities”. The prescription of a high impact organism has huge ramifications because offences which involve high impact organisms attract up to twice the usual maximum financial penalty or a jail term, or both. The regulations prescribing high impact organisms are disallowable instruments.

Clause 190. This clause authorises the making of regulations and management plans which adopt any code (which has a very wide definition, including a code of practice, standard, rule, specification, administrative procedure, quality assurance scheme or other document, published in or outside Australia) or any subsidiary legislation (made within Australia), or part thereof. These external documents may be adopted either specifically (that is, by reproducing the text of the document) or by reference (that is, by simply referring to the document). Any external document adopted in this way (and any amendments that are made to it) will be required to be published on, or accessible through, the DAF’s website.

Clause 190 authorises the adoption of these external documents either as they exist at the date of adoption or as they exist from time to time. The latter form of adoption would mean that the making of any amendments to the adopted

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56 Clause 189(a) of the Biosecurity and Agriculture Management Bill 2006.
57 For example, see clauses 14(1) and (3) of the Biosecurity and Agriculture Management Bill 2006.
58 Section 42 of the Interpretation Act 1984.
59 Regulations and management plans are disallowable instruments: see Section 42 of the Interpretation Act 1984 and clause 46 of the Biosecurity and Agriculture Management Bill 2006.
60 Clause 161 of the Biosecurity and Agriculture Management Bill 2006.
document by the author of the external document (a person or a body outside of the Parliament) would effectively amount to that author amending the regulations or management plan without being accountable to the Parliament. Put another way, the Parliament would be able to scrutinise and, if necessary, disallow the regulations or management plan (and the incorporated external document) when it is first made, or when it is amended by way of an amending regulation or management plan. However, when the outside person or body changes the adopted external document, the rights and obligations that are imposed by means of that document (and therefore, the regulations or management plan) is changed without reference to the Parliament. This sort of change could occur without the Parliament’s knowledge as there is no requirement for the change to be tabled or subject to disallowance.

- Schedule 1. When read with clause 188(2), Schedule 1 provides a list of ‘heads of power’ for the making of regulations.

2.3 Clauses 27(2), 36(2), 74(4), 75(2), 78(4), 80(4), 83(3) and 86(4) allow regulations to dictate when the right to seek a State Administrative Tribunal (SAT) review of a:

- direction in a pest exclusion notice (provided by clause 27(1));
- decision to give a pest control notice, a pest keeping notice or a Director General’s decision upon reviewing such a notice (provided by clause 36(1));
- decision to seize a thing (provided by clause 74(1));
- declaration to destroy, dispose of or otherwise deal with a thing (provided by clause 75(1));
- direction to treat, refrain from treating, destroy or otherwise dispose of a thing (provided by clause 78(1));
- requirement in a notice to treat or destroy an organism that is believed to have been imported or transported in breach of the BAM Bill (provided by clause 80(1));
- direction of an inspector to an importer to remove an organism or prescribed potential carrier from the State or an area of the State (provided by clause 83(1)); and
- requirement in a notice given by the Director General for the recall of an organism or substance under clause 84 (provided by clause 86(1)).
2.4 In a similar vein, clause 188 and Schedule 1, Item 3 authorise the Governor’s making of regulations which provide exemptions to the proposed Act, thereby potentially allowing executive instruments to circumvent the operation of primary legislation. The exemption can relate to a particular case or a class of case, and the regulations may also prescribe the circumstances in which, or conditions which may need to be satisfied, before the exemption applies. Regulations are disallowable instruments.61

2.5 Several people and organisations which submitted comments on the Green Bills and during this inquiry voiced concerns about the lack of public scrutiny of the contemplated regulations as the regulations (and other forms of subsidiary legislation, such as declarations) are to contain much of the legislative detail under the proposed regime.63 Some stakeholders expressed a wish to see, and/or be involved in the drafting of, the regulations and other subsidiary legislation because much of the detail in which they were interested would be contained in these instruments.64

2.6 The DAF acknowledged this, and its website indicates that information about the key areas of regulation are available to interested persons on request. Those key areas are border biosecurity, control of declared pests, control of plant diseases, control of enzootic diseases of stock, exhibition and keeping of declared pest animals, identification and movement of stock, bees, control of use of veterinary chemicals,

62 Ibid.
63 For example, Submission from the Western Australian Local Government Association to the Department of Agriculture and Food, 31 March 2006, p1; Submission from the Pastoralists and Graziers Association of WA (Inc) to the Department of Agriculture and Food, 31 March 2006, pp2, 3 and 4; Regional consultation forum held in Geraldton by the Department of Agriculture and Food, 7 February 2006, Department of Agriculture and Food, Biosecurity and Agriculture Management Bill 2005: Public Consultation Report, May 2006, p29; Regional consultation forum held in Merredin by the Department of Agriculture and Food, 10 February 2006, Department of Agriculture and Food, Biosecurity and Agriculture Management Bill 2005: Public Consultation Report, May 2006, p36; Department of Agriculture and Food meeting with the Executive Committee, The Western Australian Farmers Federation, 14 February 2006, Department of Agriculture and Food, Biosecurity and Agriculture Management Bill 2005: Public Consultation Report, May 2006, p43; Department of Agriculture and Food meeting with the Meekatharra Zone Control Authority, 8 March 2006, Department of Agriculture and Food, Biosecurity and Agriculture Management Bill 2005: Public Consultation Report, May 2006, p61; Department of Agriculture and Food meeting with the Lake Grace Zone Control Authority, 16 March 2006, Department of Agriculture and Food, Biosecurity and Agriculture Management Bill 2005: Public Consultation Report, May 2006, p66; and Submission No 8 from Australian Government Department of Agriculture, Fisheries and Forestry, 12 February 2007, Attachment A, p1.
64 For example, Submission No 3 from The Western Australian Farmers Federation, January 2007, p3; Submission No 2 from the Agriculture Protection Board, 23 January 2007, p1; and Letter from West Australian Pork Producers’ Association, 31 January 2007.
control of use of agriculture chemicals, chemical residues, fertilisers, animal feeds and vendor declarations for cattle.\textsuperscript{65}

2.7 The DAF also explained to the Committee that the highly prescriptive nature of the existing biosecurity and agriculture management legislation is inflexible and that one of the underlying aims of the bills is to create more workable legislation:

\begin{quote}
the vast majority of the operational requirements of legislation are written into the legislation itself - they are not in regulations - so they are quickly outdated, very difficult to change and do not meet the requirements of the community through its government and regulatory agencies, and often do not meet the needs of industry and landholders. A proposal was developed to achieve integration, modernisation and flexibility by bringing all the legislation together, by developing it in a way in which the major heads of power were built into legislation but the operational detail, to the extent it was sensible, was built into regulations, so that the legislation could continue to be modernised and adjusted to meet the needs in what is a pretty rapidly changing operating environment.\textsuperscript{66}
\end{quote}

2.8 Four Regulations Reference Groups have been established in order to advise the DAF on ways to improve the effectiveness of existing legislation, to identify any risks which are not presently managed and to develop proposals for replacement regulations under the proposed Act.\textsuperscript{67} A list of the members of these Regulations Reference Groups was provided by the DAF and is attached as \textbf{Appendix 6}. The DAF also advised the Committee that:

\begin{quote}
The work of the RRGs [Regulations Reference Groups] included in-depth consideration of the basic principles behind the Bill and the supporting regulations, and the capacity of the legislation to meet current and future community and industry requirements. The RRGs will next meet to consider the draft regulations when these are available.\textsuperscript{68}
\end{quote}


\textsuperscript{66} Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, \textit{Transcript of Evidence}, 31 January 2007, p2.

\textsuperscript{67} Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 March 2007, p2.

\textsuperscript{68} \textit{Ibid.}
The Parliament’s primary function is to make laws. As noted by Mr Garth Thornton, a former Parliamentary Counsel of Western Australia and the author of a leading text on legislative drafting, there is a traditional view that legislative power should be delegated in only the most exceptional circumstances:

"it is of the essence of representative democracy that supreme legislative authority should be exercised by persons directly responsible to the electorate."

However, the traditional rules do not allow adequately for the practical needs of modern government, for there are undoubtedly factors which in certain circumstances make delegated legislation on matters of substance and principle both legitimate and desirable ...

The traditional rules still hold good; but are subject to relaxation where this can be justified for sufficient reason. This is a matter for balanced consideration at the design stage of every major legislative scheme. The guidelines of legislative policy must be established by principal legislation. It is within the sphere of the draftsman’s responsibility to make sure that extensive legislative power is not delegated for the wrong reasons.

... The extent to which legislative power should properly be delegated in a particular case is not a matter which is capable of being considered in isolation. It should be considered in relation to –

(a) the identity of the delegate, and the extent, if any, to which it is desired to authorise him to sub-delegate;

(b) consultation obligations to be imposed on the delegate; and

(c) the nature and extent of parliamentary supervision intended to be exercised.\textsuperscript{69}

It is a matter for debate as to whether these factors are appropriate in any particular case of delegation of legislative power.

When commenting on the ramifications of the Sentencing Matrix Bill 1999, which was the subject of an inquiry by the former Standing Committee on Legislation (1989

to 2001), Mr Neil Morgan, Director of Studies, Crime Research Centre, University of Western Australia, observed that:

Legislation should not be cluttered up with unnecessary details but, equally Parliament should not delegate a matter to regulations unless the key parameters of legislative policy are clearly set out in the enabling legislation. In the words of Professor De Smith: ‘skeletal legislation is justifiable only in order to deal with a state of dire emergency ... or a quite exceptional situation’.  

2.12 The clauses of the BAM Bill which are discussed above illustrate the way in which any regulations and other subsidiary legislation made pursuant to the bill will contain all of the operational details of the proposed legislative scheme and much of the legislative detail, and will dictate the extent of the bill’s operation. The Committee considered that the BAM Bill can be characterised as a ‘skeletal’ bill, in that it would be impossible for the bill to operate without the existence of the contemplated subsidiary legislation. A bill is ‘skeletal’ if it:

- significantly delegates legislative powers; and/or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

2.13 Put another way, skeletal bills involve a delegation of legislative power so that the real substance and operation of the relevant law is contained in subsidiary legislation. In such cases it can be argued that too much policy and detail is left to subordinate legislation, such as regulations.

2.14 The Committee was cautious about the skeletal nature of the BAM Bill. However, having considered all of the relevant factors, the Committee was of the view that, on the whole, the bill’s delegation of legislative power is appropriate. Three areas in which the Committee was less satisfied with the delegation of legislative power are clause 190, the clauses which authorise the making of regulations which affect a person’s right to apply for a SAT review of a decision or requirement of some sort, and Schedule 1, Item 3. These provisions are discussed in turn:

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Clause 190

2.15 With respect to clause 190, the Committee considered that it would be more appropriate to authorise regulations and management plans which adopt external documents only as those documents exist on the date of adoption or as at a stated date. By removing the power for regulations and management plans to adopt external documents as they exist from time to time, the opportunity for external persons and bodies to amend regulations and management plans without the knowledge and scrutiny of the Parliament is also removed.

Recommendation 1: The Committee recommends that clause 190 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to remove the power for regulations and management plans to adopt a code or subsidiary legislation as it exists from time to time.

Clauses 27(2), 36(2), 74(4), 75(2), 78(4), 80(4), 83(3) and 86(4)

2.16 The clauses appear to fall into two categories:

- one where urgent action is likely to be necessary (clauses 27(2), 36(2), 74(4) and 75(2)); and
- another where urgent action may be less of a priority (clauses 78(4), 80(4), 83(3) and 86(4)),

once a SAT review is initiated.

2.17 As an example of a situation requiring urgent action which may be incompatible with running a SAT review, a “highly perishable product or a serious declared pest at a crucial stage of its life cycle” may need to be seized immediately under clause 73. The Committee could envisage that a review by the SAT, and any associated stay of the operation of the decision or requirement under review, may well delay the actions which are contemplated by the decision or requirement, leading to the frustration of the initial aim of that decision or requirement. The Committee observed that the time taken to complete applications lodged with the SAT for 2005/2006 ranged from one week to 68 weeks, depending upon the nature of the application. The Committee also noted that the SAT has the power to order the stay of the operation of a decision

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72 Refer to pages 11 to 12 in this Report for a discussion of this clause.
73 Refer to pages 12 to 13 in this Report for a discussion of these clauses.
that is being reviewed.\textsuperscript{76} However, that order can only be made if the SAT considers it desirable to do so after taking into account the following factors:

- the interests of any persons whose interests may be affected by the order;
- any submission made by the decision-maker; and
- the public interest.\textsuperscript{77}

2.18 Conversely, the commencement of a SAT review pursuant to clauses 78(4), 80(4) or 86(4) will have the effect of staying the operation of the decision or requirement under review.\textsuperscript{78} A SAT review undertaken pursuant to clause 83 has a similar effect because the organism or prescribed potential carrier which is the subject of a direction to remove a thing from the State or an area of the State may be detained by the Director General until the direction is reviewed.\textsuperscript{79} The Exploratory Memorandum does not shed any light on what sort of circumstances are likely to be prescribed in regulations made pursuant to clauses 78(4), 80(4), 83(3) and 86(4). However, the Committee anticipated that, given that commencing a SAT review would have the effect of staying or delaying the operation of a decision or requirement, the regulations (if any) may also tend to avoid applications for review if the relevant decision or requirement must be carried out urgently.

\textbf{Recommendation 2:} The Committee recommends that clauses 27, 36, 74 and 75 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to restrict the regulation-making power in those clauses to prescribing only circumstances of emergency or urgent need in which the right to seek a State Administrative Tribunal review does not apply.

\textbf{Recommendation 3:} The Committee recommends that clauses 78, 80, 83 and 86 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to restrict the regulation-making power in those clauses to prescribing only circumstances of emergency or urgent need in which the right to seek a State Administrative Tribunal review does not apply.

\textsuperscript{76} Section 25(2) of the \textit{State Administrative Tribunal Act 2004}.

\textsuperscript{77} Section 25(4) of the \textit{State Administrative Tribunal Act 2004}.

\textsuperscript{78} Clauses 78(2), 80(2), and 86(2) of the Biosecurity and Agriculture Management Bill 2006.

\textsuperscript{79} Clause 83(2) of the Biosecurity and Agriculture Management Bill 2006.
2.19 Schedule 1, Item 3 provides a power for the Governor to make regulations which can prescribe exemptions from the application of a provision in the proposed Act. Given that the BAM Bill already contains very extensive executive powers affecting the operation of the proposed Act, the Committee queried why the provision is necessary.

2.20 The DAF provided the following justification for this regulation-making power:

When an Act has very broad general offences, it is often necessary to rely on the regulations to ensure that the offence provisions can operate in an effective manner and with appropriate exemptions. The item is in the same terms as in the Environmental Protection Act 1986 Schedule 2 item 29.

2.21 The unrestricted power to make regulations which is provided in Schedule 1, Item 3, and the vague reason for this power made it difficult for the Committee to either accept or oppose the provision, but the Committee brings this provision to the attention of the Legislative Council.

Lack of an Objects Clause

2.22 The Committee observed that the BAM Bill lacks a clause which provides a statement of intention as to how the proposed Act is to operate.

2.23 When commenting on the green BAM Bill the then Department of Environment suggested that the lack of an objects clause may lead to uncertainty about the proposed Act’s operation. The Department of Fisheries (DOF) is also in favour of the insertion of an objects clause into the BAM Bill, advising the DAF during the public consultation on the Green Bills that the addition of an objects clause in the green BAM Bill would be “very useful” because the set of objects would “guide the Minister and Executive Director in the exercise of their discretions and performance of their duties…” and would also “allow the public to readily understand the purposes of aquatic conservation and management under … [the proposed Act].”

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80 Refer to paragraph 2.4 in this Report for a discussion of this provision.
81 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 March 2007, p2.
82 Submission from the Department of Environment to the Department of Agriculture and Food, 30 March 2006, p3.
83 Submission from the Department of Fisheries to the Department of Agriculture and Food, 29 March 2006, p1.
84 Ibid.
85 Ibid, p2.
The DOF also argued that an objects clause can “save time and argument in decision making and legal proceedings”.86

2.24 DAF’s response to these concerns was that it recognised the perceived benefits of an objects clause, but considered that inserting an objects clause into the green BAM Bill could “pose a risk of narrowing the intended scope of the Bill”.87

Committee comment


2.26 While the Committee agreed with the comments made by the DOF and the then Department of Environment that objects clauses are useful tools in assisting with the determination of the operative effect of an Act, it also acknowledged that objects clauses are not definitive:

Such an expression of intention in the Act of the Parliament will not, of course, be definitive. But the courts can resort to it in case of uncertainty or ambiguity when the operation of the Act of the Parliament, according to its other terms, has been ascertained and applied.88

2.27 The following observations have been made about the operation of the objects clause in the Freedom of Information Act 1982 (Cth):

It could not be said that the clause has always had an influential effect on the interpretation of the Act. Nevertheless, where an interpretation has been adopted that does not fit readily with the clause, it has had to be explained and that in itself seems a worthwhile exercise in directing consideration of the purpose of the legislation.89

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86 Ibid.
88 Re Credit Tribunal; Ex parte General Motors Acceptance Corp, Australia (1977) 14 ALR 257 at 260.
2.28 In light of the fact that the BAM Bill represents an attempt to amalgamate the effect of 17 existing Acts and because of the bill’s skeletal nature, the Committee considered that the bill would benefit from the insertion of an objects clause. The Committee also noted that the BAM Bill is not intended to deal with human-specific diseases and that the regulation of pests and diseases which affect only human health remains with the Health Act 1911. This limitation on the scope of the bill is obscure: it appears to have been achieved through careful definition of the terms ‘disease’ and ‘animal’ and the limitation is not made apparent in the bill’s long title. In the Committee’s view, any objects clause which is to be inserted into the bill should explicitly state that the regulation of pests and diseases which affect only human health is not covered by the bill.

2.29 Further, the Committee believed that any risk of an objects clause narrowing the scope of the BAM Bill would be outweighed by the advantages gained in inserting such a clause.

2.30 The Committee suggests that the Minister’s Second Reading Speech for the BAM Bill would be a useful starting point for the formulation of an objects clause:

The purpose of the bill is to provide effective biosecurity and agriculture management for Western Australia ... by establishing an effective means of controlling the entry, establishment, spread and impact of animal and plant pests and diseases; controlling the use of agricultural and veterinary chemicals; allowing standards to be set to ensure the safety and quality of agricultural products; and enabling certain funds to be raised for biosecurity-related purposes.

Recommendation 4: The Committee recommends that the Biosecurity and Agriculture Management Bill 2006 be amended by inserting an objects clause. The clause should explicitly state that the regulation of pests and diseases which affect only human health is not covered by the bill.

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90 Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p14.


92 Hon Kim Chance MLC, Minister for Agriculture and Food, Parliament of Western Australia, Legislative Council, Parliamentary Debates (Hansard), 2 November 2006, p8142.
CLAUSE 3 - RELATIONSHIP WITH OTHER ACTS

Acts which prevail in case of inconsistency

2.31 Refer to the discussions at paragraphs 2.63 to 2.67, 2.103 to 2.110, 2.111 to 2.112 and 2.114 of this Report.

CLAUSE 5 - MEANING OF TERMS USED IN THIS ACT

‘Biosecurity’ not defined

2.32 The term ‘biosecurity’ is not defined in the BAM Bill nor is it defined in the Repeal Bill or Taxing Bill. According to the Explanatory Memorandum for the BAM Bill, the lack of a definition for ‘biosecurity’ was intentional:

This is to avoid any potential limitation of the operation of the Bill’s provisions by arguments over the scope of any definition of this term. Wide use of the term is relatively recent yet generally well understood and the term is used infrequently in the substantive provisions of the Bill as opposed to the headings. Essentially, the term biosecurity describes the protection of the State’s agricultural industries, environment, economy, lifestyle and amenity from the risks posed by harmful organisms. 93

2.33 In contrast, Western Power, when commenting on the green BAM Bill, suggested that defining ‘biosecurity’ would ensure that the purpose and operation of the BAM Bill are clear. 94

2.34 The Committee noted that, despite the comments in the Explanatory Memorandum, ‘biosecurity’ appears to be used substantively in clauses 48(1), 49, 152(2), 155(1)(d) and 170(1) of the BAM Bill. For example, the people who are to be appointed to the proposed Biosecurity Council must have “a general or specific interest and expertise in the management of biosecurity in the State” (emphasis added). 95 When the Committee queried why the DAF did not consider that a definition of the term would enhance the operation of the bill, the DAF again relied on the argument that a definition could unforeseeably restrict the scope of the term, and therefore, the bill. 96 However, Mr Robert Delane, Deputy Director General (Biosecurity & Research), DAF accepted that ‘biosecurity’ is still not a term that is generally understood:

94 Submission from Western Power to the Department of Agriculture and Food, 27 March 2006, p1.
95 Clause 48(1)(a) of the Biosecurity and Agriculture Management Bill 2006.
96 Mr Robert Delane, Deputy Director General (Biosecurity & Research), and Mr Richard Walker, Policy Officer, Biosecurity, Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p22.
It is a term that is very commonly used by the likes of me nowadays, but for some people it is still a very new, perhaps even foreign, term. It is increasingly utilised and will be pretty much part of the lexicon in this area in five years, I think, but that does not necessarily help people who may choose to interpret it differently.\textsuperscript{97}

2.35 A search of Australian and New Zealand primary legislation revealed that there is currently no statutory definition of ‘biosecurity’, despite the fact that the term is used as a part of phrases which appear in some of those Acts.\textsuperscript{98} In non-legislative contexts, ‘biosecurity’ has been defined as:

- “the protection of the economy, the environment and human health from negative impacts associated with pests, diseases and weeds”.\textsuperscript{99} The DAF advised the Committee that this is the current, nationally-accepted definition of ‘biosecurity’;\textsuperscript{100}
- “security measures against the transmission of disease to the plants or animals of a particular region”\textsuperscript{101};
- “security measures taken against bioterrorism”\textsuperscript{102}; and
- “the protection of people, animals and ecological systems against disease and other biological threats”\textsuperscript{103}.

2.36 After further consideration, the DAF took the view that, although ‘biosecurity’ is not specifically defined in the BAM Bill, it is, in effect, defined by, and reflected in, the wording of clauses 11(1) and 21(2).\textsuperscript{104} The relevant wording which the DAF alluded to is:

\begin{itemize}
  \item \textit{(a) has or may have an adverse effect on —}
\end{itemize}

\textsuperscript{97} Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, \textit{Transcript of Evidence}, 31 January 2007, p22.

\textsuperscript{98} For example, ‘biosecurity’ is used in the phrase ‘biosecurity control area’ in \textit{Biosecurity Act 1993} (NZ) but it is not defined.

\textsuperscript{99} Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 20 February 2007, p1.

\textsuperscript{100} \textit{Ibid.}


\textsuperscript{102} \textit{Ibid.}


\textsuperscript{104} Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 20 February 2007, p1.
(i) another organism in the area; or

(ii) human beings in the area; or

(iii) the environment, or part of the environment, in the area; or

(iv) agricultural activities, fishing or pearling activities, or related commercial activities, carried on, or intended to be carried on, in the area;

or

(b) may have an adverse effect on any of those things if it were present in the area, or if it were present in the area in greater numbers or to a greater extent.

2.37 If a definition of ‘biosecurity’ was to be inserted into the BAM Bill, the DAF recommended the following definition, in order to avoid any possible confusion:

“biosecurity” means protection from the adverse effects referred to in sections 11(1) and 21(2).  

2.38 That definition is preferred by the DAF over the current, nationally-accepted definition of ‘biosecurity’ (the protection of the economy, the environment and human health from negative impacts associated with pests, diseases and weeds). While the latter definition is useful in ordinary communications, when it can be understood in a non-technical sense as incorporating the general themes of biosecurity, it does not take account of the specifically defined meanings of important terms in the BAM Bill, such as ‘organism’, ‘disease’ and ‘declared pest’.  

2.39 The Department indicated that the Minister will explore the definition of ‘biosecurity’ and outline the scope of that term during debate on the bills in the Legislative Council.

Committee comment

2.40 Given that ‘biosecurity’ is used substantively in the BAM Bill and that the term is not widely used or understood, the Committee considered that the insertion of a definition

105 Ibid.

106 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 March 2007, p1; refer also to item 4 in Appendix 4 of this Report.

107 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 20 February 2007, pp1 to 2; and Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 March 2007, p1.
for the term would help to further clarify the scope and operation of the BAM Bill. The Committee was of the view that any risk of a definition narrowing the scope of the BAM Bill would be outweighed by the advantages gained in inserting the definition.

2.41 The Committee favoured the following definition for ‘biosecurity’, as recommended by the DAF: “biosecurity” means protection from the adverse effects referred to in sections 11(1) and 21(2).\footnote{Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 20 February 2007, p1.}

Recommendation 5: The Committee recommends that clause 5 of the Biosecurity and Agriculture Management Bill 2006 be amended by inserting a definition of ‘biosecurity’.

Practical effect of definition of ‘land’

2.42 The Australian Government Department of Agriculture, Fisheries and Forestry raised concerns about the practical effect of the definition of ‘land’ in the BAM Bill\footnote{Submission No 8 from Australian Government Department of Agriculture, Fisheries and Forestry, 12 February 2007, Attachment A, pp4 to 5.} (refer to item 3 in Appendix 4 of this Report for questions and answers related to these issues). The Committee was satisfied with the DAF’s response to these concerns.

CLAUSE 6 - MEANING OF ‘CONTAMINATED’

Meaning of ‘specified’

2.43 This clause deals with circumstances in which a thing is considered to be contaminated by a substance, even if no maximum residue limit has been prescribed for that thing in relation to that substance. These circumstances are to be “specified” rather than ‘prescribed’ by regulations; this is despite the fact that ‘prescribed’ has a particular meaning in the BAM Bill:

“prescribed” means prescribed under regulations made under this Act;\footnote{Clause 5 of the Biosecurity and Agriculture Management Bill 2006.}

2.44 It is a fundamental principle of statutory interpretation that the use of different words shows a \textit{prima facie} intention to convey a different meaning.\footnote{DC Pearce and RS Geddes, \textit{Statutory Interpretation in Australia}, 5\textsuperscript{th} Edition, Butterworths, Australia, 2001, pp90-91.} The Committee understands that ‘prescribe’, when used in the context of providing a subsidiary
legislation-making power, requires the matter which is to be prescribed to appear in, and be dealt with by, the text of that subsidiary legislation. For example, where an Act provides that a matter is to be prescribed by regulations, the resulting regulations would be exceeding their legislative power if they delegated the matter to the decision of a public servant. While the regulations would be disallowable and subject to publication and tabling requirements, the decision of that public servant (made under delegated legislative authority) would not normally be required to be tabled in Parliament, nor would it normally be disallowable.

2.45 The apparent difference in meaning between ‘specify’ and ‘prescribe’ in the BAM Bill is strengthened by the fact the drafter has found it necessary to define a derivative of ‘specify’ in clause 113 (Part 5, Division 3 - Evidentiary provisions):

“specified”, in relation to a claim, prosecution notice or other document, means specified in the claim, prosecution notice or document.

2.46 When the Committee queried the intended meaning of ‘specified’ in clause 6, the DAF explained that ‘specified’ and ‘prescribed’ are used interchangeably with respect to regulation-making powers, and that the two words, when used in these contexts, have no difference in meaning. ‘Specify’, and derivations of this word, are also used, when referring to matters to be prescribed by regulations, in clauses 23(1) and (3), 27(2), 36(2), 74(4), 75(2), 78(4), 80(4), 83(3), 86(4), 141(1)(a), 145(1) and (6), 147(1), 190(3), Schedule 1 Item 3, and Schedule 1, Item 52(b). The DAF also indicated that “sometimes "specified" seems to read better than "prescribed"” but it maintained that there is no difference in meaning between the two words.

Committee comment

2.47 The Committee did not agree with the DAF’s assertion that there is no difference in meaning between ‘prescribed’ and ‘specified’. As ‘prescribed’ has a particular meaning, both generally and as it is defined in the BAM Bill, the Committee considered that any regulation-making power in the bill should utilise the verb ‘prescribe’ and any of its variations.

112 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p1.
113 Letter from Mr Graeme Wilson, Director, Planning and Policy, Department of Agriculture and Food, 28 February 2007, Attachment, p4.
114 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p1.
115 Ibid.
Recommendation 6: The Committee recommends that clauses 6(c), 27(2), 36(2), 74(4), 75(2), 78(4), 80(4), 83(3), 86(4), 141(1)(a), 145(1) and (6), 147(1), 190(3), Schedule 1, Item 3, and Schedule 1, Item 52(b) of the Biosecurity and Agriculture Management Bill 2006 be amended by replacing the words ‘specified’ or ‘specify’ where they occur with the words ‘prescribed’ or ‘prescribe’, respectively.

Recommendation 7: The Committee recommends that clauses 23(1) and (3) of the Biosecurity and Agriculture Management Bill 2006 be amended so that a ‘potential carrier’ is ‘prescribed’ by regulations and ‘specified’ by management plans.

CLAUSE 12 - CONSULTATION WITH OTHER MINISTERS AND BIOSECURITY COUNCIL

2.48 Clause 12 deals with the consultation which the Minister is required to undertake prior to declaring an organism a permitted organism (pursuant to clause 10) or a prohibited organism (under clause 11):

12. Consultation with other Ministers and Biosecurity Council

(1) Before making a declaration under section 10 or 11, other than a declaration relating to a fish, the Minister must consult with —

(a) the Minister for the Environment; and

(b) the CALM Act Minister; and

(c) any other Minister who in the opinion of the Minister has a relevant interest; and

(d) if the Minister is of the opinion that such consultation is necessary for the purpose of properly informing himself or herself as to whether or not the declaration should be made, the Biosecurity Council.

(2) Before making a declaration under section 10 or 11 relating to a fish, the Minister must consult with —

(a) the Minister for Fisheries; and

(b) any other Minister who in the opinion of the Minister has a relevant interest; and

(c) if the Minister is of the opinion that such consultation is necessary for the purpose of properly informing
consultation with Biosecurity Council

2.49 Under clauses 12(1)(d) and (2)(d), the Minister is not obliged to consult the Biosecurity Council on each and every occasion that such a permitted organism or a prohibited organism declaration is to be made, only when the Minister is of the opinion that that consultation is necessary. The DAF provided the following rationale for these clauses:

Mr Walker: The number of species that will be listed as prohibited organisms and permitted organisms will run into the tens of thousands, probably, so a requirement for consultation in each and every instance is not practical.

Mr Delane: It would be difficult for the Biosecurity Council to add value in that circumstance, so although practicality will say that there will be some circumstances in which that causes problems, and those will be reviewed, the normal consultation, regulatory and political processes will bring those to the fore, I think. That might be a situation in which the minister refers to the council for some further advice.\textsuperscript{116}

Committee comment

2.50 The Committee was satisfied with the DAF’s explanation of the rationale for clauses 12(1)(d) and (2)(d).

Consultation with other Ministers

2.51 The green BAM Bill’s equivalent of clause 12\textsuperscript{117} mandated consultation with both the Minister for Environment and the Minister administering the Conservation and Land Management Act 1984 (CALM Act Minister)\textsuperscript{118} before making every declaration as to permitted organisms and prohibited organisms. If the proposed declaration involved a fish, the Minister administering the Fish Resources Management Act 1994 (Minister for Fisheries)\textsuperscript{119} also had to be consulted. Other Ministers were only required to be consulted if the Minister considered that they had a relevant interest in

\footnotesize{\textsuperscript{116} Mr Richard Walker, Policy Officer, Biosecurity, and Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p23.}

\footnotesize{\textsuperscript{117} Refer to clause 12 of the Biosecurity and Agriculture Management Bill 2005.}

\footnotesize{\textsuperscript{118} Clause 5 of the Biosecurity and Agriculture Management Bill 2006.}

\footnotesize{\textsuperscript{119} Ibid.}
the proposed declaration. The text of the equivalent clause is reproduced below in order to assist the Legislative Council in its debate of the bills:

12. **Consultation with other Ministers and Biosecurity Council**

Before making a declaration under section 10 or 11 the Minister must consult with —

(a) the Minister for the Environment;

(b) the CALM Act Minister;

(c) if the proposed declaration relates to a fish, the Minister for Fisheries;

(d) any other Minister who in the opinion of the Minister has a relevant interest; and

(e) if the Minister is of the opinion that such consultation is necessary for the purpose of properly informing himself or herself as to whether or not the declaration should be made, the Biosecurity Council.

2.52 When addressing the operation of the green BAM Bill, the DOF submitted that it is a critical requirement for extremely rapid action in respect of potential introduced aquatic pests, … [meaning] … that mechanisms for section 10, 11 and 21 declarations must be efficient and effective. Accordingly, it is essential that sections 12(a), (b) and 21(4)(a) and (b) of the Bill are amended to remove the additional requirement to consult with the listed Ministers in respect of fish.”

2.53 The clause 12 which is now before the Committee is significantly different in that the Minister for Fisheries is the only Minister who must be consulted before a proposed declaration relating to a fish is made.

2.54 The Department of Health (DOH) suggested that clause 12 be amended so that the Minister is also required to consult the Minister for Health before declaring an organism (including a fish) to be either a permitted or prohibited organism. The suggestion was made on the basis that the Minister for Health has a specific interest in ensuring that activities, including agricultural and biosecurity activities, do not...
adversely impact on the health of the population. In response, the DAF indicated that clause 12(1)(c) ("any other Minister who in the opinion of the Minister has a relevant interest") already authorises consultation with the Minister for Health:

To require consultation with the Minister for Health in relation to pests that have no human health impacts is an unnecessary administrative burden and may be counter-productive, particularly where a declaration needs to be made quickly to deal with an urgent, high-risk situation. Clause 12(1) requires consultation with the Minister for the Environment and the CALM Act Minister (which will usually be one and the same) and the Minister for Fisheries because these Ministers are responsible for managing two key areas that are covered by the Bill. i.e. the protection of the environment and fish resources against the impacts of harmful organisms.

2.55 The Department for Environment and Conservation (DEC) recommended to the Committee that clause 12(2) be amended so that the Minister is also required to consult with the Minister administering the Environmental Protection Act 1986 (Minister for the Environment) before declaring a fish to be either a permitted or prohibited organism. The suggestion was made on the basis that the Minister for the Environment is responsible for the protection of the environment, including the aquatic environment, and the conservation of biodiversity generally. Any decision by the Minister to declare an organism either a permitted or prohibited organism could then benefit from, and incorporate, the knowledge held by the Minister for the Environment and the DEC. The DAF again relied upon the Minister’s option to consult any other Minister where relevant (clauses 12(1)(c) and (2)(b)). It appeared, from the DAF’s response to this issue, that clause 12 of the BAM Bill had been amended from the green BAM Bill as a result of the DOF’s concerns:

The Department of Fisheries specifically requested that clause 12(2) only require the Minister for Agriculture and Food to consult with the Minister for Fisheries before declaring a fish to be either a prohibited or permitted organism, as the Fisheries Minister has primary responsibility for managing the aquatic environment. The Department of Fisheries maintains that the Bill should not impose a mandatory obligation on the Minister to consult with the Environment

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122 Submission No 4 from the Department of Health, 30 January 2007, pp2 to 3.
123 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 February 2007, Attachment, p2.
125 Submission No 7 from the Department of Environment and Conservation, 5 February 2007, pp1 to 2.
Minister on every proposal to declare fish. Some declarations may need to be made quickly to deal with urgent, high-risk situations.\textsuperscript{126}

**Committee comment**

2.56 The Committee recognised the concerns raised by the DOH but was satisfied that clause 12(1)(c) provides the Minister for Health with an adequate opportunity to be consulted.

2.57 While a majority of the Committee (comprised of Hon Graham Giffard, Hon Sally Talbot, Hon Ken Baston and Hon Peter Collier MLCs) acknowledged the concerns raised by the DOF, it considered that the Minister for Fisheries should not necessarily have an almost exclusive, ‘first priority’ right to be consulted in relation to proposed declarations relating to fish. These Members also considered that it would be sufficient for the Minister to decide which other Ministers were most appropriately consulted on each occasion.

**Recommendation 8:** A majority of the Committee (comprised of Hon Graham Giffard, Hon Sally Talbot, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clause 12 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to:

(a) delete the express requirement to consult with the Minister administering the *Environmental Protection Act 1986*;

(b) delete the express requirement to consult with the Minister administering the *Conservation and Land Management Act 1984*; and

(c) delete the requirement for a unique consultation process for declarations relating to a fish.

2.58 A minority of the Committee (comprised of Hon Giz Watson MLC) favoured the approach adopted by clause 12 in the green BAM Bill.\textsuperscript{127} This approach would still oblige the Minister to consult with the Minister for the Environment and the CALM Act Minister, who are the two Ministers who have the main responsibilities for the environment, before making each declaration as to permitted organisms and prohibited organisms. In addition, the approach would also:

\textsuperscript{126} Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 February 2007, Attachment, p2.

\textsuperscript{127} Clause 12 of the Biosecurity and Agriculture Management Bill 2005 is set out in paragraph 2.51 of this Report.
• require the Minister for Fisheries, who has responsibility for matters relating to the aquatic environment, to be consulted prior to the making of any declaration relating to a fish; and

• preserve the Minister’s discretion to consult any other Minister who, in the opinion of the Minister, has a relevant interest in any declaration.

**PART 2, DIVISION 2 - IMPORTING ORGANISMS INTO WESTERN AUSTRALIA**

**National Competition Policy Principles and Impact on Free Trade**

2.59 In light of the restrictions imposed by Part 2, Division 2 of the BAM Bill on importing certain organisms, the Committee queried how the bill is intended to operate under the National Competition Policy principles and other prohibitions on anti-competitive activities. The DAF advised the Committee that these types of considerations have been taken into account in the development of the BAM Bill, and will continue to be important in the enforcement of the proposed Act and regulations. Some of this advice to the Committee has been reproduced below to assist the Legislative Council in its debate of the bills.

*Mr Delane:* Only two pieces of legislation are particularly affected. An example is the Cattle Industry Compensation Act, which has been covered, which has provided for government to have a compulsion to provide assistance to that sector. For example, the Cattle Industry Compensation Act is based on stamp duty, which has constitutional issues, but it also provides specific assistance, and government has to match that to that particular sector. That has been picked up in the National Competition Council, I think. All the others, including the Agriculture and Related Resources Protection Act, were deemed in the assessment to be not impacted by that legislation. It has been an imperative but it has not been a central imperative to this reform.

... 

*Mr Walker:* As long as we can justify the basis on which the organism is prohibited from entering the state. Ordinarily, an organism that is prohibited would not already be present within the state, or if it were present, it would be under effective control, so it would not ordinarily be something that is regularly traded; although, having said that, the nursery and garden industry obviously wants to get its hands on all manner of weeds. We are particularly concerned

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128 For more information on the National Competition Policy, refer to the National Competition Council’s website: [http://www.ncc.gov.au/](http://www.ncc.gov.au/).
about its views on how they might impact on the environment. Any prohibition is justified technically.

Mr Delane: It would be illegal under the interstate trade provisions for free trade and under international law under the sanitary and phytosanitary treaty arrangements for this state to impose unjustifiable regulation on the movement of any goods where it could not be adequately justified on the basis of biological risk.

...

Mr Delane: ... We apply a pretty rigorous, risk-based approach to that. We are obligated not to recommend, and the government is obligated not to put in place, regulations that are more than necessary to manage that risk. The same applies under the international treaty and the obligations there of the Australian government as a signatory to that treaty to not have what are called second-tier arrangements in place, so that Western Australia does not exclude produce from this state when it cannot be justified adequately on scientific grounds under the provisions of that treaty. Perhaps the more relevant test case for us has been New Zealand stone fruit. We have been negotiating for some time with New Zealand on stone fruit and only relatively recently put in place regulations that, for example, enable apricots to come in from New Zealand. We also have a number of other areas. Apples are a classic case. Apples cannot come into Western Australia from eastern Australia, and a number of other produce items cannot come into Western Australia from the rest of Australia, because of our assessed biosecurity risk and, therefore, state regulation. If they were imported from overseas to Western Australia, they could also not come.129

2.60 The Committee was also advised that the BAM Bill will modernise many existing import restrictions:

Hon GIZ WATSON: Will this new act change the existing situation; for example, would the same powers apply to apples as currently apply?

Mr Delane: Exactly. In those cases this does not change the powers but it modernises them, so that they can be more consistently and efficiently managed. It does not change the policy decision; that is,

129 Mr Robert Delane, Deputy Director General (Biosecurity & Research), and Mr Richard Walker, Policy Officer, Biosecurity, Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, pp12 to 13.
Free trade between Australia and other Countries

2.61 As the DAF advised, Australia, as a member of the World Trade Organisation, and a signatory to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), is bound by the SPS Agreement. The SPS Agreement:

- recognises that member countries have the right to take sanitary and phytosanitary measures but that they should be applied only to the extent necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail;

- encourages member countries to base their measures on international standards, guidelines and recommendations where they exist. However, Members may maintain or introduce measures which result in higher standards if there is scientific justification or as a consequence of consistent risk decisions based on an appropriate risk assessment; and

- prescribes procedures and criteria for the assessment of risk and the determination of appropriate levels of sanitary or phytosanitary protection.

2.62 Instruments of subsidiary legislation which were separately made by the Commonwealth and by Tasmania have previously been found by the World Trade Organisation to be inconsistent with the SPS Agreement. Both instruments effectively banned the importation of fresh, chilled or frozen salmon into Australia.

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130 Hon Giz Watson MLC and Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p13.


and Tasmania, respectively.\textsuperscript{134} These instruments were found to have breached Article 5.1 and, by implication, Article 2.2 of the SPS Agreement, which require a sanitary or phytosanitary measure to be “based on” a proper risk assessment or an international standard, and sufficient scientific evidence, respectively.\textsuperscript{135} Australia was also found to have acted inconsistently with Article 5.6, which requires member countries to ensure that their sanitary and phytosanitary measures are not more trade-restrictive than necessary to achieve the appropriate level of protection, taking into account technical and economic feasibility.\textsuperscript{136}

\textit{Free trade under the Commonwealth Constitution}

2.63 Section 92 of the \textit{Commonwealth of Australia Constitution Act} (Cth) provides that trade, commerce and intercourse between the States “shall be absolutely free”. The Committee had the benefit of considering the Australian Government Department of Agriculture, Fisheries and Forestry’s thoughts on how the BAM Bill may operate under section 92.\textsuperscript{137} In that department’s view:

\begin{quote}
Generally State quarantine laws which apply to interstate trade will not contravene section 92, since they will protect a state from a threat to its welfare. However, in addressing this question, the extent and severity of the restrictions will be highly relevant.
\end{quote}

\ldots

\begin{quote}
[If the powers under the BAM Bill] ... are used in a manner which is disproportionate to the quarantine objectives, there is the potential for section 92 to be infringed. However, it is difficult to determine whether the Bill infringes section 92 of the Constitution without regard to the declarations and regulations which will need to be made to give it effect.\textsuperscript{138}
\end{quote}

\textit{Committee comment}

2.64 The Committee observed that it will be the ministerial declarations and the regulations, rather than the BAM Bill clauses, which will ultimately determine which organisms can and cannot be imported into the State, and if importation is allowed,\textsuperscript{134} G Goh, ‘Comment - Australia’s Participation in the WTO Dispute Settlement System’, (2002) \textit{7 Federal Law Review}: http://www.austlii.edu.au/au/journals/FedLRev/2002/7.html, (viewed on 22 March 2007).

\textsuperscript{135} Summary of the key findings World Trade Organisation’s Compliance Panel in \textit{WT/DS18:} http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds18sum_e.pdf, (viewed on 23 March 2007).

\textsuperscript{136} \textit{Ibid}.

\textsuperscript{137} Submission No 8 from Australian Government Department of Agriculture, Fisheries and Forestry, 12 February 2007, Attachment A, pp1 to 2.

\textsuperscript{138} \textit{Ibid}.  

what conditions will be imposed. The Committee stresses that the ministerial declarations and the regulations made under Part 2, Division 2 of the BAM Bill:

- will need to be based on scientifically-sound evidence and proper risk assessments; and

- must not be more trade-restrictive than is necessary in the circumstances,

so as to be consistent with Australia’s international obligations, the Commonwealth Constitution and National Competition Policy requirements.

2.65 The Committee also noted that it may be difficult in some circumstances to achieve the requisite level of scientific evidence which will be necessary to support a proposed biosecurity measure which may affect the importation of an organism into the State.\(^{139}\)

**Potential conflict with Commonwealth legislation**

2.66 The Australian Government Department of Agriculture, Fisheries and Forestry raised concerns about potential inconsistencies between provisions relating to the importing of organisms under the BAM Bill and Commonwealth legislation and the practical ramifications of this\(^{140}\) (refer to item 9 in Appendix 4 of this Report for questions and answers related to these issues). The Committee was satisfied with the DAF’s response to these concerns.

**Potential conflict with other State legislation**

2.67 The DEC raised a concern that regulations made under clause 14, which appears in Part 2, Division 2 of the BAM Bill, has the potential to conflict with the *Wildlife Conservation Act 1950* and regulations made under that Act\(^{141}\) (refer to item 10 in Appendix 4 of this Report for questions and answers related to this issue). The Committee refers to paragraphs 2.103 to 2.110 in this Report as those discussions and comments are applicable to this issue.

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\(^{139}\) For example, refer to *Conservation Council of South Australia Inc v Development Assessment Commission & Tuna Boat Owners Association of South Australia (No 2)* [1999] SA ERDC 86 (Unreported, Trenorden J, Commissioner Hodgson and Commissioner Berriman, 16 December 1999), paragraph 31, where it was found that “there is a significant lack of scientific information on disease in non-salmonid marine finfish, and the susceptibility of Australia’s native species to exotic pathogens. ... There is some risk in using imported pilchards as feed. It might be a manageable risk but nothing was suggested in this regard. There is ongoing research. We do not know the full scientific consequences of using imported pilchards as feed.”

\(^{140}\) Submission No 8 from Australian Government Department of Agriculture, Fisheries and Forestry, 12 February 2007, Attachment A, pp2 to 3.

\(^{141}\) Submission No 7 from the Department of Environment and Conservation, 5 February 2007, p2.
CLAUSE 21 - DECLARED PESTS

2.68 Similarly to clause 12 of the BAM Bill, clauses 21(4) and (5) oblige the Minister to consult with various other Ministers and the Biosecurity Council prior to declaring an organism a declared pest (pursuant to clause 21(2)):

(4) Before making a declaration under this section, other than a declaration relating to a fish, the Minister must consult with —

(a) the Minister for the Environment; and
(b) the CALM Act Minister; and
(c) any other Minister who in the opinion of the Minister has a relevant interest; and
(d) if the Minister is of the opinion that such consultation is necessary for the purpose of properly informing himself or herself as to whether or not the declaration should be made, the Biosecurity Council.

(5) Before making a declaration under this section relating to a fish, the Minister must consult with —

(a) the Minister for Fisheries; and
(b) any other Minister who in the opinion of the Minister has a relevant interest; and
(c) if the Minister is of the opinion that such consultation is necessary for the purpose of properly informing himself or herself as to whether or not the declaration should be made, the Biosecurity Council.

Consultation with the Biosecurity Council

2.69 Under clauses 21(4) and (5), the Minister is not obliged to consult the Biosecurity Council on each and every occasion that such a declared pest declaration is to be made; rather, only when the Minister is of the opinion that that consultation is necessary. The DAF provided the following rationale for these clauses:

Mr Walker: Ordinarily the minister would consult widely with the department or persons within a particular area in other public authorities before making a declaration. If some contention existed - Hon Giz Watson mentioned buffel grass, which would be a
contentious declaration if it were made - the minister would seek the advice of the council. I am not sure whether he or she would need to do it in each and every instance. We are trying to lift the view of the council so that it deals strategically with biosecurity issues and ensures that adequate arrangements are established in each sector so that they can respond to, assess and manage biosecurity threats.

Mr Delane: Our experience in developing this is that we do not want to specify in legislation the things that are adequately dealt with in normal administrative processes. Certainly in my eight or nine years experience, if a recommendation for declaration in any form or imposition to regulation goes forward to the minister of the day without adequate consultation and without detailing who has been consulted and if they had any issues about them, that public servant is being foolhardy unless it is considered a very serious risk and urgent action is required with some ex-post consultation.

The Committee was satisfied with the DAF’s explanation.

Consultation with other Ministers

The green BAM Bill’s equivalent of clauses 21(4) and (5) mandated consultation with both the Minister for Environment and the CALM Act Minister before making every declaration as to declared pests. If the proposed declaration involved a fish, the Minister for Fisheries also had to be consulted. Other Ministers were only required to be consulted if the Minister considered that they had a relevant interest in the proposed declaration. The text of the equivalent clause is reproduced below in order to assist the Legislative Council in its debate of the bills:

(4) Before making a declaration under this section the Minister must consult with —

(a) the Minister for the Environment;

(b) the CALM Act Minister;

(c) if the proposed declaration relates to a fish, the Minister for Fisheries;

(d) any other Minister who in the opinion of the Minister has a relevant interest; and

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142 Mr Richard Walker, Policy Officer, Biosecurity, and Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p23.

143 Refer to clause 21(4) of the Biosecurity and Agriculture Management Bill 2005.
(e) if the Minister is of the opinion that such consultation is necessary for the purpose of properly informing himself or herself as to whether or not the declaration should be made, the Biosecurity Council.

2.72 The issues considered by the Committee with respect to the consultation that is to occur in the making of declared pest declarations under clauses 21(4) and (5) of the BAM Bill are essentially identical to those discussed in paragraphs 2.51 to 2.55 in this Report regarding clause 12 of the bill.

Committee comment

2.73 The Committee recognised the concerns raised by the DOH but was satisfied that clause 21(4)(c) provides the Minister for Health with an adequate opportunity to be consulted.

2.74 While a majority of the Committee (comprised of Hon Graham Giffard, Hon Sally Talbot, Hon Ken Baston and Hon Peter Collier) acknowledged the concerns raised by the DOF, it considered that the Minister for Fisheries should not necessarily have an almost exclusive, ‘first priority’ right to be consulted in relation to proposed declarations relating to fish. These Members also considered that it would be sufficient for the Minister to decide which other Ministers were most appropriately consulted on each occasion.

Recommendation 9: A majority of the Committee (comprised of Hon Graham Giffard, Hon Sally Talbot, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clauses 21(4) and (5) of the Biosecurity and Agriculture Management Bill 2006 be amended so as to:

(a) delete the express requirement to consult with the Minister administering the Environmental Protection Act 1986;

(b) delete the express requirement to consult with the Minister administering the Conservation and Land Management Act 1984; and

(c) delete the requirement for a unique consultation process for declarations relating to a fish.

2.75 A minority of the Committee (comprised of Hon Giz Watson MLC) favoured the approach adopted by clause 21(4) in the green BAM Bill.144 This approach would still

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144 Clause 12 of the Biosecurity and Agriculture Management Bill 2005 is set out in paragraph 2.51 of this Report.
oblige the Minister to consult with the Minister for the Environment and the CALM Act Minister, who are the Ministers who have the main responsibilities for the environment, before making each declaration as to declared pests. In addition, the approach would also:

- require the Minister for Fisheries, who has responsibility for matters relating to the aquatic environment, to be consulted prior to the making of any declaration relating to a fish; and
- preserve the Minister’s discretion to consult any other Ministers who, in the opinion of the Minister, has a relevant interest in any declaration.

**CLAUSE 25 - DUTY TO REPORT DECLARED PEST**

**Harsh offence**

2.76 This clause imposes a maximum fine of $20,000 if a person finds or suspects that there is a declared pest (or an organism or thing which is infected or infested with the declared pest) in an area for which an organism is a declared pest, or that an organism or thing is infected or infested with a declared pest in that area, and fails to report the presence or suspected presence of the declared pest to the Director General or an inspector in accordance with the clause. The maximum penalty for the offence increases to a $100,000 fine and imprisonment for 12 months if the declared pest is a ‘high impact organism’.145

2.77 It appears as though one of the impetuses for this clause was the DAF’s:

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\text{experience that some landowners or persons in charge of plants or animals may be reluctant to report the presence of potentially serious pests or diseases in order to avoid the financial cost of control measures.}^{146}
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2.78 While the Committee understood the rationale for this clause,147 it was concerned that the public would have difficulty identifying whether an organism is a declared pest, particularly in light of the significant penalties which are prescribed. In effect, members of the public will be expected to know as much about declared pests, and as aware of declared pests, as inspectors who are appointed under the BAM Bill. In response, the DAF directed the Committee to the publication requirements of

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145 Regulations may be made prescribing a prohibited organism (declared under clause 11) as a ‘high impact organism’ pursuant to clause 189 of the Biosecurity and Agriculture Management Bill 2006. Prohibited organisms will be declared pests for the whole State: clause 21(1) of the Biosecurity and Agriculture Management Bill 2006.

146 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p1.

147 Refer to the Department of Agriculture’s comments at item 14 in Appendix 4 of this Report.
declarations as to permitted organisms, prohibited organisms and declared pests under clauses 158 and 159. The DAF contended that the public could use these publications to inform themselves of which organisms are declared pests and that if a person had any difficulties identifying an organism, they need only contact the DAF.148

2.79 The Committee noted that clause 158 provides that the publication of a declaration may be effected by publishing a notice in the Government Gazette stating that a declaration has been made and that particulars of the declaration may be obtained from the DAF’s head office and the DAF’s website.149 Clause 158 also allows for the publication of the full text of the declaration in the Government Gazette.150

2.80 The Committee was advised that the option to publish a notice of the making of a declaration in the Government Gazette was inserted because full declarations could be “quite lengthy”151. According to Mr Robert Delane, Deputy Director General (Biosecurity and Research), DAF, “The number of species that will be listed as prohibited organisms and permitted organisms will run into the tens of thousands...”152

2.81 While the BAM Bill is intended to replace and re-enact much of the State’s existing biosecurity legislation, the DAF advised the Committee that it will be necessary to ‘freshly’ declare organisms as prohibited organisms or declared pests under the proposed Act, even if they have already been declared as ‘declared animals’ or ‘declared plants’ under the current regime.153 That is, the process for converting declared animals and declared plants into either prohibited organisms or declared pests will not be a simple transfer of status:

Determining the status to be given to these animals and plants under the proposed BAM Act is not a straightforward matter because a decision will have to be made as to whether each currently declared plant or declared animal should be declared to be a prohibited

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148 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p1.
150 Ibid, clause 158(4)(a).
151 Mr Richard Walker, Policy Officer, Biosecurity, Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p10.
152 Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p23.
153 Telephone conversation between Mr Richard Walker, Policy Officer, Biosecurity, Department of Agriculture and Food and the Committee’s Advisory Officer (Legal), 21 March 2007, confirmed by letter from Mr Graeme Wilson, Director, Policy and Planning, Department of Agriculture and Food, 22 March 2007.
organism or a declared pest and if the latter, whether it is to be a declared pest for the whole or part of the State.\textsuperscript{154}

2.82 The DAF assured the Committee that, while the status of a declared organism will change under the proposed Act, the management consequences for that organism will not change between the existing and new regimes. The DAF advised the Committee that its preparations for converting declared animals and declared plants into prohibited organisms or declared pests are well-advanced.\textsuperscript{155}

2.83 The overall effect of Part 7, Division 3 of the BAM Bill (which includes clauses 158 and 159) is that the Director General will be required to maintain up-to-date lists of all permitted organisms, prohibited organisms and declared pests on the DAF’s website and at the DAF’s head office, and to ensure that these lists are available for perusal at all reasonable times and at no cost to members of the public. However, it will not be mandatory for a declaration (or notice of the making of a declaration) to be published in the \textit{Government Gazette}.\textsuperscript{156}

2.84 It was also noted by the Committee that the DAF is considering more effective means of compiling and disseminating biosecurity information to the public so that people are aware of their legal responsibilities.\textsuperscript{157} In addition to the requirement to publish lists of organisms on the DAF’s website, the DAF is working through plans to develop an electronic distribution system which will:

\begin{quote}
allow stakeholders to register their interest in receiving advice of the introduction or amendment of regulations, information adopted by the regulations (eg conditions of entry for potential carriers) and other relevant information.\textsuperscript{158}
\end{quote}

2.85 In response to a suggestion made by the Pastoralists and Graziers Association of WA (Inc) (PGA),\textsuperscript{159} the DAF also undertook to make any information published on its website available for perusal at its regional offices.\textsuperscript{159}

\begin{footnotes}
\item[154] Letter from Mr Graeme Wilson, Director, Policy and Planning, Department of Agriculture and Food, 22 March 2007.
\item[155] Telephone conversation between Mr Richard Walker, Policy Officer, Biosecurity, Department of Agriculture and Food and the Committee’s Advisory Officer (Legal), 21 March 2007.
\item[157] Ibid.
\item[158] Submission from the Pastoralists and Graziers Association of WA (Inc) to the Department of Agriculture and Food, 31 March 2006, p4.
\end{footnotes}
Committee comment

2.86 In the Committee’s opinion, members of the public, and indeed other public authorities, must be properly educated about pests and diseases and be placed in the best possible position to comply with the reporting requirements of clause 25. Accordingly, the publication requirements for declarations of permitted organisms, prohibited organisms and declared pests under the BAM Bill need to be stricter and, in practice, supplemented by other means of publication or information distribution.

2.87 With respect to the publication of declarations in the Government Gazette, the Committee considered that declarations must be published in the Government Gazette, in addition to the already mandatory publication of lists of organisms on the DAF’s website and the availability of lists of organisms at the DAF’s head office. The Committee was also of the view that the publication of declarations in the Government Gazette should only be effected by a publication of the full declarations. The Committee was conscious of the strong likelihood that full declarations could be lengthy. However, it considered that this may only be evident immediately after the proposed Act has commenced operation, when existing declared animals and declared plants are converted into prohibited organisms or declared pests. The Committee refers to its discussion and comments at paragraphs 2.185 to 2.188 and Recommendation 26 on page 75 of this Report.

2.88 The Committee recognised and welcomed the DAF’s initiatives in exploring more effective means of disseminating biosecurity information to the public. In addition to the DAF’s existing plans, the Committee suggests that:

- the proposed electronic distribution system include the dissemination of information about permitted organisms, prohibited organisms and declared pests; and

- declarations as to permitted organisms, prohibited organisms and declared pests and published lists of such organisms include the common and scientific names, representative photographs or pictures of the organisms, and any other aids for identifying the organisms.

Recommendation 10: The Committee recommends that clause 158 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to require the declarations published pursuant to that clause to refer to organisms by both their common and scientific names, and to include a representative photograph or picture of, and any other aids for identifying, any named organisms.
Recommendation 11: The Committee recommends that clause 159 of the Biosecurity and Agriculture Management Bill 2006 be amended so as to require the lists of organisms mentioned in that clause to refer to organisms by both their common and scientific names, and to include a representative photograph or picture of, and any other aids for identifying, any named organisms.

CLAUSE 28 - COMPLIANCE WITH PEST EXCLUSION NOTICE

Director General’s discretion to report non-compliance by public authorities

2.89 This clause prescribes the ramifications for non-compliance with a pest exclusion notice issued under clause 26. A person who receives a pest exclusion notice and does not comply with it may be liable to a fine of up to $20,000. In the case of a non-complying public authority however, no fiscal penalty is imposed; instead, the Director General may include a summary of the public authority’s non-compliance in the DAF’s next annual report.

2.90 Clause 5 of the BAM Bill defines ‘public authority’ as follows:

(a) a Minister of the State; or

(b) an agency or an organisation as those terms are defined in the Public Sector Management Act 1994; or

(c) a body, corporate or unincorporate, that is established or continued for a public purpose by the State, regardless of the way it is established; or

(d) a local government or regional local government;

2.91 Several stakeholders who commented on the green BAM Bill considered that public authorities should be subject to the same penalties that apply to members of the public for breaches of the proposed Act.  

The DAF recognised that there is a general perception amongst stakeholders that the Government inadequately manages pests on its own land and that rural stakeholders have clearly and consistently maintained that the Government “must demonstrate land management leadership by improving the level of pest control on public lands.”

The DAF saw this issue as one which results from a lack of resourcing for pest control on Government-controlled property and considered that, in practice, nothing would be achieved from fining public authorities for non-compliance:

Mr Walker:  ... The government is unlikely to establish provisions that allow an authority to be fined, except in extreme circumstances where human life is involved, or something almost as extreme as that. I believe penalties can be applied to public authorities in relation to animal welfare. It is a funding issue rather than a legal issue. If a penalty were imposed on a public authority, the money would go into the consolidated fund; it would not deal with the problem. Instead we have proposed a mechanism which reports on the performance of a public authority and allows Parliament to scrutinise the performance once a report is included in the Department of Agriculture’s annual report, and highlights the plight of agencies such as the Department of Environment and Conservation in terms of funding for biosecurity purposes.

Mr Delane:  This is an issue that is raised quite a lot by landholders and producer stakeholders. Our research internationally has not turned up a situation we have been able to draw from where for this type of matter one department or its chief executive has been open to fining and potential legal action because the department has not carried out controls. That is quite different from the more social issues, such as animal welfare and occupational health and safety etc, where those sorts of provisions are well accepted in communities all over the world. Stakeholders may say differently but our take on their feedback is they now recognise it is a resourcing issue, not a willingness issue. Ultimately when government is funding two arms, to ask the government to prosecute the Department of Environment and Conservation because it is not carrying out controls seems to be a little ridiculous, and certainly for us to take them to court.

The Committee noted that there is already a precedent for legislation which imposes financial penalties on public authorities. Under the Environmental Protection Act.

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162 Mr Robert Delane, Deputy Director General (Biosecurity & Research), and Mr Richard Walker, Policy Officer, Biosecurity, Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, p15.
1986, public authorities\textsuperscript{163} are capable of committing offences and being subject to fiscal penalties. This is due to the fact that public authorities are included in the definition of ‘person’\textsuperscript{164} and many offences prescribed under that Act are framed in terms of a ‘person’ (or another entity, which includes a ‘person’) committing an offence\textsuperscript{165}.

2.94 Currently, clause 28 is worded so that the Director General has a discretion as to whether or not a public authority’s non-compliance with a pest exclusion notice will be reported in the DAF’s next annual report. When the Committee queried whether there would be a problem if the requirement to publish a summary of the non-compliance was mandatory, the DAF’s response was that it would not be useful and that there would be other, more appropriate avenues for reporting the non-compliance:

That was debated. The conclusion that was reached and recommended was that it would not be overly instructive to require the Director General of Agriculture to report that and to list it. The Biosecurity Council is in place and is well positioned to provide advice to the minister of the day and also to the Parliament on the effective functioning of this legislation, including whether the government has the appropriate allocation of resources to deal with pests on public land, for example, or on utility corridors. Our conclusion was that there was adequate transparency in place and it would be very surprising, if that continued to be an issue, if the Biosecurity Council did not include it in its report and it was brought to the attention of the Parliament and every other stakeholder who chose to take up the argument with the government of the day.\textsuperscript{166}

2.95 The Committee also discussed the possibility of publishing a public authority’s non-compliance directly on the DAF’s website. In the DAF’s view:

\textit{Mr Delane:} It would start to get rather messy if we published every misdemeanour of all landholders on the website for all the world to see. We need to be able to use web sites to facilitate community and economic activity and the function of this act. At the same time we need to avoid using web sites to inform people elsewhere in the world.

\textsuperscript{163} ‘Public authority’ means “a Minister of the Crown acting in his official capacity, department of the Government, State agency or instrumentality, local government or other person, whether corporate or not, who or which under the authority of a written law administers or carries on for the benefit of the State, or any district or other part thereof, a social service or public utility”: section 3 of the \textit{Environmental Protection Act 1986}.

\textsuperscript{164} ‘Person’ “includes a public authority”: section 3 of the \textit{Environmental Protection Act 1986}.

\textsuperscript{165} For example, refer to Part V of the \textit{Environmental Protection Act 1986}, which deals with environmental regulation.

\textsuperscript{166} Mr Robert Delane, Deputy Director General (Biosecurity & Research), Department of Agriculture and Food, \textit{Transcript of Evidence}, 31 January 2007, p16.
about information they might use against us. We have sought to utilise the web site to help with that, but if there are issues that can be dealt with only through the Western Australian parliamentary and political processes, that is the way they should be dealt with rather than circulating them for debate around the world.167

...

Mr Richardson: It is my observation that government departments do not like being named in Parliament as non-performers. If they were named repeatedly and nothing was done, there would be something wrong within government if it did not make sure that was rectified. This legislation will enable us to have a more inclusive approach to planning and dealing with issues. With the biosecurity groups, we will reach a position of having an agreed plan within a region such as Carnarvon or Kalgoorlie indicating how we wish to deal with the biosecurity issues over the next five years. A five-year plan will be agreed on showing how we will deal with it on government lands and on private lands, if you like. In some cases that will be via a joint effort and in other cases it will be by the government department doing its thing and the landholders doing their thing. At least they will know what is going on and they will be able to monitor the situation and raise issues. We have found that, to date, it has been a very productive way to go about it. The Department of Environment and Conservation people who live in the regions do not like going out every other day and being belted by the rest of the community who say they are not doing this and they are not doing that. They are keen to have it done. Our challenge is to identify what resources are required [p19] to adequately address what must be done. That is part of the biosecurity review we have been going through. What has come out of that is that a significant amount of additional investment is required annually from where we are at the moment.168

Committee comment

2.96 The Committee recognised the concerns of stakeholders who indicated that the Government must improve its management of pests on public lands. For example, the Committee could envisage a situation where biosecurity measures undertaken on privately-controlled land which is adjacent to poorly-managed Government-controlled

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167 Ibid.

168 Mr Chris Richardson, Policy Officer, Biosecurity, Department of Agriculture and Food, Transcript of Evidence, 31 January 2007, pp18 to 19.
land would be rendered futile if pests and diseases were allowed to proliferate and escape from the latter property. Accordingly, the Committee considered that it should be compulsory for the Director General to include a summary of every failure by a public authority to comply with a pest exclusion notice in the DAF’s next annual report.

Recommendation 12: The Committee recommends that clause 28 of the Biosecurity and Agriculture Management Bill 2006 be amended so that it is compulsory for the Director General to include a summary of every failure by a public authority to comply with a pest exclusion notice in the Department of Agriculture and Food’s next annual report.

2.97 A majority of the Committee (comprised of Hon Giz Watson, Hon Ken Baston and Hon Peter Collier) did not agree fully with the DAF’s argument against the imposition of financial penalties on public authorities, particularly in light of the existence of statutory authorities or government trading enterprises which have some income streams which are independent of the Consolidated Account. These Members suggest that, in addition to a summary of a public authority’s non-compliance appearing in the DAF’s annual report, public authorities should be subject to the same maximum penalty for failing to comply with a pest exclusion notice as members of the public.

Recommendation 13: A majority of the Committee (comprised of Hon Giz Watson, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clause 28 of the Biosecurity and Agriculture Management Bill 2006 be amended so that public authorities are subject to a fine of up to $20,000 for failing to comply with a pest exclusion notice.

CLAUSE 29 - DUTY TO CONTROL DECLARED PEST

Director General’s discretion to report non-compliance by public authorities

2.98 This clause prescribes the ramifications for failing to comply with prescribed control measures in relation to a declared pest. A person who does not comply with the prescribed control measures may be liable to a fine of up to $20,000. In the case of a non-complying public authority however, no fiscal penalty is imposed; instead, the Director General may include a summary of the public authority’s non-compliance in the DAF’s next annual report.

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169 Clauses 29(2) and (3) of the Biosecurity and Agriculture Management Bill 2006.
170 Ibid, clause 29(7).
Committee comment

2.99 The Committee refers to the discussion and comments at paragraphs 2.91 to 2.97 in this Report as they are applicable to this issue.

Recommendation 14: The Committee recommends that clause 29 of the Biosecurity and Agriculture Management Bill 2006 be amended so that it is compulsory for the Director General to include a summary of every failure by a public authority to comply with prescribed control measures in relation to a declared pest in the Department of Agriculture and Food’s next annual report.

Recommendation 15: A majority of the Committee (comprised of Hon Giz Watson, Hon Ken Baston and Hon Peter Collier MLCs) recommends that clause 29 of the Biosecurity and Agriculture Management Bill 2006 be amended so that public authorities are subject to a fine of up to $20,000 for failing to comply with prescribed control measures in relation to a declared pest.

CLAUSE 30 - PEST CONTROL NOTICE

Director General’s discretion to provide copy of pest control notice

2.100 The Manjimup Zone Control Authority suggested that it would be more appropriate to require the Director General, subject to her or his opinion or belief, to provide copies of a pest control notice to people and organisations other than the recipient of the original notice171 (refer to item 15 in Appendix 4 of this Report for a question and answer related to this issue). The Committee was satisfied with the DAF’s response to this suggestion.

CLAUSE 31 - COMPLIANCE WITH PEST CONTROL NOTICE

Director General’s discretion to report non-compliance by public authorities

2.101 This clause prescribes the ramifications for non-compliance with a pest control notice issued under clause 30. A person who receives a pest control notice and does not comply with it may be liable to a fine of up to $50,000 (or up to $100,000 and imprisonment for 12 months if the pest control notice involves a high impact organism). In the case of a non-complying public authority however, no criminal penalty can be imposed; instead, the Director General may include a summary of the public authority’s non-compliance in the DAF’s next annual report.

171 Submission No 1 from the Manjimup Zone Control Authority, 5 February 2007, p2.
Committee comment

2.102 The Committee refers to the discussion and comments at paragraphs 2.91 to 2.97 in this Report as they are applicable to this issue.

Recommendation 16: The Committee recommends that clause 31 of the Biosecurity and Agriculture Management Bill 2006 be amended so that it is compulsory for the Director General to include a summary of every failure by a public authority to comply with a pest control notice in the Department of Agriculture and Food’s next annual report.

Recommendation 17: A majority of the Committee (comprised of Hon Giz Watson, Hon Ken Baston and Hon Peter Collier MLcs) recommends that clause 31 of the Biosecurity and Agriculture Management Bill 2006 be amended so that public authorities are subject to a fine of up to $50,000 (or up to $100,000 if the declared pest is a high impact organism) for failing to comply with a pest control notice.

Clause 38 - Power to control pests

Inconsistency with other State legislation

2.103 Clause 38 empowers a person who is required under the BAM Bill to take measures to control a declared pest to do all that is necessary to comply with that requirement. The DEC is concerned that this clause appears to have the potential to come into conflict with the administration and enforcement of, or the exercise of powers given under, other Acts. For example, if a person destroys native flora or fauna consequentially or incidentally to his or her efforts to comply with a requirement under the bill to control a declared pest, they may contravene the native vegetation protection provisions of the Environmental Protection Act 1986 or the flora and fauna protection provisions of the Wildlife Conservation Act 1950.172

2.104 It appeared to the Committee that other provisions in the BAM Bill could also potentially conflict with other State legislation. For example, clauses 41, 42 and 71(3) all authorise the doing of certain things which are necessary to achieve certain biosecurity goals.

2.105 In response to this issue, the DAF advised the Committee that it had considered this potential conflict with other Acts and that any potential conflicts would be minimised.

172 Submission No 7 from the Department of Environment and Conservation, 5 February 2007, p3.
or avoided by, essentially, the careful enforcement of all legislation dealing with biosecurity, the environment and agriculture. This would involve:

- Appropriately framed pest control notices.
- Regulations that take account of other legislation where necessary.
- The likelihood that consequential or incidental destruction of native flora would be covered by clause 1 of Schedule 6 of the Environmental Protection Act 1986 (clearing that is done in order to give effect to a requirement to clear under a written law).
- Sensible enforcement of the Environmental Protection Act and the Wildlife Conservation Act.

In its response to the Committee, the DAF also indicated that recourse would be made to clause 3(2) of the BAM Bill if necessary. The effect of clauses 3(2) and (3) is that any inconsistency between a provision in the BAM Bill and a provision in an Act listed in clause 3(2) will be resolved in favour of the latter provision. However, the Committee noted that while clause 3(2) lists seven Western Australian Acts, it does not list the Environmental Protection Act 1986 or the Wildlife Conservation Act 1950. The rule of interpretation known as expressio unius would apply in this case to specifically exclude both these Acts from the operation of clause 3(2) and (3). After seeking clarification on this point, the DAF advised the Committee that it had referred to clause 3(2) in mistake. While the DAF was open to the possibility of including the Environmental Protection Act 1986 in clause 3(2) as an Act which would prevail over the proposed Act, it was against including the Wildlife Conservation Act 1950 in the list of prevailing Acts because the DAF considers that the Wildlife Conservation Act 1950 “establishes a rather antiquated regulatory scheme”.

Interestingly, section 5 of the Environmental Protection Act 1986 already provides that it is to prevail over any other inconsistent State legislation.

173 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 February 2007, Attachment, p3.
174 Ibid.
175 Ibid.
177 Letter from Mr Graeme Wilson, Director, Planning and Policy, Department of Agriculture and Food, 28 February 2007, Attachment, p6.
178 Ibid.
Committee comment

2.108 The Committee was dissatisfied with the DAF’s responses in regard to the above issues, where they relate to the *Environmental Protection Act 1986*, and suggests that the *Environmental Protection Act 1986* should be included in the list of prevailing Acts in clause 3(2).

**Recommendation 18: The Committee recommends that the *Environmental Protection Act 1986* be listed in clause 3(2) of the Biosecurity and Agriculture Management Bill 2006.**

2.109 A majority of the Committee (comprised of Hon Graham Giffard, Hon Sally Talbot, Hon Ken Baston and Hon Peter Collier) accepted advice from the DAF that the *Wildlife Conservation Act 1950* “establishes a rather antiquated regulatory scheme”\(^\text{179}\). These Members noted the DAF’s advice that all legislation dealing with biosecurity, the environment and agriculture would be carefully enforced in order to minimise or avoid potential conflicts between the various written laws.

2.110 Hon Giz Watson was also dissatisfied with the DAF’s responses in regard to the above issues where they relate to the *Wildlife Conservation Act 1950*. The Member considered that, regardless of whether the *Wildlife Conservation Act 1950* “establishes a rather antiquated regulatory regime”\(^\text{180}\), the BAM Bill should contain a mechanism for resolving any potential inconsistencies between the proposed Act and the *Wildlife Conservation Act 1950*. In the case of any inconsistencies between the proposed Act and the *Wildlife Conservation Act 1950*, Hon Giz Watson suggests that the latter Act should prevail.

**CLAUSE 39 - AGREEMENTS TO SUPPLY PEST CONTROL MATERIALS**

**Inconsistency between clauses 3(3) and 39(3)**

2.111 As a result of the Committee’s inquiry, the DAF advised the Committee that the Government intends to amend clause 3(3) so that it is clear that it is subject to the operation of clause 39(3)\(^\text{181}\). For comments on this issue, the Committee refers to items 18 and 19 in Appendix 4.

2.112 The DAF’s proposed amendment to clause 3(3) and the corresponding explanatory note, as at 20 March 2007, appear at item 2 in Appendix 4. The Committee was satisfied with the proposed amendment.

\(^{179}\) Ibid.

\(^{180}\) Ibid.

\(^{181}\) Ibid, pp4 to 5.
CLAUSE 41 - DEPARTMENT MAY CARRY OUT OPERATIONAL WORK

Entry into private property to conduct operational work

2.113 The Committee queried the effect of clause 41 in terms of DAF officers and inspectors entering into private property and whether their entry would be regulated\(^\text{182}\) (refer to item 20 in Appendix 4 of this Report for questions and answers related to these issues). The Committee was satisfied with the DAF’s response to these concerns.

CLAUSE 42 - DIRECTOR GENERAL MAY GIVE DIRECTIONS FOR URGENT MEASURES TO CONTROL DECLARED PEST

Inconsistency with Commonwealth legislation

2.114 The Australian Government Department of Agriculture, Fisheries and Forestry raised concerns about potential inconsistencies between directions issued under clause 42 of the BAM Bill and the enforcement of Commonwealth legislation\(^\text{183}\) (refer to item 21 in Appendix 4 of this Report for questions and answers related to these issues). The Committee was satisfied with the DAF’s response to these concerns.

CLAUSE 44 - MANAGEMENT PLANS

Consultation with other Ministers

2.115 Clause 44 empowers the Minister to issue management plans for the control of declared pests in an area. Management plans are subject to the publication and tabling requirements of Part VI of the *Interpretation Act 1984*, and are disallowable instruments.\(^\text{184}\)

2.116 Subclause (5) requires the Minister to consult with, and obtain the approval of, certain Ministers prior to issuing a management plan. Where a management plan relates to:

- a fish or a declared pest in an aquatic environment, the plan must first be approved by the Minister for Fisheries; and
- a declared pest that is an animal native to Australia, other than a fish, the plan must first be approved by the CALM Act Minister.

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\(^{182}\) Letter to Department of Agriculture and Food, 1 February 2007, Enclosure, p2.

\(^{183}\) Submission No 8 from Australian Government Department of Agriculture, Fisheries and Forestry, 12 February 2007, Attachment A, p3.

\(^{184}\) Clause 46 of the Biosecurity and Agriculture Management Bill 2006.
2.117 The Committee considered that it is appropriate that the consultation requirements for management plans, given the strategic and collaborative nature of these plans, differ from those for declarations as to permitted organisms, prohibited organisms and declared pests. However, the Committee suggests that:

- given the Minister for the Environment’s responsibility for the whole environment, including the aquatic environment; and

- given the CALM Act Minister’s responsibility for marine nature reserves, marine parks and marine management areas, as defined in the Conservation and Land Management Act 1984,

the Minister should also be required to obtain the prior approval of:

- the Minister for the Environment and the CALM Act Minister when issuing a management plan in relation to a fish (or a declared pest in an aquatic environment); and

- the Minister for the Environment when issuing a management plan in relation to a declared pest that is an animal native to Australia (other than a fish).

Recommendation 19: The Committee recommends that clause 44 of the Biosecurity and Agriculture Management Bill 2006 be amended so that:

(a) a proposed management plan in relation to a fish (or declared pest in an aquatic environment) can only be issued by the Minister after the Minister administering the Fish Resources Management Act 1994, the Minister administering the Environmental Protection Act 1986 and the Minister administering the Conservation and Land Management Act 1984 have first approved the proposed management plan; and

(b) a proposed management plan in relation to a declared pest that is an animal native to Australia (other than a fish) can only be issued by the Minister after the Minister administering the Environmental Protection Act 1986 and the Minister administering the Conservation and Land Management Act 1984 have first approved the proposed management plan.

PART 2, DIVISION 6 - BIOSECURITY COUNCIL

Membership of Biosecurity Council

2.118 Clause 47 of the BAM Bill provides that the Minister must establish a Biosecurity Council. The functions of the Biosecurity Council will be to advise the Minister or
the Director General on any matter related to biosecurity, whether that matter is referred by the Minister or the Director General, or the matter is considered by the Biosecurity Council of its own motion.\textsuperscript{185} It is anticipated that the Biosecurity Council will consist of around 10 members.\textsuperscript{186}

2.119 There was a lot of interest in the membership of the Biosecurity Council, particularly during the public consultation on the Green Bills. Some stakeholders, such as the Western Australian Local Government Association (WALGA), The Western Australian Farmers Federation and the Faculty of Natural and Agricultural Sciences of The University of Western Australia,\textsuperscript{187} indicated that they would appreciate the opportunity for their interests or their members’ interests, as the case may be, to be represented on the Biosecurity Council.\textsuperscript{188}

2.120 Rather than seeking membership on the Biosecurity Council:

- the PGA indicated that it would look forward to having input into any further development of the functions, constitution, membership and procedures of the Biosecurity Council;\textsuperscript{189}

- the Conservation Council of Western Australia submitted that the Biosecurity Council must include equal weighting of government (State and local), industry and community representation;\textsuperscript{190} and

- the Jerramungup Zone Control Authority suggested that there should be adequate agricultural representation on the Biosecurity Council.\textsuperscript{191}

2.121 The Committee noted that clause 48 of the BAM Bill directs the Minister as to the appropriate persons to be appointed to the Biosecurity Council by requiring members to have an interest and expertise in the management of biosecurity in the State and by

\textsuperscript{185} Clause 49 of the Biosecurity and Agriculture Management Bill 2006.

\textsuperscript{186} Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 February 2007, Attachment, p4.

\textsuperscript{187} Refer to item 22 in Appendix 4 of this Report.

\textsuperscript{188} Submission from the Western Australian Local Government Association to the Department of Agriculture and Food, 31 March 2006, p1; Submission from The Western Australian Farmers Federation to the Department of Agriculture and Food, 27 March 2006, p1; Submission No 3 from The Western Australian Farmers Federation, January 2007, p2; and Submission No 5 from the Faculty of Natural and Agricultural Sciences, The University of Western Australia, 16 January 2007, p2.

\textsuperscript{189} Submission from the Pastoralists and Graziers Association of WA (Inc) to the Department of Agriculture and Food, 31 March 2006, p3.

\textsuperscript{190} Submission from the Conservation Council of Western Australia to the Department of Agriculture and Food, 31 March 2006, p5.

\textsuperscript{191} Email from Chairman, Jerramungup Zone Control Authority, 30 March 2006, Department of Agriculture and Food, \textit{Biosecurity and Agriculture Management Bill 2005: Public Consultation Report}, May 2006, p79.
requiring the representation of community and producer organisations on the Biosecurity Council:

48. **Membership of Biosecurity Council**

(1) The Biosecurity Council must —

(a) be comprised of members who, in the opinion of the Minister, have a general or specific interest and expertise in the management of biosecurity in the State; and

(b) include members of community and producer organisations.

(2) The regulations may make provision for the nomination of members referred to in subsection (1) by prescribed community and producer organisations.

2.122 The DAF indicated that it is intended that the regulations made pursuant to clause 48(2) will prescribe the WALGA as an organisation which can nominate a person for appointment to the Biosecurity Council.\(^\text{192}\) Peak industry bodies representing the majority of farmers’ interests may also be prescribed in this way.\(^\text{193}\) In response to the request from the Faculty of Natural and Agricultural Sciences of The University of Western Australia to be represented on the Biosecurity Council, the DAF advised the Committee that:

> Clearly it is quite possible that a person from the faculty of Natural and Agricultural Sciences at the University of Western Australia or from another academic or research institution would be an appropriate appointment to the Council. It should be noted, however, that such a person would not be appointed as a representative of the institution to which they belong but as an individual with the requisite interest and expertise. Similarly, members of community and producer groups appointed as required by clause 48(1)(b) will not be appointed to represent those organisations, as such, although the specific mention is included to ensure that the interests of the sectors of industry, and the community that those organisations represent are brought to the Council.\(^\text{194}\)


\(^{193}\) *Ibid*, p78.

\(^{194}\) Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 February 2007, Attachment, p4.
2.123 A search of Western Australian legislation for the membership of ministerial councils revealed that it is usual legislative practice not to name individual members but to describe the qualifications, skills, knowledge, training and experience which are expected of the members. Occasionally, the legislation will nominate *ex officio*\(^{195}\) council members or prescribe that a council member is to hold a certain office or position. One Act, the *Soil and Land Conservation Act 1945*, goes as far as prescribing the organisations which may nominate a council member or a group of persons from which a council member will be appointed.

*Committee comment*

2.124 The Committee is satisfied that Part 2, Division 6, and in particular, clause 48:

- is appropriately drafted;
- is consistent with sound legislative practice; and
- can potentially accommodate the various requests and comments made by stakeholders with respect to the membership of the Biosecurity Council.

**PART 3, DIVISION 2 - CHEMICAL PRODUCTS**

*Coordinated development of regulations made under Part 3, Division 2*

2.125 The DOH stressed that regulations made under Part 3, Division 2 of the BAM Bill for the control of chemical products beyond the point of sale must be drafted in conjunction with the current review of legislation controlling the use of pesticides in the State.\(^{196}\) The Committee also inquired about the progress and the process of the drafting of the regulations.\(^{197}\) Refer to items 26 and 27 in Appendix 4 of this Report for questions and answers related to this issue. The Committee was satisfied with the DAF’s responses.

**CLAUSE 65 - ENTRY AND ACCESS TO PLACE OR CONVEYANCE, AND INSPECTION POWERS**

*Entry into dwellings for inspection purposes*

2.126 The Committee queried the effect of clause 65 in terms of DAF inspectors entering into private property and whether their entry would be regulated.\(^{198}\) The Australian Government Department of Agriculture, Fisheries and Forestry raised a concern about the regulation of DAF inspectors entering Australian Quarantine Inspection Service

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\(^{196}\) Submission No 7 from the Department of Environment and Conservation, 5 February 2007, p2.

\(^{197}\) Letter to Department of Agriculture and Food, 22 February 2007, Enclosure 1, p5.

\(^{198}\) Letter to the Department of Agriculture and Food, 1 February 2007, Enclosure, p3.
quarantine facilities. Refer to items 28 and 29 in Appendix 4 of this Report for questions and answers related to these issues. The Committee was satisfied with the DAF’s response to these concerns.

**CLAUSE 79 - TREATMENT OR DESTRUCTION TO PREVENT RISK**

**Reversal of onus of proof**

2.127 This clause authorises the Director General to issue a notice to an owner of an organism or a potential carrier to treat or destroy the organism or potential carrier, and any progeny of the organism, if the Director General has reasonable grounds to believe that the organism, a progenitor of that organism or the potential carrier was imported into the State or transported within the State in breach of the proposed Act. Subclause (4) provides that the owner commits an offence if she or he contravenes the notice, “*unless that person has a lawful excuse for the contravention*”.

2.128 At common law, it is ordinarily the duty of the prosecution, not the accused, to prove all elements of an offence.\(^{199}\) This requirement is central to the common law right of a person to be presumed innocent until proven guilty beyond reasonable doubt.\(^{200}\) The Committee noted that in Western Australia, the criminal law is not based on the common law but is principally based on the *Criminal Code*.\(^{201}\) However, as the *Criminal Code* is silent in relation to the onus or legal burden of proof, it has been accepted that the rule in *Woolmington v Director of Public Prosecutions* [1935] AC 462 operates with respect to criminal proceedings.\(^{202}\)

2.129 A statutory provision will reverse the onus of proof if it requires the person charged with an offence to prove or disprove some matter in order to establish his or her innocence. Generally, a reversal of onus of proof should be opposed unless the subject matter is peculiarly within the knowledge of the accused and it would be extremely difficult, or very expensive, for the prosecution to prove. For example, the relevant fact must be something inherently impractical to test by alternative evidentiary means and the accused would be particularly well-positioned to disprove guilt.\(^{203}\)

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\(^{199}\) See for example, *Director of Public Prosecutions v United Telecasters* (1990) 91 ALR 1 at p5, citing *Woolmington v Director of Public Prosecutions* [1935] AC 462, at pp481 to 482.


\(^{201}\) Section 2 of the *Criminal Code Act 1913*; and RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p1. See also *R v Susanne Dorothy Hutchinson* [2003] WASCA 323 (Unreported, Malcolm CJ, Stettler and McKechnie JJ, 18 December 2003), paragraph 33.


\(^{203}\) See for example, Parliament of Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report 3, *Economic Regulation Authority Bill 2002*, May 2003, p22.
2.130 In any prosecution conducted pursuant to clause 79, subclause (4), when read with clause 114(b), reverses the onus of proof in relation to an element of the offence - whether or not a person has a lawful excuse for contravening the notice. In the absence of clause 114(b), the prosecution would be responsible for adducing evidence to prove beyond a reasonable doubt that a person did not have a lawful excuse for contravening the notice. Put another way, once the prosecution has proven that the accused owner contravened the notice, the effect of clause 79(4), when read with 114(b), is that the accused owner will need to prove that she or he had a lawful excuse for contravening the notice in order to avoid criminal liability.

2.131 The DAF indicated that the evidentiary provisions in the BAM Bill are no more onerous than those contained in the existing legislation, some of which are to be replaced. The Committee compiled a list of clauses which it considered had the potential to reverse the onus of proof or amount to averment provisions. However, when the Committee asked the DAF to identify the equivalent provisions in the existing legislation to the clauses in the Committee’s list, it was clear, at least in some cases, that some evidentiary provisions in the BAM Bill are more onerous.

2.132 In relation to clause 79(4), the DAF advised the Committee that the subclause is a newly-added feature:

Clause 79 is a provision identified some years ago as an area in which the current legislation is seriously lacking and that needed to be rectified by the Bill. A notice given under this section must be complied with but the provision would be substantially more onerous without clause 79(4).

2.133 It was also noted by the DAF that section 78 of the Criminal Procedure Act 2004 provides that, in simple offences, the burden of proof in relation to any exception,

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204 “In any proceedings under this Act the onus of proving that — ... (b) anything was done or omitted to be done with lawful excuse or authority or reasonable excuse; ... lies upon the person making that assertion.”


206 As to ‘averment’ provisions, refer to the discussion at paragraphs 2.162 to 2.163 in this Report.

207 Refer to item 76 in Appendix 4 of this Report.

208 Refer to item 76 in Appendix 4 of this Report.

209 Letter from Mr Graeme Wilson, Director, Planning and Policy, Department of Agriculture and Food, 28 February 2007, Attachment, p11.

210 ‘Simple offence “means an offence that is not an indictable offence”. An “indictable offence” is defined as “a crime or any other offence described by a written law as an indictable offence, irrespective of whether in some circumstances it may be dealt with summarily”: section 3 of the Criminal Procedure Act 2004. Indictable offences are those which are “triable by a judge and jury”: Dr P Nygh and P Butt, Editors, Butterworths Australian Legal Dictionary, Butterworths, Australia, 1997, p589.
condition, excuse, exemption, proviso or qualification in an offence lies on the defendant.\textsuperscript{211}

Committee comment

2.134 While the Committee understood that the intent of inserting the phrase ‘unless that person has a lawful excuse for the contravention’ was to provide an owner who is accused of contravening a treatment or destruction notice issued under clause 79(1) with a defence to the offence, it was of the view that the inclusion of the phrase, coupled with the effect of clause 114(b):

- increases the evidentiary burden on the accused owner; and
- decreases the evidentiary burden on the prosecution.

2.135 However, the Committee was also of the view that the accused owner would be well-placed to prove that she or he had a lawful excuse for contravening the notice and it may be extremely difficult, or very expensive, for the prosecution to prove otherwise. Accordingly, the Committee believed that, in this case, the reversal of onus of proof is reasonable.

CLAUSE 84 - RECALL OF ORGANISM OR SUBSTANCE

Reversal of onus of proof

2.136 Clause 84 makes it an offence for a person who has, or has had, possession or control of a prohibited organism or a recallable substance to fail to comply with a notice issued under that clause. Subclause (5), when read with clause 114(b), reverses the onus of proof in relation to an element of the offence - whether or not a person has a lawful excuse for failing to comply with the notice.

Committee comment

2.137 For reasons which are similar to those discussed at paragraphs 2.134 to 2.135 in this Report, the Committee considered that, in this case, the reversal of onus of proof is reasonable.

CLAUSE 92 - OFFENCES

Reversal of onus of proof

2.138 This clause makes it an offence for a person to:

\textsuperscript{211} Letter from Mr Graeme Wilson, Director, Planning and Policy, Department of Agriculture and Food, 28 February 2007, Attachment, p12.
• wilfully obstruct, hinder or resist, or fail to comply with the request of, a person enforcing the proposed Act (subclause (a), (b), (c) and (d)); or

• wilfully make a false statement to, or mislead, an inspector (subclause (e)).

2.139 Subclauses (a), (b), (c) and (d), when read with clause 114(b), reverse the onus of proof in relation to an element of the offence - whether or not a person has a lawful excuse for her or his acts or omissions.

Committee comment

2.140 For reasons which are similar to those discussed at paragraphs 2.134 to 2.135 in this Report, the Committee considered that, in these cases, the reversals of onus of proof are reasonable.

CLAUSE 93 - SELF-INCRIMINATING INFORMATION

Person must object to giving self-incriminating information before being protected

2.141 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production of the document would tend to incriminate that person or expose them to a civil penalty. The privilege against self-incrimination protects not only from direct incrimination, but also from making a disclosure that may lead indirectly to incrimination or to the discovery of other evidence of an incriminating nature. It is one of several immunities that, together, make up what is commonly referred to as ‘the right to silence’. Other immunities encompassed by the right to silence include:

• those possessed by people suspected of or charged with a criminal offence from being compelled to answer questions at a police interrogation; or

• that which protects an accused person from having to give evidence at trial.

2.142 Clause 93 abrogates, at least partly, the privilege against self-incrimination. It provides that a person is not excused from giving any information to an inspector on the ground that the information might tend to incriminate the person or render them liable to a penalty. Some protection (the information is not admissible in evidence in

\(\text{Pyneboard Pty Ltd v Trade Practices Commission} (1983) 152 \text{CLR} 328 \text{at p335.}\)

\(\text{Ibid} \text{, at paragraph 2.1.}\)
civil or criminal proceedings against the person) against the requirement to give the self-incriminating information is provided in subclause (2), but only after the person objects to the requirement to provide self-incriminating information.

2.143 When the Committee queried why the protection is not given automatically, the DAF advised that:

The “objection” formula in relation to incriminating information was used because it is used in other Western Australian legislation and seemed appropriate for the purposes of the BAM Bill, whereas an automatic protection would have been unnecessarily restricting. For Western Australian examples see s.13A(5) Aerial Spraying Control Act 1966; s.23 Australian Crime Commission (Western Australia) Act 2004; s.19(2) Caravan Parks and Camping Grounds Act 1995; s.15 Energy Coordination Act 1994; s.69 Energy Operators (Powers) Act 1979; s112A Environmental Protection Act 1986; s.17(5) Exotic Diseases of Animals Act 1993; s.46 First Home Owner Grant Act 2000. The formula is also routinely used by the Commonwealth.

2.144 The Committee noted that the Queensland Parliament’s Scrutiny of Legislation Committee, when considering an abrogation of the privilege against self-incrimination, has adopted a benchmark that a person should not be required to fulfil any condition, such as formally claiming the right to remain silent, in order to secure a restriction on the use of the information that is given.

Committee comment

2.145 While the Committee accepted that the abrogation of the privilege against self-incrimination is justifiable for biosecurity reasons, it was of the view that it is unreasonable to require a person to object to providing information on self-incriminating grounds in order for the restriction on the use of the information to be triggered. The Committee was concerned that members of the public may not be aware of the privilege and/or may not be aware of the requirement to object (before giving the information) in order to access the protection offered by clause 93(2). Therefore, the Committee believed that the protection against the use of the information should be automatic and unconditional.

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216 Except in relation to proceedings for perjury or for offences arising under the Biosecurity and Agriculture Management Bill 2006 because the person gave false or misleading information: clause 93(2) of the Biosecurity and Agriculture Management Bill 2006.

217 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p3.

2.146 With respect, the Committee was not satisfied with the DAF’s response on this issue. The Committee was not convinced that the ‘objection formula’ is appropriate in this case simply because it has been utilised in other State and Commonwealth legislation.

Recommendation 20: The Committee recommends that clause 93 of the Biosecurity and Agriculture Management Bill 2006 be amended so that it is no longer necessary for a person to object to giving information in order for that information to be inadmissible in any civil or criminal proceedings against her or him except in proceedings for perjury or for an offence under the Bill arising out of the person giving false or misleading information.

Person is only protected against direct use of self-incriminating information

2.147 Clause 93(2) only protects the person giving the information against the ‘direct use’, rather than the ‘derivative use’, of the information. Direct use immunity:

> prevents the subsequent admission of evidence of the fact of a disclosure made under compulsion, or of the information disclosed, in a proceeding against the individual who was compelled to provide the information.219

2.148 This form of protection does not provide the same protection as the common law privilege against self-incrimination because it does not also prevent the information which is provided from being used as a basis for obtaining other evidence to be used against the person in question. In other words, derivative use immunity prevents the use of information gained under compulsion to “uncover other evidence against the individual who provided the information”.220

2.149 When the Committee queried why the protection in clause 93(2) does not extend to derivate use immunity, the DAF provided the following advice:

> Protection against use as evidence of this information, if it might be incriminating, was not included because it did not occur to anyone to include it and as far as the Department and the drafter are aware it is not found in any other Western Australian legislation. Section 112A(3) of the Environmental Protection Act 1986 specifically

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provides that derived information is admissible but the Department does not see a need for a provision such as that.\textsuperscript{221}

2.150 Despite that advice, the Committee noted section 373(1) of the \textit{Offshore Minerals Act 2001}, which does provide derivative use immunity:

\begin{quote}
373. \textbf{Immunity from use of information etc. given in response to request under section 367, 368, 369, 370 or 371}

(1) Where a person gives the Minister information in response to a request under section 367 or 368, or to a question under section 369(1), the following are not admissible in evidence against the person in any proceedings —

(a) the document containing the information given in response to the request;

(b) the answer to the question; or

(c) any information, document or thing obtained as a direct or indirect consequence of the giving of the information or answer.
\end{quote}

\textit{Committee comment}

2.151 With respect, the Committee was not satisfied with the DAF’s remarks about this issue.

2.152 Due to the fact that clause 93 compels a person to give self-incriminating information, the Committee considered that the clause should include a protection against any indirect or derivative use of that information.

\textsuperscript{221} Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p3.
Recommendation 21: The Committee recommends that clause 93 of the Biosecurity and Agriculture Management Bill 2006 be amended so that any information, document or thing obtained as a direct or indirect consequence of:

(a) the information; and

(b) the fact that the information was given,

is not admissible in any civil or criminal proceedings against the person giving the information, except in proceedings for perjury or for an offence under the Bill arising out of the person giving false or misleading information.

CLAUSE 94 - TAKING REMEDIAL ACTION

Entry into private property

2.153 As a result of the Committee’s inquiry, the DAF advised the Committee that the Government intends to amend clause 94 so that it is clear that the Director General’s power to take ‘remedial action’ is concomitant with a power to enter private land. In this regard, the Government intends to make reference to the powers of entry in clauses 65(1)(b), 222 (c), 223 and (d), 224 225. For comments on this issue, the Committee refers to item 32 in Appendix 4.

2.154 The DAF’s proposed amendments to clause 94 and the corresponding explanatory note, as at 20 March 2007, appear at item 33 in Appendix 4. It appears from these amendments that reference will also be made to the powers provided in clauses 65(1)(e) 226 and (f) 227. The Committee was satisfied with the proposed amendments.

222 The power, at any time, to enter a place that is not a dwelling.
223 The power, at any time, to enter a dwelling with the consent of the person apparently in control of the dwelling.
224 The power, at any time, to enter a place, including a dwelling, in accordance with an entry warrant.
225 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, pp3 to 4.
226 The power to take onto or into the place any assistants, contractors, animals, vehicles, instruments, equipment or materials, for as long as is necessary to complete the inspection.
227 The power to remain on or in the place, with the assistants, contracts, animals, vehicles, instruments, equipment or materials, for as long as is necessary to complete the inspection.
Clause 95 - Charge on land to secure cost of remedial action

Unreasonable effect

2.155 Under clause 95, where ‘remedial action’ is taken by the Director General against an owner of land under clause 94, the cost of taking the remedial action is a charge on the land.\(^{228}\) If the amount payable (known as the ‘charge amount’) is not paid by the due date, the Director General may lodge a memorial of the charge with the Registrar of Titles.\(^{230}\) One effect of registering a memorial on the land is that no instruments to transfer the land may be registered after the memorial is registered without the consent of the Director General.\(^{231}\) Clause 95(3) provides that the charge amount is taken not to be paid by the due date if a cheque that is presented by the landowner in purported payment of the charge amount is dishonoured on the first presentation – this is the case even though the due date may not have arrived when the cheque is dishonoured. If no cheques are presented prior to the due date, clause 95 makes no provision for the registration of a memorial on the land prior to the due date.

2.156 The rationale for clause 95(3) is that it “provides some certainty by putting the onus on the payer to ensure a cheque is honoured and avoids the Department having to re-present cheques.”\(^{232}\)

Committee comment

2.157 The Committee observed that clause 95(3) could, in effect, potentially disadvantage landowners who intend to pay for the charge amount ahead of the due date, compared to landowners who intend to pay for the charge amount on the due date or have no intent at all to pay for the charge amount.

2.158 A cheque may be dishonoured for various reasons, some of which are innocent and inadvertent. The Committee was concerned that a cheque which is presented by a well-meaning landowner ahead of the due date could be dishonoured for reasons beyond her or his control, and, as a result, a memorial may be registered on the certificate of title for their land prematurely. Conversely, a landowner who chooses not to pay the charge amount on the due date is not exposed to the possibility of a memorial being registered on the certificate of title for their land until on or after the due date.

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\(^{228}\) In this context, a ‘charge’ is “a form of security for the payment of a debt or performance of an obligation, consisting of the right of a creditor to receive payment out of some specific fund or out of the proceeds of the realisation of specific property.”: L. Rutherford and S. Bone, Editors, Osborn’s Concise Law Dictionary, 8th Edition, The Law Book Company, Perth, 1993, p66.

\(^{229}\) Clause 95(1) of the Biosecurity and Agriculture Management Bill 2006.

\(^{230}\) Ibid, clause 95(2).

\(^{231}\) Ibid, clause 97.
2.159 With respect, the DAF’s rationale for clause 95(3) is only relevant if a landowner who is in debt to the Government for a charge amount attempts to pay the charge amount (using a cheque) before it is due. The Committee was of the view that clause 95(3) is unreasonable and inequitable in its effect and recommends that it be deleted.

Recommendation 22: The Committee recommends that clause 95(3) of the Biosecurity and Agriculture Management Bill 2006 be deleted.

CLAUSE 98 - RECOVERY OF UNPAID CHARGE AMOUNT

Power to sell

2.160 This clause allows land (whether it is privately or publicly owned) which is charged with the cost of remedial action (known as the ‘charge amount’) undertaken by the Director General to be sold in order to recover the charge amount if it remains unpaid after the due date.233 The DAF advised the Committee that:

action by the Director General to force the sale of land to recover an unpaid charge amount would only be taken as a last resort. The Director General would only consider this course of action if the amount unpaid was substantial and all other avenues to recover it had been exhausted.234

Committee comment

2.161 The Committee supported the DAF’s proposed approach to the exercise of the power of sale conferred by clause 98. The Committee was of the view that it was necessary for clause 98 to reflect this approach expressly.

Recommendation 23: The Committee recommends that clause 98 of the Biosecurity and Agriculture Management Bill 2006 be amended to include a requirement that the power of sale should only be exercised after all other avenues of recovering the amount charged on land pursuant to clause 95 have been exhausted.

232 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p4.
233 Explanatory Memorandum for Biosecurity and Agriculture Management Bill 2006, p34.
234 Letter from Mr Graeme Wilson, Director, Planning and Policy, Department of Agriculture and Food, 28 February 2007, Attachment, p8.
Averment clauses

2.162 Clauses 105(3), 115 to 120, and 123(3) of the BAM Bill are ‘averment clauses’. These types of clauses generally allow statements of fact made by the prosecution to be accepted as proved unless the accused brings evidence before the court to rebut them and are distinct from reversals of the onus of proof. ‘Averment clauses’ and the issues surrounding them were discussed by the former Uniform Legislation and General Purposes Committee (2002 to 2005).236

2.163 By way of an example of how one of these averment clauses operates, clause 123(3) provides that an averment in a claim, prosecution notice or other document in proceedings under the BAM Bill that a person is or was at a specified time, the owner or occupier of specified land is, in the absence of evidence to the contrary, taken to be proved. If a prosecution notice specifies that an accused person was the owner of a property at a specified time, and the accused person shows that there is sufficient evidence that the truth of that claim should be disputed (this is known as the ‘evidential burden’), the legal burden of proving the initial claim would still be on the prosecution. The words, ‘in the absence of evidence to the contrary’ would not require the accused person to prove anything.

2.164 In relation to clauses 115 to 120 and 123(3), the DAF provided the following advice:

most of the provisions in Part 5, Division 3 of the Bill are largely drawn from provisions that appear in Acts that are to be repealed. Some of them relate to acts done officially which ought not to be required to be put to proof unless contested - a presumption of regularity. It would place a huge and unnecessary burden on the prosecution and the courts if evidence had to be led in relation to all of these matters. As it is, evidence has to be led if the matter is contested. Other provisions are not really capable of proof by the prosecution - for example to prove that something was done without lawful authority places an impossible burden on the prosecution but it is relatively simple for the defence to prove that there was lawful authority.

Committee comment

2.165 The Committee considered that clauses 105(3), 115 to 120, and 123(3) fall within a class of averment clauses which are acceptable because they relate to matters of formal proof and/or matters peculiarly within the defendant’s knowledge.

2.166 However, it was noted by the Committee that clause 117 (which provides averments as to purpose and intent) seems unusually broad - effectively creating strict liability. While the DAF advised the Committee that clause 117 is equivalent to the current section 66 of the *Veterinary Chemical Control and Animal Feeding Stuffs Act 1976*, the Committee observed that the effect of clause 117 is much broader than that of section 66.

Division 2 - Responsibility of certain persons

Vicarious liability of certain persons

2.167 The clauses in Part 5, Division 2 (clauses 110, 111 and 112) each provide for certain persons (officers of bodies corporate, principals of agents and employers of employees, respectively) to be liable for the offences of other persons (their bodies corporate, their agents and their employees, respectively).

2.168 For example, under clause 112, if an employee is charged in her or his capacity as an employee with an offence under the BAM Bill, her or his employer may also be charged with the offence whether or not the employee acted without the employer’s authority or contrary to the employer’s orders or instructions. If the employee is then convicted of the offence, the employer is taken to have also committed the offence. The employer may also be charged with the offence even if the employee is not charged with the offence.

2.169 The DAF’s explanation of the rationale for clause 112 also applies to clauses 110 and 111:

*The rationale for this clause is the principle that employer’s have a responsibility not only to not direct or authorise the commission of an offence by an employee but to take reasonable measures to ensure that offences are not committed by employees. Where the employer has done so and does not know about the commission of the offence then that employer has a defence to a charge under this section. Subclause (3) [equivalent to clauses 110(4) and 111(3)] would be used in a situation where the culpability of the employer for failing to take measures to prevent an offence was greater than the culpability*

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of the employee who actually committed the offence, making it unfair to charge the employee. This kind of ‘vicarious liability’ clause is regularly used in legislation creating offences.\(^{238}\)

**Implied exclusion of excuse in section 23 of the Criminal Code and reversal of onus of proof**

2.170 Chapter V of the *Criminal Code* provides excuses and defences to acts or omissions which constitute offences.\(^ {239}\) Section 36 of the *Criminal Code* provides that Chapter V applies to all persons charged with any offence against the statute law of Western Australia.

2.171 Section 23 of the *Criminal Code*, which appears in Chapter V, provides people charged with a statutory offence with the following excuse to alleviate their criminal responsibility:

**23. Accident etc., intention, motive**

Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident. (emphasis added)

2.172 That is, in prosecuting a statutory offence where the evidence indicates that the accused may not have ‘willed’ the act or omission in question, the prosecution must ordinarily negate or disprove that indication in order to succeed.\(^ {240}\) The excuse offered in section 23 of the *Criminal Code* would normally be available to a person who is accused of being liable for the commission of a statutory offence by another person.\(^ {241}\)

2.173 The Committee noted that the effect of clauses 110, 111 and 112 (that is, making a person liable for the act or omission of another person) is that the excuse provided by section 23 is implicitly excluded.\(^ {242}\) Further, clauses 110(6), 111(5) and 112(5) each provide a defence for the officer, principal or employer, respectively. A person

\(^{238}\) Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p4.

\(^{239}\) *Criminal Code Compilation Act 1913*.

\(^{240}\) RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, pp71 and 76; and RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2004, pp90 and 137.

\(^{241}\) *Hunt v Maloney* [1959] Qd R 164; and *Geraldton Fisherman’s Co-operative Ltd v Munro* [1963] WAR 129 at p133.

\(^{242}\) See *Lappan v Hughes* [2003] WASCA 173 at paragraphs 18 and 20, where it was found that the nature of an express statutory defence implicitly excluded the operation of the excuse conferred in section 23 of the *Criminal Code*. 
charged under clauses 110, 111 and 112 will not be found guilty if she or he can prove that:

- the offence was committed without her or his consent or connivance (‘first limb’); and

- she or he took all measures to prevent the commission of the offence that she or he could reasonably have been expected to take having regard to the circumstances (and in the case of the corporate officer, having regard to their functions in the body corporate) (‘second limb’).

2.174 While the ‘first limb’ of the defence still allows the officer, principal or employer to escape criminal liability in cases where the act or omission in question did not occur because of the exercise of their will (which is similar in nature to the section 23 excuse), the difference is that, under the BAM Bill, it will be the accused who must prove this matter and it is no longer incumbent on the prosecution to disprove the matter. In other words, the effect of excluding section 23 of the Criminal Code and providing the above defence is that there is a reversal in the onus of proof.

Committee comment

2.175 The Committee was satisfied with the rationale and effect of clauses 110, 111 and 112. Given that the excuse provided in section 23 of the Criminal Code is implicitly excluded by clauses 110, 111 and 112, regardless of whether the defence in clauses 110(6), 111(5) and 112(5) are also provided, the Committee favoured the inclusion of the express defence in clauses 110(6), 111(5) and 112(5).

2.176 With regard to the reversal of onus of proof which is caused by the clauses, the Committee was of the view that the accused would be well-placed to prove that the offence was committed without her or his consent or connivance. If the excuse in section 23 of the Criminal Code had not been excluded and the express defence in clauses 110(6), 111(5) and 112(5) not been provided, the Committee considered that it may have been extremely difficult, or very expensive, for the prosecution to disprove that the offence occurred without the exercise of the accused person’s will. Accordingly, the Committee believed that, in this case, the reversal of onus of proof is reasonable.

Implied exclusion of ‘mistake of fact’ excuse in section 24 of the Criminal Code and reversal of onus of proof

2.177 Section 24 of the Criminal Code provides as follows:

24. **Mistake of fact**
A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

2.178 Ordinarily, in prosecuting a statutory offence where the evidence indicates that the accused may have held an honest and reasonable, but mistaken, belief while committing the act or omission in question, the prosecution must ordinarily negate or disprove that indication in order to succeed.\(^\text{243}\)

2.179 The nature of the ‘second limb’ of the defence which is provided in clauses 110(6), 111(5) and 112(5), which requires the accused to prove that they had taken all reasonable measures to prevent the commission of the offence, implicitly excludes the operation of section 24 of the *Criminal Code*.\(^\text{244}\) As a result, the ‘second limb’ of clauses 110(6), 111(5) and 112(5) also reverses the onus of proof.

Committee comment

2.180 With regard to the reversal of onus of proof which is caused by the inclusion of the ‘second limb’ of the express defence, the Committee was of the view that the accused would be well-placed to prove that she or he took all reasonable measures to prevent the commission of the offence. If the ‘second limb’ of the express defence in clauses 110(6), 111(5) and 112(5) had not been provided, the Committee considered that it may have been extremely difficult, or very expensive, for the prosecution to disprove the excuse offered in section 24 of the *Criminal Code*. Accordingly, the Committee believed that, in this case, the reversal of onus of proof is reasonable.


\(^{244}\) See Geraldton Fisherman’s Co-operative Ltd v Munro [1963] WAR 129 at p133; McPherson v Cairn [1977] WAR 28 at pp31 to 32, where it was found that the nature of an express defence implicitly excluded the operation of section 24 of the *Criminal Code*; and more recently, Lappan v Hughes [2003] WASCA 173 at paragraphs 18 and 20, where it was also found that the nature of an express statutory defence implicitly excluded the operation of section 24 of the *Criminal Code*. 
Reversals of onus of proof

Clause 114

2.181 As to clause 114 and its potential to reverse the onus of proof, the Committee refers to its discussions at paragraphs 2.127 to 2.135 in this Report.

Clause 121

2.182 Clauses 121(2) and (3) presume that certain documents have been signed by certain persons, such as the Minister, the Director General or their delegates, unless the contrary is “proved”. In the Committee’s view, proof of these matters would be too onerous for the defence and should properly remain the burden of the prosecution. The Committee would be satisfied if the defence was only required to show some evidence to dispute the presumptions, rather than being required to prove that the presumptions are incorrect.

Recommendation 24: The Committee recommends that clauses 121(2) and (3) of the Biosecurity and Agriculture Management Bill 2006 be amended so that the matters provided for in those clauses are presumed only in the absence of evidence to the contrary.

Clause 123

2.183 Subclause (1) provides that certain information is evidence that a person is an owner or occupier of land unless the contrary is “proved”. The Committee would be more satisfied with the subclause if the defence was only required to show some evidence to dispute the forms of information that are listed, rather than being required to prove that they were not the owner or occupier of certain land.

Recommendation 25: The Committee recommends that clause 123(1) of the Biosecurity and Agriculture Management Bill 2006 be amended so that the matters provided for in those clauses are taken to be evidence only in the absence of evidence to the contrary.
CLAUSE 156 - EXECUTION OF DOCUMENTS BY MINISTERIAL BODY

Averment clauses

2.184 Subclauses (6), (8) and (9) are averment clauses\(^{245}\) which presume that certain documents have been properly sealed by the Western Australian Agriculture Ministerial Body, “until the contrary is shown”. The Committee considered these subclauses to be reasonable.

CLAUSE 158 - PUBLICATION OF CERTAIN DECLARATIONS

Publication of non-disallowable declarations

2.185 Among other things, clause 158 provides:

- that declarations as to permitted organisms, prohibited organisms and declared pests are non-disallowable instruments; and
- that publication of these declarations may be effected by publishing the declarations (or notice of the making of the declarations) in the Government Gazette.

2.186 As discussed at paragraphs 2.79 to 2.87 in this Report, the minimum level of publication of a declaration in the Government Gazette, if it is to be published in that document, is for a notification of the making of the declaration to be published. Consolidated lists of declared organisms must also be kept at the DAF’s head office and be available on its website. The Committee reiterates that the BAM Bill does not require declarations (or notice of the making of declarations) to be published in the Government Gazette.

2.187 During public consultation on the Green Bills, the DOF suggested that historical information relating to declarations made under the green BAM Bill would be readily available if the whole declaration was required to be gazetted, in addition to the current consolidated version of each declaration being available through the DAF’s website (and the DAF’s head office). This was a recognition by the DOF that historical information of this nature may be required by the public, legal advisers, the courts and enforcement officers.\(^{246}\)

Committee comment

2.188 The Committee agreed with the DOF’s suggestion and was also of the view that the full publication of declarations in the Government Gazette would assist with the

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\(^{245}\) As to ‘averment’ clauses, refer to the discussion at paragraphs 2.162 to 2.163 of this Report.

\(^{246}\) Submission from the Department of Fisheries to the Department of Agriculture and Food, 29 March 2006, p3.
formal proof of declarations, if that were ever necessary. For these reasons and those discussed at paragraphs 2.79 to 2.87 in this Report, the Committee recommends that the full text of declarations as to permitted organisms, prohibited organisms and declared pests should always be published in the Government Gazette.

Recommendation 26: The Committee recommends that clause 158 of the Biosecurity and Agriculture Management Bill 2006 be amended so that:

(a) a declaration made under clause 10, 11 or 21(2) must be published in the Government Gazette; and

(b) the publication of such a declaration may only be effected by publishing the full text of the declaration in the Government Gazette.

CLAUSE 163 - APPOINTMENT OF INSPECTORS

Skills, knowledge and training of inspectors

2.189 The DOH suggested that the BAM Bill should clearly provide for the skills, knowledge and training that is required of inspectors who will be appointed under the bill\(^\text{247}\) (refer to item 55 in Appendix 4 of this Report for questions and answers related to this issue). The Committee was satisfied with the DAF’s response to this suggestion.

CLAUSE 165 - IDENTIFICATION CARDS

Reversal of onus of proof

2.190 Subclause (4) reverses the onus of proof\(^\text{248}\) by requiring a person who has ceased to be an inspector for the purposes of the BAM Bill to prove that she or he had a reasonable excuse for not returning their identification card to the Director General when they ceased to be an inspector. The Committee considered this subclause to be reasonable.

CLAUSE 178 - TIME OF SERVICE

Unclear wording

2.191 As a result of the Committee’s inquiry, the DAF advised the Committee that the Government intends to amend clauses 178(2) and (3) so that it is clear that these clauses are referring to ‘the fifth business day’ and ‘the 10\(^\text{th}\) business day’,

\(^{247}\) Submission No 4 from the Department of Health, 30 January 2007, p4.

\(^{248}\) As to reversals of onus of proof, refer to the discussion at paragraphs 2.127 to 2.135 of this Report.
respectively. For comments on this issue, the Committee refers to items 56 and 57 in Appendix 4.

2.192 The DAF’s proposed amendments to clause 178 and the corresponding explanatory note, as at 20 March 2007, appear at item 58 in Appendix 4. The Committee was satisfied with the proposed amendments.

CLAUSE 182 - DELEGATION BY MINISTER

Averment clause

2.193 Subclause (5) is an averment clause which presumes that a person exercising or performing a power or duty which is delegated by the Minister is operating within the terms of the delegation, “unless the contrary is shown”. The Committee considered this subclause to be reasonable.

CLAUSE 183 - DELEGATION BY DIRECTOR GENERAL

Averment clause

2.194 Subclause (5) is an averment clause which presumes that a person exercising or performing a power or duty which is delegated by the Director General is operating within the terms of the delegation, “unless the contrary is shown”. The Committee considered this subclause to be reasonable.

CLAUSE 187 - IMMUNITY FROM TORTIOUS LIABILITY

2.195 One of the fundamental principles of law is that all persons are equal before the law, and should therefore be fully liable for their acts or omissions. A law should not confer immunity on a specified person or class of persons from legal proceedings or prosecution without adequate justification. Where such an immunity is conferred on public sector officials or employees, it has been suggested by some Australian parliamentary committees that:

- the immunity should not extend to negligence; and

- the responsible authority should remain liable for damage caused by its negligence, or the negligence of its officers or employees. That is, while civil liability may not attach to an official or employee, liability attaches instead to the State.

249 Letter from Mr Graeme Wilson, Director, Planning and Policy, Department of Agriculture and Food, 28 February 2007, Attachment, p8.

250 As to ‘averment’ clauses, refer to the discussion at paragraphs 2.162 to 2.163 of this Report.

251 As to ‘averment’ clauses, refer to the discussion at paragraphs 2.162 to 2.163 of this Report.
Clause 187 of the BAM Bill confers immunity from actions in tort on the Minister, the Western Australian Agriculture Ministerial Body, the Director General, an inspector or a person employed by the DAF (referred to as ‘officials’) “for anything that the official has done, in good faith, in the performance or purported performance of a function under this ... [bill]” (emphasis added).  

Officials’ immunity

The current wording of this clause suggests that the officials will be protected from being sued for negligence, which is a creature of tort, as long as they have acted in good faith during the performance of a function under the proposed Act. ‘Negligence’ has been described as “breach by the defendant of a legal duty to take care, which results in damage to the plaintiff”\(^254\), while an act done in ‘good faith’ means an act which has been carried out with propriety or honesty\(^255\). The Committee observed that a person who acts negligently can still act in good faith.

In response to the Committee’s query about the rationale for clause 187(3), the DAF advised that:

*The Department is advised by Parliamentary Counsel’s office that clause 187 is the standard provision for protection from liability required to be used by that office. It would be extremely rare for officials acting in good faith on behalf of the State to be subject to personal liability and neither the Department nor the drafter is aware of an example where that is the case.*\(^256\)

The Committee noted that there is legislative precedent in Western Australia for public officials to be protected from tortious liability when acting in good faith *without* also protecting them when they commit negligent acts or omissions. As an example of such a provision, section 125 of the *Taxation Administration Act 2003* is reproduced here for the information of the Legislative Council:

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\(^{252}\) “A civil wrong distinguished from the law of contract, law of restitution, and the criminal law.” ... “Torts serve to protect a person’s interests in his or her bodily security, tangible property, financial resources, or reputation.” ... “The law of torts therefore aims to restore the injured person to the position he or she was in before the tort was committed.”: Dr P Nygh and P Butt, Editors, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, pp1172 to 1173. “A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract, or the breach of a trust or other merely equitable obligation.”: L Rutherford and S Bone, Editors, *Osborn’s Concise Law Dictionary*, 8th Edition, The Law Book Company, Perth, 1993, p326.

\(^{253}\) Clause 187(3) of the Biosecurity and Agriculture Management Bill 2006.


\(^{256}\) Letter from Mr Graeme Wilson, Director, Planning and Policy, Department of Agriculture and Food, 28 February 2007, Attachment, p9.
125. Exemption from personal liability

(1) The Commissioner or an investigator is not personally liable for anything done or omitted to be done in good faith and without negligence in the performance or purported performance, of a function under a taxation Act.

(2) Subsection (1) does not relieve the State of any liability that, but for that subsection, it might have had for the acts or omissions of the Commissioner or an investigator.

Committee comment

2.200 The Committee acknowledged that it is essential for the operation of the proposed Act for the officials to be assured of protection against tortious liability if they are acting in good faith.

The State’s immunity

2.201 Clause 187(5) of the BAM Bill provides that the State is also relieved of any liability that it might otherwise have had for an official’s performance or purported performance of a function under the proposed Act. The DAF provided the following explanation for this clause:

> It is a matter of policy whether or not the State is also exempted from liability. See Dangerous Goods Safety Act 2004 section 32; Civil Judgments Enforcement Act 2004 section 111; Community Protection (Offender Reporting) Act 2004 section 109; Tobacco Products Control Act 2006 section 121; Commissioner for Children and Young People Act 2006 section 59; Criminal and Found Property Disposal Act 2006 section 35 for recent similar examples. Generally if the functions exercised are of a public benefit nature, exemption of the State is considered appropriate. Action where the biosecurity of the State is at risk should not be impeded by possible exposure of the State to liability.257

2.202 The Committee noted that, conversely, there are other Western Australian Acts which do not relieve the State of its liability, if any, for the acts or omissions of its officials. As an example of such legislation, the Committee again refers to section 125 of the Taxation Administration Act 2003, as reproduced in paragraph 2.199 of this Report.

Committee comment

2.203 The Committee considered that, for the purposes of protecting the State against biosecurity risks, it is justifiable for the Parliament to provide the State with immunity from any liability that it might otherwise have had. However, this liability should not extend to the negligent acts or omissions of an official. If the following recommendation is not accepted by the House, the Committee can envisage a very real risk that, for example, a farmer or an aquaculturist could have their business destroyed by the negligence of an officer under the proposed Act.  

Recommendation 27: The Committee recommends that clause 187 of the Biosecurity and Agriculture Management Bill 2006 be amended so that an action in tort can be brought against the State for anything that an official has done in negligence in the performance or purported performance of a function under the proposed Act.

CLAUSE 188 - REGULATIONS - GENERAL POWER

Use of verbs other than ‘prescribe’

2.204 Clause 188(2) supplements the general regulation-making power in subclause (1) by providing that regulations may be made to “provide for, authorise, prescribe, require, prohibit, restrict or otherwise regulate all or any of the matters set out in Schedule 1.”

Committee comment

2.205 The Committee refers to its comments at paragraphs 2.43 to 2.47 in this Report regarding the implications of using different verbs to confer regulation-making powers and makes the following recommendation:

Recommendation 28: The Committee recommends that clause 188(2) of the Biosecurity and Agriculture Management Bill 2006 be amended by deleting the words ‘provide for’, ‘authorise’, ‘require’, ‘prohibit’, ‘restrict’ and ‘otherwise regulate’.

CLAUSE 193 - LOCAL GOVERNMENT MAY MAKE LOCAL LAWS

Prescribing environmental weeds as pest plants

2.206 Clause 193(2)(a) authorises local governments to make local laws for prescribing as a pest plant in their districts any plant (other than a declared pest for that area) that, in their opinion, is likely to adversely affect the value of property in their districts, or

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the health, comfort or convenience of the inhabitants of their districts. It was not readily apparent to the Committee that the highlighted phrase would authorise the prescription of ‘environmental weeds’ as pest plants under local laws.

2.207 ‘Environmental weeds’ were described by the Western Australian Weeds Committee (WAWC) as plants which have “an adverse impact on the environment - including natural ecosystems and the diversity of indigenous flora and fauna.”\(^{259}\) A list of plants which, in the WAWC’s view, are environmental weeds was provided by that committee and is attached as Appendix 7. ‘Agricultural weeds’ are plants which have “an adverse impact on agriculture”, although there is not always a clear distinction between environmental and agricultural weeds.\(^{260}\) For example, the WAWC advised the Committee that wild oats can be considered to be both an environmental and an agricultural weed.\(^{261}\)

2.208 Some stakeholders suggested that clause 193(2)(a) should also allow local governments to make local laws prescribing plants which adversely affect the natural environment or parts of the natural environment as pest plants.\(^{262}\) One of these stakeholders, the Environmental Defender’s Office, argued that the suggested amendment would provide local governments with an additional factor to rely upon when seeking to control pest plants in their districts. The WAWC submitted that, while clause 193(2)(a) did not restrict the prescription of environmental weeds as pest plants, the scope of the clause could be clarified by specifically referring to plants which are likely to adversely affect the environment.\(^{263}\)

2.209 The Committee noted that clause 193 is essentially equivalent to section 110 of the Agriculture and Related Resources Protection Act 1976, which will be replaced by the proposed Act.

2.210 In the DAF’s view, clause 193(2)(a) does not prevent local governments from prescribing environmental weeds of local significance as pest plants, unless those plants are already declared as declared pests pursuant to clause 21 of the BAM Bill:\(^{264}\)

\[
\text{The provisions in this clause do not prevent local government authorities from being able to prescribe environmental weeds of local significance as pest}
\]

\(^{259}\) Letter from Ms Judith Fisher, Chair, Western Australian Weeds Committee, 2 March 2007, p1.
\(^{260}\) Ibid.
\(^{261}\) Ibid.
\(^{262}\) Submission from the Conservation Council of Western Australia to the Department of Agriculture and Food, 31 March 2006, p1; Submission from the Western Australian Weeds Committee to the Department of Agriculture and Food, 30 March 2006, p2; and Submission No 6 from the Environmental Defender’s Office, 5 February 2007, p2.
\(^{263}\) Letter from Ms Judith Fisher, Chair, Western Australian Weeds Committee, 2 March 2007, pp2 and 3.
\(^{264}\) Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 February 2007, Attachment, p5.
plants, as these plants may affect the value of property in a district or the convenience of residents. The terminology used in this clause, is consistent with the terminology currently used in the Agriculture and Related Resources Protection Act 1976. Many environmental [weeds] are already prescribed by local authorities as pest plants. For instance the Town of Kwinana has prescribed bridle creeper (Asparagus asparagoides) and several other environmental weeds as pest plants.

The Committee was also advised that the DAF has previously circulated information to assist local governments with assessing whether a plant should be prescribed as a pest plant under their local laws. This information, titled, Prescribing Pest Plants - General Guidelines to Assess Plants for Pest Plant Status, helps local governments to measure the impact of a plant on the health, comfort or convenience of persons living in a district and to aid in the development of proposals to prescribe plants as pest plants under local laws authorised by the existing legislation. Item 2 e) on guidelines queries the subject plant’s propensity to affect the natural environment. A copy of the guidelines is attached as Appendix 8. The WAWC also informed the Committee that it can provide local governments with assistance in identifying potential environmental weeds which they may want to consider prescribing as pest plants.

Committee comment

The Committee acknowledged that clause 193 is effectively a replica of section 110 of the Agriculture and Related Resources Protection Act 1976 and that, in the past, it has been used by local governments to prescribe environmental weeds as pest plants. However, the Committee also observed that the object of that Act is to “protect primary industries and the resources related to primary industries” rather than the natural environment. The Committee was concerned that if the same words are to be preserved in the BAM Bill, the local government control of environmental weeds would continue to be regulated as an accidental effect of the control of agricultural weeds, rather than as weeds in their own right. Accordingly, the Committee recommends that clause 193(2)(a) should make specific reference to environmental weeds as plants which can be prescribed as pest plants in local laws.

Recommendation 29: The Committee recommends that clause 193(2)(a) of the Biosecurity and Agriculture Management Bill 2006 be amended so as to authorise expressly the making of local laws which prescribe plants which are likely to adversely affect the environment in a local government district as pest plants.

265 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, pp4 to 5.
266 Letter from Ms Judith Fisher, Chair, Western Australian Weeds Committee, 2 March 2007, pp2 to 3.
267 Section 3 of the Agriculture and Related Resources Protection Act 1976.
Local government immunity from payment of compensation

2.213 Clause 193(2)(c) authorises local governments to make local laws which will allow the local government to control pest plants on private property at the expense of the owner or occupier if that owner or occupier does not comply with a notice to control pest plants on their property. Part of the clause reads “for authorising the local government without payment of compensation to control the pest plants”.

2.214 When the Committee queried the intent and scope of the phrase ‘without payment of compensation’, the DAF provided the following response:

The phrase “without payment of compensation” indicates that if a local government is forced to undertake control of a pest plant on a person’s land because that person has failed to comply with a notice then the local government will not be liable to compensate the person for any loss or damage suffered as a result of the control action taken.

The phrase occurs in the existing legislation.

...  

A local government has a duty to take the action without causing unnecessary damage and if a person took legal action claiming that a local government had negligently caused unnecessary damage then the question would be decided by the court.268

2.215 It was noted by the Committee that clause 193(2)(c) is effectively equivalent to section 110(c) of the Agriculture and Related Resources Protection Act 1976.

Committee comment

2.216 The Committee was concerned by the general immunity from payment of compensation which is afforded to local government conducting activities to control pest plants on private property. However, the Committee also understood that it is important for the purposes of the BAM Bill and biosecurity in this State, that local governments and their agents are able to carry out their functions under the proposed Act without the fear of being exposed to legal action.

2.217 In the Committee’s view, it would be more appropriate to limit the immunity conferred on local governments and their agents to situations where they have conducted the pest plant control measures in good faith and having exercised reasonable care. The Committee suggests that the immunity should be couched in similar terms to the protection conferred on the State in clause 187, subject to the

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268 Letter from Mr Graeme Wilson, Director, Planning and Policy, Department of Agriculture and Food, 28 February 2007, Attachment, p9.
Committee’s Recommendation 27 in relation to that clause (refer to paragraphs 2.195 to 2.203 in this Report).

Recommendation 30: The Committee recommends that clause 193(2)(c) of the Biosecurity and Agriculture Management Bill 2006 be amended so that the immunity from payment of compensation which is conferred on local governments is limited to situations where they and their agents have conducted the pest plant control measures in good faith and without negligence.

CLAUSE 194 - REVIEW OF ACT

2.218 Clause 194 provides for a ministerial review of the proposed Act as soon as is practicable after 10 years from its commencement. The Minister will be required to consider the adequacy of the penalties imposed under the proposed Act as well as any other matters that appear to the Minister to be relevant to the operation and effectiveness of the Act.

Committee comment

2.219 Given the skeletal nature of the BAM Bill, which leaves many legislative and operational details to regulations which are yet to be developed, and the importance of biosecurity in Western Australia, the Committee considered that it would be more appropriate to require a review of the operation and effectiveness of the proposed Act every 10 years after the date of its commencement.

Recommendation 31: The Committee recommends that clause 194 of the Biosecurity and Agriculture Management Bill 2006 be amended so that the review of the proposed Act must be performed as soon as is practicable after every 10-year period after the Act’s commencement.

SCHEDULE 1, ITEM 13 - REGULATIONS FOR THE LABELLING ETC OF AN ORGANISM, AGRICULTURAL PRODUCT, ANIMAL FEED, FERTILISER OR OTHER THING

2.220 The Environmental Defender’s Office suggested that the BAM Bill include a provision, as opposed to a regulation-making power, which would expressly require the labelling of all nursery plants that are capable of being declared prohibited organisms (refer to item 73 in Appendix 4 of this Report for a question and answer related to this issue). The Committee was satisfied with the DAF’s response to this suggestion.

269 Submission No 6 from the Environmental Defender’s Office, 5 February 2007, p2.
SCHEDULE 1, ITEM 46 - REGULATIONS FOR THE REGISTRATION OF BUSINESSES SUPPLYING GARDEN PLANTS OR LIVE ANIMALS AS PETS

2.221 The DEC raised a concern that regulations made under Schedule 1, Item 46 of the BAM Bill have the potential to conflict with the Wildlife Conservation Act 1950 and regulations made under that Act\(^\text{270}\) (refer to item 69 in Appendix 4 of this Report for a question and answer related to this issue). The Committee also refers to paragraphs 2.103 to 2.110 in this Report as those discussions and comments are applicable to this issue.

IMPOSITION OF OFFENCE FOR CONTAMINATION CAUSED BY GENETICALLY MODIFIED CROPS

2.222 The Environmental Defender’s Office suggested that the BAM Bill impose a strict liability\(^\text{271}\) offence for contamination caused by genetically modified crops\(^\text{272}\) (refer to item 72 in Appendix 4 of this Report for a question and answer related to this issue). A majority of the Committee (comprised of Hon Graham Giffard, Hon Sally Talbot, Hon Ken Baston and Hon Peter Collier) was satisfied with the DAF’s response to this suggestion.

2.223 Hon Giz Watson agreed with the suggestion made by the Environmental Defender’s Office. The Member suggests that it would not be sufficient if the offence appeared in regulations made under the BAM Bill. The serious nature of contamination by genetically modified crops warrants placing of such an offence in an Act.

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\(^{270}\) Submission No 7 from the Department of Environment and Conservation, 5 February 2007, p4.


\(^{272}\) Submission No 6 from the Environmental Defender’s Office, 5 February 2007, p2.
CHAPTER 3
BIOSECURITY AND AGRICULTURE MANAGEMENT (REPEAL AND CONSEQUENTIAL PROVISIONS) BILL 2006

CLAUSE 4 - APPLICATION OF INTERPRETATION ACT 1984

Henry VIII effect

3.1 The Explanatory Memorandum indicates that this clause is designed to ensure that subsidiary legislation, authorisations and other instruments made under the Acts which are to be repealed under the Repeal Bill can continue to operate to the extent necessary under the Act proposed by the BAM Bill and to the extent that they are not inconsistent with the proposed Act. That is, so long as they are not inconsistent with the proposed Act, regulations made under the existing statutes can continue to operate as if they were made pursuant to the proposed Act. This is achieved by effectively deeming that the Act proposed by the BAM Bill is repealing and re-enacting the statutes which will be repealed by the Repeal Bill (these repeals are effected in Part 2 of the Repeal Bill).

3.2 For the purposes of informing the debate in the Legislative Council, the Committee notes that clauses 4(5)(a) and (c) of the Repeal Bill have a strong Henry VIII effect because they authorise the making of regulations which:

- modify the operation of another written law;
- have effect despite another written law; or
- provide that the provisions of another written law do not apply,

in order to deal with any consequences that may arise once the Act proposed by the BAM Bill is in operation.

3.3 The Committee noted that Henry VIII-type clauses have been the subject of concern in reports by past Legislative Council committees. Generally, Henry VIII clauses are

273 Explanatory Memorandum for the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006, p.3.

considered to be inappropriate delegations of legislative power because they allow for the Executive to override the intention of the Parliament as it is expressed in an Act.\textsuperscript{275}

Put another way:

\begin{displayquote}
These clauses are sometimes regarded as having insufficient regard for the doctrine of separation of powers and ultimately, for the institution of Parliament.\textsuperscript{276}
\end{displayquote}

3.4 However, there are some circumstances in which Henry VIII clauses can be used appropriately; for example, in order to prescribe ‘administrative’ or very routine matters. The Queensland Legislative Assembly’s Scrutiny of Legislation Committee identified four categories of justifiable uses of Henry VIII clauses:

- Urgent Executive action.
- Innovative legislation.
- Consequential amendments.
- Transitional arrangements.\textsuperscript{277}

Committee comment

3.5 The Committee considered that the Henry VIII-type authority which is provided in clauses 4(5)(a) and (c) is justifiable on the basis that regulations made under that authority (if any) will prescribe matters that are necessary to manage any consequences that may arise once the Act proposed by the BAM Bill is in operation.

3.6 However, the Committee was of the view that these significant regulation-making powers should not continue indefinitely; they should remain available to the Executive for only as long a period as is reasonably and practicably necessary to enable any consequential issues to be identified and resolved. The Committee considered that the Legislative Council’s consideration of clauses 4(5)(a) and (c) will be assisted by an explanation from the Minister as to the amount of time which will be needed to identify and resolve any issues of a consequential nature.


\textsuperscript{276} \textit{Ibid.}

\textsuperscript{277} \textit{Ibid, p38.}
Recommendation 32: The Committee recommends that clause 4 of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 be amended so that the powers to make regulations of the type contemplated and authorised in clauses 4(5)(a) and (c) can be exercised for only as long a period as is reasonably and practicably necessary to identify the need for, and effect, such regulations.

Clause 5 - Transitional Regulations

Henry VIII effect

3.7 Clause 5(2) of the Repeal Bill has a strong Henry VIII effect because it authorises the making of regulations which may provide that specified provisions of a written law do not apply, or apply with specified modifications. This regulation-making power is conferred for the purpose of ensuring a smooth transition from the existing legislative regime to the one proposed by the BAM Bill. The power can only be exercised if there is not sufficient provision in the Repeal Bill for dealing with an issue or matter of a transitional nature.\textsuperscript{278}

Committee comment

3.8 The Committee considered that the Henry VIII-type authority which is provided in clause 5(2) is justifiable on the basis that regulations made under that authority (if any) will prescribe matters that are necessary to manage any transitional issues which cannot otherwise be dealt with under the Repeal Bill.

3.9 However, the Committee was of the view that this significant regulation-making power should not continue indefinitely; it should remain available to the Executive for only as long a period as is reasonably and practicably necessary to enable any transitional issues to be identified and resolved. The Committee considered that the Legislative Council’s consideration of clause 5(2) will be assisted by an explanation from the Minister as to the amount of time which will be needed to identify and resolve any issues of a transitional nature which cannot otherwise be dealt with under the Repeal Bill.

Recommendation 33: The Committee recommends that clause 5 of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 be amended so that the power to make regulations of the type contemplated and authorised in clause 5(2) can be exercised for only as long a period as is reasonably and practicably necessary to identify the need for, and effect, such regulations.

\textsuperscript{278} Clause 5(1) of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006.
Retrospective operation of regulations

3.10 Clause 5(3) of the Repeal Bill authorises the transitional regulations made under clause 5(2), if any, to operate retrospectively. That is, these regulations may have effect even before the date that they are published in the *Government Gazette*, which is usually the earliest date on which they can officially commence operation.279

3.11 Section 41 of the *Interpretation Act 1984* prescribes the formal requirements for the publication and commencement of subsidiary legislation. Subsection (1)(b) permits regulations to come into operation on either the day that they are published in the *Government Gazette* or on another day which is specified in that subsidiary legislation. However, section 41(1)(b) does not permit the making of regulations which operate prior to the date of publication because the wording of that provision does not contemplate a date of commencement which is earlier than the date of publication.280

3.12 Clause 5(3) of the Repeal Bill avoids the limitations of section 41(1)(b) of the *Interpretation Act 1984* by providing clear and express words authorising the making of regulations which can operate retrospectively. The effect of clause 5(3) and section 41(1)(b) is that transitional regulations will commence operation on either the date of their publication in the *Government Gazette* or on a later date which is prescribed in those regulations. However, if those regulations provide that a specified state of affairs is deemed to have existed (or to have not existed) on and from a day that is earlier than the date of publication (but not earlier than the date on which the Act proposed by the BAM Bill comes into operation), the regulations will have effect in that limited sense.

3.13 Clause 5(5) of the Repeal Bill tempers the effect of clause 5(3) to some degree: if transitional regulations do have retrospective effect and for example, a certain state of affairs is deemed to exist some time between the commencement of the BAM Bill as an Act and a date that is earlier than the commencement of those transitional regulations, the regulations do not:

- affect the rights281 of any person existing before the day of publication in a prejudicial manner; or
- impose liabilities on any person in respect of anything done or omitted to be done before the date of publication.

---

279 Refer to section 41(1)(b) of the *Interpretation Act 1984*.

280 See *Watson v Lee* (1979) 144 CLR 374.

281 These include any actual, prospective or contingent rights: definition of ‘right’ in clause 3 of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006.
However, the rights and liabilities of the State, an authority of the State and local governments may be affected by the retrospective effect of transitional regulations.

3.14 Either House of Parliament may disallow transitional regulations once they are made, but disallowance would not affect the validity, or cure the invalidity, of anything done or omitted to be done prior to the date of disallowance.\textsuperscript{282}

3.15 The Committee also noted that ‘legitimate expectations’ which are prejudicially affected by the retrospective operation of transitional regulations may not be protected by clause 5(5) as they do not fall within the definition of a ‘right’\textsuperscript{283} in the Repeal Bill. A ‘legitimate expectation’ is “reasonable expectation that a legal right or liberty will be obtained or renewed, or will not be unfairly withdrawn without a hearing. … A legitimate expectation falls short of being a legal right, but has been recognised as an interest protected by procedural fairness.”\textsuperscript{284}

Committee comment

3.16 The Committee observed that the combined effect of clauses 5(2) and (3) is that:

- the operation of other legislation can be modified retrospectively by transitional regulations;
- transitional regulations can retrospectively affect the rights and liabilities of the State, an authority of the State or a local government; and
- transitional regulations can retrospectively affect any legitimate expectations or any broader rights or interests recognised by the law, but which do not fall with the definition of a ‘right’ under the Repeal Bill.

3.17 It was also observed by the Committee that the above effects should generally be brought about only by an Act of Parliament. The Committee brings clause 5(3) of the Repeal Bill to the attention of the Legislative Council.

CLAUSE 7 - CONSTRUCTION OF REFERENCES IN WRITTEN LAWS

Convenient stopgap

3.18 In addition to ensuring that the consequential amendments contained in the Repeal Bill are comprehensive, clause 7 is a convenient way of ensuring that any references

\textsuperscript{282} Section 42(2) of the \textit{Interpretation Act 1984}.

\textsuperscript{283} A ‘right’ “means any right, power, privilege or immunity whether actual, prospective or contingent.”: clause 3 of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006.

\textsuperscript{284} Dr P Nygh and P Butt, Editors, \textit{Butterworths Australian Legal Dictionary}, Butterworths, Australia, 1997, p683.
in legislation to Acts which will be repealed (‘just in case’ there are any remaining after the Repeal Bill has commenced operation as an Act)\textsuperscript{285} are interpreted as including references to corresponding provisions in the Act proposed by the BAM Bill.

Committee comment

3.19 While the Committee recognised that this clause is aimed at avoiding inadvertent ‘gaps’ in moving from the existing to the proposed legislative biosecurity regime, it stressed the importance of \textbf{directly} amending (as opposed to tacitly indirectly amending, as is the case with clause 7) all existing legislative provisions which will be affected by the transition. This is to ensure that every person referring to legislation will not unwittingly misinterpret the legislation due to an ignorance of the existence of a clause like clause 7.

**CLAUSE 16 - CERTAIN INTELLECTUAL PROPERTY**

Averment clause

3.20 Clause 16(2) is an averment clause\textsuperscript{286} which provides that written certification from the Western Australian Agriculture Ministerial Body that a specified intellectual property right was (or was not) created, acquired or held for the purposes of the \textit{Agriculture Act 1988} is conclusive evidence of that fact, \textit{“unless the contrary is shown”}. That \textit{Agriculture Act 1988} is to be repealed by the Repeal Bill and this clause aids in the transition between that Act and the Act which is proposed by the BAM Bill. The types of intellectual property which are intended to be covered under this clause are, for example, grain, pasture and horticultural varieties bred and developed by the DAF, either alone or in conjunction with other research organisations.\textsuperscript{287}

3.21 The Committee considered this clause to be reasonable.

**CLAUSE 36 - \textit{FINANCIAL ADMINISTRATION AND AUDIT ACT 1985} AMENDED**

Repeal and replacement of \textit{Financial Administration and Audit Act 1985}

3.22 The DAF advised the Committee that the Government intends to amend clause 36 so that it refers to the \textit{Financial Management Act 2006} rather than the now repealed


\textsuperscript{286} As to ‘averment’ clauses, refer to the discussion at paragraphs 2.162 to 2.163 of this Report.

\textsuperscript{287} \textit{Explanatory Memorandum} for the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006.
Financial Administration and Audit Act 1985. For comments on this issue, the Committee refers to item 87 in Appendix 4.

3.23 The DAF’s proposed amendment to clause 36 and the corresponding explanatory note, as at 20 March 2007, appear at item 88 in Appendix 4. The Committee was satisfied with the proposed amendment.

CLAUSE 38 - PLANT PESTS AND DISEASES (ERADICATION FUNDS) ACT 1974 AMENDED

Convenient stopgap

3.24 While the Plant Pests and Diseases (Eradication Funds) Act 1974 is proposed to be repealed by the Repeal Bill, its repeal will be delayed until the equivalent of the Skeleton Weed Eradication Fund has been established under the proposed biosecurity scheme. In the meantime, the Act must be consequentially amended to be consistent with the commencement of the BAM Bill. However, instead of consequentially amending the Plant Pests and Diseases (Eradication Funds) Act 1974 in a direct manner, clause 38(3), among other things, inserts a new proposed section 4A(a) into the Act. The proposed section provides that any reference in the Plant Pests and Diseases (Eradication Funds) Act 1974 to the Agriculture Protection Board is taken to be a reference to the proposed Western Australian Agriculture Ministerial Body to be established under the BAM Bill.

Committee comment

3.25 The Committee observed that clause 38(3) is a convenient and indirect way of ensuring that any references in the Plant Pests and Diseases (Eradication Funds) Act 1974 are interpreted as references to the Western Australian Agriculture Ministerial Body.

3.26 While the Committee recognised that this clause is aimed at avoiding the need to directly amend an Act which is earmarked for repeal, it again stresses the importance of directly amending (as opposed to tacitly or indirectly amending, as is the case with clause 38(3)) all existing legislative provisions which will be affected by the transition from the existing to the proposed legislative biosecurity scheme. This is to ensure that every person referring to legislation will not unwittingly misinterpret the legislation due to an ignorance of the existence of a clause like clause 38(3).

288 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 February 2007, Attachment, p7.

289 And other grain and seed crops industry funds which raise money for industry-specific biosecurity programmes and compensating producers who suffer loss as a result of a pest affecting the industry.
CLAUSE 43 - PROCEEDS OF SALE OF CERTAIN ASSETS

Averment clause

3.27 Clause 43(3) is an averment clause\(^\text{290}\) which provides that a written certification from the Western Australian Agriculture Ministerial Body that a specified asset was (or was not) purchased from moneys in The Agriculture Protection Board Fund is conclusive evidence of that fact, "unless the contrary is shown". The Agriculture Protection Board Fund was established under the Agriculture Protection Board Act 1950, which is to be repealed by the Repeal Bill. This clause aids in the transition between that Act and the Act which is proposed by the BAM Bill by ensuring that the proceeds of sale of any assets (currently owned by the Agriculture Protection Board and to be vested in the Western Australian Agriculture Ministerial Body) will be credited to the same account from which money was debited to fund the purchase of the assets.

3.28 The Committee considered this clause to be reasonable.

CLAUSE 64 - AGRICULTURAL PRODUCE COMMISSION ACT 1988 AMENDED

Entry into private property

3.29 Clause 64(2) inserts a proposed section 12A into the Agricultural Produce Commission Act 1988, which is effectively equivalent to section 17A of the Plant Diseases Act 1914, which is proposed to be repealed by clause 63 of the Repeal Bill. The proposed section 12A provides any persons employed or engaged by a producer’s committee (referred to here as an ‘officer’) established to administer a fruit fly foliage baiting scheme to, when authorised by the producer’s committee, enter any orchard within the specified area to bait or spray all or any of the fruit trees and fruit vines.

3.30 The Committee observed that the proposed section 12A does not contain any procedures for an officer’s entry into an orchard, as is the case with the current section 17A of the Plant Diseases Act 1914. The DAF confirmed this observation.\(^\text{291}\)

3.31 It was noted by the Committee that clause 65 of the BAM Bill (which deals with entry and access to places and conveyances for inspection purposes) was amended to include a requirement for inspectors to take all reasonable steps to inform an owner, occupier or person in charge of a place of the inspector’s intention to:

- stop, detain, board and enter a conveyance (that is not a mobile home);
- enter a place that is not a dwelling; or

\(^{290}\) As to ‘averment’ clauses, refer to the discussion at paragraphs 2.162 to 2.163 of this Report.

\(^{291}\) Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 9 February 2007, Attachment, p5.
• patrol and inspect any fence or bounding land or premises,

before exercising these powers. 292 Before an inspector enters a dwelling with the consent of the person apparently in control of a dwelling, an inspector is also required to inform that person of the inspector’s intention to enter and inspect the dwelling. 293

It appeared as though the inclusion of notification requirements in clause 65 of the BAM Bill was made by the DAF after it received submissions during the public consultation on the Green Bills that inspectors could be placed in danger if they entered properties unannounced:

Pastoral industry representatives considered that provision should be included in the [BAM] Bill to require inspectors to give notice to a pastoral lessee before entering a lease to carry out an inspection. This request was said to stem from a concern that pastoralists and occupiers of large tracts of rural land in undertaking potentially dangerous activities such as shooting and trapping might inadvertently injure an inspector if unaware of the presence of that inspector on the land. The Department advised that it is normal procedure to require an inspector to contact an occupier either prior to or upon arrival at a property. Nevertheless DAFWA recommends that an appropriate reference to notification of occupiers be included in the Bill. 294

Committee comment

3.32 The Committee considered that an officer’s entry into orchards pursuant to proposed section 12A of the Plant Diseases Act 1914 may involve concerns for that officer’s safety which are similar to those voiced in relation to inspectors entering properties under section 65 of the BAM Bill. Accordingly, the Committee suggests that clause 64(2) should also insert a requirement for an officer entering pursuant to proposed section 12A to take reasonable steps to warn the owner or occupier of an orchard of the officer’s intention to enter the orchard, prior to the entry.

Recommendation 34: The Committee recommends that clause 64 of the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 be amended so that it also inserts a requirement for the officer entering an orchard pursuant to proposed section 12A to take reasonable steps to warn the owner or occupier of the orchard of the officer’s intention to enter the orchard, prior to the entry.

292 Clause 65(3) of the Biosecurity and Agriculture Management Bill 2006.
293 Ibid, clause 65(2).
CLAUSE 89 - EXOTIC DISEASES OF ANIMALS ACT 1993 AMENDED

Preservation of significant Crown power

3.33 For the purpose of informing debate in the Legislative Council, the Committee highlights clause 89(4) of the Repeal Bill. This clause proposes to insert a new section 28A into the Exotic Diseases of Animals Act 1993 which is effectively equivalent to section 10A of the Stock Diseases (Regulations) Act 1968.

3.34 The effect of clause 89(4) is that it preserves the Crown’s power to take possession of any stock on Crown land which is situated within a proclaimed area. The Crown can then treat or dispose of the stock without any payment of compensation to the previous owners of the stock. Certain areas may be proclaimed for this purpose if it is necessary to prevent the spread of an exotic disease or to eradicate or control an exotic disease.

3.35 As a result of the Committee’s inquiry, the DAF advised that the phrase ‘Crown land’, as it is used in proposed section 28A, is intended to refer only to Crown land which has not been alienated or otherwise lawfully allocated to another person. For example, it is not intended for Crown land which is the subject of a pastoral lease to be included in ‘Crown land’ for the purposes of proposed section 28A. The DAF indicated to the Committee that it proposes to introduce an amendment in order to clarify the intent of proposed section 28A.295

3.36 The DAF’s proposed amendments to clause 89 and the corresponding explanatory note, as at 20 March 2007, appear at item 98 in Appendix 4. The Committee was satisfied with the proposed amendments.

Hon Graham Giffard MLC
Chair
Date: 3 April 2007

295 Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 15 March 2007, p2.
APPENDIX 1

STAKEHOLDERS TO WHOM THE COMMITTEE WROTE
## APPENDIX 1

**STAKEHOLDERS TO WHOM THE COMMITTEE WROTE**

<table>
<thead>
<tr>
<th>NAME</th>
<th>ORGANISATION</th>
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<tbody>
<tr>
<td>Ms Maria Saraceni</td>
<td>The Law Society of Western Australia</td>
</tr>
<tr>
<td>Mr Hannes Schoombee</td>
<td>Environmental Defender's Office WA (Inc)</td>
</tr>
<tr>
<td>Mr Sandy McTaggart</td>
<td>Pastoralists and Graziers' Association of WA</td>
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<tr>
<td>Mr Chris Richardson</td>
<td>Agriculture Protection Board</td>
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<tr>
<td>Mr Trevor Blinco</td>
<td>Aquaculture Council of Western Australia</td>
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<tr>
<td>Mr David Sutton</td>
<td>Management Committee, The Wilderness Society</td>
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<tr>
<td>Mr Chris Tallentire</td>
<td>Conservation Council of Western Australia</td>
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<tr>
<td>Mr Bob Pearce</td>
<td>Forest Industries Federation of Western Australia</td>
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<tr>
<td>Mr Trevor De Landgraft</td>
<td>Western Australian Farmers Federation</td>
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<tr>
<td>Mr Max Ball</td>
<td>Western Australian Fishing Industry Council Inc</td>
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<tr>
<td>Cr Bill Mitchell</td>
<td>Western Australian Local Government Association</td>
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<tr>
<td>Dr Mikael Hirsch</td>
<td>CSIRO Biotechnology Strategy Group</td>
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<tr>
<td>Mr Alan Hill</td>
<td>Western Australian Fruit Growers’ Association Inc</td>
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<tr>
<td>Mr Russell Cox</td>
<td>West Australian Pork Producers’ Association</td>
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<td>Ms Sandy Lloyd</td>
<td>The Weeds Society of Western Australia Inc</td>
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<td>Mr Ivan Solomon</td>
<td>The Royal Agricultural Society of Western Australia Inc</td>
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<td>Professor Graeme Robertson</td>
<td>The Pastoral Lands Board of Western Australia</td>
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<td>Professor Aileen Plant</td>
<td>Australian Biosecurity Cooperative Research Centre</td>
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<td>NAME</td>
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<tr>
<td>Mr Steve Porritt</td>
<td>Albany Zone Control Authority</td>
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<td>Chairman</td>
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<td>Mr Brad McCormick</td>
<td>Bunbury Zone Control Authority</td>
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<td>Mr Scott Wauchope</td>
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<td>Mr Brendan Nicholas</td>
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<td>Mr Peter Metcalf</td>
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<td>Mr Keith Devenish</td>
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<td>Ms Jo Peters</td>
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<td>Mr Jon Glauert</td>
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<td>Mr Noel Wilson</td>
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<td>Mr Greg Power</td>
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<td>Mr Greg Brennan</td>
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<td>Ms Pamela l’Anson</td>
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<td>Mr John Borger</td>
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<td>Mr Neil Guise</td>
<td>Waroona Zone Control Authority</td>
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<td>NAME</td>
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<tr>
<td>Mr Keiran McNamara Executive Director</td>
<td>Department of Conservation and Land Management</td>
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<tr>
<td>Ms Judy Fisher Chair</td>
<td>Western Australian Weeds Committee</td>
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<td>Mr Rudy Teh Environment and Land Manager</td>
<td>Western Power</td>
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<tr>
<td>Dr Peter Allen Chair</td>
<td>Invasive Animals Cooperative Research Centre</td>
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<td>Dr Simon McKirdy Chief Executive Officer</td>
<td>Cooperative Research Centre for National Plant Biosecurity</td>
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<tr>
<td>The Hon John Kerin AM, BA, BEc, FIAI, FTE, Chairman</td>
<td>Cooperative Research Centre for Weed Management</td>
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<td>Dr Walter Cox Chairman</td>
<td>Environmental Protection Authority</td>
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<tr>
<td>Mr Peter Rogers Executive Director</td>
<td>Department of Fisheries</td>
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<tr>
<td>Dr Neale Fong Director General</td>
<td>Department of Health</td>
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<td>Mr Greg Martin Director General</td>
<td>Department of Planning and Infrastructure</td>
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<td>Mr Timothy Marney Under Treasurer</td>
<td>Department of Treasury and Finance</td>
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<td>Ms Cheryl Gwilliam Director General</td>
<td>Department of Local Government and Regional Development</td>
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<td>Mr Brian Stynes Biosecurity</td>
<td>Australian Quarantine and Inspection Service (Western Australia)</td>
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<td>Mr John Robertson Chair</td>
<td>Environmental Weeds Action Network Inc</td>
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<tr>
<td>Dr Mark Lund Head of School</td>
<td>School of Natural Sciences, Edith Cowan University</td>
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<tr>
<td>Associate Professor Graeme Wright Acting Executive Dean</td>
<td>Division of Resources and Environment, Curtin University of Technology</td>
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<td>Professor Alistar Robertson Dean</td>
<td>Faculty of Natural and Agricultural Sciences, The University of Western Australia</td>
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<tr>
<td>Professor Yianni Attikiouzel Executive Dean</td>
<td>Division of Science and Engineering, Murdoch University</td>
</tr>
<tr>
<td>Ms Joanne Francis President</td>
<td>The Wildflower Society of WA Inc</td>
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APPENDIX 2

WRITTEN SUBMISSIONS RECEIVED
## APPENDIX 2
### WRITTEN SUBMISSIONS RECEIVED

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<td>Dr Kesi Kesavan</td>
<td>Manjimup Zone Control Authority</td>
<td>30 January 2007</td>
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<td>2</td>
<td>Mr Chris Richardson</td>
<td>Agriculture Protection Board</td>
<td>23 January 2007</td>
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<td>Mr Trevor De Landgraafft</td>
<td>The Western Australian Farmers Federation (Inc)</td>
<td>31 January 2007</td>
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<td>President</td>
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<td>4</td>
<td>Dr Neale Fong</td>
<td>Department of Health</td>
<td>30 January 2007</td>
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<td>5</td>
<td>Professor Alistar Robertson</td>
<td>Faculty of Natural and Agriculture Sciences, The University of Western Australia</td>
<td>16 January 2007</td>
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<td>Dean</td>
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<td>6</td>
<td>Mr Cameron Poustie</td>
<td>Environmental Defender’s Office</td>
<td>5 February 2007</td>
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<td>Principal Solicitor</td>
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<td>Mr Keiran McNamara</td>
<td>Department of Environment and Conservation</td>
<td>5 February 2007</td>
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<td>8</td>
<td>Ms Sally Standen</td>
<td>Animal and Plant Health Policy, Department of Agriculture, Fisheries and Forestry, Australian Government</td>
<td>12 February 2007</td>
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<tr>
<td></td>
<td>General Manager</td>
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APPENDIX 3

WITNESSES WHO APPEARED BEFORE THE COMMITTEE
APPENDIX 3

WITNESSES WHO AppeARED BEFORE THE COMMITTEE

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<tr>
<th>NAME</th>
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<tr>
<td>Mr Robert Delane</td>
<td>Department of Agriculture and Food</td>
<td>31 January 2007</td>
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<tr>
<td>Deputy Director General</td>
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<tr>
<td>(Biosecurity and Research)</td>
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<td>Mr Greg Pickles</td>
<td>Department of Agriculture and Food</td>
<td>31 January 2007</td>
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<td>Director Border Biosecurity</td>
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<td>and Emergency Response</td>
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<tr>
<td>Mr Damian Collopy</td>
<td>Department of Agriculture and Food</td>
<td>31 January 2007</td>
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<td>Manager Invasive Species</td>
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<tr>
<td>Mr Richard Walker</td>
<td>Department of Agriculture and Food</td>
<td>31 January 2007</td>
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<tr>
<td>Policy Officer Biosecurity</td>
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<tr>
<td>Mr Chris Richardson</td>
<td>Agriculture Protection Board of Western Australia</td>
<td>31 January 2007</td>
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<tr>
<td>Chairman</td>
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APPENDIX 4

COMBINED QUESTIONS AND ANSWERS AND AMENDMENTS PROPOSED BY
THE DEPARTMENT OF AGRICULTURE AND FOOD
APPENDIX 4

COMBINED QUESTIONS AND ANSWERS AND AMENDMENTS PROPOSED BY THE DEPARTMENT OF AGRICULTURE AND FOOD

QUESTIONS AND ANSWERS RESULTING FROM CORRESPONDENCE BETWEEN LEGISLATION COMMITTEE AND DEPARTMENT OF AGRICULTURE AND FOOD

INCORPORATING

AMENDMENTS PROPOSED BY DEPARTMENT OF AGRICULTURE AND FOOD AND EXPLANATORY NOTES


ABBREVIATIONS
AGDAFF = Australian Government Department of Agriculture, Fisheries and Forestry
BAM Bill = Biosecurity and Agriculture Management Bill 2006
DEC = Department of Environment and Conservation
DOH = Department of Health
EM = Explanatory Memorandum
Repeal Bill = Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006
ZCA = Zone Control Authority
Aerial Spray Act = Aerial Spraying Control Act 1966
Ag Prod Act = Agricultural Products Act 1929
Ant Act = Argentine Ant Act 1968
APB Act = Agriculture Protection Board Act 1950
ARRP Act = Agriculture and Related Resources Protection Act 1976
BK Act = Beekeepers Act 1963
Fert Act = Fertilizers Act 1977
PD Act = Plant Diseases Act 1914
VCCAFS Act = Veterinary Chemical Control and Animal Feeding Stuffs Act 1976

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<tr>
<td>1</td>
<td>Clause 3 - Please explain why the Food Bill 2005 is not referred to in this clause, despite its intended replacement of the Health Act 1911.</td>
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<td>The Food Bill is not referred to in clause 3 because Bills are never referred to in Acts. The Health Act is still in force. When the Food Bill becomes an Act section 3 of the BAM Act (or clause 3 of the Bill if it has not yet been enacted) will be amended to refer to the Food Act, but this will be as well as, not instead of, the Health Act. The Food Bill is not intended to replace the Health Act in its entirety, only those parts of it regulating food. (A replacement for the Health Act is planned, however, and the reference in clause 3 will be amended again when that is enacted.)</td>
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<td>2</td>
<td>Clause 3</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td></td>
<td>Page 3, line 1 — To delete “If” and insert instead —</td>
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| | The amendment to clause 3 corrects an inconsistency between this clause, under which, in the event of an inconsistency between the BAM Act and the Poisons Act, the latter would prevail, and clause 39(3), under which the Director General may supply poison for the control of declared pests despite anything to the contrary in the Poisons Act. This inconsistency was noted by the Standing Committee on Legislation. As a general rule,
### Committee’s Questions

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<td>“Except as provided in section 39(3), if”.</td>
<td>the Director General does not supply poisons otherwise than in accordance with the Poisons Act but the provision is retained (as in the section of the Agriculture and Related Resources Protection Act which it replaces) in case of an emergency situation.</td>
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<td><strong>3</strong> Clause 5 - The term ‘land’ is defined to include:</td>
<td>(a) and (b) Paragraph (e) of the Bill definition of ‘land’ in section 5 results in the inclusion of the Australian Fishing Zone – in respect of fish managed by the State under an arrangement with the Commonwealth. Most fish in the Australian Fishing Zone off Western Australia are currently managed by the State under State legislation. Accordingly, in respect of most fish, ‘land’ in the Bill would include the waters of the Australian Fishing Zone off Western Australia.</td>
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<td>(b) all marine and other waters within the limits of the State; and</td>
<td>It is appropriate that the legislation deal with not only the terrestrial estate and the internal and coastal waters of Western Australia but also the Australian Fishing Zone off Western Australia in respect of fish which are already substantially under the legal jurisdiction of, and managed by, the State of Western Australia.</td>
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<td>(c) all coastal waters of the State as defined by section 3(1) of the Coastal Waters (State Powers) Act 1980 of the Commonwealth; and</td>
<td>Severe and serious biosecurity threats to Western Australia can readily be foreseen in the waters immediately adjacent to State coastal waters. The State of</td>
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<td>(e) in respect of fish managed by the State under an arrangement with the Commonwealth under the Fish Resources Management Act 1994 Part 3 or the Pearling Act 1990, the waters of the Australian fishing zone as defined by the Fisheries Management Act 1991</td>
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<td>Response by the Department of Agriculture and Food</td>
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<td><strong>of the Commonwealth</strong></td>
<td>Western Australia is responsible, under relevant Offshore Constitutional Settlement arrangements with the Commonwealth, for the effective sustainable management and legal regulation of fish in the Australian Fishing Zone (with specified exceptions(^{296})) off Western Australia. This State responsibility for fisheries management and regulation in the Australian Fishing Zone has grown as a result of the recognition of the practical realities of managing and regulating these matters.</td>
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<td>(a) How is paragraph (e) of the definition intended to work in practice?</td>
<td>Fisheries and marine biodiversity could be very seriously impacted by biosecurity threats such as the introduction of diseases and pests. It would be illogical if the State did not also regulate relevant biosecurity matters (such as bait fish and potentially pest infested fishing gear) which are part of fishing, and which directly relate to fish already under the legal jurisdiction of the State.</td>
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<td>(b) As many fish are constantly mobile, will paragraph (e) of the definition effectively mean that the whole of the Australian fishing zone is included in the definition of ‘land’? If so, would this exceed the State’s legislative powers?</td>
<td>In addition to the State legislative powers in the Australian Fishing Zone as a result of Offshore Constitutional Settlement arrangements made with the Commonwealth, the State of Western Australia has the power to make legislation for the peace, order and good government of the State(^{297}) and which operates extraterritorially(^{298}). The</td>
</tr>
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<td>(c) Will an organism which is in water, which is included in the definition of ‘land’, be ‘on land’ pursuant to clause 9?</td>
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\(^{296}\) Such as tuna and tuna like species and foreign fishing.  
\(^{297}\) See section 2 Constitution Act 1889.  
\(^{298}\)
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<td>clause authorises an inspector to give a pest control notice to an owner or occupier of land (in an area for which an organism is a declared pest) if the declared pest is found “on or in the vicinity of the land”.</td>
<td>High Court has confirmed the ability of a State to make extraterritorial laws which have at least a remote or general connection with the State and are not inconsistent with a valid Commonwealth law. Biosecurity laws which apply outside State coastal waters for the protection of Western Australian fish, fishers and fisheries and the marine environment have a sufficient connection with the State.</td>
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<td>(d) How would clause 30 operate in the Australian fishing zone?</td>
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<td>(e) Would the owner or occupier of ‘land’ within the Australian fishing zone be the State? If so, would the pest control notice be given to the State?</td>
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<td>The AGDAFF also considered the operation of the definition of ‘land’ in relation to clause 51 (residue management notices).</td>
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<td>(f) Please confirm whether a residue management notice issued in relation to ‘land’ within the Australian fishing zone would be issued to the State?</td>
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<td>(g) Please advise whether the definition of ‘land’, in conjunction with other provisions in the BAM Bill, will impact on any legislation administered by the AGDAFF.</td>
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298 See also section 2 of the *Australia Act 1986* (Cth) which confirmed the power.

299 *Bonser v La Macchia* (1968-69) 122 CLR 177 per Windeyer J at 216 and Barwick CJ at 219; *Pierce v Florencia* (1976) 135 CLR 507 per Gibbs J at 518; *Port MacDonnell Professional Fishermen’s Association v South Australia* (1989) 168 CLR 580 at 340; *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14.
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<td>activity on the land”) in the Australian Fishing Zone; or</td>
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<td>a person holding an aquaculture licence, aquaculture lease</td>
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<td>or pearl oyster farm lease (a person who is an “occupier of</td>
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<td>land”) relating to waters within the Australian Fishing</td>
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<td>Zone.</td>
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<td>The State of Western Australia could be the owner or</td>
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<td>occupier of land being part of the Australian Fishing Zone</td>
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<td>so technically the State could be given a pest control</td>
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<td>notice. However, it is difficult to envisage a situation</td>
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<td>where the need for this would arise because in practice,</td>
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<td>pest control action in relation to the ocean will required to</td>
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<td>be taken by persons conducting activities on the ocean</td>
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<td>(boat owners and operators and fishers) rather than by the</td>
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<td>‘owner’ or occupier of the ocean (as far as it comes within</td>
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<td>the definition of land).</td>
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<td>(f) The Department can not envisage any situation in which a residue</td>
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<td>management notice under the BAM Bill would be used in relation</td>
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<td>to land (water) within the Australian fishing zone other than in</td>
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<td>relation to an aquaculture situation where the notice would be</td>
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<td>given to the holder of the aquaculture licence, aquaculture lease or</td>
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<td>pearl oyster farm lease as occupier. The Department presumes a</td>
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<td>situation involving contamination of the open sea would be dealt</td>
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<td>Committee’s Questions</td>
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<td>with by prohibiting or regulating the taking of fish from the contaminated area using relevant powers under the Fish Resources Management Act or the Pearling Act.</td>
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<td>(g) This question is very broad and it is not really possible for the Department to answer briefly or meaningfully. AGDAFF is in a better position to be able to do so. However, it can be noted that in accordance with section 109 of the Australian Constitution, a provision of the Bill will be invalid to the extent that it is inconsistent with a Commonwealth law.</td>
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<tr>
<td>4 Clause 5 - Your letter dated 20 February 2007 advises that the current, nationally-accepted meaning of ‘biosecurity’ is ‘the protection of the economy, the environment and human health from negative impacts associated with pests, diseases and weeds’. Does the Department foresee any difficulties in the application of this definition?</td>
<td>The Department would see a problem with the application of this definition if it were included as a definition of “biosecurity” in the BAM Bill. This meaning is useful in ordinary communication as indicating what is meant by the term, but it is not appropriate as a statutory definition for the term in the BAM Bill. The meaning quoted does not take account of the defined meanings of the important terms “organism”, “disease” and “declared pest” that are used in the Bill. For example, the term “disease” only covers diseases that affect animals and plants, not diseases that affect only humans; the term “pest” is not used in the Bill in isolation but only in the context of something being a declared pest; the term “weed” is not used in the Bill, which does not specifically distinguish between plant pests (weeds) and animal pests; and the term “organism” includes not only diseases, but also disease causing agents and prions or other prescribed agents that can cause a disease. The definition quoted, when used</td>
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<td>generally, could be understood in a non-technical sense as covering all these things but this would not be the case if it was simply inserted, as is, into the Bill where it could have the effect of narrowing the scope of the Bill, and its ability to cope with all sorts of biosecurity threats well into the future. The Department anticipates that the Minister will explore this issue during debate in the Legislative Council.</td>
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</table>
| 5 Clause 5            | • Include a definition of “Authority” and remove the definition of “Ministerial Body”. Under amendments to Part 7, Division 1, the body corporate established by the Act becomes the “Western Australian Agriculture Authority” rather than the “Western Australian Agriculture Ministerial Body”. This is dealt with at number 8, below.  
• Include a definition of “Land Titles Register”. |

The Minister for Agriculture and Food: To move —  
Page 4, after line 20 — To insert —  
“Authority” means the Western Australian Agriculture Authority established under section 150;  
”.

The Minister for Agriculture and Food: To move —  
Page 9, after line 12 — To insert —  
“.
### Committee’s Questions

<table>
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| 6      | **Clause 6(c)** - This clause deals with circumstances in which a thing is considered to be contaminated by a substance, even if no maximum residue limit has been prescribed for that thing in relation to that substance. These circumstances are to be ‘specified’ by regulations.  
  
  (a) Why is the term ‘specified’ used rather than ‘prescribed’?  
  (b) Does ‘specified’ mean something different from ‘prescribed’?  
  (c) Is that the same meaning that is given to ‘specify’ or ‘specified’, as these terms are used in the remaining clauses of the BAM Bill? | "Specified" and "prescribed" are used interchangeably when referring to matters included in the regulations (see "specify/specified" in clauses 27(2); 36(2); 74(4); 75(2); 78(4); 80(4); 83(3); 86(4); 141(1)(a); 145(1); 147(1); 190(3); Schedule 1 item 3, 52(b)) - sometimes "specified" seems to read better than "prescribed" but there is no difference in meaning. "Prescribed" is defined in clause 5 as only referring to matters in regulations and is not used in the Bill in relation to matters in notices etc. - in those cases "specified" is always used. |
| 7      | **Clause 6(c).** Regarding your response faxed on 9/2/07.                                                                                                                                                      | The Department has been advised by Parliamentary Counsel’s office that "prescribed" and "specified" when used in relation to matters that are to |
The Committee does not agree with your statement that “there is no difference in meaning” between ‘prescribed’ and ‘specified’. It is a fundamental principle of statutory interpretation that the use of different words shows a prima facie intention to convey a different meaning. In your previous answer, you stated: “Prescribed” is defined in clause 5 as only referring to matters in regulations and is not used in the Bill in relation to matters in notices etc. - in those cases "specified" is always used. Is this not a clear distinction in meaning?

**Response by the Department of Agriculture and Food**

be dealt with in the regulations have no difference in meaning. It is not possible to use "prescribed" in relation to matters that are not under the regulations because it is defined in the Bill to mean "prescribed under regulations".

<p>| Committee’s Questions | 8 Clause 12 - The DOH suggests that clause 12 be amended so that the Minister is also required to consult the Minister for Health before declaring an organism (including fish) to be either a permitted or prohibited organism. The suggestion is made on the basis that the Minister for Health has a specific interest in ensuring that activities, including agricultural and biosecurity activities, do not adversely impact on the health of the population. (a) What is the Department’s view on this? The DEC suggests that clause 12(2) be amended so that the Minister is also required to consult with the Minister for the Environment before declaring a fish to be either a permitted or prohibited organism. The suggestion is made on the basis that the Minister for the Environment is responsible for the protection of | Response by the Department of Agriculture and Food | Under clause 12(1)(c) the Minister for Agriculture and Food is able to consult with the Minister for Health before declaring an organism to be either a permitted or prohibited organism if that organism has the potential to impact on human health. To require consultation with the Minister for Health in relation to pests that have no human health impacts is an unnecessary administrative burden and may be counter-productive, particularly where a declaration needs to be made quickly to deal with an urgent, high-risk situation. Clause 12(1) requires consultation with the Minister for the Environment and the CALM Act Minister (which will usually be one and the same) and the Minister for Fisheries because these Ministers are responsible for managing two key areas that are covered by the Bill. i.e. the protection of the environment and fish resources against the impacts of harmful |</p>
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<td>the environment, including the aquatic environment, and the conservation of biodiversity generally. Any decision by the Minister to declare an organism either a permitted or prohibited organism can then benefit from, and incorporate, the knowledge held by the Minister for the Environment and the DEC. (b) What is the Department’s view on this?</td>
<td>organisms. (b) The Department of Fisheries specifically requested that clause 12(2) only require the Minister for Agriculture and Food to consult with the Minister for Fisheries before declaring a fish to be either a prohibited or permitted organism, as the Fisheries Minister has primary responsibility for managing the aquatic environment. The Department of Fisheries maintains that the Bill should not impose a mandatory obligation on the Minister to consult with the Environment Minister on every proposal to declare fish. Some declarations may need to be made quickly to deal with urgent, high-risk situations. Consultation will occur under clause 12(1)(c) where appropriate but there is no need for the added administrative burden that would result from a removal of the discretion.</td>
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<td>9 Part 2, Division 2 - The AGDAFF indicated that there is the potential for the BAM Bill to be inconsistent with a Commonwealth law where the latter prohibits or restricts the importation of a particular product into Australia and the BAM Bill allows the importation of the product into Western Australia. In such a case, the Commonwealth legislation would prevail under section 109 of the Commonwealth Constitution. (a) Has the Department considered potential inconsistencies</td>
<td>(a) The Department does not foresee any circumstances in which a particular product would be allowed to be imported into Western Australia when it is prohibited or restricted from entering Australia by Commonwealth legislation. The opposite situation may arise, however, if a product is allowed into Australia generally but because of a particular risk to Western Australia its entry into Western Australia is prohibited or restricted. The Department has previously had advice from the State Solicitors Office that it is possible in such a case that the two laws could</td>
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| (a) How has the WA Government responded to the question of the Department of Agriculture and Food operating concurrently without conflict? | operate concurrently without conflict (and notes that this is consistent with advice given to AGDAFF by the Australian Government Solicitor). It would depend on the precise legal circumstances. If an inconsistency did arise, for whatever reason, section 109 of the Australian Constitution would operate and the Commonwealth law would override the State law. (b) It is the WA Government’s intention to continue to work with Commonwealth authorities to ensure the National and State biosecurity systems interact as seamlessly as possible and that any restrictions on the movement of goods across the State and international borders are based on sound scientific assessment of the risks posed by organisms of biosecurity concern and potential carriers of these organisms, consistent with national and international obligations. The Department is continuing to work with the AGDAFF’s AusBIOSEC Taskforce to develop a policy framework that will improve national collaboration on biosecurity issues in the primary production and environment sectors.  
(c) While the roles of Commonwealth and State authorities for biosecurity management are interrelated, they are quite distinct. The movement of goods across the International border is a Commonwealth responsibility. The WA Government is responsible for managing the import of goods into Western Australia from another State or Territory. The Department refers |
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<td>any member of the public who is enquiring about importing goods into Australia from another country to the relevant Commonwealth authority. Corresponding arrangements are in place with Commonwealth authorities in respect to State border issues. The distinction between the responsibilities of the Commonwealth and the State exist under the current legislation and the new legislation will not provide any increase in potential for confusion.</td>
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<td>Clause 14 - The DEC contends that the prescription of a permit system to authorise the import of prohibited organisms has the potential to duplicate or cut across the existing import licence provisions of the <em>Wildlife Conservation Act 1950</em>, the <em>Wildlife Conservation Regulations 1970</em> and the <em>Wildlife Conservation (Reptile and Amphibians) Regulations 2002</em>. It suggests that these matters will need to be taken into consideration in the drafting of the regulations under the bill. Please confirm whether the regulations that are to be made under clause 14 (and any other relevant provisions of the bill) will be drafted with these issues in mind.</td>
<td>The Department will consult with the Department of Environment and Conservation when developing regulations and a permit system to manage the import of prohibited organisms. The Department is confident that any potential conflicts between those regulations and the <em>Wildlife Conservation Act 1950</em> and its regulations will be resolved during the drafting process.</td>
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<td>Clause 16 - The DEC suggests that the phrase ‘ought reasonably to know’ either requires further clarification or should be omitted. The DEC considers that it may be difficult for an inspector to</td>
<td>The Department does not agree with this suggestion. The phrase “ought reasonably to know” is included precisely because it assists in dealing with the problem alluded to – the difficulty in determining whether a person</td>
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<td>determine the alleged offender’s level of knowledge about the illegality of importing an organism or potential carrier without an admission from the alleged offender as to their knowledge. What is the Department’s view on this?</td>
<td>actually knew something. If it is impossible to prove actual knowledge then an offence can nevertheless be established by showing that whether or not a person actually knew something the circumstances were such that he or she should have known it. This is a reasonable provision and one commonly found in legislation. It is not unclear or uncertain. It simply depends on establishing what a person in the defendant’s position could reasonably be expected to know.</td>
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<td>12 Clause 17 - Refer to the above comments regarding clause 16.</td>
<td>As for 2 [clause 16].</td>
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<td>13 Clause 21 - The DOH suggests that clauses 21(4) and (5) be amended so that the Minister is also required to consult the Minister for Health before declaring an organism (including fish) to be a declared pest. The suggestion is made on the basis that the Minister for Health has a specific interest in ensuring that activities, including agricultural and biosecurity activities, do not adversely impact on the health of the population. (a) What is the Department’s view on this? The DEC suggests that clause 21(5) be amended so that the Minister is also required to consult with the Minister for the Environment before declaring a fish to be a declared pest. The suggestion is made on the basis that the Minister for the Environment is responsible for the protection of the environment, (a) and (b) The same advice applies for declared pests as was given under item 2 for permitted or prohibited organisms.</td>
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<td>including the aquatic environment, and the conservation of biodiversity generally. Any decision by the Minister to declare an organism a declared pest can then benefit from, and incorporate, the knowledge held by the Minister for the Environment and the DEC.</td>
<td>(a) The obligation on a person to report the presence, or the suspected presence, of a declared pest is important. Mounting a timely and effective response to incursions of harmful organisms (pests and diseases) that are exotic to the State, improves the chances of a successful eradication to avoid major economic consequences or harmful impacts on the environment or public amenity. Similarly, if a declared pest is known to be present within an area and that pest or disease is subject to an exclusion or eradication program, it is imperative that prompt action is taken when the pest or disease is found in order to eradicate it and prevent it from spreading to neighbouring lands, and plants and animals (as the case may be) on those lands. It has been the Department’s experience that some landholders or persons in charge of plants or animals may be reluctant to report the presence of potentially serious pests or diseases in order to avoid the financial cost of control measures. The penalties for failing to report the presence or suspected presence of a pest or disease need to be significant to underline the</td>
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<td>(b) What is the Department’s view on this?</td>
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14 Clause 25 - This clause imposes a maximum fine of $20,000 if a person finds or suspects that there is a declared pest in an area for which an organism is a declared pest or that an organism or thing is infected or infested with a declared pest in that area and fails to report the presence or suspected presence of the declared pest to the Director General or an inspector in accordance with the clause (the maximum penalty increases to a $100,000 fine and imprisonment for 12 months if the declared pest is a high impact organism). |

(a) This clause appears to be quite harsh. What was the rationale for the significant penalties that are imposed by this clause? |

(b) How are people supposed to know when an organism is a declared pest?
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<td>importance of compliance and provide a sufficient deterrent to breach.</td>
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<td>(b) People know or may inform themselves that something is a declared pest because the declaration will be published under clause 158 and a list of all declared pests will be kept on the Department’s electronic site under clause 159 and be available for perusal at the Department’s head office. If a person is unable to identify an organism found they need only contact the Department to have it identified.</td>
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<td>15 Clause 30 - The Manjimup ZCA has suggested that clause 30(3) be amended so that the Director General is required to provide a copy of a pest control notice to another person and any relevant management committee if the belief and opinion required in clauses 30(3)(a)(ii) and (b) exist. What is the Department’s view on this?</td>
<td>The Department does not agree with this suggestion. If the belief and opinion required in clauses 30(3)(a)(ii) and 30(3)(b) exist, then in most cases the Director General will provide a copy of the pest control notice as contemplated by the section. However, there may be cases where, despite the circumstances referred to in those provisions, these considerations are outweighed by others such as privacy or public interest.</td>
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<td>16 Clause 38 - The DEC is concerned this clause appears to have the potential to come into conflict with the administration and enforcement of, or the exercise of powers given under, other Acts. For example, if a person destroys native flora or fauna consequentially or incidentally to his or her efforts to comply with a requirement under the bill to control a declared pest, they may</td>
<td>(a) Yes.</td>
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<td></td>
<td>(b) Potential conflicts will be minimised or avoided by:</td>
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<td></td>
<td>• Appropriately framed pest control notices.</td>
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<td>• Regulations that take account of other legislation where necessary.</td>
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<td>contravene the native vegetation protection provisions of the Environmental Protection Act 1986 or the flora and fauna protection provisions of the Wildlife Conservation Act 1950. (a) Has the Department considered this potential conflict with other Acts? (b) How can/will the potential conflicts be minimised or avoided?</td>
<td>- The likelihood that consequential or incidental destruction of native flora would be covered by clause 1 of Schedule 6 of the Environmental Protection Act 1986 (clearing that is done in order to give effect to a requirement to clear under a written law). - Sensible enforcement of the Environmental Protection Act and the Wildlife Conservation Act. - Recourse to clause 3(2) if necessary.</td>
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<tr>
<td>Clause 38 - Regarding your response dated 15/2/07. The Department refers to how potential conflicts will be minimised or avoided by (amongst other things): “Recourse to clause 3(2) if necessary”. Clause 3(2) lists 7 Acts but not the Environmental Protection Act 1986 or the Wildlife Conservation Act 1950. The expressio unius rule would apply to specifically exclude both these Acts. (a) Please explain why these two Acts are not included in clause 3(2). (b) Does the Department intend to amend clause 3(2)? (c) Is the Environmental Protection Agency the lead agency with regard to the controlling of pests? Does its</td>
<td>(a) The answer the committee refers to was mistaken. As the committee notes, clause 3(2) does not include the Environmental Protection Act or the Wildlife Conservation Act. The mistake is explained by the fact that originally, when the Soil and Land Conservation Act was to be included in the Bill, the Environmental Protection Act was listed. The Wildlife Conservation Act is not included in clause 3(2) because it establishes a rather antiquated regulatory scheme that was developed in 1950 and which should not take precedence over the BAM Act. (b) No. (c) No, the Department of Agriculture and Food is the lead agency for the control of pests (biosecurity) and hence the Environmental</td>
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<td>legislation have primacy?</td>
<td>Protection Act is not included in clause 3(2). The Department does not expect any conflict to arise in relation to the operation of the proposed BAM Act and the Environmental Protection Act but would be open to consideration of a suggestion that the latter be included in clause 3(2) if the Department of Environment and Conservation see a potential for conflict that would necessitate that Act taking precedence. The Department notes, however, that the DEC has not suggested this to date.</td>
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18 | **Clause 39** - This clause authorises the Director General to supply poison (despite anything contrary in the *Poisons Act 1964*) to a person under an agreement with that person to supply materials, appliances or services for the control of declared pests. The EM indicates that such poisons could include herbicides. What controls are there for the use of the poisons supplied by the Director General? |
| This clause does not cover the use of any materials that they have been supplied to a person under agreement with the Director General. The recipient of any materials or appliances would have to abide by any relevant laws for the use of those materials or appliances. In the case of poisons, this would be the *Poisons Act 1964*. There will be regulations under the BAM Act for the control of use of agricultural chemicals. |

19 | **Clause 39.** Regarding your response faxed on 9/2/07. |
| (a) Please explain what restraints (if any) are on the Director General when supplying a poison. |
| Clause 39(3) preserves the existing statutory arrangement under section 8(2) of the *Agriculture Protection Board Act 1950* and section 32 the *Poisons Act 1964* for the supply of poison products. This provision originated when the State was responsible for the registration of agriculture and veterinary chemicals, a function that is now performed by the Commonwealth via the Australian Pesticides and Veterinary Medicines Authority. |
| (b) The *Poisons Act 1964* contemplates both use and supply of poisons, for example, the Long Title, sections 19 and 22. The Committee notes that clause 39(3) permits the |
Director General to supply a poison “despite anything to the contrary in the Poisons Act 1964”. Yet clause 3(2) provides for the provisions in the BAM Bill to be “in addition to” provisions in the Poisons Act 1964. Clause 3(3) then provides that if a provision of the BAM Bill is inconsistent with a provision in the Poisons Act 1964, the Poisons Act 1964 prevails to the extent of the inconsistency. Clause 39(3) appears to be inconsistent with clause 3(3). What is the interplay between clause 39(3) and clause 3(3)?

The Director General would not in normal circumstances supply poison to a person contrary to the requirements of the Poisons Act 1964. Currently the Department’s Bait Production Unit manufactures and supplies several Schedule 7 poison products that are used to control animal pests, such as wild dogs, foxes and rabbits. These products include 1080 (sodium monofluoroacetate) concentrate and 1080 bait products, strychnine, ready to lay rabbit baits and alphachlorase. The restraints that apply on the Director General for the supply of poison products include requirements to:

- Obtain a licence and comply with to manufacture and sell by retail or wholesale Schedule 7 poisons, and to comply with any condition on the licence;
- Comply with the conditions of any permit issued under the Act;
- Comply with the Code of Practice for the Safe Use and Management of 1080 which imposes significant controls on the use of 1080 baits, more so than is seen with other pesticides. This means that 1080 is not available to the general public. The risks associated with the proposed use of 1080 must be assessed and a person must be trained to use 1080 before they can purchase it and use it on their property. Incident reporting requirements apply;
- Comply with the Code of Practice for the Safe Use and Management of strychnine, which establishes similar standards to those required for 1080; and
- Maintain records of the sales of poisons.

The arrangements under the BAM Bill are intended to accommodate a
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<td>wide range of pest and disease threats well into the future. While clause 39(3) may be regarded as being somewhat outdated, this arrangement has been preserved to deal with some unforeseen situation that necessitates the taking of urgent action to control a declared pest animal that involves the supply of poisons to another person under conditions that do not comply with the Poisons Act 1964. For example landholders in an area might be required to participate in a control program using poisons to reduce a sudden build-up of declared pest animals in that area and prevent damage to environmentally sensitive areas or primary production. If the circumstances under which poisons are supplied to a person are not covered by the Poisons Act 1964, then clause 39 (3) would allow the Director General to take action to deal with a potentially high risk situation. However, it is correct that as the two provisions are drafted there is a clear inconsistency and an amendment will be moved to make 3(3) subject to section 39(3).</td>
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<p>| 20 Clause 41 - Subclause (3) authorises an officer of the Department or an inspector to enter any place (not including a dwelling) for the purpose of doing ‘operational work’. Subclause (2) authorises the carrying out of ‘operational work’ at any time. (a) Since ‘dwelling’, as it is defined in clause 63, is confined to the actual structure that is inhabited, does this clause authorise entry into, for example, a person’s backyard (that is, the person’s land surrounding their dwelling)? | (a) The term dwelling as defined under clause 63 does not include the backyard of a dwelling. Therefore an officer of the Department or inspector may enter a backyard to undertake operational work without obtaining permission from the occupier or person in charge of the place, or an entry warrant. This is necessary to deal with emergency situations, such as an outbreak of codling moth (Cydia pomonella – a serious pest of fruit trees) in urban areas. (b) The Department will issue property access guidelines to inspectors and Department officers. These will specify the circumstances in |</p>
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<td>(b) How will the entry be regulated or controlled? What procedures will apply to the entry? For example, will an officer need to give notice of their intent to enter a property for the purpose of undertaking ‘operational work’? Would regulations made under Schedule 1 Item 14(a) of the BAM Bill be used to regulate such entry?</td>
<td>which entry into the yard of a dwelling is permitted and the steps the inspector must take before entering. There will be an obligation on the officer or inspector to take reasonable steps to inform the owner, occupier or person in charge of the place of their intention to enter property to undertake operational work. While regulations may be established for this purpose, the only regulations that are contemplated at this point is a requirement for an officer or inspector to notify the owner, occupier or person in charge of the place of their intention to use poisons, chemicals or traps on the land. If there is doubt as to whether the property surrounding a dwelling is part of the “building” or “structure” of the dwelling the officer or inspector will be required to obtain the consent of the owner.</td>
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| (c) The Committee notes that ‘dwelling’ does not include vessels, such as houseboats. Why was it deemed necessary to allow officers or inspectors to enter houseboats but not other types of dwellings? During the briefing on 31 January 2007, the Department indicated to the Committee (in relation to clause 65) that it was necessary to make an exception for entry onto vessels so that the BAM Bill would be consistent with the *Fish Resources Management Act 1994*. The Committee understands that the exception was also necessary to ensure that the BAM Bill would be consistent with the *Pearling Act 1990* ([Public Consultation Report](#) p15). Please indicate which sections of those Acts are relevant to this issue. | c) The relevant sections are:  
*Fish Resource Management Act 1994* – Section 191. Note under Section 185 an inspector is only required to obtain an entry warrant before they can enter and carry out a search of premises used as a residence. This obligation does not cover boats.  
*Pearling Act 1990* – Section 36. |

21 Clause 42 - This clause empowers the Director General to direct an inspector to carry out a measure or action to control a declared pest. Despite any other provision of the BAM Bill or any other |

(a) Yes, the Department has considered the potential conflict with other Acts although it is difficult to consider in the abstract.
### Committee’s Questions

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<td>(a)</td>
<td>Has the Department considered this potential conflict with other Acts?</td>
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<tr>
<td>(b)</td>
<td>Is this clause (and clauses 38, 41 and 71(3)) intended to operate so as to authorise any measure or action that is directed by the Director General, despite the possibility that the measure or action may be in breach of another Act?</td>
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<td>(c)</td>
<td>How can/will the potential conflicts be minimised or avoided?</td>
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### Response by the Department of Agriculture and Food

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<td>(b)</td>
<td>Essentially the situation is that the Director General and inspectors will need to be mindful of obligations under Commonwealth Laws and the provisions referred to are not intended to, and cannot, authorise a breach of those laws.</td>
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<td>(c)</td>
<td>The Department will continue to consult and make arrangements with relevant State and Commonwealth authorities to avoid any potential conflicts.</td>
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**22 Part 2, Division 6 - The University of Western Australia Faculty of Natural and Agricultural Sciences suggests that the University**

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<td>(a)</td>
<td>The Bill requires the Biosecurity Council to “be comprised of members who, in the opinion of the Minister have a general or...</td>
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<td>should be represented on the proposed Biosecurity Council.</td>
<td>specific interest and expertise in the management of biosecurity in the State”. It is required to include members of community and producer organisations but the Bill is otherwise silent as to where the members will be drawn from. Clearly it is quite possible that a person from the faculty of Natural and Agricultural Sciences at the University of Western Australia or from another academic or research institution would be an appropriate appointment to the Council. It should be noted, however, that such a person would not be appointed as a representative of the institution to which they belong but as an individual with the requisite interest and expertise. Similarly, members of community and producer groups appointed as required by clause 48(1)(b) will not be appointed to represent those organisations, as such, although the specific mention is included to ensure that the interests of the sectors of industry, and the community that those organisations represent are brought to the Council. The Biosecurity Council will seek advice from Universities and other research organisations on biosecurity matters to whatever extent it considers necessary. Therefore it is not possible to say “how much” or “what type” of input would be sought but clearly, given the scientific nature of the subject with which the Council is concerned, it would not be surprising if this input was substantial.</td>
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<td>(a) How much and what type of input into the proposed Biosecurity Council is anticipated from universities, higher education providers and researchers?</td>
<td></td>
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<tr>
<td>(b) What is the planned size of the proposed Biosecurity Council? Will it still be a 10-member council as indicated in Appendix A of the Department’s Public Consultation Report?</td>
<td>(b) Yes, it is anticipated that the Biosecurity Council will consist of around 10 members.</td>
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<td>Committee’s Questions</td>
<td>Response by the Department of Agriculture and Food</td>
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<td>23 Clause 51</td>
<td>Correct the inadvertent omission of the word “occupier” from the clause. This clause deals with obligations in relation to dealing with land that is likely to produce agricultural produce with excessive chemical residues. Clearly these obligations need to apply to the occupier of land as well as the owner; and</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
<td>Change the reference to a “memorial” to a “notification” (on the title to land that is subject to a residue management notice). Where, as here, it is not necessary to prevent the sale of land a “notification” is the appropriate instrument under the Transfer of Land Act. This amendment, as well as those mentioned below, is proposed in response to advice from the Registrar of Titles. Because it is not necessary to use a memorial to register the existence of a residue management notice clause 55 (which deals with the consequences of a memorial being lodged) is to be removed.</td>
</tr>
<tr>
<td>Page 43, line 10 — To insert after “owner” —</td>
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<td>“ or occupier “.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
<td>Clauses 51 and 54 will be amended to change the reference to a “memorial” to a reference to “notification” (on the title to land that is subject to a residue management notice). Where, as here, it is not necessary to prevent the sale of land a notification is the appropriate instrument under the Transfer of Land Act.</td>
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<td>Page 43, line 14 — To insert after “owner” —</td>
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<td>“ or occupier “.</td>
<td></td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 43, line 25 — To insert after “owner” —</td>
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<td>“ or occupier “.</td>
<td></td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 43, line 28 — To insert after “owner” —</td>
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<td>“ or occupier “.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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</table>
### Committee’s Questions

| Page 43, line 29 — To insert after “owner” — |
| — “ or occupier ”. |
| The Minister for Agriculture and Food: To move — |
| Page 44, line 6 — To delete “memorial” and insert instead — |
| — “ notification ”. |
| The Minister for Agriculture and Food: To move — |
| Page 44, line 8 — To delete “notice of release in respect of the memorial is registered by the Registrar of Titles” and insert instead — |
| — “ removal of notification is registered under that section ”. |
| The Minister for Agriculture and Food: To move — |
| Page 44, line 9 — To insert after “owner” — |
| — “ or occupier ”. |

### Response by the Department of Agriculture and Food

The amendments to clauses 54, 97, 98, 100, 101, 102, 103 and 123 are also proposed as a result of advice from the Registrar of titles (or consequential to amendments made on the basis of that advice). The amendments will
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| The Minister for Agriculture and Food: To move —  
Page 45, line 2 — To delete “memorial” and insert instead —  
“ notification “. | make the provisions more workable by ensuring that the appropriate instruments, and Landgate’s standard practices, can be used. These are discussed in more detail in separate explanatory notes.  
Clause 54 will also be amended to refer to “removal of notification” rather than “notice of release”. This change is also made in clause 97. |
| The Minister for Agriculture and Food: To move —  
Page 45, line 5 — To delete “memorial” and insert instead —  
“ notification “. | |
| The Minister for Agriculture and Food: To move —  
Page 45, lines 6 and 7 — To delete “notice of release in respect of the memorial” and insert instead —  
“ removal of notification “. | |
| [Clerks:  
Heading to clause 54 would require amendment to read “Notification may be lodged with Registrar of Titles”. ] | |
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<td><strong>25</strong> Clause 55</td>
<td>Because it is not necessary to use a memorial to register the existence of a residue management notice clause 55 (which deals with the consequences of a memorial being lodged) will be removed.</td>
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<td>The Minister for Agriculture and Food: To oppose the clause.</td>
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<td>[Clerks:</td>
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<td>Subsequent clauses and cross-references throughout Bill would require renumbering. ]</td>
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<td><strong>26</strong> Part 3, Division 2</td>
<td>(a) Yes. The Department has previously advised the DOH that the recommendations of its pesticides review will be included in the development of regulations and codes of practice under the BAM Act.</td>
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<td>- The DOH advises that the existing legislation controlling the use of pesticides in WA is currently under review and suggests that any regulations that are to be made to control the acquisition, supply, use, storage, handling or transport of a chemical product (for example, regulations made under Part 3, Division 2, and Schedule 1) need to be drafted in conjunction with this review process. The Committee also notes that clause 191 provides the Minister with the power to issue codes of practice for, among other things, the use and management of chemical products.</td>
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<td>(a) Is the Department aware of the review of the existing legislation controlling the use of pesticides in WA?</td>
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<td>(b) What steps have been/will be taken to ensure that the regulations and codes of practice will be consistent with</td>
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<td>(b) The review recommends the establishment of a coordinating committee which will consist of representatives from government agencies and stakeholder groups. The Department will be represented on this group. The DOH will be a crucial contributor to the development of regulations under the BAM Act via the consultation required by clause 192 and this is particularly so given the type of regulatory structure recommended by the review.</td>
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<td>the results of that review?</td>
<td>(a) The Department has provided several sets of drafting instructions to Parliamentary Counsel’s Office but no drafts have yet been received. Several other sets of drafting instructions are being finalised by the Department and the Department of Fisheries which is overseeing the development of proposed biosecurity regulations for fish and aquatic environments, and the management of ballast water.</td>
</tr>
<tr>
<td><strong>27</strong> Part 3, Division 2. Regarding your response dated 15/2/07.</td>
<td>(b) The Department is consulting and will continue to consult with other public authorities, and key producer and community organizations on the drafting of the regulations. Four Regulations Reference Groups have been formed to provide the principal means of consultation. Members of the reference groups are drawn from these organizations. It is also proposed that suitable drafts of the regulations will be made available for public comment.</td>
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<td>(a) The Committee requests a progress report on the drafting of the regulations underpinning the BAM Bill.</td>
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<td>(b) How extensive is (or will be) the consultation process in the development of the regulations?</td>
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<td><strong>28</strong> Clause 65 - This clause deals with entry and access to places or conveyances for inspection purposes, and inspection powers.</td>
<td>(a) As noted in the previous answer, yes, the term “dwelling” as defined in clause 63 is limited to the “building, structure or tent” (or part thereof) so an inspector is not prevented from entering the land surrounding a dwelling. An inspector will be able to enter and conduct a search in, for instance a backyard, to look for signs of prohibited organisms such as serious diseases of fruit trees, or</td>
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<td>(a) Under subclause (1)(b), an inspector may at any time, for inspection purposes, enter a place that is not a dwelling. Again, the definition of the term ‘dwelling’ is confined to</td>
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<td>the actual structure that is inhabited (clause 63). Does the power of entry provided in clause 65(1)(b) extend to a person’s land surrounding their dwelling?</td>
<td>exotic aviary birds that have been illegally imported into the State. If there is doubt as to whether the property surrounding a dwelling is part of the “building” or “structure” of the dwelling the inspector will be required to obtain the consent of the owner and failing that an entry warrant.</td>
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<td>(b) The entry of dwellings is carefully regulated in clause 65. However, vessels, such as houseboats, are not included in the definition of ‘dwelling’. In fact, subclause 65(1)(a) provides that any conveyance (which includes vessels) may, at any time, be stopped, detained, boarded and entered unless that conveyance is a mobile home which is not a vessel. Why are vessels specifically excluded from the protections that are afforded to other types of dwellings when an inspector is seeking to enter a place or conveyance for inspection purposes? The Committee reiterates its request at Q9(c).</td>
<td>(b) The power to board or enter a conveyance applies to a vessel regardless of whether it is being used as a dwelling for consistency with the Fish Resources Management Act 1994, and the Pearling Act 1990. This is necessary so that if an inspector who has entered a vessel under the authority of either of those Acts finds a declared pest or something regulated under the BAM Act the legality of powers exercised under the BAM Act in relation to that thing will not be open to question. If it were otherwise it could defeat the purpose of having fisheries officers and inspectors also operating as inspectors under the BAM Act.</td>
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<td>Clause 65 - Clause 65 authorises an inspector, for inspection purposes, to enter a place that is not a dwelling (for instance, a quarantine facility) at any time. Clause 65(4)(b) also excuses an inspector from the requirement to take reasonable steps to inform the owner, occupier or person in charge of a ‘quarantine facility’ of his or her intent to enter that facility. The AGDAFF considers that this clause would be inconsistent with section 76 of the Quarantine Act 1908 (Cth) if it purported to apply to AQIS The term “quarantine facility” would only include an AQIS quarantine facility if that facility was the subject of an arrangement referred to in clause 166. Any such arrangement would be expected to include a requirement for permission of a Commonwealth officer prior to entry to the facility by an inspector. If it didn’t or if an inspector wished to enter an AQIS facility that was not a ‘quarantine facility’ under the Bill then clause 65 could not operate to authorise entry without permission and therefore it is not inconsistent with section 76 of the Commonwealth Quarantine Act.</td>
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<td>quarantine facilities to the extent that it purports to allow an inspector to enter these facilities without the permission of an AQIS quarantine officer. (a) Is the term ‘quarantine facility’ intended to include an AQIS quarantine facility? (b) If so, has the Department considered the inconsistency with section 76 of the Quarantine Act 1908 (Cth)?</td>
<td>(a) An example of significant damage to property might be damage done in gaining forced access to a place to deal with an urgent, high-risk situation, or to prevent the destruction of evidence. Currently inspectors seek the authority of the Director General if they are likely to cause minor damage to property (for example if they are to cut a lock on a gate) and this arrangement would continue after the new Act commences in operation. (b) The inspector makes the initial assessment and if in doubt would seek the authority of the Director General. Guidelines or instructions may be issued in relation to this matter. (c) If significant damage is justified in the circumstances the Director General will authorise the use of force.</td>
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<td><strong>Clause 91</strong> - This clause authorises an inspector to use assistance and force that is reasonably necessary in the circumstances when carrying out a function under the BAM Bill. However, if the use of reasonable force is likely to cause ‘significant’ damage to property, the inspector cannot use that force without the authority of the Director General. (a) What is an example of ‘significant’ damage? (b) Who decides whether damage is ‘significant’ and how is that person expected to make that decision? (c) What if significant damage is justified under the circumstances?</td>
<td>(a) An example of significant damage to property might be damage done in gaining forced access to a place to deal with an urgent, high-risk situation, or to prevent the destruction of evidence. Currently inspectors seek the authority of the Director General if they are likely to cause minor damage to property (for example if they are to cut a lock on a gate) and this arrangement would continue after the new Act commences in operation. (b) The inspector makes the initial assessment and if in doubt would seek the authority of the Director General. Guidelines or instructions may be issued in relation to this matter. (c) If significant damage is justified in the circumstances the Director General will authorise the use of force.</td>
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<td><strong>Clause 93</strong> - This clause provides that a person is not excused from</td>
<td>(a) The &quot;objection&quot; formula in relation to incriminating information</td>
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giving any information to an inspector on the ground that the information might tend to incriminate the person or render them liable to a penalty. However some protection against the requirement to provide the self-incriminating information is provided in subclause (2).

(a) Why is the protection in subclause (2) given only after the person objects to the requirement to provide self-incriminating information? Why isn’t the protection given automatically?

(b) Why does the protection in subclause (2) not extend to self-incriminating information that is derived from the information that is first given?

was used because it is used in other Western Australian legislation and seemed appropriate for the purposes of the BAM Bill, whereas an automatic protection would have been unnecessarily restricting. For Western Australian examples see s.13A(5) Aerial Spraying Control Act 1966; s.23 Australian Crime Commission (Western Australia) Act 2004; s.19(2) Caravan Parks and Camping Grounds Act 1995; s.15 Energy Coordination Act 1994; s.69 Energy Operators (Powers) Act 1979; s112A Environmental Protection Act 1986; s.17(5) Exotic Diseases of Animals Act 1993; s.46 First Home Owner Grant Act 2000. The formula is also routinely used by the Commonwealth.

(b) The Department assumes the Committee is referring to information obtained as a result of (as opposed to directly from) an answer given by a person. Protection against use as evidence of this information, if it might be incriminating, was not included because it did not occur to anyone to include it and as far as the Department and the drafter are aware it is not found in any other Western Australian legislation. Section 112A(3) of the Environmental Protection Act 1986 specifically provides that derived information is admissible but the Department does not see a need for a provision such as that.

32 Clause 94 – Subclause (1) authorises the Director General to take ‘remedial action’; that is, do anything that has not been done by

(a) “Anything incidental” is not intended to include entry onto private land. A power to enter the land is essential to, not incidental to, a
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<td>the owner, occupier or other person required to comply with a notice, direction or</td>
<td>power to take remedial action on that land - it would be impossible to take remedial action on private land without</td>
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<td>other requirement under the BAM Bill. The Director General is also authorised to do</td>
<td>entering it. The power to enter is therefore necessarily implied in the power to carry out the remedial action.</td>
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<td>anything incidental to the remedial action.</td>
<td>However, the Department believes it would be preferable to make this power transparent and to this end suggests the</td>
</tr>
<tr>
<td>(a) Was ‘anything incidental’ intended to include entry onto private land?</td>
<td>inclusion in this clause of reference to the powers of entry under clause 65(1)(b), (c) and (d).</td>
</tr>
<tr>
<td>(b) [Regardless of the answer to (a)] Why?</td>
<td>(b) Because the Department does not consider that the power to enter land can properly be considered “incidental”.</td>
</tr>
<tr>
<td>(c) [If the answer to (a) is yes] What procedures, if any, are required to be</td>
<td>(c) No procedures are set out in the Bill. If procedures were to be prescribed by regulation item 14(a) of Schedule 1</td>
</tr>
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<td>complied with before the Director General may enter onto private property? That is,</td>
<td>would not be relied. This is for the purpose of regulating the entry to land of persons and other things in order to</td>
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<td>are there equivalents to the clause 65 procedures for entry (for inspection purposes)</td>
<td>prevent the spread of declared pests and if regulations were contemplated one would expect to see reference to them</td>
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<tr>
<td>in this context? Would regulations made under Schedule 1 Item 14(a) of the BAM Bill be</td>
<td>in clause 94(2). There will certainly be administrative procedures that inspectors will be required to comply with</td>
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<td>used to regulate such entry?</td>
<td>relating to notice and consent but as noted at a) the Department suggests that clause 94(1) be amended and has</td>
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<td></td>
<td>instructed Parliamentary Counsel to draft an appropriate provision. This will be provided to the Committee when it is</td>
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<td>available.</td>
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33 Clause 94

The amendments to clause 94 are proposed because it is advisable that:
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<tr>
<td>The Minister for Agriculture and Food: To move — Page 73, after line 19 — To insert — &quot; (2) If the Director General is to take remedial action under section 37 or 87 or under the regulations, an inspector may exercise any of the powers specified in section 65(1)(b), (c), (d), (e) and (f) that are necessary or expedient for the purposes of taking the remedial action, as if the remedial action were an inspection purpose. &quot;[Clerks: Subsequent subclauses would require renumbering.] The Minister for Agriculture and Food: To move — Page 73, after line 21 — To insert — &quot; (a) the procedure for taking remedial action;</td>
<td>The powers that may be exercised when remedial action is taken in the event of a failure to comply with obligations under the Act are clear on the face of the legislation and not left to the status of powers implied by the existence of the power to take the remedial action; and A power to make regulations as to “the procedure for taking remedial action” is included in the regulation-making powers of clause 94(3).</td>
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<tr>
<td>[Clerks: Subsequent paragraphs would require renumbering.]</td>
<td>”.</td>
</tr>
<tr>
<td><strong>34 Clause 95</strong> – Where ‘remedial action’ is taken against an owner of land under clause 94, the cost of taking the remedial action is a charge on the land. If the charge amount is not paid by the due date, the Director General may lodge a memorial of the charge with the Registrar of Titles (subclause (2)). One effect of registering a memorial on the land is that no instruments to transfer the land may be registered after the memorial is registered without the consent of the Director General (clause 97). Subclause (3) provides that the charge amount is taken not to be paid by the due date if a cheque that is presented by the landowner in purported payment of the charge amount is dishonoured on the first presentation – this is the case even though the due date may not have arrived when the cheque is dishonoured. What was the rationale for subclause (3)?</td>
<td>This clause provides some certainty by putting the onus on the payer to ensure a cheque is honoured and avoids the Department having to re-present cheques.</td>
</tr>
<tr>
<td><strong>35 Clause 97</strong> The Minister for Agriculture and Food: To move —</td>
<td>The amendments to clauses 54, 97, 98, 100, 101, 102, 103 and 123 are also proposed as a result of advice from the Registrar of Titles (or consequential to amendments made on the basis of that advice). The</td>
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<tr>
<td>Page 75, lines 7 to 9 — To delete the lines.</td>
<td>Amendments will make the provisions more workable by ensuring that the appropriate instruments, and Landgate’s standard practices, can be used. These are discussed in more detail in separate explanatory notes.</td>
</tr>
<tr>
<td>[Clerks:</td>
<td>Clause 54 will also be amended to refer to “removal of notification” rather than “notice of release”. This change is also made in clause 97.</td>
</tr>
<tr>
<td>Page 75, line 10 — paragraph designation (b) to be deleted.</td>
<td></td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
<td>Clause 97 as drafted requires a memorial to prevent transfer of the land in question and enables it to prevent other dealings. To ensure consistency with Landgate’s forms and procedures this is to be amended so that all dealings are prohibited. Where it is not necessary, in a particular case, that a dealing be prohibited, the Director General will consent to that dealing being registered.</td>
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<tr>
<td>Page 75, line 10 — To delete “may” and insert instead — “is to”.</td>
<td>Under subclauses (2) and (3) it is contemplated that the Registrar of Titles will hold in his or her custody dealings lodged while a memorial (prohibiting registration of further dealings) is registered against the title until the memorial is withdrawn. This is unnecessary and could cause problems.</td>
</tr>
<tr>
<td>The Minister for Agriculture and Food: To move —</td>
<td>The deletion of subclauses (2) and (3) will still permit the intention of the clause to be effected by the Registrar having the legal power to reject all subsequent dealings with land after registration of a memorial. The proposed amendment avoids the problematic legal issues that would arise if those documents were retained, raising questions and competing claims as to the current legal status of the documents and the order of priority of</td>
</tr>
<tr>
<td>Page 75, line 11 — To delete “other”.</td>
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### Committee’s Questions

[Clarks:
Page 75, line 6 — subclause designation (1) to be deleted.]

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<th><strong>Clause 98</strong> - This clause allows land which is charged with the cost of remedial action undertaken by the Director General to be sold in order to recover the cost if it remains unpaid after the due date. Will the power to sell such land only be exercised as a last resort?</th>
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<td>37</td>
<td><strong>Clause 98</strong></td>
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<td></td>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td></td>
<td>Page 75, line 29 — To delete “powers” and insert instead —</td>
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<td></td>
<td>“ functions ”.</td>
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<td></td>
<td>The Minister for Agriculture and Food: To move —</td>
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<td></td>
<td>Page 76, line 4 — To delete “powers” and insert instead —</td>
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<td></td>
<td>“ functions ”.</td>
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### Response by the Department of Agriculture and Food

registration.

Yes, action by the Director General to force the sale of land to recover an unpaid charge amount would only be taken as a last resort. The Director General would only consider this course of action if the amount unpaid was substantial and all other avenues to recover it had been exhausted.

The amendments to clauses 54, 97, 98, 100, 101, 102, 103 and 123 are also proposed as a result of advice from the Registrar of Titles (or consequential to amendments made on the basis of that advice). The amendments will make the provisions more workable by ensuring that the appropriate instruments, and Landgate’s standard practices, can be used. These are discussed in more detail in separate explanatory notes.

Clause 98 allows the equivalent of a mortgagee sale when an amount charged on land remains unpaid. Landgate advised that it is usually expected that procedures for exercising a chargee’s right of sale would be set out in full in the legislation. In this case, however, the Department of Agriculture and Food does not consider this feasible or necessary. A sale of land has never been required in relation to a debt due for remedial work and it is hoped it will never be required under the new legislation. It would be an exceptional case in which resort needed to be had to this
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<td>Page 76, line 10 — To delete “powers” and insert instead — “ functions ”.</td>
<td>provision but it is included so that the Bill is not found lacking in the unlikely event that it is needed. Consequently detailed provisions are uncalled for.</td>
</tr>
<tr>
<td>The Minister for Agriculture and Food: To move —</td>
<td>The proposed amendment will substitute “functions” for “powers” to ensure that the Director General will have the obligations (as well as the rights) of a mortgagee if the provision is used.</td>
</tr>
<tr>
<td>Page 76, after line 12 — To insert — “ (4) The existence of a charge or registration of a memorial of a charge on land does not affect the Director General’s discretion to proceed for recovery of the unpaid amount in proceedings unrelated to the charge.</td>
<td>A new subclause (4) is inserted to make it clear that a charge or a memorial of a charge does not prevent the Director General from pursuing other means of recovery of an amount owing.</td>
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<tr>
<td>(4) The existence of a charge or registration of a memorial of a charge on land does not affect the Director General’s discretion to proceed for recovery of the unpaid amount in proceedings unrelated to the charge.</td>
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38 **Clause 100**

The Minister for Agriculture and Food: To move —  

Page 77, lines 4 and 5 — To delete “give a notice of release to the owner of the land to be lodged for registration under section 101” and insert instead — “ lodge a withdrawal of memorial with the Registrar of Titles ”.  

The amendments to clauses 54, 97, 98, 100, 101, 102, 103 and 123 are also proposed as a result of advice from the Registrar of Titles (or consequential to amendments made on the basis of that advice). The amendments will make the provisions more workable by ensuring that the appropriate instruments, and Landgate’s standard practices, can be used. These are discussed in more detail in separate explanatory notes.  

The amendment to clause 100 will make the clause consistent with Landgate terminology.  

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Committee’s Questions

[Clerks:
The heading to clause 100 would require amendment so that it reads “Withdrawal of memorial”.]

39 Clause 101

The Minister for Agriculture and Food: To move —
Page 77, after line 8 — To insert the following —

(1) In this Division —
“land document” means —

(a) a notification or removal of notification lodged with the Registrar of Titles under Part 3 Division 1; or

(b) a memorial or withdrawal of memorial lodged with the Registrar of Titles under Part 4 Division 6;

“register”, in relation to a land document, means —

Response by the Department of Agriculture and Food

The amendments to clauses 54, 97, 98, 100, 101, 102, 103 and 123 are also proposed as a result of advice from the Registrar of Titles (or consequential to amendments made on the basis of that advice). The amendments will make the provisions more workable by ensuring that the appropriate instruments, and Landgate’s standard practices, can be used. These are discussed in more detail in separate explanatory notes.

Clause 101 deals with the registration of memorials and notices. It is strictly correct to say that a memorial is “registered” on the Land Titles register whereas a notification is “endorsed” on the certificate of title. Rather than make this distinction in each place necessary, clause 101 will be amended to define “register”, in relation to “land documents” (also defined). Subclause (3) will be amended accordingly.

Clause 102 of the Bill provides that registration fees will not be payable on memorials or notices (of release of memorial) lodged under the Act. This is to be amended to remove the exemption from registration fees and a specific requirement to pay any relevant fee is included in the redrafted clause 101(3). As a result, the Director General will be required to pay registration fees on documents lodged with the Registrar of Titles in the
### Committee’s Questions

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<td>(a)</td>
<td>endorse the particulars of the document on the certificate of title for the land to which the document relates; and</td>
</tr>
<tr>
<td>(b)</td>
<td>register or enter the particulars of the document in the Land Titles Register;</td>
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[Clarks: Subsequent subclauses will require renumbering.]

The Minister for Agriculture and Food: To move —

Page 77, line 9 — To delete “A memorial or notice lodged with the Registrar of Titles under this Act” and insert instead —

“ A land document ”.

The Minister for Agriculture and Food: To move —

Page 77, line 12 — To delete “memorials and notices lodged with the Registrar under this Act” and insert instead —

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<td>same manner as anyone else.</td>
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<td>“land documents”.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 77, line 17 — To delete “memorial or notice” and insert instead —</td>
<td></td>
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<tr>
<td>“land document”.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 77, lines 18 and 19 — To delete the lines and insert instead —</td>
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<td>“</td>
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<td>(3) The Registrar of Titles must, on the lodging of a land document and payment of any relevant fee, register the document.</td>
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</table>

40 Clause 102

The Minister for Agriculture and Food: To move —       |

Page 77, line 21 — To delete “The registration of a memorial or | The amendments to clauses 54, 97, 98, 100, 101, 102, 103 and 123 are also proposed as a result of advice from the Registrar of Titles (or consequential to amendments made on the basis of that advice). The amendments will make the provisions more workable by ensuring that the |
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<td>notice under this Act” and insert instead — “ A land document registered under section 101 ”.</td>
<td>appropriate instruments, and Landgate’s standard practices, can be used. These are discussed in more detail in separate explanatory notes.</td>
</tr>
<tr>
<td>The Minister for Agriculture and Food: To move — Page 77, line 22 — To delete “and registration fees”.</td>
<td>Clause 101 deals with the registration of memorials and notices. It is strictly correct to say that a memorial is “registered” on the Land Titles register whereas a notification is “endorsed” on the certificate of title. Rather than make this distinction in each place necessary, clause 101 will be amended to define “register”, in relation to “land documents” (also defined). Subclause (3) will be amended accordingly.</td>
</tr>
<tr>
<td>[Clerks: The heading to clause 102 would require amendment by deleting “and registration fees”.]</td>
<td>Clause 102 of the Bill provides that registration fees will not be payable on memorials or notices (of release of memorial) lodged under the Act. This is to be amended to remove the exemption from registration fees and a specific requirement to pay any relevant fee is included in the redrafted clause 101(3). As a result, the Director General will be required to pay registration fees on documents lodged with the Registrar of Titles in the same manner as anyone else.</td>
</tr>
<tr>
<td><strong>41</strong> Clause 103</td>
<td>The amendments to clauses 54, 97, 98, 100, 101, 102, 103 and 123 are also proposed as a result of advice from the Registrar of Titles (or consequential to amendments made on the basis of that advice). The amendments will make the provisions more workable by ensuring that the appropriate instruments, and Landgate’s standard practices, can be used. These are discussed in more detail in separate explanatory notes.</td>
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<td>The Minister for Agriculture and Food: To move — Page 77, line 24 — To delete “or notice in relation to land is registered” and insert instead — “ is registered under section 101 ”.</td>
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<td><strong>42</strong> Clause 112 – If an employee is charged in her or his capacity as an employee with an offence under the BAM Bill, her or his employer may also be charged with the offence whether or not the employee acted without the employer’s authority or contrary to the employer’s orders or instructions. If the employee is then convicted of the offence, the employer is taken to have also committed the offence. The employer may also be charged with the offence even if the employee is not charged with the offence. What is the rationale for this clause?</td>
<td>The rationale for this clause is the principle that employer’s have a responsibility not only to not direct or authorise the commission of an offence by an employee but to take reasonable measures to ensure that offences are not committed by employees. Where the employer has done so and does not know about the commission of the offence then that employer has a defence to a charge under this section. Subclause (3) would be used in a situation where the culpability of the employer for failing to take measures to prevent an offence was greater than the culpability of the employee who actually committed the offence, making it unfair to charge the employee. This kind of ‘vicarious liability’ clause is regularly used in legislation creating offences.</td>
</tr>
</tbody>
</table>
| **43** Clause 123  
The Minister for Agriculture and Food: To move —  
Page 89, lines 26 to 29 — To delete the lines.  
[Clerks:  
Subsequent subparagraphs will require renumbering. ] | The amendments to clauses 54, 97, 98, 100, 101, 102, 103 and 123 are also proposed as a result of advice from the Registrar of Titles (or consequential to amendments made on the basis of that advice). The amendments will make the provisions more workable by ensuring that the appropriate instruments, and Landgate’s standard practices, can be used. These are discussed in more detail in separate explanatory notes.  
Clause 123(b)(i) makes provision for the Registrar of Titles or Assistant Registrar of Titles to provide, for the purposes of proceedings under the BAM Act, a certificate that a registered proprietor’s name appears in the Land Titles Register. Provision already exists under section 239B of the |
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<td><em>Transfer of Land Act 1893 for documents and printouts setting out matters at a particular point in time to be certified and sealed for use as evidence in Court. Consequently clause 123(b)(i) will be deleted as unnecessary.</em></td>
</tr>
<tr>
<td><strong>44</strong> Clause 129</td>
<td>The amendments to clauses 129, 139, 145 and 157 take account of the fact that the <em>Financial Administration and Audit Act 1985</em> has now been replaced by the <em>Financial Management Act 2006</em>, under which the Consolidated Fund is now known as the Consolidated Account.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 93, lines 8 to 10 — To delete the lines and insert instead —</td>
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<td>“operating account” means an agency special purpose account established and maintained under the Financial Management Act 2006 section 16;</td>
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<td>“”</td>
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<p>| <strong>45</strong> Clause 139     | The amendments to clauses 129, 139, 145 and 157 take account of the fact that the <em>Financial Administration and Audit Act 1985</em> has now been replaced by the <em>Financial Management Act 2006</em>, under which the Consolidated Fund is now known as the Consolidated Account. |
| The Minister for Agriculture and Food: To move — |  |
| Page 99, line 9 — To delete “Fund” and insert instead — |  |
| “Account” |  |</p>
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| Page 99, line 18 — To delete “Fund” and insert instead — “Account”.
[Clerks: “Fund” to be deleted and “Account” inserted in the heading.] | The amendment to clause 141 corrects an error. |
| 46 Clause 141 | |
| The Minister for Agriculture and Food: To move — Page 100, line 6 — To delete “management” and insert instead — “activity”.
<p>| The amendments to clauses 129, 139, 145 and 157 take account of the fact that the Financial Administration and Audit Act 1985 has now been replaced by the Financial Management Act 2006, under which the Consolidated Fund is now known as the Consolidated Account. The amendment to clause 145 will allow producer contributions to fund improvement of techniques for the control of prescribed pests and thereby improve the efficiency and effectiveness of pest control programs. |
| 47 Clause 145 | |
| The Minister for Agriculture and Food: To move — Page 102, line 27 — To insert after “control of — “, or for the advancement and improvement of control measures for,”. |</p>
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<td>Page 103, line 6 — To delete “Fund” and insert instead — “Account”. The Minister for Agriculture and Food: To move — Page 103, line 21 — To delete “Fund” and insert instead — “Account”. Division heading The Minister for Agriculture and Food: To move —</td>
<td>The amendments to clauses 150, 151, 152, 153, 154, 155, 156, 157, 182 and 187 relate to the substitution of the “Agriculture Authority” for the “Ministerial Body” as the body corporate established under the Act. Most of the amendments simply make that change in terminology but the reasons for it and the relevant substantial changes should be noted. The BAM Bill required the establishment of a body corporate to replace</td>
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<tr>
<td>Page 107, lines 2 and 3 — To delete “Minister and the Western Australian Agriculture Ministerial Body” and insert instead — “Western Australian Agriculture Authority”.</td>
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“Authority”. | the body corporate established under the *Agriculture Act 1988*, which is to be repealed. The Bill, as drafted, established the “Western Australian Agriculture Ministerial Body” as a body corporate (clause 150) “through which the Minister can perform any functions of the Minister that can more conveniently or appropriately be performed by a body corporate than an individual” (clause 151). Parliamentary Counsel advised that a “Ministerial Body” used in this way was a device that had been used successfully in other legislation.

The Minister for Agriculture and Food: To move — Page 107, line 7 — To delete “Ministerial Body” and insert instead — “Authority”.

Page 107, line 9 — To delete “Ministerial Body” and insert instead — “Authority”.

The Minister for Agriculture and Food: To move — Page 107, line 11 — To delete “Ministerial Body” and insert instead — “Authority”.

The Minister for Agriculture and Food: To move — Page 107, line 12 — To delete “Ministerial Body” and insert instead — “Authority”.

The Bill confers the functions (including powers) on the Minister (clause 152, 154 and 155). These include specific provisions in relation to participation in a business concern (subject to the approval of the Treasurer, clause 153), in relation to intellectual property (clause 154) and in relation to research bodies (clause 155).

An important driver for these provisions was the need to remedy deficiencies in the Agriculture Act that had imposed unintended limitations on the capacity of the Department of Agriculture and Food, and more particularly the body corporate, to participate fully in some important research ventures and to efficiently exploit the intellectual property created within the Department.

Because of the difficult conceptual distinctions between the Minister as an individual and the Ministerial Body as a separate legal entity but an ‘empty corporation’, and because of the need for clarity in relation to ownership of
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<td>instead —</td>
<td>intellectual property and rights to apply for the protection of intellectual property, not only in Australia but overseas, officers of the Department were concerned that while the provisions were sound from a legal and drafting perspective, there would be problems in applying them practically, and explaining them in dealings with other parties, particularly international parties.</td>
</tr>
<tr>
<td>“ Authority ”.</td>
<td>The Department therefore took the view that because the body corporate would be a statutory corporation (and therefore be limited in its functions to those set out in the legislation establishing it) and because in practice the functions listed in clause 152 would be performed by the Ministerial Body, not the Minister as such, it would be preferable for this to be clear on the face of the section. This is particularly so in view of the history of difficulty the Department has had with legal interpretations of the functions and capacity of the body corporate under the legislation that is to be repealed by the BAM Bill. The amended provisions achieve this.</td>
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<td>(b) to perform such other functions as are conferred on it under this or</td>
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<td>any other Act.</td>
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An important driver for these provisions was the need to remedy deficiencies in the Agriculture Act that had imposed unintended limitations on the capacity of the Department of Agriculture and Food, and more particularly the body corporate, to participate fully in some important research ventures and to efficiently exploit the intellectual property created within the Department.

Because of the difficult conceptual distinctions between the Minister as an individual and the Ministerial Body as a separate legal entity but an ‘empty corporation’, and because of the need for clarity in relation to ownership of intellectual property and rights to apply for the protection of intellectual property, not only in Australia but overseas, officers of the Department were concerned that while the provisions were sound from a legal and drafting perspective, there would be problems in applying them practically, and explaining them in dealings with other parties, particularly international parties.

The Department therefore took the view that because the body corporate would be a statutory corporation (and therefore be limited in its functions to those set out in the legislation establishing it) and because in practice the functions listed in clause 152 would be performed by the Ministerial Body,
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<td>Page 108, line 14 — delete full stop and insert semi-colon.]</td>
<td>individual and the Ministerial Body as a separate legal entity but an ‘empty corporation’, and because of the need for clarity in relation to ownership of intellectual property and rights to apply for the protection of intellectual property, not only in Australia but overseas, officers of the Department were concerned that while the provisions were sound from a legal and drafting perspective, there would be problems in applying them practically, and explaining them in dealings with other parties, particularly international parties.</td>
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<td>Page 108, before line 15 — To insert —</td>
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<td>(2) The Authority has all the powers it needs to perform its functions.</td>
<td>The Department therefore took the view that because the body corporate would be a statutory corporation (and therefore be limited in its functions to those set out in the legislation establishing it) and because in practice the functions listed in clause 152 would be performed by the Ministerial Body, not the Minister as such, it would be preferable for this to be clear on the face of the section. This is particularly so in view of the history of difficulty the Department has had with legal interpretations of the functions and capacity of the body corporate under the legislation that is to be repealed by the BAM Bill. The amended provisions achieve this.</td>
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<td>The body corporate has been called the Agriculture “Authority” rather than the Agriculture “Ministerial Body” because the latter term in reserved for use where the model in the Bill as drafted is used (that is, where powers given to the Minister may, in some circumstances, be exercised by a Ministerial body corporate).</td>
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<td>Page 108, line 21 — To insert after “concern” — “ or research body ”.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 108, line 25 — To insert after “purpose” — “ , and for that purpose, apply for, hold, receive, exploit and dispose of any intellectual property ”.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 108, line 29 — To delete “Minister” and insert instead — “ Authority ”.</td>
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<td>The Minister for Agriculture and Food: To move — Page 109, line 7 — To delete “the Minister” and insert instead — “in relation to a business concern, the Authority”.</td>
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<td>The Minister for Agriculture and Food: To move — Page 109, line 11 — To delete “or is of a kind referred to in</td>
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<td>(1) Any intellectual property, or right to apply for, hold, receive, exploit or dispose of intellectual property, that the State acquires on or after the day on which this section comes into operation is, by operation of this section, assigned to the Authority.</td>
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<td>(2) In subsection (1) —</td>
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<td>“intellectual property” means intellectual property —</td>
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<td>(a) created in the course of the performance of functions under this Act; or</td>
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<td>(b) otherwise created in the course of the performance of functions by a person in that person’s capacity as a person employed or engaged in the department.</td>
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<td>51</td>
<td>Clause 155</td>
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<td>The Minister for Agriculture and Food: To oppose the clause.</td>
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<tr>
<td>Page 110, line 24 — To delete “Ministerial Body” and insert instead —</td>
<td>on the capacity of the Department of Agriculture and Food, and more particularly the body corporate, to participate fully in some important research ventures and to efficiently exploit the intellectual property created within the Department.</td>
</tr>
<tr>
<td>“ Authority ”.</td>
<td>Because of the difficult conceptual distinctions between the Minister as an individual and the Ministerial Body as a separate legal entity but an ‘empty corporation’, and because of the need for clarity in relation to ownership of intellectual property and rights to apply for the protection of intellectual property, not only in Australia but overseas, officers of the Department were concerned that while the provisions were sound from a legal and drafting perspective, there would be problems in applying them practically, and explaining them in dealings with other parties, particularly international parties.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
<td>The Department therefore took the view that because the body corporate would be a statutory corporation (and therefore be limited in its functions to those set out in the legislation establishing it) and because in practice the functions listed in clause 152 would be performed by the Ministerial Body, not the Minister as such, it would be preferable for this to be clear on the face of the section. This is particularly so in view of the history of difficulty the Department has had with legal interpretations of the functions and capacity of the body corporate under the legislation that is to be repealed by the BAM Bill. The amended provisions achieve this.</td>
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<tr>
<td>Page 110, line 26 — To delete “Ministerial Body” and insert instead —</td>
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<td>“ Authority ”.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 110, line 29 — To delete “Ministerial Body” and insert instead —</td>
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<tr>
<td>“ Authority ”.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 110, line 30 — To delete “Ministerial Body” and insert instead —</td>
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<td>“ Authority ”.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move — Page 111, line 1 — To delete “Ministerial Body” and insert instead — “Authority”.</td>
<td>The body corporate has been called the Agriculture “Authority” rather than the Agriculture “Ministerial Body” because the latter term in reserved for use where the model in the Bill as drafted is used (that is, where powers given to the Minister may, in some circumstances, be exercised by a Ministerial body corporate).</td>
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<tr>
<td>The Minister for Agriculture and Food: To move — Page 111, line 4 — To delete “Ministerial Body” and insert instead — “Authority”.</td>
<td>Clause 150, amended as proposed, will establish the Authority and the purpose of the Authority will be clearly set out in clause 151. Clause 152 will confer the relevant powers on the Authority. In reviewing the Bill during drafting of the amendments it was realised that there is no reason why the Authority’s power to participate in a research body needed to be the subject of a separate clause. Consequently clause 155 will be removed and provisions enabling this participation will be included in clause 152 with appropriate amendments to that clause and clause 153.</td>
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<td>The Minister for Agriculture and Food: To move — Page 111, line 6 — To delete “Ministerial Body” and insert instead — “Authority”.</td>
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<td>The Minister for Agriculture and Food: To move — Page 111, lines 12 and 13 — To delete “Ministerial Body” and insert instead —</td>
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<td>Committee’s Questions</td>
<td>Response by the Department of Agriculture and Food</td>
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<td>&quot;Authority&quot;.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 111, line 16 — To delete “Ministerial Body” and insert instead —</td>
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<td>“Authority”.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 111, line 17 — To delete “Ministerial Body” and insert instead —</td>
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<td>“Authority”.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 111, line 20 — To delete “Ministerial Body’s” and insert instead —</td>
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<tr>
<td>“Authority’s”</td>
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<td>[Clerks:</td>
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<tr>
<td>In heading to clause delete “Ministerial Body” and insert instead</td>
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</table>
### Committee’s Questions

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<thead>
<tr>
<th>Clause 157 – Please confirm whether the intended effect of clause 157(a) was to make the Director General/the accountable officer for the Department accountable to the Minister for the financial management of the actions of the Minister under clauses 152, 154 and 156 of the BAM Bill, as they are exercised by the Western Australian Agriculture Ministerial Body?</th>
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<tbody>
<tr>
<td>(a) If so, why?</td>
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<tr>
<td>(b) If not, what was the intent of clause 157(a)?</td>
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</table>

### Response by the Department of Agriculture and Food

| (a) The purpose of clause 157 is to ensure that the Financial Administration and Audit Act (now replaced by the \textit{Financial Management Act 2006}) applies in relation to financial operations of the Ministerial Body and that the Director General is the accountable authority under that Act in relation to those operations. Accountable authorities have extensive responsibilities under the Financial Management Act as well as being responsible to the Minister for financial management. Proposed amendments to this clause will be provided to the Committee. |
| (b) There needs to be an accountable authority and the Director General is the appropriate officer. |
| (c) Not applicable. |

### 54 Clause 157

The Minister for Agriculture and Food: To move —

Page 111, lines 31 and 32 — To delete “Financial Administration and Audit Act 1985” and insert instead —

“Financial Management Act 2006”.

The amendments to clauses 150, 151, 152, 153, 154, 155, 156, 157, 182 and 187 relate to the substitution of the “Agriculture Authority” for the “Ministerial Body” as the body corporate established under the Act. Most of the amendments simply make that change in terminology but the reasons for it and the relevant substantial changes should be noted.

The BAM Bill required the establishment of a body corporate to replace the body corporate established under the \textit{Agriculture Act 1988}, which is to
Committee’s Questions | Response by the Department of Agriculture and Food
---|---
The Minister for Agriculture and Food: To move — Page 112, lines 1 and 2 — To delete “Part II Division 14” and insert instead — “Part 5”.

be repealed. The Bill, as drafted, established the “Western Australian Agriculture Ministerial Body” as a body corporate (clause 150) “through which the Minister can perform any functions of the Minister that can more conveniently or appropriately be performed by a body corporate than an individual” (clause 151). Parliamentary Counsel advised that a “Ministerial Body” used in this way was a device that had been used successfully in other legislation.

The Bill confers the functions (including powers) on the Minister (clause 152, 154 and 155). These include specific provisions in relation to participation in a business concern (subject to the approval of the Treasurer, clause 153), in relation to intellectual property (clause 154) and in relation to research bodies (clause 155).

An important driver for these provisions was the need to remedy deficiencies in the Agriculture Act that had imposed unintended limitations on the capacity of the Department of Agriculture and Food, and more particularly the body corporate, to participate fully in some important research ventures and to efficiently exploit the intellectual property created within the Department.

Because of the difficult conceptual distinctions between the Minister as an individual and the Ministerial Body as a separate legal entity but an ‘empty corporation’, and because of the need for clarity in relation to ownership of intellectual property and rights to apply for the protection of intellectual
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<td>property, not only in Australia but overseas, officers of the Department were concerned that while the provisions were sound from a legal and drafting perspective, there would be problems in applying them practically, and explaining them in dealings with other parties, particularly international parties.</td>
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<td>The Department therefore took the view that because the body corporate would be a statutory corporation (and therefore be limited in its functions to those set out in the legislation establishing it) and because in practice the functions listed in clause 152 would be performed by the Ministerial Body, not the Minister as such, it would be preferable for this to be clear on the face of the section. This is particularly so in view of the history of difficulty the Department has had with legal interpretations of the functions and capacity of the body corporate under the legislation that is to be repealed by the BAM Bill. The amended provisions achieve this.</td>
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<td>Clause 150, amended as proposed, will establish the Authority and the purpose of the Authority will be clearly set out in clause 151. Clause 152 will confer the relevant powers on the Authority. In reviewing the Bill</td>
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<td><strong>Clause 163</strong> - The DOH notes that the BAM Bill is silent as to the competencies which are required of inspectors appointed the bill. It suggests that there should be a clarification of the skills, knowledge and training level that is required of these inspectors.</td>
<td>during drafting of the amendments it was realised that there is no reason why the Authority’s power to participate in a research body needed to be the subject of a separate clause. Consequently clause 155 will be removed and provisions enabling this participation will be included in clause 152 with appropriate amendments to that clause and clause 153.</td>
</tr>
<tr>
<td>(a) What is the Department’s view on this?</td>
<td>(a) A high level of skills, knowledge and training will be required of inspectors under the BAM Act and Cabinet recently provided funding to the Department to develop and deliver an extensive training and program for this purpose. It is not necessary or sensible to specify required competencies in the Bill because unless this was done in terms so vague as to be of little use, it would require an amendment of the Act to update the requirements whenever changes occurred. The matter could be addressed by regulations if necessary and this can be considered.</td>
</tr>
<tr>
<td>(b) Are environmental health officers from local governments expected to be appointed as inspectors under the BAM Bill?</td>
<td>(b) Environmental Health Officers could be appointed as inspectors to carry out certain functions under the proposed BAM Act if this was considered useful but there is no current expectation that this will happen. The matter can be discussed with the Department of Health and with local governments.</td>
</tr>
<tr>
<td><strong>Clause 178</strong> – This clause provides for the time of service of documents which are sent by post, faxed or emailed to, or left for, the addressee.</td>
<td>(a) and (b) The reference to &quot;business day&quot; means that non-business days are not counted. However, it would be clearer if the clause referred to &quot;the 5th business day&quot; and &quot;the 10th</td>
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<td>(a) Subclause (2) provides that a document sent by post to an address within Australia but outside Western Australia is taken to be given “on the business day 5 days after the day on which the document was sent to the person to whom it was addressed.” What happens if the fifth day after the day on which the document was sent is not a business day in the jurisdiction to which the document is sent?</td>
<td>business day” rather than “the business day that is 5 days (10 days) after….”.</td>
</tr>
<tr>
<td>(b) Subclause (3) provides that a document sent by post to an address outside Australia is taken to be given “on the business day 10 days after the day on which the document was sent to the person to whom it was addressed.” What happens if the 10th day after the day on which the document was sent is not a business day in the jurisdiction to which the document is sent?</td>
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<td>57 Clause 178 - Regarding your response faxed on 9/2/07.</td>
<td>The Department confirms that an amendment to clause 178 will be moved.</td>
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<tr>
<td>Your response alludes to an amendment to make it clear that the reference to “business day” means that non business days are not counted. Please confirm whether the Department will, via a Supplementary Notice Paper, amend clause 178 to state “the 5th business day” and “the 10th business day” or similar.</td>
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<td><strong>58</strong> Clause 178</td>
<td>Clause 178 will be amended to make it clear that non-business days are not to be counted in determining the time when a document sent outside Western Australia or outside Australia. This is proposed in response to comments made by the Committee on the clause as drafted.</td>
</tr>
</tbody>
</table>
| The Minister for Agriculture and Food: To move —  
Page 122, lines 11 and 12 — To delete “business day 5 days” and insert instead —  
“ 5th business day ”. |                                                                                                                                 |
| The Minister for Agriculture and Food: To move —  
Page 122, line 15 — To delete “business day 10 days” and insert instead —  
“ 10th business day ”. |                                                                                                                                 |
| **59** Clause 182    | The amendments to clauses 150, 151, 152, 153, 154, 155, 156, 157, 182 and 187 relate to the substitution of the “Agriculture Authority” for the “Ministerial Body” as the body corporate established under the Act. Most of the amendments simply make that change in terminology but the reasons for it and the relevant substantial changes should be noted. |
| The Minister for Agriculture and Food: To move —  
Page 123, line 15 — To delete “Ministerial Body” and insert instead —  
“ Authority ”. | The BAM Bill required the establishment of a body corporate to replace the body corporate established under the Agriculture Act 1988, which is to be repealed. The Bill, as drafted, established the “Western Australian Agriculture Ministerial Body” as a body corporate (clause 150) “through
which the Minister can perform any functions of the Minister that can more conveniently or appropriately be performed by a body corporate than an individual” (clause 151). Parliamentary Counsel advised that a “Ministerial Body” used in this way was a device that had been used successfully in other legislation.

The Bill confers the functions (including powers) on the Minister (clause 152, 154 and 155). These include specific provisions in relation to participation in a business concern (subject to the approval of the Treasurer, clause 153), in relation to intellectual property (clause 154) and in relation to research bodies (clause 155).

An important driver for these provisions was the need to remedy deficiencies in the Agriculture Act that had imposed unintended limitations on the capacity of the Department of Agriculture and Food, and more particularly the body corporate, to participate fully in some important research ventures and to efficiently exploit the intellectual property created within the Department.

Because of the difficult conceptual distinctions between the Minister as an individual and the Ministerial Body as a separate legal entity but an ‘empty corporation’, and because of the need for clarity in relation to ownership of intellectual property and rights to apply for the protection of intellectual property, not only in Australia but overseas, officers of the Department were concerned that while the provisions were sound from a legal and
Committee’s Questions | Response by the Department of Agriculture and Food
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The Department therefore took the view that because the body corporate would be a statutory corporation (and therefore be limited in its functions to those set out in the legislation establishing it) and because in practice the functions listed in clause 152 would be performed by the Ministerial Body, not the Minister as such, it would be preferable for this to be clear on the face of the section. This is particularly so in view of the history of difficulty the Department has had with legal interpretations of the functions and capacity of the body corporate under the legislation that is to be repealed by the BAM Bill. The amended provisions achieve this.

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Clause 150, amended as proposed, will establish the Authority and the purpose of the Authority will be clearly set out in clause 151. Clause 152 will confer the relevant powers on the Authority. In reviewing the Bill during drafting of the amendments it was realised that there is no reason why the Authority’s power to participate in a research body needed to be
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<td>the subject of a separate clause. Consequently clause 155 will be removed and provisions enabling this participation will be included in clause 152 with appropriate amendments to that clause and clause 153.</td>
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<tr>
<td><strong>60</strong> Clause 185</td>
<td>No department needs statutory authority to ‘request’ information. What clause 185 deals with is authority to disclose information. The DEC does not need specific provision in its Acts to disclose ‘relevant information’ to an authorised officer of DAFWA – that is what clause 185 provides. Clause 185 is not concerned with whether DEC (or any other department) can disclose information relevant to that department’s legislation to any other department so in that sense the answer to the question is yes – the relevant Acts would need to be amended if the DEC wants similar capacity to get information from other agencies. However, that is nothing to do with the BAM Bill. If the question is really getting at whether the DEC’s Acts need something in them to enable the DEC to provide ‘relevant information’ to DAFWA then as noted, the answer is no.</td>
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<td>The DEC is unclear as to whether it would be necessary for a similar provision in the relevant Acts administered by the DEC to enable the DEC to request such information from the Department and other relevant information sharing agencies. What is the Department’s view on this?</td>
</tr>
<tr>
<td><strong>61</strong> Clause 187</td>
<td>The Department is advised by Parliamentary Counsel’s office that clause 187 is the standard provision for protection from liability required to be used by that office. It would be extremely rare for officials acting in good faith on behalf of the State to be subject to personal liability and neither the Department nor the drafter is aware of an example where that is the case. It is a matter of policy whether or not the State is also exempted from liability. See Dangerous Goods Safety Act 2004 section 32; Civil Judgments Enforcement Act 2004 section 111; Community Protection</td>
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<td>This clause provides ‘officials’ with immunity from tortious liability for “anything that the official has done, in good faith, in the performance or purported performance of a function under this Act”. The current wording of the clause suggests that these ‘officials’ are also protected against liability for their negligent acts and omissions. (a) What was the rationale for this?</td>
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<td>Committee’s Questions</td>
<td>Response by the Department of Agriculture and Food</td>
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<td>Clause 187(5) also relieves the State of any liability that it might otherwise have had for anything done or omitted to be done by an ‘official’. (b) What was the rationale for this?</td>
<td>(Offender Reporting) Act 2004 section 109; Tobacco Products Control Act 2006 section 121; Commissioner for Children and Young People Act 2006 section 59; Criminal and Found Property Disposal Act 2006 section 35 for recent similar examples. Generally if the functions exercised are of a public benefit nature, exemption of the State is considered appropriate. Action where the biosecurity of the State is at risk should not be impeded by possible exposure of the State to liability.</td>
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<td>62 Clause 187</td>
<td>The amendments to clauses 150, 151, 152, 153, 154, 155, 156, 157, 182 and 187 relate to the substitution of the “Agriculture Authority” for the “Ministerial Body” as the body corporate established under the Act. Most of the amendments simply make that change in terminology but the reasons for it and the relevant substantial changes should be noted. The BAM Bill required the establishment of a body corporate to replace the body corporate established under the <em>Agriculture Act 1988</em>, which is to be repealed. The Bill, as drafted, established the “Western Australian Agriculture Ministerial Body” as a body corporate (clause 150) “through which the Minister can perform any functions of the Minister that can more conveniently or appropriately be performed by a body corporate than an individual” (clause 151). Parliamentary Counsel advised that a “Ministerial Body” used in this way was a device that had been used successfully in other legislation. The Bill confers the functions (including powers) on the Minister (clause</td>
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152, 154 and 155). These include specific provisions in relation to participation in a business concern (subject to the approval of the Treasurer, clause 153), in relation to intellectual property (clause 154) and in relation to research bodies (clause 155).

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The Department therefore took the view that because the body corporate would be a statutory corporation (and therefore be limited in its functions to those set out in the legislation establishing it) and because in practice the...
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functions listed in clause 152 would be performed by the Ministerial Body, not the Minister as such, it would be preferable for this to be clear on the face of the section. This is particularly so in view of the history of difficulty the Department has had with legal interpretations of the functions and capacity of the body corporate under the legislation that is to be repealed by the BAM Bill. The amended provisions achieve this.

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Clause 150, amended as proposed, will establish the Authority and the purpose of the Authority will be clearly set out in clause 151. Clause 152 will confer the relevant powers on the Authority. In reviewing the Bill during drafting of the amendments it was realised that there is no reason why the Authority’s power to participate in a research body needed to be the subject of a separate clause. Consequently clause 155 will be removed and provisions enabling this participation will be included in clause 152 with appropriate amendments to that clause and clause 153.

Clause 192 – This clause provides for the Minister’s obligations to consult with certain specified bodies and people prior to the making of regulations or the issuing of a code of practice under “Affected by or interested in a significant way” means affected or interested in a way that is more than merely remote or trivial. The Minister is not required to consult with every possible person who might
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<td>the BAM Bill. Such bodies and people include “other bodies and persons which or who appear to the Minister to be likely to be affected by, or interested in, in a significant way, the regulations or code of practice, as the case requires.” Please provide the Committee with an indication of what is meant by “affected by, or interested in, in a significant way”.</td>
<td>have (or claim to have) a vague interest in the subject of the regulations or code of practice. The provision would be unworkable otherwise.</td>
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<tr>
<td>64 Clause 193 – Subclause (2)(a) authorises local governments to make local laws for prescribing as a pest plant in their districts any plant (other than a declared pest for that area) that, in their opinion, is likely to adversely affect the value of property in their districts, or the health, comfort or convenience of the inhabitants of their districts. Why does this authority not extend to plants that are likely to adversely affect the environment in the local government district?</td>
<td>The provisions in this clause do not prevent local government authorities from being able to prescribe environmental weeds of local significance as pest plants, as these plants may affect the value of property in a district or the convenience of residents. The terminology used in this clause, is consistent with the terminology currently used in the Agriculture and Related Resources Protection Act 1976. Many environmental are already prescribed by local authorities as pest plants. For instance the Town of Kwinana has prescribed bridle creeper (<em>Asparagus asparagoides</em>) and several other environmental weeds as pest plants.</td>
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<td>65 Clause 193 – The Manjimup ZCA has the following concerns about this clause: (a) Where does the money come from to administer local laws and local government controls on pest plants? (b) Who ‘backs up’ local government efforts in controlling</td>
<td>(a) and (b) Local governments are responsible for funding the administration of local laws relating to pest plants under clause 193, as they are for other local laws. (c) Again, this is a matter for the relevant local government. (d) How a local government measures the impact of a plant on the health, comfort or convenience of inhabitants of the district is a</td>
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<td>pest plants?</td>
<td>decision for that local government (it is the local government’s ‘opinion’ that is relevant). However, the Department of Agriculture and Food has previously circulated information to assist local governments in this. To measure the impact of a plant on the health, comfort or convenience of persons living in a district and to aid in the development of proposals to prescribe plants as pest plants under local laws authorised by the Agriculture and Related Resources Protection Act 1976 (ARRP Act). A copy of this information is attached at Appendix 1. The ARRP Act will be repealed by the BAM Act. Clause 193 of the BAM Bill preserves the power for local authorities to establish pest plant local laws, to the same extent as under the ARRP Act.</td>
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<tr>
<td>(c) What framework structure is required to implement a pest plant control in any particular area?</td>
<td>It is not correct that clause 193 will potentially compromise local government biosecurity activities or that these activities “may now be limited to the management of pest plants”. All clause 193 does is preserve the existing local government capacity to make local laws relating to pest plants. It does not limit or affect a local governments ability, or obligation to control declared pests on land under its management or to be involved in any matter regulated by the BAM Act. It is anticipated that local governments will play an increasingly lead role in the management of declared pests, such as foxes, wild dogs, and various weeds that are widely distributed throughout the State. If necessary or useful, local government officers could be appointed</td>
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<tr>
<td>(d) How are the local governments expected to measure the impact of ‘health, comfort or convenience’ issues referred to in this clause?</td>
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<tr>
<td>The DOH is of the view that this clause will potentially compromise local government biosecurity activities because these activities may now be limited to the management of pest plants.</td>
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<td>(e) Please confirm whether this will be the effect of clause 193.</td>
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<td>The Environmental Defender’s Officer suggests that this clause should be amended to allow local governments to make local laws prescribing plants which are environmental weeds as pest plants. This suggestion is made to provide local governments with an additional factor to rely upon when seeking to control a pest plants in their districts.</td>
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<td>(f) What is the Department’s view on this?</td>
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</table>

(f) Clause 193 does not prevent local governments from prescribing environmental weeds of local significance as pest plants (unless they are “declared pests” and therefore already subject to control). It is likely that environmental weeds will come within the terms of clause 193 and it may be noted that the environmental impact of a weed is taken into account in the guidelines referred to at (e) above.

66 Clause 193 - Clause 193(2)(c) authorises local governments to make local laws which will allow the local government to control pest plants at the expense of the owner or occupier, if that owner or occupier does not comply with a notice to control pest plants on their property. Part of the clause reads “for authorising the local government without payment of compensation to control the pest plants”.

(a) What is meant by the phrase “without payment of compensation”?

(b) Does it relate to the removal and/or destruction of the pest plants or does it also extend to any damage that may be caused to the property as a result of the local government’s control of the pest plants?

(a) The phrase “without payment of compensation” indicates that if a local government is forced to undertake control of a pest plant on a person’s land because that person has failed to comply with a notice then the local government will not be liable to compensate the person for any loss or damage suffered as a result of the control action taken. The phrase occurs in the existing legislation.

(b) No doubt a local government would argue that the phrase extended to any damage caused to the property whereas a person seeking compensation would argue otherwise. A local government has a duty to take the action without causing unnecessary damage and if a person took legal action claiming that a local government had negligently caused unnecessary damage then the question would be decided by the court.

(c) There is some confusion evident in this question. A plant is not “declared” to be a pest plant under clause 193, it is prescribed as...
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<th>Committee’s Questions</th>
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<tbody>
<tr>
<td>(c) Please clarify that when a plant is declared a “pest”, does that mean the declaration is restricted to agricultural pests? What about environmental pests?</td>
<td>such by a local law made by a local government under the authority of that provision (and subject to and in accordance with the Local Government Act). If a plant is a “declared pest” under the BAM Bill then it cannot be the subject of pest plant local laws. The issue of environmental pests was canvassed in the Department’s answer to question 13, faxed to the Committee on 15/2/07. Clause 193 does not prevent local governments from prescribing environmental weeds of local significance as pest plants (unless they are “declared pests” and therefore already subject to control).</td>
</tr>
<tr>
<td>(d) Clause 193 restricts local governments to making local laws about any pest “plant”. How will local governments control environmental pests that are not “plants” and not declared as “pests” such as foxes, animals or aquatic pests?</td>
<td>(d) If a pest that is not a plant is a declared pest under the BAM Bill then the local government will be required to deal with it in accordance with the Bill. If the pest in question is not a declared pest under the BAM Bill then a local government could deal with it under relevant powers under the Local Government Act or, if it thought fit, could suggest to the Minister that the pest in question ought to be made a declared pest under the BAM Bill.</td>
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</table>

| Schedule 1, Item 3 - This provision appears to be a very wide regulation-making power which can be used to exempt any person, any thing or any circumstances from the application of a provision of the proposed Act. Given that the bill already contains very extensive executive powers affecting the operation of the proposed Act, why is this provision necessary? | When an Act has very broad general offences, it is often necessary to rely on the regulations to ensure that the offence provisions can operate in an effective manner and with appropriate exemptions. The item is in the same terms as in the *Environmental Protection Act 1986* Schedule 2 item 29. |

<p>| Schedule 1 Item 23 | Clause 101 deals with the registration of memorials and notices. It is strictly correct to say that a memorial is “registered” on the Land Titles |</p>
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<tr>
<th>Committee’s Questions</th>
<th>Response by the Department of Agriculture and Food</th>
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</thead>
</table>
| The Minister for Agriculture and Food: To move —  
Page 136, line 2 — To delete “a notice” and insert instead —  
“a land document”. | register whereas a notification is “endorsed” on the certificate of title. Rather than make this distinction in each place necessary, clause 101 will be amended to define “register”, in relation to “land documents” (also defined). Subclause (3) will be amended accordingly. |
| **69** Schedule 1, Item 46 - The DEC is concerned that regulations made under this clause would have the potential to create duplication or conflict with existing licensing provisions under section 23D of the *Wildlife Conservation Act 1950*, regulation 13 of the *Wildlife Conservation Regulations 1970*, and regulation 5 of the *Wildlife Conservation (Reptiles and Amphibians) Regulations 2002*.  
Please confirm whether these matters will be taken into consideration during the drafting of any regulations made under this head of power and any other relevant provision of the bill. | The Department will consult with the Department of Environment and Conservation if regulations are to be established for the registration of businesses supplying garden plants or live animals as pets. The Department is confident that any potential conflicts between regulations under item 14 and the *Wildlife Conservation Act 1950* and regulations will be resolved during the drafting process. |
| **70** The DOH is concerned that there is the potential for auditors from the DOH and inspectors from the Department being responsible for the same premises and issues, resulting in a duplication of services.  
(a) Does the Department share this concern?  
(b) How will any duplication of services be minimised or avoided? | (a) and (b) The Department does not share the concern of the Department of Health. The Department does not see much potential for duplication and in any event is very supportive of cooperative service delivery arrangements between agencies to avoid or minimise the duplication of services and public inconvenience. The Department will discuss this matter further with the Department of Health. |
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<th>Committee’s Questions</th>
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<tr>
<td>avoided?</td>
<td>as it intends to establish a Memorandum of Understanding between agencies that are involved in the administration of the BAM Act and delivery of regulatory inspection services.</td>
</tr>
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<td>71</td>
<td>The DOH indicates that there is some confusion over the regulation of the control of stable fly; that is, whether the regulation should be contained in health legislation or biosecurity legislation. If biosecurity legislation is to regulate the control of stable fly:</td>
</tr>
<tr>
<td>(a) if regulations and codes are adopted, how would they be enforced and policed throughout the State, and by whom?</td>
<td>(a) The Department does not believe there is “confusion” over the control of stable fly but there have been discussions as to which portfolio is the most appropriate for the legislative instruments to be used for this purpose. Aspects of stable fly control, through regulation of the use of animal manure, are relevant to Agriculture and Food, Health and Environmental Protection (nitrification of ground water). There is sufficient relevant power under the BAM Bill for this to be the preferred option and if this is used then the regulations or code of practice, as the case may be, will be administered and enforced by the Department of Agriculture and Food and inspectors appointed under the BAM Act.</td>
</tr>
<tr>
<td>(b) how far could regulations and codes go in addressing problems with fly breeding and the effects on communities?</td>
<td>(b) It is not entirely clear what is meant by this question but in as much as the Department believes the BAM Bill regulation making powers are sufficient the answer is: As far as necessary. The Department doesn’t believe there are any big issues in any distinction or separation between “the effects on communities” of stable fly breeding and other aspects of it.</td>
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<tr>
<td>(c) would officers or inspectors appointed under that legislation have sufficient powers of entry similar to that provided under the Health Act 1911?</td>
<td>(c) Yes.</td>
</tr>
<tr>
<td>(d) if the intention is to devolve policing functions to local government officers, would any resources, funding and training be provided by the State Government?</td>
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<td>Committee’s Questions</td>
<td>Response by the Department of Agriculture and Food</td>
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<td>(d) It is not the intention to devolve policing issues to local government officers.</td>
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<td>72 The Environmental Defender’s Office suggests that the bill should impose a strict liability offence for contamination caused by genetically modified crops. What is the Department’s view on this?</td>
<td>Regulations under the BAM Act could include offences in relation to things “contaminated” by genetically modified organisms but no need for such regulations has been identified. Genetically modified crops are not permitted in Western Australia because of an order under the <em>Genetically Modified Crops Free Areas Act 2003</em>. In these circumstances, the question of whether there should be a “strict liability” offence is difficult to consider in the abstract and raises many issues some of which were touched upon during debate in the Legislative Council last year on the <em>Gene Technology Act 2006</em>.</td>
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<td>73 The Environmental Defender’s Office suggests that the bill should include provisions which expressly require the labelling of all nursery plants that are capable of being declared prohibited organisms. Such labelling should also indicate the likelihood of the plants’ escape from private gardens, and the methods which can be used to prevent their escape. The Committee notes that regulations made under Schedule 1 can already impose labelling requirements for organisms. What is the Department’s view on inserting a clause as per the above suggestion into the bill?</td>
<td>The Department does not consider it necessary to add an additional item to Schedule 1 to allow regulations to be established for the labelling of nursery plants. Schedule 1, item 13 adequately deals with this matter.</td>
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<td>Committee’s Questions</td>
<td>Response by the Department of Agriculture and Food</td>
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<td><strong>74</strong> Researchers within the University of Western Australia Faculty of Natural and Agricultural Sciences are keen to preserve their ability under the existing legislation to import, hold and use organisms for the purposes of their research, and to continue their collaborative work with international laboratories. Can and will these activities be maintained under the BAM Bill?</td>
<td>Yes, the regulations will allow research and educational institutions, such as the University of Western Australia and the Perth Zoo, to import, keep and exhibit declared pests under secure conditions.</td>
</tr>
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</table>
| **75** Please indicate whether the Department agrees with the following statements made by the AGDAFF:  
(a) Offence provisions in the BAM Bill will not apply to the Commonwealth.  
(b) Employees and agents of the Commonwealth who are exercising Commonwealth statutory powers will not be subject to BAM Bill provisions which are inconsistent with those statutory powers. | The Department agrees with the statements. |
| **76** The Committee has identified the following provisions as clauses which potentially reverse the onus of proof or amount to averment provisions: clauses 29(5), 29(6), 79(4), 84(5), 92(a), 92(b), 92(c), 92(d), 105(3), 110(6), 111(5), 112(5), 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 156(6), 156(8), 156(9), 165(4), 178(1), 182(5) and 183(4). The Department has indicated that the | (a)  
BAM Clause 29(5)  
29(6)  
79(4)  
Equivalent Section/Act 51(2) ARRP Act |
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<td>evidentiary provisions in the BAM Bill are no more onerous than those contained in existing legislation which is to be replaced.</td>
<td>84(5)</td>
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<td>(a) Please identify the equivalent provisions in the existing legislation to the clauses listed above.</td>
<td>92(a) 87 ARRP Act</td>
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<td>(b) What is the rationale for the above clauses?</td>
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<td>182(5)</td>
<td>17 Aerial Spray Act</td>
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<td>183(4)</td>
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This is not an exhaustive list and see generally, for example, ARRP Part VII, Division 3.

(b) Clauses 29(5) and (6), which provide defences to a charge of failing to take required control measures, cannot properly be interpreted as reversing the onus of proof or being averment provisions. Clause 29(5) applies where 2 or more persons, say the owner and the occupier of land, are required to take control measures. If the owner does the job the occupier can’t be prosecuted for not doing it. The important thing is that the measures are taken, it doesn’t much matter by whom. Clause 29(6) provides a defence if a person who is required to take control measures against a declared pest did not know and couldn’t reasonably be expected to know of the presence of the pest and where this is the case it would not usually be a difficult thing for the person to establish. Requiring a person to prove the elements of a defence is normal procedure – the prosecution proves the elements of the offence.

Clause 79 is a provision identified some years ago as an area in which the current legislation is seriously lacking and that needed to be rectified by the Bill. A notice given under this section must
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<td>be complied with but the provision would be substantially more onerous without clause 79(4).</td>
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<td>Similarly, clause 84 is a new provision included in response to an identified area of need and deficiency in the existing legislation. Here again, the provision would be substantially more onerous without clause 84(5).</td>
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<td>The provisions of clause 92 that the Committee refers to may be regarded as offences of ‘obstruction’. The rationale behind the lawful excuse let-out is that if a person has a lawful excuse for something that would otherwise be regarded as obstruction, they should not be guilty of the offence.</td>
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<td>Clause 105(2) allows a prosecution notice to specify a date on which evidence of an offence first came to the attention of a person authorised to institute proceedings rather than the day on which the offence was committed. The rationale for clause 105(3) is to avoid need for proof that this was, in fact, the day on which evidence came to the person’s attention because this would not normally be a matter of contention for the defendant. If it was, because, for example the defendant alleged that the person was aware of evidence on a date prior to the date stated and which was more than 5 years prior to the institution of the prosecution, then the defendant would raise evidence of this and the prosecution</td>
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<td>Committee’s Questions</td>
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<td>would then have to prove the date stated in the prosecution notice as the relevant date.</td>
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<td>Clause 110(6) provides a defence to one of the vicarious liability offences discussed in other answers to the Committee’s questions. This defence is lacking in some of the equivalent existing provisions, e.g.: VCCAFS Act section 61.</td>
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<td></td>
<td>Clause 111 is the now standard provision for liability of a principal for the acts of an agent and again, subclause (5) provides a defence that was lacking from some equivalents. The provision as a whole can be seen as a vast improvement on, for example, PDA section 23.</td>
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<td>Clause 112(5) – see comments in relation to clause 110(6).</td>
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<td>Clause 114 is a new provision in the sense that it consolidates into one, aspects of other provisions that were scattered through other Acts. The rationale for this provision is that the things required to be proved are in the nature of a defence to a charge and are things that will be within the knowledge of the person required to prove them, rather than the prosecution.</td>
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<td>It should be noted that section 78 of the Criminal Procedure Act 2004 (the equivalent to former s.72 of the Justices Act) provides that in simple offences the burden of proof in relation to any</td>
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### Committee’s Questions

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<tr>
<th>Response by the Department of Agriculture and Food</th>
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<td>exception, condition, excuse, exemption, proviso or qualification in an offence lies on the defendant.</td>
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</table>

It should also be noted that the Bill does not contain the all encompassing averment provision contained in section 36 of the Plant Diseases Act.

The provisions of Part 5, Division 3 (clause 114 on) are included to enable prosecutions to be conducted without a waste of resources on the proof of things that can usually be readily accepted by the defendant or are within the defendant’s knowledge and which may be difficult if not impossible for the prosecution to prove. These provisions do not amount to a reversal of proof. Rather, they remove the need for proof of certain things unless evidence to the contrary is raised. The defence is not put to proof of these things and need only provide some evidence - in which case the prosecution will be required to prove the matter that would otherwise be taken to be proved.

As previously advised, most of the provisions in Part 5, Division 3 of the Bill are largely drawn from provisions that appear in Acts that are to be repealed. Some of them relate to acts done officially which ought not to be required to be put to proof unless contested - a presumption of regularity. It would place a huge and unnecessary burden on the prosecution and the courts if evidence
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<td>had to be led in relation to all of these matters. As it is, evidence has to be led if the matter is contested. Other provisions are not really capable of proof by the prosecution - for example to prove that something was done without lawful authority places an impossible burden on the prosecution but it is relatively simple for the defence to prove that there was lawful authority.</td>
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<td>A similar time and resource-saving rationale can be seen for clauses 120,121,123, 156(6) and 156(8). Clause 156(9) does not appear in existing legislation but simply provides the same status for a facsimile seal or signature as for a seal or signature.</td>
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<td>Clause 165(4) would be unreasonable if it did not require the person claiming to have a good excuse to prove it. It is a potentially serious matter for a person to fail to return an identification card yet a particularly easy requirement to comply with. In the unlikely event that a case of failure to return a card went as far as a prosecution it would be unreasonable not to provide a let–out for some-one with a good excuse for the failure but it would also be unreasonable to require the prosecution to prove the absence of a good excuse and it is difficult to see how this could be done.</td>
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<tr>
<td>Clauses 110(6), 111(5) and 112(5) each provide a defence for people who may face liability for an offence committed by</td>
<td>The Department has been advised by Parliamentary Counsel’s Office that the clauses referred to are in the standard form for vicarious liability offences which has been consistently used for many years - see Criminal</td>
</tr>
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</table>
### Committee’s Questions

| another person. The Committee notes that section 24 of the *Criminal Code* (which provides all people charged with any offence against the statute law of Western Australia with the excuse of ‘mistake of fact’) may be excluded either expressly or impliedly by the provisions of another law. Please advise whether the above clauses are intended to exclude the operation of section 24 of the *Criminal Code*. |

### Response by the Department of Agriculture and Food

| Procedure Act 2004 section 180 and Tobacco Products Control Act 2006 sections 109 and 110 for recent examples. Vicarious liability offences are not like standard criminal offences - one would not want a director or employer to be able to argue that, because they didn't know something was happening, they were not liable - they are required to also show that they met the "reasonable measures" requirements set out in the defence. Otherwise the provision would be pointless. To the extent, if any, that that requirement affects the operation of section 24 of the *Criminal Code*, that section would not apply. |

| Part 3, Division 2. Your letter dated 28 February 2007 (Attachment, page 8, Answer 9(b)) indicates that Four Regulations Reference Groups have been formed to provide the principal means of consultation for the drafting of the regulations. Are the members of these groups similar to the stakeholders who were consulted about the green bills? Please provide a list of the members of these groups. |

| In December 2005, the Department wrote to a large number of producer and community organisations, including those bodies represented on the Regulations Reference Groups (RRGs), inviting them to send a representative to participate in one of six consultation forums on the green bills. The RRGs were established specifically to advise the Department on ways to improve the effectiveness of existing legislation, to identify any risks not presently managed and to develop proposals for replacement regulations under the proposed new BAM Act. The work of the RRGs included in-depth consideration of the basic principles behind the Bill and the supporting regulations, and the capacity of the legislation to meet current and future community and industry requirements. The RRGs will next meet to consider the draft regulations when these are available. A list of the members of the Regulations Reference Groups is attached at |

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### Committee’s Questions

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<th>Questions regarding the Repeal Bill</th>
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#### 79 Clause 12

The Minister for Agriculture and Food: To move —

Page 9, after line 19 — To insert —

“Authority” means the Western Australian Agriculture Authority established under the Biosecurity and Agriculture Management Act 2006;

The Minister for Agriculture and Food: To move —

Page 9, lines 25 to 27 — To delete the lines.

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Appendix A. Also listed are the members of the Overarching Reference Group, made up of representatives of majority stakeholder groups. The function of this group was to overview the final drafting of the BAM Bill, and the public consultation process on the green bills and the proposed regulations.

The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.
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<td><strong>80</strong> Clause 13</td>
<td>The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 10, line 3 — To delete “Ministerial Body” and insert instead —</td>
<td></td>
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<tr>
<td>“ Authority ”.</td>
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<tr>
<td>[Clerks: Delete “Ministerial Body” in clause heading and insert “Authority”.]</td>
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<tr>
<td><strong>81</strong> Clause 14</td>
<td>The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 10, line 8 — To delete “Ministerial Body” and insert instead —</td>
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<td>“ Authority ”.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 10, line 11 — To delete “Ministerial Body” and insert</td>
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<td>Committee’s Questions</td>
<td>Response by the Department of Agriculture and Food</td>
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<td>instead —</td>
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<td>&quot; Authority &quot;.</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 10, line 17 — To delete “Ministerial Body” and insert instead —</td>
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<td>&quot; Authority &quot;.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 10, line 19 — To delete “Ministerial Body” and insert instead —</td>
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<td>&quot; Authority &quot;.</td>
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| 82 | Clause 15 |                                                   |
|    |          | The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body. |

The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.
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<th>Committee’s Questions</th>
<th>Response by the Department of Agriculture and Food</th>
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</table>
| The Minister for Agriculture and Food: To move —  
Page 10, line 30 — To delete “Ministerial Body” and insert instead —  
“ Authority “. | The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.  
Clause 154, relating to intellectual property has been re-drafted following extensive discussions with and advice from the State Solicitors Office. For further information see amendments for clause 154 of the BAM Bill. |
| 83 Clause 16 | |
| The Minister for Agriculture and Food: To move —  
Page 11, lines 2 to 5 — To delete the lines and insert instead —  
“ (1) On the commencement day any intellectual property, or right to apply for, hold, receive, exploit or dispose of intellectual property, that the State has immediately before that day is, by operation of this section, assigned to the Authority.  
(2) In subsection (1) —  
“intellectual property” means intellectual property created in the performance of functions under the repealed Act. | |
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<tr>
<td>[Clerks:</td>
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<td>Line 6: Renumbering of subclause (2) will be required.]</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<td>Page 11, line 6 — To delete “Ministerial Body” and insert instead —</td>
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<tr>
<td>“ Minister ”.</td>
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<td><strong>84</strong> Clause 17</td>
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<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 11, line 16 — To delete “Ministerial Body” and insert instead —</td>
<td></td>
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<tr>
<td>“ Authority ”.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 11, line 21 — To delete “Ministerial Body” and insert instead —</td>
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<tr>
<td>The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.</td>
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</table>
### Committee’s Questions

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<tbody>
<tr>
<td><strong>Part 2, Division 3</strong> - The DOH has indicated that it is imperative that the close liaison between it and the Department is maintained in order to ensure that there is a smooth transition from the licensing regime under the <em>Aerial Spraying Control Act 1966</em> (upon its repeal) to the anticipated regime under the <em>Health (Pesticides) Regulations 1956</em>. In particular, the <em>Aerial Spraying Control Act 1966</em> should not be repealed until the new regime is in place. What steps have been/will be taken to ensure that the above transition runs smoothly?</td>
<td><strong>Response by the Department of Agriculture and Food</strong></td>
</tr>
<tr>
<td><strong>Clause 19</strong> – The EM (p5) indicates that this clause will preserve section 16 of the <em>Aerial Spraying Control Act 1966</em>, despite the proposed repeal of that Act by clause 18 of the Repeal Bill. The Committee notes that while clause 19 preserves sections 14(4), (5) and (6) and 15 of the <em>Aerial Spraying Control Act 1966</em>, it does not also preserve section 16 of that Act. Is it still the intent of the Repeal Bill to preserve that section?</td>
<td>The reference to section 16 is an error – it should have been section 15.</td>
</tr>
<tr>
<td><strong>Clause 36</strong> - Why isn’t the amendment made to the <em>Financial Management Act 2006</em> rather than the now repealed *Financial</td>
<td><strong>Response by the Department of Agriculture and Food</strong></td>
</tr>
</tbody>
</table>

The DOH need have no concerns about the timing of the transition to the Health (Pesticides) Regulations of the aerial spraying licensing regime. Close liaison between the departments will be maintained and the Aerial Spraying Act will not be repealed until the new regime is in place.

The reference to section 16 is an error – it should have been section 15.

The *Financial Management Act 2006* is not referred to in clause 36 because it had not been passed when the BAM Bill was introduced into or
<table>
<thead>
<tr>
<th>Committee’s Questions</th>
<th>Response by the Department of Agriculture and Food</th>
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<tbody>
<tr>
<td>Administration and Audit Act 1985?</td>
<td>clause 36 will be amended in the Legislative Council. As noted in answer to the Committee’s previous questions, clause 36 will be amended in the Legislative Council. The amendments to clauses 36, 41 and 45 take account of the fact that the Financial Administration and Audit Act 1985 has now been replaced by the Financial Management Act 2006, under which the Consolidated Fund is now known as the Consolidated Account the final reporting of statutory authorities is adequately covered, removing the need for specific provision for the final reporting of the Agriculture Protection Board in this Bill.</td>
</tr>
<tr>
<td>88 Clause 36 The Minister for Agriculture and Food: To move — Page 17, line 6 — To delete “Administration and Audit Act 1985” and insert instead “Management Act 2006”. [Clerks: Page 17, line 4 — clause heading to be changed to “Financial Management Act 2006 amended”. Page 17, lines 7 and 8 — footnote to changed to “Act No. 76 of 2006”.]</td>
<td></td>
</tr>
<tr>
<td>89 Clause 38 The Minister for Agriculture and Food: To move — Page 19, lines 9 to 16 — To delete the lines. [Clerks:</td>
<td>The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.</td>
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<td>Committee’s Questions</td>
<td>Response by the Department of Agriculture and Food</td>
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<td>Subsequent subclauses will require renumbering.]</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 19, line 25 — To delete “Ministerial Body” and insert instead —</td>
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<tr>
<td>“ Authority ”.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 19, line 26 — To delete “Ministerial Body” and insert instead —</td>
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<tr>
<td>“ Authority ”.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 19, after line 28 — To insert the following —</td>
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<td>“</td>
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<td>(2) In this section —</td>
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<td>“Authority” means the Western Australian Agriculture Authority established under the Biosecurity and</td>
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### Committee’s Questions

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<tr>
<th>#</th>
<th>Clause</th>
<th>Text</th>
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<tr>
<td>90</td>
<td>40</td>
<td>The Minister for Agriculture and Food: To move —</td>
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<th>Response by the Department of Agriculture and Food</th>
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<tr>
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<td></td>
<td>The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.</td>
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</tbody>
</table>

Agriculture Management Act 2006.

[Clerks: Page 19, line 19 — proposed section heading to be changed to “Authority has functions of Protection Board”. Page 19, line 20 — insert subsection designation “(1)”.]
<table>
<thead>
<tr>
<th>Committee’s Questions</th>
<th>Response by the Department of Agriculture and Food</th>
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</thead>
<tbody>
<tr>
<td>The Minister for Agriculture and Food: To move — Page 20, lines 19 to 21 — To delete the lines.</td>
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</tr>
<tr>
<td><strong>91 Clause 41</strong></td>
<td>The amendments to clauses 36, 41 and 45 take account of the fact that the <em>Financial Administration and Audit Act 1985</em> has now been replaced by the <em>Financial Management Act 2006</em>, under which the Consolidated Fund is now known as the Consolidated Account the final reporting of statutory authorities is adequately covered, removing the need for specific provision for the final reporting of the Agriculture Protection Board in this Bill.</td>
</tr>
<tr>
<td>The Minister for Agriculture and Food: To move — Page 20, line 26 — To delete “Fund” and insert instead — “ Account  ”.</td>
<td></td>
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<tr>
<td>The Minister for Agriculture and Food: To move — Page 21, line 1 — To delete “Fund” and insert instead — “ Account  ”.</td>
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</tr>
<tr>
<td><strong>92 Clause 42</strong></td>
<td>The other amendments relate to the corporate body under the legislation becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body.</td>
</tr>
<tr>
<td>The Minister for Agriculture and Food: To move — Page 21, lines 7 and 8 — To delete “Ministerial Body” and insert instead — “ Authority  ”.</td>
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<tr>
<td>Committee’s Questions</td>
<td>Response by the Department of Agriculture and Food</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 21, line 11 — To delete “Ministerial Body” and insert instead —</td>
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<tr>
<td>“ Authority ”.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 21, line 17 — To delete “Ministerial Body” and insert instead —</td>
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<tr>
<td>“ Authority ”.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
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<tr>
<td>Page 21, lines 18 and 19 — To delete “Ministerial Body” and insert instead —</td>
<td></td>
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<tr>
<td>“ Authority ”.</td>
<td></td>
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<tr>
<td><strong>93</strong> <strong>Clause 43</strong></td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
<td></td>
</tr>
<tr>
<td>Page 21, line 21 — To delete “Ministerial Body” and insert</td>
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<td>instead —</td>
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<tr>
<td>“ Authority ”.</td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
<td>The amendments to clauses 36, 41 and 45 take account of the fact that the Financial Administration and Audit Act 1985 has now been replaced by the Financial Management Act 2006, under which the Consolidated Fund is now known as the Consolidated Account the final reporting of statutory authorities is adequately covered, removing the need for specific provision for the final reporting of the Agriculture Protection Board in this Bill.</td>
</tr>
<tr>
<td>Page 21, line 27 — To delete “Ministerial Body” and insert instead —</td>
<td></td>
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<tr>
<td>“ Authority ”.</td>
<td></td>
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<tr>
<td>The Minister for Agriculture and Food: To move —</td>
<td></td>
</tr>
<tr>
<td>Page 22, line 1 — To delete “Ministerial Body” and insert instead —</td>
<td></td>
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<tr>
<td>“ Authority ”.</td>
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94 Clause 45

The Minister for Agriculture and Food: To oppose the clause.

[Clerks:
Renumbering of subsequent clauses will be required.]

95 Clause 46

The other amendments relate to the corporate body under the legislation
<table>
<thead>
<tr>
<th>Committee’s Questions</th>
<th>Response by the Department of Agriculture and Food</th>
</tr>
</thead>
</table>
| The Minister for Agriculture and Food: To move —  
Page 23, line 20 — To delete “Ministerial Body” and insert instead —  
“ Authority ”.  
The Minister for Agriculture and Food: To move —  
Page 23, line 24 — To delete “Ministerial Body” and insert instead —  
“ Authority ”.  

becoming the Western Australian Agriculture Authority rather than the Western Australian Ministerial Body. |

| 96 Clause 64 – This clause inserts a proposed section 12A into the Agricultural Produce Commission Act 1988, which is effectively equivalent to section 17A of the Plant Diseases Act 1914, which is proposed to be repealed by clause 63 of the Repeal Bill. The proposed section 12A provides any persons employed or engaged by a producer's committee established to administer a fruit fly foliage baiting scheme to, when authorised by the producer’s committee, enter any orchard within the specified area to bait or spray all or any of the fruit trees and fruit vines.  
(a) What procedures, if any, are required to be complied with before the person may enter onto private property? That |
| (a) No procedures equivalent to clause 65 are prescribed by the Agricultural Produce Commission Act.  
(b) No. Schedule 1 item 14 is for the purpose of regulating the entry to land of persons and other things in order to prevent the spread of declared pests (item 6 would be more relevant). However, if further provisions were needed in relation to the activities of persons engaged by a producers’ committee undertaking fruit fly baiting, these would need to be found in the Agricultural Produce Committee Act or regulations, not the BAM Act or regulations made under it. |
<table>
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<tr>
<th>Committee’s Questions</th>
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<tbody>
<tr>
<td>is, are there equivalents to the clause 65 BAM Bill procedures for entry (for inspection purposes) in this context?</td>
<td>The phrase is not intended to include land that is the subject of a pastoral lease and the Department proposes an amendment to make it clear that the term refers to land not referred to in clause 7(1)(a), (b) and (c) of the BAM Bill.</td>
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<tr>
<td>(b) Would regulations made under Schedule 1 Item 14(a) of the BAM Bill be used to regulate such entry?</td>
<td></td>
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<tr>
<td>97 Clause 89(4) - With respect to the provisions which are sought to be inserted into the <em>Exotic Diseases of Animals Act 1993</em>, is the phrase ‘Crown land’ intended to include land which is the subject of pastoral leases, or does it only refer to unallocated Crown land?</td>
<td>The amendment to clause 89 inserts a definition of “Crown land” into a clause that is added to the Exotic Diseases of Animals Act as a consequence of the repeal of the Stock Diseases (Regulations) Act. This is to be included as a result of comments by the committee highlighting the absence of a definition.</td>
</tr>
<tr>
<td>98 Clause 89</td>
<td></td>
</tr>
<tr>
<td>The Minister for Agriculture and Food: To move — Page 41, after line 21 — “ “Crown land” means land other than — (a) land alienated from the Crown; or (b) land that the Crown has lawfully agreed to alienate; or</td>
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<td>(c) land held under a lease lawfully granted by the Crown;</td>
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<td>&quot;&quot;.</td>
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<tr>
<td>99 The Environmental Health Directorate of the DOH was of the view that the Agricultural Practices (Disputes) Act 1995 would be repealed.</td>
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<tr>
<td>(a) Please confirm whether that Act will be repealed.</td>
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<tr>
<td>(b) If so, will the effect of its provisions be incorporated into other legislation?</td>
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<tr>
<td>It is correct that the Agricultural Practices (Disputes) Act 1995 has previously been earmarked for repeal. There is currently no priority given to repeal of that Act in the readily foreseeable future.</td>
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</tbody>
</table>
APPENDIX 5

DEPARTMENT OF AGRICULTURE AND FOOD LETTER DATED

30 JANUARY 2007

30 January 2007

Ms Denise Wong
Advisory Officer (Legal)
Legislation Committee
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Wong

BIOSECURITY AND AGRICULTURE MANAGEMENT (BAM) BILL 2006; BAM (REPEAL AND CONSEQUENTIAL PROVISIONS) BILL 2006

I refer to your telephone conversation with Richard Walker on 28 January 2007 and your request for additional information on the above two Bills to assist the members of the Legislation Committee in their inquiry into this legislation.

I attach the following information in response to your request:

- A précis of significant amendments to other Acts that are proposed under the BAM (Repeal and Consequential Provisions) Bill 2006, and;
- A précis of significant changes that were made to the BAM Bill 2006 as a result of public consultation on the draft Bill held during the first quarter of 2006.

Prior to the introduction of the Bill into Parliament the Department of Agriculture and Food and Parliamentary Counsel’s Office also identified a number of minor changes that were necessary for the operation of several clauses in the Bill. These were relatively simple technical changes that did not alter the policy or effect of the Bill and, therefore, these have not been mentioned.

Several amendments were made to the Bill in the Legislative Assembly. For the benefit of the members of the Committee I have included an outline of these changes.

I trust this information will assist the members of the Committee.

Yours sincerely

Rod Delane
DEPUTY DIRECTOR GENERAL
(BIOSECURITY AND RESEARCH)

Atts
SIGNIFICANT AMENDMENTS TO OTHER ACTS PROPOSED BY THE BAM
(REPEAL AND CONSEQUENTIAL PROVISIONS) BILL 2006

Most of the consequential amendments contained in this Bill are of a minor nature, simply
replacing references to the repealed Acts with references to the proposed BAM Act. The
following amendments are of more significance.

Clause 37(3) - This amends the Firearms Act 1973 by broadening the types of bird pests
that may be controlled by inspectors using silencers on specified models of rifles. The
existing provision in the Firearms Act 1973 only allows the use of silenced rifles to control
common starlings (Sturnus vulgaris). Silenced rifles are particularly effective for controlling
other types of prohibited bird species, in particular Indian ringneck parrots (Psittacula
krameri), that are occasionally found in the wild. The Commissioner of Police has supported
this amendment on the basis that an agricultural inspector (an inspector appointed under the
BAM Act) must continue to be authorised by the Minister for Police to possess, carry and use
silencers.

Clause 38 - This amends the Plant Pests and Diseases (Eradications Funds) Act 1974, so
that the functions of the Agriculture Protection Board under that Act will be performed by the
Agriculture Ministerial Body when the Agriculture Protection Board Act 1950 is repealed.

The Plant Pests and Diseases (Eradications Funds) Act 1974 and the Agriculture Protection
Board Act 1950 (APB Act) will both be repealed by the BAM Act but while there will be no
delay with the repeal of the APB Act, the repeal of the Plant Pests and Diseases
(Eradications Funds) Act 1974 may not take effect until some time after the BAM Act
commences.

The Plant Pests and Diseases (Eradications Funds) Act 1974 establishes a fund for skeleton
weed control and compensation for losses caused by the weed and this will, in due course,
be replaced by a prescribed account under the BAM Act. The existing fund will continue until
the new fund is established. (See clause 5(3) (a) which provides that the repeal is not to
take place until an industry funding scheme account (prescribed account) under the BAM Act
has been established for the grain and seed crops industry.) The new scheme will be
established by regulations following appropriate industry consultation. Until the regulations
are ready, the Agriculture Ministerial Body will perform the role of the APB in relation to the
existing Skeleton Weed Eradication Fund.

Clause 86(4) – This amends the Cattle Industry Compensation Act 1965 (CIC Act) by
repealing section 25 which provides for funds collected under the Act through the payment of
stamp duty on cattle sales, to be matched by the Government from the Consolidated Fund.
The CIC Act will eventually be repealed by the BAM (Repeal and Consequential Provisions)
Act but, as with the Plant Pests and Diseases (Eradications Funds) Act 1974, the CIC Act
cannot be repealed until regulations are made to establish an account for the cattle industry
under the BAM Act. The repeal of section 25 need not wait for the repeal of the rest of the
CIC Act.

Clause 90 - This amends the Fish Resources Management Act 1994 by repealing Part 9 of
the Act (Noxious Fish) and by deleting references to noxious fish in other parts. These
provisions are not required because noxious fish will be dealt with as declared pests under
the BAM Act.
SIGNIFICANT CHANGES TO THE BAM BILL ARISING FROM PUBLIC
CONSULTATION ON THE DRAFT BILL IN 2006

Several changes were made to the Bill following the period of public consultation on the draft
Bill during the first quarter of 2006. The following changes are of significance.

Clauses 12 and 21 were modified so that the Minister for Agriculture is required to consult
with the Minister for Fisheries, but not necessarily any other Ministers, before declaring a fish
or fish disease as a prohibited organism, permitted organism or declared pest.

Clauses 26 and 30 were changed to include provision to allow:

- A pest exclusion notice or a pest control notice to be issued to non-occupiers of land
  conducting activities on that land.
- A copy of a pest control notice or a pest exclusion notice to be given to non-occupiers
  of land conducting activities on that land.

This change will allow notices to be given to organisations such as utilities corporations that
conduct activities on land.

Clause 48 was modified to make it clear that all members of the Biosecurity Council must
have the interest and experience referred to in clause 48(a). This change requires the
membership of the Council to consist of (rather than include) persons referred to in
subclause (a) and include persons referred to in subclause (b).

Clause 49(a) was modified to allow the Biosecurity Council to give advice on any matter
related to biosecurity, not just matters that are specified in the instrument of appointment
referred to in clause 47.

Clause 59 was modified to broaden the definition of animal feed to include water that is to be
used for stock to drink so that contamination of water will be covered by provisions
prohibiting the adulteration of agricultural products or animal feed.

The terminology used in Part 3, Division 1 of the Bill was modified to remove any references
to 'contaminated land'. This was necessary to avoid any confusion with the Contaminated
Sites Act 2003.

Clause 63 was modified to remove the requirement for an inspector to obtain an entry
warrant before entering a vessel that is normally used as a dwelling. This modification was
necessary to ensure that the arrangements for inspectors under the BAM Act to enter
vessels is consistent with the Fish Resources Management Act 1994.

Clause 65 was modified to include provision to require an inspector, where practical, to make
reasonable attempts to inform an owner or occupier of the intention to exercise inspection
powers prior to the exercise of those powers. This obligation is not to apply where it would
defeat the purpose of the inspection (for example, if it might lead to the destruction of
evidence) and is not to apply in a public place (as defined under subclause (5)).

Clause 134 was added to include provision for rates to be imposed where a mining tenement
or petroleum production licence or exploration permit is held in respect of land even though
the land may have been the subject of a rate determination in the hands of the holder of
another interest in the land, for example a pastoral lessee.
Clause 141(1)(b) was modified to allow persons who have a financial interest in a sector of agricultural activity to be a member of a management committee that has been formed to advise the Director General on matters relevant to an account for an industry funding scheme. Previously it was limited to persons who were producers. (An error has been noted in this clause where "management" should be "activity".)

Clause 171 was modified to remove a penalty of $10,000 that could have applied if a recognised Biosecurity Group failed to spend an allocation from the Declared Pest Account within a specified period of time. A penalty in this situation seemed unnecessary.

Clause 192 was modified to require the Minister to consult before issuing or approving a Code of Practice.

Clause 194 was added to require the Minister to carry out a review of the Act at least every 10 years to, amongst other things, ensure the adequacy of penalties under the Act.

In light of stakeholder feedback on the draft Bill, several changes were made to Schedule 1 to broaden the matters for which regulations may be made. None of these changes warrant specific mention.
AMENDMENTS TO THE BAM BILL 2006 MADE IN THE LEGISLATIVE ASSEMBLY

Clause 35 and 36 – These clauses were amended to:

- Give the Director General the option not to undertake a review of a pest control or pest keeping notice in which case the person seeking the review may go straight to the SAT for that review.
- Include a right of review to the SAT of a decision of the Director General as the result of a review.
- Remove the words in clause 36(1) that limit the right of review to "prescribed" pest control or pest keeping notices. This limitation is not required in this subclause and the words were left in due to an oversight.

Prior to the amendment the clause prevented review by the SAT unless an internal review has first been conducted.

Clause 95 and 97 were amended to ensure that where a memorial of a charge on land to secure a debt due for the cost of remedial action taken on that land has been registered, the debt for remedial action must be cleared before the land charged can be sold. Previously a subsequent owner could be saddled with a debt incurred through failure of a previous owner to comply with obligations under the Act.

Clause 145 was amended to broaden its application so that compensation could be paid for any losses, costs or expenses of a prescribed kind that are suffered or incurred as a result of an animal, agricultural product or other thing being infected or infested by a declared pest specified by the regulations establishing the account or as a result of actions or measures taken to control that declared pest.

Clause 192 was amended to include specific reference to community and producer organisations as groups the Minister is required to consult with on regulations or a management plan. These were covered in the clause as drafted by a reference to "other bodies and persons" but specific mention is a good idea and consistent with the specific mention of these organisations in relation to membership of the Biosecurity Council.
APPENDIX 6

REGULATIONS REFERENCE GROUPS
APPENDIX 6
REGULATIONS REFERENCE GROUPS

REGULATIONS REFERENCE GROUPS TO THE AGRICULTURE MANAGEMENT BILL
The name and membership of each Regulations Reference Group is provided below.

ANIMAL BIOSECURITY REFERENCE GROUP
Chairman: Chris Richardson Agriculture Protection Board
Executive Officer: Richard Walker Department of Agriculture and Food
Members:
- Rob Gillam (Deputy Chair) Agriculture Protection Board
- Tim Darcy Pastoralists & Graziers Association (H Harding proxy)
- Brian English WA Farmers
- David Byrne Police (invited for Stock Identification regulations)
- Mark Batty WA Local Government Association
- Stuart Chamberlain Pot Industry Association Australia
- Jeni Hood Department of Local Government
Department support:
- Farnan Dixon
- Fiona Sundaram
- Marion Massam
- Bob Vassallo
Executive Director: Rob Delane

PLANT BIOSECURITY REFERENCE GROUP
Chairman: Ron Creagh Agriculture Protection Board
Executive Officer: Richard Walker Department of Agriculture and Food
Members:
- Keith Bridgart (Deputy Chair) Agriculture Protection Board
- Barry Largh Pastoralists & Graziers Association (S Brockman proxy)
- Andy Duncan WA Farmers
- Steve Dillely WA Fruitgrowers Association
- Sam Camilleri WA Vegetable Growers Association
- Sandy Pate Nursery Industry Association
- Mark Batty WA Local Government Association
- Judith Fisher WA Weeds Committee
Department support:
- Mark Stuart
- Siastli Shattuck
Executive Director: Rob Delane

-1-
CHEMICAL CONTROL REFERENCE GROUP

Chairman: Chris Richardson Agriculture Protection Board
Executive Officer: Chris Sharpe Department of Agriculture and Food

Members:
Brian Young (Deputy Chair) Agriculture Protection Board
Graeme Smith Pastoralists & Graziers Association (S Brockman proxy)
Kevin Fuchsbiicher WA Farmers
TBA Fertiliser Industry Federation
Martin Matson Health Department
Warren Potts WA Stockfeeds Manufacturers
Brad Hampton Stockfeed Manufacturers Association
Michael Lumbsden Australian Veterinary Association
Ray Batey Veterinary Surgeons Board
Vivienne Hillyer Organic Grower (Corresponding)
Ric Madin Australian Association of Agricultural Consultants
Mark Batty WA Local Government Association
Judy Fisher WA Weeds Committee

Department support Sarah Wylie
Farren Dixon

Executive Director Rob Delane

FISHERIES REFERENCE GROUP

Chairman: Peter Millington Department of Fisheries
Executive Officer: Craig Astbury Department of Fisheries

Members:
Brett McCallum Pearl Producers Association and WA Fishing Industry Council
Dan Machin Aquaculture Council of WA
Stuart Chamberlain Pet Industry Association of Australia
Mark Pagano Recfishwest
Mike Williams Department of Planning and Infrastructure (Ballast water regulations only)
Rebecca James Fremantle Port Authority (Ballast water regulations only)
Brad Williamson Albany Port Authority (Ballast water regulations only)
Teresa Hatch Australian Ship Owners Association (Ballast water regulations only)
John Hurst Association of Australian Ports and Marine Authorities (Ballast water regulations only)

Department support Rob Tragonning
Glen Criddle

Executive Director Peter Millington
APPENDIX 7
ENVIRONMENTAL WEEDS OF WESTERN AUSTRALIA
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Appendix 1. Environmental Weeds of Western Australia (see References list for source)

Acacia acuminata Benth.
Acacia baileyana F.Muell.
Acacia bleakleyi Maiden
Acacia dealbata Link
Acacia dealbata (J.C.Wendl.) Willd.
Acacia elata A.Cunn. ex Benth.
Acacia farnesiana (L.) Willd.
Acacia fontifolia (Vent.) Willd.
Acacia leucophylla F.Muell. ex Benth.
Acacia lasiocalyx C.R.P.Andrews
Acacia longifolia (Andrews) Willd.
Acacia melanoxylon R.Br.
Acacia microbotrya Benth.
Acacia nilotica (L.) Willd. ex Delile
Acacia podalyriifolia A.Cunn. ex G.Don
Acacia prostrata F.Muell.
Acacia prominens A.Cunn. ex G.Don
Acacia pycnantha Benth.
Acacia retinodes Schidt.
Acacia saligna (Labill.) H.L.Wendl.
Acacia sophorae (Labill.) R.Br.
Acacia nova-zelandiae Kirk
Acanthospernum hispidum DC.
Actinotus helianthi Labill.
Acanthus unguiculatus (L.) Yatabe & Bergius
Aeonium haworthii Webb & Berthel.
Aerva javanica (Burm. f.) Juss. ex Schult.
Aeschynomene villosa Poiret
Agapanthus praecox Willd.
Agave americana L.
Agave saludana Perrine
Ageratum conyzoides L.
Agoseris flexuosa (Willd.) Sweet
Agrostis capillata L.
Alliaria petiolata (Mill.) Swingle
Aire caryophyllea L.
Aire cupaniana Guss.
Aire praecox L.
Albizia lebbeck (L.) Benth.
Albuca canadenisis (L.) F.M.Leight.
Alisma lanceolatum With.
Allium triquetrum L.
Alliaria petiolata (Miq.) L. A. S. Johnson
Alopecurus geniculatus L.
Alopecurus myosuroides Huds.
Alternanthera pungens Kunth
Alysianthus ovalifolius (Schumach.) J.Leonard
Alyssum inflofolium Stephan ex Willd.
Amaranthus tricolor L.
Amaranthus bellidonnis L.
Ambrosia artemisiifolia L.
Ambrosia psilostachya DC.
Ammophila arenaria (L.) Link
Anagallis minima (L.) E.H.H.Krause
Anchusa officinalis (Gaertn.) Britten
Ancrea cordifolia (Tenn.) Steenis
Anthoxanthum odoratum L.
Anthericum lusitanicum (Willd.) Sch.Bip.
Anthericum lusitanicum (Willd.) Sch.Bip.
Arundo donax L.
Arctotheca calendula (L.) Levyns
Arctotheca populifolia (Bog.) Norlinth
Arctotis stechnadiifolia P.J.Bergius
Arenaria leptocladus (Robh.) Guss.
Argemone ochroleuca Sweet
Argyranthemum franciscanum (Willd.) W Obj. et Sch.Bip.
Argyranthemum frutescens (L.) Sch.Bip.
Arundo donax L.
Asclepias curassavica L.
Asparagus asparagoides (L.) Druce
Asparagus densiflorus (Kunth) Jessop
Asphodelus fistulosus L.
Aster alpinus (Linn) Schultes (L.) Duby
Atriplex prostrata Boucher ex DC.
Austroculum parryi (Juss. ex Lass.) Backeb
Avellinia micheli (Stey) Pari
Avena barbata Pott ex Link
Avena fatua L.
Avena sterilis L.
Aconitum fissifolium (Raddi) Kuhl.
Acastana angustifolia Sweet
Babiana nana (Andrews) Spreng.
Babiana tuberosa (Burm.f.) Kar Gawi
Bacopa monnieri (L.) Pennell
Baeckea virgata (J. R. Forst. & G. Forst.) Andrews
Baeomera uniflora (Jacq.) G.J.Lewis
Banksia cafetii R.Br.
Berkheya rigida (Thunb.) Bol. & Wolley-Dod ex Levyns
Berula erecta (Huds.) Coville
Bidens bipinnata L.
Bidens pilosa L.
Boerhaavia cocinea Mill.
Boerhaavia schomburgkiana Oliver
Brachychiton populiceps (Schott & Endl.) R. Br.
Bractypodium distachyon (L.) P.Beauv.
Brassica barbarea (L.) Janca
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Brassica rapa L.
Brassica tournefortii Gouan
Briza maxima L.
Briza minor L.
Bromus diandrus Roth
Bromus hordeaceus L.
Bromus japonicus Thunb.
Bromus madritensis L.
Bromus rigidus Roth
Bryophyllum delagoense (Eckl. & Zeyh.) Schinz
Buddleja dysphylla (Benth.) Radlk.
Buddleja madagascariensis Lam.
Bupleurum semicompactum L.
Cakile edentula (Bigelov) Hook.
Cakile maritima Scop.
Calandrinia ciliata (Ruiz. & Pav.) DC.
Callistemon rigidus R. Br.
Callistemon rugulosus (Schldl. & Link) DC.
Callitriche hamulata Kutzinger
Callitriche stagnalis Scop.
Calliciris columnellaris F. Mueller.
Calliciris endlicheri (Parl.) F. M. Bailey
Calliciris glaucophylla Joy Thomps. & L. A. S. Johnson
Callichiris romboidea R. Br. ex Rich.
Callichiris robusta F. Mueller.
Callichiris verrucosa (A. Cunn. ex Endl.) F. Mueller.
Calothamnus graniticus Hawkeswood
Calothamnus quadrifolius R. Br.
Calothamnus validus S. Moore
Caltropis procera (Ait.) W.T.Ait.
Canna x L.H.Bailey
Cardiospermum grandiflorum Sw.
Cardiospermum halicacabum L.
Carduus pycnocephalus L.
Carduus tenuiflorus Curtis
Carex divisa Huds.
Carpobrotus aequaleus (Haw.) N.E.Br.
Carpobrotus edulis (L.) Bolus
Carrichera annua (L.) DC.
Carthamus lanatus L.
Casuarina cunninghamiana Miq.
Casuarina equisetifolia L.
Casuarina glauca Sieber ex Spreng.
Catharanthus roseus (L.) G.Don
Cenchrus billorus Roxb.
Cenchrus ciliaris L.
Centaurea melitensis L.
Centaurea erythraea Rafn
Centaurium tenuiflorum (Hoffm. & Link) Fritsch ex Janch.
Centranthus macrosiphon Boiss.
Centranthus ruber (L.) DC.
Cerastium balearicum F.Herm.
Cerastium comatum Desv.
Cerastium glomeratum Thuill.
Cerastium pumilum Curtis
Cerastium vulgare Hartm.
Ceralopteris thalictroides (L.) Brongn.
Chamaesyce palimensis (H. Christ) F.A. Bisby & K.W.Nicholls
Chamaesyce australis (Boiss.) D.C.Hassall
Chamelaucium uncinatum Schauer
Chasmanthe floribunda (Salisb.) N.E.Br.
Chenopodium album L.
Chenopodium ambrosioides L.
Chenopodium giganteum D. Don
Chenopodium glaucum L.
Chenopodium macrocarpum Hook. f.
Chenopodium multifidum L.
Chenopodium murale L.
Chrysanthemoides monilifera (L.) Norl.
Chrysocoma coma-aurea L.
Cicendia filiformis (L.) Delarbre
Cicendia quadrangularis (Dombey ex Lambert) Griseb.
Cinnamomum camphora (L.) J. Presl
Cirsium vulgare (Savi) Ten.
Citrus colocynthis (L.) Schrad.
Citrus lanatus (Thunb.) Matsum. & Nakai
Cleretum papulosum (L. f.) N.E.Br.
Clitorea ternatea L.
Colocasia esculenta (L.) Schott
Conium maculatum L.
Coryza bonariensis (L.) Cronquist
Coryza parva Cronq.
Coryza sumatrensis (Retz.) E.Walker
Corchorus citrinus L.
Corchorus trilocularis L.
Corrigiola littoralis L.
Cortaderia selloana (Schult. & Schult. f.) Asch. & Graebn.
Cotula bipinnata Thunb.
Cotula coronopifolia L.
Cotula turbinata L.
Cotyledon orbiculata L.
Crassula alata (Viv.) A. Berger
Crassula glomerata P. Bergius
Crassula natans (Eckl. & Zeyh.) Rowley
Crassula ovata (Mill.) Druce
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Crassula tetragona (Toelken) Tolken  
Crassula thunbergiana Schultes  
Crepis capillaris (L.) Wallr.  
Crepis foetida L.  
Crepis vesicaria L.  
Crinum moorei Hook. f.  
Crotalaria goreensis Guill. & Perr.  
Crotalaria juncea L.  
Cucumis myriocarpus Naudin  
Cucurbita pepo L.  
Cuscuta epithymum (L.) L.  
Cuscuta planiflora Ten.  
Cyanella hyacinthoides L.  
Cyathaea cooperi (Hook. ex F. Muell.) Domin  
Cyclospermum leptophyllum (Pers.) Sprague ex Britton & P.Wilson  
Cylindropuntia tunoota (Lohm.) Kunth.  
Cymbalaria muralis P.Gaertner  
Cynodon dactylon (L.) Pers.  
Cynodon dactylon (L.) Pers.  
Cynodon dactylon (L.) Pers.  
Cyperus congestus Vahl  
Cyperus eragrostis Lamb.  
Cyperus levisagittus L.  
Cyperus polyphychos Rottb.  
Cyperus rotundus L.  
Cyperus tenellus L. f.  
Cyperus tenuiflorus Rottb.  
Cytornium falcatum (L. f.) C.Presl  
Dactylis glomerata L.  
Datura leitchhardii F. Muell. ex Bentham  
Delairea odorata L.  
Delonix regia (Bojer ex Hook.) Raf.  
Dennstaedtia davallioides (R. Br.) T. Moore  
Desmazeria marina (L.) Druce  
Desmodium tortuosum (Sw.) DC.  
Dichondra micrantha Urb.  
Dietes grandiflora N.E.Br.  
Digitaria ciliaris (Retz.) Koeler  
Digitaria sanguinalis (L.) Scop.  
Diplolaena damiplani Desf.  
Dipogon igneusus (L.) Verdc.  
Disa bracteata Sw.  
Dischisma arenarium E.Mey.  
Dischisma capitatum (Thumb.) Choisy  
Dittrichia graveolens (L.) Greuter  
Drosanthemum candelis (Haw.) Schwantes  
Echinocloa colonia (L.) Link  
Echinocloa crus-galli (L.) P.Beauv.  
Echium plantagineum L.  
Egeria densa Planch.  
Ehrharta calycina Sm.  
Ehrharta erecta Lam.  
Ehrharta longiflora Sm.  
Ehrharta villosa Schult. f.  
Eichhornia crassipes (Mart.) Solms  
Eloea canadensis Michx.  
Emes australis Steinh.  
Epilobium ciliatum Raf.  
Epilobium tetragonum L.  
Eragrostis barleri Daveau  
Eragrostis curvula (Schrad.) Nees  
Eragrostis minor Host  
Erica baccans L.  
Erodium aureum Carolin  
Erodium botrys (Cav.) Bertol.  
Erodium brachycarpum (Godr.) Thell.  
Erodium cicutarium (L.) L'Héril.  
Erythrina x Barneby & Krukoff  
Eucalyptus botryoides Sm.  
Eucalyptus citriodora Hook.  
Eucalyptus cladocalyx F.Muell.  
Eucalyptus conferruminata D.Carr & S.Carr  
Eucalyptus globulus Labill.  
Eucalyptus gomphocephala DC.  
Eucalyptus lehmannii (Schauer) Bentham  
Eucalyptus leucoxyylon F. Muell.  
Eucalyptus maculata Hook.  
Eucalyptus microcorys F. Muell.  
Eucalyptus muelleriana A. W. Howitt  
Eucalyptus polyanthemos Schauer  
Eucalyptus saligna Sm.  
Euphorbia cyathophora Murray  
Euphorbia helioscopia L.  
Euphorbia heterophylla L.  
Euphorbia paralias L.  
Euphorbia peplus L.  
Euphorbia segetalis L.  
Euphorbia terracina L.  
Ferraria crispa Burm.  
Ficus carica L.  
Foeniculum vulgare Mill.  
Freedia albula (C.L.Mey.) Gumbel. - Klett  
Furmaria capreolata L.  
Furmaria muralis Sond. ex W.D.J.Koch  
Furcraea foetida (L.) Haw.  
Furcraea selloa K.Koch  
Galium aparine L.  
Galium divaricatum Pourret ex Lam.  
Galium murale (L.) All.  
Gamochaeta americana (Mill.) Wedd.
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Gamochaeta falcata (Lam.) Cabrera
Genista linifolia L.
Genista monsspaulana (L.) L.A.S.Johnson
Gladiolus angustus L.
Gladiolus caryophyllaeus (Bur. f.) Poir.
Gladiolus undulatus L.
Glyceria declinata Brébiss.
Glyceria maxima (Hartm.) Holmb.
Grap nimus polycaloon Pers.
Gomphocarpus frutescens (L.) W.T.Aiton
Gomphocarpus physocarpus E.Mey.
Gosperia persontana L.
Gossypium hirsutum L.
Grevillea arenaria R.Br.
Grevillea acroptilis Meisn.
Grevillea rosmarinifolia A.Cunn.
Gypsophila tubulosa (Joub. & Spach) Boiss.
Hainardia cylindrica (Willd.) Greuter
Hakea costata Meissner
Hakea elliptica (Sm.) R. Br.
Hakea francisiana F.Muell.
Hakea laurina R.Br.
Hakea pycnomeura Meissner
Hakea salicifolia (Vet.) B.L.Burtt
Hakea saricca Schrad. & J. C. Wendl.
Hakea suaveolens R. Br.
Hedypnois rhagadioides (L.) Willd.
Heliotropium curassavicum L.
Heimathotheca echloides (L.) Holub
Hesperantha falcata (L. f.) Ker Gawl.
Hibbertia cuneiformis (Labill.) Sm.
Hibiscus diversifolius Jacq.
Hibiscus seeleria L.
Histiogytis incisa (Thunb.) J.Sm.
Holcus lanatus L.
Holcus segetis Nees
Homoianthus novo-guineensis (Warb.) Lauterb. & K.Schum.
Hordeum glaucum Steud.
Hordeum leporinum Link
Hordeum maritimum Huds.
Humulus lupulus L.
Hydrocotyle ranunculoides L. f.
Hyparrhenia hirta (L.) Stapf
Hypericum perforatum L. DC.
Hypochaeris glabra L.
Hypochaeris radicata L.
Hypolepis dicksonioides (Endl.) Hook.
Hypolepis rugosula (Labill.) J.Sm.
Hypopsis suaveolens (L.) Poit.
illecebrum verticillatum L.
ipheion uniflorum (Lindl.) Raf.
ipomea cairica (L.) Sweet
ipomea indica (Burm.) Merr.
ipomea nil (L.) Roth
ipomea pes-pigridis L.
ipomea quamoclit L.
Iris faeigata Fisch. ex Fisch. & C.A.Mey.
Isolepis hystrix (Thunb.) Nees
Isolepis marginata (Thunb.) Diels
Isolepis prolifera (Rottb.) R.Br.
Ixia maculata L.
Ixia polystachya L.
Jatropha gossypifolia L.
Juncus acutus L.
Juncus articulatus L.
Juncus bufonius L.
Juncus capitatus Weigel
Juncus microcephalus Kunth
Juncus usitatus L.A.S.Johnson
Kennedia nigricans Lindl.
Kennedia rubicunda (Schneev.) Vent.
Kunzea baxter (Klotzsch) Schauer
Kunzea sp. -
Lachenalia aloides (L.f.) Engl.
Lachenalia bulbifera (Cirillo) Engl.
Lachenalia mutabilis Sweet
Lachenalia reflexa Thunb.
Lactuca saligna L.
Lactuca seriola L.
Lactuca virosa L.
Lagurus ovatus L.
Lamarckia aurea (L.) Moench
Lampranthus glaucus (L.) N.E.Br.
Lampranthus multiflorus (Jacq.) N.E.Br.
Lavandula stoechas L.
Lechaeustria biloba Lindl.
Leontis leonurus (L.) R.Br.
Lepidium africanum (Bur. f.) Dc.
Lepidium bonariense L.
Lepidium didymum L.
Lepidium laevigatum (Gaertn.) F.Muell.
Lepidium petersonii F. M. Bailey
Lepidium rotundifolium (Maiden & Betch.) F. Rodway ex Cheel
Leucacena leucocephala (Lam.) de Wit
Limonium companyonis (Gren. & Billot) Kuntze
Limonium lobatum (L. f.) Kuntze
Limonium sinuatum (L.) Mill.
Linum trigynum L.
Lolium rigidum Gaudin
Lolium temulentum L.
Lonicera japonica Thunb.
Lotus angustissimus L.
Lotus subtilflorus Lag.
Lotus uliginosus Schkuhr
Lupinus angustifolius L.
Lupinus cosentinii Guss.
Lycium ferocissimum Miers
Lycopersicon esculentum Mill.
Lythrum hyssopifolia L.
Macroptilium atropurpureum (DC.) Urb.
Macroptilium lathyroides (L.) Urb.
Malva dandromorpha M.F.Ray
Malva linnaei M.F.Ray
Malva parviflora L.
Malvastrum americanum (L.) Torr.
Mangifera indica L.
 Matthiola Incana (L.) R.Br.
 Medicago fasciata (L.) Mill.
 Medicago littoralis Rohde ex Loisel.
 Medicago minima (L.) Bartal.
 medicago polymorpha L.
 Melaleuca armillaris (Sol. ex Gaertn.) Sm.
 Melaleuca decussata R. Br.
 Melaleuca diosmifolia Andrews
 Melaleuca hypericifolia Sm.
 Melaleuca lanceolata Otto
 Melaleuca parviflora Brynes
 Melaleuca pentagona Labill.
 Melaleuca quinquenervia (Cav.) S.T.Blake
 Melilotus indicus (L.) All.
 Mellilotus siculus (Turra) Vitman ex B.D.Jacks.
 Melochia pyramidalis L.
 Mentha aquatica L.
 Mentha pulegium L.
 Mentha suaveolens Ehrh.
 Mentha x piperita L.
 Mentha x spicata L.
 Mercurialis annua L.
 Merremia aegyptia (L.) Urb.
 Merremia dissecta (Jacq.) Hallier f.
 Mesembryanthemum aitonis Jacq.
 Mesembryanthemum crystallinum L.
 Mesembryanthemum nodiflorum L.
 Minuartia mediterranea (Link) K.Maly
 Mispelotes ornitum (L.) Raf.
 Moenchia erecta (L.) Gaertn., B.Mey. & Scherb.
 Monopsis debilis (L.) C.Presl
 Moraea flaccida (Sweet) Steud.
 Moraea fugax (D.Delaroche) Jacq.
 Moraea lewisiae (Goldblatt) Goldblatt
 Moraea miniat a Andrews
 Moraea setifolia (L. f.) Druce
 Muscari comosum (L.) Mill.
 Myosotis sylvatica Ehrh. ex Hoffm.
 Narcissus papyraceus Ker Gawl.
 Nicosiana glauca Graham
 Nothoscordum gracile (Alt.) Stearn
 Nyphea macroserma Merr. & L. M. Perry
 Nyphea mexicana Zucc.
 Nyphea odorata Alt.
 Ocimum basilicum L.
 Ocimum tenuiflorum L.
 Oenothera drummondii Hook.
 Olea europaea L.
 Opuntia stricta (Haw.) Haw.
 Oregia variegata (L.) Haw.
 Ornithogalum longibracteatum Jacq.
 Ornithopus compressus L.
 Ornithopus pinnatus (Mill.) Druce
 Orobanchaceae minor Sm.
 Osteospermum calendulaceum L. f.
 Oxalis caprina Thumb.
 Oxalis depressa Eckl. & Zeyh.
 Oxalis flava L.
 Oxalis glabra Thumb.
 Oxalis incarnata L.
 Oxalis pes-caprae L.
 Oxalis purpurea L.
 Oxylolium lanceolatum (Vent.) Druce
 Pancratium maritimum L.
 Popaver hybridum L.
 Parapholis incurva (L.) C.E.Hubb.
 Paraserianthes lophantha (Wild.) I.C.Nielsen
 Parentucellia latifolia (L.) Caruel
 Parentucellia viscosa (L.) Caruel
 Parietaria judaica L.
 Parkinsonia aculeata L.
 Parthenocissus tricuspidata (Sieb. & Zucc.) Planch.
 Paspalum conjugatum P.J.Bergius
 Paspalum dilatatum Poir.
 Paspalum distichum L.
 Paspalum fasciculatum Willd. ex Flüggé
 Paspalum scrobiculatum L.
 Paspalum urvilleanum Steud.
 Paspalum vaginatum Swartz
Passiflora cinnabarina Lindl.
Passiflora foetida L.
Pelargonium almehlifloides (L.) L'Hér.  
Pelargonium capitatum (L.) L'Hér.  
Pennisetum clandestinum Hornst. ex Chiov.
Pennisetum macraourum Trin.
Pennisetum pedicellatum Trin.
Pennisetum purpureum Schumach.
Pennisetum setaceum (Forsk.) Chiov.
Pentasachis alboe (Nees) Stapf
Pentasachis pallida (Thunb.) H.P. Linder
Petrophytis dubia (Raf.) G. López & Romo
Petroselinum crispum (Mill.) Nyman ex A. W. Hill
Phalaris minor Retz.
Phileum arenarium L.
Phoenix daubytleri L.
Phyla canescens (Kunth) Greene
Phyla nodiflora (L.) Greene
Phyllospodium cordatum (Thunb.) O. M. Hilliard
Physalis minima L.
Physalis peruviana L.
Physola saccharata L.
Pinus pinaster Ait.
Pinus radiata D. Don
Piptatherum miliaecum (L.) Cosson
Pittosporum undulatum Vent.
Platyodon beckiana (F. Muell.) E. Pritz.
Plantago lanceolata L.
Plantago major L.
Poa annua L.
Polyarcton tetraphyllum (L.) L.
Polygala myrtifolia L.
Polygogon maritimus Willd.
Polygogon monspilicola (L.) Desf.
Populus alba L.
Populus nigra L.
Potulaca olacerae L.
Potulacaria afric (L.) Jacq.
Prosopis glandulosa Torr.
Prosopis juliflora (Sw.) DC.
Prosopis paludina (Humb. & Bonpl. ex Willd.) Kunth
Prunella vulgaris L.
Prunus cerasifera Ehrh.
Proralea pinna L.
Pectoria lapazae (L.) Juss.
Pupula miranthra Hauman
Ranunculus muriatus L.
Ranunculus trifolius Desf.
Rapistrum rugosum (L.) All.
Reichardia tingitana (L.) Roth
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Sisyrinchium iridiifolium Kunth
Solanum americanum Mill.
Solanum hoplopetalum Bitter & Summerh.
Solanum fastigiatus Ait.
Solanum flanneum Hepper & P.-M.L.Jaager
Solanum nigrum L.
Solanum suberosum (Req.) Dandy
Sonchus asper (Jord.) Ball
Sonchus oleraceus L.
Sonchus tenerrimus L.
Sorghum halepense (L.) Pers.
Sparaxis bulbifera (L.) Ker Gawl.
Sparaxis grandiflora (D.Delaroche) Ker Gawl.
Sparaxis pillansii L.Bolus
Spergula arvensis L.
Spergula pietrandra L.
Spergularia bocconii (Scheele) Asch. & Graebn.
Spergularia diandra (Guss.) Boiss.
Spergularia marina (L.) Griseb.
Spergularia rubra (L.) J.Presl & C.Presl
Spinifex sericeus R.Br.
Stachys arvensis (L.) L.
Stachytarpheta cayennensis (Rich.) Vahl
Stellaria media (L.) Vill.
Stenolaphrum secundatum (Waller) Kuntze
Stylosanthes hamata (L.) Taub.
Stylosanthes humilis Kunth
Stylosanthes scabra Vogel
Stylosanthes viscosa (L.) Sw.
Succowia bafearica (L.) Medik.
Symphyotrichum subulatum (Michx.) G.L.Nesom
Talinum paniculatum (Jacq.) Gaertn.
Tamarindus indica L.
Tamarix aphylla (L.) H.Karst.
Tecoma stans (L.) Juss. ex Kunth
Telagonia decumbens Mill.
Telephile barbata (L.) Gaertn.
Trachyandra divaricata (Jacq.) Kunth
Trifolium uniolae (L.) R.Michx.
Tridax procumbens L.
Trifolium angustifolium L.
Trifolium arvense L.
Trifolium campestre Schreb.
Trifolium campestre Brot.
Trifolium dubium Sibth.
Trifolium glomeratum L.
Trifolium hirtum All.
Trifolium ilicisicum Balb. ex Loisel.
Trifolium repens L.
Trifolium scabrum L.
Trifolium stellatum L.
Trifolium subterraneum L.
Trifolium tomentosum L.
Triglochin bulbosa L.
Trifolium pratense A.Rich.
Tropaeolum majus L.
Turnera ulmifolia L.
Typha orientalis C.Presl
Ulmus procera Salisb.
Urochloa mosambicensis (Hack.) Dandy
Urochloa mutica (Forssk.) T.Q.Nguyen
Urosporum picoideum (L.) Scop. ex Schmidt
Ursinia anthemoides (L.) Poir.
Ursinia speciosa DC.
Urtica urens L.
Vallisneria americana Michx.
Vallotrophysa deaesifolium (Thunb.) Hilliard & Burtt.
Verbascum virgatum Stokes
Verbena officinalis L.
Verbena encheloides (Cav.) Benth. & Hook. f. ex A.Gray
Veronica arvensis L.
Verticordia monadelpha Turcz.
Vicia hissata (L.) Gray
Vicia monantha Retz.
Vicia sativa L.
Vigna radiata (L.) R. Wilczek (Dalz.) Ohwi & H. Ohashi
Vicia major L.
Viola odorata L.
Vulpia bromoides (L.) Gray
Vulpia fasciculata (Forssk.) Fritsch
Vulpia muralis (Kunth) Nees
Vulpia myuros (L.) C.C.Gmel.
Wahlenbergia capensis (L.) A.DC.
Washingtonia filifera (Linden ex André) H.Wendl.
Watsonia borbonica (Poir.) Goldblatt
Watsonia knysana L.Bolus
Watsonia marginata (L.) Ker Gawl.
Watsonia meriana (L.) Mill.
Watsonia versfeldii J.F.Mathews & L.Bolus
Wigandia urens (Ruiz & Pav.) Kunth
Xerocrystum bracteatum (Vent.) N.N.Tsvelev
Yucca filamentosa L.
Zaluzianskya divaricata (Thunb.) Walp.
Zantedeschia aethiopica (L.) Spreng.
References List (sourced from the Plants Database, a Dept of Agriculture and Food dataset, and is based on the following sources)


APPENDIX 8

PRESCRIBING PEST PLANTS - GENERAL GUIDELINES TO ASSESS PLANTS FOR PEST PLANT STATUS
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APPENDIX 1

PRESCRIBING PEST PLANTS
GENERAL GUIDELINES TO ASSESS PLANTS FOR PEST PLANT STATUS

The following information should be considered when proposing to prescribe plants as Pest Plants for a local authority district in accordance with the Local Government Act and the Agriculture & Related Resources Protection Act. An assessment report, using the information below as a guideline, should be prepared by any Local Government Authority proposing to prescribe a Pest Plant.

1. PLANT PROPOSED TO BE PRESCRIBED AS A PEST PLANT:
   a) Common name(s):
   b) Botanical name:
   c) Essentially this a weed of (not mutually exclusive):
      ☐ agriculture  ☐ natural environment  ☐ urban environment  ☐ waste land
   d) Has this plant been prescribed elsewhere in WA?
   e) Has the prescription of this plant in other districts led to the successful control of the plant.
   f) In prescribing this plant, is the objective of the authority to enforce control, or encourage control. If it is the latter what other options are available to the LGA, other than prescribing it a Pest Plant.
   g) Are there any beneficial uses of the plant.
   h) Does the plant have any commercial value.
   i) How does the plant spread and can the authority develop a strategy to contain the plant, or minimise spread.

2. Within the locality does the plant have a propensity to:
   a) affect health, comfort or convenience of inhabitants
   b) affect public or open space
   c) affect domestic animals,
   d) affect the garden environment
   e) affect the natural environment
   f) affect agricultural production (livestock and crops)
   g) lower property values

3. What is the current distribution of the plant within the district and the extent of any infestation.

4. What level of control is the authority seeking, i.e. eradication, management or control.

5. Is the plant already being controlled within the district and how successful has this control effort been.
6. What control measures will be implemented, and are they considered to be:
   h) effective
   i) cost effective
   j) fair
   k) acceptable to the community
   l) enforceable
   m) achievable
   n) practical
   o) auditable
   p) justifiable

7. Have groups within the community discussed the proposal and do they support the control of the plant.

8. Do landholders require any specialised training (such as chemical spraying), or access to equipment meet their obligations to control the plant.

9. Is the plant already Declared under the Agriculture and Related Resources Protection Act, 1976.

10. Any other information the authority considers necessary.