

ALEXANDRA MOORE

**ACC FOR THE COWS?
ANALYSING HOW BEST TO DEAL WITH LOSSES CAUSED
BY BIOSECURITY BREACHES.**

Faculty of Law
Victoria University of Wellington

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Abstract

Since 2010, New Zealand has suffered a number of biosecurity breach events causing losses to primary industries. The response decisions from the Ministry for Primary Industries have had huge impacts on different sectors ability to recover their losses. This paper considers the current approach to recovering financial losses caused by biosecurity breaches. It evaluates the options available for reform; Negligence claims, comprehensive state compensation schemes, private insurance and improving the existing scheme. The ability for capped state compensation schemes to share costs according to benefits gained, increase certainty and consistency in the application of compensation and the avoidance of long drawn out negligence cases makes it the most viable solution to these compensation issues.

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I Introduction

Mycoplasma bovis was first detected in New Zealand in mid 2017. In May 2018 the government announced eradication would be attempted with the costs to farmers fully compensated.¹ Just months later the High Court handed down a decision finding that claimant kiwifruit growers were entitled to damages from the government covering losses caused by the Psa outbreak in 2010.² The negligence claim was filed after the government refused compensation to growers under the pest management plan dealing with Psa.³ These cases illustrate the opposite ends of the spectrum of approaches available in New Zealand to recover losses following biosecurity breaches.

Currently, some disease outbreaks causing losses are fully government compensated while others receive nothing. The approach to compensation is highly discretionary. But if these biosecurity breaches continue the way they have been in recent years, New Zealand will need a more robust way of dealing with these losses. This paper analyses different approaches to recovering private losses and considers which scheme is best suited to biosecurity breach losses.

The paper begins by providing wider background to the issue. Part III sets out the current scheme under the Biosecurity Act 1993 and gives four examples of how the Act has been applied to recover loss caused by biosecurity breaches. Next, Part IV outlines aims for reform and considers the options available; Negligence claims, state compensation, private insurance or modifying the current system. Finally, Part V looks at each of these options in light of the aims of reform and evaluates their viability.

II Background

A Biosecurity in New Zealand

¹ New Zealand Government, Jacinda Ardern and O'Connor "Plan to eradicate *Mycoplasma bovis*" (press release, 28 May 2018).

² *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559.

³ At [444].

New Zealand has a reputation for strict biosecurity standards.⁴ As a relatively isolated island nation, the ability to control entry of goods is somewhat more attainable than in a continental country. Not only that, strict border biosecurity is crucial to protecting the agricultural industry that the New Zealand economy is so heavily reliant upon. As such, New Zealand has managed to avoid some major disease outbreaks to the benefit of the primary industries. The result is a farming culture reliant on free-flowing movement of stock and large farms throughout the country.⁵

Consequently, when biosecurity breaches do occur, the impact is devastating. Diseases spread quickly causing financial losses and forcing the agriculture industry to reconsider the way it operates. The stringent biosecurity procedures put in place to protect our borders are inevitably questioned.

The isolated nature of New Zealand and the economic dependency on agriculture, also makes eradication and management attempts much more attractive than in other countries. However, eradication and management require government intervention and can involve the culling of ostensibly healthy stock and crops in the hope of minimizing the long-term impact of disease outbreaks in New Zealand. Eradication and management powers for unwanted organisms are dealt with under the Biosecurity Act 1993.

B The Biosecurity Act 1993

The Biosecurity Act (the Act) deals with risk goods before and after entry into New Zealand. The Act is implemented by the Ministry for Primary Industries (MPI) and includes provisions relating to importation of risk goods,⁶ preventing and reporting entry of unwanted organisms,⁷ pest management for unwanted organisms and unauthorized goods,⁸ and response and recovery actions for unwanted organisms.⁹

⁴ *Strathboss*, above n 2, at [148]-[153] details why biosecurity is important to New Zealand.

⁵ Biosecurity New Zealand “Questions and Answers – *Mycoplasma bovis* announcement” (press release) <<https://www.mpi.govt.nz>>.

⁶ Biosecurity Act 1993, pt 3.

⁷ Part 4.

⁸ Part 5.

⁹ Part 6.

The Act requires MPI chief technical officers to set Import Health Standards specifying prerequisites necessary for “the effective management of risks associated with importing risk goods”.¹⁰ Once imported goods arrive in New Zealand they must be cleared for entry into New Zealand by an MPI inspector,¹¹ this requires satisfaction that the goods are not risk goods or that the goods have nonetheless met the relevant requirements.¹² The Act also empowers inspectors to require a person entering New Zealand “to surrender to an inspector uncleared goods that are risk goods” which they have in their possession.¹³

Under pt 4 of the Act there is a general duty on the public to report any suspicion that a notifiable organism (as defined by the Act) is present in New Zealand to the chief technical officer.¹⁴

Part 5 of the Act details pest management plans which are aimed at providing for “the eradication or effective management of harmful organisms that are present in New Zealand”.¹⁵ Plans set out what powers will be used,¹⁶ the costs involved,¹⁷ whether compensation will be provided¹⁸ and other issues for implementation.¹⁹

Administrative powers under pt 6 include seizing and disposing of unauthorised goods,²⁰ destruction of imported organisms,²¹ and declaring restricted²² or controlled movement areas.²³

¹⁰ Section 22(1).

¹¹ Section 25.

¹² Section 27.

¹³ Section 30.

¹⁴ Section 46.

¹⁵ Section 54.

¹⁶ Sections 61(2)(g), 70(2)(g), 81(2)(f) and 90(2)(f).

¹⁷ Sections 61(2)(q), 70(2)(q), 81(2)(c)(x) and 90(2)(o).

¹⁸ Sections 61(2)(m), 70(2)(n), 81(2)(l) and 90(2)(l).

¹⁹ See generally ss 61, 70, 81 and 90.

²⁰ Section 116.

²¹ Section 127.

²² Section 130.

²³ Section 131.

Biosecurity emergencies are dealt with under pt 7 of the Act, while pt 8 outlines enforcement, penalties and offences for non-compliance.

But where a biosecurity breach does occur there are a range of pathways MPI can take to deal with the problem, and not all pathways are created equal.

III The Current Approach to Losses Caused by Biosecurity Breaches

C Options under the Biosecurity Act 1993

In dealing with an unwanted organism MPI makes orders in an attempt to either manage or eradicate the organism. This can either be done under a pest management plan, at either the regional or national level,²⁴ or by direct use of powers under pt 6. Part 5A enables government/industry agreements (GIAs) which allow for joint decision-making and funding for readiness and response activities, in the event of an unwanted organism effecting that industry.²⁵

1 Compensation under the Act

The main compensation provision under the Act, s 162A, provides:

- (1) This section applies when—
 - (a) powers under this Act are exercised for the purpose of eradicating or managing an organism; and
 - (b) the powers are not exercised to implement a pest management plan or pathway management plan; and
 - (c) the exercise of the powers causes loss to a person as a result of—
 - (i) damage to or destruction of the person's property; or
 - (ii) restrictions imposed under Part 6 or 7 on the movement or disposal of the person's goods; and

²⁴ See generally pt 5.

²⁵ Section 100X.

- (d) there is no agreement under Part 5A that applies to the loss and whose provisions on compensation are expressed to take priority over this section.
- (2) The person is entitled to compensation under this section for loss that—
- (a) is verifiable; and
 - (b) is loss that the person has been unable to mitigate by taking every step that is reasonable in the circumstances.
- (3) Compensation must not be paid if—
- (a) the person's loss relates to unauthorised goods or uncleared goods; or
 - (b) the person suffered the loss before the time at which the exercise of the powers began; or
 - (c) the person failed to comply with biosecurity law—
 - (i) in a serious or significant way; or
 - (ii) in a way that contributed to the presence of the organism; or
 - (iii) in a way that contributed to the spread of the organism.
- (4) The amount of compensation paid must put the person to whom it is paid in no better or worse position than a person whose property or goods are not directly affected by the exercise of the powers...

Where there is a GIA which overrides s 162A or a pest management pathway in operation, there is no entitlement to compensation. Pest management plans are not required to provide for losses,²⁶ despite being specifically excluded from s 162A. The plan could require culling of all livestock or all crops and still offer no compensation for these massive losses.²⁷ Or it could provide for full compensation, this is discretionary.

Where risk goods are cleared for entry based on false or misleading information, they are considered unauthorized goods and can be seized by inspectors under s 116:²⁸

- (1) Any inspector lawfully exercising a power under any of sections 19(2), 30A, 31, 34(5), 109, 111, 113, 114, or 120 may seize—

²⁶ Sections 64(4)(a), 73(4)(a), 84(4)(a) and 93(4)(a).

²⁷ See *Strathboss*, above n 2, at [442].

²⁸ Biosecurity Act 1993, s 116.

- (a) any unauthorised goods:
- (b) any goods where an inspector has reasonable grounds to suspect—
 - (i) those goods are in contact with, or have been in contact with, unauthorised goods; and
 - (ii) pests or unwanted organisms could have been transmitted from the unauthorised goods to those goods...

The cost of disposing of these goods is a debt owed to the Crown by the owner, although there is a discretion to waive the costs where the owner was unaware the goods were unauthorised.²⁹ The scope of these powers is not entirely clear, but at face value there is no requirement for compensation even where there was fault on the part of MPI. It is also unclear if these are perpetual powers over imported goods; Could a finding of false information at any time lead to seizure and disposal of goods? Are imported goods forever subject to this power?³⁰

There is considerable uncertainty in what approach MPI will take in dealing with unauthorized goods or unwanted organisms in New Zealand. Losses caused by biosecurity breaches are not dealt with in a uniform manner. Decisions to implement pest management plans or use pt 6 powers directly are specific to each individual case, but these decisions can dictate whether or not owners are entitled to compensation for property damage caused by powers exercised under the Act.

Where compensation is not available under s 162A or under the pest management plan, financial losses might be recovered by other means.

D Alternative options

2 Ex Gratia payments, negotiation settlements and funding recovery

There have been situations where orders executed under the Act have caused losses to owners but there is no entitlement to compensation. The presence of pea weevil in the Wairarapa led growers

²⁹ Section 117.

³⁰ See generally *Waimea Nurseries Ltd v Director General for Primary Industries* [2018] NZHC 2183.

to destroy their crops.³¹ A Controlled Area Notice under the Act also prevented replanting for two years to ensure weevils die out.³² There was no entitlement under s 162A for the income lost over two years without new crops.³³ However, an ex gratia payment was made to the growers by cabinet decision under the Public Finance Act.³⁴

The Government could also assist owners by funding recovery programs for the affected community rather than covering losses directly.

3 *Negligence claims*

Where no government funding is forthcoming to cover the costs of the biosecurity breach, those suffering losses can take a negligence claim. Any claim requires finding a party at fault for the biosecurity breach and proving that the loss was caused by that breach. A class action could be taken by the owners suffering loss against MPI for failures in the importation process or the response.³⁵ Or a claim could be taken against a private individual who has breached biosecurity standards.

E Unpredictable Responses

The current options available for recovering loss caused by biosecurity breaches are varied, and which approach will apply is unpredictable. Four recent examples of biosecurity breaches in New Zealand demonstrate the different pathways necessary for owners to recover financial losses in each case. Choices made by MPI dictated the industry response.

³¹ See Ministry for Primary Industries “Controlled Area Notice: Section 131 – Controlled Area, Movement Controls and Procedures in Respect of Pea Weevil (*Bruchus pisorum*)” (Controlled Area Notice, 11 August 2016), pt 4.

³² See generally Ministry for Primary Industries “Controlled Area Notice: Section 131 – Controlled Area, Movement Controls and Procedures in Respect of Pea Weevil (*Bruchus pisorum*)” (Controlled Area Notice, 11 August 2016); Ministry for Primary Industries “Fact sheet about the controls: Pea Weevil Response” (Fact sheet, 28 July 2016).

³³ See “AGM and Conference Papers” (Process Vegetables New Zealand 2018 Annual General Meeting, Christchurch, July 2018) at 7.

³⁴ At 7; See generally Public Finance Act 1989; See also “Wairarapa pea growing ban extended” (26 April 2018) Federated Farmers of New Zealand <www.fedfarm.org.nz>.

³⁵ For example, see *Strathboss*, above n 2.

4 *Pseudomonas syringae pv actinidiae (Psa)*

In late 2010, Psa was detected on a kiwifruit orchard in Te Puke.³⁶ The risk of Psa was known to the industry and Ministry of Agriculture and Forestry (MAF, as it was then) as the disease had already caused damage to the kiwifruit industry in both Europe and Asia.³⁷ Psa is a bacterium existing as both an epiphyte (presenting on the surface of kiwifruit vines) and an endophyte (living within the vine and causing severe infection).³⁸ Psa generally spreads through wind and rain, transferal by pruning equipment, birds and insects.³⁹ Symptoms range from spotted leaves to vine death.⁴⁰

During the initial response to Psa, the government and the kiwifruit industry agreed to contribute \$25 million each to help fund the management of Psa.⁴¹ This involved infected vines being cut out with owners being compensated on a per hectare basis.⁴²

But by early 2011, Psa had spread to the wider Bay of Plenty region and attempts to eradicate were abandoned.⁴³ A pest management plan was put in place which did not offer compensation to the orchardists effected.⁴⁴

In *Strathboss Kiwifruit Ltd v Attorney-General*, a group of kiwifruit orchardists affected by the outbreak took a negligence claim against the Crown for the systematic failures of MAF in dealing with pollen imports considered to have caused the outbreak.⁴⁵ In 2018, the High Court held that

³⁶ At [1] and [104]; “Psa-V” (2011) KiwifruitVineHealth <www.kvh.org>; “About Psa” The Kiwifruit Claim <www.thekiwifruitclaim.org>.

³⁷ Mycoplasma is classified as an unwanted organism in New Zealand for the purposes of the Biosecurity Act 1993; *Strathboss*, above n 2, at [23] and [94]-[98].

³⁸ “Psa-V” (2011) KiwifruitVineHealth <www.kvh.org>.

³⁹ *Strathboss*, above n 2, at [88].

⁴⁰ “Psa-V Symptoms Guide” (2011) KiwifruitVineHealth <www.kvh.org>; and “Psa (bacterial kiwifruit vine disease)” (5 January 2017) MPI <www.mpi.govt.nz>.

⁴¹ *Strathboss*, above n 2, at [117].

⁴² At [118].

⁴³ At [124].

⁴⁴ At [125]-[126].

⁴⁵ Above n 2.

MAF personnel owed a duty of care to orchardists “to take care in carrying out their biosecurity functions relating to the importation and border clearance of risk goods”⁴⁶ and that this duty was breached by the failures of staff during the importation permit application process.⁴⁷ Damages were to be determined during a later hearing. The Crown is appealing the decision.⁴⁸

5 *Bonamia Ostreae*

In 2015, *Bonamia Ostreae* was detected in the Nelson and Marlborough region.⁴⁹ *Bonamia Ostreae* is a bacterium fatal to oysters.⁵⁰ Despite restrictions of movement, in 2017 *Bonamia Ostreae* was found in oyster farms on Stewart Island.⁵¹ MPI ordered that all farmed oysters in the area be culled in an eradication attempt.⁵² Full compensation is available to the farmers under s 162A, this includes consequential losses.⁵³

6 *Mycoplasma Bovis*

In July 2017, a south Canterbury farm tested positive for *mycoplasma bovis*,⁵⁴ a bacterial disease which causes a range of conditions in cattle including late-term abortions, arthritis, pneumonia,

⁴⁶ At [21].

⁴⁷ At [17] and [29]-[34].

⁴⁸ *Notice of Appeal: Attorney General v Strathboss Kiwifruit Ltd CA*, 24 July 2018.

⁴⁹ Ministry for Primary Industries “*Bonamia Ostreae*” (12 July 2018) MPI <www.mpi.govt.nz/protection-and-response/responding/alerts/>.

⁵⁰ Ministry for Primary Industries “*Bonamia Ostreae*” (12 July 2018) MPI <www.mpi.govt.nz/protection-and-response/responding/alerts/>.

⁵¹ Ministry for Primary Industries “*Bonamia Ostreae*” (12 July 2018) MPI <www.mpi.govt.nz/protection-and-response/responding/alerts/>.

⁵² Ministry for Primary Industries “*Bonamia Ostreae*” (12 July 2018) MPI <www.mpi.govt.nz/protection-and-response/responding/alerts/>.

⁵³ Ministry for Primary Industries “*Bonamia Ostreae*” (12 July 2018) MPI <www.mpi.govt.nz/protection-and-response/responding/alerts/>.

⁵⁴ Ministry for Primary Industries “Investigation underway into *Mycoplasma bovis* infection on South Canterbury farm” (25 July 2017) MPI <www.mpi.govt.nz/news-and-resources/media-releases/>; and Max Green “NZ cow herd hit by first case of *Mycoplasma Bovis*” (28 July 2017) *Agra Europe* <<http://link.galegroup.com>> at 18.

and a form of mastitis which is unresponsive to current treatments.⁵⁵ At the time of writing the number of infected properties was 72, with 343 properties under assessment.⁵⁶

After 10 months of deliberation, the government announced MPI would be undertaking an eradication attempt.⁵⁷ The attempt will involve the culling of all cows on a property which is under MPI orders, whether the cow has tested positive or not.⁵⁸ Full compensation is available under s 162A. Funding for the plan is being shared, roughly a third of the costs are being paid by Beef+Lamb and DairyNZ and the rest by the government.⁵⁹ The costs are expected to total \$886 million over 10 years.⁶⁰

7 *Apple and Stone fruit Trees*

In 2018, MPI audited the Washington clean plant facility, Clean Plant Centre Northwest (CPCN), for the purposes of re-accreditation.⁶¹ Clean plant facilities grow stem stock for importation of new fruit varieties.⁶² MPI found test records were missing and results had been incorrectly recorded. The result was that apple and stone fruit plant matter which had been allowed clearance into New Zealand for the past five years, was declared as unauthorised goods by MPI.⁶³ MPI ordered destruction or containment of all the plant matter and its derivatives from the 5 year period,⁶⁴ this totalled 47,827 trees.⁶⁵ No compensation was to be available as the orders were made under s 116. The goods were unauthorised, despite having been in the country for up to five years and not having actually been tested for diseases.

⁵⁵ Ministry for Primary Industries “What is *Mycoplasma bovis*?” (28 June 2018) MPI <www.mpi.govt.nz/protection-and-response/mycoplasma-bovis/>.

⁵⁶ Biosecurity New Zealand “Situation Report” (5 October 2018) Biosecurity New Zealand <www.biosecurity.govt.nz/protection-and-response/>.

⁵⁷ “Plan to eradicate *Mycoplasma bovis*”, above n 1.

⁵⁸ Biosecurity Act 1993, s 122.

⁵⁹ “Plan to eradicate *Mycoplasma bovis*”, above n 1.

⁶⁰ “Plan to eradicate *Mycoplasma bovis*”, above n 1; “Questions and Answers – *Mycoplasma bovis* announcement”, above n 5.

⁶¹ *Waimea Nurseries*, above n 30, at [6].

⁶² At [4].

⁶³ At [6].

⁶⁴ At [8].

⁶⁵ At [9].

Five growers challenged the order under judicial review, questioning the use of s 116. The High Court held that while the problems with CPCN cast doubt on the accuracy of the test results recorded, this did not mean the goods were unauthorised as it could not be said the results were false or misleading.⁶⁶ Many of the trees are in the ground and are immovable, therefore going beyond the definition of 'goods'.⁶⁷ Using s 116 for all the plant matter imported from that facility for the last five years went beyond the scope of the section.⁶⁸ The orders under s 116 were consequently set aside.⁶⁹ At the time of writing, additional orders were yet to be made.

IV Options for Reform

The current scheme provides little certainty to the agricultural industry for how they will be impacted in the event of a biosecurity breach. The livelihood of owners is in the hands of MPI officials' decisions at the time of the event. Planning for this type of loss becomes impossible. Similar cases do not always appear to be treated alike.

The problem is that loss is inevitable for biosecurity breaches resulting in entry of unwanted organisms, whether it be due to complete loss of property (a fatal disease) or through damage to property (poor crop yields or productivity due to illness). If loss is inevitable, it is questionable to what extent loss covered under s 162A is really caused by powers exercised by MPI officials. Kiwifruit growers suffered loss, and Psa management plans still required growers' compliance, but compensation was limited. There would have been loss suffered no matter what, but some groups are completely compensated while others are left out. There are no set criteria for when problems will be dealt with under a pest management plan and when they will be dealt with by direct use of powers (meaning there is an entitlement s 162A compensation).

The current scheme creates uncertainty for owners in the agriculture industry and there is disparity in treatment of these situations based on factors beyond the control of the owners.

⁶⁶ At [46].

⁶⁷ At [52]-[57].

⁶⁸ At [84].

⁶⁹ At [95].

F Aims

In assessing the adequacy of a scheme for recovering loss caused by biosecurity breaches consideration should be given to the certainty the scheme provides to those suffering loss, the cost involved and how that is shared, the consistency in application, its efficiency (both temporally and financially), and the ability of the scheme to deter risky biosecurity practices.⁷⁰

The current uncertainty about how the government will address biosecurity breaches means that those most likely to be affected by disease outbreak are unable to effectively prepare and plan financially for the losses involved. Farming is an already unpredictable endeavour, pay-outs change drastically with the market and output is dependent on a number of factors including weather. Adding to that, the unpredictability of how a biosecurity breach causing loss will affect business makes planning for business expansion or getting insurance very difficult. Any new scheme would need to provide more certainty to owners to enable for greater business planning.

The current scheme fails to treat loss caused by biosecurity breaches in the same manner. There either needs to be clear standards about which situations will be dealt with under pest management plans and when compensation will be available, or there needs to be compensation across all biosecurity breach situations. Any other system is hard to justify because the ultimate cause of the loss in all these cases is the breach of biosecurity.

Obviously for any scheme to succeed it must be financially viable. The costs involved in a disease outbreak are likely to be extensive. The party paying should be able to afford the costs.

Costs should also be shared fairly according to the benefits gained in return. Owners who have suffered loss obviously get a direct benefit from being compensated. Currently s 162A compensates loss on the basis that all of New Zealand benefits from strong primary industries but the cost of compensation should be shared between parties in proportion to the benefit gained.

⁷⁰ See generally Owen Woodhouse *Compensation for Personal Injury in New Zealand* (Royal Commission of Inquiry, 1967) at [55].

Recovery schemes should not add to the stresses of those already suffering from the biosecurity breach, thus it should be both temporally and financially efficient. This ensures that the scheme is easily accessible to all.

Any system covering costs for losses should consider the role it plays in deterring the behaviour that causes or contributes to the loss. There should still be mechanisms for deterring poor biosecurity and incentivising compliance with government orders.

A new scheme for dealing with loss caused by biosecurity breaches should consider all these factors and find a fair balance for the both the tax payers and those primary industry players suffering financial loss.

G Reform options

In light of the above considerations, there are several options for reform in this area. The Act could offer no compensation and parties suffering loss could instead recover their costs by taking a civil claim against a negligent party, whether that be MPI or a third party.⁷¹ Or a more comprehensive system of state compensation could be offered.⁷² Private insurance could either sit alongside a state compensation scheme or it could operate alone. In the alternative, the current model could be modified to provide greater certainty about when compensation will be available.

8 Negligence

The Common Law action of negligence is a fault-based theory dependent “upon an objective standard of reasonableness.”⁷³ The standard of reasonableness is supposed to ensure that activities of social utility are not brought to a halt by a risk averse public.⁷⁴ Care should be proportionate to

⁷¹ See generally Richard Bennett, “Economic Rationale for Interventions to Control Livestock Disease” (2012) 11 *EuroChoices* 5 at 8.

⁷² See generally Bennett, above n 71, at 8.

⁷³ Woodhouse, above n 70, at [68].

⁷⁴ At [68].

the risk. Where a reasonable standard of care is not met, and loss occurs as a result, the loss is compensated by the person at fault.⁷⁵

(a) Viability?

The viability of negligence as the method for recovering losses caused by biosecurity breaches is dependent on whether these types of issues are capable of being dealt with under the rigid structure of negligence claims. A brief traversal of each of the requirements of a negligence claim is necessary.

(i) Duty of Care

There are unlikely to be issues establishing a duty of care for biosecurity breach situations, especially after the *Strathboss* case. Individuals importing biological resources and MPI departments involved in providing import permits and clearance of goods are both aware of the risks involved with importing these goods.⁷⁶ The risks are clearly outlined in biosecurity regulations and import health standards, and the impact in a country built on primary industries is obvious.⁷⁷

Mycoplasma bovis was a known risk to MPI and farmers, it is present throughout the OECD and known to cause physical harm to cattle.⁷⁸ New Zealand's primary industries rely on MPI to set appropriate biosecurity measures and ensure that imports meet certain health standards to minimise risk.⁷⁹ They are also reliant on the general public to adhere to these requirements. Beyond personal compliance, those affected by biosecurity breaches are relying on MPI to control the risk and for

⁷⁵ At [68].

⁷⁶ See *Strathboss*, above n 2, at [23].

⁷⁷ See "Import Health Standard For Bovine Embryos" (MAF Biosecurity NZ, 27 June 2011) at [61]; "Import Health Standard For Bovine Semen" (MAF Biosecurity NZ, 27 June 2011) at [65].

⁷⁸ *Mycoplasma* is classified as an unwanted organism in New Zealand for the purposes of the Biosecurity Act 1993; Although there has been a discussion of a case of *mycoplasma bovis* in Norway in 2014: Andrew Swallow "Large Mobs a Problem" (2018) NZ Farm Life Media <<https://nzfarmlife.co.nz>>; and F P Maunsell and others "Mycoplasma Bovis Infections in Cattle" (2011) 25 *Journal of Veterinary Internal Medicine* 772 at 773; Compare *Strathboss*, above n 2, at [23] and [495].

⁷⁹ See *Strathboss*, above n 2, at [23] and [25].

the public to comply.⁸⁰ It is obvious that if material is allowed into New Zealand without a proper assessment of biosecurity risks, or without compliance with import health standards, the health of livestock, crops and humans is at risk.⁸¹

However, it is unlikely that a duty would be owed to the public beyond farmers and horticulturists. In *Strathboss*, the court held that post harvest operators, such as Seeka, that suffered losses following the Psa outbreak were not owed a duty by MAF.⁸² Economic loss suffered by vets, dairy companies, and the wider agricultural industry would most likely not be covered as the loss suffered is “relational economic loss”.⁸³ The loss is more remote and harder to separate from economic loss of the wider general public.⁸⁴ But this problem is not specific to negligence, any system of compensation will have trouble determining what loss is to be compensated and what loss is too remote. The wider industry may lose some profit but their rights to property are not affected and their economic loss is not an immediate consequence of the biosecurity breach.

(ii) Breach

Issues around finding a breach for disease outbreak situations are no more complex than other negligence cases. Omissions from MPI in regulating imports would still amount to a breach of duty considering that the department has been delegated responsibility for this. MPI has control over these kinds of risks and the public is reliant on them exercising their functions to a reasonable standard.⁸⁵

Meeting the standard of care required by importers will depend on the responsibilities allocated to the importer under the specific import health standard but more generally, importers are responsible for taking all “reasonable steps to ensure that the goods comply with applicable import

⁸⁰ At [25].

⁸¹ At [25].

⁸² At [27] and [498].

⁸³ At [27].

⁸⁴ At [27].

⁸⁵ Biosecurity Act 1993, ss 22–24; See generally Biosecurity Act 1993, Pt 3; *Strathboss*, above n 2, at [23] and [495].

health standards”.⁸⁶ Failure to declare risk goods or to ensure that imports have met import health standards would clearly breach the duty of care owed.

There are questions around the sufficiency of the import health standard for importing bovine embryos and semen. Keith Woodford believes that mycoplasma bovis most likely entered via imported bovine semen or embryos.⁸⁷ There are a range of requirements to meet the import health standard for bovine embryos and semen but the only requirement aimed specifically at dealing with mycoplasma bovis is that the donor must not have tested positive mycoplasma bovis before.⁸⁸ There is no requirement that a donor has been tested for mycoplasma bovis.⁸⁹

If the import health standard was insufficient, would it be considered as a procedural error or as a matter of government policy? In the case of Psa, pollen was imported for kiwifruit orchards and MPI had undertaken a review on the associated pests and diseases of pollen. The scope of the review was insufficiently communicated in order to fully address the risk of bacteria,⁹⁰ the report was then applied for uses of pollen which the report did not consider,⁹¹ and the permit issued did not receive risk analysis sign off.⁹² The high court held these were procedural errors and not issues of policy on which experts could reasonably differ and therefore failed to meet the standard of care required of MAF.⁹³

It would be hard to say whether the import health standard requirements for mycoplasma bovis were the result of poor procedure or whether this was an issue on which experts could differ. Up until 2017 it had not been shown that mycoplasma bovis could be transmitted via frozen semen so arguably MPI didn't foresee the risk involved for such consignments and considered that requiring

⁸⁶ Section 16B.

⁸⁷ Keith Woodford “Keith Woodford explains why European semen is the likely source of the disease, and how this helps explain the rapid spread” (5 June 2018) Interest.co.nz <www.interest.co.nz/rural-news>.

⁸⁸ “Import Health Standard For Bovine Embryos” (MAF Biosecurity NZ, 27 June 2011) at [61]; “Import Health Standard For Bovine Semen” (MAF Biosecurity NZ, 27 June 2011) at [65].

⁸⁹ Woodford, above n 87.

⁹⁰ *Strathboss*, above n 2, at [30].

⁹¹ At [31].

⁹² At [32].

⁹³ At [33].

donors were free from any positive tests was sufficient to deal with the risk.⁹⁴ But any requirement for mycoplasma bovis purposes at all indicates that there was an understanding that it was a likely risk of importation of semen. Requiring that donors have been tested may have seemed out of proportion to the risk and may have caused excessive expense but given that mycoplasma bovis is present almost everywhere except New Zealand,⁹⁵ and that donors may not present symptoms despite carrying the pathogen,⁹⁶ there is a pretty high level of risk involved. These issues come down to the scientific information available to MPI at the time of importation. If the error was inaccurately assessing available information in preparing standards for importation, it would be considered a breach of duty but if this was an issue of policy, a weighing up of the known risks against costs and efficiency, issues on which experts could reasonably differ, it is likely the duty of care has been met.

(iii) Causation

Up until the 1990s, proving causation for loss suffered from disease outbreak would likely have been beyond the capabilities of science.⁹⁷ Negligence was not developed to cover these types of situations where the chain of causation is unable to be monitored and traced by sight. Disease pathways are complex and the damage caused can be hard to trace back to a specific event but modern science provides much greater evidence of disease origin than was previously possible.⁹⁸

In the Psa outbreak, a consignment of pollen was given biosecurity clearance through a flawed permit process,⁹⁹ the pollen contained anthers and was then used on orchards in Te Puke, just prior to Psa detection.¹⁰⁰ MAF argued it was impossible to tell whether the Psa outbreak was the result

⁹⁴ See generally Vera Haapala and others “Semen as a source of mycoplasma bovis mastitis in dairy herds” (2018) 216 *Veterinary Microbiology* 60; See also Woodsford, above n 87.

⁹⁵ See Andrew Swallow “Large Mobs a Problem” (2018) NZ Farm Life Media <<https://nzfarmlife.co.nz>>.

⁹⁶ Maunsell and others, above n 78, at 773.

⁹⁷ The first genome of a free-living organism to be fully sequenced was in 1995, prior to whole genome sequencing for organisms tracing the origin of the bacterium would have been much more difficult: Robert D Fleischmann and others “Whole-Genome Random Sequencing and Assembly of *Haemophilus influenzae* Rd” (1995) 269 *Science* 496.

⁹⁸ See *Strathboss*, above n 2, at [38] and [84].

⁹⁹ At [30]–[33].

¹⁰⁰ At [38].

of that pollen consignment.¹⁰¹ The High Court held that while scientific certainty around causation was near impossible, that was not the civil standard:¹⁰²

On the contrary, the approach to be taken in a case like the present is to gather together all the properly established strands of circumstantial evidence and then to stand back and ask the ultimate question of whether the plaintiffs' explanation is more likely than not to be true.

Circumstantial evidence included that Psa can survive shipping and pollen-extracting cycloning processes, there were several direct connections between the consignment of pollen and the early infections, genetic testing showed that the strain of Psa was Chinese (most likely from Shaanxi, which is where the pollen had been shipped from), and a second consignment from the same source tested positive for Psa.¹⁰³

The genetic testing and second shipment testing positive are pretty convincing factors and are the kind of scientific evidence that could be very valuable in biosecurity cases. Science has now advanced to a point where causation would be much easier to prove to a civil standard for these biosecurity breach type situations.

But maybe Psa is a special case, not all bacteria have clearly delineated genetic strains which are associated with different locations, in this case causation might be harder to prove to the civil standard. The New Zealand variant of mycoplasma bovis is unique but only one locus away from a European/US variant.¹⁰⁴

(iv) Remoteness

Remoteness requires a very fact dependent assessment and there do not appear to be issues specific to biosecurity breaches.

¹⁰¹ At [37].

¹⁰² At [37].

¹⁰³ At [38].

¹⁰⁴ Woodsford, above n 87.

Whilst satisfaction of the duty of care, breach and causation requirements of negligence in disease cases are not insurmountable hurdles, perhaps the rigid structure and the underlying principles of negligence are not conducive to a fair system of loss recovery.

9 Comprehensive State Compensation

A system of comprehensive state compensation would avoid issues of fairness. It would remove the need for costly, time consuming and unpredictable negligence claims but would be an added burden on the taxpayer. Compensation for all biosecurity breaches causing loss would incentivize early reporting of disease detection and compliance with MPI orders, where necessary.¹⁰⁵ But there will always be concern that by compensating all losses there is no incentive for the public to comply with biosecurity and for farmers to provide their biosecurity systems.¹⁰⁶ Any compensation scheme, like s 162A, would obviously require that the applicant has taken all reasonable steps to mitigate their loss. But once the damage has been done by an irresponsible party, whether unintentional or not, the losses of all other parties still need to be compensated.

State compensation could be administered under a provision similar to s 162A except it would cover all property damage caused by use of powers under the Act. This would include powers implemented under a pest management plan, for any purpose, not just eradication and management.

Alternatively, state compensation could cover all property damage directly caused by a biosecurity breach. This would not require use of powers under the Act, just that an unwanted organism has entered the country through biosecurity failures and that the owner's crops or animals have been damaged. All property damage from biosecurity breaches is ultimately caused by unwanted organisms over which the person suffering loss generally has no control. Offering compensation to all would be fair in the sense that the owners have suffered loss for the same reason, but this option would be very difficult to administer – how would biosecurity breaches be defined? Would there need to be a breach of the Biosecurity Act? Or would it be sufficient that an unwanted organism has entered New Zealand even if modern science, and consequently the Act's

¹⁰⁵ Bennett, above n 71, at 8.

¹⁰⁶ At 8.

requirements, were incapable of having prevented that entry? For how long after entry would the scheme compensate property damage? If the organism became established in New Zealand would the compensation stop? It would be unfair to offer full compensation to those struck earliest and nothing to those later affected.

Compensation based on government orders causing property damage (similar to s 162A) removes these issues about when compensation would be triggered. However, a blanket compensation provision would cost much more than the current scheme and with the increasing number of bacterial disease outbreaks in New Zealand agriculture this would be a heavy burden on the tax payer.

(a) Pollutor pays

One solution to this would be a levy similar to a ‘polluter pays’ type system – if you “create the risk or contribute to the magnitude of the impact by [your] activities”, you pay accordingly.¹⁰⁷ Or levies could be according to the benefit gained, you pay in proportion to your benefit.¹⁰⁸ Bennett explains:¹⁰⁹

A general principle might be that where livestock producers, or a subset of them say according to species or production system, are the primary beneficiaries of policy (e.g. in the case of a production disease that has no implications for human health, food safety etc.) then they should pay the greater share.

Where there is no risk of human health or food safety, the costs of compensation should be greatest for the industry effected.¹¹⁰ The wider public will pay due to increased market prices and decreased product quantities.¹¹¹

¹⁰⁷ At 9.

¹⁰⁸ At 9.

¹⁰⁹ At 9.

¹¹⁰ At 9.

¹¹¹ At 9.

This is already what happens in New Zealand to some extent as GIAs will generally agree on a cost sharing scheme.¹¹² For mycoplasma bovis, DairyNZ and Beef+Lamb will pay about a third of the costs for eradication and MPI will cover the rest.¹¹³ But GIAs are not required for compensation under s 162A, theoretically the government could be left to cover the entire compensation bill (this does make it less likely that the government would attempt eradication as the compensation costs may weigh against the benefits received, but given the broad discretion involved there is a lack of transparency and consistency in these decisions).

Bennett also argues that where the wider public benefits, for example where there are issues of food safety, human health or animal welfare, then the government should pay more.¹¹⁴ The result would be a compensation scheme where the industry share in the cost is dependent on a range of factors specific to each disease. This would require a fairly complex compensation system. Antón argues:¹¹⁵

Although preventive measures may generate externalities (wider societal benefits) and “animal health” has public good characteristics, the extent to which they benefit society as a whole or just a given industry depends on the specificities of each disease.

Policy should balance benefits of prevention and control versus costs to improve resource allocation.¹¹⁶

At the very least if compensation is to be comprehensive in coverage it would require more robust decision-making processes for MPI in deciding how to share costs of compensation. This could require GIAs agreed upon before compensation is available, or even just providing greater certainty about when compensation must be available under pest management plans.

¹¹² Biosecurity Act 1993, s 100X(b).

¹¹³ “Plan to eradicate Mycoplasma bovis”, above n 1; and “Questions and Answers – Mycoplasma bovis announcement”, above n 5.

¹¹⁴ Bennett, above n 71, at 10.

¹¹⁵ Jesús Antón “Responses to Risk – The Role of Policy and Compensation Schemes” (2012) 11 EuroChoices 23 at 23.

¹¹⁶ At 23.

(b) Capped compensation

Alternatively, compensation could be offered across all losses caused by orders under the Act but capped at a maximum value similar to the Earthquake Commission (EQC) Insurance.¹¹⁷ Currently in New Zealand, residential buildings, land and contents which are covered by a private insurance policy that includes fire insurance are automatically covered by EQC Insurance.¹¹⁸ “EQCover costs 20 cents (+ GST) for every \$100 of home or contents fire insurance”.¹¹⁹ This provides a maximum cover of \$100,000 for home¹²⁰ and \$20,000 for contents for damages or imminent damages caused by a natural disaster.¹²¹ The payout is from the Natural Disaster Fund¹²² but is guaranteed by the Government.¹²³

A similar scheme could be set up for damage caused by government orders dealing with biosecurity breaches. The maximum coverage could be a set value across all events or it could be tailored to the industry according to its value to the economy. Tailoring the maximum coverage to the industry would allow the government to encourage more valuable industries. However, this could lead to similar problems to the current system where it is hard to measure the value of the industry and its future viability.

Currently, the decision to use powers directly requires consideration of whether the attempt at eradication is worth the cost of full compensation under s 162A.¹²⁴ Under an EQC insurance type scheme, whether orders are made under a pest management plan or under direct use of powers to eradicate or manage the organism, the compensation cost will be the same and will not cover the full extent of the loss. The cost of compensation is not so inextricably caught up in the choice to eradicate or manage the organism by direct use of powers.

¹¹⁷ See Earthquake Commission Act 1993, pt 2.

¹¹⁸ Sections 18-20.

¹¹⁹ “EQC Insurance” (1 August 2018) EQC <www.eqc.govt.nz/what-we-do/>; See also Earthquake Commission Regulations 1993, reg 3.

¹²⁰ Section 18(1).

¹²¹ Section 20.

¹²² Section 13.

¹²³ Section 16.

¹²⁴ See Biosecurity New Zealand “Eradication decision” (23 August 2018) Biosecurity New Zealand <www.biosecurity.govt.nz/protection-and-response/mycoplasma-bovis/>.

If New Zealand does insist on relying on government bail outs for any situation beyond the preparation of the public, and if these biosecurity breaches continue at the rate they are, New Zealand will either need to accept a change in culture for agriculture or provide a compensation system that is not a financial drag on taxpayers. To afford widespread compensation needs while still providing a return to the taxpayer, a cap on state compensation may be prudent.

Antón argues that compensation requires a precise balance, over compensating will reduce incentives for adhering to biosecurity practices and cost potentially more than it's worth but under compensating is a heavy burden on those who have directly suffered.¹²⁵ To meet this balance:¹²⁶

[c]omplementary (private) insurance can improve the efficiency of the resources allocated to compensation. A clear definition of the specific compensation rules applied to each disease and a good delineation of responsibilities between government and stakeholders is required to make insurance work.

Many countries have mixed private and public cost sharing schemes for compensating losses from biosecurity breaches, for example Germany offers compensation for culled animals but private insurance covers consequential losses.¹²⁷ Compensation which is limited financially recognizes that biosecurity breaches are difficult to plan or insure for, without placing the burden on taxpayers completely.

Limited compensation could reduce insurance premiums which may help to make insurance for this type of loss more affordable and easier for insurance companies to plan for. And by not covering the full losses there is still the potential for the insurance company to claim against any party negligently involved in the biosecurity breach. An insurance company is much better placed to undergo the time consuming and costly process of a negligence claim. Negligence claims could therefore still act as a deterrent for poor biosecurity.

¹²⁵ Antón, above n 115, at 24.

¹²⁶ At 24.

¹²⁷ At 24-26.

10 Private Insurance

Currently private insurance for the types of losses caused by biosecurity breaches is not common amongst farmers and orchardists.¹²⁸ In *Strathboss* private insurance undertaken by the claimant growers did not cover the losses caused by Psa.¹²⁹ The cost of private insurance for these specified individual stock has been considered too expensive to justify. Potentially this will attitude will change with the increasing frequency of these issues, but the unpredictable nature of disease and the potentially massive losses caused by biosecurity breaches does mean that the cost of insurance premiums will always be relatively large.

Partial government compensation for all losses would provide more certainty about the costs involved for insurance companies and could result in decreased premiums. By covering losses up to a certain value per owner for each loss causing event, only the more extreme situations would require private insurance to cover the costs. Decreased premiums and the promise of partial government compensation would incentivize uptake of private insurance for biosecurity breaches.

Requiring private insurance for the capped government compensation to apply incentivizes private insurance thereby minimizing the losses consequential of biosecurity breaches, in turn benefitting the wider public.¹³⁰ The EQC Insurance raises concerns by requiring private insurance before the government compensation is available - government funding is not going to the most vulnerable. This is less likely to be an issue in the case of biosecurity issues – if a business cannot afford private insurance to cover these situations, arguably they may not be economically efficient enough to justify the government propping them up. Whereas the EQC is dealing with the public at large and their homes, the same capitalist arguments cannot be applied to homes and lives.

¹²⁸ Insurance covering disease for livestock is generally additional under individually specified livestock provisions; see “Livestock” (2018) FMG Advice & Insurance <www.fmg.co.nz/what-we-cover/farmers-growers/sheep-and-beef/livestock/>.

¹²⁹ *Strathboss*, above n 2, at [394].

¹³⁰ See generally Antón, above n 115, at 24.

As mentioned above, having private insurance involved also allows for negligence actions to be taken by insurance companies in cases where there has clearly been wrongdoing thereby punishing the party at fault and deterring these types of reprehensible action.

Private insurance is a poor option by itself to cover biosecurity breach losses but when combined with capped state compensation, it offers a potentially fairer approach than the current discretionary approach.

However, there are a number of practical issues with insurance for crops or livestock. Crops and animals have a limited lifespan and are susceptible to weather damage and the many diseases already present in New Zealand. This creates problems defining what crop and stock insurance would cover, or what type of policy would be needed to entitle an owner to coverage under a capped compensation scheme as described above. Unlike natural disaster damage, biosecurity orders from the Government are the direct cause of the loss, not all of the crops or animals would have died had the Government not intervened. Would it be possible to have an insurance policy for Government ordered losses? Losses of this nature could be considered similar to imminent damage from natural disasters which is covered by EQC.

Whilst a capped compensation system could help to decrease the cost of premiums for biosecurity breach disease outbreaks, having insurance as a prerequisite for coverage may be unrealistic. Instead private insurance could be optional.

11 Modifying the Current Model

The current system provides flexibility to allow for the range of situations that MPI might face in dealing with biosecurity breaches. The value of the industry affected, the chances of eradication, and the cost of potential recovery activities will all play into the decision of whether to address the problem using a pest management plan, and in that case whether compensation will be available, or by direct use of powers for the purpose of eradication or management.¹³¹ Arguably, MPI is the best placed to be making these decisions about when compensation should be made available. But

¹³¹ See “Questions and Answers – Mycoplasma bovis announcement”, above n 5; See generally Biosecurity Act 1993, pts 5 and 6.

the current scheme leaves a lot of uncertainty for farmers and potentially makes these decisions more political than they should be.

Modifying the current system to provide greater certainty would involve clear rules about when pest management plans will be used and when powers will be employed directly. Where pest management plans are used there should be guidelines about where compensation should be available. Obviously, there is a need to maintain flexibility to deal with different unwanted organisms, affecting different industries to differing extents. However, general standards outlining the kinds of considerations which should go into these decisions would provide greater structure to process. The ability of the public to understand the decision-making process allows for better personal preparedness to deal with biosecurity issues and may help to increase consistency in how cases are dealt with.

Cases such as *Waimea Nurseries*, considering the decision to remove the fruit trees, show how unclear and uncertain the use of powers under the Biosecurity Act currently are. It is questionable whether the same action would have been taken if similar failures were found in a testing facility involved in clearing bovine semen or embryos. The Government ordering all cows that derived from that semen or embryo to be culled or detained without testing for disease, five years after the semen or embryos were imported, without any compensation available seems pretty far-fetched. Whilst the decision about the fruit trees was overturned by the High Court, the same decision would surely never have been made about cows and that seems to indicate that there is still something highly political about the decision-making process under the Biosecurity Act.

The lobbying power of the dairy industry has always been strong in New Zealand and that has naturally influenced the government but given the decreasing number of dairy farm owners the continuing influence of the dairy industry on issues such as biosecurity compensation is confusing at times.¹³² The contribution of primary industries to New Zealand's GDP has "decreased from 12

¹³² Statistics New Zealand "Change in farm numbers and farm size" (19 April 2018) Statistics New Zealand <http://archive.stats.govt.nz/browse_for_stats/environment/environmental-reporting-series/environmental-indicators/Home/Land/farm-size-and-numbers.aspx>.

percent in 1972 to 8 percent in 2009”,¹³³ the number of farm owners has decreased and there are questions about the future viability of farming given climate change and the rise of dairy/meat alternatives.¹³⁴ Providing more structure to the Biosecurity Act could help to reduce the political influence on these decisions. This would involve clearly outlining what considerations should be included in decisions on compensation availability under pest management plans. The distinction between eradication or management, and pest management plans needs to be more clearly outlined. The scope of s 116 should be more clearly defined. Perhaps a single provision dealing with all compensation matters is needed for the sake of clarity.

Ultimately however, the losses caused by biosecurity breaches should be treated fairly. If agriculture is as important to New Zealand’s economy as is so often claimed, then New Zealand needs a more consistent and clear system for dealing with losses in these cases. The lack of consistency, and certainty in these decisions is not solved by providing a clearer outline of how a broken system might be executed. Judicial review should be considered a last resort for ensuring reasonable exercise of discretion by the government, but the current scheme leaves itself open to attack due to its confusing nature.

12 Should Consequential Loss be Included?

Other countries schemes for compensating losses from biosecurity measures other countries aimed at eradicating diseases do not commonly cover consequential losses. Under s 162A, compensation covers all direct losses.¹³⁵ Arguably, New Zealand does so because the prosperity of agriculture is so important to the whole economy, but it does seem rather extreme to cover consequential losses. Might it be better to offer compensation for all property damage resulting from MPI orders and

¹³³ Statistics New Zealand “What New Zealand actually does for a living: from manufacturing to a services-oriented economy” (2012) Statistics New Zealand <http://archive.stats.govt.nz/browse_for_stats/economic_indicators/NationalAccounts/Contribution-to-gdp.aspx>.

¹³⁴ See generally Ministry for Primary Industries *The Evolution of Plant Protein: Assessing Consumer Response* (29 May 2018).

¹³⁵ See Ministry for Primary Industries “Compensation” (2 July 2018) Ministry for Primary Industries <www.biosecurity.govt.nz/protection-and-response/mycoplasma-bovis/>.

not include consequential losses? The extent of compensation is very important. Whiting comments,¹³⁶

All forms of emergency compensation to farmers must be funded and set at a rate that encourages voluntary participation, if the goals of disease eradication are to be reached. In setting rates of compensation, a balance must be struck that will result in buy-in from the farming community while a scheme of last resort is maintained. Clearly, for a disease eradication program to be successful, it must not be more profitable for a farmer to have an infected herd rather than a disease-free herd, yet the consequence of having an infected herd must not be so onerous that the farmer will not report the disease. Similarly, in developing compensation for welfare slaughter, the compensation program must not be so financially attractive as to encourage animal neglect in order to qualify or so punitive as to result in animal abandonment.

Does consequential loss go too far? Arguably it reduces the sense of urgency for the owner to get themselves back to their prior business performance, although the claim for compensation is still subject to remoteness requirements. The result is increased time spent verifying what loss will be compensated. Other countries which offer compensation for livestock disease management, such as Australia, Germany, the Netherlands, and Vietnam, do not compensate consequential losses.¹³⁷ Potentially this is due to the increased cost with little increased public benefit in return, or due to the increased administrative cost involved in verifying consequential losses. Maybe New Zealand's agricultural industry is that much more important to our economy to justify compensating consequential losses, but it surely slows down the processing of compensation claims. Potentially these kinds of loss are better off being left where they lie. It reduces the financial cost of compensation, which makes it more viable to offer compensation in all instances, and the time involved in assessing claims would be reduced. Consequential losses could instead be treated as a risk of the industry.

¹³⁶ Terry L Whiting "Foreign animal disease outbreaks, the animal welfare implications for Canada: Risks apparent from international experience" (2003) 44 Can Vet J 805 at 810.

¹³⁷ Antón, above n 115, at 25.

V Evaluating the Options

But how do each of the above options for reform measure up to the aims set out above?

H Ability to Cover Costs and Cost-sharing

13 Negligence

(a) Contributory Negligence

The ability to apportion damages according to contributory negligence is arguably both a positive and a negative of using negligence to compensate losses for biosecurity breaches.¹³⁸ The nature of bacterial spread means damage is widespread across an industry. The many layers of response to bacterial disease are each responsible for mitigating loss within the industry. These layers of response mean there are many potential parties to be claimed against for contributory negligence. Given the huge financial cost of damages, the ability to claim against more than one party provides claimants with a greater chance of recovering costs. A single farmer may not be able to cover the cost of mycoplasma bovis losses but claiming against the hypothetical farmer, vet, and National Animal Identification and Tracing (NAIT) organization would offer a much better chance of recovering damages.

On the other hand, the layers of involvement in the response, and the different responsibilities of each party, creates a complex web of liability issues. The financial and temporal costs of class actions against a range of defendants undermines the advantages of using negligence to cover compensation in these cases. It is easy to imagine a farmer who failed to meet import health standards assigning partial blame to the vet who negligently failed to identify the symptoms of cows and diagnose the problem, who might question the NAIT organization who failed to enforce NAIT Act requirements. And all the defendant parties might question whether farmers took all reasonable steps to mitigate their loss.¹³⁹ State compensation schemes avoid these issues, under s

¹³⁸ See Contributory Negligence Act 1947, s 3.

¹³⁹ See Woodhouse, above n 70, at [39]

162A compensation is awarded irrespective of fault so long as the applicant was unable to mitigate their loss “by taking every step that is reasonable in the circumstances.”¹⁴⁰

(b) Ability to cover costs

Negligence largely developed in the late 19th Century and early 20th Century.¹⁴¹ But in the past 50 years individualistic fault-based systems aimed at recovering loss have been brought into question or replaced by social security.¹⁴² The kinds of loss suffered during the industrial revolution were much more limited. Providing damages for a snail in a drink is hardly on the same scale as liability for the losses spanning an entire industry. The ability to prove that disease spread was the fault of an individual was beyond thought, let alone the scope of negligence claims. Biosecurity was barely considered. International travel was limited and costly. Agricultural enterprise was not on the same scale it is today. Can the fault-based theory of a much more individualistic society really hold up in today’s world?

Whilst it might be possible to trace the mycoplasma bovis outbreak to the actions of a farmer, the scale of the loss is far beyond what negligence was developed to address. The death of possibly thousands of cows and the consequent economic loss is beyond the financial means of most individuals, including a lot of farmers. There could be the possibility of the farmer at fault claiming contributory negligence on the part of a vet who failed to diagnose mycoplasma bovis early on or the NAIT system failing to enforce animal tracing requirements, thereby increasing the time taken to notify affected farmers. But contributory negligence claims are a remote possibility and an arbitrary one at that.¹⁴³

A negligence claim against the government would be more likely to actually meet the costs of damages. But again, whether the loss is caused by the government or not is completely beyond the control of the person suffering the loss. Whilst this is true of any negligence case, given the

¹⁴⁰ Biosecurity Act 1993, s 162A(2)(b).

¹⁴¹ Woodhouse, above n 70, at [65]-[67].

¹⁴² At [67].

¹⁴³ See Woodhouse, above n 70, at [39].

importance of primary industries in New Zealand, a more predictable and reliable system seems necessary.

14 Compensation

(a) shared community responsibility

On announcing the eradication attempt for *Mycoplasma bovis*, the government maintained that the New Zealand public benefits from farming and therefore compensating the losses of farmers is for the benefit of society.¹⁴⁴ MPI offers, “[t]he success of the dairy and beef industries is crucial to the prosperity of all New Zealanders.”¹⁴⁵

The *Strathboss* case also held that New Zealand society would benefit from losses being shared by the taxpayer (although the argument was made in the context of MAF paying damages for negligence).¹⁴⁶ But how true is this statement? This statement is premised on the idea of community responsibility – everyone is subject to the same risk of loss therefore we should all pay to cover the damages. The same argument was made in the Woodhouse report that led to ACC in the 1970s.¹⁴⁷ But is biosecurity really as wide spread a risk as personal injury? With ACC every person paying the levy has a chance of directly benefiting from the system should they be injured. The same cannot be said if biosecurity breach damages were all compensated. Farmers and orchardists are the direct beneficiaries of the system and yet farmers are generally a wealthy sector of society with large amounts of equity to borrow against. They are hardly the most vulnerable of society and they are also a very limited group.

While New Zealand was once a country built on small family farms, there is an increasing concentration of farm ownership amongst a select few wealthy families. “Between 2002 and 2016, the total number of farms in New Zealand decreased by 24.1 percent.”¹⁴⁸ However, the land

¹⁴⁴ See “Questions and Answers – *Mycoplasma bovis* announcement”, above n 5.

¹⁴⁵ See “Questions and Answers – *Mycoplasma bovis* announcement”, above n 5.

¹⁴⁶ *Strathboss*, above n 2, at [25].

¹⁴⁷ See Woodhouse, above n 70, at [55].

¹⁴⁸ “Change in farm numbers and farm size”, above n 132.

occupied by farms decreased much less with a change of 10.3 percent.¹⁴⁹ In Dairy farming, the number of dairy farms decreased by 23.5 percent but the land occupied increased by 22.6 percent, “indicating some dairy farms are getting larger and more specialised”.¹⁵⁰ Between 2002 and 2012, apart from arable crop farms, all farm types decreased in number in New Zealand.¹⁵¹ These statistics show an industry with a decreasing number of owners to directly benefit from compensation.

The government is arguing that the wider public all benefit from agriculture and should help cover losses because of it, but farm owners are benefiting far more. Farm ownership, especially on large scale dairy farms, is considered a relatively lucrative business to be in. If all this wealth is concentrated in one group and the public is footing the bill to cover biosecurity breaches it seems unlikely that the taxpayers are really seeing the full extent of the benefits or that wealth is being fairly shared. The extent to which the public will benefit is also dependent on the disease being tackled,¹⁵² and therefore a comprehensive compensation scheme may be inappropriate.

(b) affordability

Having comprehensive compensation available for all losses caused by biosecurity breaches would be a large cost on taxpayers. It is impossible to predict what diseases will enter New Zealand and when. This makes it hard to balance the benefits of offering a fair compensation scheme for primary industries against the overall cost. Unlike in the case of personal injury, there isn't as much existing experience of these losses in New Zealand.¹⁵³ These losses haven't always been around, and they are increasing in frequency. It isn't as simple as comparing the existing cost of personal injury negligence claims against the predicted cost of compensation as there has only been one negligence case involving biosecurity breach in New Zealand and there has also been state compensation mixed in.

¹⁴⁹ “Change in farm numbers and farm size”, above n 132.

¹⁵⁰ “Change in farm numbers and farm size”, above n 132.

¹⁵¹ “Change in farm numbers and farm size”, above n 132.

¹⁵² Antón, above n 115, at 23.

¹⁵³ See generally Woodhouse, above n 70.

Setting up a system which fully compensates primary industry losses suffered due to biosecurity issues will cost a lot and there is still the possibility of these industries becoming less economically viable in the future, either due to continued biosecurity issues or new food technology overtaking much of the meat, dairy and fruit industry. The benefits of compensating personal injury were unlikely to change quickly, whereas the benefits of supporting primary industries are unpredictable.

Without being able to value the benefits of comprehensive compensation it is hard to argue that the financial cost involved is worthwhile for the taxpayer. It is a big risk to take.

A 'pollutor pays' type levy system would reduce the cost to taxpayers, but it would be difficult to value the amount the public contributes to the risk or the amount that they benefit from the compensation scheme. This type of scheme would probably end up being paid for in similar proportions to current compensation under a GIA but the total cost to taxpayers would increase due to the comprehensive availability of compensation. Bacterial disease outbreaks are becoming more frequent and the cost of the government covering the same proportion of compensation for more events, more often is unlikely to be sustainable.

Capped compensation would limit the government's liability to each owner per loss causing event. Part of the cost of losses caused by biosecurity breaches would be covered by the taxpayer, reflecting the public benefit in having a strong agriculture industry, but the rest of the cost would fall to the farmers and growers to deal with either under insurance or by themselves. This seems to find a happy balance in ensuring fair coverage which is affordable and in line with public benefit.

15 Private Insurance

Insurance for this type of loss is generally considered impractical and expensive. There is a great deal of uncertainty insuring against this type of loss because the entry of unwanted organisms is unpredictable, and the impact can range from poor health of stock or crops which can be managed by different farm systems, through to animal or crop death. It is difficult to predict the risk of different kinds of bacterial disease outbreaks and their impact on farmers and growers.

However, a system which combined capped state compensation with private insurance could help to reduce insurance premiums and incentivize wider coverage for this type of loss. The cost would be more affordable and would be shared between the taxpayer and private parties, whether that be private insurance or the farmers themselves. This reflects the balance of benefits involved for parties – the taxpayer indirectly benefits from strong primary industries, while farmers and growers directly benefit by recovering their property losses. Farmers directly benefit from the highs of their industry and should share directly in the cost of sustaining that industry.

16 Modifying the Current system

Under the current scheme it is difficult to predict the costs involved and how that cost will be shared between parties. GIA's allow for sharing between parties, but the proportion of sharing is negotiated between the industry and the Government. As a result, it is difficult for owners to prepare for the outbreak of unwanted organisms, to what extent they will be expected to share in the loss is unknown.

By outlining where it is expected that pest management plans will be used and when compensation will be available under them, or by providing factors which must be considered in making such decisions, there would be slightly more certainty in how the Government would respond to different situations. It would still be hard to predict the cost, especially if there is no existing GIA, but owners would at least have greater clarity about when state compensation is likely to be forthcoming.

I Deterring poor biosecurity and incentivizing compliance

17 Negligence

Negligence actions act as both a specific and general deterrent.¹⁵⁴ Biosecurity in New Zealand relies on the public following biosecurity laws and regulation, farmers engaging biosecurity systems on their farms, and MPI ensuring that biosecurity laws are sufficient to protect New Zealand borders. Without the threat of financial action looming over them, would the public really

¹⁵⁴ At [90].

care enough to follow biosecurity? Is there even enough awareness of the possibility of a negligence claim for damage caused by biosecurity failures for it to be operating as a deterrent? Before ACC, there was obviously an awareness of negligence claims for personal injury, and even then it was arguably not operating as a deterrent.¹⁵⁵ The public has to believe that the breach is fault based for it to act as a deterrent.

Whilst it is likely that the public still see biosecurity breaches as fault based, there is arguably a lack of understanding that minor infringements can cause huge damage or that one person's careless omission could lead to liability for the loss suffered by a whole industry. Negligence claims are not at the forefront of mind when a traveler is considering whether to clear goods at the international border, criminal sanctions are arguably working better as a deterrent. Deterrence also doesn't prevent losses resulting from "accidents and/or irrational behaviour."¹⁵⁶

Part of the problem is that these claims are so unpredictable, it's hard to work as a deterrent when it is hard to predict the outcome of any case. To an outside perspective, a negligence claim comes down to the luck of the draw – is science capable of linking the breach to the damage caused? Is the loss too remote? What will amount to a breach of the duty of care? Sometimes these questions are easily answered, for instance the duty of care in biosecurity cases is easily found. But other times the question is complex, and experts can reasonably disagree. The result is long drawn out cases, complicated judgments, appeals and potential settlements. The *Strathboss* case was roughly 500 pages long, the judgement was released nearly eight years after Psa was detected and it has now been appealed. It is hardly clear cut. If the result of the case is so unpredictable, how can this act as a deterrent?

Perhaps if these claims became more common, if this was the only means of recovering loss caused by biosecurity breaches, deterrence might increase. But it seems unreasonable to move to an uncertain and costly system in the hope it might become a deterrent to the public. Arguably for

¹⁵⁵ At 51-52.

¹⁵⁶ Bennett, above n 71, at 8.

MPI and farmers deterrence is already met by the disruption and loss caused by bacterial disease in primary industries.¹⁵⁷

18 Compensation

If all biosecurity breaches are compensated, arguably the incentive to take care in matters of biosecurity is diminished.¹⁵⁸ If you aren't liable for the loss caused and you know that the loss will be shared across the public, there is less motivation to comply with biosecurity – removing financial liability could minimize the seriousness of biosecurity. But again, how many people are really considering the civil liability of their actions when taking a relaxed approach to biosecurity or when they are exercising powers under the Biosecurity Act? If negligence claims aren't the driving incentive for following biosecurity, compensation is not removing an incentive. It is highly likely that the public are deterred by criminal sanctions, or the disruption to the economy caused by diseases impacting the primary industries rather than their own personal financial liability for the damage. Suing in negligence is not a big part of New Zealand culture, especially not suing an individual who is unlikely to be able to cover large losses.

Incentives for farmers and MPI are likely to come from wanting to avoid the disruption which disease causes. Whether the financial losses are compensated or not, there is an emotional toll in seeing animals or crops culled and otherwise unnecessary hours are spent getting the business back to its prior financial position.

If negligence claims are not acting as a deterrent and there already deterrents working to minimize biosecurity breaches, rejecting compensation schemes on the grounds that there is no incentive to take care in biosecurity matters is overstating the deterrent impact of negligence claims currently.

19 Modifying the Current Model

The argument for compensation under s 162A is to promote early reporting and ensure compliance. Section 162A also compensates those who may not have been caused loss but for the use of part 6

¹⁵⁷ See generally Woodhouse, above n 70, at 51.

¹⁵⁸ Bennett, above n 71, at 8.

powers or where the extent of the loss is much greater, for example not all cows killed under the mycoplasma bovis scheme would have been lost to mycoplasma bovis. However, state compensation for all losses caused directly by biosecurity breaches would still offer this incentive. If a party did not comply with eradication orders they would not be eligible for compensation.¹⁵⁹

Section 162A entitles some parties to complete compensation while others, who still may be required to comply with biosecurity orders, are left completely uncompensated, for example kiwifruit growers in the case of Psa. Why should the s 162A incentive of compensation only apply in certain cases? The Biosecurity Act already provides deterrence in the form of criminal offences under pt 8. Offences include failure to comply with rules under national or regional pest management plans,¹⁶⁰ providing misleading or false information about goods to be imported,¹⁶¹ failure to report suspicion of the presence of a notifiable organism in New Zealand,¹⁶² certain failures to comply with controlled area notices,¹⁶³ and willfully withholding information “that the person is required by law to provide in connection with the purposes of this Act”.¹⁶⁴ Offences cover a wide range of non-compliant behavior and maximum penalties include fines not exceeding \$200,000 and imprisonment not exceeding 5 years.¹⁶⁵ These provisions are likely to be the greatest deterrent to the public for poor biosecurity – criminal sanctions have a stigma around them and are more widely recognized by the public. Considering that these provisions would exist alongside any compensation scheme, the deterrent aspect of the scheme is of less importance.

J Temporal and financial efficiency

20 Negligence

Biosecurity negligence claims will often depend upon circumstantial evidence and the damages involved will often be of such a scale that they will be appealed or settled outside court. The long

¹⁵⁹ Biosecurity Act 1993, s 162A(3)(c).

¹⁶⁰ Sections 154N(18)-(19).

¹⁶¹ Section 154N(6); See also s 16A.

¹⁶² Section 154O(1); See also s 46.

¹⁶³ Section 154N(8); See also ss 134(1)(b), 134(1A) and 131(3).

¹⁶⁴ Section 154O(6).

¹⁶⁵ See generally s 157.

drawn out process delays rehabilitation, holding the parties both emotionally and financially hostage while they await a final result. For some it will not be financially possible to move on while the case is settled. For others whilst they can temporarily cover the financial losses, their lives are still disrupted by the toll of a drawn-out court case. This seriously undermines the attraction of allowing negligence claims to deal with these issues.

21 Compensation, Modifying the Current System and Private Insurance

The cost and time of administration for state compensation is likely to be similar to the current system. For capped compensation it may be less time consuming than the current state system as losses would only need to be verified up to the limited value. The rest of the losses would either be covered by the owners themselves or private insurance, which would still require verification of the rest of the losses. The state compensation scheme would at the very least avoid the disruptive and dragged out nature of appeals. The exact costs to the Government to administer such a system are unknown but the Government has improved processing for the mycoplasma bovis outbreak to guarantee a substantial part of payments within 4-10 days of a compensation claim being made and 2-3 weeks for full compensation.¹⁶⁶ Unlike negligence the cost of administering the system is not on those claiming but instead the state. MPI is much better placed to deal with this task due to access to experts, lawyers and manpower.

By comparison, private insurance claims are likely to be drawn out and disputed akin to negligence claims. Private insurance is of limited value without capped state compensation.

K Certainty and Consistency

22 Negligence

Damages in a negligence claim cover the loss suffered, rather than letting it lie where it falls. However, the advantage of this is undermined by the fact that successful negligence claims are based on the ability to prove the lack of care of another has caused the loss.¹⁶⁷ Those who cannot

¹⁶⁶ “Plan to eradicate Mycoplasma bovis”, above n 1.

¹⁶⁷ Woodhouse, above n 70, at [39].

prove this are left to cover their own losses. This result is independent of the importance of the industry affected. If it turns out to be impossible to find how mycoplasma bovis entered New Zealand should farmers be left to foot the bill? New Zealand has an ingrained cultural belief that when things get really bad, the government will provide a bail out – flooding, droughts, earthquakes, biosecurity problems, the public expect some level of help. The idea that some will get nothing from negligence claims while others will be fully indemnified is unlikely to ever sit well with the New Zealand public and if the government starts bailing some industries out, a negligence claim starts to look pretty unappealing.

23 State Compensation and Modifying the Current System

Compensation for all losses caused by biosecurity breaches would offer the greatest certainty and consistency to those affected. This would remove questions under the current system about when compensation would be available under pest management plans.

Is the nature of disease too unpredictable to make decisions on who to compensate as is the case currently? Arguably Psa losses were not compensated because the spread was too quick to justify the efforts of eradication or management. But seven years later, the kiwifruit industry has fared much better than was ever predicted.¹⁶⁸ The decision to move to a pest management plan and avoid compensation under s 162A was due to the rapid losses occurring at the time.¹⁶⁹ If the decisions about whether to compensate involve predicting the financial impact of these diseases, how accurate are these predictions ever going to be? Comprehensive compensation would ensure that parties are not losing out on compensation purely due to inaccurate predictions about the impact of the disease. Decisions whether to eradicate or manage the disease would still involve these types of predictions but compensation would not come down to the ability of science to predict the cost of the disease.

24 Private Insurance

¹⁶⁸ *Strathboss*, above n 2, at [144]-[147] and [410].

¹⁶⁹ At [124].

The ability of private insurance to cover these types of loss is uncertain. Currently farmers do not tend to insure their crops and stock due to their transient nature. This makes predicting how private insurance would work quite difficult.

L Evaluation

Whilst negligence claims are theoretically possible, are they conceptually a bad fit for addressing this type of harm? The losses are expansive and suffered by industries at the core of the economy, but negligence claims are reliant on being able to identify a party at fault. Inevitably there are cases where no one is at fault. Diseases mutate and may infiltrate New Zealand in ways which were never predicted and could not have been protected against. The loss is still suffered, and a negligence claim will offer no help. Social insurance schemes offer the advantage of addressing consequences rather than looking for those at fault.

Where there is a decision to eradicate but compensation is not forthcoming, there is little incentive for early reporting of the disease. But this alone, only justifies compensation where eradication is decided upon, it does not mean that compensation should only be available where eradication is attempted. The impacts of Psa on the kiwifruit industry and the consequent negligence case highlight the unfairness of only compensating where eradication is possible.

Capped state compensation across all biosecurity breach losses offers an incentive for early reporting and compliance. Such a system provides certainty and consistency in how losses suffered from biosecurity breaches will be dealt with. Deterrence for poor biosecurity is already provided by criminal sanctions and private insurance could still use negligence claims where appropriate to recover costs and deter wrong doing. Capped compensation also avoids the slow and disruptive nature of negligence claims that hinder farmers' and growers' ability to move on from the damage causing event.

VI Conclusion – The Best of a Bad Lot?

New Zealand is a more complex society than it once was. The country is made up of more than just simple family farmers and their service towns. Expecting the taxpayer to completely foot the bill for biosecurity losses would be unfair. Even more unfair would be to expect every biosecurity

breach to end up being settled by a negligence claim in order to cover the resulting losses with the decision completely dependent on finding someone at fault.

Whilst the current approach implements both comprehensive compensation and negligence claims, the system lacks coherency. All the options considered have their positives and negatives, but the current approach is unclear and unpredictable. A more nuanced approach is needed. Capped government compensation in combination with private insurance balances the need for certainty, affordability, deterrence, and incentivizing following MPI orders. There could be concern that this option fails to differentiate between the economic importance of the particular industry affected but under the current approach the significance of the industry affected is uncertain – surely kiwifruit is also an important industry in New Zealand? And given how unpredictable disease is, the ability to foresee the cost of the disease on any industry is limited. Not to mention the ongoing importance of any industry is also not certain. Capped government compensation for all biosecurity breaches would reduce the need for drawn out and unpredictable negligence claims without shifting the burden fully onto the taxpayer. Such a system would appeal to the New Zealand ideal of fairness for all.

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