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Horticulture Marketing and Research and
Development Services (Amendment) Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 135 2001-02

Horticulture Marketing and Research and Development
Services (Amendment) Bill 2002

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10 May 2002

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Horticulture Marketing and Research and Development Services (Amendment) Bill 2002

Date Introduced: 14 March 2002

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Royal Assent

Purpose

To amend the *Horticulture Marketing and Research and Development Services Act 2000* in order to deem Horticulture Australia Limited to be a Commonwealth agency for the purposes of section 16 of the *Customs Administration Act 1985*.

Background

Horticulture Australia Limited

Horticulture Australia Limited (HAL) was established in 2000 as a result of agreement between the horticulture industry and the Government. On 9 May 2000, as part of the 2000-2001 Budget, the Government announced its intention to amalgamate the Australian Horticultural Corporation (AHC) and the Horticultural Research & Development Corporation (HRDC) into a single horticultural services company, to be called Horticulture Australia, to administer both marketing and research and development (R&D). The Australian Dried Fruits Board was also abolished and its functions integrated with those of the new company. The amalgamation plan was the culmination of consultations between the horticultural industry and the Government over options for a new corporate framework for horticulture service delivery.¹

Unlike the bodies which it replaced, HAL is not a statutory corporation. It is established under Corporations Law as a company limited by guarantee. The *Explanatory Memorandum* to the Horticulture Marketing and Research and Development Services Bill 2000 stated that:

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The new company will be a not for personal profit company operating under Corporations Law that has industry representative bodies and voluntary funding contributors as its members, with voting rights allocated according to the amount of funds provided. ... The company will be accountable to shareholders for the effective use of funds provided.²

HAL is also accountable to the Government, and the *Horticulture Marketing and Research and Development Services Act 2000* (the Act) contains details of the accountability arrangements. The Act creates two abstract concepts, the 'industry services body' (ISB) and the 'industry export control body' (IECB). Under the Act the Minister has power to declare a corporation to be either the ISB or the IECB, or to be both at once. He or she also has power to declare the corporation no longer to be the ISB or IECB, and to transfer the functions to another, more suitable corporation. In this way, although the functions previously performed by the AHC and HRDC are performed by a private corporation, the Commonwealth retains ultimate control of these functions.

The Minister has declared HAL to be both the ISB and the IECB. As the IECB, HAL has responsibility for some of the export licensing functions previously performed by the AHC. Under the *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000* (the Consequential Act), HAL is able to issue export licences and use export control powers only until 1 February 2003.³ The Act also established a new export control process, which exists alongside the current export control powers for a two year transitional period, and which will become the sole export control process after 1 February 2003. Under the new procedure, the Secretary of Agriculture, Fisheries and Forestry Australia, not the IECB, will have the power to determine, by written order, which horticultural products and which markets will be 'regulated' and hence will require export licences before those products can be exported.⁴ Once the Secretary has declared certain horticultural products and markets to be 'regulated', a person will require a licence to export a 'regulated horticultural product' to a 'regulated horticultural market'.⁵ HAL, as the IECB, is responsible for licensing people to export those products to those markets.⁶ HAL is also vested with the powers previously exercised by the AHC to issue certificates in relation to matters connected with horticultural products.⁷ This may include quotas in relation to certain countries to which Australian horticultural products are exported.⁸

An Overview of the Australian Horticulture Industry

The Australian horticulture industry comprises fruits, vegetables, nuts, cut flowers and nursery products. Horticulture is Australia's second largest industry after wheat. It has grown by 142 per cent in the past decade and represents 18 per cent of agricultural production. It is important in regional areas, employing 80 000 people with a further 11 200 employed in processing. There are approximately 21 000 farms engaged in the industry.⁹

The Australian horticultural industry has a gross value of production of \$5.5 billion (1998/99 figures).¹⁰ The farm gate value of production was \$4.74 billion. This was made

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up of vegetables (\$1.53 billion), fruit and nuts (\$2.56 billion) and nursery production (\$0.65 billion). Total horticultural exports for 1999/2000 were valued at \$720 million, made up of fruits (\$394 million), vegetables (\$193 million), nuts (\$100 million) and nursery (\$33 million). The top three fruit export products were citrus, grapes and apples. The top three vegetable export products were asparagus, carrots and cauliflowers. Macadamias made up 76 per cent of total nut exports and cut flowers represent 91 per cent of nursery exports.¹¹

Australian Customs Service EXIT database

EXIT stands for EXport InTegration system and is the Australian Customs Service's information system for processing export entries and lists of cargo (manifests).¹² The EXIT System:

- automates procedures for reporting exports
- eliminates the need for presenting paper permits with manifests
- accelerates and simplifies the clearance of outwards sea and air cargo manifests
- enhances the ability of Customs to monitor high risk exports without impeding the majority of exports, and
- provides timely export information to:
 - Australian Bureau of Statistics for the compilation of foreign trade, balance of payments and national accounts statistics
 - permit issuing authorities for validation of permit information and requirements, and
 - Australian Taxation Office for compilation of Business Activity Statements (BAS).¹³

The AHC was a permit issuing authority and had access to the EXIT system. According to the Minister's second reading speech it was intended that HAL, as the IECB would also have access to EXIT in order to discover evidence of any breaches that may have occurred in contravention of the export controls.¹⁴ HAL has been denied access by the Australian Customs Service because it is not a Commonwealth agency under section 16 of the *Customs Administration Act 1985* (the Customs Act). Section 16 prohibits the unauthorised recording and disclosure of certain information held by the Australian Customs Service, and provides for exceptions in relation to the prohibition. Under subsection 16(3A) the Chief Executive Officer of Customs may authorise a Commonwealth agency to have access to information or a class of information held by Customs provided that the information will be used for the purposes of that agency's functions. In return the Commonwealth agency must undertake not to use or further

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disclose the information except for the purposes authorised. Section 16 of the Customs Act defines a ‘Commonwealth agency’ to mean

any instrumentality or agency of the Crown in right of the Commonwealth, and includes a department of the public service or the Commonwealth and any body corporate in which the Commonwealth holds a controlling interest, but does not include a Minister of the Crown in right of the Commonwealth.¹⁵

A ‘Statutory Fiction’

The purpose of this Bill is to amend the *Horticulture Marketing and Research and Development Services Act 2000* so that Horticulture Australia Limited is taken to be and treated as a Commonwealth agency for the purposes of section 16 of the Customs Act. The Minister in his second reading speech explains the purpose of the Bill as ‘to deem HAL, in its capacity as the export control body, to be a Commonwealth agency’.¹⁶ The legislation itself does not actually use the word ‘deem’. In 1909 the first Chief Justice of the High Court, Sir Samuel Griffith said that ‘deemed’ is commonly used ‘for the purpose of creating ... a “statutory fiction” ... that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced’.¹⁷ This passage has often been quoted in Australian courts. In 1980 Justice O’Byrne said in *Wainer v Rippon*¹⁸ that:

When the legislature uses the word ‘deemed’ in legislation, it requires acceptance of a fictional state of affairs that would be otherwise if one were not so required by the legislation. In *Hunter Douglas Australia Pty Ltd v Perma Blinds*¹⁹ the High Court considered the word ‘deemed’ in s 53(2) of the *Trade Marks Act 1955-1986*. Windeyer J said, “The words ‘deem’ or ‘deemed’ when used in a statute thus simply state the effect or meaning which some matter or thing has – the way in which it is to be adjudged. This need not import artificiality or fiction. It may be simply the statement of an indisputable conclusion”.

Main Provisions

Item 1 of Schedule 1 inserts a **new section 26A** in the *Horticulture Marketing and Research and Development Services Act 2000*. The purpose of the amendment is to deem Horticulture Australia Limited, in its capacity as the export control body, to be a Commonwealth agency for the purposes of section 16 of the *Customs Administration Act 1985*. The effect of this amendment is to enable Horticulture Australia Limited to access information from the Australian Customs Service under the same conditions as other Commonwealth agencies.

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Concluding Comments

In recent years the Government has promoted the establishment of industry owned companies to replace the statutory authorities responsible for marketing and research and development services in the agricultural industry. Some examples are Australian Wool Services, Australian Pork Limited and AWB Pty Ltd (formerly the Australian Wheat Board). All are not-for-profit companies incorporated under the Corporations Law; they are owned by the industry and accountable to the shareholders from that industry. However in most instances, where there is an export control function, this has remained within the Agriculture, Forestry and Fisheries Australia (AFFA) portfolio. For example, the Australian Quarantine and Inspection Service (AQIS) still looks after the certification of meat and dairy exports, the Wheat Export Authority has been set up as a regulatory authority and monitors exports of wheat, and the Australian Wine and Brandy Corporation continues as the statutory marketing authority for its industry. Provided that the newly established industry owned companies do not have an export control function, then they will not need access to the ACS EXIT database. It would appear that the need for this legislation is an isolated occurrence.

Endnotes

- 1 Hon Warren Truss, 'Second Reading Speech', Horticulture Marketing and Research and Development Services Bill 2000, House of Representatives, *Debates*, 5 October 2000, p. 18691.
- 2 *Explanatory Memorandum*, Horticulture Marketing and Research and Development Services Bill 2000, p. 2.
- 3 *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000* section 45 and subsection 47(2). The provision is that Part V of the *Australian Horticultural Corporation Act 1987* and the regulations, orders and instruments made under it, which deal with the system of export controls, continue in force for a period of two years beginning on the 'transfer day'. The Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Judith Troeth, declared 1 February 2001 to be the 'transfer day'.
- 4 *Horticulture Marketing and Research and Development Services Act 2000*, section 19.
- 5 *ibid.*, subsection 21(1).
- 6 *ibid.*, section 22.
- 7 *ibid.*, section 23.
- 8 *Explanatory Memorandum*, Horticulture Marketing and Research and Development Services Bill 2000, p. 13.
- 9 Horticulture Australia Website, www.horticulture.com.au (site visited 5 April 2002).

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- 10 *The Australian Horticultural Statistics Handbook 2000/2001*, p. 3.
- 11 Information compiled from *The Australian Horticultural Statistics Handbook 2000/2001* and Horticulture Australia Website, www.horticulture.com.au
- 12 Australian Customs Service, *Annual Report 2000-01*, p. 186.
- 13 EXIT Procedure Manual is available at www.customs.gov.au/bizlink/EXPORTS/EXIT/contents.htm (site visited 5 April 2002).
- 14 Hon Warren Truss, Minister for Agriculture, Fisheries and Forestry, 'Second Reading Speech', Horticulture Marketing and Research and Development Services (Amendment) Bill 2002, House of Representatives, *Debates*, 14 March 2002, p. 1300.
- 15 *Customs Administration Act 1985*, subsection 16(1A).
- 16 Hon Warren Truss, Minister for Agriculture, Fisheries and Forestry, 'Second Reading Speech', Horticulture Marketing and Research and Development Services (Amendment) Bill 2002, House of Representatives, *Debates*, 14 March 2002, p. 1300. *Osborn's Concise Law Dictionary*, Seventh edition by Roger Bird, London, Sweet & Maxwell, 1983, defines 'deemed' as 'to be treated as'.
- 17 *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696, per Griffith CJ.
- 18 *Wainer v Rippon* [1980] VR 129 at 135, per O'Bryan J.
- 19 *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49, per Windeyer, J.

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