



21 October 2011

The Committee Secretary
Senate Standing Committees on Rural Affairs and Transport
Parliament House
Canberra ACT 2600

Dear sir/madam,

Quarantine Amendments (Disallowing Permits) Bill 2011

This is to comment on the Quarantine Amendments (Disallowing Permits) Bill 2011 (“Bill”) which is subject to inquiry by the Senate Committee.

Background

The Food & Beverage Importers Association (“FBIA”) is an industry association that represents importers into Australia of food and beverages, both retail ready and ingredients for further processing. A membership list is attached.

Many food products may only be imported under permits issued by the Director of Quarantine or a delegate which prescribe biosecurity measures. Indeed, permits to import food would be one of the major categories of permits issued. Our members regularly apply for, and hold, permits issued on behalf of the Director of Quarantine to import food products subject to biosecurity measures.

Summary of the FBIA’s position

The purpose of the Bill is said to be “to ensure that any decision to allow the importation, introduction, bringing in of or removal of a thing—defined under the Quarantine Act 1908 as an animal, plant, substance of thing—is thoroughly scrutinised.” Its aim is “to protect Australia’s agricultural sector from disease by further scrutiny of import risk analyses and quarantine determinations. “ (Senator Xenophon, second reading speech, 25 August 2011).

In the view of the FBIA, the Bill is unnecessary, is potentially contrary to Australia’s WTO obligations, is practically unworkable, will cause significant and unnecessary delays to the issuing of permits and hence to trade, will disclose permit information that is rightly treated as commercially confidential and will weaken the institutional framework for biosecurity.

We would therefore request the Committee to recommend that the Bill not be passed.

Food & Beverage Importers Association

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The Bill is unnecessary

Without question, Australia, as a trading nation, requires a sound biosecurity system. Such a system is required to preserve Australia's favourable pest and disease status, which is integral to Australia's agricultural and food sector, and to minimise the risk of harm to the country's environment and biodiversity.

The critical foundation to the biosecurity system is setting of Australia's appropriate level of protection ("ALOP"), which involves consideration of Australia's national interest. This is rightly set by the Government and open for debate in Parliament. The government and parliament has then set out the administrative framework ("Framework") for the practical application of that level of protection in legislation and regulation.

That Framework is set out in the Quarantine Act 1908 and subordinate legislation including the Quarantine Regulations 2000 and the Quarantine Proclamation 1998. The Quarantine Proclamation identifies goods that may not be imported into Australia unless the Director of Animal and Plant Quarantine or its delegate grants an import permit or unless the importers comply with other conditions specified in the proclamation. Section 70 of the Quarantine Proclamation 1998 specifies the issues that the Director of Animal and Plant Quarantine must take into account when deciding whether to grant a permit:

- must consider the level of quarantine risk if the permit were granted, and
- must consider whether, if the permit were granted, the imposition of conditions would be necessary to limit the level of quarantine risk to one that is acceptably low
- may take into account anything else that he or she knows is relevant.

The level of quarantine risk is defined in section 5D of the Quarantine Act 1908 as follows:

"reference in this Act to a level of quarantine risk is a reference to:
(a) the probability of:
(i) a disease or pest being introduced, established or spread in Australia, the Cocos Islands
or Christmas Island; and
(ii) the disease or pest causing harm to human beings, animals, plants, other aspects of the
environment, or economic activities; and
(b) the probable extent of the harm"

In 2007, the Quarantine Regulations 2000 were amended to regulate the key steps of the import risk analysis process. The Regulations define both a standard and an expanded Import Risk Analysis ("IRA"), identifies certain steps which must be included in each type of IRA, specifies time limits for certain steps and overall timeframes for the completion of IRAs, and specifies publication requirements.



Parliament has therefore put in place a very detailed framework for implementing Australia's appropriate level of protection. In our view, this Bill would take Parliament beyond the setting of the Framework, (a proper legislative function), and insert the Parliament into the administrative and operational application of policy. Parliament would be assessing the merits of particular cases. The overseeing of permit issuing, an administrative activity is surely the function of the Minister, who in turn is responsible to Parliament. The Minister then has the assistance of relevant Government agencies.

The Bill does not specify how the vetting by Parliament of permits and biosecurity determinations would be conducted. As is well known, under the WTO SPS Agreement, Australia has the right to adopt sanitary and phytosanitary measures necessary for the protection of human, animal and plant life or health. As is set out in the WTO SPS Agreement, these measures must, however, be science-based, not more trade-restrictive than necessary and not arbitrarily or unjustifiably discriminatory against trading partners. This approach was confirmed by the Federal Government in its recent Trade Policy Statement. Moreover, issues in IRAs are complex and involve science and risk estimation techniques. How will Parliament scrutinise biosecurity decisions? Will there be formal hearings? Will affected parties be given an opportunity to be heard?

This Framework was carefully scrutinised by the Beale Panel in its exhaustive review and report into the Australian biosecurity system. While the Panel did make recommendations about the government and parliamentary oversight of biosecurity, it did not recommend that quarantine decisions should become Disallowable Instruments. The alleged unsound decision in one IRA (the NZ apples case) should surely not trump the recommendations of a considered report that has balanced the many aspects of an effective biosecurity system.

The FBIA believes the process contemplated by the Bill represents unnecessary additional regulation.

Potential inconsistency to Australia's WTO obligations

The FBIA is aware that the Federal Government supports the WTO SPS Agreement and endeavours to ensure that its Framework is consistent to the WTO SPS Agreement. Indeed, the Federal Government has recently taken steps to adopt the findings of WTO Dispute Panels which found that Australian measures were inconsistent to the WTO SPS Agreement.

The FBIA is concerned that the adoption of the Bill may cause Australia's trading partners to claim the Bill is inconsistent to the WTO SPS Agreement for a range of reasons, including the following:



1. Australia has always maintained that the Framework is consistent to the WTO SPS Agreement. The adoption of another level of review by Parliament pursuant to the Bill may be perceived as merely another restraint on trade by potential political intervention.
2. Any review by Parliament would not be seen as "scientifically based" but as "politically based" because the Parliament and its Committee system would not hold any specific scientific expertise over and above that contained in the Framework.
3. The process contemplated by the Bill creates uncertainty as to the progress of matters the subject of the process. For example, there may, or may not be, disallowance of the instrument. Further, there is uncertainty as to how any review might be conducted.
4. The process contemplated by the Bill does not allow for independent judicial review of any permits, conditions or refunds to grant permits arising from Parliamentary review.

Extensive Delays

We have grave concerns about the workability of this Bill. The number of permits issued annually is extensive (up to 20,000), but, as we understand, most are not issued strictly in accordance with an IRA or policy determination based on an import risk analysis. On our reading of the Bill, permits not based on such a determination would become "disallowable instruments" and have to be tabled. Most permits would therefore have to be tabled.

This would cause a very significant work load first for the Department of Agriculture, Fisheries and Forestry: what permits would need to be tabled? With what information? As well, there would have to a system for monitoring the progress of permits and of advising permit applicants. Parliament also would have to develop a process for handling and considering the many thousands of permits that would be tabled. Without doubt, there would be significant delays for the issuing of all permits.

This delay would be exacerbated by the fact that permits are issued every working day, but Parliament has limited sitting days during the year. It would be very difficult to work out when a permit might be issued, and so, the planning for forward orders and logistics arrangements would become extremely complex. As well, there would be the question of when a permit holder should apply for a permit to continue importing a commodity to ensure that trade was not disrupted. There may have to be urgent imports for which a permit has to be sought (e.g., an ingredient for a local food processor), but under the proposed Bill, it would be very difficult to know when the commodity could actually be supplied.



Disclose Commercially Confidential Information

A consequence of the Bill would be the disclosure of the name of the holder of any permit tabled in Parliament. The name of a permit holder and the commodity permitted to be imported under a permit are currently, and we believe rightly, treated as confidential on commercial grounds. The Department of Agriculture, Fisheries and Forestry (“DAFF”) does not disclose this information. There seems no reason for the names of permit holders or the commodities permitted to be imported to publicly released, as who the importer is does not relate to any measure of biosecurity risk.

Another complication would be that it would only be the names of the holders of permits tabled in parliament that would be disclosed.

Weaken the Institutional Biosecurity Framework

The concept of Biosecurity being a shared responsibility has been incorporated into Australia’s biosecurity system for many years. It was articulated by the Nairn Review in 1990 and re-affirmed by the Beale review in 2009.

Industry involved in importing products into Australia, including importers, customs brokers, freight forwarders, shipping lines, logistic operators, quarantine approved premise operators, indeed all operators along the continuum of biosecurity, have a role to play in ensuring the products they deal with do not pose a biosecurity risk.

This Bill potentially sends the message to industry that the Parliament does not trust the Department to get it right and that a further check is required. But DAFF officers make decisions every day that affect industry. If Parliament questions the competence of the Department, industry may take a similar view. In addition, we note that AQIS is the government certifying body for exports. In our view, there would be a significant possibility that the status of AQIS in export activities would also be jeopardised, as overseas governments are unlikely to draw a neat distinction between import and export activities.

Finally, the Beale Panel reported that in its view there was a widespread perception among Australia’s trading partners that the biosecurity process was not sufficiently science based and prone to political intervention and protectionist. The Bill would certainly reinforce this perception.

Accordingly, for the reasons stated above, the FBIA requests the Committee to recommend that the Bill not be passed.



Should the Committee require clarification of the above points or additional information, please do not hesitate to contact me.

Yours faithfully,

Executive Director
Food & Beverage Importers Association



Members

A.Clouet (Australia)	AB Food & Beverages
Arquilla Bulk Trading	Argentine Consul
Barilla	Bon Food
Calendar Cheese Company	Canadian High Commission
Chile Trade Commission	Chung's Foods
CONGA Foods	Dried Fruit Specialist
EGTA	F Mayer Imports
Fresh Produce Marketing	Fruitmark
Great Ocean	Guzzardi Fine Foods
GAF Foods	Global Resourcing
GB-Commtrade	Gibson Freight
Goodman Fielder	Hunt & Hunt
H.A. Bennett & Sons	Hormel Foods Australia
International Trade Management	Imports of France
Intraust Foods	Jenbray Foods
Juremont Pty Ltd	Kikkoman Australia
Kraft Foods	Langdon Ingredients
Lindt & Sprüngli	M G Kailis
Manassen Foods	Maven Voyage Seafoods
Maxwell Food Products	MWT Foods
National Starch & Chemical	Natural Ingredients
Nestle Australia Ltd	Nybor Holdings
OBM International Trade	Oregon Fruit Company
Oceanic Foods	Orange & Green
Oriental Merchants	Oxo Foods
Produce Marketing Australia	Riviana Foods
Geodis Wilson	Safcol Australia
Scalzo Food Industries	Simplot Australia
Steritech	Sunrider International
Tandem Imports	Trade Commission of Denmark
Unilever Australasia	USA Agriculture Office
USA Foods	Valcorp Holdings
Woolworths	APC Logistics