

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

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**MEMORANDUM OF ADVICE**

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## Contents

1	Request for advice.....	2
2	The facts, and my perspective.....	2
3	Implications of Australian Pork.....	3
3.1	The legal framework does not support AQIS' principal control mechanisms for cargo and border control.....	3
3.2	Dealing with the appropriate level of protection and other aspects of quarantine risk assessment involving political judgment .....	6
4	Assessment of current governance arrangements .....	7
4.1	Governance objectives .....	7
4.2	Broadening to include health and environment stakeholders .....	9
4.3	Effective, efficient and transparent development and delivery of Australia's quarantine policies and programs across the continuum of quarantine .....	12
4.4	Flexible application of resources and procedures to develop and deliver quarantine policies and programs .....	13
4.5	Maximise accountability to stakeholders.....	14
5	Direction for reform.....	21
5.1	Addressing the issues in this opinion.....	21
5.2	Consistency with Uhrig .....	22
5.3	Consideration of the government's 1997 position.....	26
6	New South Wales Farmers Association objectives.....	29

## 1 Request for advice

New South Wales Farmers Association seeks my opinion on:

1. Implications for the governance of quarantine functions of the decision of the Full Court of the Federal Court of Australia in *Director of Quarantine v Australian Pork Limited and anor*<sup>1</sup> (**Australian Pork**)
2. the adequacy of current governance arrangements for quarantine functions
3. a recommended direction for reform that meets the following objectives:
  - a. delivers autonomy from the Department of Agriculture, Fisheries and Forestry (DAFF) and the Department of Foreign Affairs and Trade (DFAT);
  - b. reports directly to the Federal Minister for Agriculture and is under his direct control;
  - c. provides transparency to domestic agricultural industries and the World Trade Organisation;
  - d. enables workplace agreements for staff; and
  - e. is fully funded by the Federal Government.

## 2 The facts, and my perspective

I am instructed with a paper prepared by New South Wales Farmers Association entitled "Crisis of Competence in Quarantine February 2006."

As my opinion on the adequacy of current governance arrangements, and a desirable approach for reform is influenced by my experience in dealing with quarantine matters it is desirable that I briefly summarise that experience.

I have extensive experience acting for Australian primary industry groups which are responding to import risk analyses (**IRAs**). In addition to the pork industry it is on public record that I have advised and acted for the banana and pome fruit industries. I have also assisted industry groups considering three other IRAs.

I advised a State government on development of its infrastructure and approach to dealing with issues arising out of Australia's implementation of public international trade measures, including the WTO SPS Agreement.

I have advised a number of importers on issues arising from their dealings with AQIS.

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<sup>1</sup> (2005) 224 ALR 103

### **3 Implications of Australian Pork**

#### **3.1 The legal framework does not support AQIS' principal control mechanisms for cargo and border control**

The principal mechanism for AQIS' cargo handling function operates (in broad terms) as follows:

- The ICON database contains information about Australian import conditions for more than 20,000 plant, animal, microbial, mineral and human commodities. It is available on the internet to be used by importers to determine if a commodity intended for import to Australia needs a quarantine permit and/or treatment or if there are any other quarantine prerequisites.
- Where a commodity intended for import requires a quarantine permit the importer or broker files an Application to Import the commodity.
- Where the proposed import is of a commodity from a country dealt with on the ICON database an import permit is issued subject to conditions listed on the ICON database.
- On arrival at a port the importer files (usually through the electronic Integrated Customs System) an Import Declaration. Where the Import Declaration states that the shipment accords with the conditions in the Import Permit AQIS clears the shipment (again through the Integrated Customs System). While the electronic management of this function is recognised by s56 of the Quarantine Act, that section itself (in s56(4)) refers to the criterion of whether "there are reasonable grounds to believe there is an unacceptably high level of quarantine risk in respect of the goods".

The key to AQIS' cargo management and border control system is the import conditions contained in the ICON database.

The IRA process conducted by Biosecurity Australia is directed to development of import conditions which are then loaded into the ICON database by AQIS.

However the quarantine legislation does not recognise, or give legal effect to, the outcome of an IRA or the conditions contained in the ICON database.

In the Australian Pork case APL commenced its proceedings seeking review of the decision of the Director of Quarantine to adopt the import conditions determined through the IRA process.

After APL commenced its proceedings a delegate of the Director issued an import permit to Fayman Ltd. APL then amended its claim to also seek review of the decision to grant the import permit to Fayman Limited.

The Full Court of the Federal Court made two fundamental findings:

1. The decision to adopt the import conditions determined through the IRA process had no legal effect; and
2. the decision to issue the import permit to Fayman Limited was valid only because the decision maker had regard to a great deal more than the IRA and the import conditions in the IRA. The majority said:

*The delegate of the director was entitled, and required, to bring together the elements referred to in s 5D [of the Quarantine Act where it defines the “level of quarantine risk”] in an overall assessment of risk, taking into account advice received, including, but not confined to, the IRA report and the determination [of quarantine conditions for pig meat by the Director of Quarantine]. (emphasis added)*

The decision in the Australian Pork case to issue the import permit was upheld because that decision was made on the basis of a very large (over 80 pages) and complex minute. (Even with that level of consideration Branson J in dissent would have held that the delegate failed to consider the level of quarantine risk of the particular permit in question). Although by the time of the trial import conditions for pig meat from the USA were contained on the ICON database, the evidence was clear that AQIS did not rely on the ICON database at all in granting the import permit in question.

The reasoning of the majority of the Federal Court quoted above makes clear that decisions to grant import permits made in direct reliance on the conditions in the ICON database are unlawful and would be set aside by a court. That is so even when those conditions have been developed through a comprehensive IRA -- **the Court made clear that the outcomes of the IRA have no legal status.**

This exposes the quarantine system to extremely high levels of risk of legal challenge in three circumstances.

First, an applicant for an import permit who is denied a permit, or has conditions imposed on the permit which are unacceptable to the applicant would succeed in a judicial review proceeding by establishing that a delegate had made a permit decision by relying on ICON.

Second, an Australian producer or industry group of producers of plants or animals the health of which may be affected by an import (such as Australian Pork) would succeed in a judicial review proceeding by establishing that a delegate had made a permit decision by relying on ICON.

Third, other members of the WTO could successfully challenge Australia's quarantine regime. In fact, a challenge on this ground has already commenced. On 17 October 2003 the European Communities requested the establishment of a Dispute Settlements Panel in a dispute with Australia described as follows:<sup>2</sup>

*The relevant legal provisions of the Australian regime for the importation of live animals, dead animals and animal parts, meat and meat products, dairy products, bee products, living plants, seeds, plant parts, and fresh fruits and vegetables are Sections 37, 38, 39, 40, 42, 62, 63 and 64 of the Quarantine Proclamation 1998 which prohibit importation of those products unless a Director of Quarantine grants a permit to import them into Australia. For example, Section 64 of the Quarantine proclamation provides that "(t)he importation into Australia of a fresh fruit or vegetable is prohibited unless a Director of Quarantine has granted the person a permit to import it into Australia".*

*The procedures and criteria applied by Directors of Quarantine for deciding whether or not to grant a permit for importation of those products are laid down in Sections 5D and 13 of the Quarantine Act 1908, Sections 64(2) and 70 of the Quarantine Proclamation 1998, and the related administrative frameworks.*

*The European Communities seeks examination by the panel of the unduly restrictive quarantine measures applied by Australia of the following products from Member States of the European Communities: tomatoes, fresh citrus fruit, apples, peaches, nectarines, cucumbers, lettuce, carrots, apricots, edible eggs, uncooked pigmeat, pig semen, uncooked poultry meat, calf-milk replacer, and organic fertiliser based on chicken manure.*

*For those products, an assessment of quarantine risk has not been carried out, and a Director of Quarantine therefore has not made a decision whether or not to grant a permit for their importation into Australia. Consequently, importation of those products into Australia is prohibited.*

*The European Communities considers that the restrictions on the above products constitute SPS measures within the meaning of Article 1.1 and paragraph 1 of Annex A of the SPS Agreement which are in breach of Australia's obligations under the provisions of the SPS Agreement*

The consequence of the decision in Australian Pork is that no "assessment of quarantine risk" for the purposes of Australian domestic legislation occurs before the time that the Director of Quarantine or her delegate comes to consider a particular application for an import permit. That characterisation of the operation of domestic law by the Federal Court establishes the nub of the complaint made

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<sup>2</sup> WT/DS287/7/Rev.1

by the European Communities -- that the Quarantine Act and Proclamation leave importers subject to broad administrative judgement in breach of Australia's obligations under the SPS Agreement.

**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, and**
- **Give legal effect or recognition to the other conditions placed in the ICON database (and those there at the commencement of that legislation).**

### 3.2 Dealing with the appropriate level of protection and other aspects of quarantine risk assessment involving political judgment

The central concept which underpins the key provisions of the Quarantine Act and Quarantine Proclamation is that of "the level of quarantine risk ....that is acceptably low."

This concept (and its counterpart of the "level of quarantine risk which is unacceptably high") conditions key powers exercised in the performance of Quarantine functions. Those powers are :

- the issue and revocation of import permits (Quarantine Proclamation s70 and Act s13)
- the making of orders into quarantine (Quarantine Act s44C, 44D, 48, 52A, 53),
- the management and control of goods in quarantine (Quarantine Act s46A)
- the seizure of goods (Quarantine Act s68), and
- the compulsory movement of ships and aircraft (Quarantine Act s78C).

**In Australian Pork the majority of the Full Court of the Federal Court described the standard of "acceptably low" level of quarantine risk as "the imponderable standard".<sup>3</sup> The Macquarie Dictionary tells us that an imponderable standard is one that is not capable of being weighed, or not worthy of consideration.**

**The consequence is that our quarantine officials are tasked with making decisions against a legislative standard devoid of meaning.**

This may assist in reducing the scope for judicial review – because it is not possible to demonstrate that an official has failed to apply an "imponderable standard."

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<sup>3</sup> Director of Quarantine v Australian Pork Limited (2005) 224 ALR 103 at [66]

However, that is at the cost of gravely deficient legislative control of the exercise of powers of immense significance:

- the powers which are conditioned by this "imponderable standard" extend to the most extreme powers of compulsory entry, seizure and destruction of property;
- as the Australian Pork case demonstrates decisions made applying this "imponderable standard" can have very substantial economic implications.

As I set out below, this gap in legislative standards is compounded by the obscure nature of political control of the decisions in question.

**Legislation should be amended to compel officials to structure their assessments of the level of quarantine risk which is acceptably low or unacceptably high.** At a minimum those amendments should:

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

## **4 Assessment of current governance arrangements**

### **4.1 Governance objectives**

Any assessment of governance arrangements depends on an articulation of the objectives to be achieved by those arrangements, and an understanding of the trade-offs which will be accepted between those objectives.

The most comprehensive consideration of those questions for Australia's quarantine functions was undertaken by the "Nairn Committee" which reported to the Australian government in 1997: *Australian Quarantine: A Shared Concern* (AGPS, 1996).

The credentials of that committee are set out in Attachment A to this advice.

The Nairn Committee recommended against maintaining the quarantine function within the department now known as DAFF for two reasons:

- this would prevent the desired broadening of the scope of awareness and ownership of quarantine beyond the interests of commercial agriculture to also encompass public health, community and environmental interests; and

- maintenance of the organisation within a government department was inimical to the speed and degree of cultural change which Nairn identified as necessary.

While the government did not accept the Nairn Committee's recommendation for a separate statutory authority, it did adopt Nairn's statement of objectives for the governance of the Quarantine function. Those objectives were:

- provide for the development of a culture, both within the organisation and in the community, that embraces the goal of quarantine and the continuum approach to quarantine;
- enhance the establishment of a partnership with stakeholders — namely governments, industry and the general public — to ensure community ownership of quarantine policies and programs;
- permit effective, efficient and transparent development and delivery of Australia's quarantine policies and programs across the continuum of quarantine;
- allow flexible application of resources and procedures to develop and deliver quarantine policies and programs;
- provide appropriate mechanisms for ensuring ongoing delivery of the public good elements of quarantine;
- provide the ability to deliver commercial objectives consistent with the goal of quarantine, Government policy and community needs;
- establish credibility with stakeholders and confidence with domestic and international consumers and overseas quarantine agencies;
- forge strong linkages with appropriate external groups to provide expert input into the development and delivery of policies and programs across the continuum of quarantine;
- be practical in both form and in delivery of functions;
- maximise accountability to stakeholders;
- be responsive to the interests and concerns of the community;
- instil and encourage the development of professionalism within the organisation;
- ensure fairness and equity in the discharge of the organisation's duties; and
- ensure independence from undue influence from any section of the community.<sup>4</sup>

The Nairn Committee also considered in detail options for separating quarantine policy functions from quarantine operational functions, and export facilitation related functions from import policy and operational roles.

The Nairn Committee firmly rejected each of those options. The Committee noted that with the implementation of company based meat inspection a number of the concerns with export facilitation would be addressed. With the

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<sup>4</sup> Nairn pages 35 - 36

implementation of company based meat inspection now complete, those concerns have now been addressed.

The Nairn Committee further noted the move in export inspection functions in fields of fish, dairy and grains towards third-party inspection with AQIS audit under a quality assurance program, and the efficiencies to be gained in areas of fruit, vegetables and horticulture in being able to access a thin level of expertise for both export and import administration.

The Nairn Committee "strongly" recommended against separation of policy and operational functions. The Committee report states:

*the development of effective and efficient quarantine policy is compromised if divorced from implementation. In addition, it is difficult to ensure that staff achieve operational objectives if denied understanding or input into the policy development and implementation process. During its visit to New Zealand, the Review Committee observed this separation model in practice, and noted that New Zealand authorities were experiencing a number of management difficulties. In particular, quarantine delivery staff expressed a feeling of isolation from policy development of the programs they were contracted to deliver. Previous informal ties between operational and policy staff had been strained by prohibited access by delivery staff to policy areas in the same building. The Review Committee is strongly of the view that splitting the policy and operational functions into separate agencies would result in a significant loss of communication between policy and service delivery arms of quarantine. This view is shared by QIAC.*

*The driving force behind many of the calls for separation of the quarantine policy function was concern that policy development should be independent of the operational functions in which AQIS was considered to have a vested interest. The Review Committee has sought to address these concerns by developing a model for risk analysis that encourages greater independence, transparency and community ownership.<sup>5</sup>*

I am not qualified to comment on every aspect of the current governance arrangements for quarantine as measured against the approach recommended by the Nairn Committee. Those aspects on which I can usefully comment are dealt with below.

## 4.2 Broadening to include health and environment stakeholders

This criterion was at the heart of Nairn's 1996 recommendations. The Committee's vision was of a quarantine function that enjoyed broad support

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<sup>5</sup> Nairn pages 38 - 39

across the community, with all relevant Australian stakeholders and across government portfolios.

The Committee particularly identified the need to improve the buy in to quarantine of interests associated with human health and environment.

Since that time Food Standards Australia New Zealand and the Australian Pesticides and Veterinary Medicines Authority have each demonstrated the power of a well-run statutory authority in garnering support across sectors.

In both of those cases the statutory authorities need to relate across portfolios, and in particular to deal with the following agencies:

- Department of Agriculture Fisheries and Forestry
- Department of Foreign Affairs and Trade
- Department of Health
- Australian Customs Service
- Department of Environment and Heritage

In each case the performance of those statutory authorities impacts directly on Australia's compliance with WTO obligations, which in turn impacts on Australia's capacity to address trade barriers in other countries.

A quarantine authority as envisaged by the Nairn Committee would have responsibilities for animal, plant and human quarantine and would provide an institutional basis for leading dialogue and thinking on fundamental challenges such as avian flu, and for garnering broad community support for its activities.

In comparison, in the quarantine area Minister McGauran told the New South Wales Farmers Association in October 2005 that there was a "crisis of confidence".

That crisis of confidence affects not only agricultural industries.

A clear, public indication that quarantine policy is not developed across the spectrum of human, animal and plant quarantine is in the enactment in 2003 of the Quarantine Amendment (Health) Act. In his second reading speech the Minister for Health explained:

*the Department of Health and Aged Care undertook a review of the human quarantine provisions of the Act in 2000, with a view to updating and improving the legislative framework for human quarantine activities in Australia. This Human Quarantine Legislation Review was overseen by a Steering Committee, chaired by the Commonwealth Chief Medical Officer, (who is also the Director of Human Quarantine) with representatives from the Australian Quarantine and*

*Inspection Service and other relevant Commonwealth agencies, and a representative of the States and Territories' Chief Quarantine Officers.*

*In December 2000, the then Minister for Health and Aged Care, Dr Michael Wooldridge, approved the Human Quarantine Legislation Review's Final Report. This Report recommended a two-stage response to the Review's findings:*

*Stage 1: Minor and technical amendments to remove some current inconsistencies and to better align some existing provisions with current policy and practice regarding human quarantine control measures.*

*Stage 2 :A strategic examination of health's role in quarantine in the context of current and future communicable disease management.*

*This Bill has been developed in response to the Stage 1 recommendation of the Final Report of the Human Quarantine Legislation Review. The proposed amendments are minor and technical in nature.*

*This Bill introduces a number of amendments and new provisions to ensure the Act is comprehensive yet flexible in its approach to border control measures.*

The principles behind two of those amendments which apply specifically to human quarantine may well be applicable to animal and plant quarantine - but because of the way in which the legislation was amended they do not extend that far.

The first of those relates to a right to administrative review, through independent medical examination, for a person who is ordered into quarantine. It is difficult to discern why such a right is built into an Act which contains no similar rights for people whose property and livelihood may be compulsorily destroyed by orders relating to plants or animals. An example of that occurring is found in the decision of the Federal Court of Australia in *Hanson v Commonwealth* (1984) 57 ALR 365.

The second relates to vector monitoring and control - which permits the monitoring and control of disease vectors within an area surrounding a port or disease outbreak in the case of human disease. If powers of that kind had been available when the return to Australia of the MV Como Express was under consideration, additional potentially feasible options would have been open to the Australian government.

That provisions such as these have been introduced for human quarantine, but not for animal or plant quarantine, demonstrates a low level of coordination of policy between human quarantine on the one hand and animal and plant quarantine on the other.

#### 4.3 Effective, efficient and transparent development and delivery of Australia's quarantine policies and programs across the continuum of quarantine

Performance of current arrangements against this objective is extremely poor.

Effective and efficient development of policy has been compromised by the failure to develop effective stakeholder relationships and the structural divisions between policy development and operational functions which have developed, contrary to the Nairn Committee's recommendations.

Evidence of these failings is documented in the nine major reports into quarantine administration produced by the Senate Committee on Rural and Regional Affairs and Transport since the Nairn Committee:

- Australian Quarantine and Inspection Service and the Importation of Salmon - Interim Report (1578 07/12/1999)
- An Appropriate Level of Protection? The Importation of Salmon Products: A Case Study of the Administration of Australian Quarantine and the Impact of International Trade Arrangements (1625 05/06/2000)
- Proposed Importation of Fresh Apple Fruit from New Zealand (Interim Report) (1764 06/08/2001)
- Interim Report - Proposed importation of fresh apple fruit from New Zealand (1869 27/06/2002)
- Management of the quarantine risks associated with the possible return to Australia of sheep aboard the MV Cormo Express (2011 29/10/2003)
- Proposed importation of fresh apple fruit from New Zealand - Final report (2046 11/03/2004)
- Biosecurity Australia's import risk analysis for pig meat (2074 13/05/2004)
- Administration of Biosecurity Australia: Revised draft import risk analysis for bananas from the Philippines (2214 17/03/2005)
- Administration of Biosecurity Australia: Revised draft import risk analysis for apples from New Zealand (2215 17/03/2005)

Examples of damage done through an inadequate link between policy and operational roles drawn from those reports are:

- The events surrounding the MV Cormo Express
- The proposal in the most recent Banana IRA that risk management for Mealy Bugs could be based on visual inspection accompanied by brushing – a proposal that could not be made by a person with any practical experience of banana quarantine
- The proposal in the same IRA that risk management for Moko could be based on plantation based reporting of levels of disease incidence without any consideration of practicality or auditability of the proposal.

Perhaps most stark here is the adoption of a policy of Disease Free areas for Foot and Mouth Disease in Brazil permitting the importation of Brazilian beef. That is the subject of a current inquiry.

Transparency, in addition to efficiency and effectiveness, was an objective articulated by the Nairn Committee.

Each of the Reports referred to above contains evidence of failures in transparency of the policy formulation process. Most stark are the findings of the Committee in Chapter 4 of the report on the revised draft import risk analysis for bananas from the Philippines (2214 17/03/2005), dealing with the misleading evidence given to the Committee by Senior officials of Biosecurity Australia.

#### 4.4 Flexible application of resources and procedures to develop and deliver quarantine policies and programs

In its response to Nairn the government announced a commitment to maintain the structural linkages between the development of animal and plant quarantine policy and the operational arm of AQIS.

However in 2000 the government reversed its commitment to maintain that broad, integrated structure of AQIS. The government established Biosecurity Australia as an independent division within DAFF. The rationale set out in the department's annual report for that year was to clearly distinguish the role of assessment of quarantine risks associated with plant and animal imports from the operational roles of AQIS.<sup>6</sup>

Then on July 15, 2004 the Minister announced:

*To remove any perception that trade considerations rather than scientific analysis influence IRA recommendations, Biosecurity Australia will be established as a separate agency outside the agricultural market access (trade) area of the Department of Agriculture Fisheries and Forestry. Biosecurity Australia will be answerable directly to a Deputy Secretary of the Department.*<sup>7</sup>

Further, on 1 December 2004 the Minister announced that Biosecurity Australia had become a prescribed agency under the Financial Management and Accountability Act:

*Biosecurity Australia has today been established as an independent agency within the agriculture, fisheries and forestry portfolio, Australian Government Minister for Agriculture, Fisheries and Forestry Warren Truss announced today.*

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<sup>6</sup> DAFF Annual Report 2000/2001 page 13

<sup>7</sup> Hon Warren Truss: Media Release 15 July, 2004

*“The Coalition Government has moved quickly to implement its election commitment to establish Biosecurity Australia as a prescribed agency under the Financial Management and Accountability Act 1997,” Mr Truss said.*

*“Establishing Biosecurity Australia as a prescribed agency has further boosted the independence of its operations and ensured appropriate financial autonomy.*

*“This change will further reassure stakeholders of Biosecurity Australia’s capacity to ensure that quarantine policy will always be based on sound science.....*

*“Biosecurity Australia will provide quarantine policy assessments and recommendations to the recently appointed Director of Animal and Plant Quarantine, Joanna Hewitt.*

This establishment of Biosecurity Australia as a prescribed agency under the Financial Management and Accountability Act means that there is now a complete financial separation between policy development (done by Biosecurity Australia and the Department of Health) and operations (done by AQIS). There is no capacity for flexible allocation of resources between policy development and operational programmes.

That separation has been to deliver “independence” to Biosecurity Australia. However the independence referred to by the Minister is from the market access and facilitation functions performed by DAFF, not from the quarantine operational functions of AQIS. The imposition of strict financial separation between Biosecurity Australia and AQIS defeats this objective without contributing to the objective of “independence”.

#### 4.5 Maximise accountability to stakeholders

Performance of current arrangements against this objective is extremely poor.

I deal with three separate aspects:

- accountability for the content of policy development
- accountability for policy development process
- accountability for operational decision-making.

##### *Accountability for content*

At the heart of each IRA process is the concept of a level of quarantine risk which is acceptably low. That is the term used in domestic law. The same concept is dealt with in the WTO SPS Agreement by reference to a member’s Appropriate Level of Protection (ALOP).

In every case of significant controversy, the level at which Australia sets its ALOP has been controversial. That is, the setting of the ALOP is a key determinant of the outcome of each IRA process.

Quarantine risk assessment must be science based. This requirement flows from the WTO agreement on Sanitary and Phytosanitary Measures (SPS Agreement) as interpreted in the Tasmanian salmon case.

However, this does not mean that all aspects of quarantine risk assessment are properly performed by scientists. There are two discreet but related aspects which involve societal value judgments which are properly made by politicians, or informed by political judgement:

1. determination of Australia's Appropriate Level of Protection (ALOP); and
2. determining the weight to be accorded to various forms of harm that are assessed as possible consequences of importation.

Scientists have little, or nothing, to add to those judgements by reason of their training, qualifications or experience.

Under the SPS agreement a WTO member is entitled to determine its own ALOP provided the WTO member:

- Takes into account the objective of minimising negative trade effects; and
- avoids arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations.

Australia's policy approach to setting its ALOP is well established. It was set out in an AQIS Policy Memorandum 1996:

*Australia has the sovereign right to determine its ALOP which reflects government policy and community expectations. This element of quarantine policy precedes and is separate from the establishment of quarantine measures by AQIS. The ALOP determines the quarantine measures required; it is not the quarantine measure that determines the ALOP.<sup>8</sup>*

*A guide to the ALOP may be found in community and industry acceptance of quarantine policy and practice over the years. It reflects value judgements of the Australian community that take into account the benefits of trade and community access to imported goods and the consequences of pest or disease introductions on industry, the environment and society in general. Australian Governments have consistently adopted a highly conservative approach with respect to the ALOP. However, since the 1980's, successive Australian Governments have rejected the proposition that it is possible or desirable for Australia to adopt a 'no-risk' approach to quarantine.<sup>9</sup>*

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<sup>8</sup> AQIS Policy Memorandum 1999/26

<sup>9</sup> AQIS Policy Memorandum 1999/26

Further, the respective roles of officials and Ministers have been clearly articulated for some years. It was summarised in AQIS evidence to the Senate in 1999:

*...the appropriate level of protection is the same in each case unless and until the government tells us that it wants a wholesale shift in the policy or it wants to tell us that we are not conforming with the policy which it requires us to implement.<sup>10</sup>*

As the Senate Rural Regional Affairs and Transport Committee reported in 2000<sup>11</sup>:

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

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

The Quarantine Proclamation incorporates the concept of Australia's ALOP by referring to "the level of quarantine risk ....that is acceptably low" (s70).

The Proclamation obliges the officer who considers the issue of an import permit to determine what "level of quarantine risk... is acceptably low ."

**There is no provision in the IRA Handbook or in the Quarantine Act or Proclamation for any officer of the department to consult the Minister on that question. Section 8B of the Act makes clear that officers are subject to direction by the Secretary but not in the capacity of Secretary. Rather the capacity in which she administers the Act is as Director of Animal and Plant Quarantine, an office created by the Act. That leaves no room for the Director, in that capacity, to be subject to direction of the Minister (to which direction she is subject in her capacity as Secretary of the Department).**

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<sup>10</sup> AQIS Evidence to the Senate Rural, Regional Affairs and Transport Committee 11 November 1999, page 323

<sup>11</sup> "An Appropriate Level of Protection – the Importation of Salmon Products" at paragraph 4.17.

The risk assessment process used by Biosecurity Australia means that those aspects of an IRA involving scientific judgment and those involving political judgments are closely intertwined. The science clearly informs (and almost always must determine) any assessment of the likelihood of entry, establishment or spread of a pest or disease and the likely extent of any harm that may flow from that entry establishment or spread.

However, political judgments are often essential to then determine the weight to be accorded any particular aspect of harm, and to determine whether the overall level of risk is acceptable.

In the Australian Pork case the majority of the Full Court of the Federal Court described this standard of "acceptably low" as "the imponderable standard".<sup>12</sup> The Macquarie Dictionary tells us that an imponderable standard is one that is not capable of being weighed, or not worthy of consideration.

The consequence is that Biosecurity Australia is tasked with making decisions against a legislative standard devoid of meaning, in a policy environment which requires and expects guidance from ministers, but with no process which permits, facilitates, or defines the proper scope of, any communication with ministers.

This exposes officials, ministers and Australia to unacceptable levels of risk. If officials do not consult ministers on questions of the ALOP, they risk improperly abrogating to themselves a role properly performed by ministers. If officials do consult with ministers on the same question they risk a finding that they have behaved improperly, because the legislation leaves it to the official and not the Minister to make the decision of what level of risk is "acceptably low".

If ministers engage in consultation during an IRA process on the ALOP to be applied and that fact becomes known, they risk Australian trading partners or stakeholders in Australia alleging that they have improperly interfered in a process which should be science based. In those circumstances ministers would be left in the invidious position of the published law and IRA Handbook making no provision for their participation at any point of the process. That circumstance must increase the risk of successful challenge to Australia's quarantine system in the WTO.

Similar considerations arise in dealing with assessment of aspects of consequences of entry establishment or spread of a quarantine pest. That assessment can include assessment of factors of the following kind which are extracted from the most recently published draft IRA:<sup>13</sup>

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<sup>12</sup> Director of Quarantine v Australian Pork Limited (2005) 224 ALR 103 at [66]

<sup>13</sup> Apples from New Zealand Draft IRA (2005) pages 34 - 35

- reduction of species that are major components of ecosystems (in terms of abundance or size),
- reduction of endangered native species
- significant reduction, displacement or elimination of other species.
- social and other effects of the pest or control mechanisms (e.g. tourism)
- significant effects on designated environmentally sensitive or protected areas
- significant change in ecological processes and the structure, stability or processes of an
- ecosystem (including further effects on plant species, erosion, water table changes, increased fire hazard, nutrient cycling, etc.)

While the dominant inputs to consequence assessment must be scientific and economic, the weight to be accorded harm of the types described in the list above involves societal value judgements of a political kind. Without a clear mechanism for communication with ministers on those questions, officials are left to make these judgments without appropriate guidance.

At present those judgments are made according to a set of "decision rules" the origins of which are opaque in origin and application. The Australian Pork case demonstrated that the outcome of an IRA could depend on arbitrary judgements under those rules, having no scientific content. In that case one particular aspect of the effects of the disease in question was said to be significant at "District" but not at "Regional" level. If that aspect were classified as significant at Regional level the risks which were classified as acceptably low would instead have been called unacceptably high.

**The determination of the ALOP in IRAs and the related assessment of consequences obfuscates the proper accountabilities of both politicians who are responsible, and entitled, to make the societal value judgements involved; and the scientists whose decisions have been cloaked in language such as "reflecting Australia's ALOP" without articulation of what that means.**

**Adequate governance requires that the role of ministers be made clear and explicit -- to be consulted on, and where appropriate, to determine Australia's ALOP (and other questions involving societal value judgements) in the conduct of IRAs.**

**For so long as the determination of those questions is embedded in the IRA process as a whole this means ministers should have the power and authority to make the final decision on any IRA.**

Accountability for process

The key participants in IRA processes and their authority and accountability is as follows.

An IRA Team, composed of selected officers from Biosecurity Australia and selected external consultants is responsible for the preparation of a draft IRA, including forming all judgments on Australia's ALOP to be applied in a particular circumstances of the import under consideration.

The Chief Executive of Biosecurity Australia publishes the draft IRA as settled by the IRA Team and seeks comment from stakeholders.

The IRA Team considers comments received and produces a final IRA.

The final IRA is referred to the Eminent Scientists Group the terms of reference of which are to:

- Review the draft Final IRA Report prepared by the IRA Team to ensure that the IRA team has properly considered all technical submissions received from stakeholders during the formal consultation period on the draft IRA; and
- Within 60 days of being presented with the draft Final IRA Report, prepare a report to the Director of Quarantine on their findings and recommend any action considered necessary to overcome any identified deficiencies.

At this point, it is wholly opaque whether the Chief Executive of Biosecurity Australia, the Director of Quarantine or the IRA Team is responsible and accountable for doing anything in response to the report of the Eminent Scientists Group.

Further, it is notable that the Eminent Scientists Group is not responsible or accountable for the quality of any of the scientific analysis in the IRA; nor is it responsible or accountable for any view adopted by the IRA Team as to Australia's ALOP. However it is responsible for reporting to the Director about the adequacy of the IRA at a point in the process when the Director has supposedly not yet seen the IRA report! It's creation by the Minister demonstrates that the Minister judged that his officials did not have the appropriate skills, prestige or independence to exercise the judgements required of them under the formal decision making framework.

It is assumed that following a process with the Eminent Scientists Group the Chief Executive of Biosecurity Australia will publish a final IRA. It is wholly opaque what role the Director might play at that point.

Stakeholders are then entitled to "appeal" to an administrative committee operated by the Department of Agriculture Fisheries and Forestry entitled the Import Risk Analysis Appeals Panel (**IRAAP**). The IRAAP is limited to considering whether the IRA team failed to take into account a significant body of

scientific evidence, or otherwise significantly deviated from the IRA process as set out in the IRA Handbook. It reports its findings, by way of recommendation to the Director.

After the IRAAP has completed its work the Director of Quarantine, being the Secretary of the Department, considers whether to adopt the outcome of the IRA as quarantine policy for the purposes of Quarantine Act. In the Australian Pork case answers to questions provided to a Senate committee indicated that the Director did not consider that he had an independent judgment or choice to make at that point.

If the Director is to play any role following the report of the Eminent Scientists Group, it is not possible for her to then bring an independent mind to the questions that arise following consideration of the IRA by the IRAAP.

This outline of the process highlights the following failures of process accountability:

- Accountability for the adequacy of the scientific analysis in an IRA is potentially spread between the IRA Team, the Chief Executive of Biosecurity Australia and the Eminent Scientists Group. Yet there is no reporting or other authority framework that binds these three different points of accountability. The opportunities for obfuscation and blame shifting are manifest.
- Accountability for the key societal value judgements in an IRA is potentially spread between the IRA team, the Chief Executive of Biosecurity Australia and the Director of Quarantine. In financial management the Chief Executive of Biosecurity Australia has no reporting or other authority framework with the Director of Quarantine. However, for personnel management purposes under the Public Service Act the Chief Executive of Biosecurity Australia is subject to direction by the Director of Quarantine.
- The opportunity for genuine and irresolvable disputes on these questions between the Director and the Chief Executive is manifest, as are the opportunities for obfuscation and blame shifting. Even more importantly, Ministers who will inevitably carry the political cost of these societal value judgements are formally excluded from the decision-making process.

The model described in section 5 would address these deficiencies by allocating to the Board of Quarantine Australia responsibility and authority to publish a draft IRA and to recommend a final IRA. That responsibility would include ensuring that all aspects of scientific analysis and due process had been properly attended to. It would expressly enable the Minister to finally determine the outcome of any IRA.

Accountability for operational decision making

In operational areas decision-making under the Quarantine Act is structured to provide relatively clear accountabilities. However there are many powers conferred on officials, the legal supervision of which depends on judicial review and which in other contexts would have been made amenable to merits review (such as by the Administrative Appeals Tribunal).

In those cases where Ministers have a proper role in operational decision-making the legislation spells out that role.

However in the bulk of cases legislation confers power on the Director of Animal and Plant Quarantine or the Director of Human Quarantine and their respective delegates.

The legislation does not envisage that those powers will be exercised by the directors and their delegates under direction from Ministers. Rather, they are powers conferred directly on officials.

## **5 Direction for reform**

### **5.1 Addressing the issues in this opinion**

The issues identified in this opinion would be addressed through placing responsibility for Quarantine functions with the statutory authority, recommended by the Nairn Committee with the following features:

- The board would be obliged to comply with any directions given to it by the Minister. Such a direction might cover, for example, those IRA's which the Minister might choose to make the final decision on himself, or might constitute the Minister's decision on such an IRA
- to ensure transparency, particularly with trading partners, Quarantine Australia would be obliged to publish any advice provided to the Minister which related to sanitary or phytosanitary measures which might be imposed by Australia and the Minister would be obliged to table any direction which related to any such issues in the Parliament
- The Board would include (but not be limited to) people with the skill sets and profile of the Eminent Scientists Group
- The board would be authorised to establish and maintain a database such as ICON in accordance with rules to be determined, and published, by the board from time to time. Those rules, akin to a delegation manual, would allocate authority and responsibility across the Board, Chief Executive 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)

- the SPS Agreement would be attached to the legislation and Quarantine Australia would be obliged to conduct itself in accordance with Australia's obligations under it (along the lines of the provisions which apply to the Civil Aviation Safety Authority and Airservices Australia relating to Australia's compliance with the Chicago Convention on Civil Aviation)
- the legislation would specify in greater detail those matters which must be taken into account by Quarantine Australia or the Minister in determining the level of quarantine risk which is acceptably low or unacceptably high

## 5.2 Consistency with Uhrig

In 2002 -- 2003 the Commonwealth, through the Department of Finance and Administration undertook a major review of the governance of its entities. The head of the review was John Uhrig and exercise is known by his name.

The policy of the Commonwealth following Uhrig is set out in a publication of the Department of Finance and Administration : Governance Arrangements for Australian Government Bodies.

In describing the policy on establishment of prescribed agencies that publication makes clear that the government considers it appropriate to have used subsidiary legislation to establish Biosecurity Australia under the Financial Management and Accountability Regulations. The matters the government will have considered in arriving at that decision are:

- a more clearly defined role and function — generally a separately identifiable body will have a single or primary role that it is required to perform;
- greater transparency in how the function or activity is conducted;
- providing a specialised and clearly defined range of functions may improve efficiency, by better allowing those managing the body to focus solely on their defined role; and
- where the activity has sufficient scale and critical mass to be conducted separately and can absorb the monitoring, reporting and accountability costs associated with good governance.<sup>14</sup>

However at this stage Biosecurity Australia has not been established as a separate agency under the Public Service Act. This would indicate a view that while Biosecurity Australia requires financial autonomy from the Department there was no pressing need to separate its staff or activities from control by the Secretary of the relevant department.<sup>15</sup>

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<sup>14</sup> Department of Finance and Administration: Governance Arrangements for Australian Government Bodies paragraph 46

<sup>15</sup> Department of Finance and Administration op. cit. paragraph 75

Financial autonomy for Biosecurity Australia has the effect of preventing flexible resource sharing between Biosecurity Australia and other parts of the Department. It can have no impact on the policy or operational autonomy of Biosecurity Australia which remain under the "control by the Secretary of the relevant department". It follows that establishment of Biosecurity Australia as a prescribed agency does not contribute to the objectives for that move which were announced by the Minister.

Rather where "some degree of independence from ministerial and departmental control" is intended the Department of Finance publication indicates a statutory body may be appropriate – because proper standards of governance mandate that Secretaries under their Minister are, and should in fact be, responsible for everything done within Departments.<sup>16</sup>

Applying the specific criteria set out in the Finance publication: Governance Arrangements for Australian Government Bodies for assessment of the desirability of creating a statutory authority produces the following outcomes. **Each aspect of the assessment points strongly to the establishment of Quarantine Australia as a statutory authority.**

The need to recognise a person as a statutory office-holder, whose role is set out in primary legislation

The need to recognise the Director of Quarantine in legislation, and to confer powers on her and her delegates, is manifest. The Quarantine Act has done so since 1908.

I set out in section 4 of this Opinion the reasons why legislation now needs to go further to define, and give legal effect to, the outcomes of IRA processes and to define the proper role of ministers where societal value judgements are being made in quarantine decision-making.

The recognition of the Director of Quarantine in legislation says nothing about where that office should be located. Indeed when the office was first created under the Quarantine Act 1908 the office was located within the Australian Customs Service. For many years following that the office was occupied by the Chief Health Officer in the Department of Health.

The need to develop some degree of independence from a normal department structure (the level of ministerial oversight/direction typically also being set out in the enabling legislation)

The minister's decisions of 2004 making Biosecurity Australia an independent agency and prescribing it under the Financial Management and Accountability

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<sup>16</sup> Department of Finance and Administration op. cit. paragraph 48

Act demonstrate the government's clear commitment to a very high degree of independence of the quarantine policy making process from the normal department structure.

AQIS operational roles already have a high degree of independence from the rest of the departmental structure. That flows firstly from the fact that AQIS exercises statutory powers which are conferred on the delegates of the Director of Quarantine in their personal capacity. The capacity of the Minister to direct or influence the exercise of those statutory powers is strictly limited by the Act itself.

The very strong disadvantage of current arrangements is that a wedge has been driven between the policy and operational sides of quarantine. The desire to demonstrate the independence of Biosecurity Australia will maintain that wedge, unless Biosecurity Australia and AQIS are brought together under the one statutory authority, independent of the market access and trade facilitation functions of the Department.

The need to establish a regulator or statutory decision-maker, including as a commission that is a body corporate

Establishment of Quarantine Australia as a statutory authority provides an opportunity to address the fundamental deficiencies in accountability and responsibility of the current arrangements.

The establishment of the Eminent Scientists Group demonstrates the need for a group of appropriate experts to perform the governance role with respect to significant quarantine policy decisions, which roll would be performed by a board of directors in a corporate environment.

Under current structures the establishment of the Eminent Scientists Group obfuscates the location of authority, responsibility and accountability as described in section 4.

**Under a statutory commission arrangement, those eminent scientists together with other appropriate experts would form the statutory commission which would have unambiguous authority and accountability for all amendments to quarantine policy. The legislation would permit the board to make appropriate delegation arrangements for the discharge of that responsibility.**

**Further, the legislation and delegation arrangements under it, would enable the implementation of a legal framework which could withstand the issues that flow from the Australian Pork case. The board would be authorised to establish and maintain a database such as ICON in accordance with rules to be determined, and published, by the board from time to time.**

**The legislation would also deal with the authority and accountability of the Minister. This would ensure that the Minister could have and choose to exercise full control on those matters where minister's participation would not be inconsistent with Australia's international obligations.**

It would be consistent with this assessment to also task the Administrative Review Council with the role of evaluating the appropriate appeal and review mechanisms that should be in place for all aspects of quarantine decision making, including in relation to IRAs.

The desire to provide for a more substantial ongoing status for the function, by describing it within legislation

This criterion was at the heart of Nairn's 1996 recommendations. The Committee's vision was of a quarantine function that enjoyed broad support across the community, with all relevant Australian stakeholders and across government portfolios.

The Committee particularly identified the need to improve the buy in to quarantine of interests associated with human health and environment.

Policy development in the area of avian flu demonstrates the imperative for strong institutional linkages between human and animal quarantine. For example, sadly, it remains the case that very few veterinary epidemiologists or pathologists ever engage in professional dialogue with human health epidemiologists or clinicians. The current administrative arrangements support that professional bifurcation.

A statutory authority which understands and operationalises its responsibilities for animal, plant and human quarantine would provide an institutional basis for leading dialogue and thinking on fundamental challenges such as avian flu, and for garnering broad community support for its activities.

Greater transparency in describing a body's functions and powers in legislation

The principal regulatory powers and functions in the quarantine area are already defined in detail in quarantine legislation.

However there is an urgent need for improved transparency to demonstrate:

- Australia's compliance with the SPS Agreement
- the scope of ministerial authority and accountability in the development of quarantine policy
- the locus of governance authority and responsibility in the sign off of IRAs and other significant quarantine policy developments
- the authority of officers to issue import permits relying simply on the contents of the ICON database.

Establishment of Quarantine Australia as a statutory authority would provide the opportunity for this transparency.

### 5.3 Consideration of the government's 1997 position

When the Nairn Committee reported the government considered and rejected its recommendation for the establishment of quarantine Australia as a separate statutory authority.

However the reasons which drove the government's decision at the time have now largely ceased to apply.

In this section I consider each of those reasons, as published on the DAFF web site in the publication The Nairn Report –The Government Response.

#### Reason 1 – linkage to agricultural trade policies

The Government response stated:

*Quarantine policy issues are a central element of the Government's agricultural and trade policies. Sound quarantine decisions preserve our agricultural production advantages and enhance our trade prospects. Adherence to our obligations under international agreements is critical to the positions we take in bilateral and multilateral trade discussions. It enables us to argue for liberalisation of restrictions imposed in other markets. As such, quarantine policy must be determined by Government along with other agricultural and trade policy issues.*

The Minister's announcement of July 2004 removed this rationale which deals with the advantages of linking Biosecurity Australia's functions with the market access and trade facilitation functions of the Department.

The Minister said that Biosecurity Australia was being established as a separate agency *to remove any perception that trade considerations rather than scientific analysis influence IRA recommendations.* The government now clearly places a higher priority on the perceived independence of Biosecurity Australia from market access and trade facilitation functions than on the integration or coordination of quarantine policy development with "other agricultural and trade policy issues".

#### Reason 2 – Ministerial responsibility

The government response says:

*Similarly, it is the responsibility of the Minister for Primary Industries and Energy to ensure quarantine decision making and operational processes are consistent with the Government's policy and that the administration of quarantine is carried out according to the Government's directions. This is best achieved as a central function of Departmental administration, not at arms length from Ministerial and Departmental responsibility.*

The separation of Biosecurity Australia from AQIS in 2000 followed by the establishment of Biosecurity Australia as a prescribed agency removed this rationale. There is now no organisational structural link between quarantine policy processes and operational decision-making. Quarantine policy making has in effect been removed from the Department of Agriculture Fisheries and Forestry.

Further, the Full Court judgment in the Australian Pork case makes clear that current legislation obliges departmental officials at a relatively low level, and not the Minister, to make decisions on the central element of government quarantine policy -- being the level of risk which is "acceptably low".

Given these recent developments there is a need to make clear that the Minister is entitled to, and responsible for, making decisions touching on Australia's quarantine policy, subject only to the constraints of the SPS Agreement.

As far as AQIS operational decision-making goes, the Quarantine Act makes clear that the Minister's current role is strictly limited and defined. The establishment of a statutory authority would not change that situation.

### Reason 3 – accountability and responsibility

The government response states:

*A fundamental consideration is the principle of accountability and responsibility for quarantine at both departmental and government levels and the issue of who should hold executive decision making power in relation to quarantine.*

The very significant deficiencies in accountability and responsibility of current arrangements as they have developed since the Nairn Committee are set out at sections 4.3 and 4.5 above.

The direction set out in this opinion provides a basis for dealing with those deficiencies.

### Reason 4 – proliferation of statutory authorities

The government response states:

*The Government has concerns about the proliferation of Commonwealth statutory bodies and the resultant distortions introduced into Commonwealth policy development, policy advice and decision making...*

*While endorsing the reform objectives of the Nairn Committee, the Government's view is that the above objectives, such as community ownership of quarantine, cultural change and more efficient use of resources, can be achieved without creating a statutory authority.*

The government response was prepared prior to the Uhrig Review. That review provides the framework for dealing with this concern. The assessment against that framework is at section 5.2 which concludes that establishment of a statutory authority in this case is warranted.

#### Reason 5 – links with the Department and other agencies

The government response states:

*A move to a statutory authority would weaken the links with the Department and other Commonwealth and State agencies.*

The moves in 2004, together with the continuing desire to demonstrate the independence of Biosecurity Australia means that there has been some weakening of the links between the Department and quarantine policy formulation.

In recent years experience in the agricultural and veterinary chemicals and food standards areas indicates that stakeholder relationships, including with areas of the Department, other departments and the states and territories can be significantly strengthened by a well-run statutory authority.

That experience is consistent with the experience across various areas of administration where cross agency and whole of government approaches have been developed and implemented since 1996.

#### Reason 6 – transition costs

The government response stated:

*A move to a statutory authority would also take some time to implement fully, creating uncertainty at a time when focus on implementing the Government response is what is required.*

While there will be some time and cost expended in the establishment of a statutory authority, the immediate operational priorities that were of concern in 1997 no longer apply. The hard work of implementing the managed risk based

approach to quarantine as recommended by Nairn was largely completed by 2000.

Further, in the area of quarantine policy the hard work of organisational separation has largely been done with the establishment of Biosecurity Australia as a prescribed agency. The establishment of a statutory authority would enable the government to derive the full benefits that are available to be reaped from that hard work.

## **6 New South Wales Farmers Association objectives**

I am instructed that the New South Wales Farmers Association's objectives include that new arrangements ensure that Quarantine Australia:

- a. delivers autonomy from the Department of Agriculture, Fisheries and Forestry (DAFF) and the Department of Foreign Affairs and Trade (DFAT);
- b. reports directly to the Federal Minister for Agriculture and is under his direct control;
- c. provides transparency to domestic agricultural industries and the World Trade Organisation;
- d. enables workplace agreements for staff; and
- e. is fully funded by the Federal Government.

The direction outlined at section 5 of this opinion fully addresses the first three of these objectives.

I understand from discussions with my instructors that the fourth objective extends beyond enabling workplace agreements for staff to achieving workplace arrangements outside the Public Service Act and supporting a rapid and major change of culture.

Workplace agreements for staff are possible under current arrangements. If employment by the proposed statutory authority is to be outside of the Public Service Act the legislation establishing the authority needs to say so.

In devising arrangements for changing culture within the organisation it needs to be borne in mind that a large portion of the operational functions of AQIS are concerned with relatively routine service delivery functions in cargo management and board of control, while aspects of Biosecurity Australia's work and of policy work within AQIS involve exceptionally complex questions of science, economics, international relations and politics and the interaction of each of those disciplines. While there will be aspects of workplace organisation that can usefully be common between those functions, there will necessarily be the differences in approach depending upon the nature of the function and the workforce which performs it.

The fifth objective, relating to the level of budget funding as opposed to cost recovery is a matter of budget policy without legal implication.

A handwritten signature in black ink, appearing to read "Tom Brennan", with a horizontal line underneath the name.

TOM BRENNAN  
27 April 2006