

Setting the quarantine parameters

Introduction

- 2.1 Australia is a consistent supporter of free trade between nations and is a member of the World Trade Organisation (WTO). The WTO recognises that nations have a right to protect themselves from the introduction of exotic pests and diseases and has an agreed set of constraints on the protective measures member countries can impose on imports. The Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) sets the parameters on the quarantine measures which can be imposed by WTO member countries. The SPS Agreement allows WTO members to determine their appropriate level of protection (ALOP) and within this parameter set quarantine measures aimed at maintaining that ALOP.
- 2.2 When an application to import a new commodity is submitted to AFFA, Biosecurity Australia undertakes an import risk analysis (IRA) to decide whether to allow importation. If importation is approved, the IRA process sets the quarantine measures and conditions which are to be imposed on the imported commodity.
- 2.3 During the inquiry the Committee received evidence on:
- the nature of Australia's ALOP;
 - the process of conducting IRAs; and

- the potential impact of any free trade negotiations on Australia's quarantine measures.

Australia's appropriate level of protection

- 2.4 In setting its ALOP, a country seeks to balance the risks of pest or disease incursions against the benefits of unfettered trade. The ALOP is thus a 'societal value judgement' which 'reflects community expectations with regard to risk generally and, in particular, with protecting agricultural industries and the environment.' It is 'an expression of government policy'.¹
- 2.5 Australia's ALOP, as recognised by the WTO dispute panel in the *Australia Salmon Case*,² is:
- ... a high or 'very conservative' level of sanitary protection aimed at reducing risk to 'very low levels', while not based on a zero-risk approach'.³
- 2.6 While no definitive statement has been provided by AFFA concerning Australia's ALOP, information in AFFA's draft *Administrative Process for Import Risk Analysis Handbook*, and a comment provided by AFFA at a public hearing are consistent with the WTO understanding of Australia's ALOP.⁴
- 2.7 Australia's ALOP has been criticised in submissions and in evidence at public hearings. Specifically, the criticisms have been:
- the ALOP is too vague and should be better defined; and
 - there should be a different ALOP for different situations, especially as identified by broader economic considerations.

Should the appropriate level of protection be better defined?

- 2.8 The Senate Rural and Regional Affairs and Transport Legislation Committee when it reviewed the *Australia Salmon Case* commented:
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1 Mr David Wilson, *The appropriate level of protection*, in *Quarantine and market access, Forum proceedings, 6–7 September 2000*, Biosecurity Australia, Canberra 2000, p. 160.

2 In October 1988, Canada successfully appealed before the WTO, Australia's ban on the importation of Canadian salmon.

3 WTO, *Australia—measures affecting importation of salmon*, 20 October 1998, paragraph 197.

4 AFFA, *Submission No. 14*, p. 200; Ms Mary Harwood, Executive Manager, Biosecurity Australia, *Transcript, 20 September*, p. 304.

... putting in place quarantine measures determined against a concept which is inherently vague and unsubstantiated, and which can only be inferred from analysing decisions on quarantine applications, is a recipe for inviting confusion and criticism. ... the standard against which the risk is being determined must be subject to some standards, guidelines or definition. The committee regards the current situation as being entirely unacceptable.⁵

- 2.9 The Senate committee recommended that the ALOP 'be more explicit and include as part of its determination environmental factors and the application of the precautionary principle.'⁶

A more quantitative appropriate level of protection?

- 2.10 The submission from Australian Pork Ltd suggested that 'Australia's assessment of low risk is essentially qualitative which stems from Biosecurity Australia's inability to define ALOP'. It added that a more quantitative definition would be consistent with WTO rules.⁷ Australian Pork Ltd also told the Committee that a quantitative analysis would provide more certainty as to 'the outcome of and rationale behind the import risk analysis and the protocols.'⁸ This view was also supported by Australian Wool Innovation Ltd.⁹
- 2.11 The Committee notes that neither the Senate committee nor the witnesses to the inquiry volunteered a more quantitative definition of Australia's ALOP.
- 2.12 A quantitative definition of ALOP has been discussed in a Productivity Commission staff research paper. The paper asks whether the ALOP could be:

... in terms of a specific expected cost of pest or disease incursion (say \$50 000 per annum) or in probabilistic terms (say one in a million probability in 100 years of a cost or disease incursion of \$50 000 per annum)?¹⁰

5 Senate Rural and Regional Affairs and Transport Legislation Committee, *An Appropriate Level of Protection? The Importation of Salmon Products: A case study of the Administration of Australian Quarantine and the Impact of International Trade Arrangements*, Canberra, 2000, p. 97.

6 Senate Rural and Regional Affairs Committee, *An Appropriate Level of Protection? p. 189*. The government has yet to respond to the committee's report.

7 Australian Pork Ltd, *Submission No. 2*, p. 10.

8 Mr Chris Ambler, *Transcript, 17 July 2002*, p. 91.

9 Australian Wool Innovation Ltd, *Submission No. 27*, p. 361; Dr Scott Williams, *Transcript, 17 July 2002*, p. 122.

10 Exhibit No. 2, Productivity Commission, *'The Role of Risk & Cost-Benefit Analysis in Determining Quarantine Measures'*, Staff Research Paper, February 2002, p. 42.

- 2.13 The paper proceeds to suggest that more precision would impose greater transparency and consistency on quarantine decision-making, because it would make it easier for 'a regulator to be consistent in evaluation across cases'. It would also reduce the vulnerability of the regulator to 'the charge of being susceptible to other influences.' The paper notes, however, that small industries would be less capable of absorbing an expected cost of a pest or disease incursion than larger industries.¹¹
- 2.14 During a public hearing the Productivity Commission acknowledged that greater precision could also lead to more criticism and the search for loopholes.¹² In saying this, however, the Productivity Commission advised the Committee that the purpose of staff research papers was 'not to recommend policy changes but to provide information and analysis.'¹³
- 2.15 In contrast to the view expressed in the Productivity Commission staff research paper, the Committee has received evidence from the Queensland and Tasmanian Governments in support of the current definition of the ALOP. The submission from the Queensland Government commented that a more prescriptive ALOP 'would require a much more detailed import risk analysis process than the data currently available would allow.'^{14,15}
- 2.16 AFFA has responded to this issue by noting that none of Australia's trading partners have a more precise definition than Australia. As well, there would be major difficulties in having a single prescriptive ALOP because there were 'so many different circumstances where it would need to be relevant.'¹⁶
- 2.17 In a supplementary submission, AFFA stated that providing a more quantitative definition of Australia's ALOP would:
- ... create significant difficulties in terms of having to publicly quantify, in a 'one size fits all' way, the extent of expected damage Australia is prepared to carry in biological, economic or environmental terms. A specific quantitative value for the ALOP could well lead to inconclusive legal debates in Australia and in the WTO over scientific evidence pointing to quarantine measures resulting in risks being slightly greater or below the ALOP value. This would not
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11 Exhibit No. 2, pp. 42, 44.

12 Mr Garth Pitkethly, *Transcript*, 3 September 2002, p. 254.

13 Mr Robert Kerr, *Transcript*, 3 September 2002, p. 253.

14 Queensland Government, *Submission No. 32*, p. 400.

15 Mr John Pauley, *Transcript*, 3 September 2002, p. 237.

16 Ms Mary Harwood, *Transcript*, 20 September 2002, p. 304.

only be limited to border measures, as SPS measures put in place by the States/Territories in governing trade in agricultural commodities within Australia are subject to the same requirement of consistency with the national ALOP.¹⁷

- 2.18 The comment from AFFA raises the question as to whether there needs to be a 'one size fits all' definition of Australia's ALOP. This issue is discussed below.

The inclusion of the precautionary principle?

- 2.19 The precautionary principle is part of a significant number of international treaties and declarations to which Australia is a signatory. Regarding the environment, it can be stated as:

In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹⁸

- 2.20 The precautionary principle is part of the Biosafety Protocol of the Convention on Biodiversity (as known as the Cartagena Protocol), which is directed at managing the movement of living modified organisms that may have adverse effects on biodiversity and human health. (Australia is not a signatory to the Cartagena Protocol.)¹⁹
- 2.21 The precautionary principle in international treaties has usually been a guiding concept without explicit directions on how it is to be applied. This has created 'uncertainty and concern that it might be used to weaken the scientific basis of risk assessment and risk management.'²⁰ A more specific concern is that the precautionary principle in the Cartagena Protocol may be used to unduly restrict trade in products of modern biotechnology.²¹
- 2.22 Commentators have noted that the WTO Appellate Body has rejected the notion that 'if it cannot be proved that an adverse event would never occur at any point of time, a WTO Member is free to prohibit entry of a product.' The Appellate Body emphasised that the likelihood of a pest or

17 AFFA, *Submission No. 47*, p. 519.

18 *1992 Rio Declaration on Environment and Development*, Principle 15.

19 Queensland Government, *Submission No. 30*, p. 398.

20 Dennis Gebbie and Bruce Bowen, *Does the SPS Agreement need a precautionary principle? The Case of food safety*. in *Quarantine and market access, Playing by the WTO rules, Forum proceedings, 6-7 September 2000*, p. 167.

21 Queensland Government, *Submission No. 30*, p. 398.

disease transmission must be indicated as a probability, and that the precautionary principle did not override the provisions of the SPS Agreement.²²

- 2.23 Nevertheless, other commentators have argued that the SPS Agreement in fact allows a precautionary approach because countries are able to determine their own ALOP which may be greater than that reflected in relevant international standards, guidelines and recommendations.²³
- 2.24 Indeed, the Committee notes that Article 5.7 allows countries, in circumstances where relevant scientific information is insufficient, to provisionally adopt quarantine measures on available pertinent information, provided they seek within a reasonable time the additional information needed for a more objective assessment of risk.

Should there be different appropriate levels of protection for different situations?

- 2.25 Returning to whether Australia should have a 'one size fits all' ALOP, the Committee received evidence from members of the horticulture industry arguing for different ALOPs depending on industry circumstances. Horticulture Australia Council Ltd told the Committee that for a small industry which might be destroyed by the establishment of a disease or pest there should be a different ALOP as compared to that for a large industry which could cope with the establishment of a pest or disease.²⁴
- 2.26 The implication is that the ALOP should be more 'conservative' for smaller, more economically vulnerable industries.
- 2.27 Evidence was also received from the Murray Goulburn Cooperative Co Ltd which would lead to the same principle of different ALOPs for different industries, but with the opposite outcome. The witness argued that the ALOP 'should take account of the economic impact of quarantine barriers on the Australian community as a whole and on the Australian export industries in particular.' The witness added, 'We are not balancing one industry against the other; we are balancing the good for the

22 Stephen Deady, *Lessons for Australia from WTO dispute settlement cases*, in *Quarantine and market access, Playing by the WTO rules, Forum proceedings, 6–7 September 2000*, p. 121.

23 Dennis Gebbie and Bruce Bowen, *Does the SPS Agreement need a precautionary principle? The Case of food safety*, in *Quarantine and market access, Playing by the WTO rules, Forum proceedings, 6–7 September 2000*, p. 167.

24 Mr Rod Fayle, *Transcript, 29 July 2002*, p. 142.

Australian economy’, but conceded that the result may be that ‘one industry benefits more than another.’²⁵

- 2.28 Murray Goulburn Cooperative cited instances where the governments of the Philippines, Thailand and the United States had hinted at increased access to their markets as a trade-off for greater access for particular commodities (eg bananas and chicken meat) to the Australian market.²⁶ This view was supported by the Australian Dairy Corporation, which advised of the loss of about \$4 million worth of trade over a 4 month period during a ‘tropical fruit argument’ with the Philippines in 2000.²⁷
- 2.29 The need for more economic assessment of quarantine policies has also been discussed in a paper by Ms Sallie James and Professor Kym Anderson. The paper comments that quarantine measures mainly focus on the effects of restrictions on import-competing Australian producers, but including the effects on consumers demonstrates that:
- ... even if imported diseases were to wipe out a local industry, the gains to consumers may outweigh the losses to import-competing producers from removing a ban on imports.²⁸
- 2.30 The paper includes as a case study an economic analysis of Australia’s banana industry and suggests that allowing bananas into Australia could benefit consumers by \$300 million annually, while producers would lose \$60–100 million annually. The net gain would be ample to fully compensate the growers’ losses. The authors’ conclusion from the case study is that it would be in Australia’s economic interest to remove the current ban on imported bananas and enjoy the net gain from trade.²⁹
- 2.31 A note of caution has been introduced in a paper by Digby Gasgoine who argues that introducing economic cost/benefit analysis would result in the restrictiveness of the SPS regime being determined by the ‘relative economic competitiveness of domestically produced and imported supplies of the commodity.’ In the case of imports from two countries with the same disease status the quarantine controls would be stricter on the country with the less efficient export industry. Therefore, there would

25 Mr Paul Kerr, *Transcript*, 3 September 2002, p. 267.

26 Mr Paul Kerr, *Transcript*, 3 September 2002, pp. 268–9.

27 Mr Phillip Goode, *Transcript*, 3 September 2002, p. 275.

28 Exhibit No. 4, Sally James & Kym Anderson, *On the need for more economic assessment of quarantine/SPS policies*, in *Australian Journal of Agricultural and Resource Economics* 42 (4): 525–44, December 1998, *Abstract*.

29 Exhibit No. 4, p. 10.

be discrimination which would contravene the goal of a non-discriminatory GATT regime.³⁰

2.32 The discrimination issue was also discussed in the Productivity Commission staff research paper. The requirement for consistency is covered in Article 5.5 of the SPS Agreement which states:

... each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

2.33 However, the research paper raised a possible defence based on the discrimination not being arbitrary because it had resulted from the 'consistent application of a transparent and objective analytical framework.' Nevertheless, the paper proceeded to raise possible breaches of other SPS Agreement articles:

- Article 2.3 which prohibits arbitrary or unjustifiable discrimination where identical or similar conditions prevail and its application in a manner constituting a disguised restriction on international trade;
- Article 5.3 which lists ways to assess risks which do not include consideration of competition or trade related impacts of allowing or restricting imports; and
- Article 3.1 which requires Members to base their quarantine measures on international standards, guidelines or recommendations, where they exist, except where there is a scientific justification to maintain higher measures (Article 3.3).³¹

2.34 The paper concluded:

Although each of these legal arguments appears to have some merit, they must be considered debatable until further WTO guidance is given (through its dispute settlement system), or there is an explicit change in the rules.³²

2.35 The Committee notes that use of broader economic considerations may also contravene Article 2.2 which requires Members to base quarantine measures on scientific principles and not maintain them without sufficient scientific evidence, except in cases where relevant scientific evidence is

30 Digby Gasgoine, *The 'appropriate level of protection': an Australian perspective*, in *The Economics of Quarantine and the SPS Agreement*, Ed Anderson, McRae & Wilson, Centre for International Studies, Adelaide and AFFA Biosecurity Australia, Canberra, 2001, pp. 136-7.

31 Exhibit No. 2, pp. 52-3.

32 Exhibit No. 2, p. 53.

insufficient, whereupon the measure can be provisionally adopted (Article 5.7).

The Committee's conclusion

- 2.36 In drawing its conclusion, the Committee notes AFFA's evidence that other WTO countries have not adopted a precisely defined ALOP. The example of a more quantitative ALOP suggested in the Productivity Commission staff research paper, unfortunately does not in the Committee's view provide the answer.
- 2.37 Setting a benchmark allowable annual cost of a potential pest or disease incursion raises the problem of accurately predicting the potential cost of a pest or disease incursion before that incursion happens. As well, the benchmark cost would have to be revised with increases due to inflation. The Committee agrees with the Productivity Commission that there is also the issue of equity for small industries which might be unable to cope with the benchmark cost of allowable incursions.
- 2.38 On the other hand, using the alternative probabilistic ALOP invites a change in the ALOP to zero risk if that probabilistic event occurs.
- 2.39 In both instances therefore it would be vital to set the benchmark at the appropriate level. Consequently, there is likely to be considerable and protracted debate on this issue by interested parties and the public in general. The Committee doubts whether the outcome would be an ALOP which did not attract legal challenge in both Australia and the forum of the WTO.
- 2.40 The Committee considers, therefore, that the case for a more quantitative ALOP has not been sustained.
- 2.41 Regarding the precautionary principle, the Committee believes that there is sufficient provision already in the SPS Agreement to address the uncertainty posed by new pest or disease threats to Australia, or from organisms which suddenly appear as a new pest or disease.
- 2.42 The Committee does not support the inclusion of broader economic considerations in deciding Australia's ALOP. The notion of allowing certain industries to be put at greater quarantine risk to pests and diseases in order to enhance the export opportunities of other industries is rejected. The Committee believes there are benefits to Australia having a diverse economy. A varied economy is a robust economy which is not unduly restricted by artificial constraints.

- 2.43 Notwithstanding the need to maintain a diverse economy for broader societal reasons, it is likely that including broader economic considerations in setting an ALOP, or adopting different ALOPs for different industries, could raise serious problems with the WTO. Indeed, evidence provided to the Committee points to potential legal difficulties arising from possible breaches of the SPS Agreement.
- 2.44 It is also clear that there is not a substantial body of case law in the Appellate Body of the WTO. Consequently, because of the costs and potential international damage arising from appeals to the WTO, it is not in Australia's best interest to become 'creative' in setting its ALOP, or creating several ALOPs, in order to rectify this case law deficiency.
- 2.45 In conclusion, the Committee believes that Australia should adopt a cautious approach as regards changing its ALOP. The WTO considers that Australia's current definition of its ALOP is appropriate, so there is no need to change it—to do otherwise would needlessly increase uncertainty. The ALOP has to be expressed in broad general qualitative terms if it is to cover all circumstances.

The import risk analysis process

- 2.46 The broad parameters for IRAs are defined by paragraphs 2, 3 and 4 of Article 5 of the SPS Agreement. They specify the use of scientific and technical consideration, but allow limited economic and trade factors to be considered when undertaking IRAs:
2. In the assessment of risks, Members shall take into account:
 - available scientific evidence;
 - relevant processes and production methods;
 - relevant inspection, sampling and testing methods;
 - prevalence of specific diseases or pests;
 - existence of pest—or disease—free areas;
 - relevant ecological and environmental conditions; and
 - quarantine or other treatment.
 3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors:

- the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease;
- the costs of control or eradication in the territory of the importing Member; and
- the relative cost-effectiveness of alternative approaches to limiting risks

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

2.47 AFFA's procedures for undertaking IRAs have evolved in response to various reviews, notably the 1996 Nairn Review and Auditor-General's recent audit.³³ The procedures currently followed are set out in AFFA's *Draft Administrative Framework for Import Risk Analysis* released in September 2001.³⁴ The Committee notes that the procedures remain in draft form and are not reflected by the handbook published on AFFA's website. The website handbook is a 1998 document and contains advice on routine and non-routine risk analyses, processes which were discontinued after the Auditor-General's review.³⁵

Recommendation 1

2.48 **The Department of Agriculture, Fisheries and Forestry—Australia should:**

- **finalise its *Draft Administrative Framework for Import Risk Analysis*; and**
- **update its website information to reflect the current procedures for import risk analysis.**

Environmental considerations

2.49 AFFA provides a flow chart as an annex to its *Draft Administrative Framework for Import Risk Analysis* which indicates that following lodgement of an import proposal Biosecurity Australia consults with Environment Australia.

33 AFFA, *Submission No. 14*, pp. 122–4.

34 AFFA, *Submission No. 14*, pp. 123, 193–296.

35 AQIS, *AQIS Import Risk Analysis Process Handbook*, Canberra, 1998.

- 2.50 The audit report commented that AFFA and Environment Australia had started developing a protocol 'for consultation between the two departments to clarify working relationships, role and responsibilities under the [quarantine and environment] legislation.' The Auditor-General urged prompt finalisation of the protocol.³⁶
- 2.51 The submission from Environment Australia advised it was 'very supportive of the recent enhancements to the consultation and IRA assessment processes undertaken by Biosecurity Australia' and provided additional information about the content of the memorandum of understanding (MOU) that was being developed. The MOU was expected to:
- enhance arrangements for the integration of Environment Australia's advice into IRA processes, especially where substantial environmental issues were likely to become involved; and
 - establish a mechanism for ongoing consultation on quarantine matters generally.³⁷
- 2.52 Environment Australia told the Committee that the MOU was almost complete,³⁸ and later at the Committee's final public hearing in September 2002, AFFA confirmed that the text had been finalised.³⁹

Recommendation 2

- 2.53 The Department of Agriculture, Fisheries and Forestry—Australia and Environment Australia should report to the Committee on the effectiveness of the memorandum of understanding between them on quarantine matters in its response to this report.**

Stakeholder comments

- 2.54 During the public hearings the Committee asked witnesses about AFFA's procedures for IRAs. In general, witnesses responded that there had been an improvement in the IRA process since the audit report.⁴⁰

36 Auditor-General, *Audit Report No. 47, 2000–01*, p. 114.

37 Environment Australia, *Submission No. 20*, p. 282.

38 Mr Gerard Early, *Transcript, 16 July 2002*, p. 50.

39 Ms Mary Harwood, *Transcript, 20 September 2002*, p. 318.

40 National Farmers' Federation, *Transcript, 17 July 2002*, p. 86; Australian Pork Ltd, *Transcript, 17 July 2002*, p. 89; Queensland Fruit and Vegetable Growers, *Transcript, 29 July 2002*, pp. 152, 154; Australian Chicken Meat Federation Inc, *Transcript, 5 August 2002*, p. 193.

2.55 However, the following issues were raised in evidence:

- consideration of the economic effects on industry;
- regional issues;
- the expertise needed to undertake IRAs;
- the legal underpinning of the procedures;
- the costs associated with IRAs; and
- the timeliness of the IRA process.

Economic effects on industry

2.56 Notwithstanding the ability under WTO rules for an IRA to consider limited economic effects, several submissions and witnesses suggested that broader economic impacts on industry should be considered. However, when pressed by the Committee, witnesses confirmed that scientific considerations should come first.

2.57 The Quarantine and Exports Advisory Council (QEAC) commented that the introduction of a new commodity into Australia may well have an economic impact and suggested this should be identified and dealt with 'in a different area, other than in the quarantine or import risk assessment area.'⁴¹

2.58 Australian Pork Ltd took a similar line to QEAC and suggested that government should undertake a review to determine 'whether any adjustment needs to be made to assist industries if imports of a particular product are allowed.'⁴² Comments from Australian Wool Innovation Ltd and the Queensland Fruit and Vegetable Growers also supported this view.⁴³

2.59 The Committee has considered whether significant IRAs should be accompanied by economic impact statements. However, to be useful and credible such impact statements would require resources and expertise to prepare. Not only would this increase the costs arising from IRAs, but the outcome of such a move might also increase pressure on government to bolster industries facing competition from imports. Such support could be regarded as a covert industry subsidy and as such undermine Australia's international stance on reducing subsidies. To be timely an impact

41 Mr Andrew Inglis, *Transcript*, 16 July 2002, p. 65.

42 Ms Kathleen Plowman, *Transcript*, 17 July 2002, p. 90.

43 Mrs Jane Holloway, *Transcript*, 17 July 2002, p. 90; Mr Mark Panitz, *Transcript*, 29 July 2002, p. 150.

statement would need to accompany the report of an IRA which would potentially complicate early release of IRAs.

Regional issues

- 2.60 The Tasmanian Government in its initial submission to the inquiry argued that the SPS Agreement allowed different quarantine measures to be imposed on commodities imported to different regions of Australia. Argument on this issue had resulted in a protracted dispute both within Australia, and between Australia and Canada at the WTO . Refusal by AFFA to adopt this stance also underlay Tasmania's current fish quarantine measures which were considered to breach WTO rules.⁴⁴
- 2.61 In a supplementary submission, the Tasmanian Government advised the Committee that its concerns had been addressed by an agreement reached at a meeting of the Primary Industries Ministerial Council. Regional differences in risk could be addressed by differing measures in specific regions and an agreed partnership approach allowing early and comprehensive cooperation 'should facilitate the process for commodities where regional differences in risk exist.'⁴⁵
- 2.62 At the Committee's final public hearing, AFFA confirmed that an agreement had been reached between the Commonwealth and the states on regional issues.⁴⁶
- 2.63 The Committee in concluding that the regional issue appears to have been resolved, notes that Article 6, paragraph 1 of the SPS Agreement concerning regional differences could act both ways. As well as allowing increased quarantine measures in certain regions, it might permit reduced quarantine measures in regions where there is less risk. For example, a primary product could be barred from entering mainland Australia because of the risk of importing disease, but it might be argued that it be allowed into a particular region because that product is **not** grown in that region. Article 6, paragraph 1 reads:

Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area — whether all of a country, part of a country, or all or parts of several countries — from which the product originated and **to which the product is destined.**
[emphasis added]

44 Tasmanian Government, *Submission No. 1*, p. 5.

45 Tasmanian Government, *Submission No. 33*, p. 404.

46 Ms Mary Harwood, *Transcript, 20 September 2002*, p. 319.

Expertise needed to undertake import risk analyses

Involvement of industry

2.64 AFFA's draft handbook on its administrative process for IRAs provides information on the creation of the panels which conduct IRAs. The Australian Chicken Meat Federation Inc (ACMF) criticised the composition of the IRA panels:

... it never fails to amaze me that when an IRA panel is set up—and Biosecurity Australia goes out there with the panel—there is no industry representation on that panel. However, the greatest expertise in the poultry industry in Australia rests with the industry and not with the people they put on panels. ... I am talking about a technical representative. I am not talking about someone who has got more of a political axe to grind ...⁴⁷

2.65 The witness acknowledged, however, that industry had an opportunity to comment through the normal IRA process and with the current IRA the opportunity had been 'reasonable'.⁴⁸

2.66 The Committee notes that AFFA's draft handbook permits Biosecurity Australia to draw on outside expertise for its IRA panels, including from industry. The handbook comments that 'in selecting members, Biosecurity Australia will draw on the register of experts it maintains and on nominations made by stakeholders and other agencies.'⁴⁹

2.67 Stakeholders are also able to comment at the commencement of an IRA on the scope, timetable, and list of the expertise required to undertake the task, as well as appeal the subsequent decision of the IRA manager. Stakeholders are consulted on any technical issues paper and on the draft IRA report. The provisions of the final report are also appealable.⁵⁰

2.68 The Committee believes that industry is adequately involved in the IRA process through being able to nominate experts for Biosecurity Australia's register, and that AFFA's administrative procedures for IRAs provide adequate opportunity for stakeholder input.

47 Dr Jeffery Fairbrother, *Transcript*, 5 August 2002, p. 193.

48 Dr Jeffery Fairbrother, *Transcript*, 5 August 2002, p. 193.

49 AFFA, *Submission No. 14*, p. 217.

50 AFFA, *Submission No. 14*, pp. 211–215.

Centre of excellence for quarantine risk management

- 2.69 In 1996, the Nairn Quarantine Review recommended the establishment of 'a Key Centre for quarantine-related risk analysis to enhance Australia as a world leader in this field.' The recommendation was not accepted on the grounds that within the additional resources provided at the time, AQIS and the Bureau of Resource Sciences would continue to develop risk assessment methods.⁵¹
- 2.70 The issue was raised again in QEAC's submission which recommended that a centre of excellence be established. QEAC envisaged the centre as integrating 'the skills of risk analysis and management, economics and science to ensure the comprehensive development of policies and protocols.' It would 'ensure establishment and continuation of the necessary intellectual capacity in risk management' and would be viewed positively internationally.⁵²
- 2.71 Appearing before the Committee, QEAC commented that risk analysis was a discipline which went beyond the quarantine area. It was an extremely difficult area especially where efforts were being made to quantify risks. The challenges of the discipline was one of the reasons for disputes between trading partners over the scientific basis of quarantine decisions. Australia had areas of expertise within AQIS, Biosecurity Australia, and CSIRO, but this needed to be drawn together into one organisation.⁵³
- 2.72 Support for a centre of excellence was provided by CSIRO, which noted Australia was no longer the leader in the area and had slipped behind New Zealand and the US. CSIRO acknowledged that Biosecurity Australia had done good work on refining the IRA process, but because of pressure from the IRA workload it had found it difficult to undertake ground-breaking research such as exploring whether there were better ways of hazard identification.⁵⁴
- 2.73 A second benefit from a centre of excellence, CSIRO argued, was that it would provide a degree of independence in the eyes of industry. Total independence from Biosecurity Australia was not necessarily the best model because Biosecurity Australia was the major client for much of the

51 AFFA, *Submission No. 14*, p. 180, referring to Recommendation 47 of the Nairn Review and the Government response.

52 QEAC, *Submission No. 6*, p. 53.

53 Mr Andrew Inglis, *Transcript, 16 July 2002*, p. 64.

54 Dr Robert Floyd, *Transcript, 3 September 2002*, pp. 243, 246.

projected research output. Consequently, Biosecurity Australia needed to be involved in the organisation.⁵⁵

2.74 The witness advised that CSIRO had considered whether to establish a cooperative research centre for biosecurity risk analysis, but had not proceeded. This was because firstly there were insufficient skills in Australia around which to build the centre, and secondly there was tension between the research goals of its government and private industry clients which meant a **cooperative** research centre was not practical.⁵⁶

2.75 The model envisaged by CSIRO was for experts from various organisations to be involved for a percentage of their time on research activity. There would be:

... a number of key staff from AFFA, some state departments, CSIRO and some universities. ... We then form linkages with the agencies, such as the Plant Protection and Quarantine group in the US and the agencies in New Zealand. They are actually very keen to work with us on some of these issues.⁵⁷

2.76 Responding to the issue, AFFA stated that the more skills brought to bear on risk analysis the better, but the question with a prospective cooperative research centre is how was it to be resourced.⁵⁸

2.77 The Committee considers that it is time for the Government to revisit the Nairn Quarantine Review's recommendation for the creation of a body to draw together a critical mass of expertise in risk analysis. Such a move could help re-establish Australia's primacy in the field and reinforce Australia's credibility when quarantine issues were brought before the WTO.

Recommendation 3

2.78 **A centre of excellence should be established to undertake risk analysis research. The Department of Agriculture, Fisheries and Forestry—Australia should review, and subsequently advise the Government, on options for the establishment of such a research centre.**

55 Dr Robert Floyd, *Transcript*, 3 September 2002, p. 243.

56 Dr Robert Floyd, *Transcript*, 3 September 2002, p. 247.

57 Dr Robert Floyd, *Transcript*, 3 September 2002, p. 248.

58 Ms Mary Harwood, *Transcript*, 20 September 2002, p. 309.

Legal underpinning of the procedures

2.79 The submission from the Australia Banana Growers' Council Inc (ABGC) provided several examples where it believed the 'Philippine bananas IRA' had not followed appropriate procedures. The ABGC concluded:

The IRA process is currently an administrative process governed by policy guidelines. Any departure by Biosecurity Australia from those guidelines has the potential to significantly disadvantage stakeholders participating in the IRA process. However, as the process is governed by policy guidelines, stakeholders have little or no opportunity to legally review the conduct of the process by Biosecurity Australia. The ABGC believes that this can, in some cases, result in stakeholders being denied procedural fairness which erodes credibility in the process and contributes to the perception of a lack of accountability on the part of Biosecurity Australia.

It is recommended that:

- the IRA process should be given legislative backing so that Biosecurity Australia cannot deviate from the prescribed process unless authorised under the legislation;
- decisions made in the IRA process should be subject to statutory judicial review;
- the IRA process should only be varied after consultation with stakeholders.⁵⁹

2.80 In support of its view, ABGC told the Committee that:

- apart from bringing the matter to Biosecurity Australia's attention, there was little industry could do if it believed procedures had not been followed;
- executive officers from AFFA could decide to vary the process and 'nowhere are they called to account';
- when no reasons were given it was difficult to explain to banana growers; and
- consequently this bred 'suspicion and fear, particularly at the regional and rural level'.⁶⁰

2.81 AFFA responded in a supplementary submission to ABGC's recommendation that the IRA process should be legislated. The department noted that the IRA process was already subject to a

⁵⁹ ABGC, *Submission No. 31*, p. 392.

⁶⁰ Mr Tony Heidrich, *Transcript, 29 July 2002*, pp. 157, 162, 163.

considerable amount of review including as a last resort Administrative Decisions Judicial Review (ADJR) action. AFFA noted several advantages of the present system, which included:

- a scientific process;
- as open and transparent a process as anywhere in the world;
- consistency with WTO obligations; and
- efficiency and the flexibility to respond to emergency situations while meeting a wide variety of quarantine situations.⁶¹

2.82 AFFA also listed the disadvantages of legislating the process:

- a greater time to make amendments and reduced flexibility for subsequent adjustment;
- a possible compromise to the ability to follow best practice because it would lock in procedures;
- a more costly and time consuming administration;
- an inflexible administrative system causing even 'simple' import proposals to be subject to unnecessary and resource-intensive processes, resulting in controversy and delays to useful imports;
- the real possibility of extensive challenge and litigation; and
- the opportunity for relevant overseas countries to seek review of controversial decisions in Australia's courts as well as before the WTO.⁶²

2.83 The Committee considers there is no substantial case for legislating the IRA process. However, once AFFA's draft procedures are finalised (the subject of Recommendation 1), **the Committee expects that they will be followed.**

The opportunity to appeal

2.84 AFFA's draft procedures allow stakeholders to appeal to a Deputy Secretary of AFFA on the proposed scope of an IRA, its indicative timetable, and the list of required expertise. At the completion of the IRA and the publication of the provisional policy determination, stakeholders again have the opportunity for an appeal. The appeal is heard by an IRA Appeal Panel (IRAAP) comprising:

61 AFFA, *Submission No. 47*, p. 522.

62 AFFA, *Submission No. 47*, pp. 522–3.

- the Chair of QEAC (acting as Chair);
 - the Chief Veterinary or Plant Protection Officer;
 - a member of AFFA from outside Biosecurity Australia;
 - a member from a State or Territory agriculture, fisheries or forestry agency; and
 - one other member of QEAC nominated by the Chair.⁶³
- 2.85 The Auditor-General noted that stakeholders were concerned that appeals were 'ultimately decided by the departmental decision-maker rather than an independent body', but concluded that AFFA had 'effectively implemented the Government's policy on appeals.'⁶⁴
- 2.86 The Committee notes that at the time of the audit there had been six appeals to the AFFA secretary, all dismissed; and three to IRAAP, two of which were **successful**. These appeals were under AFFA's 1998 procedures which were replaced with the current revised draft procedures in September 2001.⁶⁵
- 2.87 The Committee concludes on the evidence before it, that there is no reason to alter the appeal provisions. Indeed, appeals to the IRAAP have at least a reasonable chance of success, which is good evidence of the IRAAP's impartiality.

Potential for conflicts of interest

- 2.88 The Tasmanian Salmonid Growers Association (TSGA) raised the issue of potential conflicts of interest for officers involved in the IRA and policy making process.⁶⁶ At the hearing the TSGA provided hypothetical examples where a conflict might have occurred.⁶⁷
- 2.89 Notwithstanding the truth or otherwise of these claims, the Committee believes it is important for transparency and accountability that individuals involved with IRA decision-making declare any potential conflict of interest.

63 AFFA, *Submission No. 14*, pp. 211, 215, 222.

64 Auditor-General, *Audit Report No. 47 2000-01*, p. 120.

65 Auditor-General *Audit Report No. 47 2000-01*, p. 136.

66 TSGA, *Submission No. 44*, p. 486.

67 Mr Owen Carrington Smith, *Transcript, 3 September 2002*, p. 301.

Recommendation 4

- 2.90 **The Department of Agriculture, Fisheries and Forestry—Australia’s *Administrative Process for Import Risk Analysis* should contain provisions requiring individuals involved with an IRA to declare any conflict of interest.**

Facilitating import risk analyses

- 2.91 The ABGC raised the issue of how far Australia should go in facilitating market access especially when an IRA revealed a gap in scientific knowledge. ABGC’s submission stated:

While it is appropriate for Biosecurity Australia and Risk Assessment Panels to assist applicants in preparing appropriate experimental research protocols to fill the gaps in knowledge and to supervise that research, the ABGC believes that in no circumstances is it appropriate for Biosecurity Australia to expend public funds to undertake its own experimental research to fill gaps in knowledge. ... the onus should be on the applicant to demonstrate, through appropriate verifiable scientific and technical data that the importation of a particular commodity satisfies Australia’s acceptable level of protection.⁶⁸

- 2.92 The ABGC added that if access to Australian markets was going to benefit an exporting country, it, rather than the Australian taxpayer, should pay for any research work that was required.⁶⁹
- 2.93 Support was provided by the TSGA which suggested that it was far too easy for countries to apply to import products into Australia without presenting a lot of the science which is needed to make the assessment.⁷⁰
- 2.94 In drawing its conclusion, the Committee notes that paragraph 7 of Article 5 of the SPS Agreement stipulates that where relevant scientific evidence is insufficient and a WTO member provisionally adopts a series of quarantine measures, ‘Members shall seek to obtain the additional information for a more objective assessment of risk ... within a reasonable period of time.’

68 ABGC, *Submission No. 31*, p. 393.

69 Mr Tony Heidrich, *Transcript*, 29 July 2002, p. 159.

70 Mr Owen Carrington Smith, *Transcript*, 3 September 2002, p. 300.

- 2.95 As a signatory to the WTO agreement it is reasonable for Australia to facilitate access to the Australian market. Indeed, the paper from Ms Sallie James and Professor Kym Anderson argues that in the case of banana importation such access would benefit Australians.
- 2.96 The Committee has no evidence that the assistance provided by AFFA is inappropriate and does not support the ABGC view.

Timeliness of the import risk analysis process

- 2.97 The Auditor-General found in June 2001 that IRAs were taking significantly longer than anticipated. Consequently, AFFA was only able to start three animal IRAs in 1999 and one in 2000 compared with over 30 new requests received. IRAs were taking about 20 months to complete with more recent ones taking an average of over 30 months.
- 2.98 AFFA responded to the audit findings by advising it was attempting to improve its management of IRA by greater use of 'generic' or global IRAs where one IRA addressed the same commodity from different countries.⁷¹
- 2.99 A supplementary submission from AFFA indicated that Biosecurity Australia's resources only allowed between 45 and 50 IRAs to be undertaken at any one time. Currently there were 46 IRAs underway with 165 requests awaiting consideration. However, it was anticipated only 70–80 of these requests would proceed to a full IRA. The number of requests had dropped from 23 in 2000, to 11 in 2001 and 9 to October 2002, because a detailed application was now required to ensure that any request was genuine.⁷²
- 2.100 The delays in IRA completion appear to be causing a degree of frustration expressed by some of Australia's trading partners. For example the Australian Dairy Corporation (ADC) told the Committee that Thailand was not responding positively to requests to improve access for cheese, citing the need to 'solve the chicken meat problem' which had been going on for 'seven or eight years at least.'⁷³
- 2.101 The ADC agreed that the length of time for an IRA and the waiting list contributed to the perception that Australia was using quarantine as a trade barrier, and added:

71 Auditor-General, *Audit Report No. 47, 2000–01*, p. 122–3.

72 AFFA, *Submission No. 52*, p. 604.

73 Mr Phillip Goode, *Transcript, 3 September 2002*, p. 274.

Looking at it from the point of view of an exporter, I can understand their anger. The longer it takes, the more that is going to grow, the more political it becomes ...⁷⁴

2.102 The solution offered by the ADC was to increase resources and to prioritise the IRAs. IRAs originating from more important trading partners could be looked at first because delays could affect trade.⁷⁵ The submission from ADC even suggested the fast tracking of IRAs originating from countries negotiating preferential trade agreements in return for better market access for Australia agricultural products.⁷⁶ However, when questioned by the Committee, ADC emphasised that less significant trade partners should not be continually pushed to bottom of the list.⁷⁷

2.103 AFFA responded in its supplementary submission that recent changes to IRA procedures were expected to ease potential delays by identifying and handling any technical concerns of stakeholders earlier in the process. AFFA added:

However, the size of the backlog is directly related to the speed with which IRAs can be dealt with. This depends on a number of factors including the resources available (availability of suitably qualified external experts in addition to Biosecurity Australia staff), the complexity of the IRA (eg the number and type of pests and diseases that need to be considered), the availability of published or other information necessary to support the analysis, and the quality, completeness and timing of responses by the proponent country to requests for information.⁷⁸

2.104 The main impediments, AFFA advised, were in some cases the lack of essential information due to deficiencies in scientific knowledge or delays in obtaining from the applicant information on pests and diseases which were relevant to the IRA. Biosecurity Australia conducted IRAs according to a published, structured and transparent process—there was no scope to fast track IRAs.⁷⁹

74 Mr Phillip Goode, *Transcript, 3 September 2002*, p. 276.

75 Mr Phillip Goode, *Transcript, 3 September 2002*, p. 276.

76 ADC, *Submission No. 8*, p. 69.

77 Mr Phillip Goode, *Transcript, 3 September 2002*, p. 277.

78 AFFA, *Submission No. 52*, p. 604.

79 AFFA, *Submission No. 52*, p. 605.

- 2.105 The Committee estimates that at the current rate, Biosecurity Australia may reduce the current backlog to less than ten in about six years.⁸⁰ If there was a backlog of about ten, applicants could expect to wait for about six months before the IRA was commenced. The Committee believes this is a reasonable waiting time. However, if about 24 new applications are received on average each year, or the time to complete IRAs increases to an average of just over 4 years, the backlog will never be reduced.
- 2.106 It is important that the IRA backlog be reduced to a reasonable number in a reasonable time to remove any perception that Australia is using a lengthy IRA process as a non-tariff trade barrier. This is especially important because of Australia's stance supporting free trade in commodities.

Recommendation 5

- 2.107 **The Government should provide sufficient resources to Biosecurity Australia to ensure that within five years the backlog in IRAs is such that new applicants can expect to wait no longer than six months on average before their IRA commences.**
- 2.108 The Committee does not support rushing particular IRAs or manipulating the waiting list to favour applications from particular countries. It is important that the science underpinning the quarantine measures arising from an IRA is not compromised by haste. As well, 'playing favourites' risks creating the perception that Australia is prepared to compromise its quarantine to facilitate trade with particular countries.

Free trade agreements

- 2.109 Several submissions raised concerns that Australia might trade off its position on quarantine to facilitate free trade agreements with particular trade partners. The submission from the ACMF referred to 'numerous references to "genuine co-operation and resolution" of quarantine

80 The estimate assumes the current 'real' backlog is 80, 11 new applications are made each year, it takes an average of 2 years to complete an IRA, and Biosecurity Australia can undertake 48 IRAs concurrently. Every 2 years Biosecurity Australia receives 22 new applications, but completes 48—a net biennial reduction in the backlog of 26.

matters' in Department of Foreign Affairs and Trade publications concerning a possible free trade agreement with Thailand.⁸¹

- 2.110 Submissions from the Horticulture Australia Council Ltd and the National Farmers' Federation also declared that the scientific basis for Australia's quarantine measures should not be compromised to facilitate free trade agreements.⁸²
- 2.111 AFFA has responded to this issue stating:
- ... Australia has made it clear that it will not be negotiating on quarantine issues or agreeing to settlement of quarantine issues as a precondition for negotiations of free trade agreements.⁸³
- 2.112 The Committee also notes a media release by the Minister for Agriculture, Fisheries and Forestry which stated that in the current negotiations with the United States there had been 'no agreement to change Australia's quarantine standards' and that the 'approach to quarantine will not be a bargaining chip in any negotiations.'⁸⁴
- 2.113 The Committee agrees that Australia's quarantine standards should not be compromised.

81 ACMF, *Submission No. 4*, p. 37.

82 HAC, *Submission No. 19*, p. 263; NFF, *Submission No. 26*, p. 354.

83 AFFA, *Submission No. 52*, p. 605.

84 Minister for Agriculture, Fisheries and Forestry, Hon Warren Truss MP, *Media Release, Truss rejects ridiculous claims on quarantine*, 26 September 2002.

