

CHAPTER FOUR

THE APPROPRIATE LEVEL OF PROTECTION

Determination of the Appropriate Level of Protection

Submission Concerns

Submission Comment

The Precautionary Principle

Committee Comment

Determination of the Appropriate Level of Protection

4.1 The Appropriate Level of Protection [ALOP] allowed for under the SPS Agreement is for determination by the individual member state. As noted in Chapter 3, under Articles 3 and 5 of the SPS Agreement, countries are able to determine their own level of quarantine protection and that level can exceed relevant international or exporting country standards. There is no obligation to adopt an international standard, but where the international standard is adopted, the Member is not required to undertake a risk assessment. Measures not based on an international standard, guideline or recommendation must be based on a risk assessment and the adoption of the higher standard must be justified scientifically.

4.2 The SPS Agreement defines the ALOP as the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.¹ AQIS, in policy memorandum 1999/26 affirms Australia's sovereign right to determine its ALOP and states that it does so on the basis of a reflection of government policy and community expectations:

Australia has the sovereign right to determine its ALOP which reflects government policy and community expectations. This element of quarantine policy precedes and is separate from the establishment of quarantine measures by AQIS. The ALOP determines the quarantine measures required; it is not the quarantine measure that determines the ALOP.²

4.3 The SPS Agreement does not require a WTO Member to make a clear statement of the scientific basis for its ALOP. However, the Agreement does place strict conditions on the use of SPS measures to ensure that are applied consistently and are not used as a disguised restriction on international trade.³ The determination of the ALOP is qualified by the SPS Agreement, as follows:

1 Article 3.3, SPS Agreement

2 AQIS Policy Memorandum 1999/26, 22 April 1999

3 Department of Foreign Affairs and Trade, Submission 21, Appendix D

The SPS Agreement requires, however, that Australia's quarantine measures are not more trade restrictive than required, that such measures are based on a scientific risk assessment and that we do not apply different standards. In other words, Australia's freedom to define its level of protection is limited by the test of "consistency" – it is contrary to Article 5.5 to adopt a low risk policy in one field, while not doing so in a comparable field. The WTO panel confirmed this in the Salmon case.⁴

....The SPS Agreement obliges us to know what our appropriate level of protection is at the national level and then to apply that in a consistent way. The implication of this framework is that the risk assessment and the measures applied to control risk and the appropriate level of protection must have a plausible relationship to each other.⁵

4.4 However, the precise nature of the ALOP was a source of much confusion throughout the inquiry. AQIS describes the ALOP as follows:

There may be difficulties in describing the ALOP in practical terms. While the ALOP is the objective and the measure is the means of achieving that objective, to imply the ALOP from an existing SPS measure would be to assume that every measure accurately reflects the ALOP set by the Member. While our ALOP is illustrated by the body of quarantine decisions made, among those decisions will be "outliers", made for reasons perhaps significant at the time the measure was adopted, but which do not fit well into the ALOP 'zone'. Review of such decisions is carried out on a continuing basis, within the boundaries of the ALOP. This review may lead to minor changes in import policies or procedures - significant changes are considered in consultation with stakeholders. Older decisions in particular may need such review, and also matters in which new information has emerged or new technologies oblige AQIS to re-examine the outcomes.

A guide to the ALOP may be found in community and industry acceptance of quarantine policy and practice over the years. It reflects value judgements of the Australian community that take into account the benefits of trade and community access to imported goods and the consequences of pest or disease introductions on industry, the environment and society in general. Australian Governments have consistently adopted a highly conservative approach with respect to the ALOP. However, since the 1980's, successive Australian Governments have rejected the proposition that it is possible or desirable for Australia to adopt a 'no-risk' approach to quarantine. AQIS' role is to provide scientific advice enabling the definition of quarantine risk and identification of appropriate approaches to risk management, that provide for a consistent, scientific basis to the maintenance of Australia's ALOP.⁶

4 National Farmers Federation, Submission 33, p 2

5 AQIS, Evidence, RRAT, 18 February 2000, p 381

6 AQIS Policy Memorandum 1999/26, 22 April 1999

4.5 Dr Gebbie of AFFA, at the Consideration of Estimates hearing, stated that:

...I agree with you that it is the role of the government as its sovereign right to determine what the ALOP will be, but what I was trying to say is that it is a somewhat ill defined concept multilaterally. If you ask different countries what it means I suspect you will get many different answers. We are going to be dealing with this concept in the WTO, and at the end of the day I would think there has to be a multilateral understanding of its meaning. I would like to see us ...take a lead role in shaping the concept itself as we would want to see it. There is policy development in Australian Quarantine and Inspection Service and it is followed up multilaterally with the WTO in further elaborating the concept along the terms which we would want to see.⁷

4.6 AQIS defended the generality of the ALOP, describing it as a qualitative matter and not a quantitative matter.⁸ AQIS also noted during the course of the inquiry that there was no obligation under the relevant international agreements to state the appropriate level of protection and that it was not the practice of member states to make statements about what their ALOP is.⁹ Generally, it seems that states 'infer what other countries' ALOP's are by looking at the measures they apply and comparing their measures with our measures, their restrictions with our restrictions'.¹⁰

4.7 The following exchange is indicative of the attempt to clarify what the ALOP ultimately means:

Senator O'BRIEN—So the ALOP is the basis of the sovereign risk acceptance of the country, but there is a general understanding of government policy by AQIS and AQIS interprets that for each case.

Mr Gascoine—That is correct.

Senator O'BRIEN—Do I take it that that means it can vary? I thought it would have to be fixed for cases.

Mr Gascoine—The appropriate level of protection is, in principle, fixed for all cases. Our obligation is to define a set of measures in each individual case which will achieve that appropriate level of protection.¹¹

4.8 AQIS further advised:

The term ALOP as used in the SPS Agreement may be defined as a Member's expressed goals in protecting its animal and plant life or health

7 Consideration of Estimates, RRAT, 8 February 2000, p 275

8 AQIS, Evidence, RRAT, 24 September 1999, p 35

9 *ibid*, p 39

10 *ibid*, p 39

11 AQIS, Evidence, RRAT, 11 November 1999, p 322

from hazards, as reflected in legislation and other official documents, policies and procedures. In determining its ALOP, a Member strikes a balance between the risk of pest and disease incursion and its associated consequences, and the desired benefits from trade which include access to commodities for consumption and genetic improvement.¹²

4.9 AQIS impliedly acknowledges that the concept of the ALOP is not well understood. A recent article contained the following statement:

The Quarantine Development Unit is actively pursuing a better understanding of the concept of ALOP, with a view to describing Australia's ALOP in a manner which will provide better guidance to the Australian Quarantine and Inspection Service risk analysts and a clearer view for stakeholders and trading partners of the basis for our quarantine measures.¹³

4.10 The determination by AQIS of the level of restriction required is a matter of applying the appropriate level of protection set by the government to individual cases, with trade considerations playing no part. However, it is the determination of the ALOP, by whom it is determined and ultimately what the ALOP comprises which is unclear.

4.11 AQIS notes that:

The determination of a World Trade Organisation member's ALOP is based on a societal value judgment; in effect, it is the community's attitude to risk taking reflected in government policy. In setting its ALOP, a World Trade Organisation member strikes a balance between the risk of pest or disease incursion (and the associated potential for damage) and the benefits of trade (which include access to products of other countries for both consumption and production improvement).¹⁴

4.12 However, AQIS further notes that 'a member is not free to describe its ALOP with such vagueness or equivocation that the application of relevant provisions of the sanitary and phytosanitary agreement becomes impossible'.¹⁵

4.13 As noted above, the SPS Agreement guarantees, as a matter of national sovereignty, the right to determine the level of acceptable quarantine risk or ALOP. The ALOP is the basis of the sovereign risk acceptance of a member country. It is a fixed policy, and it is AQIS' responsibility to define a set of measures in individual

12 AQIS, Correspondence to Committee, 1 March 2000, p 3

13 Gascoine D, Wilson D and McRae C, *Quarantine policy in the World Trade Organisation environment*, Outlook 2000, p 171, at p 176

14 *ibid*

15 *ibid*

cases to achieve the appropriate level of protection.¹⁶ AQIS elaborated on this at public hearing:

...the appropriate level of protection is the same in each case unless and until the government tells us that it wants a wholesale shift in the policy or it wants to tell us that we are not conforming with the policy which it requires us to implement. We are applying, we think, the same appropriate level of protection in the case of salmon as we apply in the case of imports of any other agricultural product from another country.¹⁷

4.14 The ALOP is defined under the SPS Agreement as the level of protection deemed appropriate by the Member establishing a quarantine measure. AQIS described the ALOP as 'a judgement which somebody has to make...about where the right balance lies between, on the one hand, protecting Australia's animal and plant based industries and environment against pest and disease risks and, on the other hand, the advantage of allowing the maximum possible trade which is beneficial to both consumers and our own industry'¹⁸. AQIS further stated:

That judgment is very difficult to subject to objective, quantitative analysis. To our knowledge, no government anywhere has conducted such an analysis. However, it is a judgment which is made essentially by government and then implemented as policy by AQIS and its counterpart agencies around the world. When we apply the appropriate level of protection, we are applying it to individual cases. It is in some sense a standard to be achieved in any given situation where we are conducting an import risk analysis. In those individual situations, the trade considerations are no longer relevant. It is only a matter for AQIS to specify controls or requirements, where they are necessary, in order to ensure that risk is kept to an acceptably low level ...¹⁹

4.15 In its written submission, AQIS confirmed that the determination of the ALOP is a sovereign right, the prerogative of the Member and not of the WTO, and that determination of the ALOP is a 'societal value judgement' needing no scientific basis, although AQIS acknowledged that the determination must take into consideration negative trade effects.²⁰ AQIS stated that in establishing the ALOP, a member strikes a balance between:

- a) The risks of pest disease incursions and the associated potential for damage associated with trade; and

16 AQIS, Evidence, RRAT, 11 November 1999, p 322

17 *ibid*, p 323

18 *ibid*, p 321

19 *ibid*, p 321

20 AQIS, Submission 17, p 14

b) The benefits of such trade which include access to consumer and investment goods at comparative prices and to new genetic material to enhance the productivity of primary industries.²¹

4.16 AQIS described the extent to which the ALOP is limited by the requirements under the SPS Agreement as follows:

To the extent that we apply an appropriate level of protection—which, in Australian government policy terms, reflects our relative pest and disease free status—and to the extent that the relative status of freedom can be demonstrated on scientific and technical grounds, then it has that underpinning.²²

4.17 In their supplementary submission, AQIS argued that there existed a misunderstanding about the central difference between the determination of Australia's ALOP by the government as a matter of policy and the application of that determination by the Director of Quarantine and AQIS in relation to specific quarantine decisions. AQIS stated:

The government determines ALOP at the broad policy level taking into account community expectations regarding the management of risk and the amount of damage which might be done (especially to vulnerable agricultural industries and the environment) by incursions of exotic pests and diseases. It also takes into account the impact which quarantine policy may have on trade; the more restrictive is quarantine policy (ie the higher ALOP is set), the greater are the benefits of trade which are foregone.²³

4.18 AQIS further argued that, in this way, quarantine policy does take trade issues into account, but that in the application of the policy to individual cases, no regard is paid to the benefits or disbenefits of trade in salmon products; i.e. that the import risk analysis process identifies those requirements which are sufficient to reduce the risk of pest and disease incursions to a level which is consistent with government policy on the ALOP.²⁴ AQIS stated at public hearing:

It has been said by many who oppose our decision that AQIS has been driven by trade considerations. I want to say unequivocally that AQIS is not and was not influenced in the policies it has announced and which are being examined by this committee by any consideration of trade or trade retaliation.²⁵

21 AQIS, Submission 17, p 14

22 AQIS, Evidence, RRAT, 24 September 1999, p 36

23 AQIS, Supplementary Submission 59, p 8

24 *ibid*

25 AQIS, Evidence, RRAT, 24 September 1999, pp 25-6

Submission Concerns

4.19 Many submissions considered that the ALOP had been seriously undermined and that there existed good reasons for Australia maintaining a very conservative approach to quarantine and the determination of the ALOP:

AVA wishes to express the view that for diseases of great consequence to Australia such as those which would have great economic consequences, or which may not be eradicable or which would have serious public health or environmental implications the ALOP should be very conservative.²⁶

4.20 The TSGA was concerned about the following aspects of the ALOP:

- a) The means by which the ALOP was determined were unclear;
- b) The difference between the ALOP in 1996 and 1999 was not evident; and
- c) There was no clear division of responsibilities between the determination of the ALOP and the interpretation of how quarantine decisions mesh with the ALOP.²⁷

4.21 When asked at public hearing to clarify the principles behind the determination of the ALOP, and the confusion about the concept, AQIS responded:

Indeed, the SPS agreement obliges us to know what our appropriate level of protection is at the national level and then to apply that in a consistent way. The implication of this framework is that the risk assessment and the measures applied to control risk and the appropriate level of protection must have a plausible relationship to each other.²⁸

4.22 When questioned at public hearing about conflicts with the measures determined by AQIS and a finding by the WTO which compromised Australia's determined position on our appropriate level of protection, the DFAT representative responded that it would not be a matter for the department but for government to resolve:

Mr Hussin—All the interested areas of government would be involved. Obviously, the Minister for Agriculture, Fisheries and Forestry and the Minister for Trade would be the key ones who were involved, but in some cases it would go broader than that.

Senator O'BRIEN—To the cabinet?

Mr Hussin—To the cabinet perhaps....

26 Australian Veterinary Association, Submission 49, p 3

27 Tasmanian Salmonid Growers Association, Submission 46, p ii

28 AQIS, Evidence, RRAT, 18 February 2000, p 381

Senator O'BRIEN—But that is the tension, isn't it, if you come to a position that you believe is the bottom line, as it were, with regard to protection but cannot satisfy the panel for whatever reasons? We were just discussing the tension between our obligations under trade policy and the government's obligation to maintain a secure quarantine barrier. Where there is a collision, we were discussing who would make the decision as to how we would handle it. I think you have been very clearly saying that that is a matter for government and not the department.

Mr Hussin—That is correct. Obviously, we would review the issues and provide advice, but it would be for government to consider any further measures. Of course, it is the director of quarantine in this process who takes the decision.

Senator O'BRIEN—But that would follow a determination by government on the issue?

Mr Hussin—That is correct.²⁹

4.23 It is the Government, which determines the appropriate level of protection, and the Director of Quarantine who makes the policy determination in relation to quarantine measures to underpin the ALOP. However, the Committee considers that the precise nature of the ALOP is elusive.

Submission Comment

4.24 Stakeholders argued that AQIS had an obligation to base its 1999 import risk analysis decision on a previously defined ALOP. They claimed that, in the salmon case, under the SPS Agreement, Australia was entitled to develop an ALOP for determining IRA protocols which safeguarded stakeholders from imported diseases. They argued that AQIS could have abided by the WTO ruling and still maintained either a complete ban or least a much more limited import protocol than has been allowed.³⁰

Concerns in Relation to the ALOP

4.25 Major concerns in relation to the ALOP included:

- a) The determination of the ALOP did not take into account the role of the States and Territories and the need for those jurisdictions to provide for their differing circumstances; and
- b) The IRA failed to determine an appropriate level of protection (ALOP) which reflected the level of expectation of the community and therefore denied the community natural justice.

29 DFAT, Evidence, RRAT, 18 February 2000, p 397

30 Nortas Pty Ltd, Submission 37, p 8

4.26 During the course of the inquiry, it became clear that the specifics of the ALOP were a source of some confusion for stakeholders and others. It also became clear that both AQIS and DFAT were unable to articulate clearly what the ALOP precisely was and by whom it was determined. This lack of clarity has meant that stakeholders are confused as to how the sovereign right of a nation to determine its ALOP fits with the WTO requirements for the development of measures under the SPS Agreement, and particularly for the undertaking of Import Risk Analyses. One submission argued that the process was defective given the absence of an ALOP instruction from Government to AQIS.³¹

4.27 The Tasmanian Government's submission stated:

There is no evidence available to confirm that Australia has determined an ALOP against which measures decided can be tested. Certainly, there is no evidence that in determining an ALOP the Commonwealth Government has carried out any consultation process to clearly determine the expectations of the community or of the States and Territories...in the absence of a stated ALOP and considering the removal of protection measures set in 1975 it can only be concluded that the Commonwealth has determined a lower ALOP than previously existed.³²

4.28 Submissions argued that the emphasis on a level of protection acceptable to the community, which applied to the 1996 AQIS IRA, had been ignored in the recent decision. They believed that, had the 1996 ALOP been used, it would not have been possible for AQIS to change its determination in relation to uncooked salmon imports. In the light of the AQIS decision, stakeholders are convinced that a new ALOP, developed without any consultation with industry, and based partly on trade considerations, has supplanted the old ALOP:

In 1996, the AQIS IRA stated that our ALOP was to provide a level of protection acceptable to the Australian community, with the emphasis on community. In April 1999, Australia's ALOP was that which reflects government policy and community expectations.

Again, there was emphasis on government policy and community expectations. By contrast, if you look at the AQIS submission to this inquiry, it states:

In establishing its broad approach to ALOP, a member in effect strikes a balance between the following: the risks of pest or disease incursions and associated potential for damage associated with trade, and the benefits of such trade, which includes access to consumer investment goods ...

31 Management Strategy and Innovation Pty Ltd, Submission 18, p 1

32 Tasmanian Government, Submission 42, p 8

Clearly, the position put by AQIS to this inquiry is one of a trade weighted definition of ALOP.³³

4.29 This viewpoint was supported by the Nortas submission:

We can draw no other conclusion than the science and disease issues have taken a back seat to the concerns of AQIS in relation to the WTO and their perception of what was required to protect Australia's trade reputation.³⁴

4.30 The concerns of the Tasmanian Government in relation to the establishment of the ALOP were stated by the Minister for Primary Industries, Water and Environment at public hearing:

The Commonwealth... appears to have disregarded community expectations on the matter, despite its stated policy to reflect community expectations in its quarantine policy settings. Indeed, the ALOP has now moved from being an issue where it was taking into account singular community expectations to one that takes into account government policy and, more recently and I think quite ominously, the issue of trade. These sorts of matters should not be taken into account at all in this question. We are dealing with quarantine and disease issues.³⁵

4.31 The Secretary of the Tasmanian Department of Primary Industries, Water and Environment accused the Commonwealth of a process which was deficient:

In summary, the Commonwealth's ALOP process fails because it lacks transparency, it has no process for ascertaining community expectations or evaluating non-trade related issues, it assesses risks on the basis of the importance of potentially affected industries to the national economy and not on risk to animal or plant health, it includes no provision for ascertaining state and territory government concerns, and it has not produced an ALOP from which AQIS can develop measures with confidence of withstanding a challenge.³⁶

4.32 It is apparent that stakeholders are confused about the ALOP - what it is at any given time and how it is determined. The Executive Officer of the TSGA stated:

The thing that I find intriguing about the acceptable level of protection is that we have asked on a number of occasions, 'What has changed between 1996 and 1999?' The answer that we keep getting back is that the WTO made some decisions which said that the IRA we conducted in 1996 was not

33 Mr Kim Evans, Department of Primary Industries, Water and Environment, Tasmanian Government, Evidence, RRAT, 5 October 1999, pp 225-226

34 Nortas Pty Ltd, Submission 37, p 7

35 The Hon. David Llewellyn, Minister for Primary Industries, Water and Environment, Tasmanian Government, Evidence, RRAT, 5 October 1999, p 217

36 Mr Kim Evans, Department of Primary Industries, Water and Environment, Tasmanian Government, Evidence, RRAT, 5 October 1999, p 219

appropriate, but nowhere have I heard that the WTO told us that our acceptable level of protection was wrong. The industry is having difficulty accepting that, in 1996, it was not acceptable for us to import Canadian wild caught salmon, whereas, in 1999, it is acceptable for us to import not only Canadian wild caught salmon, but also a whole range of other salmon as well, given the deterioration that has occurred in the health status of salmon around the world in three intervening years. It just does not seem to stack up.³⁷

4.33 Tassal stated:

The Appropriate Level Of Protection (ALOP) is referred to as a goal of successful quarantine policy. Throughout this process however, there have been no clear explanations of how ALOP is defined for each case, and by whom. It is particularly perplexing that without any apparent review, ALOP on the issue of raw salmon imports has radically changed between the AQIS reviews of 1996 and 1999. It is of serious concern that AQIS may have built on its legitimate role of adviser to also adopt the roles of arbiter and enforcer of ALOP, which theoretically should reflect the public's aspirations.

This blurring of roles in the administration of ALOP is perhaps fundamental to much of our dissatisfaction, and its resolution a precursor to a consistent and equitable quarantine policy.³⁸

4.34 The latter comment in relation to the perceived role of AQIS as both the 'adviser' and 'arbiter and enforcer' of the ALOP was discussed by other stakeholders. There is a view held by industry and other groups that, by using a different ALOP in the 1999 IRA process without adequate consultation, AQIS had established itself as the author of the ALOP. Stakeholders expressed a strong view to the Committee that it should be the Commonwealth Government, in consultation with the community and State and Territory governments, which establishes an appropriate level of protection for Australia.

4.35 It is noted that the criticism of the determination of the ALOP may not be sustainable, given that the Committee has not been able to establish by whom the ALOP is determined, what it is and what significance the ALOP has. It is perhaps unfair to accuse AQIS of usurping the Government's responsibility so far as the ALOP is concerned³⁹, but AQIS and the Government must share some of the responsibility for the very evident confusion.

37 Mr Anthony Smithies, Tasmanian Salmonid Growers Association Limited, Evidence, RRAT, 5 October 1999, p 212

38 Tassal Limited, Submission 41, p 4

39 The Tasmanian Professional Trout Guides Association, Submission 12, p 14

Notification of Changes to the ALOP

4.36 Stakeholders claimed that AQIS did not clearly enunciate in the IRA process itself, or in its draft report, the precise details of any changes to the ALOP. As a result of this, many stakeholders believed that the scientific assessments that were conducted for the IRA process, published by AQIS as they were received on its website, would lead to a continuation of the restriction on uncooked salmon imports because of the continuing application of the 1996 ALOP. Instead, stakeholders were concerned by the protocols AQIS derived from the scientific assessments, leading many to conclude that AQIS had changed the ALOP.

We read [the IRA] and the science we believe is fairly well grounded. It is what AQIS has done with that science that we believe is flawed. When you continually say that something meets our acceptable level of protection and no-one can define what our acceptable level of protection is and if AQIS indeed is setting the acceptable level of protection as well as doing the science, it seems to me that we do not have a just outcome.⁴⁰

The process is fundamentally flawed in that the draft fails to identify Australia's ALOP, yet it determines measures that would satisfy the unspecified ALOP. It therefore cannot satisfy the transparency requirements of Article 5(8) of the SPS Agreement, which is to provide clear explanation of why the measures implemented, and not others which might be less trade-restrictive, have been applied.⁴¹

4.37 It should be noted that AQIS at all times has stated that the ALOP has been constant for a considerable period and any amendments to the ALOP would be advised to AQIS by Government.⁴²

Trade Considerations

4.38 A number of submissions raised concerns that the possible influence of trade pressures over AQIS processes had pushed Australia into a 'race to the bottom' which will lead to an overall weakening of the quarantine protection afforded nations under WTO rules. This was clearly the concern of the Tasmanian Government.⁴³ Nortas Pty Ltd also voiced its suspicion that:

The Canadian Foreign Affairs and Trade Department has pursued this issue as a *test case* on the SPS Agreement. They have chosen a product they know well in salmon (a product that has been the subject of numerous international trade disputes) and in Australia they chose a country they expected to "play by the rules" given our very public support for the WTO

40 Mr Ken Orr, The Tasmanian Professional Trout Guides Association, Evidence, RRAT, 5 October 1999, p 126

41 Tasmanian Government, Submission 42, p 9

42 AQIS, Evidence, RRAT, 11 November 1999, p 322

43 Tasmanian Government, Submission 42, p 2

... it is clearly in the interest of countries in the northern hemisphere who are already rife with diseases from reduce quarantine barriers for their trade.⁴⁴

4.39 It was suggested that the Commonwealth Government appeared to see the decisions, not so much as a challenge to make Australia's quarantine standards and procedures more consistent or to make the IRA more comprehensive, but as an embarrassment to Australia's international free trade credentials.⁴⁵ For example the Department of Agriculture, Fisheries and Forestry [AFFA] argued that:

The findings against Australia by the WTO panel and Appellate Body have challenged international perceptions of Australia as an advocate of agricultural trade reform. The importance of trade to Australia's agricultural and fisheries industries is undeniable and it is not in Australia's national interest to place these valuable and hard fought exports at risk through non-compliance with WTO rulings.⁴⁶

4.40 AFFA supported AQIS' July 1999 determination as the proper response to the WTO decisions, arguing that 'the new policies represent a significant strengthening of our overall fish quarantine regime, which is arguably now the strictest fish import regime in the world'.⁴⁷

4.41 A number of submissions expressed concerns that trade considerations were impinging on the determination of the ALOP and thereby undermining quarantine restrictions. Unlike other industry bodies, such as the Cattle Council of Australia and the Queensland Sugar Corporation, the Pork Council reiterated the necessity for quarantine measures to remain independent of trade considerations:

AQIS must ensure that overseas trade/WTO pressures do not erode the integrity of Australia's import risk analysis process. As an external observer of the salmon import issue, there is a perception that aspects of the quarantine decision process were 'fast-tracked' in response to trade/WTO pressures from Canada.

PCA considers that AQIS's first obligation should be to Australia and Australian industry, within the framework of the WTO. It is important that AQIS avoid being driven by WTO considerations, rather than by the interests of Australian industry.

The question of concern to industry is whether AQIS is fighting hard enough for Australian industries on quarantine issues, or whether AQIS is more concerned with alignment with the WTO.

44 Nortas Pty Ltd, Submission 37, p 10

45 *ibid*, p 4

46 Department of Agriculture, Fisheries and Forestry, Submission 48, p 3

47 *ibid*, p 4

In a similar vein, Australia must avoid pursuing a policy of appeasement towards trading partners when considering import access decisions on quarantine grounds. It is in Australia's immediate and long term interest to maintain a higher quarantine health status than our trading partners.

PCA considers the threats of retaliation or other posturing by trading partners should not be permitted to have any impact on Australia's sovereign right to go through full and due process on any quarantine decision.⁴⁸

4.42 In response to criticisms that it is influenced by trade considerations AQIS stated:

Our submission points out that AQIS's judgment on which restrictions are required is a matter of applying the appropriate level of protection set by the government to individual cases and that, in the application of the policy, AQIS pays no regard at all to the benefits or disbenefits of trade in salmonids or salmonid products.⁴⁹

4.43 Dr Simon Hearn, AFFA, confirmed the AQIS position:

One point I would like to make early in this discussion is that the application of the quarantine decisions, whether it be for salmon or whether it be for any other commodity, is categorically not influenced by trade policy considerations—that is to say, they are stand-alone decisions made on objective science, and it is not tolerable that trade policy should impinge on that scientific assessment.⁵⁰

4.44 However, Dr Hearn qualified this comment later when he said:

It is a stand-alone scientific analysis. Once that analysis is made, there are most distinctive trade implications. I have no doubt that, in the area of community consultation, trade considerations are addressed by community parties in terms of their views as to what is tolerable.⁵¹

The ALOP Process

4.45 Stakeholders argued that the ALOP process itself is in urgent need of reform as a result of the 1999 import risk analysis in relation to non-viable salmonids and marine finfish. AQIS, in their view, failed to abide by the same ALOP that was used in the 1996 IRA process and instead, placed trade considerations above the risks associated with the disease of salmonids. The following comment by the Tasmanian Minister for Primary Industries, Water and Environment is indicative:

48 Pork Council of Australia Ltd, Submission 52, p 3

49 AQIS, Evidence, RRAT, 11 November 1999, p 336

50 AFFA, Evidence, RRAT, 24 September 1999, p 4

51 *ibid*, p 6

We certainly look to the committee to recommend changes to the Commonwealth's appropriate level of protection and resultant measures so as to restore the level of quarantine protection delivered in the AQIS 1996 IRA report in respect of wild ocean-caught Pacific salmon. We also recommend the application of that level of protection to any other product posing a threat of introducing the disease of concern to the salmonid health of fish in Australia. We are recommending changes to the Commonwealth quarantine decision making process designed to deliver quarantine decisions consistent with the appropriate level of protection requirements of the states and territories. That is the basis of our submission and we would like you to take those recommendations on board.⁵²

4.46 The Pork Council of Australia acknowledged that, although Australia took a very conservative approach to quarantine matters to protect its unique quarantine status in the world, Australia still came under pressure from trading partners with a lesser quarantine status, to reduce quarantine requirements. The Council argued that, without a more objective definition of the value of Australia's quarantine status, the Government and AQIS are vulnerable to trade and political pressures to accept higher levels of risk than industry and the community are prepared to accept.⁵³

The Precautionary Principle

4.47 Under the *Environment Protection (Impact of Proposals) Act 1974*, AQIS is required to consider whether the granting of an import permit will effect the environment to a significant extent. AQIS states in its 1999 IRA:

Decisions made by AQIS to permit the entry of animal products, made under the *Quarantine Act* and consistent with Australia's conservative approach to risk, are unlikely to lead to significant adverse effects on the environment.⁵⁴

4.48 A key tenet of such risk assessment and management is the precautionary principle. The precautionary principle requires that measures that could potentially lead to environmental damage, such as the decision to grant an import permit, should not be taken when there is a lack of scientific knowledge.

4.49 The principle has been recognised at an international level since as early as the 1970s, although it is only in the 1990s that it has received international endorsement. The 1992 *Convention on Biological Diversity*, which Australia has ratified, states that:

52 The Hon. David Llewellyn, Minister for Primary Industries, Water and Environment, Tasmanian Government, *Evidence, RRAT*, 5 October 1999, p 215

53 Pork Council of Australia Ltd, Submission 52, p 4

54 AQIS July 1999, *Import Risk Analysis on Non-viable Salmonids and Non-Salmonid Marine Finfish*, p 6

... where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat.

4.50 The precautionary principle is also recognised in Australia. Paragraph 3.51 of the 1992 *International Agreement on the Environment*, to which the Commonwealth, the States, the Northern Territory and the Australian Local Government Association are signatories, reads:

In the application of the precautionary principle, public and private decisions should be guided by:

- i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- ii) an assessment of the risk weighted consequences of various options.

4.51 Subsequently, the precautionary principle was adopted in the 1992 *National Strategy for Ecologically Sustainable Development*, again endorsed by all three levels of government. The strategy sets out a number of factors to be taken into account in achieving ecologically sustainable development, including 'paying due regard to the precautionary principle'.

4.52 The Commonwealth Government has given legislative effect to the precautionary principle. Section 391 of the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* requires the Commonwealth Minister for the Environment and Heritage to consider the precautionary principle when making decisions relating to various sections of the Act.

4.53 There is widespread international and domestic acceptance of the precautionary principle. However, Mr Walker from Recfish Australia was critical of AQIS in hearings for failing to apply the precautionary principle in the IRA process. He attributed this to the WTO SPS Agreement:

The WTO SPS Agreement is based on controlling known diseases rather than unknown situations. We would argue that Australia's approach should be based on avoiding exposing our aquatic ecosystems to risk from exotic organisms rather than responding to known disease situations.⁵⁵

4.54 In a later meeting with the Committee, Professor Malcolm Nairn agreed that the precautionary principle should be adopted in dealing with emerging salmonid diseases on which there is insufficient scientific evidence. For this reason, the Nairn Report recommended the establishment of a Key Centre for managing risk.⁵⁶ The Key Centre proposal is discussed further in Chapter 7.

55 Evidence, RRAT, 24 September 1999, p 95

56 Evidence, RRAT, 22 May 2000, pp 11-12

Committee Comment

4.55 The Committee is concerned about the difficulty of defining 'Appropriate Level of Protection'. The Committee considers that 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.

4.56 The inability to determine precisely what is meant by the ALOP is problematic, given that quarantine measures are determined according to the extent to which they allow imports to meet Australia's ALOP. For example, AQIS includes in its IRA, in relation to risk management strategies, (required under s 70 of Quarantine Proclamation 1998), statements such as:

The risk assessment for the unrestricted importation of eviscerated salmonids...showed that the risk associated with the establishment of some disease agents would not meet Australia's appropriate level of protection. The next step was to consider how risk management measures could be implemented to reduce the unrestricted risk to a level that would meet the ALOP.⁵⁷

4.57 The extent to which a risk management measure is permitted is determined by the extent to which the impact of that measure meets Australia's ALOP.

4.58 If such conclusions are the basis for imposing or relaxing quarantine restrictions, the Committee considers that 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.

4.59 The Committee further considers that the determination of the ALOP is a matter for Government and not one which is appropriate for individual agencies. Nor should the determination of the ALOP be seen to be within the scope of one particular agency's functions.

57 AQIS, *Import Risk Analysis on Non-viable Salmonids and Non-Salmonid Marine Finfish*, July 1999, p 140

