

# QUARANTINE AND BIOSECURITY REVIEW

## Submission by the Department of Foreign Affairs and Trade

7 May 2008

### I. Introduction

1. The Department of Foreign Affairs and Trade (DFAT) is pleased to make a formal written submission to the Quarantine and Biosecurity Review (the Review) being conducted by the independent Quarantine and Biosecurity Review Panel (the Panel). In preparing its submission DFAT has had the benefit of considering the Panel's *Quarantine and Biosecurity Review Issues Paper* dated 14 March 2008 (the Issues Paper). DFAT has also appreciated the opportunity to meet with the Panel as part of its broader consultation process.
2. The Review raises important questions in terms of Australia's national interest. In DFAT's view, a fundamental question for the Panel is whether Australia's quarantine and biosecurity policy is being applied in the overall national interest. This submission sets out a range of perspectives in order to assist the Panel in addressing this fundamental question.

### II. Australia benefits from a rules-based international trading system

*Australia is a leading agricultural exporting nation*

3. Australia is one of the world's major agricultural exporters with around two thirds of total production being exported.<sup>1</sup> In 2006-07, the gross value of Australian agricultural commodities was \$36.8 billion (3.5% of Gross Domestic Product).<sup>2</sup> In 2006, Australia produced 2.3% of all global agricultural exports.<sup>3</sup>
4. Australia's large agricultural sector cannot be sustained by its relatively small population and therefore exports are essential. Agricultural exports make a significant contribution to Australia's prosperity, in terms of employment and standard of living. However, this is dependent on engendering a positive image of Australia as a partner in trade to enable us to maintain and develop markets for Australian agricultural goods.
5. Australia vigorously pursues its interests as an agricultural exporter including through membership of the Cairns Group. This is a coalition of 19 agricultural exporting countries<sup>4</sup> that has been an influential voice in global agricultural trade since its was formed by Australia in 1986, in the agricultural reform debate in the World Trade Organization (WTO), and its predecessor the *General Agreement on Tariffs and Trade* (GATT).

*The WTO establishes a rules-based international trading system*

6. As a major agricultural exporter Australia benefits from the application of fair and consistent international trading rules. These rules are established by the WTO.

---

<sup>1</sup> Australian Government Department of Foreign Affairs and Trade. Trade in Agriculture, Agriculture and the WTO. [http://www.dfat.gov.au/trade/negotiations/trade\\_in\\_agriculture.html](http://www.dfat.gov.au/trade/negotiations/trade_in_agriculture.html).

<sup>2</sup> Australian Bureau of Agriculture and Resource Economics (ABARE): Australian Commodities March Quarter 2008:01; ABS Cat No 5206.0 .

<sup>3</sup> Australian Government Department of Foreign Affairs and Trade. Trade in Agriculture, Agriculture and the WTO. [http://www.dfat.gov.au/trade/negotiations/trade\\_in\\_agriculture.html](http://www.dfat.gov.au/trade/negotiations/trade_in_agriculture.html).

<sup>4</sup> Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Uruguay.

All 151 WTO Members, including Australia and all of its major trading partners, are subject to the same set of rules. In terms of quarantine and biosecurity the WTO's *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)* is of particular relevance. The *SPS Agreement* provides an objective basis for Australia to challenge unjustifiable quarantine and food safety barriers to its agricultural exports. At the same time, Australia's quarantine and food safety regime must be consistent with the *SPS Agreement*.

### III. Australia's key rights and obligations under international trade law<sup>5</sup>

7. Consistent with its status as an active trading nation Australia has entered into a number of multilateral and bilateral trade agreements. Australia has both rights and obligations under these trade agreements. On a multilateral level, these rights and obligations are set out in WTO rules. On a bilateral level, they are contained in Australia's various free trade agreements (FTAs).
8. DFAT notes that the Issues Paper briefly touches on Australia's international obligations.<sup>6</sup> This submission seeks to provide some further detail in this regard.

#### *Core provisions of the WTO's SPS Agreement*

9. Under the *SPS Agreement* WTO Members have the right to take sanitary and phytosanitary measures (SPS measures) necessary for the protection of human, animal and plant life or health.<sup>7</sup> In general terms, SPS measures are applied to protect plants (phytosanitary measures), humans and animals (sanitary measures) within the territory of a WTO Member from the risks arising from the introduction of pests, diseases, additives, toxins and contaminants.<sup>8</sup>
10. One of the most important concepts in the *SPS Agreement* is the "appropriate level of sanitary or phytosanitary protection", commonly referred to as "ALOP" or "acceptable level of risk".<sup>9</sup> ALOP is the policy choice every WTO Member is entitled to make about the level of protection appropriate to ensure safety of human, animal or plant life or health within its territory.
11. A WTO Member's choice of ALOP is essentially unrestricted by the *SPS Agreement* and cannot be challenged by other WTO members in WTO dispute settlement proceedings. However, when determining their ALOP, WTO Members should take into account the objective of minimizing negative trade effects.<sup>10</sup>
12. The concept of ALOP needs to be clearly distinguished from an SPS measure. The ALOP is the objective while the SPS measure is the instrument chosen to achieve that objective.
13. A WTO Member's right to take SPS measures is subject to various disciplines in the *SPS Agreement*. Firstly, SPS measures must be science-based<sup>11</sup> as evidenced by the requirement that they be based on a risk assessment. Secondly, a WTO

---

<sup>5</sup> This section is merely intended to provide a simplified overview of Australia's rights and obligations under international trade law. In order to determine the precise content of these rights and obligations reference must be had to the actual text of particular provisions, as well as any relevant WTO cases.

<sup>6</sup> See paragraphs 20-22 and Box 2 in the Issues Paper.

<sup>7</sup> Article 2.1.

<sup>8</sup> Annex A(1).

<sup>9</sup> Annex A(5).

<sup>10</sup> Article 5.4.

<sup>11</sup> Articles 2.2, 5.1 & 5.7.

Member's SPS measures must not be more trade restrictive than required to achieve its ALOP.<sup>12</sup> Thirdly, WTO Members must ensure that their SPS measures do not arbitrarily or unjustifiably discriminate; nor must they constitute a disguised restriction on international trade.<sup>13</sup>

14. In DFAT's view, the Panel should take these core provisions of the *SPS Agreement* fully into account, especially the requirement that SPS measures must be science-based, when considering the jurisdictional and institutional arrangements dealt with in the Issues Paper.<sup>14</sup>

*Other relevant obligations in the SPS Agreement*

15. In addition to the core provisions referred to above, there are a variety of other relevant obligations in the *SPS Agreement*. In the interests of harmonisation, WTO Members are strongly encouraged to base their SPS measures on international standards, guidelines or recommendations<sup>15</sup> developed by the international standard setting bodies (ISSBs).<sup>16</sup> Australia participates in the ISSBs in an effort to continually improve the conditions faced by its exporters in overseas markets.

16. Further, the *SPS Agreement* requires an importing WTO Member to accept as equivalent, the different SPS measures of an exporting WTO Member, if it is demonstrated that those measures achieve the importing Member's ALOP.<sup>17</sup>

17. The *SPS Agreement* also requires WTO Members to recognize the concept of "regionalization". This means that SPS measures must be adapted to the sanitary or phytosanitary characteristics of the geographical area from which the product originated and for which the product is destined. In particular, WTO Members must recognize the concepts of pest/disease-free areas and areas of low pest/disease prevalence.<sup>18</sup>

*Procedural obligations in the SPS Agreement*

18. Apart from the substantive obligations already mentioned the *SPS Agreement* also contains a number of procedural obligations. In terms of transparency, WTO Members are required to provide information to the WTO on their SPS measures and to notify changes in their SPS measures, particularly where they impact on trade.<sup>19</sup>

19. There are also a range of procedural obligations relating to WTO Members' "control, inspection and approval procedures".<sup>20</sup> For example, importing WTO Members must ensure that such procedures are undertaken and completed without

---

<sup>12</sup> Articles 2.2 & 5.6.

<sup>13</sup> Article 2.3 & 5.5.

<sup>14</sup> In this regard, DFAT particularly notes the following questions in the Issues Paper: Who should have the ultimate decision making power on risk policy and import permits – a Minister or an independent public servant or statutory authority? How should wider consumer and economic interests (a national test) be incorporated into such a decision? See Issues Paper Part C3 and associated box of questions on page 17.

<sup>15</sup> Article 3.

<sup>16</sup> According to Annex A(3) these ISSBs are: the Codex Alimentarius Commission for food safety; the International Office of Epizootics, also known as the World Organization for Animal Health, for animal health; and the International Plant Protection Convention for plant health.

<sup>17</sup> Article 4.

<sup>18</sup> Article 6.

<sup>19</sup> Article 7 and Annex B.

<sup>20</sup> Article 8 and Annex C.

undue delay,<sup>21</sup> and that information requirements are limited to what is necessary.<sup>22</sup> Further, WTO Members must ensure that any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service.<sup>23</sup> DFAT notes that the latter procedural obligation is clearly relevant to the issue of resourcing, especially cost-recovery, dealt with in the Issues Paper.<sup>24</sup>

#### *Implementation of the SPS Agreement*

20. Each WTO Member is fully responsible for ensuring that its sub-national governments (e.g. state, territory and local governments) comply with the provisions of the *SPS Agreement*.<sup>25</sup> Given its federal structure, this obligation is of particular relevance to Australia. For example, Tasmania's unilateral action in relation to salmon imports led to an additional finding of WTO inconsistency in the dispute brought by Canada against Australia.<sup>26</sup>
21. The Issues Paper refers to the fact that: "Australia's current quarantine and biosecurity system is based on cooperation and shared responsibility between governments, industry and the public. Governments work together to implement the overlapping jurisdictional arrangements ...".<sup>27</sup> These cooperative arrangements are provided for in the *1995 Memorandum of Understanding on Animal and Plant Quarantine Measures*.
22. DFAT recommends the Panel take into account Australia's international obligations when considering the appropriate legislative framework for quarantine and biosecurity in Australia, as dealt with in the Issues Paper.<sup>28</sup>

#### *Quarantine and biosecurity under Australia's Free Trade Agreements (FTAs)*

23. Australia has FTAs with the United States, Thailand, Singapore and New Zealand – all of which are also WTO Members. Each of these four FTAs deals with quarantine and biosecurity issues in a slightly different way but they are all consistent with the *SPS Agreement*. Australia does not negotiate on specific quarantine measures in its FTAs.
24. The *1988 Protocol on Harmonization of Quarantine Administrative Procedures* with New Zealand pre-dates the WTO but is nevertheless consistent with the *SPS Agreement*. The sanitary and phytosanitary chapters in Australia's other FTAs<sup>29</sup> essentially affirm the existing rights and obligations of both Australia and trading partners under the *SPS Agreement* and provide for enhanced mechanisms for cooperation and consultation between the governments. In addition, any recourse to dispute settlement in relation to SPS matters remains in the WTO.

---

<sup>21</sup> Annex C(1)(a).

<sup>22</sup> Annex C(1)(c).

<sup>23</sup> Annex C(1)(f).

<sup>24</sup> See paragraphs 68-77 and associated box of questions in the Issues Paper.

<sup>25</sup> Article 12.

<sup>26</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.158-7.163.

<sup>27</sup> Paragraph 60 of the Issues Paper.

<sup>28</sup> See paragraphs 55-59 and associated box of questions in the Issues Paper.

<sup>29</sup> Chapter 7, *Australia–United States Free Trade Agreement*; Chapter 6, *Thailand–Australia Free Trade Agreement*; and Chapter 5, *Singapore–Australia Free Trade Agreement*

25. Greater cooperation between Australia and its trading partners on SPS matters as provided for in Australia's FTAs can significantly reduce delays and disruptions to trade that may occur when quarantine and biosecurity issues arise.

#### **IV. Australia's general approach to quarantine and biosecurity**

##### *Managed risk not zero risk*

26. Australia operates a managed risk approach, consistent with the SPS Agreement, under its quarantine and biosecurity policy. The objective of this policy is the prevention or control of the entry, establishment or spread of pests and diseases that could cause significant harm to people, animals, plants and other aspects of the environment. Successive Australian Governments have maintained a conservative, but not a zero-risk, approach to the management of biosecurity risks.
27. Risk analysis plays an important part in this managed risk approach. It analyses the level of quarantine risk that may be associated with the importation or proposed importation of animals, plants or other goods into Australia. If the risks are found to exceed Australia's ALOP, risk management measures are proposed to reduce them to that level. If the quarantine risks cannot be reduced to achieve Australia's ALOP, trade will not be allowed.

##### *Australia's ALOP*

28. Australia expresses its ALOP in qualitative terms. The Australian Government, with the agreement of all State and Territory governments, has expressed Australia's ALOP as providing a high level of sanitary and phytosanitary protection aimed at reducing risk to a very low level, but not to zero. The Australian Government's policy reflects community expectations and provides for a high standard of quarantine that manages risks to a very low level. It recognises that a zero risk stance is impractical as it would mean no tourists, no international travel and no imports.<sup>30</sup> Very few WTO members are as transparent as Australia in openly expressing their appropriate level of protection.

#### **V. Australia benefits from a conservative quarantine system, including from a trade perspective**

##### *Australia's favourable pest and disease status supports efficient agricultural production*

29. Australia's impressive performance as an agricultural exporter is based in part on its favourable pest and disease status which contributes to Australia's comparative advantage in agricultural production. Australia's geographic isolation and relatively short history of agricultural production (less than 220 years) has seen it remain free from most of the serious agricultural pests and diseases found in other parts of the world. Geographical isolation combined with strict quarantine measures have helped to ensure that many of the animal and plant pests and diseases of global significance are excluded from Australia.
30. The introduction of serious exotic pests and diseases into Australia, such as foot and mouth disease (FMD) and bovine spongiform encephalopathy (BSE), would be likely to have serious implications in terms of loss of agricultural production, as well as costing millions to control and eradicate. The Productivity Commission

---

<sup>30</sup> Biosecurity Australia, *Import Risk Analysis Handbook 2007*, page 35.

recently modelled the economic costs to Australia of an outbreak of FMD as between \$8-13 billion.<sup>31</sup>

31. In the past, incursions of exotic pests and diseases have resulted in significant costs to Australia. For example, an incursion of papaya fruit fly was detected in Queensland in the 1990s. The eradication program cost the Commonwealth, State and Territory governments approximately \$34 million.<sup>32</sup> The cost to the Queensland horticultural industry resulting from the incursion was estimated to be \$100 million, due to loss of production and sales and costs associated with implementing quarantine treatments. It was estimated that if the papaya fruit fly did become established and spread in Australia, it would cost the Australian horticultural industry approximately \$73.5 million annually from foregone export earnings, and additional costs for insecticide sprays and disinfestation of produce for domestic or export markets.<sup>33</sup>
32. Australia's conservative quarantine system seeks to minimise such incursions thereby minimising loss of agricultural production, as well as the costs of control and eradication.

*Australia's diverse native flora and fauna supports tourism*

33. Australia is one of the most biologically diverse countries in the world<sup>34</sup>, with an estimated one million species of plants, animals and microorganisms (7% of the world's total).<sup>35</sup> About 80% of Australia's plant and animal species are not naturally found on any other continent. Australia's unique biodiversity is largely the result of the country's long term isolation, size (7,617,930 km squared), naturally fragmented landscapes and climate variability.
34. Biodiversity in Australia is a significant attraction for tourism. The distinctive flora and fauna of Australia are world renowned. In the year ending June 2007, 3.5 million international visitors (68% of all international visitors to Australia) participated in nature-based tourism activities.<sup>36</sup> In addition, commercial harvesting and production of Australian native flora and fauna represents a growing portion of the agricultural sector. There is established trade in native flowers and plants and an increasing range of gourmet bush foods.
35. Australia's conservative quarantine system helps to protect Australia's native flora and fauna and thereby safeguards these industries.

---

<sup>31</sup> Productivity Commission, Commissioned Study Impacts of a food and mouth disease outbreak in Australia (page 19), 12 June 2002.

<sup>32</sup> Cantrell, B, Chadwick, B and Cahill, A., (2002). Fruit Fly Fighters: Eradication of the Papaya Fruit Fly. CSIRO Publishing.

<sup>33</sup> ABARE, (1995). Papaya fruit fly: Cost-benefit analysis of the proposed eradication programme.

<sup>34</sup> Australia is one of only 17 'megadiverse' countries recognised by the World Conservation Monitoring Centre that together contains more than 70% of all life on earth.

Williams, J., Read, C., Norton, A., Dovers, S., Burgman, M., Proctor, W. and Anderson, H., (2001). Biodiversity, Australia State of the Environment Report 2001 (Theme Report). CSIRO Publishing on behalf of the Department of the Environment and Heritage, Canberra.

<sup>35</sup> Australian Museum Online: Australia's Biodiversity. Website last viewed April 2008: <http://www.environment.gov.au/soe/2001/publication/theme-reports/biodiversity/index.html>

<sup>36</sup> Tourism Australia (2007). Nature tourism fact sheet 2007. Tourism Research Australia. Website last viewed April 2008: [http://www.tra.australia.com/content/documents/snapshots/2007/nature\\_factsht.pdf](http://www.tra.australia.com/content/documents/snapshots/2007/nature_factsht.pdf)

*Australia exports a high quality clean and green agricultural product*

36. Australia's favourable pest and disease status is of considerable benefit to Australia's agricultural export trade. It enhances the marketability of Australian agricultural products by virtue of their reputation for being "high quality clean and green". Benefits accrue not only to the agricultural sector but also to the Australian community as a whole through reduction in the use of chemicals to prevent and control pests and diseases and enhancement of the quality of life of all Australians.
37. As an island continent free of FMD and BSE, Australia is the world's leading producer of disease-free red meat. This has produced significant market opportunities for Australia. Following the discovery of BSE in some key suppliers to the Japanese and Korean market, in 2004, Australia was able to increase its market share to around 90% in those destinations. This increase saw real gains for Australian beef producers with average returns rising 16% to \$4.79/kg in that year<sup>37</sup>.

**VI. There is a cost to Australia if its quarantine system is not perceived as being rigorous, transparent and science-based**

**VI.1 Many of Australia's trading partners view our quarantine system as a defacto trade barrier**

38. Many of Australia's trading partners – including Cairns Group allies, FTA partners and other WTO Members – view Australia's quarantine system as protectionist. In essence, the allegation is that Australia uses its quarantine system, including its import risk analysis (IRA) process, as a de facto trade barrier. DFAT notes that the Issues Paper refers to similar allegations.<sup>38</sup>
39. Australia has vigorously and consistently defended our quarantine system bilaterally and in the WTO. However, in order to get a flavour of Australia's trading partners' perceptions it is informative to look at the comments made by various WTO Members in meetings of the WTO SPS Committee and as part of the WTO Trade Policy Review Mechanism. Both of these forums allow WTO Members to raise concerns about other countries' SPS measures. It should be noted that DFAT is citing these views as an indication of trading partners' perceptions and is not in any way endorsing these views as legally or factually accurate in the particular circumstances.

*Comments made by trading partners in the WTO*

40. The SPS Committee is established under the *SPS Agreement*<sup>39</sup> to provide a forum for consultations about food safety or animal and plant health measures which affect trade, and to ensure the implementation of the *SPS Agreement*. It normally meets three times per year at the WTO headquarters in Geneva. One of the standing agenda items at SPS Committee meetings enables WTO Members to raise specific trade concerns when their products are facing SPS barriers to entry into other WTO Members' markets. Since the WTO's inception in 1995, over 30

---

<sup>37</sup> DFAT, Trade 2005.

<sup>38</sup> See paragraph 64 in the Issues Paper.

<sup>39</sup> Article 12.

complaints about Australia have been raised in the SPS Committee by various trading partners.<sup>40</sup>

41. As part of the WTO's surveillance of national trade policy, all WTO Members are subject to periodic peer-review through the Trade Policy Review Mechanism (TPRM). For Australia, these reviews occur every four years. DFAT notes that this process is touched on in Part C7 of the Issues Paper.<sup>41</sup> Concerns about Australia's strict quarantine system have been raised in all three of Australia's Trade Policy Reviews to date (1998, 2002 and 2007). In 1998, ten WTO members raised concerns; thirteen raised concerns in 2002; and ten in 2007.
42. The major concerns raised by Australia's trading partners to date relate to the perceived lack of a scientific basis underpinning Australia's SPS measures, the timeliness of reviews, risk assessments and the adoption of SPS measures. In the concluding remarks of each of Australia's Trade Policy Reviews, the respective Chairs pointed to WTO Members' concerns about the strictness of Australia's SPS requirements, their trade restrictiveness and the lengthiness of related procedures.<sup>42</sup>
43. Some examples of the concerns raised by Australia's trading partners in the SPS Committee and the TPRM can be found at Attachment A.

*Other avenues for Australia's trading partners to raise quarantine concerns*

44. Aside from the formal WTO channels, there are also formal bilateral SPS consultation mechanisms, including under Australia's existing FTAs, in which Australia's trading partners can, and often do, raise quarantine concerns.<sup>43</sup> In addition to formally raising quarantine concerns as described above, Australia's trading partners also frequently informally raise such concerns bilaterally.

**VI.2 These perceptions weaken the impact of Australia's advocacy for more open markets and capacity building efforts**

45. Australia is at the forefront of international advocacy for agricultural trade liberalisation, and of trade liberalisation more generally. Australia makes considerable efforts to encourage other countries to embrace unilateral reform of agricultural policy. However, perceptions by trading partners that Australia's quarantine system is protectionist risk undermining Australia's trade policy credentials, including in the WTO Doha Round of negotiations. In addition, in an SPS-specific context, the negative perceptions about Australia's quarantine system can hinder its ability to overcome quarantine barriers for Australian agricultural products in potential export markets.

---

<sup>40</sup> <http://members.wto.org/members/G/AG/R/1-46>

<sup>41</sup> See paragraph 95 in the Issues Paper.

<sup>42</sup> <http://members.wto.org/members/WT/TPR/M/178,WT/TPR/M/104,WT/TPR/M/41>

<sup>43</sup> Under the 1998 Protocol on Harmonisation of Quarantine Administrative Procedures to the Australia-New Zealand Closer Economic Relations Trade Agreement, Australia and New Zealand agreed to establish a Consultative Group to provide direction for quarantine harmonisation. The Thailand-Australia FTA (TAFTA) established an Expert Group on Sanitary and Phytosanitary Measures and Food Standards as a consultative forum to strengthen cooperation between Australia and Thailand and deepen mutual understanding of each Party's regulations and procedures. The Singapore-Australia FTA (ASFTA) provides for a cooperative work programme between Australia and Singapore on SPS and quarantine matters, which includes consultation. The Australia-United States FTA (AUSFTA) established a Committee on Sanitary and Phytosanitary Matters to enhance cooperation and consultation between Australia and the United States on SPS matters.

46. In the pursuit of more open markets and more efficient and transparent global quarantine systems, Australia provides SPS related technical assistance to developing countries. At the SPS Committee meeting in October 2007, Australia reported on over 90 projects in 36 countries and a contribution of over A\$31.4 million provided by Australia in 2006-07<sup>44</sup>.
47. Australia mainly focuses its SPS capacity building efforts in the Asia-Pacific region but also assists the Middle East and Africa, as well as groups of countries or regional organisations such as Pacific Island Countries and Territories (PICTs), the Association of Southeast Asian Nations (ASEAN), Codex member countries and the Asia Pacific Economic Cooperation (APEC) group.
48. Australia's capacity building activities focus on providing practical training and expertise to assist countries to comply with SPS measures and enhance their export markets, it also seeks to improve developing countries' capacity to develop and implement their own SPS measures based on science.
49. These efforts may at times be undermined when the targeted countries perceive Australia's regime to be lacking in transparency.

### **VI.3 Australia is active in addressing quarantine barriers internationally**

50. Australia actively pursues the interests of Australian exporters facing quarantine related market access barriers overseas. These matters are normally raised bilaterally in the first instance. For example, we have achieved improved market access to a number of important markets in East Asia for Australian agricultural products in recent years. Australia is also active in discussions in the SPS Committee and the WTO TPRM regarding the specific quarantine practices of other Members.
51. Australia has established a number of formal bilateral technical working groups with trading partners that meet on a regular basis. These include plant and animal technical working groups with Japan, Korea and China. Through these groups, we have achieved new or improved market access. China agreed in 2004 to a protocol for mango exports and then in 2006 to a protocol for citrus exports from Australia. More recently, China approved four new Australian establishments for the processing of beef and sheep and one for deer. In 2007, Korea agreed to an import protocol for Australian mangoes. Japan has also agreed to a reduction in the inspection rate for fresh Australian mangoes exported to Japan. Both Japan and Korea have amended their import protocols for Australia citrus to include additional treatment options in relation to disinfestations temperatures and Taiwan is currently considering the same request from Australia.
52. There are instances where Australia has, through the implementation of new regulations by our trading partners, had to re-establish previously acquired market access. Some recent examples include stonefruit and cherry exports to Taiwan, Tasmanian carrots into Korea and meat exports to the Philippines. Australia, with the assistance of our overseas missions, has actively engaged in re-establishing these markets. Taiwan is currently considering Australia's submission for stonefruit and cherries. Market access for Tasmanian carrots into Korea was

---

<sup>44</sup> SPS Committee October 2007, Technical assistance provided between January 2006 and December 2007.

regained in late 2007. Australia remains engaged with the Philippines to re-establish meat exports.

53. The pursuit of improved market access for Australian exporters is a high priority and engages significant resources in Australia and at our overseas posts. It is usually necessary to sustain our lobby efforts over a lengthy period in close cooperation with the relevant Australian industry.
54. Given the importance of international trade rules for Australia's food and agricultural trade, Australia participates in the work of a number of international standard setting bodies including Codex Alimentarius, the World Organisation for Animal Health (OIE) and the International Plant Protection Convention (IPPC). Australia is actively involved and in some instances has taken a lead role in developing and promoting the international standards set by these bodies. The SPS Committee draws on the work of these standard setting bodies.

#### **VI.4 Australia's quarantine system has been challenged in a number of WTO disputes and there may be further disputes**

##### *The WTO dispute settlement system*

55. One of the key features of the WTO is its binding dispute settlement system which allows WTO Members to bring formal proceedings to enforce their rights under WTO rules if they believe another WTO Member is in breach of those rules. The conduct of WTO disputes is governed by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the DSU).
56. The DSU encourages WTO Members to settle their disputes by mutual agreement, but where this is not possible it sets out detailed procedures for their resolution. WTO disputes are heard by panels, and panel findings may be appealed to the WTO's Appellate Body. WTO Members must remove or amend measures found to be WTO inconsistent within a reasonable period of time, failing which they may be required to pay compensation (usually in the form of tariff concessions to the "winning" party) or they risk retaliation by the "winning" party (usually in the form of the suspension of tariff concessions). The DSU states that both compensation and retaliation are temporary measures and should not be preferred to full implementation of a recommendation bringing the offending measure into conformity with WTO rules.
57. Australia has successfully prosecuted several WTO disputes as a complainant in order to advance its trade interests. Australia has also been a respondent in a number of cases.<sup>45</sup>

##### *Previous WTO SPS disputes*

58. WTO Members have so far brought a number of WTO disputes involving the *SPS Agreement* before a panel and/or the Appellate Body.<sup>46</sup> It is worth noting that in all these disputes the respondents' SPS measures were found to be inconsistent with the *SPS Agreement* on at least one ground. The most common finding of WTO inconsistency was that the measure lacked sufficient scientific evidence, in violation of Article 2.2, and/or that the measure was not based on a risk

---

<sup>45</sup> For details see: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)

<sup>46</sup> *Hormones; Australia – Salmon; Japan – Agricultural Products; Japan – Apples; and EC – Biotech Products.*

assessment required by Article 5. Recent WTO case law has focused on the issue of undue delay under Annex C(1)(a) of the *SPS Agreement*.

*WTO SPS disputes involving Australia.*

59. Since the DSU commenced operations in 1995, Australia has been a respondent in ten WTO disputes, six of which were SPS disputes. All of these SPS disputes have challenged the scientific basis of Australia's quarantine measures and some have alleged that Australia's quarantine measures were more trade-restrictive than required. Attachment B provides a brief description of each of these WTO SPS disputes.

60. In relation to the WTO SPS disputes brought against Australia to date:

- two have not proceeded past the preliminary stages of dispute settlement (although they may be reactivated at any time);
- two were resolved through formal bilateral settlement notified to the WTO;
- one resulted in findings and recommendations by a panel and the Appellate Body against Australia; and
- another one, the challenge to Australia's measures affecting the importation of apples from New Zealand, is proceeding to a panel hearing later this year.

61. In the only finalised dispute to date, *Australia – Salmon*, the Appellate Body found that Australia's import restrictions on Canadian salmon were not based on a proper risk assessment and therefore violated *SPS Agreement* Article 5.1. It further concluded the different levels of protection provided to imports of salmon compared to imports of other fish meant that the measures arbitrarily or unjustifiably discriminated between WTO Members in violation of *SPS Agreement* Article 5.5. In resolving the dispute, Australia brought its measures into compliance with the *SPS Agreement*.

62. A number of Australia's trading partners have indicated they may bring further WTO SPS disputes against Australia. For example, some ASEAN members have threatened such action in relation to the measures imposed following Australia's revised generic IRA for prawns and prawn products.

*Resource implications of defending WTO disputes*

63. DFAT leads Australia's representation in WTO disputes, in close cooperation with other agencies. Defending Australia's position in WTO disputes is a significant responsibility which engages the Government's limited international trade law and scientific resources for lengthy periods of time. For example, there are currently three DFAT lawyers plus one administrative officer working full time preparing Australia's defence to New Zealand's WTO challenge on apples. DFAT leads an interagency team comprising officers from our embassies in Geneva and Wellington, the Attorney-General's Department, the Department of Agriculture, Fisheries and Forestry, Biosecurity Australia and the Australian Quarantine and Inspection Service.

64. This also means fewer resources can be devoted to prosecuting Australia's offensive interests either by providing scientific muscle to our own market access requests, or in bringing forward WTO disputes where our own trade is adversely affected by measures imposed by our trading partners.

### *Implications of losing a WTO dispute*

65. If Australia faces an adverse ruling in a WTO dispute, we would need to review the measures concerned to bring it into conformity with the WTO rules. This could mean Australia being required to remove or alter particular quarantine measures applied to a specific product.

### **VI.5 Other costs**

66. There can be other costs if Australia fails to strike the appropriate balance between science-based protection from pest and disease risks, and allowing open trade when the science permits it. Low levels of importation of internationally competitive agricultural goods - including fresh foods – may reduce competition leading to increased prices and reduced choice.

### **VII. Recent reforms to the IRA process are aimed at improving Australia's quarantine system**

67. The recent review of Australia's IRA process was designed, in part, to address trading partners' complaints about timeliness and predictability of the IRA process. The new arrangements came into effect on 5 September 2007. One of the key reforms was the establishment of regulations for specific timeframes in completing IRAs. Another key reform was the establishment of an Import Market Access Advisory Group (IMAAG) to advise Biosecurity Australia on prioritisation of import proposals, and to monitor progress of Biosecurity Australia's work programme.

68. WTO members were encouraged by Australia's reforms. However trading partners, including the European Communities, clearly intimated that they would be monitoring Australia closely to assess the impact of the reforms.

### **VIII. Conclusion**

69. DFAT thanks the Panel for the opportunity to present its views to the Review, DFAT would be happy to meet with the Panel to discuss any of the issues raised in this submission should the Panel consider that this would be of assistance.

### **Examples of specific trade concerns raised by Australia's trading partners**

A number of examples of the concerns raised by Australia's trading partners are identified below. These comments do not reflect the views of DFAT or the Australian Government. (Note – This is not an exhaustive list of concerns raised by trading partners).

#### *2001 SPS Committee Meeting (10-11 July)*

With regard to Australia's import risk assessment on table grapes, the following comment was made: "The United States was disappointed at Australia's apparent abandonment of its commitment to a transparent, science-based risk assessment system."

#### *2002 Australia's Trade Policy Review*

The representative of Switzerland stated that Australian: "quarantine and inspection provisions were so strict that in some cases they were precluding market access and were not compatible with international rules and obligations."

The representative of the European Communities stated: "While it was a sovereign right to set high animal health requirements, he believed that Australia failed to meet WTO commitments because of the many protracted steps before quarantine decisions were made, and the lack of scientific justification when setting standards higher than those in international recommendations. The Australian Quarantine and Inspection Service measures and the Food Standards Code were more trade restrictive than required, thus making imports impossible."

#### *2003 SPS Committee Meeting (2-3 April)*

With regard to Australia's import requirement for Netherlands Truss Tomatoes, the following comment was made: "...the European Communities ...recognised the right of Australia to set its own level of protection, yet the resulting rules had the effect of blocking trade for years on end without any scientific justification."

With regard to Australia's restrictions on infectious bursal disease in chicken products, the following comment was made: "Australia's import risk analysis process was very complicated, unduly long and conducted without a specific timeframe."

#### *2007 Australia's Trade Policy Review*

The ASEAN representative "was concerned by Australia's strict SPS measures and rigid quarantine frameworks, particularly with its Revised Draft Generic IRA Report for Prawns and Prawn Products, circulated in November 2006. ASEAN did not consider the draft IRA report and interim measures scientifically justifiable, and therefore urged Australia to carefully review the newly proposed IRA measures in this regard. The current quarantine requirements for ornamental fish imported into Australia were onerous..."

The representative of the European Communities stated "On SPS measures, Australia [needs to] establish fair, non-discriminatory, and transparent rules for agricultural imports, and align its SPS measures with international guidelines..."

The Brazilian representative "noted that the frequent requests for information in addition to the sanitary certificate, in the form of "additional declarations", functioned as obstacles to the free flow of trade to Australia."

### **Australia's involvement in WTO SPS Disputes**

***Australia – Measures Affecting Importation of Salmon***<sup>47</sup>, involved a complaint by Canada against Australia's quarantine prohibition on fresh, chilled or frozen Canadian salmon. The WTO Appellate Body found that Australia's final Import Risk Analysis ("IRA") did not conform with SPS provisions and therefore the import prohibition was not based on a proper risk assessment. The Appellate Body also found that the different measures applied between fresh, chilled or frozen salmon and other fish having diseases in common (for which imports were not prohibited) amounted to discrimination or a disguised restriction on international trade.

Australia was accorded eight months to bring its measures into WTO consistency. During that period, Australia conducted revised risk assessments. As a result, the prohibition on wild, ocean caught Pacific salmon was replaced with a suite of quarantine measures; quarantine measures on certain other fin fish were tightened. Canada formally complained that the measures taken to comply, as well as a new quarantine measure by Tasmania, were still WTO-inconsistent. The compliance panel found that, with the exception of one of the Commonwealth's 11 quarantine measures applied to salmon, Australia's revised measures were consistent with its SPS obligations. However, the panel found that the Tasmanian measure was not based on a risk assessment and therefore was WTO-inconsistent. Australia reached agreement with Canada on an adjusted measure to replace the inconsistent Commonwealth measure and also in relation to steps that Australia would take to achieve Tasmania's observance of Australia's SPS obligations under the existing Memorandum of Understanding between the Commonwealth, States and Territories on quarantine.

***Australia – Measures Affecting Importation of Salmonids***<sup>48</sup> involved a complaint by the United States covering the same legal issues, but involving a broader product coverage (salmon as well as trout). The complaint was settled without proceeding to litigation. The United States accepted the arrangements applying to wild, ocean caught, Pacific salmon and trout from Canada.

The ***Australia – Certain Measures Affecting the Importation of Fresh Pineapple***<sup>49</sup> dispute has not progressed beyond consultations. The Philippines alleges that Australia's quarantine measures on fresh pineapple are more trade-restrictive than necessary and breach Articles XI and XIII of GATT 1994. It also alleges that, if the measures are SPS measures, then they breach Articles 2, 3 or 5 of the SPS Agreement. The dispute also includes a broader complaint against Australia's quarantine system.

The ***Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables***<sup>50</sup> dispute was lodged by the Philippines in conjunction with the *Australia – Fresh Pineapple* dispute. A panel was established on 29 August 2003, at the request of the Philippines, although to date the matter has not progressed further. The dispute involves a complaint against Australia's quarantine system as it relates to fresh fruit and vegetables, in particular bananas, plaintain and papaya. This broad systemic challenge directly contests the WTO-consistency of Australia's quarantine system.

---

<sup>47</sup> WT/DS18/R, WT/DS18/AB/R, WT/DS18/9 and WT/DS18/RW, commenced 5 October 1995

<sup>48</sup> WT/DS21, commenced 20 November 1995

<sup>49</sup> WT/DS271, commenced 18 October 2002

<sup>50</sup> WT/DS270, commenced 18 October 2002

*Australia – Quarantine Regime for Imports*<sup>51</sup> also included a challenge to Australia’s overall quarantine regime. The European Communities claimed that under Australia’s quarantine system the importation of products was *a priori* prohibited, and that since prohibitions were not based on risk assessments, the system violated the SPS Agreement. This dispute was settled by Mutually Agreed Solution notified to the WTO in March 2007, without amendment to Australia’s quarantine legislation or to our very low quarantine risk setting.

*Australia — Measures Affecting the Importation of Apples from New Zealand*<sup>52</sup> is a dispute currently before the WTO. At New Zealand’s request, a dispute settlement panel was composed in March 2008 to hear the case, after formal consultations between the parties in October 2007 failed to settle the matter. New Zealand’s complaint relates to the quarantine conditions required by Australia for the importation of New Zealand apples.

Australia will defend the case vigorously. Under the existing timetable, the panel’s final decision is expected to be circulated to the WTO Membership in the second half of 2009.

---

<sup>51</sup> WT/DS287, commenced 3 April 2003

<sup>52</sup> WT/DS367, commenced 31 August 2007