

EXECUTIVE SUMMARY AND RECOMMENDATIONS

On 19 July 1999, AQIS announced amended quarantine measures for salmon products, non-marine finfish and ornamental finfish. The amended measures resulted from a successful challenge in the World Trade Organisation [WTO] by Canada against Australia's quarantine measures for salmon. Australia was required to make its quarantine measures for salmon less trade restrictive, but at the same time tightened import controls on bait fish and ornamental finfish. The amended arrangements met with significant criticism within Australia and were the subject of a further challenge by Canada.

Australia's Membership of the WTO

Australia's membership of the World Trade Organisation (WTO) carries with it rights and obligations, which affect the legal and regulatory regime established by Australia for the importation of goods. In particular, it is a signatory state to the Agreement on Sanitary and Phytosanitary Measures, the principal agreement governing the use of import controls, the aim of which was to allow only scientifically-based health protection, and not to allow measures implemented as trade restrictive measures. It is the requirements of this agreement which were the subject of the salmon dispute within the WTO.

Impact of the Amended Measures

Concerns about the potential negative impact of the decision were expressed by representatives of the aquaculture industry in Tasmania and Victoria, recreational fishing bodies and environmental interests. However, the AQIS decision, which included the tightening of measures for the import of baitfish and ornamental finfish, also had implications for the tuna fishing industry, the cray fishing industry and importers of goldfish and other ornamental finfish.

Australia commands a premium in the international market for food products as a result of its disease free status. Should diseases not currently found in fish be introduced into Australia as a result of the amended quarantine measures, the consequences are potentially significant.

Tasmania's 'clean and green' image is a prime marketing device, allowing that state to charge a premium on many of its products. Any disease incursion has the potential to undermine the image and impact negatively on that premium. Opponents of the AQIS 19 July 1999 decision argue that the environment and native fish species are also at risk.

However, the decision had potential to impact negatively on importers of baitfish for the tuna and cray fishing industries, sited principally in South Australia and Western Australia respectively, by restricting the quarantine requirements on imports of baitfish. The pet industry was also concerned that any further restrictions on the

import of ornamental finfish and particularly goldfish, would affect the viability of sections of the industry.

Referral of the Inquiry

The Senate referred the inquiry to the Committee, charging it with the investigation of the following matters:

The effectiveness of the legal and regulatory regimes governing the Australian Quarantine and Inspection Service (AQIS) and the need to ensure transparency, consistency, scientific rigour and the highest standards of protection of the environment, the local fish population and the fishing and recreational fishing industries of Australia, having regard, in particular, to the administrative procedures and decision-making processes involved in the recent AQIS decision to allow the importation of salmon products into Australia

Major Issues

The following major matters became the focus of the inquiry:

- a) The defining of Australia's Appropriate Level of Protection;
- b) The import risk analysis process, particularly the consultation and notification procedures set out in the AQIS handbook and the science and methodology of the Import Risk Analysis itself; and
- c) The legal and regulatory regime, including the international agreements to which Australia is a signatory and the obligations incurred by those agreements.

The Appropriate Level of Protection

A country can set its ALOP at whatever level it chooses, but a country cannot impose quarantine measures beyond what is necessary 'to protect human, animal and plant life or health.

The ALOP is further constrained by the 'consistency' requirement - a country must be consistent in its application of SPS measures and cannot apply such measures in a more stringent way in one area than in another like area. It is contrary to Article 5.5 to adopt a low risk policy in one field, while not doing so in a comparable field. Thus, the import of whole marine finfish for bait for the tuna and cray fishing industries and of live goldfish for the pet industry must be subject to the same SPS measures as those applying to the importation of uncooked salmon products. The barrier cannot be set at one level for one species and at another for other like products.

It would appear that, while a member has considerable freedom to determine its ALOP, because the extent of quarantine measures are constrained by the requirements of the various international agreements entered into by Australia, the determination of the ALOP may be of little practical significance. In effect, the ALOP is constrained by the requirement that quarantine measures must be scientifically justifiable. To this

extent, the Committee considers that the ALOP can be rendered meaningless by the process.

The Committee acknowledges that the concept provides an overarching principle, which serves to indicate the conservative nature of Australia's quarantine arrangements. The Committee considers that determination of the ALOP should be more explicit and must take account of environmental considerations and the precautionary principle.

Import Risk Analysis

There are two elements to any consideration of import risk analysis - the methodology and the science of any single import risk analysis and the process by which such investigations are undertaken and finalised.

The science and the methodology

While the science per se was not an issue, the incompleteness of scientific data at present was. Many submissions argued that, in the face of scientific uncertainty, the precautionary principle should be applied and no imports allowed until the precise extent of the risk to human, animal and plant life and the environment could be assessed. They argued that, however slight the risk might be, the consequences were such that due caution should be exercised.

The Committee recognises that import risk analysis is a relatively new technique.; At the same time, it is a vital process for a country that has a high reliance on agricultural exports. AQIS must consider imports that may carry diseases which could be devastating to our agricultural industries and natural environment. The importance of getting it right is magnified even more when taking account of the limited disease problems we have in comparison with other countries.

The Committee considers that it is essential for Australia to be at the forefront of developments in this area and therefore recommends the establishment of a Key Centre for Risk Analysis, as was also recommended by the Nairn Review of Quarantine.

There are different and equally appropriate methodologies and approaches to the conduct of risk analysis, although there are both international and domestic guidelines on the conduct of IRA's. While it is the Committee's view that AQIS relied too much on qualitative risk analysis in the 1999 IRA, that IRA was endorsed by the WTO in February, 2000. However, the Committee is firmly of the view that quantitative risk analysis skills must be enhanced and that technique used to its best advantage.

The import risk analysis procedures

AQIS consultation processes were heavily criticised by some stakeholders. They argued that, while AQIS provided information, they were not able to participate in the process - their contributions were not actively sought and neither were they able to have their input properly considered and incorporated.

The Committee considers that consultation is a participative process, whereby stakeholders views are sought, considered and incorporated into any analysis. AQIS has been criticised for its consultation processes over a number of years and the Committee retains its concerns about AQIS' performance in this area.

The Committee is also concerned about the procedures by which AQIS undertakes the IRA process, principally the extensive publication of the draft IRA, which ultimately was damaging to Australia's case in the WTO. The Committee notes that WTO guidelines only require the notification of final measures to other WTO members. There is absolutely no requirement to publish draft documentation or preliminary findings. The Committee considers that a far greater level of caution must be exercised by AQIS and that no draft documentation or preliminary findings should be given broad publication, as currently happens.

Indeed, such documentation should only be distributed to domestic parties who are deemed to have a relevant interest in the process and then only on a confidential basis. The procedures and Handbook should be amended to reflect this.. The Committee also considers that, to further enhance the consultative approach, a Risk Assessment Committee for each import risk analysis should be established at an early stage of the risk analysis process. Such committees should comprise relevant domestic stakeholders nominated by their respective representative bodies.

International Law and the Conduct of the Case in the WTO

The Committee's major concerns, so far as international law and litigation are concerned, relate to:

- a) The significance attached by successive governments over the last two decades to international law and litigation in international bodies such as the WTO;
- b) The conduct of the salmon case in the WTO; and
- c) The availability and utilisation of legal expertise within the Australian Government.

The world trade arena is one of increasing political and economic importance. However, the Committee is concerned about the failure to appreciate the expanding significance of international law. The Committee is particularly concerned that there is no single specialist office of international law with overriding responsibility for dealing with international legal matters. The Committee is apprehensive about the quantum and quality of resources currently devoted to international law and for the conduct of litigation in international courts.

The international law function is broader than merely the conduct of litigation and any responsible agency must be involved at an earlier point in time than the point of dispute. The Committee considers that it is in Australia's interests to ensure that legal input is a fundamental part of any negotiation or policy development process, but that the specialist ability to litigate the case before the WTO must also be available.

The Committee considers that it is imperative that the Government establish a statutory office of international legal adviser, within the Attorney-General's portfolio, to provide a mechanism for more effective international legal outcomes for Australia.

RECOMMENDATIONS

Recommendation 1

That the Australian Government make application to the WTO for a variation to the WTO Rules to have disease free area status applied to fish and fish products that are untreated.

Recommendation 2

That AQIS maintain an ongoing review of its import protocols and develop procedures that enable it to implement new import protocols as a response to any changes in perceived risk or any new scientific evidence which might arise.

Recommendation 3

The Committee affirms recommendation 8.17 in its 1996 report on AQIS and recommends that, prior to the publication of documentation, AQIS consult with stakeholders, incorporating the outcome of such consultations in any documentation.

Recommendation 4

The Committee recommends that AQIS, in its review of the IRA processes and procedures, amend the procedures to allow for the direct involvement of domestic stakeholders through the establishment of a Risk Assessment Committee for each import risk analysis.

Recommendation 5

That the Import Risk Analysis procedures and Handbook be amended to ensure that the consultation process takes place prior to the development and publication of documents such as issues papers and the like.

Recommendation 6

That draft Import Risk Analysis documents and other like documentation not contain any proposed or indicative conclusions.

Recommendation 7

That:

- a) The publication of documentation be limited to the requirements of our international obligations; and
- b) Discussion papers or draft documents should have limited distribution on a strictly confidential basis and be restricted to domestic stakeholders and the seeking of expert opinion.

Recommendation 8

That, wherever possible, AQIS support their qualitative analysis with quantitative risk assessment techniques.

Recommendation 9

That, given the fundamental significance of risk analysis, the Government establish a Key Centre for quarantine related risk analysis, consistent with that proposed by the Nairn Committee in *Australian Quarantine - A Shared Responsibility*.

Recommendation 10

That the Commonwealth Government, in consultation with the community and with State and Territory governments, be responsible for the establishment of an appropriate level of protection for Australia.

Recommendation 11

That the ALOP be more explicit and include as part of its determination environmental factors and the application of the precautionary principle.

Recommendation 12

That an International Legal Adviser's Office be established to provide high quality international legal advice from the early stages of Australia's relationships with other countries and international organisations.

Recommendation 13

That the International Legal Adviser's Office be established as a statutory authority within the Attorney-General's Department.

Recommendation 14

That the Head of that Office, the Legal Adviser, be appointed at the highest level, reporting to the Attorney-General and to the Prime Minister.

Recommendation 15

That a thorough evaluation be undertaken of the approach to and conduct of international litigation by such countries as Canada and the United States, especially in disputes under agreements governed by the WTO. The investigation could be via an independent agent/adviser or a parliamentary committee.