CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

Introduction
Conduct of the Import Risk Analysis
The Appropriate Level of Protection
Australia's Membership of the WTO and International Law

Introduction

7.1 Following the challenge in the WTO, Australia was required to amend its quarantine regulations or face retaliation by Canada. As noted earlier, a settlement between Canada and Australia was agreed on 17 May 2000. However, many industry and angling groups, along with the Tasmanian Government, still believe the importation of fish under the current conditions carries substantial disease risk. The Committee shares the concern that any lowering of the standard of quarantine protection may have irreversible effects on human, animal or plant life and health or on the environment.

7.2 The conclusions of the revised Import Risk Analysis (IRA) Report have been strongly questioned in some sectors and supported in others. AQIS argues that the 1999 IRA and amended quarantine regulations gave Australia a strengthened quarantine regime, which underpins a conservative ALOP.[1] While regulations for the importation of many fish species were made more stringent, those for the importation of uncooked salmon products were required to be less import restrictive. The consumer ready requirement, which was found by the WTO to be not supported by the IRA, has been replaced with an alternative method [see Appendix 3], while the Commonwealth Government is required to continue to seek observance on the part of Tasmania.

7.3 The Committee's inquiry ultimately focussed around three major areas:

a) The conduct of the import risk analysis – the procedures, the methodology, science and conclusions;

b) Australia's ALOP; and

c) The conduct of the dispute within the WTO, including the litigation strategy undertaken by Australia, the interpretations put by AQIS and DFAT on the requirements of the relevant international agreements and the extent to which Australia's conduct met those requirements.

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

The Conduct of the Import Risk Analysis

7.4 The Committee considers that the conduct of the 1999 IRA was basically sound. The WTO endorsed the IRA in its report released in February, 2000. However, there were significant deficiencies identified during the process, which included release of the draft 1995 IRA, which in the event must be considered to have been premature and not required under the terms of the SPS Agreement, and poor relations with stakeholders. The premature release of the IRA, which included AQIS' intended actions in relation to quarantine measures, strategically damaged Australia's case from the very early stages. The quality of consultation was also an issue.

The Appropriate Level of Protection

7.5 The Committee is strongly of the opinion that the ALOP is too vague a concept; it is poorly articulated, with no real guidance as to what it is in reality, how it is determined and by which agencies it is determined. The confusion surrounding the ALOP guaranteed disaffection with the outcome of the 1999 IRA.

International Law

7.6 A significant concern to the Committee, which became apparent during the course of the inquiry, was what seems to be a progressive weakening of the standing of international law generally within government. This may be attributable partially to failure by government to fully understand the implications of Australia's increasing obligations under international agreements, including the growing significance of the WTO. The significance of the salmon dispute with Canada and its implications for Australia, not simply in terms of quarantine protection, but also in the wider arena of international trade generally, highlights the importance of appropriate recognition at the highest level of the significance of WTO and other international obligations.

7.7 The Committee considers that there is a substantial national interest in having a quarantine regime which is framed to protect Australian agriculture and biodiversity. However, there is a general perception that trade issues take priority over the quarantine regime. Such concerns highlight the very real possibility that one outcome of challenges over quarantine standards could be the emergence of 'lowest common denominator' standards of quarantine protection. The outcome of the salmon dispute has fundamental implications for Australia's national interest, both in terms of its agricultural industries and biodiversity, and in terms of its interest in the fair and safe operation of the WTO system.

Conduct of the Import Risk Analysis

7.8 The major complaints made to the Committee in relation to the conduct of the IRA were:

a) The incomplete nature of the science and the consequential lack of justification for the conclusions, including the failure to consider adequately the consequences of any disease incursion;

b) The methodology of the IRA; and

c) The inadequacy of the consultation with stakeholders.

The Incomplete Nature of the Science

7.9 The genuine concerns of many stakeholders included the uncertainty of the science, the seriousness of the consequences if a disease outbreak were to occur and the difficulty or impossibility of any containment or eradication measures. **Many submissions acknowledged that chances of a disease outbreak were slight, but argued that, given the seriousness of the consequences, the ban on imports should remain until more was known about particular diseases**. The Committee shares this view.

7.10 It is the Committee's view that the science as set out in the IRA was an exhaustive analysis of current data. The concerns of the Committee relate primarily to the relative scarcity of data on fish diseases, transmission and virility, and to the failure of the OIE's *Aquatic Animal Health Code,* which only makes recommendations in relation to listed diseases and does not include some diseases which are of serious concern to Australia, such as *infectious salmon anaemia*, a disease prevalent throughout the northern hemisphere.

7.11 The SPS Agreement allows members to have an agreed level of protection higher than international standards, even in the midst of scientific uncertainty, for members to take economic and environmental factors into account when determining the ALOP, and for members to require adequate proof that imports are sourced from disease free areas. The onus is on individual WTO members to ensure that the quarantine protections afforded by the ALOP are maintained. How such protection is to be maintained in the face of the requirement that quarantine measures must be scientifically justifiable is uncertain. The Committee considers that the WTO Agreements are ambiguous and potentially contradictory in the meaning and impact of the two concepts.

7.12 The Committee is concerned that allowing salmon imports from areas known to be infected with disease may set a precedent for imports of other like products and that quarantine requirements for products such as meat and grain may be compromised.

7.13 The Committee notes that, for uncooked and untreated meat and grains, Australia requires imports to be sourced from disease free areas, but that this is not the case with fish or fish products. The Committee considers that there is no justification for the inconsistency in the different arrangements. However, the Committee considers that it should be possible for the benchmark for salmon and like products to be raised rather than that for other products such as grain and beef to be lowered. The Committee is concerned that the decision on salmon could set a precedent which may undermine the quarantine requirements in other areas.

7.14 The Committee believes that it should be open to Australia, and other signatory states, to adopt the 'precautionary principle' and only allow imports where it is known that they are safe and there is no risk to native species. The adoption of this principle formally would advantage Australia in situations such as importation of fish, where there is a lack of substantial scientific information on some fish diseases.

Recommendation 1

7.15 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.

The Uncertainty of the Science

7.16 The Committee is concerned about the uncertainty of the science and the relative immaturity of the WTO and AQIS processes in relation to the conduct of import risk analyses. Should evidence of risk emerge AQIS must be able to respond quickly and effectively. Australia must ensure that it maintains protection of native and farmed fisheries, pending review of any new information or increased risk factors.

Recommendation 2

7.17 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.

The IRA Process - Consultation

7.18 The Committee notes the comments and concerns of stakeholders in this matter. Many of the stakeholders considered the consultation to be inadequate and insufficient - while they were informed for the most part, they were not able to participate in the process.

7.19 The Committee recognises that AQIS was required to conform to a timeframe not of its own choosing and which consequently necessitated a modified consultation process. The Committee notes that AQIS advised stakeholders about the modified process and continued to advise them of developments throughout the process. However, the Committee considers that AQIS was not sufficiently mindful of the concerns of the Tasmanian stakeholders and failed to ensure that they received appropriate information at the same time as other parties, including overseas parties.

7.20 The Committee considers that there is a distinction between consultation where views are actively canvassed and taken into account and consultation where stakeholders are merely informed of updated events and/or progress. The Committee notes the comments in the Nairn report on consultation:

> Import risk analysis should be conducted in a consultative framework, with agreed priorities and timetables. Consultation should be early and broad,

> with the inclusion of all relevant stakeholders. Early consultation should help to engender the partnership approach advocated by the Review Committee, and avoid the adversarial and confrontational approach that has characterised import risk analysis of some proposed imports in recent years.[2]

7.21 The Nairn Committee noted that many submissions to the review stressed that early consultation and use of a partnership approach in considering import risk analyses would address many concerns about the process used.[3] The Committee stated that early consultation with key stakeholders would help to obtain consensus on the following matters:

a) Priorities;

b) The need for a detailed risk analysis;

c) The timetable and deadlines;

d) The scope of the risk analysis and the methods employed; and

e) Risk management strategies to allow the proposed import without damaging Australia's animal and plant health status.[4]

7.22 This Committee also notes its comments in the Senate Rural and Regional Affairs and Transport [RRAT] Committee's 1996 report on the Australian Quarantine Inspection Service:

> The Committee, however, was concerned that the standard practice of consulting industry after the development of an initial risk assessment might be unsatisfactory in two respects. First, the initial draft might contain inaccuracies which could be easily avoided by wider consultation during the development of the draft IRA. Secondly, the release of a draft document that has not involved prior input from the industry may lead to expensive and acrimonious disputes. Such a process seems to expose the credibility and scientific expertise of AQIS to avoidable criticism.
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> The Committee considers that the disadvantages of the current consultative arrangements are illustrated by the debate over the draft IRA on uncooked Pacific salmon. For example, the Committee finds it difficult to understand why AQIS did not inspect and have extensive discussions with the salmon industry in Tasmania. The Committee considers that this course of action would have been preferable to what has now become a protracted, acrimonious and seemingly inefficient process.[5]

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2 Nairn M et al, *Australian Quarantine - A Shared Responsibility*, DPIE, 1996, p 89

3 ibid, p 90

4 ibid, p 91

5 RRAT Committee, *Australian Quarantine Inspection Service*, May 1996, p 101

7.23 Similar criticisms of AQIS consultation processes were made in the most recent IRA process. Stakeholders were particularly concerned at the form of consultation undertaken by AQIS, whereby they were informed about progress rather than being consulted for their input. This method of consultation effectively meant there was no other appropriate mechanism for consideration of stakeholders' input.

7.24 The RRAT Committee's 1996 report on AQIS made the following recommendation:

> 8.17 The Committee recommends that AQIS should have wide-ranging consultations with relevant industry groups before publishing a draft IRA. The Committee considers that such an approach will protect the integrity of AQIS' scientific reputation, reduce the likelihood of protracted and acrimonious debates, and ensure stable investment environments in the relevant industries.[6]

7.25 The Committee is concerned to ensure that domestic stakeholders are given appropriate consideration at an early stage. AQIS was very clear at public hearing on 22 May 2000, about the importance of ensuring that the transparency provisions of the SPS Agreement were met, but appeared to be less concerned with accommodating the interests of domestic stakeholders. A comprehensive consultation process must be pursued with domestic stakeholders prior to the development of any issues papers, draft risk analysis documents or position papers.

Recommendation 3

7.26 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.

Risk Assessment Panels and Committees

7.27 One of the mechanisms that could assist AQIS in improving its consultation arrangements and relations with stakeholders is domestic stakeholder representation on Risk Assessment Committees. The Committee notes the Nairn discussion on the composition and use of such risk assessment panels. However, these panels primarily comprise members with experience and expertise in quarantine risk analysis plus members with scientific expertise relevant to the import access request under consideration.[7] The Committee 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.

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6 ibid

7 Nairn M et al, *Australian Quarantine - A Shared Responsibility*, DPIE, 1996, p 100

7.28 The Committee considers that AQIS should not be solely responsible for the nomination of members of Risk Assessment Committees. The Committee considers that stakeholder representation on risk assessment panels could go some way to ensuring that their views are actively considered and incorporated into any risk analysis process.

Recommendation 4

7.29 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.

The IRA Procedures and Publication of Draft Documentation

7.30 The Committee notes the procedures set out in the IRA Handbook for consultation and distribution of draft and final documents. In particular, the Committee is concerned about the extent of public release of draft documents, including conclusions.

7.31 The Committee acknowledges the benefit of consultation and the contribution to better and more open decision making that appropriate consultation can bring. However, the Committee's view is that, if anything, the inclusion of extensive publication of draft documentation in the consultation process undertaken by AQIS and as set out in the Handbook is unnecessarily broad. In particular, wide public release of the draft IRA, including indicative conclusions, was damaging to Australia's defence of the case when it came before the WTO in 1998. When it came time to release a final IRA with different conclusions from those contained within the draft, Australia and AQIS had to justify the amended conclusions, when the evidence had not altered significantly from that presented in the draft IRA. Had the draft IRA conclusions not been publicly released, the Committee considers that the defence of the case before the WTO would not have been so difficult.

7.32 The extensive publication of draft documents, while a formal part of the consultation process, is potentially damaging. The draft documents are provided not only to stakeholders, however that term may be defined, but are published in the AQIS Bulletin and on the Internet homepage. The Committee notes the advice from the Department of Foreign Affairs and Trade, the statements in the WTO Handbook on transparency and AQIS' own admission that publication to this extent goes beyond the requirements of the SPS Agreement. The Committee considers that this degree of publication was not required to meet Australia's international obligations, nor was it in Australia's domestic and international interests.

7.33 The Committee is seriously concerned that the premature public release of documents can positively prejudice Australia's position in WTO litigation. The Committee considers that the Government and its agencies must be mindful of the consequences of premature public release of such documents. It is the Committee's firmly held view that draft risk analyses should not be publicly released, especially on

the Internet site. Documentation accessible through the Internet should comprise Australia's rules, regulations and other documentation appropriate for international scrutiny.

WTO notification requirements

7.34 The Committee notes that the WTO process requires Australia to provide notification to the international community of a proposed measure and the mechanism for that notification, ie through inquiry points. The Committee further notes that the WTO only requires notification of a final measure at a stage which will allow interested parties to comment and have those comments taken into account. However, the determination of the final measure is a domestic process. This domestic process is developed by AQIS, which has the freedom to determine the extent to which it consults and precisely what is released into the public domain.

7.35 The processes set out in the Handbook were developed following the recommendations of the Nairn Committee review. However, so far as the Committee can ascertain, AQIS neither sought nor received advice on the extent to which AQIS was required to consult under the terms of the SPS Agreement. It appears that, during the development of the procedures and Handbook , no consideration was given to the implications of the extent of the consultation processes developed. Legal advice on the responsibilities incurred under the SPS Agreement and the limits of those responsibilities may have provided AQIS with some appropriate parameters within which to develop their procedures.

7.36 The Committee notes the WTO's own Handbook on the transparency provisions of the SPS Agreement, which does not require publication of draft regulations or draft IRA's. The Committee is firmly of the view that the transparency requirements under the SPS Agreement are appropriately fulfilled through the issue of Animal Quarantine Policy Memoranda.

7.37 The Committee considers that failure to take legal advice while developing the procedures outlined in the Handbook detracted from Australia's case in the WTO, leading to the requirement to ease import restrictions on salmon.

7.38 The Committee considers that the IRA procedures and Handbook developed by AQIS must be amended to provide for domestic procedures which will not require the release of documentation potentially prejudicial to Australia's interests. In particular, the Handbook must be amended to reflect amended consultation arrangements, which, while in accordance with the letter and spirit of the international agreements to which Australia is a signatory, do not compromise or prejudice Australia's interests.

7.39 The concern is compounded by the relative immaturity of the WTO and the potential value as a precedent of all cases coming before that body to date. The WTO is more in the tradition of a court than many of the other international courts and tribunals. AQIS itself notes:

> From the outset the international status of the GATT went beyond that of a 'best endeavours' international treaty and was typified as a multilateral contract involving black letter law, compared to the more charter type language of most other international treaties.[8]

7.40 It would be highly unusual for parties before the WTO not to cite existing cases as precedents and for the presiding officers not to rely on such cases for their value as a precedent. The Committee considers that AQIS and DFAT should have been more aware of the potential consequences of their actions and should have been more cautious about the processes adopted by both departments, given the implications of challenges within the WTO.

Recommendation 5

7.41 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

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

Recommendation 7

7.43 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.

The Methodology of the IRA

7.44 A significant factor in the development of the risk analysis is consideration of the relevant economic facts relating to risk reduction and risk management.[9] Given that disputes under the SPS and TBT Agreements will require consideration of scientific evidence, most often in the form of a risk assessment, such risk assessments will become increasingly important in dispute settlement cases. It is necessary to ensure that the methodology is rigorous.[10]

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8 AQIS, Submission 17, p 10

9 ibid, p 13

10 David Robertson, 'Incorporating Risk Assessment in Trade Policy', in *Industry Competitiveness, Trade and the Environment*, Productivity Commission Workshop Papers, Melbourne, 27 November 1998, p 84

7.45 The discussion of quantitative and qualitative risk assessment techniques is set out in Chapter Six. AQIS has continued to defend its use of qualitative risk analysis methodology, arguing that 'it is normal practice to conduct quarantine risk analyses on a qualitative rather than a quantitative basis, ie data are analysed and results presented in descriptive rather than numerical terms'.[11] AQIS also uses the Nairn Committee's comments in their 1996 report to further justify qualitative risk analysis, arguing that a good qualitative analysis is better than a poorly executed quantitative risk analysis. The Committee does not disagree with this stance. However, qualitative analysis should not stand alone or be absolute.

7.46 In answers to questions on notice, AQIS stated that the criticisms of the 1996 IRA were not based on Australia's failure to adopt a quantitative approach to risk analysis, but on its failure to meet SPS requirements because certain judgements, including the interpretation of some data and the conclusions of the analysis were not sufficiently supported by scientific evidence contained in the report.[12]

7.47 The Committee notes the report of the WTO, released on 18 February 2000, in which that organisation affirmed the validity of the qualitative approach to risk analysis generally and in this particular instance, ie the 1999 IRA. The Committee therefore makes no criticism of the methodology of the 1999 IRA, but does offer the following comments on the methodology of risk analysis generally.

7.48 Quantitative risk analysis is an evolving technique. The Committee further notes the comments of the OIE, which suggest that qualitative risk analysis is preferred i) in situations not requiring mathematical modelling skills; ii) will be more commonly used for those diseases, where there are well developed internationally agreed standards, where there is broad agreement concerning the likely risks, and iii) in areas of routine decision making. Quantitative risk assessment is a more objective tool.

7.49 The Committee recognises that:

a) The number of variables make quantitative risk analysis more difficult;

b) The methodology is developing.

7.50 The Committee acknowledges that no single method of import risk assessment is applicable in all situations - that different methods will be appropriate for different circumstances. Nevertheless, it is clear from the proceedings of the Panel of Experts that there was considerable criticism of AQIS' failure to undertake a more substantial quantitative analysis in the initial IRA. While the methodology of the 1999 IRA was ultimately endorsed by the WTO, the Committee feels that quantitative

11 AQIS, Supplementary Submission 59, (p 17

12 AQIS, Correspondence to Committee, 1 March 2000

risk analysis methodology should be used wherever possible and appropriate, in order that challenges in the WTO are minimised.

7.51 Where AQIS uses qualitative risk analysis methodology, AQIS must ensure that there is no ambiguity in the terminology used to describe risk factors. One of the difficulties with the salmon IRA was the lack of distinction between some of the terminology and language of the conclusions. Either AQIS must ensure that the terminology is clear and unambiguous or it should attempt quantitative risk analysis to minimise the subjectivity of any conclusions.

7.52 The judgment on the quantitative/qualitative risk analysis was one for AQIS to make. However, the Committee considers that there would be less risk of a challenge were more use to be made of quantitative risk analysis methodology or if the terminology used was explicit and unambiguous.

Recommendation 8

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

Key Centre for Risk Analysis

7.54 The Committee recognises the advantages membership of the WTO has for Australia as a trade dependent nation and one which is vulnerable to retaliation under the rules of the WTO. However, the Committee considers that Australia must ensure that the value of that membership is maximised without harm to Australia's domestic industries, human, animal and plant life and health and the environment. Australia has a special quarantine status - this significant aspect of Australia as a nation must be protected.

7.55 The Nairn Committee recognised the necessity for Australia to develop and maintain a leadership role in quarantine risk analysis. The Committee conceded that Australia had previously had a significant leadership role in this area internationally (particularly in animal health in the late 1980s and early 1990s), but had not maintained that position in recent years. The Review further commented:

> As a significant trading nation, it is in Australia's interests to lead in this area and to influence international developments through organisations such as the OIE and the IPPC.[13]

7.56 The Nairn Committee also noted the resources being committed to quarantine risk analysis by such countries as Canada, the US and New Zealand . In order to redress this situation, one of the recommendations of the Review was the establishment of a Key Centre for quarantine risk analysis to enhance Australia's reputation in this field. The Review Committee stated:

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13 Nairn M et al, *Australian Quarantine - A Shared Responsibility*, 1996, p 112

> One way to re-kindle interest and establish a strong base for this work in Australia is to develop a Key Centre in quarantine-related risk analysis. Such a Centre would provide a base for training and research in risk analysis and related disciplines… Ideally, the Centre should be based at an Australian university, preferably in a relevant faculty or school (eg. of epidemiology, public health, veterinary science or plant protection), and involve other agencies with expertise and experience in quarantine risk analysis.[14]

7.57 The Review Committee stated that the establishment of a Key Centre for quarantine-related risk analysis was 'essential to enhance Australia's intellectual leadership in this area' and recommended that 'the Government provide funds to establish a Key Centre for quarantine related risk analysis to enhance Australia as a world leader in this field'[15]

7.58 This Committee agrees that the establishment of a Key Centre is fundamental to the enhancement of both the conduct of risk analysis and as a means of participating in a leadership role in the international community in this area.

Recommendation 9

7.59 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*.

The Appropriate Level Of Protection

7.60 It is generally agreed that Australia takes a very conservative approach to its ALOP, whatever the specifics of that concept might be. However, it would appear that, while a member has considerable freedom to determine its ALOP, because the extent of quarantine measures which can be imposed is not unfettered, ie they 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.

7.61 This constraint is best demonstrated by quoting AQIS' submission, which states:

> **The obligations on members with regard to their SPS measures apply irrespective of the political processes involved in developing policies and applying operational procedures. Measures must be based on scientific**

14 ibid

15 ibid, p 113

principles and be applied only to the extent necessary to protect human, animal or plant life or health.[16]

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

7.63 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.

7.64 The Committee notes that environmental considerations and the precautionary principle, discussed in Chapter Four, have not been sufficiently considered in the determination of appropriate quarantine measures. Credible ALOP assessment means that a range of important factors, including the ability of diseases to be contained or eradicated, the potential impact on industries, the environment and biodiversity should be taken into account as WTO rules allow. The Committee affirms the view that the determination of the ALOP is a matter for government and no one agency should be required to explain or defend the ALOP. It is clear to the Committee that individual agencies are either reluctant or unable to state authoritatively or explicitly on what basis the ALOP is determined or by whom.

7.65 The Committee acknowledges that the ALOP 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.

Recommendation 10

7.66 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

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

16 AQIS, Submission 17, p 14

Australia's Membership of the WTO and International Law

7.68 The Committee is mindful of Australia's vulnerability as an exporter and a small nation. It notes the comments made in many submissions in support of Australia's membership of the WTO and the net benefit of that membership. For example, the NFF stated:

> …AQIS is obliged to make decisions on many import access requests that are politically sensitive – chicken meat, pork, apples and salmon. In all of these decisions there are both winners and losers. No matter what the decision, AQIS itself is in a no-win position.
>
> Australia has an interest in other WTO Members accepting the judgements of their competent quarantine authorities. Australia must therefore apply the same objective rules to import requests as those against which its own import requests must be judged.
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> …Through the Cairns Group Australia punches above its weight in WTO negotiations. But because we are highly visible players on the international stage our opponents are ever ready to criticise us…There is not a level playing field for agricultural trade, but Australia has nothing to gain by not playing by the rules of international trade. We lack the resources to compete with larger countries in domestic and export subsidies.[17]

7.69 The Director of Quarantine, Mr Paul Hickey, affirmed the importance to Australia of its membership of the WTO, and as a signatory to the SPS Agreement in particular, at public hearing:

> The dominant view that the SPS agreement is bad news for Australia must be dispelled. In 1998-99 AQIS achieved 44 new commodity/market combinations for our exports. It protected 103 markets from closure or disruption in the face of disease or processing events in Australia. In all of these cases, the disciplines of the SPS agreement are the leverage used by AQIS in its successful negotiations. [18]

7.70 It was emphasised that the dispute settlement mechanism at the heart of the WTO system reduces the scope for unilateral action by powerful nations, thereby guaranteeing fair trade:[19]

> Like all WTO Member governments, the Australian Government operates at the interface of a domestic political arena and the international political arena. The domestic pressures to reject an objectively reasonable dispute settlement decision may be great. It is understandable that some domestic constituencies want to protect Australian agriculture by a 'zero-risk' approach to imports, while strongly promoting exports. The need to address

17 National Farmers Federation, Submission 33, p 3-4

18 AQIS, Evidence, RRAT, 24 September 1999, p 24

19 National Farmers Federation, Submission 33, p 1

> this impossibility was recommended by Professor Malcolm Nairn in the 1996 Report of the Australian Quarantine Review Committee.[20]

7.71 It is noted that the RRAT Committee's 1996 Report on AQIS also affirmed that 'no-risk' quarantine policy 'is not, and never has been, a viable quarantine policy option'.[21]

International Law and the Conduct of the Case in the WTO

7.72 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.

7.73 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 considers that the quantum and quality of resources currently devoted to international law and for the conduct of litigation in international courts is inadequate.

7.74 The Committee notes and has referred previously to the increasingly 'legalistic nature' of the WTO compared with other international courts and tribunals. The Committee considers that Australia must take litigation before this body far more seriously, given the consequences for Australian trade interests. It is the Committee's view that a whole of government approach is required.

7.75 The Committee questions the role of DFAT as the lead agency in WTO litigation matters. This role appears to stem from the historical responsibility of DFAT, and previously the Department of Trade, for the GATT negotiations. The Committee notes the advice from DFAT to the effect that legal resources recently have been enhanced within the Branch.[22] However, there was no indication in that advice of the specialist skills the new recruits to the area had - whether they were specialist advocates or generalist lawyers. The Committee considers that

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20 ibid, p 3

21 RRAT, *Australian Quarantine and Inspection Service,* 1996, p 65

22 DFAT, Correspondence to Committee, 28 February 2000

responsibility for the conduct of litigation and international law generally should be re-examined by Government.

7.76 The Committee is also concerned about the role the Office of International Law within the Attorney-General's Department has played in this decade. The Committee notes that within the Attorney-General's Department, there was previously an international advisings area, which had responsibility for the gamut of international law advisings. While there is still expertise resident within the Attorney-General's Department, it appears that that expertise is not made available unless requested from a 'client' agency. The difficulty with this arrangement is that, under the current tied arrangements there is no one agency with responsibility for the conduct of international litigation and the accountability that goes with that responsibility.

7.77 In particular, the Committee considers that it is in Australia's interests to ensure that legal input is an essential part of any negotiation or policy development process. The Committee recognises the inherent tension between the trade negotiation and diplomatic roles of the Department of Foreign Affairs and Trade and that of litigator before international courts and tribunals, albeit trade courts. For this reason, the Committee considers that an office responsible for the provision of international legal advice and the conduct of litigation in the international arena should be a discrete entity, reporting direct to the responsible Minister and able to bring an independent opinion to any matter. However, the Committee also recognises the advantages of being closely integrated with the Department of Foreign Affairs and Trade.

7.78 Notwithstanding any augmentation of DFAT resources, it is the Committee's strongly held view that the conduct of litigation in the WTO requires specialist expert litigation skills, which do not appear to be present in DFAT. Nor is the Office of International Law sufficiently resourced to adequately fulfil the function. The Committee notes the comment of the officer from the Office of International Law, when he noted that additional legal resources would be required to enhance service provision.[23]

7.79 The current arrangements under the Administrative Orders present another problem. International law is a tied arrangement, whereby the international law function is the joint responsibility of DFAT and the Attorney-General's Department, with neither agency having the primary responsibility for international law. The Committee is also concerned at the current policy within the Office of International Law, which requires that a client agency approach the Office before that Office can become involved in the conduct of litigation. The Committee is concerned that the current administrative arrangements are not sufficiently prescriptive to ensure that the responsibility and accountability for international litigation is vested in the appropriate agency.

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23 Attorney General's Department, RRAT, Evidence, 18 February 2000, p 391

7.80 The international law function is broader than merely the conduct of litigation. Any responsible agency must be involved at an earlier point in time than the point of dispute. The Committee notes the establishment of the Disputes Investigation and Enforcement Unit at the domestic level and commends the Government for its initiative in setting up such a body. However, the Committee remains concerned that insufficient regard has been paid to the international law function.

An International Legal Adviser

7.81 The Committee considers that it would be advantageous to establish an international legal adviser's office to provide a mechanism for more effective international legal outcomes for Australia. The first objective of international legal advising should be either to avoid disputes which require litigation or resolve such disputes at a very early stage. The Committee emphasises that such an office must be part of an integrated approach to the provision of international legal advice to the government. Such advice should encompass the following:

a) Negotiation of new treaties;

b) Establishment of international bodies;

c) Membership of international legal organisations;

d) Negotiations on the interpretation and application of treaties; and

e) Dispute settlement which will include not only negotiations in respect of an issue but also the possibility of conciliation, mediation, arbitration or finally litigation.

7.82 The Committee discussed the location of the Office and considered three possibilities:

a) Attorney-General's Department;

b) The Department of Foreign Affairs and Trade; and

c) The Department of Prime Minister and Cabinet.

7.83 The Attorney-General's Department is responsible for the provision of legal advice to the government. The Department is required to provide high level legal advice in a wide-ranging number of areas including specialised areas such as constitutional law and international law.

7.84 The Department of Foreign Affairs and Trade is responsible for protecting and advancing Australia's international interests through its dealings with other governments and international organisations.

7.85 The Department of Prime Minister and Cabinet was established to deal with the following principal matters:

a) Co-ordination of government administration;

b) Assistance to Cabinet and its committees;

c) Policy advice and administrative support to the Prime Minister;

d) Inter-governmental relations and communications with state and territory governments;

e) Status of women;

f) Aboriginal and Torres Strait Islander affairs; and

g) Government ceremonial and hospitality.

7.86 In the light of the responsibilities listed above, it can be seen that, currently, the departments with responsibilities most aligned with the provision of International legal advice are Attorney-General's and the Department of Foreign Affairs and Trade.

7.87 The Committee reiterates that a whole of government approach to the conduct of international litigation is required. The Committee considers that the first step in providing a more effective system is the creation of an International Legal Adviser's Office. The Committee understands that such an office exists within the United States Department of State. The responsibilities of the Office must encompass the matters listed in paragraph 7.81 above.

7.88 The Committee also concludes that the Office should be established as a statutory authority, albeit located within the Attorney-General's Department and reporting direct to the Attorney-General. The Office should include within it an office of International Litigation. The Committee considers that the establishment arrangements of the Australian Safeguards and Non-Proliferation Office provides an appropriate model.[24] The Director-General of ASNO is a statutory office, reporting directly to the Minister for Foreign Affairs and Trade, appointed to 'ensure the independence and integrity of Australia's domestic and bilateral safeguards functions'.[25]

7.89 For administrative effectiveness the Committee considers that there should be an outposted senior officer from the International Legal Adviser's Office within every division of DFAT, in order to ensure the provision of specialised international legal advice at a very early stage and the consideration of any matter which had the propensity to lead to discussions of an international legal nature or which may impose international legal obligations on Australia. It may also be appropriate for officers to be seconded to AFFA and, in particular, AQIS. The Committee further considers that, like the Key Centre proposal, the International Legal Adviser's Office will be able to

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24 See Appendix 7

25 ASNO Annual Report 1998-99, p 7

provide the basis for Australian international lawyers to be placed in international legal organisations of interest to Australia.

Recommendation 12

7.90 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

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

Recommendation 14

7.92 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.

Evaluation of International Arrangements

7.93 The Committee is concerned about Australia's performance to date in the WTO. The Committee notes the aggressive nature of the challenges undertaken by Canada and the United States and considers that Australia may be able to benefit from an examination of the practices and procedures adopted by such countries in their pursuit of claims within the WTO. The Committee also notes that New Zealand has been proactive in bringing cases before the WTO.

7.94 The Committee believes that Australia failed to fully utilise all the legal expertise available to it within Government in responding to the WTO proceedings; nor did it utilise sufficiently outside expertise. As a consequence, Australia appeared before the WTO ill-equipped and poorly prepared than it might have been.

Recommendation 15

7.95 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.

Senator Winston Crane
Chairman