

Guide to completing a claim for compensation under section 162A of the Biosecurity Act 1993

INTRODUCTION

The Ministry of Agriculture and Forestry (MAF) has developed these guidelines to help ensure a fair and timely compensation process. Compensation claims will be received by the Biosecurity New Zealand from the point when a compensable loss has occurred and been documented. Each claim is assessed against the criteria in the Biosecurity Act and additional information is requested from the claimant or other parties where necessary. A recommendation as to entitlement is made to the Assistant Director-General, Biosecurity New Zealand who is responsible for determining the claim.

Answers to the following questions are set out below to inform those that may be entitled to receive compensation.

- **What are the legal criteria for the payment of compensation?**
- **How will the compensation processes operate?**
- **What do claimants need to do now?**
- **What assistance is available to prepare or support a claim?**

Information is also provided to assist with completing the compensation claim form and deciding what supporting information must be submitted to support the claim.

WHAT ARE THE LEGAL CRITERIA FOR THE PAYMENT OF COMPENSATION?

The legal requirements for the payment of compensation are set out in section 162A of the Biosecurity Act 1993. Section 162A states as follows:

- (1) Where -
 - (a) Powers under this Act are exercised for the purpose of the management or eradication of any organism; and
 - (b) The exercise of those powers causes verifiable loss as a result of -
 - (i) The damage to or destruction of a person's property; or
 - (ii) Restrictions, imposed in accordance with Part VI or Part VII, on the movement or disposal of a person's goods, -that person is entitled to compensation for that loss.
- (2) The compensation payable under this section must be of such an amount that the person to whom it is paid will be in no better or worse position than any person whose property or goods are not directly affected by the exercise of the powers.
- (3) Compensation payable by a Minister or by a chief executive is payable from money appropriated by Parliament for the purpose.
- (4) Compensation must not be paid under this section to any person -
 - (a) In respect of a loss in relation to unauthorised goods or uncleared goods; or
 - (b) In respect of a loss suffered before the time when the exercise of the powers commenced; or

(c) Who has failed to comply with this Act or regulations made under this Act and whose failure has been serious or significant or has contributed to the presence of the organism or to the spread of the organism being managed or eradicated.

(5) Any dispute concerning the eligibility for, or amount of, compensation must be submitted to arbitration and the provisions of the Arbitration Act 1996 apply.

(6) Nothing in this section applies to any loss suffered by any person as a result of the exercise of powers under this Act to implement a pest management strategy.

What this means is that compensation can only be paid under section 162A for a loss that:

- is verifiable; and
- results from damage to, or destruction of property, or from restrictions placed on the movement or disposal of goods; and
- is caused by the exercise of powers under the Biosecurity Act for the purpose of eradication of an unwanted organism.

Please note that damage caused by the organism itself cannot be compensated for under section 162A.

While every claim for compensation will be considered on its merits, section 162A provides that compensation must not be paid:

- for a loss related to unauthorised goods or uncleared goods;
- for a loss suffered before the time the exercise of powers commenced;
- to any person who has failed to comply with the Biosecurity Act or regulations made under the Act where the failure is serious or significant or contributed to the presence or spread of the organism being managed or eradicated.

HOW DOES THE COMPENSATION PROCESS OPERATE?

The compensation process continues while statutory powers remain in force. Claims will be received after losses have been incurred and the claim has been prepared.

Every effort will be made to settle claims within a reasonable time. Where claims are more complex, MAF will seek expert advice before an offer of compensation is made.

The Biosecurity Act provides for arbitration where eligibility for, or the amount of, compensation is disputed. However, claimants will first be able to request that MAF reconsider a claim for compensation. The diagram on page 5 of this guide illustrates the process.

WHAT DO CLAIMANTS NEED TO DO NOW?

Any person who considers they are legally entitled to compensation should lodge a claim with MAF as soon as possible. Any subsequent claim should exclude those losses for which a claim has already been lodged.

Please send completed forms and all necessary supporting documentation to: Grace Clarke, Biosecurity New Zealand, PO Box 2526, Wellington.

WHAT DO CLAIMANTS NEED TO DO IN THE FUTURE?

Assessment of claims in respect to the duty to mitigate loss

It is an accepted principle at common law that anyone who receives statutory compensation is under a duty to mitigate their loss so that it does not escalate, including escalation over time.

In assessing claims, and particularly claims for the same recurring loss, MAF needs to explore, with the claimant, reasonable mitigation options that may have been available to them in their particular circumstances. MAF invites claimants to discuss mitigation options with MAF if and when it appears that recurrent losses eligible for compensation will be incurred.

Where reasonable attempts to mitigate losses have been made, MAF will compensate the reasonable cost of mitigation and, if necessary, compensate any eligible residual losses that could not be mitigated. The following process summarises the parties responsibilities with respect to mitigation:

First, MAF will identify possible mitigation options that were reasonably open to the claimant in their circumstances, using the following general principles:

- The claimant is not required to do more to prevent the escalation of loss than is reasonable in his or her circumstances. The duty is not an onerous one, and it is up to the Crown to show that reasonable steps have not been taken. This involves the Crown identifying what reasonable options were open to the claimant, in his or her circumstances.
- The claimant is entitled to recover expenses reasonably incurred in mitigation (even where the steps taken were unsuccessful).
- If the claimant lacks the necessary means she or he cannot be required to spend money in mitigation, and the claimant is not required to dispose of his or her capital assets.

Secondly, MAF will obtain expert technical or professional advice on the reasonable probability that the claimant could have taken those steps.

Thirdly, using the probability ratio advised by the experts, MAF will calculate the percentage of loss that should have been mitigated by the claimant, (taking into account any actual mitigation by the claimant), and deduct this from the amount of compensation payable.

WHAT ASSISTANCE IS AVAILABLE TO PREPARE OR SUPPORT A CLAIM?

Professional legal, accounting or secretarial assistance will not normally be critical to the preparation of a successful claim. The cost of engaging such services lies with the claimant and is not compensable.

The cost of commissioning any independent technical reports and collecting or recording of evidence of damage or loss lies with the claimant.

General advice about biosecurity compensation may be obtained from MAF by contacting:

- Grace Clarke
Biosecurity New Zealand
- Telephone: 04 894 0417
 - Facsimile: 04 894 0730
 - Postal: PO Box, 2526, Wellington

COMPLETING THE CLAIM FORM – SOME EXPLANATORY NOTES

MAF prefers for claims to be submitted on the forms provided (copy attached). Please ensure that all sections of the form relevant to your claim are completed in full.

If completing your claim in handwriting, please take care to ensure it is easy to read.

Section 1: General information and contact details

1A requires details about the owner of the damaged or destroyed property or goods affected by restrictions. Please fill in as many of the fields as you can.

In 1B, details of the owner's authorised agent are not required if you are the owner, and wish to be the person contacted in relation to the claim.

Section 2: Details of the loss for which compensation is sought

Please supply as much detail as possible about the cause and the value of the loss you have suffered. Summary information in the tables on pages 2 and 4 of the claim form is important, but additional comments on pages 3 and 5 may be necessary to help MAF understand the nature of your claim.

To avoid confusion about the nature, quality or quantity of property or goods affected, descriptions should be as precise as possible.

Please indicate the date or period of time in which each loss was incurred.

Section 3: List of supporting documents

To help MAF keep track of all the documents, it is recommended that you number the front page of each supporting document. Please ensure the number you put on the page matches the number beside that document on the list of supporting documents.

Please supply any relevant supporting documentation necessary to verify your claim. The type of documentation necessary will differ depending on the nature of the claim.

Section 4: Declaration and Privacy Act notice

Part 4 of the completed claim form must be signed and dated in the presence of a Justice of the Peace, Solicitor or Barrister or any other person authorised by law to administer an oath. Please read the declaration, Privacy Act notice and the important notes in part 5 of the claim form, before you sign.

DIAGRAM: THE COMPENSATION PROCESS

