

**ADVICE TO NSW FARMERS' ASSOCIATION ON
LEGISLATED STRUCTURE FOR AUSTRALIAN
GOVERNMENT QUARANTINE AGENCIES**

EXECUTIVE SUMMARY AND CONCLUSIONS

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Structural flaws in the current quarantine system in need of remedy are as follows:

Quarantine policy is not developed across the spectrum of human, animal and plant quarantine and there is no institutional basis for leading dialogue and thinking on fundamental societal challenges such as avian flu and for garnering broad community support for quarantine and biosecurity activities.

Effective, efficient and transparent development of policy has been compromised by the failure to develop effective stakeholder relationships and the structural divisions between policy development and operational functions.

The establishment of Biosecurity Australia (BA) as a prescribed agency under the Financial Management and Accountability Act has financially separated policy development (done by BA and the Department of Health) and operations (done by Australian Quarantine Inspection Service AQIS) leaving no capacity for flexible allocation of resources between the two.

Quarantine Act does not support the policy mechanisms for AQIS control of the border as there is no recognition in the Act for the ICON database or Import Risk Analyses (IRA). This exposes the Australian Government to extremely high levels of risk of legal challenge by an importer denied a permit and by Australian producers affected by an import. The lack of legal standing under domestic legislation for a scientific assessment which is required under the Sanitary and Phytosanitary agreement also leaves the Government exposed to challenge by members of the World Trade Organisation (WTO).

Recommendation: The legislation should be amended to:

- **prescribe a process by which the outcome of an IRA is formally adopted**
- **give legal effect to that formalised outcome**
- **give legal effect to the other conditions placed in the ICON database**

The Quarantine Act does not define Australia's Appropriate Level of Protection (ALOP) thus decisions are made on an imponderable legislative standard devoid of meaning.

Recommendation: Legislative amendments should:

- **specify those matters which must be taken into account in determining the level of quarantine risk which is acceptably low**
- **facilitate consultation with ministers and authorise ministers (rather than officials) to determine when a level of quarantine risk is acceptably low**

There is no provision in the IRA Handbook or the Quarantine Act for any officer of the department to consult the Minister on the societal value judgments involved in the determination of Australia's ALOP and the weighting to be accorded to various forms of harm in assessing the consequences of importation. This exposes officials, ministers and Australia to unacceptable levels of risk and increases the risks of successful challenge to Australia's quarantine system in the WTO.

Recommendation: Adequate governance requires that the role of ministers be made explicit to be consulted on and where appropriate to determine Australia's ALOP and to finally determine the outcome of any IRA.

Accountability for the adequacy of scientific analysis in an IRA is spread, without a framework, between the IRA Team, the CEO of BA and the Eminent Scientist Group.

Recommendation: Allocate to a Board of a statutory authority the responsibility and authority to publish a draft IRA and to recommend a final IRA to ensure that all aspects of scientific analysis and due process have been properly attended to.

Recommendation: The issues addressed in this opinion would be addressed through placing responsibility for quarantine functions with the statutory authority recommended by the Nairn Committee in 1997 with the following updated features:

- **The board comply with any directions given to it by the Minister**
- **The statutory authority publish any advice provided to the Minister relating to an SPS measure imposed by Australia**
- **The minister be obliged to table any direction related to an SPS measure in the Parliament**
- **The board include (but not limited to) people with the skill set and profile of the Eminent Scientists Group**
- **The board establish and maintain a database such as ICON in accordance with rules to be determined and published. Those rules would allocate responsibility across the Board, CEO and policy development parts of the organisation for amending and updating import conditions (subject to any direction of the Minister). The rules would also deal with any processes the board considered desirable to be followed (eg appeals).**
- **Attach the SPS Agreement to the legislation and the statutory authority would be obliged to conduct itself in accordance with Australia's obligations under it.**
- **The legislation would specify in greater detail those matters which must be taken into account by the statutory authority or the Minister in determining the level of quarantine risk which is acceptably low.**

Conclusion

Australia cannot afford to continue with its present quarantine legal and structural framework. Although it may appear to be disruptive at first glance, the establishment of a statutory authority for AQIS and BA under updated Nairn guidelines offers the best hope of permanent cure of Australia's legal and operational problems with quarantine issues.