

## **Setting and applying spending limits under the Deed**

### **Secretariat guidance**

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#### **Purpose**

This paper provides advice on setting and applying spending limits, which takes into account the rights and expectations of Signatories around the application of good faith, fiscal caps, other principles in the Deed and relevant guidance. It should be read with the Deed and Secretariat guidance on the definition of good faith.

#### **Background**

The Deed is the foundation document for decision-making and cost sharing for joint biosecurity readiness and response activities that are recorded in an Operational Agreement (OA). It outlines the principles of the partnerships between MPI and each industry Signatory. It should be read as a whole package to ensure provisions are set in the context intended by potential Signatories when it was drafted.

Industry organisations and MPI enter into the GIA Deed with the intention of meeting their commitments, and with full acceptance that they will be bound by all of the rights and obligations that come with signing the Deed. They also expect that they will receive a differential benefit over non-Signatories by signing up. This benefit will be assessed by each potential Signatory as they define the value the Deed offers them, and forms the basis for engaging with their members in seeking a mandate to sign.

Acknowledging that primary industries vary in their size and capacity, the financial liabilities of participating in OAs are limited for industry Signatories through setting a fiscal cap (Clause 5.1.11 of the Deed). The Deed states that the amount proposed for a Signatory's cost-share may not exceed the fiscal cap of that Signatory.

All Signatories are expected to act in good faith and within any financial limits that the Deed allows them to set. This means that while the Crown cannot seek to levy an industry Signatory above its stated fiscal cap, there is an expectation that each fiscal cap embodies the concept of good faith. The Deed drafting group considered it inappropriate for the Crown to recover costs from industry Deed Signatories that benefit from joint readiness and response activities in an OA.

#### **Setting limits on spending**

The Deed allows industry Signatories to set a fiscal cap, which sets a limit on its funding liabilities for cost-shared readiness and response activities (clause 5.1.11 of the Deed). A process for determining a fiscal cap is not prescribed in the Deed. Guidance to assist industry Signatories set a cap has been developed by a joint working group subsequent to the drafting of the Deed and is in Attachment 1. It

recommends that a fiscal cap is pest-specific, applied only to response and set by an industry consistent with the expected impact that organism might have and how much an industry is prepared to invest to avoid or mitigate that impact.

Limits on commitments for readiness activities are set during negotiation of an OA by its Signatories. They are informed by considerations around a fiscal cap, even though the cap is not specifically applied.

## Setting a baseline

Where an industry benefits from a readiness or response action, being a Signatory to the Deed will provide it with the option to participate in discussions relevant to that action. Whether the benefiting industries choose to invest and the extent to which they invest in proposed actions will take into account any limitations that they set.

### Choosing to invest:

- ❖ The Signatory cares about it – it has the right to invest in what matters most
- ❖ The Signatory benefits from doing something
- ❖ The proposed biosecurity outcome is achievable
- ❖ It's affordable – either cash or in-kind
- ❖ It has the support of MPI, the industry participants and stakeholders

Operating in good faith demands that Deed Signatories are open and honest about their biosecurity priorities, clear about why these are important (materiality) and what they are prepared to invest in preparing for and/or responding to these priorities. The Deed contains numerous provisions that commit Signatories to know, understand and document their biosecurity risk profile (3.1.1c, 3.1.2f, 3.1.3b, 3.1.3f, 3.2.3a).

A natural host, by default, benefits from the absence of an injurious organism. Signatories that achieve economic benefit from producing or growing that host are considered an affected industry and likely to benefit from its absence. Establishing a list of priority organisms allows both industry and MPI to identify and rank the organisms they are most concerned about with reference to materiality considerations – thus enabling invest in what matters most.

Guidance for setting a fiscal cap proposes that industry Signatories define and document these priorities and allocate spending limits to them. This ensures that all Signatories are aware of them and can identify industries with a shared interest in an unwanted organism and what importance, through impact, it is afforded. A number of industries have identified a list of priority pests. These can be found as separate animal and plant industry lists with the policy, guidance and information papers in the GIA Handbook on the GIA website ([www.gia.org.nz/handbook](http://www.gia.org.nz/handbook)).

Many industry organisations are likely to require transparency around their priority pests and proposed investment, and limits, for their members and for financial accountability reasons, so will do this anyway. For MPI, budget processes and prioritisation of investment and actions will drive equivalent transparency around priority pests.

## Questions and issues

A number of issues have been identified through developing the processes, policies and guidance to implement the Deed. These are posed here and responses provided that draw on the application of good faith and spending limits as they are described in the Deed. A similar approach is likely to inform or direct answers to other questions that may arise as the Deed is implemented.

### **Under what circumstances can Signatories elect not to participate in readiness or response activities where evidence indicates that they would benefit?**

A number of considerations may contribute to a Signatory choosing not to share the costs or participate in activities included in an OA, even though evidence is available that they could expect to be impacted by a specific unwanted organism, or from other activities that improve overall biosecurity readiness and/or response (Section 6 of the Deed). These include, but may not be limited to:

- Materiality
- Technical feasibility
- Cost benefit
- Financial
- Contributions

#### **Materiality**

Materiality in this context is the unwanted organisms, actions and outcomes that a Signatory really cares about. Defining materiality allows a sector to prioritise its investment and resources to the things that matter most. In choosing not to participate on reduced or minimal materiality, a Signatory should reference its sector’s priority pests, fiscal caps and relevant sustainability interests.

The sustainability framework (Table 1), adapted from Murningham (2013), may help Signatories to determine materiality. The organizing principle for sustainability is sustainable development, which includes the four interconnected domains of ecology, economics, politics and culture. These domains should not be inconsistent with values that are taken into account in determining the proportions of public and industry benefit for cost shares.

**Table 1: Sustainability framework**

Sustainability interests <i>Environment, social capital, human capital, business model &amp; innovation, leadership &amp; governance</i>		
Evidence of interest	Evidence of financial impact	Forward looking adjustment
Financial risks	Revenue impact	Magnitude
Legal drivers	Return on investment	Probability
Industry norms	Risk management	Externality
Stakeholder interests	Management quality	
Innovation opportunity		
Prioritised sustainability issues		

Defining and documenting materiality might include the ability to:

- Discern which biosecurity risks are most material to the industry, its stakeholders, rural and regional communities, the national interest and the wider operating environment. This is especially important because the materiality of sustainability issues may change with risk exposure and mitigation, with their impacts occurring over different time frames
- Develop appropriate mechanisms and processes that enable continual learning and assessment of material priorities, and how performance improvements can occur to prevent or mitigate their impact
- Manage materiality in ways that anchor sustainability issues at the heart of production systems
- Disclose on a timely and transparent basis both progress and impacts of sustainability commitments within a wider context where they actually are felt

### ***Technical feasibility***

Technical feasibility refers to the ability to achieve the biosecurity outcomes sought. For an eradication program to be successful, the unwanted organism should be:

- Detectable – the organism or its symptoms must be detectable at an acceptable efficacy and reasonable cost – delimitation and confirmation of absence
- Containable – the unwanted organism must be able to be contained within a defined area
- Eradicable – there are tools and strategies available to destroy the unwanted organism, which are practical and pragmatic, cost effective and legal.

### ***Cost benefit***

The cost:benefit assessment informs a decision on whether the cost of response or proposed readiness activity is warranted against the benefits that are accrued from eradicating the unwanted organism or achieving the readiness outcome. It provides a checkpoint for Signatory beneficiaries to determine that the proposed activity is fit for purpose, efficient and fiscally justified.

For an affected Signatory, a fiscal cap analysis will provide a reference point for determining whether the cost is affordable.

A beneficiary is defined in clause 7.1 of the Deed as any person or party that obtains value from avoiding, delaying or reducing the impact of an unwanted organism. These impacts include:

- Increased costs of managing the unwanted organism
- Additional costs of production
- Production losses
- Costs of creating new production systems
- Environmental
- Social/cultural including human health
- Macro-economic
- Market demand
- Market access including preferred access from pest freedom status

### ***Financial***

The fiscal cap provides limits on expenditure for response activities and their use is valid. Signing the Deed does not commit Signatories to a limitless commitment. However, Signatories should expect that expenditure limits are defined, documented and reported for the information of all as the basis for electing not to participate in actions where there is evidence that they would benefit.

### ***Contribution***

The Deed allows for contribution to readiness or response in the form of cash or 'in-kind' as outlined in clause 5.1.9 of the Deed. A Signatory may choose to participate in shared activities using in-kind contributions of resources rather than as a financial transaction. They may also support a response in such a way as to facilitate the biosecurity outcome sought without direction or cost arising from invoking the Biosecurity Act 1993. This may, in some circumstances, constitute an in-kind contribution.

### **What, if any, actions could be taken to compel participation in actions directed in an Operational Agreement (OA)?**

Dispute resolution processes are included in the OA standard contract and in clause 4.5.1 of the Deed. There is an expectation that the Signatories work in partnership so that disputes are resolved effectively.

### **What actions, if any, would be taken to recoup costs from Signatory beneficiaries, taking into account the considerations of the Joint Working Group that developed the Deed?**

The Deed Joint Working Group considered it inappropriate to cost recover from Signatory beneficiaries, believing that they should be expected to meet all the rights and obligations that come with signing the Deed, and act in good faith to participate where they benefit within the financial limits that the Deed allows them to set. It would also be inconsistent with the principle of consensus decision-making to charge a Signatory for the costs of a response after that Signatory had determined, in good faith, that it was not appropriate to undertake the response.

The accountability framework for Deed Signatories will be developed consistent with clause 3.1.1e of the Deed. The framework is intended to help Signatories define their performance goals and expectations as the basis for accounting to their GIA partners. Where evidence emerges that a Signatory is not managing the biosecurity risks that are their responsibility, then the Signatories may initiate dispute resolution processes to rectify the situation.

In circumstances where the actions of a Signatory or non-Signatory potentially compromise New Zealand's biosecurity status, powers of the Biosecurity Act may be applied independent of the Deed to mitigate a biosecurity risk.

Where an industry has signed an OA, the provisions of the specific OA will apply.

### **What happens if government and affected industries agree to undertake a response but they cannot agree a cost share?**

Should a cost share not be agreed, the dispute resolution provisions may be applied (clause 4.5.1).

## **Who is responsible for response costs in a situation where an unwanted organism is in or associated with recently imported goods that have cleared the border?**

The Response Guide Joint Working Group and the Interim Fruit Fly Council have discussed this matter. It is an area that requires further consideration.

The Australian response plan for plant pests was agreed by government and industry and clarifies when joint response arrangement will be enacted, as follows:

The EPPRD will be used where the (emergency plant pest) EPP Incident occurs post-border. That is, where the detection is not contained within the originally imported goods.

The EPPRD will not be used if:

- An EPP is detected in a consignment of goods at the border or in a consignment of goods that are not under quarantine control (i.e. has passed through the border) and the EPP remains within the imported items.
- An EPP is detected and is contained within a Post-Entry Quarantine (PEQ) facility.

In these situations, the detection is considered to be “at the border” and the Australian Government will manage any required response. Materials held in PEQ facilities are considered to remain “at the border” until the material has been officially released. Furthermore, pests of timber that are detected when contained within the imported goods (e.g. an imported piece of furniture) will be considered as part of an intact consignment and therefore, the EPPRD will not apply.

An equivalent arrangement might be considered under the GIA.

## **What happens if a relatively small sector disagrees with a particular action, response or decision that others agree to? Under the Deed consensus is required, which could derail the majority.**

Clause 2.2.3 of the Deed is clear in requiring that decision-making under the Deed will treat all Signatories consistently and will be by *consensus except as otherwise agreed by the Signatories*. Alternatives to consensus have been identified in the operating model for the Deed Governance Group, including that there must be consensus to use alternatives to consensus decision-making. Early consideration of alternatives to consensus should be made by potential Signatories of an OA and this is prompted in section 4.2 of the OA guidance document ([www.gia.org.nz/handbook](http://www.gia.org.nz/handbook)).

Agreement on the outcomes to be achieved through joint activities sets the foundation of consensus decision-making. A failure to agree outcomes will make decisions to achieve them practically impossible. The underlying reasons for not agreeing may be legitimate i.e. cost, feasibility for that industry, and if allowed by the Deed, valid.

There are no ‘off the shelf’ alternatives to consensus but a suite of alternatives may develop over time and could be provided to Signatories as Secretariat guidance.

## **What happens if an industry reaches its fiscal cap and doesn’t want to continue while a majority of industries do want to continue – if that industry will continue to benefit shouldn’t they continue to pay?**

The Deed provides for good faith and financial limits, giving Signatories the right to determine where and how they will invest to achieve better biosecurity outcomes for the benefit of their sector.

Industries that have reached their fiscal cap for either an activity or a pest must review their ongoing investment in both. If they can no longer afford the costs of participating – whether in cash or kind, the Deed allows them to withdraw from that activity with an expectation that liabilities they have accrued to the time they withdraw are met.

Industries that have reached their fiscal cap should have the right to safeguard any earlier investment in the biosecurity outcome they have funded and could continue to participate in the response in an advisory or observer capacity, with the agreement of the remaining parties. They will not have decision-making rights over matters that create new liabilities. However, it may not be unreasonable that industries that have contributed to a response and subsequently withdrawn due to an inability to pay, regain their decision-making rights relevant to ending the response or transitioning to ongoing pest management.

The Deed allows a Signatory to withdraw from the Deed, but requires that any liabilities that are accrued by that Signatory up to the date that withdrawal takes effect are met. This includes situations where an industry organisation no longer meets the eligibility requirements for signing the Deed that are in the Biosecurity Act 1993, and is removed by the Minister for Primary Industries.

Signatories that have reached their fiscal cap and choose to withdraw will have an obligation to ensure that they do not impede or otherwise hinder the ongoing action to achieve the biosecurity outcome(s) in an OA by their own actions – that is, they should not become an exacerbator if they are no longer sharing costs.

**Will the application of the 50% cap by government impact MPI’s cost:benefit analysis and therefore MPI’s willingness to participate in a response?**

The principles in the GIA Response Guide include that MPI will act in the interest of the New Zealand public and will preserve options in this interest until a joint decision on specific actions is made. It will also operate in the spirit of partnership beyond the scope of the GIA Deed for biosecurity response. These commitments, together with the establishment of the public:industry cost share, and a cost:benefit analysis (which is undertaken through the response strategic leadership group to inform a response), will provide transparency around any shared response.

**What rights and/or obligations do industries have that are impacted by a response but not harmed by the unwanted organism eliciting the response? How are they taken into account in impact/beneficiary analysis, cost shares, decision-making?**

A natural host, by default, benefits from the absence of an injurious organism. Signatories that achieve economic benefit from producing or growing that host are considered an affected industry and are likely to benefit from its absence. However, the Deed allows an industry to set limits around its response expenditure, and negotiate within its fiscal boundaries for readiness activities in an OA.

Indirect impacts of an unwanted organism, such as through a response rather than direct harm from the organism, are not accommodated in the impact scenario at clause 5.1.8c. However, an industry that is impacted by a response may seek to participate in an advisory capacity to ensure that its actions do not inadvertently impact the success of the response activity (i.e. they become an exacerbator). If an industry is not receiving a direct benefit from eradicating the unwanted organism

such that they are not included in the cost share determination, they are not a response decision-maker.

In situations where an industry has the potential to be significantly impacted by a response, including at particular times of the year, they may choose to sign an OA with industries that are directly impacted by the unwanted organism. The OA framework allows industries to negotiate and agree their cost share with reference to the Deed, but also allows the Deed provisions to be modified where OA Signatories agree.

## References

1. [The GIA Deed.](#)
2. [Consolidated comments from consultation on the draft GIA Deed released December 2012.](#)
3. Marcy Murningham. August 2013. [Redefining Materiality II: Why it Matters, Who's Involved, and What It Means for Corporate Leaders and Boards.](#)

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## Framework for determining fiscal caps

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### Policy

(The what)

The Government Industry Agreement for Biosecurity Readiness and Response Deed (the Deed) provides for industry Signatories to set a limit on their funding liabilities for cost-shared biosecurity readiness and response activities undertaken by Deed Signatories and recorded in an Operational Agreement (OA).

A fiscal cap will allow response decision-makers from industry Signatories to make commitments on behalf of their sector to the fiscal cap amount without further consultation. The fiscal cap may be used as a trigger to allow an industry to determine whether they support funding a response past their cap.

### Guidance

(Principles – interpreting the Deed)

1. A fiscal cap will only apply to response.
2. It will be set by the OA Signatories.
3. Each OA has its own fiscal cap.
4. It will be expressed as a dollar (NZD) amount.
5. The fiscal cap must be sufficient to ensure the OA it applies to can be fully funded.
6. Fiscal caps will be listed in the relevant OAs and will not be covered by any confidentiality agreements.
7. Industry Deed Signatories should define a fiscal cap for each of its priority unwanted organisms using an estimate of the indicative response costs for each organism.
8. Government's share of funding is within MPI financial appropriations.
9. A fiscal cap may be reviewed on the basis of new information.

### Process

(The doing/how)

Tools to assist with setting fiscal caps may include:

- A template to assist with collating data needs
- A cost calculator tool to assist the assessment of response costs for priority pests