

**Supplementary material to NSW Farmers' Association's  
submission to the Beale Inquiry into Quarantine and Biosecurity  
necessitated by the appearance of strong, yet misguided,  
opposition to NSW Farmers' Association's position on vital  
structural changes to AQIS/BA**

**Arguments for a statutory agency for quarantine  
– particularly a statutory authority with a governing board**

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**NSW Farmers' Association  
Level 10, 255 Elizabeth Street  
Sydney NSW 2000**

Ph: (02) 8251 1700  
Fax: (02) 8251 1750

**NSW Farmers' Association Background**

The NSW Farmer's Association (the Association) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, meat, wool and grain producers, to more specialised producers in the dairy, horticulture, egg, poultry meat, pork, oyster and goat industries.

## 1. Introduction

Discussions with several farming organisations have revealed virtually no support for a statutory authority for quarantine beyond the NSW Farmers Association (the 'Association'). However, the arguments presented for these opinions show no familiarity with the Commonwealth *Authorities and Companies Act 1997* (CAC) and the *Financial Management Accountabilities Act 1997* (FMA), the Uhrig report of 2003, the Department of Finance and Administration's (DFA) advice on statutory agencies of 2005 and the Commonwealth Government's progress report on reviewing statutory entities of 2007.

From a study of these documents it is clear that the concerns listed by such farming organisations of retaining ultimate ministerial responsibility, accountability of the entity to government, transparency of the entity to government, protection from undue influence from any sector, compliance with the WTO SPS Agreement, performing regulatory functions, sound financial management, delivering scientific excellence and tailoring employment conditions can all be accommodated through the careful drafting of specific enabling legislation for any new statutory entity (agency or authority).

Using the guidance in the Department of Finance and Administration's document, *Governance arrangements for Australian Government Bodies August 2005*<sup>1</sup>, it is obvious that:

1. AQIS and BA should be removed from the Department of Agriculture Fisheries and Forestry (DAFF) and have no influence from the Department of Foreign Affairs and Trade (DFAT)
2. a new body outside of DAFF and Biosecurity Australia (BA) needs to be created
3. the new body needs to be statutory (have enabling legislation)
4. the new body needs to have a governing board and Chief Executive Officer (CEO)

## 2. Removal from DAFF

The DFA document states that Departments (numbers indicate points within the DFA document):

- **maximise ministerial control (33)**
- **allows for well understood lines of responsibility to operate (33)**
- **include clear application of other accountability laws and processes (33)**
- **are for functions of governments that require close ministerial involvement, direction and responsibility (budget, defence and policy) (34)**
- **provide more flexibility and deliver rapid alteration if required by the government (35)**

It seems to be a common view in agricultural industry submissions, of which the Association is aware, that the Minister should retain ultimately responsibility for the decisions made in quarantine and that all the above functions in quarantine can be delivered by a Department through AQIS and a prescribed agency through BA.

However, the prescribing of BA as a non statutory agency was for the express purpose of creating the impression of some distance from DAFF. The Agriculture and Food Policy Reference Group acknowledged in its report of 2006 "Creating our Future: Agriculture and Food Policy for the Next Generation"<sup>2</sup>, that this prescribed agency structure enhanced BA's independence from the policy machinery of government. In reality, it has

<sup>1</sup> (<http://www.finance.gov.au/finframework/docs/FMR2.pdf> accessed 30 April 2008)

<sup>2</sup> [http://www.agfoodgroup.gov.au/publications/next\\_generation](http://www.agfoodgroup.gov.au/publications/next_generation) (accessed 30 April 2008)

no enabling legislation and is a part of DAFF as its FMA Act only enables it to manage its own finances. The Chief Executive is subject to the direction and control of the Secretary of DAFF under the Public Service Act 1999 (PSA). To overcome this legislative limitation to independence, the Agriculture and Food Policy Reference Group recommended the need to create an independent institutional structure for BA (citing a statutory authority with an independent board) to promote confidence in the quarantine system

Having AQIS and BA respectively either part of the Department or still a non statutory entity has failed to deliver adequate quarantine outcomes. It is likely, based on evidence from the Callinan Inquiry, that their separation has worsened the Department's quarantine capacity. The only alternative solution, not yet tried, is to remove quarantine (both BA and AQIS) from the Department entirely with the provisos that there be reporting obligations to DAFF and the Minister as required in new enabling legislation.

### **3. Unable to use an existing body**

BA is the only existing alternate body for AQIS to be moved into and as noted above it is not a statutory agency. Therefore a new body must be created with enabling legislation either under the FMA or the CAC Acts.

### **4. Why establish enabling legislation thereby creating a new statutory entity?**

The DFA document states that statutory agencies (numbers indicate points within the DFA document):

- **develop some degree of independence from a normal department structure (49)**
  - i. The matrix management system, prevalent in departments, was revealed in the Callinan Inquiry as causing a focus on budget outcomes rather than quarantine outcomes through multiple reporting lines and absence of decision making power.
  - ii. The best way to achieve a cultural change when other operational or policy approaches have failed is to change the organisation's design.
  - iii. Even though organisational design doesn't need enabling legislation to implement, the reorganisation will attain a greater significance and importance if done in conjunction with enabling legislation.
- **enable a regulator or statutory decision maker (49)**
  - i. Enabling legislation accommodates an organisation with a regulatory function.
- **provide for a more substantial ongoing status for the function by describing it within legislation (49)**
  - i. The *Quarantine Act 1908* would gain a greater status if it was supported by a body with enabling legislation as there would be a statutory requirement to implement the policies of the Government and take direction from the Minister.
- **allow greater transparency in describing a body's function and powers in legislation (49)**
  - i. The operational independence of a statutory entity from a Department can be outlined in enabling legislation while retaining

- the accountability and reporting lines to both a Minister and the Department Secretary.
- ii. In the Association's proposal any suggestion of trade influence from Departmental staff (either DAFF or DFAT) would be removed with the Minister taking full responsibility for policy direction.
- **under both the FMA Act and CAC Act they require the CEO or Directors of a governing board (respectively) to handle public money (or the money of the agency) in a proper manner by making the best use of resources (58,59)**
  - i. As with BA as a prescribed agency, the financial management of a statutory entity would be accommodated by either the FMA or CAC Acts and both the Government influence on that management and the agency's reporting and accountability back to Government would be written into enabling legislation.
- **it is preferable, but not essential, for a financially autonomous body to also be established with its own staffing powers. Generally this should occur under the Public Service Act 1999 (PSA) but sometimes alternative staffing is appropriate. (74)**
  - i. The current staff for both AQIS and BA are through DAFF and thus the PSA. Enabling legislation can still adopt employment through the PSA which now accommodates collectively bargained workplace agreements which can include performance indicators.

## 5. Why a governing board with a CEO is needed

A CEO is taken as a given in any statutory entity and will not be discussed further.

The Association has advocated a statutory authority under the CAC Act as suggested by the Nairn Report of 1996<sup>3</sup> because it agrees with the advantages cited by Professor Nairn, in particular:

- a functional independence from the Department
- a suitable structure for engendering a cultural change in the organisation
- potential for greater job satisfaction for staff
- competitive management
- more public accountability

The 2005 DFA advice states that the CAC Act is more appropriately applied to a body that (numbers indicate points within the DFA document):

- o **operates commercially with the intention of making a profit in a competitive environment**
- o **has an entrepreneurial focus**
- o **has assets not to be owned or controlled directly by the commonwealth**
- o **requires a degree of independence from general policies of government (92)**

The Association is aware that the above characteristics do not fit with the description of a quarantine agency, however it has advocated that as a governing board would improve the quarantine outcomes of a statutory entity, and DFA documentation implies the CAC Act accommodates a governing board resulting in the creation of a statutory authority, this type of entity remains supported by the Association.

The Association is also aware that the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission are examples of

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<sup>3</sup> [http://www.daff.gov.au/data/assets/pdf\\_file/0009/111969/nairn\\_report.pdf](http://www.daff.gov.au/data/assets/pdf_file/0009/111969/nairn_report.pdf) (accessed 30 April 2008)

statutory agencies with governing boards under the FMA Act both with independence from Government.

It is a matter for Government to decide under which Act, either FMA or CAC the statutory entity should be placed, depending on whether it should hold money on its own account or not.

The adoption of the Uhrig 'executive management' and 'power to act' templates has removed some governing boards and strengthened others respectively, depending on the strength of the relationship needed between the board and Government. Where boards have been retained, **Departmental Secretaries and staff have been removed from the boards but reporting requirements to Ministers and Departmental Secretaries have been increased. These changes are dictated in the enabling legislation for each authority (147).**

The DFA document states (numbers indicate points within the DFA document) that:

- **CAC Act enables a governing board whose directors must act in the interests of the body as opposed to acting as representatives for other constituencies (85)**
  - i. The fears of undue sector interests are managed by the enabling legislation which can determine the qualities of the directors and the need to have them as Ministerial appointments.
  - ii. Conversely, the fears of undue political interests can be managed by the same mechanisms.
- **boards are an effective governance structure where they have been delegated the full power to act (appointment and removal of CEO, appointing the chairperson, setting strategic direction, supervising management, defining the values and culture of a body, managing and overseeing risk issues, monitoring the performance of the body and holding management accountability for its performance). (148)**
  - i. Although Uhrig stated that a governing board would be generally inappropriate for non commercial entities, for those with a narrow mandate, where the Minister sets policy and if the board was to perform statutory functions, some significant structural change is still needed in order to avert another outbreak such as Equine Influenza. The functions of a board, listed by DFA above, and the collective skills and experience that can comprise a board (ie non representational appointments) are precisely what is required to change the culture of quarantine operations and management that has not been achieved under DAFF supervision. The Association also acknowledges that the DFA document suggests a range of approaches to deal with effective governance as alternatives to a board.

The employment of staff will also be an important characteristic in a statutory entity. The DFA document states (numbers indicate points within the DFA document) that:

- **The flexibility in the Australian Public Service under the workplace relations system [now using collective agreements] provides agencies with significant capacity to determine appropriate remuneration and conditions arrangements for employees. There is now less reason for establishing or moving a body outside of PSA coverage. (162)**
- **If a body is to be prescribed under the FMA Act the body should employ staff under the PSA unless there are sound arguments to the contrary (163)**

- **If the PSA is not proposed to govern a body's employment regime, it could implement a code of conduct and statement of values. (170)**
  - i. There seems to be adequate capacity for performance based employment incentives to be created under the current PSA Act in order to facilitate a cultural change in the organisation.

## 6. Countering critics of a statutory authority

In 1997, the Government of the day rejected Nairn's proposal for a statutory authority and governing board in its official response<sup>4</sup>. The Government cited the need for accountability and responsibility for executive decision making. Therefore the Government saw to it that the Departmental Secretary and the Minister retained this power. However, in the current debate, agricultural industries have not argued that the Departmental Secretary should maintain this power but they strongly argue that the Minister should do so. This can be delivered through a statutory entity.

The Government also had concerns about the proliferation of statutory authorities. The implementation of the Uhrig report from 2003<sup>5</sup> as at May 2007, has addressed this by converting 9 statutory authorities to statutory agencies by replacing their boards with executive management structures and strengthening 15 more by increasing power to their boards as revealed in the Governance Implementation Update (Uhrig Review) May 2007.<sup>6</sup>

The Government was concerned that a statutory authority would distort Commonwealth policy development, policy advice and decision making. Since Uhrig's advice, 6 years after this concern was voiced, enabling legislation mechanisms have tightened the reporting and accountability to Ministers and Department Secretaries and the expected outcomes from statutory entities through 'Statements of Intent' and 'Statements of Expectations' which can be written into the statutory authorities enabling legislation.

The Association is encouraged that the Government did endorse the objectives of the Nairn Committee for community ownership of quarantine, cultural change and more efficient use of resources. **However, it is apparent that the community feels betrayed by inadequate quarantine services, there has been no cultural change that places quarantine objectives as paramount and resources have not focused on delivering quarantine outcomes but rather on producing corporate plans.**

Professor Malcolm Nairn has reconsidered the recommendation for a statutory authority given it was made 11 years ago. In his article for the Farm Policy Journal "A Retrospective of the 1996 Review of Quarantine in Australia", Vol. 5 No. 1, February Quarter 2008, he lists improvements to quarantine as the creation of BA as an independent agency, reformation and regulation of the Import Risk Analysis (IRA) process, the Australian Centre of Excellence for Risk Analysis and the widespread acknowledgement of the need to view biosecurity in a broader more multidiscipline light (one example being AUSBIOSEC). He cites these as diminishing the case for a statutory authority.

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<sup>4</sup> <http://www.daff.gov.au/aqis/about/reports-pubs/nairn/govt-response> (accessed 30 April 2008)

<sup>5</sup> [http://www.finance.gov.au/finframework/docs/Uhrig\\_Report\\_July\\_2003.pdf](http://www.finance.gov.au/finframework/docs/Uhrig_Report_July_2003.pdf) (accessed 30 April 2008)

<sup>6</sup> [http://www.finance.gov.au/finframework/docs/Governance\\_Implementation\\_Update\\_May\\_2007.pdf](http://www.finance.gov.au/finframework/docs/Governance_Implementation_Update_May_2007.pdf) (accessed 30 April 2008)

However the problems of culture and being under the influence of DAFF on trade matters were key reasons given in the 1996 Nairn Report as arguments in favour of a statutory authority. These have not been addressed and remain the main drivers behind the Association's push for a statutory entity outside of government Departments.

The Association acknowledges the incentive for the Government to create BA as a prescribed agency but has concerns that it did not achieve its objective of independence from Government. Furthermore the separation from AQIS has diminished effective communication, produced operational problems within AQIS and not allowed policy reviews to take a high enough prominence in BA workplans. Regardless of these shortcomings, the focus of independence was on BA, as policy (and not operations) was a political problem for the Government at the time. At present, and especially as a result of the evidence from the Callinan Inquiry, both BA and AQIS have been shown to be involved in the Government's political problem.

The regulation of the IRA process, the expansion of stakeholder consultation and the more appropriate use of the Eminent Scientists Group has not yet had an impact on quarantine and judgment is being reserved by many. However, again this solution was focused on the policy arm of quarantine by addressing the activities of BA and not the implementation on the ground of such policies by AQIS.

The Australian Centre of Excellence for Risk Analysis has received wide support and has shown its independence and its expert capacity. As its name indicates, it also focuses on policy and its initial work has looked at the IRA consultation process and the volume and time of trade impacts on the IRA outputs. Operational functions of AQIS can only be assisted in terms of risk analysis for resource allocation and scrutiny of operational functions produced from BA policy recommendations. There is however, no obligation for any adoption of advice from the Centre of Excellence.

AUSBIOSEC is a high level strategy that will set up a cross discipline framework for coordinating the quarantine continuum, however, there are still calls for involvement of human health professionals. This strategy has wide support but again it is about policy and not about ensuring operations are delivered on the ground to a high standard.

Alan Oxley, Managing Director of ITS Global stated in his article "Maintaining confidence in the safety of Australian food exports" Farm Policy Journal, Vol. 5 No. 1, February Quarter 2008, that there was a case for creating an authority with the sole purpose of producing the IRAs. He proposed it would be required to be constant, predictable and transparent and meet the highest standards of natural justice in the exercise of administrative discretion. He stated that such an authority needed to be viewed as independent, expert, authoritative, credible and not subject to Government direction or political influence.

To have an entity that produces only IRAs ignores the other risk analysis work done by BA and ignores the need to strengthen the essential link for quarantine effectiveness between policy from BA and operations from AQIS.

In contrast to agricultural industries which have promoted Ministerial responsibility for decision making, the view of several economists is that this taints quarantine with trade. It is therefore clear that if some sort of statutory agency is pursued, defining the policy from Government that determines the culture of the agency plus defining the role of the Minister will be the key to its successful establishment. The objective of common interest to agriculture will be to ensure the entity meets international obligations, operates within Government policy guidelines (which must be transparent), reports its operations to the Minister and the Departmental Secretary and accommodates direction from a Minister when necessary in order for that Minister to manage his/her ultimate responsibility for the actions of that authority. The matters of defining the extent to which the entity is a separate legal “person” or not or holds money on its own account or not is a matter for Government on which the Association has no view.

## **Conclusion**

Much has been said against creating a statutory authority despite the body of information produced by the DFA that support the creation of statutory agencies, and statutory authorities in particular.

The Association considers that the opponents of this proposal have resisted gaining a detailed understanding of its proposal and the most basic Government literature on statutory agencies. The arguments of some of these opponents of a statutory authority are mainly based on a perceived need for the Government to have responsibility for the decisions made (in the absence of political interference), particularly decisions on the IRAs.

Unfortunately, there is an absence of evidence contributing to debate on how this need can be best achieved. The Association maintains that there has been insufficient analysis of the documents listed at the top of this argument and encourages the Quarantine and Biosecurity Review Team to seek expert submissions on these matters.

The Association has presented evidence from the DFA’s own documentation, that there are plenty of ways to create enabling legislation in the present system to counter the arguments against statutory frameworks. The alternative of leaving the quarantine authorities within DAFF only leaves the Quarantine and Biosecurity Review Panel with recommendations for small scale changes which risk having little success for significant improvement to the culture within the whole quarantine system and this has consequences too nasty to think about.

The Association has listed a summary of what it is seeking in the structure of a new quarantine authority on page 15 of its submission “Submission to the Quarantine and Biosecurity Review”, April 2008. As the Association does not claim any particular expertise in preparing this supplementary submission on governance arrangements, it remains a matter for Government to determine the legal mechanisms that best deliver those structural changes.