INTRODUCTION

The Import Risk Analysis Appeals Panel (IRAAP) was convened in accordance with the Import Risk Analysis Handbook 2007 (update 2009) (the IRA Handbook) published by the Australian Government Department of Agriculture, Fisheries and Forestry.

Eight submissions were received within the appeal period in response to the release of the **provisional final import risk analysis (IRA) report for the importation of freshwater ornamental fish: review of biosecurity risks associated with gourami iridovirus and related viruses (freshwater ornamental finfish).** The Chair determined that the claims made in three submissions (containing seven claims) were worthy of further consideration by the IRAAP, these appeals being from:

- A1 Aquarium World
- Pet Industry Association of Australia (PIAA)
- Ms Sherryl Robertson

The IRAAP comprised of:

- Mr Andrew Inglis AM, Chair (Chair—Biosecurity Advisory Council)
- Dr Joanne Daly (Biosecurity Advisory Council)
- Mr Ian Thompson (Executive Manager—Department of Agriculture, Fisheries and Forestry)

Consistent with the IRA Handbook, the IRAAP considers appeals, supported by a statement of reasons, based on the following ground:

- there was a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder.

The IRAAP does not consider matters relating to:

- the scientific merits of the IRA,
- the merits of the recommendations made or the conclusions reached by Biosecurity Australia or the Eminent Scientists Group.

The IRAAP may make one of three findings in relation to an appeal:

- allow a claim
- disallow a claim, or
- find it outside the grounds of appeal.
In addition to the appeals, the IRAAP was provided with documents relating to the freshwater ornamental finfish IRA process, which included:

- the IRA Handbook
- the Biosecurity Australia Advice (BAA) 2008/29 – Commencement of an Import Risk Analysis for Ornamental Finfish with respect to Gourami Iridovirus
- the Ornamental Fish Testing Project Final Report, WA Marine Research Laboratories – 24 March 2009
- the 2009 draft IRA report on freshwater ornamental finfish
- BAA 2009/12 – the Extension to the consultation period
- the Submissions in response to the draft IRA report – 20 August 2009
- the Questions and Answers – June 2010
- the Provisional final IRA report for freshwater ornamental finfish
- responses from Biosecurity Australia on questions raised by the Chair of IRAAP; and
- independent legal advice.

The IRAAP’s assessment of the appeals follows.
Appellant

A1 Aquarium World

CLAIM 1

CLAIM – Biosecurity Australia had failed to “consult with and seek input from the applicant, industry and other relevant stakeholders.”

FINDING

Claim disallowed.

SUMMARY OF APPEAL

The appellant claimed that a deviation from the IRA process had occurred because Biosecurity Australia (BA) according to the IRA Handbook “is to consult with and seek input from industry stakeholders. Biosecurity Australia has failed to adequately comply with this process.”

Reasons

According to the IRA flowchart (Annexure 1 of the IRA Handbook) “BA consults with and seeks input from applicant, industry and other relevant stakeholders”.

Consultation steps under the IRA Handbook are taken at section 5.1 (Consultation on scope and approach), section 5.5 (Risk Analysis and report preparation) and more generally, section 4.6 (Communication with stakeholders) for standard IRAs.

The IRAAP met to determine whether or not a significant deviation to the IRA process that adversely affected the interests of stakeholders occurred, including under sections 5.1, 5.5 and 4.6 of the IRA Handbook.

1. Section 5.1 of the IRA Handbook states that: “Biosecurity Australia will consult, whenever necessary, with the proposer, industry and other stakeholders on the scope and approach of an IRA before the Chief Executive announces the commencement of the regulated steps of the IRA.”

The IRAAP considered the following information when making its determination:

- That a policy review was undertaken in 2005 after the release of new scientific information which implied that the current risk management measures (1999 IRA on Live Ornamental Finfish) did not meet Australia’s Appropriate Level of Protection (ALOP).

- The list of stakeholders contacted or consulted throughout the regulated IRA process.

- The consultation that was undertaken in the policy review process prior to the announcement of the commencement of the regulated IRA process.
• Section 5.1 of the IRA Handbook and specifically what obligation it places on Biosecurity Australia to consult “whenever necessary”.

• A timeline of events on the freshwater ornamental finfish IRA.

• The approach that was taken by Biosecurity Australia to contact and consult with stakeholders in line with the requirement for consultation.

• The number and range of stakeholders that were either contacted or consulted.

2. In section 5.5 of the IRA Handbook, "Biosecurity Australia will conduct its risk analysis with whatever input is needed from specialists, taking into account information gained from consultation with stakeholders, and prepare a draft IRA report". [as extracted]

The IRAAP considered the following information when making their determination:

• The list of stakeholders contacted or consulted throughout the regulated IRA process provided by Biosecurity Australia

• The consultation that was undertaken on the risk analysis and report preparation.

• The approach that was taken by Biosecurity Australia to contact and consult with stakeholders against the requirements for consultation

• The number and range of stakeholders that were either contacted or consulted.

3. Section 4.6 of the IRA Handbook states that: “Engagement with stakeholders is an important part of the IRA process. Biosecurity Australia will consult with stakeholders early in, and throughout, the IRA process. Consultation will be both formal and informal and will aim to seek stakeholder views on all issues relevant to the IRA. Relevant consultative steps are included in the IRA process as described at section 5. Information on Biosecurity Australia’s work program and on the status of IRAs is available on Biosecurity Australia’s website. Biosecurity Australia maintains a database of registered stakeholders to facilitate engagement and communication with people and organisations with an interest in Biosecurity Australia’s work. The database enables stakeholders to indicate areas of interest and the way they prefer to receive information”. [as extracted]

The panel considered the following information when making their determination:

• The approach taken by Biosecurity Australia to contact and consult with stakeholders early in and throughout the IRA process in line with the consultation requirements under section 5.

The IRAAP noted that section 4.6 provides that "relevant consultative steps are included in the IRA process as described at section 5".
The IRAAP considered that section 4.6 did not impose separate process obligations on top of those already contained in section 5 (and Annex 1 which was incorporated by reference). As the IRAAP found that BA had engaged in stakeholder consultation at the required stages in the IRA process, it was satisfied that section 4.6 had been complied with.

After taking into consideration all available information, the IRAAP considered that the requirements set out in sections 4.6, 5.1 5.5 and Annex 1 of the IRA Handbook had been met. As such, the IRAAP concluded that there had not been a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder and the claim was disallowed.
CLAIM 2

CLAIM – There had been a significant deviation from the IRA process because stakeholders were directed to use the IRA Handbook which contained misleading statements.

FINDING

Claim disallowed.

SUMMARY OF APPEAL

The appellant claimed that there were misleading statements within the IRA Handbook 2007 (update 2009) and the IRAAP framework due to a letter received by some stakeholders outlining an erroneous ground for appeal.

Background

Between 17-18 August, the IRAAP secretariat received three requests for extension to the 30 day appeal period on the provisional final IRA report for freshwater ornamental finfish. The IRAAP secretariat responded on 19 August 2010 in writing to the submissions, declining the requests for extension. The letter contained, in error, a ground for appeal from the IRA Handbook 2003 which is not available under the IRA Handbook 2007 (update 2009).

On 23 August 2010 the IRAAP secretariat received feedback from A1 Aquarium World (who was not one of the appellants seeking an extension) that there was an error in the original letter. The IRAAP secretariat immediately sent an email to the parties who had received the original letter to clarify that a mistake had been made.

The email made it clear that the original letter was to be retracted and replaced by a new letter (which outlined that there was only one ground for appeal as stated in the IRA Handbook 2007 (update 2009). The Manager of the IRAAP secretariat followed up via phone call with A1 Aquarium World to outline the mistake and restate that the only ground for appeal available under the IRA Handbook 2007 (update 2009) was that there was a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder.

Reasons

The panel considered the following information when making their determination:

- The letters submitted by three stakeholders requesting an extension.
- The response letters from the IRAAP secretariat to three stakeholders.
• The follow up email to the three stakeholders acknowledging the error and outlining that a further letter would be sent to replace and update the original letter.

• A corrected follow up letter.

The IRAAP considered that the IRA Handbook 2007 (update 2009) did not contain any misleading statements and that the IRAAP secretariat had taken appropriate steps to correct the error in the letter dated 19 August 2010.

As such, the IRAAP concluded that there had not been a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder and the claim was disallowed.
CLAIM 3

CLAIM – A significant body of scientific information relevant to the outcomes of the IRA was not considered.

FINDING

Outside the ground for appeal

Reasons

The IRAAP referred to Annex 6 of the IRA Handbook 2007 (update 2009) which prescribed a single ground for appeal, namely that there was a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder, and matters that an IRAAP may not consider.

The matters that an IRAAP did not consider included: ‘the scientific merits of the IRA’ and ‘the merits of the recommendations made or the conclusions reached by Biosecurity Australia.’

The IRAAP was satisfied that as this claim did not refer to the ground for appeal under Annex 6 of the IRA Handbook 2007 (update 2009) and therefore that it was ‘outside the ground for appeal’.
IMPORTATION OF FRESHWATER ORNAMENTAL FISH: REVIEW OF BIOSECURITY RISKS ASSOCIATED WITH GOURAMI IRIDOVIRUS AND RELATED VIRUSES FINDINGS REPORT

Appellant

Pet Industry Association of Australia

CLAIM 1

A) CLAIM – That there had been a significant change to the provisional final IRA report which adversely affected the interests of a stakeholder.

B) CLAIM – That because of the addition of the new species without notification or consultation that this represented a significant variation of the IRA process from that previously announced.

FINDING

Claim disallowed.

SUMMARY OF APPEAL

The appellant claimed that a deviation from the IRA process had occurred because Biosecurity Australia (BA) had made a significant change to the provisional final IRA report. The change has been in relation to the “inclusion of the sub-family Macropodinae (family Osphronemidae) which contains two very common ornamental fish – the Siamese fighting fish (Betta splendnes) and the paradise fish (Macropodus opercularis).”

Reasons

Section 5.9 of the IRA Handbook outlined process for the preparation and publication of the provisional final IRA report:

“Biosecurity Australia will prepare a provisional final IRA report, taking into account stakeholder comments and, in the case of expanded IRAs, any recommendations made by the Eminent Scientists Group (ESG).

In considering the recommendations in the provisional final IRA report, the Chief Executive of Biosecurity Australia must be satisfied that, in his or her opinion, the IRA has been conducted in accordance with the Regulations and the process described in this IRA Handbook.

Before the provisional final IRA report is published, Biosecurity Australia will consult with state and territory governments on the proposed outcomes of the IRA. This consultation will include, for example, issues of regional pest status and risk, and aspects of joint responsibility arising from the IRA’s recommendations.

Biosecurity Australia will announce that a provisional final IRA report has been placed on the Biosecurity Australia website. Biosecurity Australia will also distribute the provisional final IRA report to the proposer and registered stakeholders.

The regulated timeframe for an IRA ends when a provisional final IRA report is issued.”
The IRAAP discussed the requirements under section 5.9 of the IRA Handbook and whether or not ‘significant’ changes to the provisional final IRA report was a significant deviation to the regulated IRA process that adversely affected stakeholders.

The IRAAP noted that when preparing a provisional final IRA report Biosecurity Australia had taken into account stakeholder comments. The IRAAP agreed that in many cases there would be changes made to the provisional final IRA in response to stakeholder comments including, if necessary, the addition of new species within the scope of the IRA.

The IRAAP considered the obligations the Chief Executive of Biosecurity Australia had under section 5.9 of the IRA Handbook. The IRAAP considered whether the Chief Executive is under an obligation to refuse to authorise the release of the "Provisional Final IRA Report" and its recommendations until he or she is satisfied of all the factors in section 5.9.

The IRAAP also considered the following information provided by Biosecurity Australia when making their determination:

- “Biosecurity Australia advised Chief Executive Officers of the Primary Industries Standing Committee (PISC) on 21 July 2010 – through standard PISC consultation processes – that the provisional IRA report would be released and providing an outline of the amended tighter quarantine measures. State and territory Chief Veterinary Officers and/or Fisheries Directors were advised by email on 23 July 2010 prior to the release of the provisional final IRA report. Details were provided of the recommended major changes to risk management from the draft to the provisional final IRA report.”

After taking into consideration all available information, the IRAAP agreed that the requirements set out in sections 5.9 of the IRA Handbook had been met. As such, the IRAAP concluded that there had not been a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder and the claim was disallowed.
Appellant
Sherryl Robertson

CLAIM 1

CLAIM – That the process undertaken in section 5.9 of the IRA Handbook 2007 (update 2009) ‘Preparation and publication of provisional final IRA report’ with respect to the freshwater ornamental finfish IRA was not reasonable and therefore was a significant deviation to the IRA.

FINDING

Claim disallowed.

SUMMARY OF APPEAL

The appellant claimed that the provisional final IRA report was unreasonable, and therefore that there had been a deviation from the regulated IRA process due to the following reasons:

1. a significant citation error,
2. the Release Assessment fails to consider all current quarantine measures,
3. failure to recognise that fish in quarantine post arrival detention periods are assessed as a batch, not as individuals,
4. an assumption that all megalocytivirus infection detected in Australia must have resulted from recently imported fish.

Reasons

Section 5.9 of the IRA Handbook stated that:

In considering the recommendations in the provisional final IRA report, the Chief Executive of Biosecurity Australia must be satisfied that, in his or her opinion, the IRA has been conducted in accordance with the Regulations and the process described in this Handbook, and that the recommendations:

• are reasonable, in the light of the evidence
• meet the Government’s objectives for biosecurity
• are consistent with Australian legislation
• accord with Australia’s international rights and obligations. [as extracted]

The IRAAP considered section 5.9 of the IRA Handbook and the provisional final IRA recommendations. Section 5.9 of the IRA Handbook indicated that the Chief Executive of Biosecurity Australia must be satisfied that the recommendations in the IRA were reasonable, in light of the evidence.
The IRAAP considered that section 5.9 required the Chief Executive to be satisfied that the listed matters had been undertaken.

The IRAAP noted that it may not consider the ‘scientific merits of the IRA’ and ‘the merits of the recommendations made or the conclusions reached by Biosecurity Australia’.

After taking into consideration all available information, the IRAAP agreed that the requirements set out in sections 5.9 of the IRA Handbook had been met. As such, the IRAAP concluded that there had not been a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder and the claim was disallowed.
CLAIM 2

CLAIM – That Biosecurity Australia had not revised the draft IRA report after submissions had been received.

FINDING

Claim disallowed

SUMMARY OF APPEAL

The IRA Handbook under section 5.7 ‘Revising the draft IRA report’ stated that:

“Biosecurity Australia will consider submissions received on a draft IRA report and may consult informally with stakeholders. Biosecurity Australia may revise the draft IRA report as appropriate.”

The appellant claimed that submissions to the draft IRA report had not been considered and therefore the provisional final IRA report was not reasonable.

Reasons

The IRAAP considered the following information provided by Biosecurity Australia:

- “All submissions received during the extended consultation period were considered. One stakeholder provided a late submission which was not considered. In not accepting the submission, Biosecurity Australia advised the stakeholder that the issues they raised were also raised by other stakeholders and therefore would be considered in preparing the provisional final IRA report.”

- Biosecurity Australia was asked if any revisions were made in respect to information provided in submissions on the draft IRA report.

  “Yes. A number of changes were made in response to stakeholder comments. The main changes are detailed in Appendix 1 of the provisional final IRA report.”

The IRAAP noted that in accordance with section 5.7 of the IRA Handbook Biosecurity Australia would consider submissions but there were no obligations for Biosecurity Australia to change the IRA report in response to this consideration.

After taking into consideration all available information the IRAAP agreed that the requirements set out in section 5.7 of the IRA Handbook had been met. As such, the IRAAP concluded that there had not been a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder and the claim was disallowed.
Appellant

Sherryl Robertson

CLAIM 3

CLAIM – That the draft IRA report was not considered by the Eminent Scientists Group (ESG) and that due to this, serious scientific questions raised by submissions had been ignored.

FINDING

Claim disallowed.

Reasons

Section 4.2 of the IRA Handbook stated that:

The Quarantine Regulations 2000 provide for standard and expanded IRAs and outline the steps and maximum timeframes that apply for each type of IRA (see section 4.4 of the IRA Handbook).

The Chief Executive may decide the expanded process will be followed where:

• the IRA involves significant differences in scientific opinion or
• significant harm to people, animals, plants or the environment may result from an importation.

The standard IRA process will be followed in all other circumstances. [as extracted]

The IRAAP noted that the consideration on whether or not an ESG would consider the draft IRA report was covered in section 4.2 of the IRA Handbook. A review by the ESG only applied to the expanded IRA process and neither the IRA Handbook nor Regulation 69C of the Quarantine Regulations 2000 (Cth) provided any scope for referral to the ESG as part of a standard IRA process.

The IRAAP considered that under the regulated IRA process the choice of whether to conduct a standard or expanded IRA process was a matter for the Chief Executive’s discretion when the conditions for an expanded process were met. The Chief Executive had decided that an expanded process would not be followed. Accordingly, the IRA process was a standard process and ESG review did not apply.

After taking into consideration all available information, the IRAAP agreed that the requirements set out in sections 4.2 of the IRA Handbook had been met. As such, the IRAAP concluded that there had not been a significant deviation from the regulated IRA process that adversely affected the interests of a stakeholder and the claim was disallowed.