

BIOLOGICAL CONTROL AMENDMENT BILL 2017 SERIAL NO. 33

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

MINISTER FOR PRIMARY INDUSTRY AND RESOURCES

EXPLANATORY STATEMENT

GENERAL OUTLINE

The Biological Control Amendment Bill 2017 (the Bill) makes legislative amendments that ensure consistency with national biological control programs, following recent changes to the *Commonwealth Biological Control Act 1984*. Biological control legislation in all states and the Northern Territory support the Commonwealth Act under a 'mirror' scheme established in the 1980s. The successful operation of the scheme is dependent on national consistency.

The main function of these Acts, including the *Biological Control Act* (NT), is to provide a legislative framework for the biological control of pests; to provide the opportunity for due consideration of proposed biocontrol activities to ensure they are in the public interest; and to provide protection from litigation under all relevant laws as relevant to the release of a biocontrol agent to control a target organism.

The purpose of this Bill is to specify viruses and sub-viral agents within the definition of an organism and removes the term 'live' from references to agent organisms. This supports the same intent as the Commonwealth Act, and removes any ambiguity in the definitions in light of ongoing scientific debate about the definition of an organism. The amendment thereby relieves the Northern Territory of liability for losses or damages suffered as a consequence of releasing all categories of agents (whether live organism, virus or a sub-viral agent) with authority under the Act.

The existing offence provisions have been converted to ensure compliance with Part IIAA of the *Criminal Code* (NT) [Criminal Code] and current penalty levels have also been revised to conform to similar offences across the Northern Territory statute book.

NOTES ON CLAUSES

Clause 1. Short Title

This is a formal clause which provides for the citation of the Bill. The Bill when passed may be cited as the *Biological Control Amendment Act 2017*.

Clause 2. Commencement

This is a formal clause which provides for when the Act will come into operation. The Act will commence on the day fixed by the Administrator by notice in the *Gazette*.

Clause 3. Act amended

This is a formal clause which provides that the following amendments are made to the *Biological Control Act*.

Clause 4. Part 1 heading replaced.

The heading **Preliminary** is replaced by the heading **Preliminary matters**. The Roman numeral **I** in the heading is replaced by the numeral **1**. These amendments have been made to comply with current drafting practice and modernise the language of the Act.

AMENDMENTS

Clause 5. Section 3 amended

Item 1 Subsection 3(1) (repeal definitions of *Council* and *prescribed live organism*)

Item 1 repeals the definitions of *Council* and *prescribed live organism* in subsection 3(1).

Item 2 Subsection 3(1) (insert definitions of *Council* and *prescribed organism*)

Item 2 inserts a new definition in subsection 3(1) to replace the repealed definition of *Council*. The new definition of *Council* is more convertible, in meaning either the existing body, currently the Agriculture and Resource Management Council of Australia and New Zealand; or any other prescribed body that may supercede it for the purposes of the definition. This eliminates the requirement for further amendments being

made to the Act should the current Council change its name or be replaced.

Item 2 also inserts a new definition in subsection 3(1) for *prescribed organisms* which replaces the repealed definition of *prescribed live organisms*. The new definition specifically mentions viruses and sub-viral agents in addition to live organisms because the status of viruses as living entities is a matter for ongoing scientific debate. This item supports the declaration of viruses and sub-viral agents as agent organisms under Part III and Part IV of the Act. Conformance with the original definition of *prescribed live organisms* under the Act has been retained in excluding live vaccines and resistant cultivars, which do not possess the characteristics to be used as biological control.

Item 3 Subsection 3(1) (amend definition of *kind*)

Item 3 amends the definition of *kind* so that it relates to viruses and sub-viral agents in addition to live organisms, taking account of ongoing scientific debate about whether a virus is a living entity. This clarification supports declarations of viruses (or sub-viral agents) of a particular kind as agent organisms under Part III and Part IV of the Act, or as target organisms under Part II and Part IV of the Act.

Item 4 Subsection 3(1) (amend definition of *organism*)

In paragraph (b) in the definition of *organism*, the words **paragraph (a)** is replaced by **(a); or** to allow for the addition of paragraph (c) [refer to Item 5].

Item 5 Subsection 3(1) (amend definition of *organism*)

Paragraphs (a) and (b) of the definition of *organism*, are unchanged. Item 4 adds paragraph (c) to the definition of *organism* for the purpose of the Act to specifically name viruses or sub-viral agents within the definition. The definition of an organism is a matter of ongoing scientific debate, therefore clarification is provided to support future declarations of viruses (or sub-viral agents) as agent organisms under Part III and Part IV of the Act, or as target organisms under Part II and Part IV of the Act.

Item 6 Subsection 3(1)

Item 6 provides an amendment at the end of the section to include a note of reference to the *Interpretation Act*.

Clause 6. Section 4 amended

Biological control for the purposes of the Act is confined to the control of organisms of a particular kind by prescribed organisms of another kind. This clause amends section 4 to provide for the inclusion of viruses and sub-viral agents as control agents. The status of viruses as living entities is a matter of ongoing scientific debate, so in accordance with the new definition of *prescribed organism* in Clause 5, Item 2, the term 'live' is omitted from this section and replaced by the term 'prescribed'. This amendment removes ambiguity about the use of viruses (and sub-viral agents) in biological control programs.

Clause 6 also makes an administrative amendment to section 4 comply with current drafting practice and modernise the language of the Act.

The words **shall be** are replaced by the word **is**.

Clause 7. Section 9A inserted

Clause 7 inserts a new section 9A after section 9 in Part 1 titled **Application of Criminal Code**. The addition of this new clause provides that Part IIAA of the Criminal Code applies to an offence against the proposed Act. The Bill includes amendments to offence provisions which aim to ensure conformance to Part IIAA of the Criminal Code.

The new section 9A also includes a note of reference to Part IIAA of the Criminal Code.

Clause 8. Part II heading amended

The Roman numeral **II** in the heading is replaced by the numeral **2**. This amendment has been made to comply with current drafting practice and modernise the language of the Act.

Clause 9. Part III heading amended

The Roman numeral **III** in the heading is replaced by the numeral **3**. This amendment has been made to comply with current drafting practice and modernise the language of the Act.

Clause 10. Section 19 amended

Clause 10 removes the term 'live' from references to *prescribed live organisms* in subsection 19(1) to conform to the new definitions within this Bill. The term *prescribed live organisms* has been repealed in this

Bill (refer Clause 3, Item 1) and the term *prescribed organisms* is newly defined and excludes the term 'live' (refer Clause 3, Item 2).

Clause 11. Section 20 amended

Clause 11 removes the term 'live' from references to *prescribed live organisms* in subsection 20(1) to conform to the new definitions within this Bill. The term *prescribed live organisms* has been repealed in this Bill (refer Clause 3, Item 1) and the term *prescribed organisms* is newly defined and excludes the term 'live' (refer Clause 3, Item 2).

Clause 11 also makes a number of administrative amendments to section 20 to comply with current drafting practice and modernise the language of the Act.

In subsection 20(1), the word **Where** is replaced by the word **If**.

In subsection 20(1)(b) the comma is replaced by a semi-colon after the word **apply**, changing it to **apply**;

In subsection 20(1), the words **referred to** are replaced by the word **mentioned**.

In subsections 20(2) and (3), the word **shall** is replaced by the word **must**.

In subsection 20(2)(b), the spelling of the word **authorized** is changed to **authorised**.

In subsection 20(3)(a) the conjunction **and** is added after the semi-colon at the end of the paragraph.

Clause 12. Section 24 amended

Clause 12 removes the term 'live' from references to *prescribed live organisms* in subsection 24(1) to conform to the new definitions within this Bill. The term *prescribed live organisms* has been repealed in this Bill (refer Clause 3, Item 1) and the term *prescribed organisms* is newly defined and excludes the term 'live' (refer Clause 3, Item 2).

Clause 12 also makes a number of administrative amendments to section 24 to comply with current drafting practice and modernise the language of the Act.

In subsections 24(1), (3) and (4), the word **Where** is replaced by the word **If**.

In subsections 24(1) and (2), the word **shall** is replaced by the word **must**.

In subsection 24(2)(a) to (d) the conjunction **and** is added after the semi-colon at the end of each paragraph.

In subsection 24(2)(e), the word **Where** is replaced by the word **If**.

In subsections 24(3), the words **shall cause** are replaced by the words **must make** and the words **to be** are removed.

Clause 13. Part IV heading amended

The Roman numeral **IV** in the heading is replaced by the numeral **4**. This amendment has been made to comply with current drafting practice and modernise the language of the Act.

Clause 14. Section 28 amended

Clause 14 removes the term 'live' from references to *prescribed live organisms* in subsection 28(1)(b) to conform to the new definitions within this Bill. The term *prescribed live organisms* has been repealed in this Bill (refer Clause 3, Item 1) and the term *prescribed organisms* is newly defined and excludes the term 'live' (refer Clause 3, Item 2).

Clause 14 also makes a number of administrative amendments to section 28 to comply with current drafting practice and modernise the language of the Act.

In subsection 28(1)(a)(i) the conjunction **or** is added after the semi-colon at the end of the subparagraph.

In subsection 28(1)(a)(iii) the conjunction **and** is added after the semi-colon at the end of the subparagraph.

In subsection 28(1)(c) the comma is replaced by a semi-colon after the word **effects**, changing it to **effects;**.

In subsections 28(1) and (2), the word **shall** is replaced by the word **must**.

In subsection 28(1), the words **by notice in the Gazette** are replaced by the words **Gazette notice**.

In subsection 28(1)(d), the word **where** is replaced by the word **if**.

Clause 15. Section 29 amended

Clause 15 removes the term 'live' from references to *prescribed live organisms* in subsection 29(1), to conform to the new definitions within this Bill. The term *prescribed live organisms* has been repealed in this Bill (refer Clause 3, Item 1) and the term *prescribed organisms* is newly defined and excludes the term 'live' (refer Clause 3, Item 2).

Clause 15 also makes a number of administrative amendments to section 29 to comply with current drafting practice and modernise the language of the Act.

In subsection 29(1), the word **Where** is replaced by the word **If**.

In subsection 29(1)(b) and 29(1)(d) the comma is replaced by a semi-colon after the word **organism**, changing it to **organism;**.

In subsection 29(1), the words **by notice in the Gazette** are replaced by the words **Gazette notice**.

In subsection 29(2), the word **shall** is replaced by the word **must**.

Clause 16. Section 32 amended

Clause 16 removes the term 'live' from references to *prescribed live organisms* in subsection 32(2)(a), to conform to the new definitions within this Bill. The term *prescribed live organisms* has been repealed in this Bill (refer Clause 3, Item 1) and the term *prescribed organisms* is newly defined and excludes the term 'live' (refer Clause 3, Item 2).

Clause 16 also makes a number of administrative amendments to section 32 to comply with current drafting practice and modernise the language of the Act.

In subsections 32(1) and (2), the word **Where** is replaced by the word **If**.

In subsection 32(1), the words **by notice in the *Gazette*** are replaced by the words ***Gazette notice***.

In subsection 32(2)(b), the comma is replaced by a semi-colon after the word **organism**, changing it to **organism;**

In subsection 32(2), the words **shall by notice in the *Gazette*** are replaced by the words **must, by *Gazette notice***.

Clause 17. Part V heading amended

The Roman numeral **V** in the heading is replaced by the numeral **5**. This amendment has been made to comply with current drafting practice and modernise the language of the Act.

Clause 18. Part VI heading amended

The Roman numeral **VI** in the heading is replaced by the numeral **6**. This amendment has been made to comply with current drafting practice and modernise the language of the Act.

Clause 19. Section 35 amended

Clause 19 removes the term 'live' from references to *prescribed live organisms* in subsection 35(3) to conform to the new definitions within this Bill. The term *prescribed live organisms* has been repealed in this Bill (refer Clause 3, Item 1) and the term *prescribed organisms* is newly defined and excludes the term 'live' (refer Clause 3, Item 2).

Clause 19 also makes a number of administrative amendments to section 35 to comply with current drafting practice and modernise the language of the Act.

In subsections 35(1), (2) and (3) the word **shall** is replaced by the words **is to**.

In subsection 35(3), the word **Where** is replaced by the word **if**.

In subsection 35(4), the word **where** is replaced by the word **if**.

In subsection 34(4)(a) the conjunction **and** is added after the semi-colon at the end of the paragraph.

Clause 20. Part VII heading amended

The Roman numeral **VII** in the heading is replaced by the numeral **7**. This amendment has been made to comply with current drafting practice and modernise the language of the Act.

Clause 21. Sections 41 and 43 replaced

Clause 21 repeals section 41 and inserts a new section for the same offence **Failure of Witness to attend**. The amendment to the offence provision is aimed at ensuring the offence complies with Part IIAA of the Criminal Code. The new section 41 changes the offence from the repealed section in that the offending conduct is based on an intentional act for offences where a person fails to comply with prescribed actions in relation to the serving of a summons to appear as a witness at an inquiry by a Commission, or the serving of a summons to produce evidentiary material [41(1)(b) and (2)(b)]. The new section 41 states that strict liability applies to the physical elements (the serving of a summons) in subsections 41(1)(a) and (2)(a). The reasonable excuse provision is retained. The inserted section follows a similar provision in the *Northern Territory Civil and Administrative Tribunal Act*.

The inserted section applies a maximum penalty of 100 penalty units or imprisonment for 6 months.

Clause 21 repeals section 43 and inserts a new section for the same offence **Refusal to take oath or to answer questions**. The amendment to the offence provision is aimed at ensuring the offence complies with Part IIAA of the Criminal Code. The new section 43 changes the offence from the repealed section in that the offending conduct is based on an intentional act for the purposes of 43(1). The 'reasonable excuse' defence provision is retained.

The inserted section applies a new maximum penalty of 50 penalty units or imprisonment for 6 months.

Clause 22. Sections 45 and 46 replaced

Clause 22 repeals section 45 and inserts a new section for the same offence, **False or misleading evidence**. The amendment to the offence provision is aimed at ensuring the offence complies with Part IIAA of the Criminal Code. The new section 45 changes the offence from the repealed section in that the offending conduct is intentional in relation to knowingly giving evidence that is false or misleading.

The inserted section applies a maximum penalty of 200 penalty units or imprisonment for 2 years for the offence. The notable increase to the monetary penalty is in line with similar offences in the NT statute book..

Clause 22 repeals section 46 **Contempt of Commission** and inserts a new section for the same offence, **Obstructing or hindering Commission**. The amendment to the offence provision is aimed at ensuring the offence complies with Part IIAA of the Criminal Code. The new section 46 changes the offence from the repealed section in that the offending conduct is based on knowledge of the inquiry and the Commissioner's role [46(a)] and is intentional for the purpose of 46(b). The inserted section follows a similar provision to section 87 of the *Northern Territory Civil and Administrative Tribunal Act*.

The inserted section applies a new maximum monetary penalty of 100 penalty units or the existing imprisonment for 12 months

Clause 23. Section 49 replaced

Clause 23 repeals section 49 and inserts a new section for the same offence **Witness not to be prejudiced**. The amendment to the offence provision is aimed at ensuring the offence complies with Part IIAA of the Criminal Code. The new section 43 changes the offence from the repealed section in that the offending conduct is based on an intentional act for the purposes of 49(1) and (2). The inserted section retains a legal burden of proof on the defendant in relation to any prosecution of subsection 49(2).

The inserted section applies a new monetary maximum penalty of 100 penalty units or the existing imprisonment for 12 months.

Clause 24. Part VIII heading replaced

The heading **Miscellaneous** is replaced by the heading **Miscellaneous matters**. The Roman numeral **VIII** in the heading is replaced by the numeral **8**. These amendments have been made to comply with current drafting practice and modernise the language of the Act.

Clause 25. Part 9 inserted

Clause 25 inserts a new Part 9 titled **Transitional matters for Biological Control Amendment Act 2017** to be placed after section 56. Part 9 has one new section, **57 Existing declarations continue**.

The transitional provisions will ensure that existing declarations that have been validly made by *Gazette* notice under section 5 of the *Biological Control Act* by the Northern Territory Biological Control Authority (the Authority) to declare a law of the Commonwealth or a State of the Commonwealth to be a relevant law, will continue in effect despite the amendments to the Act. The new section 57 will also ensure that existing declarations that have been validly made by *Gazette* notice under section 32(1) and (2) of the *Biological Control Act* by the Authority to declare target and agent organisms will continue despite the amendments to the Act. The transitional provisions also clarify that where an existing declaration refers to a *prescribed live organism* that it is taken to refer to a *prescribed organism* to conform to the new definitions within this Bill. The term *prescribed live organisms* has been repealed in this Bill (refer Clause 3, Item 1) and the term *prescribed organisms* is newly defined and excludes the term 'live' (refer Clause 3, Item 2).

Clause 26. Repeal of Act

This is a formal clause which provides that the Act is repealed on the day after it commences.

Statement of Compatibility with Human Rights
*Prepared in accordance with Part 3 of the Human Rights
(Parliamentary Scrutiny) Act 2011 (Cwlth)*

Biological Control Amendment Bill 2017

In relation to its overall purpose, this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. This compatibility statement provides justification for matters specific to Clauses 21 and 23 of the Bill that may be considered to have a bearing on the rights and liberties of individuals.

Overview of the Bill

The *Biological Control Act* (NT) [the Act] provides for the declaration of agent and target organisms for biological control activities.

The purpose of the Biological Control Amendment Bill 2017 (the Bill) is to amend the definition of an ‘organism’ to reflect the use of viruses and sub-viral agents as agent organisms or target organisms under the Act; and further clarifies the definition of an ‘organism’ for the purpose of the Act by omitting the term ‘live’. The amendment is intended to achieve uniformity with provisions of biological control legislation of the Commonwealth and all States of Australia, and will provide strengthened legislative authority for future biological control programs.

The Act has not been significantly amended for more than 30 years. The amendments to the offence provisions are aimed at ensuring the offences comply with Part IIAA of the *Criminal Code Act* (NT) [Criminal Code].

Human rights implications

For the purpose of the Act, the amended definition of an *organism* in the Bill supports future declarations of organisms by clarifying that viruses (or sub-viral agents) are target or agent organisms. The definition of an *organism* explicitly excludes humans.

In relation to two of the offence provisions, this Bill engages rights referred to in the International Convention on Civil and Political Rights (ICCPR). The ICCPR protects the presumption of innocence. Article 14(2) states “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.

Reversal of Onus of Proof

The reversal of the onus of proof in section 49(3) of the Bill is relevant to the consideration of the presumption of innocence.

Clause 23 of the Bill replaces the section 49 offence provision **Witness not to be prejudiced**. This section creates an offence to prevent employers taking prejudicial action against their employees for giving evidence at an inquiry. It is a form of a common 'whistleblower' protection offence.

Subsection 49(3) places a legal burden of proof on the employer to prove that the actions taken in subsection 49(2) in relation to an employee appearing to give evidence at the Commission is not related to the employee's role as a witness in an inquiry or their role to provide evidence to the inquiry.

Section 43BV of the Criminal Code states that a law that imposes a legal burden of proof on a defendant can only do so if it expressly states that the burden is a legal one. Further, section 43BW of the Criminal Code states that a legal burden on the defendant must be discharged on the balance of probabilities. Generally the presumption of innocence requires the prosecution to prove each element of an offence beyond reasonable doubt. An offence provision which requires the defendant to prove a matter to the legal burden of proof will engage the presumption of innocence because the defendant's failure to discharge the burden of proof in relation to the defence may result in their conviction for the offence despite the prosecution having to prove the offence beyond reasonable doubt.

Currently Part II of the Criminal Code applies to the offences in the *Biological Control Act*. The Bill amends section 49 (and other offences) to convert the section to comply with the principles and concepts of Part IIAA of the Criminal Code. It is intended that the current policy of the offence, together with the criminal responsibility principles in Part II of the Criminal Code, be retained to the extent that is possible, taking account of differences between Part II and Part IIAA of the Criminal Code.

The current wording of section 49(3) of the *Biological Control Act* suggests an intention to confer a legal burden of proof because it states 'the burden lies on the employer'. The same wording is used in the

equivalent offences in other jurisdictions' biological control legislation. Further, section 440 of the Criminal Code currently applies to the offence and provides that any matter that needs to be proved by the defence at trial must be proved on the balance of probabilities. This section therefore confers what is, under Part IIAA, a legal burden of proof.

Reversing the onus of proof will not necessarily be inconsistent with the presumption of innocence, provided the reversal of onus is not unreasonable in the circumstances and the offence otherwise maintains the rights of the accused. The reverse onus might be considered legitimate where the burden relates to facts that are readily provable by the defendant as matters within their own knowledge, and is more practical to be proved by the defendant. In this case, placing the legal burden of the defendant is appropriate because the matter required to be established, namely that the employer did not dismiss or prejudice, or threaten to dismiss or prejudice, the employee because of the employee's evidence or intended evidence at the Commission, is a matter peculiarly within the knowledge of the defendant.

Strict Liability

Some offences in the Bill prescribe strict liability for certain physical elements of the offence. Section 43AN of the Criminal Code states that where strict liability is prescribed for an offence or an element of an offence, there are no fault elements for the offence or the physical element, and the defence of mistake of fact under section 43AX is available.

Strict liability offences engage the presumption of innocence because a person can be found guilty of an offence without the need to prove fault or 'a guilty mind' for the offence or for an element of the offence.

Clause 21 of the Bill replaces the section 41 offence provision **Failure of Witness to attend**. New section 41(3) states that strict liability applies to the physical elements in 41(1)(a) and (2)(a). Those physical elements are that the person has been served with a summons to appear as a witness at an inquiry by a Commission [for the offence in section 41(1)] or the person has been served with a summons to produce evidentiary material [for the offence in section 41(2)].

Strict liability is used in these circumstances because it can be reasonably expected that the person was aware of the fact that they had

been served with the summons. Service of a summons is lawfully effected if section 25 of the *Interpretation Act* is complied with, and that section is aimed at ensuring the person served actually receives the document. The objective of the offences are to ensure compliance with summonses issued by a Commission.

The offences in section 41(1) and (2) are not wholly strict liability, as strict liability applies to one physical element of each of the offences. Additionally, subsection 41(4) provides for a reasonable excuse defence to the offences. What is a reasonable excuse will be up to the Court or Jury to determine in the circumstances of the case.

Conclusion

This Bill does interfere with the presumption of innocence, but in a reasonable and proportionate manner to achieve a legitimate outcome.

The Hon Ken Vowles MLA, Minister for Primary Industry and Resources