20 February 2009

Australian Banana Growers' Council Inc

Submission to Senate Rural and Regional Affairs and Transport Committee

Inquiry into the import risk analysis (IRA) for the importation of Cavendish bananas from the Philippines

1 Executive Summary

1.1 About the Council

The Australian Banana Growers' Council Inc (**Council**) is the Australian banana industry's peak body representing the interests of Australia's 796 banana growers.

1.2 Participation in IRA process

The Council has actively participated as a stakeholder in representing the interests of its members in the import risk analysis for bananas from the Philippines since it commenced in early 2000.

The Council has provided detailed scientific and technical submissions to Biosecurity Australia at each stage of stakeholder consultation in the IRA process, including in response to the Technical Information Paper released in 2002, and the various draft IRA reports released in 2002, 2004 and 2007.

The Council has also made submissions to Biosecurity Australia at various stages of the IRA process in relation to Biosecurity Australia's conduct of the bananas IRA.

The Council also provided a submission to, and attended hearings of, the Committee's inquiry entitled "*Administration of Biosecurity Australia – Revised draft import risk analysis for bananas from the Philippines*".

1.3 Issues raised in this Submission

As the Committee is aware, the Council has had many difficulties with Biosecurity Australia's administration of the bananas IRA over many years.

There are many issues of concern which the Council could raise about Biosecurity Australia's administration of the bananas IRA in this Submission.

However, the Council has decided to only raise the following two issues which are of very serious concern to the Council:

- Biosecurity Australia's failure to specify the risk management measures which would apply to the importation of the bananas from the Philippines with the consequence that the determination of those risk management measures will occur outside of the IRA process; and
- the ability for compliance by Philippine banana growers with the risk management regime to be effectively monitored and enforced unless AQIS on-the-ground inspectors are directly involved in monitoring and enforcing compliance through the conduct of real-time inspections in plantations and packing stations on an intensive and ongoing basis .

The Council looks forward to appearing before the Committee and would be happy to provide any additional information which the Committee requires.

2 Biosecurity Australia's failure to specify risk management measures

2.1 Requirement to specify risk management measures

The *Import Risk Analysis Handbook 2003* (**IRA Handbook**) states that an import risk analysis "*identifies the pests and diseases relevant to an import proposal, assesses the risks posed by them and, if those risks are unacceptable, specifies what measures should be taken to reduce those risks to an acceptable level* [emphasis added]."[1]

Consistent with that description, the final IRA report states that an import risk analysis (**IRA**) is comprised of the following three discrete stages: pest categorisation, pest risk assessment and pest risk management.[2]

The final IRA report describes the third stage (pest risk management) of an IRA as the "*process of identifying and implementing measures to mitigate risks to achieve Australia's ALOP while ensuring that any negative effects on trade are minimised.*"[3]

The third stage (pest risk management) of an IRA involves:

- identifying potential risk management measures for each of the pests assessed in stage 2 (pest risk assessment) of the IRA as requiring risk management;
- assessing the efficacy of each of those potential risk management measures; and
- assessing whether any of those potential risk management measures, either alone or in combination, could reduce the risk of the entry, establishment and spread of the pest sufficiently to achieve Australia's ALOP.

2.2 Biosecurity Australia's failure to specify risk management measures

The IRA team did not complete that critical third stage (pest risk management) of the IRA for Moko, black Sigatoka and freckle and, as a consequence, did not (and could not) recommend any risk management measures for those pests.

The IRA team did:

- calculate a 'pest threshold' for each of Moko, black Sigatoka and freckle;[4] and
- identify a range of potential risk management measures for those pests.[5]

However, the IRA team failed to undertake the critical element of analysis involved in the third stage of the IRA which is to:

- assess the efficacy of each of the identified potential risk management measures for those pests; and

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1 see paragraph 3.1 of the IRA Handbook (at page 8)
2 see paragraph 3.1 of part B of the final IRA report (at page 15)
3 see paragraph 3.1.3 of part B of the final IRA report (at page 16)
4 see paragraphs 9.16, 10.19 and 11.12 of part B of the final IRA report (at pages 107, 150 and 182)
5 see paragraphs 9.16.1, 10.19.1 and 11.12.1 of part B of the final IRA report (at pages 108, 153 and 184)

- consequently, assess whether those potential risk management measures, either alone or in combination, could reduce the risk of the entry, establishment and spread of those pests sufficiently to achieve Australia's ALOP (or, expressed another way, reduce the level of infection of those pest sufficiently to achieve the 'pest threshold' for those pests).

What is the 'pest threshold' for a pest?

The 'pest threshold' for a pest is the level of pest infection which must be achieved in order for the risk of the entry, establishment and spread of the pest to achieve Australia's ALOP.

The 'pest threshold' for a pest is simply an alternative way of expressing the level of risk which must be achieved for the pest to achieve Australia's ALOP.

Calculating the 'pest threshold' for a pest is the starting point of the third stage of the IRA.

Failure to assess the efficacy of potential identified risk management measures

While the IRA team identified a token range of potential risk management measures for the pests and considered whether those potential risk management measures were technically feasible, it did not undertake the next step in the third stage (pest risk management) of the IRA, which was to assess the efficacy of each of the identified potential risk management measures.

Instead, the IRA team undertook a scientifically irrelevant hypothetical analysis based on unverified "*example efficacies*" for the identified potential risk management measures.

That hypothetical analysis involved the IRA team suggesting some unverified "*example efficacies*" for the potential risk management measures for Moko, black Sigatoka and freckle and assessing whether, based on those unverified "*example efficacies*", the potential risk mitigation measures, either alone or in combination, could achieve Australia's ALOP for those pests.[6]

However, IRA team recognised that the "*example efficacies*" were unverified and were simply "*examples"* and *"do not imply that such a level of reduction will be achieved*".[7]

Based on that hypothetical analysis, the final IRA report identified a number of combinations of risk management measures ("*possible systems approaches*")[8] for Moko, black Sigatoka and freckle which "*could*"[9] achieve Australia's ALOP. It was necessary for the IRA team to say that those combinations of risk management measures *"could*" (rather that "would") achieve Australia's ALOP because they did not assess the efficacy of the potential risk management measures and, therefore, were not in a position to know whether or not they would actually achieve Australia's ALOP.

Having determined that some "*possible systems approaches*" could (not would) achieve Australia's ALOP, the IRA team then concluded that:

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6 see paragraphs 9.16.2, 10.19.2 and 11.12.2 of part B of the final IRA report (at pages 111, 156 and 186)

7 see section headed 'Conclusion' in paragraphs 9.16.2, 10.19.2 and 11.12.2 of part B of the final IRA report (at pages 113, 159 and 188)

8 see section headed 'Systems approach' in paragraphs 9.16.2, 10.19.2 and 11.12.2 of part B of the final IRA report (at pages 113, 158 and 188)

9 see section headed 'Conclusion' in paragraphs 9.16.2, 10.19.2 and 11.12.2 of part B of the final IRA report (at pages 113, 159 and 188)

The Philippines Government would be required to provide evidence to Australian authorities on the efficacy of any phytosanitary risk management measures proposed to reduce the level of [infection of the pest] to levels which would achieve Australia's ALOP [that is, the 'pest threshold' for the pest].

Any proposed phytosanitary risk management measures would be required to be demonstrated, to Australia's satisfaction, by laboratory experiments and/or field trials and under commercial conditions …[10]

The outcome is that the final IRA report does not recommend any particular risk management measures for Moko, black Sigatoka and freckle (because it could not because the IRA team did not undertake the critical element of analysis required to make such a recommendation).

The risk management measures for Moko, black Sigatoka and freckle are left to be proposed by the Philippines Government (or a Philippines import proponent) at some later time after the conclusion of the IRA process, and the assessment of the efficacies of those risk management measures is left to be determined at some later time after the conclusion of the IRA process.

The effect has been to defer the completion of the third stage (pest risk management) of the IRA for Moko, black Sigatoka and freckle to a later time and a later forum, outside of the IRA process.

Annexure A to this Submission contains a more detailed technical discussion about the failure to compete the third stage (pest risk management) of the IRA for Moko, black Sigatoka and freckle.

2.3 Biosecurity Australia's attempt to conceal the failure to specify risk management measures

The Council believes Biosecurity Australia has sought to mislead stakeholders about its failure to specify risk management measures by drafting key parts of the final IRA report in a vague and uncertain way so as to give the impression that risk management measures have been proposed for Moko, black Sigatoka and freckle when, on a proper analysis of the final IRA report, that is not the case (and could not be the case because the critical element of analysis described above was never undertaken).

This endeavour to mislead stakeholders is reflected in the Biosecurity Australia Advice 2008/34 which announced the release of the final IRA report. That advice states (in part):

Biosecurity Australia has completed the Final Import Risk Analysis (IRA) Report for the Importation of Cavendish Bananas from the Philippines into Australia.

The final IRA report includes recommendations on risk management measures. …

The final IRA report recommends bananas could enter Australia if the Philippines meets strict risk management measures for seven groups of pests of quarantine concern, including moko, black Sigatoka and freckle.

[10] see paragraphs 9.16.3, 10.19.3 and 11.12.3 of part B of the final IRA report (at pages 113, 159 and 189)

The final IRA report does not recommend specific risk management measures for Moko, black Sigatoka and freckle. It simply suggests a number of "possible systems approaches" which "could" (not would) achieve Australia's ALOP for those pests and leaves it up to the Philippines Government, after the conclusion of the IRA process, to propose risk management measures and to demonstrate that they would be effective to achieve Australia's ALOP.

2.4 The impact of Biosecurity Australia's failure on the Council

The effect of the approach adopted by the IRA team is to defer to some future occasion and some other forum the consideration of what risk management measures, if any, will be applied to the importation of bananas from the Philippines.

It leaves it to the Philippines Government (or a Philippines import proponent) to provide on that future occasion and in that other forum, information necessary to assess the efficacy of its proposed risk management measures.

The Council does not take issue with requiring the Philippines Government to provide information necessary to assess the efficacy of proposed risk management measures, it takes issue with the fact that Biosecurity Australia did not seek and consider that information as part of the IRA process as it was required to do.

The Council should have been entitled, through the IRA process under the IRA Handbook, to challenge and test the consideration of what risk management measures, if any, would be applied to the importation of bananas from the Philippines.

It should also have been entitled, through the IRA process under the IRA Handbook, to challenge and test any information provided by the Philippines Government in support of any proposed risk management measures.

The Council has now been denied the opportunity to do those things which it was supposed to be entitled to do through the IRA process under the IRA Handbook. The final IRA report should not have been completed without the assessment of that information and the recommendation of risk management measures.

The Council now finds itself in the intolerable position of the chief executive of Biosecurity Australia having recommended that the importation of bananas from the Philippines be permitted in circumstances in which the Council:

- does not know what risk management measures will apply to the importation; and
- is denied the opportunity, to which it should have been entitled though the IRA process under the IRA Handbook, to comment on the assessment of the efficacy of the proposed risk management measures having regard to the information provided by the Philippines Government.

2.5 The Council's request

The Council wishes to be provided with the opportunity, outside of the IRA process, to comment on any proposed risk management measures for the importation of bananas from the Philippines and the information presented by the Philippines Government (or a Philippines import proponent) in support of those risk management measures.

The Council has written to the Director of Animal and Plant Quarantine (the Secretary of the Department of Agriculture, Fisheries and Forestry) requesting that the Director of Animal and Plant Quarantine provide the Council with that opportunity.

In effect, the Council has simply requested that the Director of Animal and Plant Quarantine provide the Council with the opportunity which it should have been provided during the IRA process under the IRA Handbook.

The Council asks the Committee to:

- inquire into why Biosecurity Australia released the final IRA report without completing the third stage (pest risk management) of the IRA for Moko, black Sigatoka and freckle as required under the IRA Handbook; and
- support the Council's request to be provided with the opportunity discussed above.

3 Proposed risk management regime

3.1 Introduction

As discussed in **section 2** above, the final IRA report suggests a number of possible systems approaches for Moko, black Sigatoka and freckle (but, for the reasons discussed above, does not recommend any particular systems approach).

In the case of Moko, those possible systems approaches are comprised of combinations of the following possible risk management measures:

- areas of low pest prevalence (that is, low levels of infection in Philippine plantations);
- post-harvest chlorine treatment (that is, chlorine treatment in wash tanks in Philippine packing stations); and
- visual inspection for discolouration of the pseduostem (the stem of a bunch) and peduncle (the crown of a hand) followed by corrective action (that is, the inspection for, and removal of, discoloured fruit from export).[11]

In the case of black Sigatoka, those possible systems approaches are comprised of combinations of the following possible risk management measures:

- areas of low pest prevalence (that is, low levels of infection in Philippine plantations);
- trash minimisation (that is, steps to reduce the levels of trash in Philippine plantations and/or packing stations); and
- post-harvest fungicide treatment (that is, the treatment of harvested fruit with a fungicide in the packing station).[12]

In the case of freckle, those possible systems approaches are comprised of combinations of the following possible risk management measures:

- areas of low pest prevalence (that is low levels of infection in Philippine plantations);
- fungicide bunch sprays (that is, spraying growing bunches with fungicide in Philippine plantations); and
- post harvest fungicide treatment (that is, the treatment of harvested fruit with a fungicide in the packing station).[13]

The possible risk management measures specified above are collectively referred to as ‘possible risk management measures’ in this section of this Submission.

3.2 Proposed risk management measures open for avoidance

Most of the possible risk management measures are not part of current standard commercial practice in the Philippines and compliance with them would impose a

[11] see section headed ‘Systems approach’ in paragraph 9.16.2 of part B of the final IRA report (at page 113)
[12] see section headed ‘Systems approach’ in paragraph 10.19.2 of part B of the final IRA report (at page158)
[13] see section headed ‘Systems approach’ in paragraph 11.12.2 of part B of the final IRA report (at page 188)

significant initial and ongoing financial and operational burden on individual Philippine banana growers (particularly the areas of low pest prevalence regime which is common to all of the possible systems approaches identified in the final IRA report).

As a consequence, Philippine banana growers will have a strong economic incentive for non-compliance.

For example, compliance with an area of low pest prevalence measure for Moko would require a weekly inspection of a grower's registered plantation/block to identify diseased plants and, in the event that the level of disease exceeds the prescribed pest prevalence, the reporting of that fact. That reporting would lead to the suspension of the plantation/block from exporting to Australia for at least 12 months. Thus compliance involves the significant cost of weekly inspections, and in the event that the prescribed level of pest prevalence is exceeded, the very substantial cost of the registered plantation/block being suspended from exporting to Australia.

In the absence of intensive continuous and effective ongoing compliance monitoring, the Council strongly believes that there is a very real likelihood that Philippine banana growers would seek to avoid complying with any risk management regime.

The likelihood of non-compliance occurring undetected is very high given that non-compliance with many of the proposed risk management measures will not be able to be detected through pre-clearance inspections in the Philippines or on-arrival inspections in Australia (as discussed in **section 3.3** below).

3.3 Integrity of the any of the proposed systems approaches relies on the action of Philippine banana industry participants

All of the possible risk management measures for Moko, black Sigatoka and freckle are required to be implemented by Philippine banana growers through the actions of their plantation and packing station workers.

The final IRA report contemplates that an agency of the Philippines Government (the Philippine Bureau of Plant Industry (**BPI**)), and persons accredited by it, will be responsible for monitoring and enforcing compliance by Philippine banana growers with the risk management regime.[14]

The proper implementation of the risk management regime therefore requires competence, diligence and honesty from a large number of Philippine banana growers, plantation and packing station workers and BPI officials.

There is nothing in the risk management regime which would assure the competence, diligence or honesty of those engaged in implementing the possible risk management measures.

In addition, because Philippine banana growers interests will not be served by achieving compliance, there will be strong economic and political forces continuously at work to provide powerful incentives to BPI and its political masters to obfuscate its dealings with AQIS where to be transparent would harm the interests of Philippine banana growers.

The same set of forces will also be at work to undermine the diligence, if not honesty, of officers of BPI in the discharge of their functions under the risk management regime.

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[14] Chapter 20 of part B of the final IRA report (at page 293).

The Philippines is ranked 121 out of 163 countries (with a score of 2.3 – 2.8 out of 10) in the recent Corruption Perception Index (2006) published by Transparency International. That ranking places the Philippines in the bottom 10 of country rankings. Graft and corruption is acknowledged as being a very serious problem in the Philippines (including by the Philippines Government). In an environment in which graft and corruption is commonplace, there is a very real risk that the integrity of the risk management regime will be prejudiced by graft and corruption of BPI officials.

The consequences of BPI officials turning a blind eye to non-compliance for whatever reason would be no less damaging to the integrity of the risk management regime than BPI officials actively engaging in graft and corruption.

The Council is strongly opposed to the establishment of a risk management regime which relies, for its integrity, on strong and effective compliance monitoring and enforcement but which, in the context of an operational framework which provides inadequate incentives for compliance and in an environment of systemic graft and corruption, imposes the responsibility for compliance monitoring and enforcement on BPI. The Australian banana industry can have no confidence (nor should the Australian Government) that BPI will fulfil its responsibilities professionally and impartially.

What is more, even if BPI were to conduct itself with complete diligence and honesty it is highly doubtful that the risk management regime would or could deliver what is required of it – because an audit approach cannot assure consistent and accurate administration by Philippine plantation and packing station workers when those people are economically dependant on Philippine banana growers.

3.4 Very limited ability to inspect for non-compliance

Pre-clearance inspections in the Philippines and on-arrival inspections in Australia provide an opportunity to remove fruit from the export pathway which has been compromised by non-compliance with certain of the possible risk management measures.

However, non-compliance with the following possible risk management measures for Moko, black Sigatoka and freckle will not be able to be detected through pre-clearance and on-arrival inspections:

- the area of low pest prevalence measure for Moko, black Sigatoka and freckle;
- the visual inspection and correction measure for Moko;
- the post-harvest treatment measures for Moko, black Sigatoka and freckle; and
- the fungicide bunch spray measure for freckle.

As such, pre-clearance and on-arrival inspection will not be able to detect non-compliance with:

- any of the possible risk management measures for Moko and freckle; and
- two of the three possible risk management measures for black Sigatoka.

As a consequence, any fruit which is compromised by non-compliance with any of the above possible risk management measures which is not immediately detected and removed from the export pathway at the time of the non-compliance will continue

through the entire export pathway (including pre-clearance and on-arrival inspections) undetected.

The integrity of the risk management regime therefore requires intensive and ongoing compliance monitoring and corrective action so that fruit which is compromised by non-compliance with the prescribed risk management measures can be immediately detected and removed from the export pathway.

3.5 Involvement of AQIS

The final IRA report contemplates that AQIS will have a role in off-shore compliance monitoring and enforcement.

However, that role appears to be limited to:

- an audit function; and
- pre-clearance inspection (at least for the initial period of trade).

Audit

The final IRA report contemplates the following audit role for AQIS:

- audit of delegated risk management procedures;[15]
- audit of the Philippine operating manual and work plan on their production, processing and certification system;[16]
- field audits to measure compliance with plantation registration, block identification, disease management/monitoring, records management and the administration of areas of low pest prevalence and accreditation requirements;[17]
- audits to measure compliance, such as trash minimisation in registered plantation/blocks, packing station responsibilities, traceability, labelling, segregation and production security, BPI/agency inspection and certification processes and other procedures relevant to identified quarantine pests;[18]
- audit of participants in BPI certification arrangements;[19]
- audits of records relating to operation under standard commercial practice;[20]
- audits of records relating to weekly disease control and plantation monitoring and spray diaries;[21]
- audit of records relating to the replacement of damaged bunch covers;[22]
- audit of proposed inspection methodology for the area of low pest prevalence measure;[23]

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15 see paragraph 20.2.2 of part B of the final IRA report (at page 294)
16 see paragraph 20.2.4 of part B of the final IRA report (at page 295)
17 see paragraph 20.2.4 of part B of the final IRA report (at page 295)
18 see paragraph 20.2.4 of part B of the final IRA report (at page 295)
19 see paragraph 20.2.4 of part B of the final IRA report (at page 295)
20 see paragraph 20.3.1 of part B of the final IRA report (at page 296)
21 see paragraph 20.3.2 of part B of the final IRA report (at page 296)
22 see paragraph 20.3.2 of part B of the final IRA report (at page 296)
23 see paragraph 20.3.2 of part B of the final IRA report (at page 297)

- audit of BPI's documented criteria in relation to appointment of accredited persons for plantation inspections;[24]
- audit of pest survey records;[25]
- audit of vascular inspection records;[26]
- audit of trash minimisation procedures;[27]
- audit of documented system for application of post-harvest treatment for Moko and black Sigatoka;[28]
- audit of documentation in relation to maintenance of good hygiene on the packing line;[29] and
- audit of composite sampling procedures.[30]

The final IRA report contemplates that AQIS will have a role in conducting field audits and compliance auditing. The final IRA report notes that "*[a]udits may be conducted at the discretion of AQIS during the entire production cycle and also as a component of any pre-clearance arrangement*".[31]

While it is not completely clear from the final IRA report, it appears that AQIS's role will be limited to performing field audits and compliance audits on a limited and ad hoc basis, and that much of AQIS's audit activity will involve paper audits of records and procedures.

For the reasons discussed above, the integrity of the proposed risk management regime requires strong and effective off-shore compliance monitoring and enforcement. That compliance monitoring and enforcement must be conducted intensively and on an ongoing basis.

For the reasons discussed above, BPI cannot be relied upon to conduct that compliance monitoring and enforcement.

If the risk management regime is to be implemented in the form contemplated in the final IRA report, on-the-ground AQIS inspectors must be responsible for conducting compliance monitoring and enforcement, as well as other critical activities such as weekly plantation inspections.

AQIS's "audit" role must be directed at detecting instances of non-compliance at the time of the non-compliance and removing any compromised fruit from the export pathway.

AQIS on-the-ground inspectors must be directly involved in verifying compliance with the possible risk management measures through the real-time inspections of the implementation of the possible risk management measures in both plantations and packing stations.

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[24] see paragraph 20.3.2 of part B of the final IRA report (at page 297)
[25] see paragraph 20.3.2 of part B of the final IRA report (at page 297)
[26] see paragraph 20.3.3 of part B of the final IRA report (at page 298)
[27] see paragraph 20.3.5 of part B of the final IRA report (at page 298)
[28] see paragraph 20.4.4 of part B of the final IRA report (at page 300)
[29] see paragraph 20.4.5 of part B of the final IRA report (at page 301)
[30] see paragraph 20.4.6 of part B of the final IRA report (at page 301)
[31] see paragraph 20.2.4 of part B of the final IRA report (at page 295)

AQIS inspections should not occur on a limited and ad hoc basis but should occur intensively on an ongoing basis for so long as a plantation/block remains registered to export fruit to Australia.

Importantly, it is not sufficient for AQIS to rely upon paper audits of records as verification for compliance with the possible risk management measures because:

- records can be falsified;
- it is not possible for AQIS in verifying whether records (for example, pest survey records) accurately report the matters to which they relate (for example, pest prevalence);
- a paper audits can only verify whether record maintenance requirements have been complied with; and
- even if a paper audit was able to identify non-compliance with a possible risk management measure, because of the delay between the occurrence of the non-compliance and the time of conducting the paper audit, it would be unlikely that AQIS could take action to remove compromised fruit from the export pathway.

Weekly plantation inspections

The final IRA report contemplates that AQIS would have a limited role in conducting field audits to measure compliance with the possible area of low pest prevalence measure for Moko, black Sigatoka and freckle and in conducting paper audits of pest survey records.

While it is not completely clear from the final IRA report, it appears that the final IRA report contemplates that AQIS will conduct field audits on a limited and ad hoc basis. For the reasons discussed above, paper audits of pest survey records provide no verification of the level of pest prevalence in a plantation.

That level of AQIS involvement in such a critical aspect of the area of low pest prevalence measure for Moko, black Sigatoka and freckle is not sufficient.

For the reasons discussed above, weekly plantation inspections should not be conducted by BPI (or persons accredited by BPI) but should be conducted by AQIS on-the-ground inspectors.

Pre-clearance inspections

The final IRA report contemplates that AQIS will be involved in conducting pre-clearance inspections for "*the initial trade*"[32] or "*for at least [the] initial trade*"[33]. The final IRA report also contemplates that "*[t]he need for pre-clearance would be reassessed after experience had been gained following significant trade*".[34]

The final IRA report states that "*[u]nder pre-clearance arrangements, AQIS officers would be involved in plantation inspections for Moko, black Sigatoka, freckle and other quarantine pests, in direct verification of packing station procedures, and in fruit inspections*".[35]

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[32] see paragraphs 15.7, 16.7, 17.7 and 19.7 of part B of the final IRA report (at page 247, 259, 271 and 290)
[33] see paragraphs 20.4.7 and 20.6.5 of part B of the final IRA report (at pages 302 and 305)
[34] see paragraph 20.4.7 of part B of the final IRA report (at page 302)
[35] see paragraph 20.4.7 of part B of the final IRA report (at page 302)

It is not clear what level of involvement it is proposed that AQIS on-the-ground inspectors will have in directly verifying compliance with the possible risk management measures under the pre-clearance arrangements during the initial period of trade.

It appears that even under the pre-clearance arrangements, AQIS on-the-ground inspectors will have limited involvement in direct verification of the possible risk management measures.

For the reasons discussed above, AQIS on-the-ground inspectors must:

- be directly involved in monitoring and enforcing compliance with the risk management regime through the conduct of real-time inspections in plantations and packing stations on an intensive and ongoing basis; and
- undertake weekly plantation inspections (or must directly supervise persons accredited by AQIS to undertake those inspections).

It is not acceptable to place a limit on the time in which AQIS will be involved in the direct verification of compliance with the possible risk management measures as has been proposed for pre-clearance inspections. That involvement must continue for so long as imports are permitted from the Philippines.

3.6 The Council's request

The Council asks the Committee to:

- inquire into the likely duration and extent of AQIS's on-the-ground role in monitoring and enforcing compliance with the risk management regime if trade is permitted; and
- support the Council's submission that AQIS on-the-ground inspectors:
    - be directly involved in monitoring and enforcing compliance with the risk management regime through the conduct of real-time inspections in plantations and packing stations on an intensive and ongoing basis; and
    - undertake weekly plantation inspections (or must directly supervise persons accredited by AQIS to undertake those inspections).

4 Other issues

4.1 Failure to maintain public file

The Handbook requires Biosecurity Australia to place particular documents on the public file for the bananas IRA.

Paragraph 3.9 of the Handbook (at page 10) (in part) provides:

> *At the commencement of the IRA, Biosecurity Australia establishes a public file to contain non-confidential submissions and other technical documentation.*
>
> *…*
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> *Further details of the material to be placed on each public file are in Annex 6.*

Annex 6 of the Handbook (at page 29) provides:

> *A public file containing non-confidential submissions and other technical documentation is established at the commencement of each IRA. Each public file is held at Biosecurity Australia's office in Canberra and documents may be accessed during business hours, by prior appointment, for perusal and copying. Submissions and other documentation in electronic form are made available to stakeholders on request. To maximise access to documents, stakeholders are encouraged to make submissions electronically. Where appropriate, documentation on the public file which is in electronic form is available on the AFFA website.*
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> *A public file for an IRA contains the following non-confidential material:*
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> - *a table of contents*
> - *the background to the import proposal*
> - *determinations and decisions on procedural matters made by the Deputy Secretary and the Executive Manager of Biosecurity Australia during the conduct of the IRA*
> - *documents publicly circulated by Biosecurity Australia during the IRA, including those providing advice and/or seeking input on:*
> - *commencement of the IRA*
> - *scope and approach for the IRA and composition of the IRA team*
> - *appeals*
> - *the technical issues paper and Draft and Final IRA Reports*
> - *the recommendation for a policy determination and the final policy determination.*
> - *relevant technical submissions and other correspondence*
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>   *This will not include a submission, or part of a submission, that a stakeholder indicates is confidential and is capable of being classified as such in accordance with the Freedom of Information Act, or which*

Biosecurity Australia reasonably considers may give rise to an action for defamation.

Advice that confidential material has been received will be placed on the public file.

- *correspondence raising relevant technical issues*
- *technical material used in the IRA, not available in the public domain and not subject to copyright*
- *a list of technical material used in the IRA but subject to copyright (titles of references only)*
- *AFFA's responses to submissions, including statements of reasons*
- *where appropriate, formal reports provided by a technical working group (TWG), consultant or peer reviewer*

On 1 September 2006, by *Biosecurity Australia Policy Memorandum 2006/27*, the then Executive Manager of Biosecurity Australia notified stakeholders that, effective 1 July 2006, "*Biosecurity Australia has now improved arrangements for public files by making our website the main access point for public file information*" and that "*[its] electronic images of documents that previously could only be viewed on the file in Canberra are now to be available via the website*".

By email dated 14 September 2006, Mr John Wilson, Communications Manager, Biosecurity Australia confirmed to Tony Heidrich, Chief Executive Officer of the Council that "*[a]s per our discussion and the policy memorandum you received about access to public file material* [Biosecurity Australia Policy Memorandum 2006/27]*, any information that is put on the public file, since 1 July this year, for the import risk analysis on bananas from the Philippines will also be added to the banana IRA information on the BA website*."

The public file for the bananas IRA on Biosecurity Australia's website (http://www.daffa.gov.au/ba/ira/current-plant/banana-philippines) does not contain much of the material which is required by the Handbook to be placed on the public file.

In particular, the public file does not contain the following documents which are required by the Handbook to be placed on the public file:

(a) a significant amount of correspondence between the Council and the Department of Agriculture, Fisheries and Forestry (including Biosecurity Australia) in relation to the bananas IRA;

(b) advice and recommendations provided by the Bureau of Rural Sciences to Biosecurity Australia in connection with the Bureau of Rural Sciences' involvement in the audit and verification of the Philippines' bananas import risk analysis referred to on pages 307 – 308 of part B of the final IRA report;

(c) the original and revised Factors and Model workbooks, referred to on pages 307 - 308 of part B of the final IRA report, which were audited by the Bureau of Rural Sciences;

(d) correspondence between Biosecurity Australia and the Eminent Scientists Group in relation to the bananas IRA;

(e) the documents referred to on page 1 (under the heading "Introduction") of *The Report of the Eminent Scientists Group on the Draft Final IRA Import Risk Analysis Report for the Importation of Cavendish Bananas from the Philippines* (August 2008);

(f) all correspondence between the Australian Government and the Philippines' Government in relation to the bananas IRA including, by way of example, the correspondence between Biosecurity Australia and the Philippines' Bureau of Plant Industry referred to in the summary of IRA team meeting 37 on 25 October 2007;

(g) all technical information and advice provided to the IRA team and/or Biosecurity Australia by the "*consultant plant physiologist*" (who is referred to in the summary of IRA team meeting 63);

(h) the inventory of any significant changes to the draft IRA report, with reasons for those changes, which was required to be included in the final IRA report in accordance with paragraph 4.16 of the Handbook;

(i) the "*information from an expert on the movement of mucilage and sap from freshly cut banana bunches*" (which is referred to in the summary of IRA team meeting 55);

(j) all technical information and advice provided to the IRA team and/or Biosecurity Australia by the "*banana plant physiology and nutrition specialist*" (who is referred to in the summary of IRA team meeting 56);

(k) all technical information and advice provided by the "*Moko specialist working group*" (which is referred to in the summary of IRA team meeting 54);

(l) all technical information and advice provided by the "*specialists engaged to review stakeholder comments regarding the moko PRA*" (who are referred to in the summary of IRA team meeting 47);

(m) all technical information and advice provided by the "*external expert working group*" (which is referred to in the summary of IRA team meeting 39);

(n) "*the recommendation for a policy determination*" (separate from the final IRA report) (see page 29 of the Handbook);

(o) all "*relevant technical submissions and other correspondence*" (see page 29 of the Handbook) including, for example, correspondence with the consultants, the Council, the Philippines' Government and the Eminent Scientists Group;

(p) all "*correspondence raising relevant technical issues*" (see page 29 of the Handbook);

(q) all "*technical material used in the IRA, not available in the public domain and not subject to copyright*" (see page 29 of the Handbook);

(r) "*formal reports provided by a technical working group (TWG), consultant or peer reviewer*"; and

(s) "*AFFA's responses to submissions, including statements of reasons*" (see page 29 of the Handbook).

In addition, the summary of IRA team meeting 16 records the decision of the IRA team that "*[r]ecords of Banana IRA Team meetings are to be kept on the public file.*"

The summary of IRA team meeting 63 states:

> *The IRA team considered draft records of meetings and meeting summaries for IRA team meetings 61 and 62. The records of meetings and summaries were agreed.*

It is apparent from that statement, and other similar statements in the summaries of IRA team meetings, that records of each IRA team meeting (separate from the summaries of IRA team meetings) were prepared.

In accordance with the requirements of the Handbook and the decision of the IRA team (referred to in paragraph 3.8 above), the records of each IRA team meeting (in addition to the summaries of each IRA team meeting) should have been placed on the public file.

Biosecurity Australia's failure to place all required material on the public file has been ongoing during the whole of the IRA process.

Prior to the public file being made available online, the Council regularly and routinely inspected the public file at Biosecurity Australia's offices. Indeed, the Council (through its lawyers) first wrote to AQIS (the agency then responsible for the conduct of the bananas IRA) on 10 August 2000 advising it that the Council wished to inspect the public file for the bananas IRA and that "*[w]e envisage that we will conduct a similar inspection each fortnight until the completion of the IRA process*". A copy of that letter should be on the public file.

The Council has written to Biosecurity Australia on numerous occasions during the course of the IRA, requesting that the public file be kept up-to-date in accordance with the requirements of the Handbook. A copy of those letters should be on the public file. Despite those numerous requests, Biosecurity Australia has failed to keep the public file up-to-date in accordance with the requirements of the Handbook.

Through its regular and routine inspection of the public file, and its correspondence with Biosecurity Australia regarding the content of the public file, Biosecurity Australia has been aware that the Council has sought to rely upon the information placed on the public file to inform it of technical, administrative and other matters relevant to the IRA process. Despite that knowledge, Biosecurity Australia has failed to keep the public file up-to-date in accordance with the requirements of the Handbook.

The Council's interests are materially adversely affected by the failure of Biosecurity Australia to place all required material on the public file because it has prevented the Council from being informed about technical, administrative and other matters which are relevant to the Council's participation as a key stakeholder in the IRA process about which the Council was entitled to be made aware and about which it could have made submissions to the Australian Government and/or the IRA team during the course of the IRA process.

4.2 Failure to include required content in final IRA report

The Handbook requires that the final IRA report contain (among other matters):

(a) the IRA team's responses to issues raised; and

(b) an inventory of any significant changes to the draft IRA report, with reasons for those changes.

Paragraph 4.16 (at page 16) of the Handbook provides (in part) [emphasis added]:

> *The Final IRA Report draws all issues together and includes:*
>
> - *the IRA team's responses to the issues raised*
> - *an inventory of any significant changes to the Draft IRA Report, with reasons for those changes*
> - *… .*

The final IRA report does not include the IRA team's responses to many of the issues raised by the stakeholders in their submissions on the draft IRA report (2007) as required by the Handbook.

The summary of IRA team meeting 37 records the agreement of the IRA team to "*tabulate and classify all stakeholder comments.*"

The summary of IRA team meeting 39 identifies that "[t]he IRA team examined categories of stakeholder comments that had been tabulated by Biosecurity Australia."

It is apparent from the summaries of the IRA team meetings that the IRA team signed off responses to stakeholder comments in relation to the draft IRA report (2007), presumably in the tabulated form prepared by Biosecurity Australia (see the summaries of IRA team meetings 37, 38, 39, 40, 46, 47, 49, 48, 52 and 54).

The Report of the Eminent Scientists Group on the Draft Final Import Risk Analysis Report for the Importation of Cavendish Bananas from the Philippines (August 2008) refers to the Eminent Scientists Group being provided with "a summary table setting out stakeholder comments and BA's responses to those comments".

Despite the preparation of responses to stakeholder comments, and the existence of a summary table setting out responses, responses to stakeholder comments were not included in the final IRA report as required by the Handbook and have not been otherwise published.

While the text of the draft IRA report (2007) has been varied in preparing the final IRA report, presumably in some cases in response to stakeholder comments, the variation to the text does not constitute "the IRA team's response to the issues raised" by stakeholders because the change in the text is, in many instances, not responsive to the comments raised by stakeholders. In many instances, stakeholders are unable to ascertain the IRA team's responses to their comments from the final IRA report.

By way of example, in its response to the assessment of factor 4 of "Exposure – transfer by leaching (Scenario B)" in draft IRA report (2007), the Council disputed the IRA team's assumption that Moko will generally be dispersed, rather than be present in aggregates on the basis that the bacteria belonging to the *R. solanacearum* complex do not form coherent aggregates. The Council's submission included a reference to a peer reviewed scientific journal which supported the Council's position. The relevant text of the draft IRA report (2007) was not varied in response to the Council's submissions on that issue. Nothing in the final IRA report is responsive to the Council's submission on

that issue. As a consequence, the Council is unaware of the IRA team's response to the Council's submission on that issue.

By way of a further example, nothing in the final IRA report is responsive to many of the submissions in relation to statistical and methodological issues in section 2 and Annexures 2 and 3 of the Council's response to the draft IRA report (2007).

In addition, the final IRA report does not include an inventory of significant changes to the draft IRA report (2007), with the reasons for those changes as required by the Handbook. It is not sufficient for significant changes to the draft IRA report to be recorded by changes in text of the draft IRA report at the point in the text at which the significant change arises. The Handbook requires an inventory (a listing) of significant changes, with reasons for each of those changes.

A number of stakeholders lodged submissions in relation to the draft IRA report (2007), including the Council which lodged a very detailed technical submission.

As a consequence of the deviations described above, the Council is unaware of the IRA team's response to scientific and technical submissions made by the Council in response to the draft IRA report (2007).

In addition, it is not possible for the Council to ascertain whether the IRA team considered all of the submissions received on the draft IRA report as is required by paragraph 4.16 of the Handbook.

The failure to include an inventory of significant changes to the draft IRA report, with reasons for those changes has severely prejudiced the Council's ability to identify those significant changes and to understand the reasons for them within the time for lodging this appeal. On 20 November 2008, the Council wrote to Dr Grant of Biosecurity Australia advising Biosecurity Australia that it and its statistical consultants were unable to understand a significant change to the draft IRA report (being the revised assessment of Imp5 for Moko in section 9.3.5 of the final IRA report) and requested information which would enable the Council to understand the reasons for that change. A copy of that letter should be on the public file. By letter dated 24 November 2008, Dr Grant responded as follows (in part):

> *With regards to your letter dated 20 November 2008, the appeal period is not a consultation stage in the IRA process. In the interests of a fair process for all stakeholders, I do not consider it appropriate to enter into consultation with individual stakeholders on the content of the final IRA report during this period. The values contained in section 9.3.5 of the final IRA report are based on the expert considerations of the IRA team. Section 9.3.5 of the final IRA report highlights the issues that were considered by the IRA team in arriving at the values used in the model.*

A copy of that letter should be on the public file. The letter from Dr Grant identifies the difficulty with the discussion in section 9.3.5 of the final IRA report: it simply highlights the issues which were considered as part of the IRA team's expert consideration but does not provide sufficient information to enable stakeholders to understand the reasons for the change. If the final IRA report had included an inventory of significant changes, including reasons for those changes, as required by the Handbook, the Council would have been in a position to understand the reason for the revision of Imp5 for Moko.

The Council has identified a number of other significant changes to the draft IRA report which it and its scientific and technical advisors are not able to understand because no reasons for the changes have been provided in the final IRA report. However, as a consequence of Dr Grant's response of 24 November 2008, the Council has not asked for further information which would enable it to understand the reasons for those changes.

Annexure A

Biosecurity Australia's failure to specify risk management measures

The Handbook requires that the import risk analysis "*specifies what measures should be taken to reduce [the] risks [posed by relevant pests and diseases] to an acceptable level.*"[36]

It requires the following process [emphasis added]:

(a) in cases where the risks are rated as unacceptable the draft IRA report "presents an evaluation of technically-feasible risk management measures to determine whether the risk can be successfully mitigated to achieve Australia's ALOP"; [37]

(b) consideration of stakeholder comments on the draft IRA report; [38]

(c) publication of a final IRA report which recommends "*the appropriate risk management options;*"[39] and

(d) recommendation of a policy "*which will set the parameters for import*". [40]

What deviation occurred?

No recommendation of the appropriate risk management options is contained in the final IRA report and no recommendation for, or indication of, a policy determination which will set the parameters for the importation of mature hard green Cavendish bananas from the Philippines has been made and published.

In particular, no recommendation that any particular risk management measures should be taken to reduce the risks of importation associated with the entry, establishment and spread of Moko, black Sigatoka and freckle to an acceptable level has been made and published.

In examining risk management options for each of Moko, black Sigatoka and freckle, the final IRA report adopts the following four stage approach:

(a) Assessment of pest thresholds

Firstly, the final IRA report contains an assessment of the maximum pest threshold for each pest, based on the annual unrestricted probability of entry, establishment and spread (annual unrestricted PEES) for each pest which, if achieved, would achieve Australia's ALOP (see pages 107-108, 151-153 and 183 - 184 of part B of the final IRA report).

(b) Listing of some potential risk management measures

[36] Handbook paragraph 3.1 (at page 8)
[37] Handbook paragraph 4.12 (at page 15)
[38] Handbook paragraph 4.16 (at page 16)
[39] Handbook paragraph 4.16 (at page 16)
[40] Handbook paragraph 4.19 (at page 17)

Next, the final IRA report examines some "*potential phytosanitary risk management measures*" for each pest. In each case it states the self evidently correct proposition that "*[a] range of potential phytosanitary risk management measures may be considered if they can be demonstrated, to Australia's satisfaction, to reduce the unrestricted risk and achieve Australia's ALOP."*[41]

In each case there follows a discussion of a range of potential risk management measures which makes clear that the IRA team has not determined whether any such measures "*can be demonstrated, to Australia's satisfaction, to reduce the unrestricted risk and achieve Australia's ALOP"*. [42]

Then, in each case, there follows the acknowledgement that "*there are potentially other possible risk management measures"* (see pages 110, 156 and 186 of part B of the final IRA report).

(c) Hypothetical analysis of the application of the potential risk management measures

Next, the final IRA report contains a hypothetical analysis of the application of some of the potential risk management measures for each pest. That analysis is based on unverified hypothetical "*example efficacies*" for each of the potential measures. The hypothetical analysis includes an assessment of whether, based on the hypothetical "*example efficacies*", the potential measures could, either alone or in combination, achieve Australia's ALOP. Based on that hypothetical analysis, the final IRA report identifies a number of "*possible systems approaches*" comprised of combinations of the potential measures. In each case, the hypothetical analysis concludes as follows (at pages 113, 159 and 188-189 of part B of the final IRA report) [emphasis added]:

> *Conclusion*
>
> *Example pest reduction levels for those measures considered feasible are provided in Table* [reference to relevant table omitted]*. The values given, which are based on the level of pest assessed to be currently present in the Philippines, as contained in the report, are included as examples and do not imply that such a level of reduction will be achieved. The strength of any mitigation measure will depend on how the measure is implemented. As mentioned previously, the Philippines' Government would be required to demonstrate the effect of any proposed mitigation measures using laboratory and/or field trials and under commercial conditions. Table* [reference to relevant table omitted] *suggests that possibly no single feasible measure would be adequate to reduce the risk sufficiently, but that there could be combinations of measures that should achieve Australia's ALOP.*

(d) Risk management conclusion

Finally, the final IRA report contains a conclusion regarding the assessment of the risk management options for each pest. The conclusion for Moko (at pages 113-114 of part B of the final IRA report) is as follows [emphasis added]:

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[41] at pages 108, 153 and 184 of part B
[42] at pages 108, 153 and 184 of part B

The Philippines' Government would be required to provide evidence to Australian authorities on the efficacy of any phytosanitary risk management measures proposed to reduce the level of the proportion of banana clusters infected with Moko bacteria to levels that would achieve Australia's ALOP.

Any proposed phytosanitary risk management measures would be required to be demonstrated, to Australia's satisfaction, by laboratory experiments and/or field trials and under commercial conditions and would need to be completed to provide supporting evidence, including that:

- *The strength of proposed phytosanitary risk management measures, or combinations of phytosanitary risk management measures (a systems approach), is sufficient to reduce the proportion of clusters infected with Moko bacteria to the levels required to meet Australia's ALOP*
- *Procedures for visual inspection for vascular discolouration of the pseudostem and peduncle including the detection and examination of cut pseudostem and peduncles are effective*
- *Areas of Low Pest Prevalence are effective and the level of efficacy can be measured by procedures such as sampling.*

Other evidence may also be required, depending on the specific risk management measures proposed for consideration.

Further details of the proposed risk management regime are provided in Chapter 20.

The risk management conclusions for black Sigatoka (at page 159 of part B of the final IRA report) and freckle (at page 189 of part B of the final IRA report) adopt a similar form (although are pest specific).

The final IRA report identifies "areas of low pest prevalence" as a potential risk management measure for Moko, black Sigatoka and freckle (either alone or in combination with other risk management measures as part of a systems approach). However, the identification of "areas of low pest prevalence" as a potential risk management measure for each of those pests does not amount to a recommendation of "areas of low pest prevalence" as a risk management measure for those pests; it is simply a suggestion, at the most general level, of a category of risk management measure which could be adopted.

Even if the identification of "areas of low pest prevalence" as a potential risk management measure for Moko, black Sigatoka and freckle, does amount to a recommendation of "areas of low pest prevalence" as a risk management measure for those pests (which is disputed by the Council), the final IRA report expressly does not specify any maximum level of pest prevalence for the "areas of low pest prevalence" risk management measure for Moko, black Sigatoka and freckle. In order to set the parameters for import, any recommendation to adopt an "area of low pest prevalence" risk management measure would need to specify the maximum level of pest prevalence for the area because the maximum level of pest prevalence is the defining parameter of an area of low pest prevalence risk management measure.

Chapter 20 of part B the final IRA report, which discusses risk management and the draft operational framework, reiterates that the risk management measures considered in the individual pest risk analysis chapters of the final IRA report for Moko, black Sigatoka and freckle are "*examples of potential phytosanitary risk management measures*".[43] While chapter 20 sets out some high-level requirements for a number of risk mitigation measures for Moko, black Sigatoka and freckle, it does so on the basis that they are potential measures for those pests.

It is clear that the numerous references to "*proposed*" risk management measures for Moko, black Sigatoka and freckle in the final IRA report are to risk management measures which are to be proposed (presumably by the Philippines' Government or in an import application) at some future time.

The failure to recommend risk management measures which could reduce the risks of importation associated with the entry, establishment and spread of Moko, black Sigatoka and freckle to an acceptable level arises from the failure to undertake the critical element of analysis in the import risk analysis.

In order to assess whether any particular risk management measures (alone or in combination) for Moko, black Sigatoka and freckle would reduce the risks of the entry, establishment and spread of those pests to an acceptable level, it is necessary to undertake an assessment of the efficacies (as opposed to the hypothetical example efficacies) of the potential risk management measures for those pests.

In the absence of such an assessment, it is impossible to make an assessment of which risk management measures should be taken to reduce the risk of the entry, establishment and spread associated with those pests to an acceptable level.

However, there is no assessment of the efficacies of any potential risk management measures for Moko, black Sigatoka and freckle in the final IRA report. The final IRA report simply includes a hypothetical analysis of potential risk management measures based on hypothetical "*example efficacies*" which the final IRA report expressly acknowledges are only included as examples and do not imply that such efficacies would actually be achieved.

Instead of the appropriate risk management measures which would reduce the risks of importation associated with the entry, establishment and spread of Moko, black Sigatoka and freckle to an acceptable level, the final IRA report contemplates that:

(a) risk management measures for Moko, black Sigatoka and freckle will be "proposed" (presumably by the Philippines' Government or an import applicant) at some future unspecified time; and

(b) after they have been proposed, the actual efficacies of those measures would need to be demonstrated by the Philippines' Government to Australian authorities.

The final IRA report concludes that the third phase of the risk analysis process described in paragraphs 3.1, 4.12 and 4.16 of the Handbook (being the evaluation and specification of the appropriate risk management measures) will be deferred until some future time after the conclusion of the IRA process.

[43] at page 293 of part B

As a consequence it is impossible for there to be any determination (whether by the IRA team or the Executive Manager) to recommend a policy determination which will set the parameters for import as required by paragraph 4.19 of the Handbook.